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SECOND CIRCUIT REVIEW

Expert Analysis

Court Determines What Constitutes a 'Domestic Injury' in Wake of 'RJR Nabisco'

By **Martin Flumenbaum** And **Brad S. Karp**

In an instance of first impression for any U.S. Court of Appeals, the Second Circuit, in *Bascuñán v. Elsaca*, 874 F.3d 806 (2d Cir. 2017), created a broad rule for what constitutes a "domestic injury" under §1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), the "civil RICO" statute. In *RJR Nabisco v. European Community*, 136 S. Ct. 2090 (2016), the Supreme Court had held that private right of actions pursuant to §1964(c) do not apply extraterritorially, but rather, require a domestic injury. Id. at 2095; see also 18 U.S.C. §1964(c). The Supreme Court, however, left open what it means for an injury to be "domestic." *RJR Nabisco*, 136 S. Ct. at 2093. In *Bascuñán v. Elsaca*, the Second Circuit finally addressed that question in an opinion written by Circuit Judge José Cabranes, joined by Circuit Judge Debra Ann Livingston and District Judge Willian H. Pauley III, sitting by designation. The court ultimately held that a plaintiff's place of residence may not be the sole factor in determining whether an injury is "domestic," and mandated that a broader range of factors must be considered, including where the alleged conduct occurred and where the plaintiff's business or property was located.

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Background

In *Bascuñán*, plaintiff Jorge Yarur Bascuñán, along with various corporations, brought a civil RICO action against defendants Daniel Yarur Elsaca and several corporate entities. *Bascuñán*, 874 F.3d at 806. Bascuñán and Elsaca—a prominent Chilean economist and former head of Chile's Superintendencia de Valores y Seguros (Chile's version of the U.S. Securities and Exchange Commission)—are cousins and both are citizens and residents of Chile. Id. at 810-11. When Bascuñán's parents passed away in the 1990s, he inherited a substantial fortune, and hired Elsaca to manage his estate, also later granting him power of attorney over his finances. Id. at 811.

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The amended complaint alleges that Elsaca perpetrated four different fraudulent financial schemes in order to siphon off $64 million from Bascuñán's estate. These involved: (1) a trust account, administered by J.P. Morgan with funds held in a New York bank account that

Elsaca allegedly transferred funds, earning "sham" investment fees; (2) a private investment fund in Chile, allegedly used by Elsaca to pocket most of the estate's assets after they were laundered through N.Y. bank accounts; (3) an alleged physical theft—by Elsaca under his power of attorney—of bearer shares, owned by Bascuñán's estate, from a J.P. Morgan safe deposit box in New York; and (4) dividend payments which Elsaca took from one of the estate's Chilean bank accounts and deposited in his own name. Id. at 811-13.

District Court's Opinion

In December 2015, Elsaca filed a motion to dismiss Bascuñán's complaint. Id. In assessing the injuries Bascuñán alleges to have suffered, District Court Judge George B. Daniels characterized his injury as a single $64 million "economic loss," and asked two "commonsense questions" to determine where this injury accrued: Who became poorer? And where did they become poorer? *Bascuñán v. Daniel Yarur Elsaca*, Amended Complaint, 2016 WL 5475998, at *4 (S.D.N.Y. Sept. 28, 2016). According to the district court, "[t]his inquiry usually focuses upon where the economic impact of the injury was ultimately felt," which is "normally the state of plaintiffs residence." Id. (internal citations omitted). The court understood *RJR Nabisco* to require the analysis to focus on the location where the plaintiff suffered the alleged injury, and *not* the location of the defendant's conduct. Id. at *5. Thus, the district court concluded that, because the funds were owned by Bascuñán, who suffered the $64 million loss in Chile where he resides, the injury was foreign. Id. at *6. On appeal, Bascuñán argued that his place of residence should not be the sole determinant as to whether his injuries were domestic, and that, because some of his injuries were to property located within the United States, those claims satisfy civil RICO's domestic injury requirement. The Second Circuit agreed.

Second Circuit's Ruling

As an initial matter, the Second Circuit took issue with the district court's analysis of Bascuñán's injury as a single $64 million economic loss. The court held "that where a civil RICO plaintiff alleges separate schemes that harmed materially distinct interests to property or business, each harm—that is to say, each 'injury'—should be analyzed separately for purposes of this inquiry." *Bascuñán*, 874 F.3d at 814. The Second Circuit, finding that the district court's rule would effectively stop any foreign resident from alleging a civil RICO claim, held that, "[a]t a minimum, when a foreign plaintiff maintains tangible property in the United States, the misappropriation of that property constitutes a domestic injury." Id.

The Second Circuit noted that "courts must examine more closely the specific type of injuries alleged" in order to determine what it means to have an injury *to business or property*, as the Supreme Court required in *RJR Nabisco*. Id. Specifically, the court held that because "application of the domestic injury rule in any given case will not always be self-evident," an analysis will require an inquiry into the particular facts alleged in each case. Id. at 817-18 (quoting *RJR Nabisco*, 136 S. Ct. at 2111). "In addition, if a plaintiff alleges more than one injury, courts should separately analyze each injury … [and] the plaintiff may recover for [any domestic] injury even if all of the other injuries are foreign." Id. at 818.

In its analysis of the four separate schemes alleged by Bascuñán, the Second Circuit ultimately held that an economic injury could only qualify as domestic if the property was physically located in the United States. Id. at 819. The court found that "to hold otherwise would subvert the intended effect" of *RJR Nabisco*'s domestic injury requirement because, due to the "primacy of American banking and financial institutions," U.S.-based financial transactions are likely to be involved in any transnational RICO case. Id. However, if a "defendant's mere use of a domestic bank account could transform an otherwise foreign injury into a domestic one," then it could effectively eliminate "the domestic injury requirement in a large number of cases." Id.

Thus, because the investment fund and dividend payment schemes did not involve any property physically located within the United States, the court held that these two schemes alleged only foreign injuries. Id. Conversely, the Second Circuit held that the trust account scheme and the theft of the bearer shares alleged domestic injuries. While it recognized that money is ultimately fungible, the court found that the money allegedly stolen in the trust account scheme "was situated in a specific geographic location at the time of injury such that we can treat it as tangible property." Id. at 820. Since the money was tangible property, "located in the United States when it was stolen or harmed," the injury is domestic, "even if the plaintiff himself resides abroad." Id. at 820-21. Similarly, the court found that the physical theft of the bearer shares from the safe deposit box in New York constitutes a misappropriation of tangible property in the United States. Id. at 824. Thus, both of these alleged schemes involved domestic injuries.

The court found this rule to be consistent with *RJR Nabisco*'s holding. It noted that the rule furthers the "principles animating the presumption against extraterritoriality" because foreign entities owning private property in the United States "expect that our laws will protect them in the event of damage to that property." Id. at 821. Additionally, the *RJR Nabisco* decision specifically made clear that its holding should not be construed to estop foreign plaintiffs from suing under RICO. Id. As a final matter, the court emphasized that a plaintiff's residence may often be relevant and even dispositive in determining whether an injury is domestic or not, but "with respect to the particular type of property injury" alleged in this case, the court concluded "that the location of the property and not the residency of the plaintiff is the dispositive factor. Id. at 824.

The Second Circuit labeled each individual scheme a separate injury, which allowed it to find that at least two schemes involving tangible property located in New York were domestic injuries.

Following the publication of the Second Circuit's opinion, Elsaca petitioned the Second Circuit panel to reconsider its holding, arguing that under power of attorney, he did not commit theft when he allegedly removed the bearer bonds from the New York bank account—rather, if any theft occurred, in happened once he allegedly had a law firm in Panama cancel the bearer shares and register them in a new name. See Petition for Panel Rehearing at 3, No. 16-cv-3626 (Nov. 13, 2017), Dkt. No. 75. On November 28, the Second Circuit denied Elsaca's request. Order at 1, Dkt. No. 83. On December 6, the court reversed the lower court's granting of Elsaca's motion to dismiss and remanded the case to the district court. Judgment at 1, Dkt. No. 87-1.

Conclusion

The key distinction between the district court and the Second Circuit's opinion is a different understanding of the threshold question: What is the injury? The district court labeled the economic loss as a single injury which, as a whole, occurred at plaintiff's place of residence. The Second Circuit, on the other hand, labeled each individual scheme a separate injury, which allowed it to find that at least two schemes involving tangible property located in New York were domestic injuries. Moreover, the Second Circuit was able to consider where the injury to the property occurred, rather than just where the plaintiff was located. It will be instructive to see whether the other circuits share the Second Circuit's broader view of *RJR Nabisco*'s domestic injury requirement.