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What 2nd Circ. Did And Didn't Tell Us About RICO's Reach

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On Oct. 30, 2017, the Second Circuit issued its opinion in Bascuñán v. Elsaca,[1] becoming the first court of appeals to address the requirement that a private claim under the Racketeer Influenced and Corrupt Organizations Act must be based on a "domestic" injury to the plaintiff's business or property. That requirement emerged with little explanation of its meaning from the U.S. Supreme Court's 2016 decision in RJR Nabisco,[2] and in the 16 months since that decision was issued, district courts have failed to reach a consensus as to how the geographic location of an injury should be determined in RICO cases having cross-border facts. The Second Circuit's decision addresses the issue with two main holdings.

First, if "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 [the domestic injury] inquiry."[3] Second, "a plaintiff who is a foreign resident may nevertheless allege a civil RICO injury that is domestic. At a minimum, when a foreign plaintiff maintains tangible property in the United States, the misappropriation of that property constitutes a domestic injury."[4]

The Bascuñán decision, though narrow because it focuses on misappropriation of money or its equivalents held in the United States, resolves some of the uncertainty seen in district courts, at least in the Second Circuit. Perhaps it is also fair to add "for the time being." The court of appeals' analysis appears to depart from that required by RJR Nabisco in ways that other courts, or even the Supreme Court itself, may ultimately confront and decide with a different outcome.

Background

Plaintiff-appellant Jorge Bascuñán, a citizen and resident of Chile, has led a privileged but difficult life. Born the only heir to a substantial fortune, he "was afflicted with a number of emotional and physical ailments,"[5] and was unable to manage his own finances. Ultimately, he appointed his cousin, defendant Daniel Yarur Elsaca, to be his financial manager and gave Elsaca a broad power of attorney. Over the next 10 years until Bascuñán fired him, Elsaca allegedly engaged in a variety of fraudulent financial schemes resulting in his acquiring control of approximately $64 million from the estate of Bascuñán's late parents. In 2015, Bascuñán sued Elsaca and related entities in U.S. district court in Manhattan, claiming violations of the RICO statute through breaches of the mail fraud, wire fraud, bank

fraud, money laundering, and Travel Act statutes.

Specifically, Bascuñán's amended complaint alleged four principal schemes committed by Elsaca and his associates and related companies:

- The New York Trust Account Scheme, involving the payment of allegedly sham investment and legal fees from a Bascuñán account held at J.P. Morgan in New York;

- The General Anacapri Investment Fraud Scheme, which involved the creation of a private investment fund in Chile "that took in a substantial amount of money from the Estate and paid back very little,"[6] with money instead being allegedly transferred to Elsaca and his associates in Chile;

- The Theft of BCI Shares, involving the alleged physical theft and subsequent conversion of "bearer shares" of stock in a company called BCI held in a safety deposit box at J.P. Morgan in New York; and

- The Dividend Scheme, involving the alleged diversion of dividends received in Chile from Bascuñán's BCI stock holdings.

The district court dismissed Bascuñán's complaint, finding that, despite the activities allegedly occurring in New York, it failed to allege a "domestic" injury as required in private RICO cases by RJR Nabisco. Characterizing the amended complaint as alleging an "economic injury," the court concluded that such injuries should be deemed to have been suffered by Bascuñán in Chile, the country of his citizenship and residence.[7]

The Court of Appeals' Decision

In RJR Nabisco, the Supreme Court held that the RICO statute should be given extraterritorial effect to the extent a "pattern of racketeering activity" is alleged based on RICO predicate offenses that themselves have such a geographic reach.[8] The court separately evaluated the RICO private cause of action, 18 U.S.C. § 1964(c), however, and concluded that it should have no extraterritorial effect, requiring that a nongovernmental plaintiff allege a "domestic injury" in order to proceed with a case.[9] RJR Nabisco did not itself apply this requirement and, as the Second Circuit observed, the court's guidance as to the meaning of a "domestic" injury was "admittedly sparse."[10] The predictable result, as we have previously observed, has been a diversity of approaches among the district courts.[11] The Bascuñán case is the first decision by a court of appeals to address the question.

The Second Circuit initially found error in the district court's decision to characterize Bascuñán's alleged injury merely as "economic" for purposes of determining whether it was suffered in the United States or abroad: All injuries cognizable in a private RICO action are "economic," and "courts must examine more closely the specific type of injuries alleged."[12] With this in mind, the court of appeals found the Dividend Scheme and the General Anacapri Investment Fraud Scheme were not domestic. The former involved the alleged theft of funds from a foreign bank account beneficially owned by a foreign citizen and resident, while the latter likewise involved players and actions located outside the United States. "Bascuñán and his relevant property always remained abroad, and these injuries did not arise from any preexisting connection between Bascuñán and the United States."[13]

In both cases, New York bank accounts were involved after the fact, as a place where Elsaca allegedly

transferred funds to accounts he controlled and for the alleged laundering of stolen money. The court of appeals found this domestic link inadequate, rejecting Bascuñán's argument that a RICO injury was domestic so long as funds ultimately resided in this country.[14] Rather, it concluded that "an injury to tangible property is generally a domestic injury only if the property was physically located in the United States."[15] To allow the subsequent use of American banking and financial institutions in connection with the facilitation or concealment of theft to constitute a domestic injury would "subvert the intended effect" of the requirement, creating a RICO remedy in connection with a wide array of injuries that were appropriately considered foreign.[16]

The Second Circuit's focus on the location of "tangible property" led it to conclude that the other two schemes alleged by Bascuñán stated claims under RICO. The New York Trust Account Scheme involved the alleged misappropriation of funds held in an account in New York. Money, of course, is property, and the court of appeals found money in a bank account to be "tangible property, by which we mean property that can be fairly said to exist in a precise location."[17] A more conventional use of "tangible property" certainly could apply to the BCI Share Theft, which involved the alleged physical removal of stock certificates from a safety deposit box in New York.

Focusing on the location of tangible property was also found consistent with RJR Nabisco "and furthers the principles animating the presumption against extraterritoriality," which the court of appeals understood mainly to be "the need to avoid 'international friction.'"[18] "Foreign persons and entities that own private property located within the United States expect that our laws will protect them in the event of damage to that property."[19] To hold otherwise in the context of a RICO claim was said to threaten international comity by deterring foreign investment and penalizing economic cooperation.

Notably, the court of appeals also cited the Restatement (Second) of Conflicts of Laws in support of its rule, observing that the Restatement directed that the local law of the state "where the injury occurred to the tangible thing" will generally be applied to "most issues" in the case of transjurisdictional torts.[20] The interests advanced by this rule were said to "mirror the concerns underlying the presumption against extraterritoriality," and thus were germane to determining the location of a RICO injury.

Elsaca argued that injuries to "financial property" should be treated differently from other forms of property, but the court of appeals found no basis for the distinction.[21] He further sought to apply the Second Circuit's decision in the Atlantica Holdings case, where a residence-based analysis was used to determine whether an alleged securities fraud had a "direct effect" in the United States for purposes of applying the Foreign Sovereign Immunities Act.[22] The court of appeals found that case inapposite, however, because rather than the theft of specific assets from bank accounts in New York, as alleged by Bascuñán, it considered an alleged injury to the "value of [an] ownership interest in a company, for which the clear locational nexus was the shareholder's place or residence."[23] Finally, the court of appeals rejected use of a specific New York "borrowing statute" used to determine when tort claims accrue for purposes of applying a statute of limitations, finding that statute served different purposes from those advanced by the presumption against extraterritoriality.[24]

Discussion

The Bascuñán opinion addresses the somewhat narrow question of injuries involving money and its equivalents held at bank accounts and safety deposit boxes, although the opinion might be read to suggest that other injuries should also first be assessed under the Second Restatement of Conflicts of Laws. The durability and scope of the court of appeals' distinction that injuries to the value of a

plaintiff's interest in a corporation arise where the plaintiff is located (irrespective of where the corporation is located) perhaps remains to be seen. Likewise, future cases will determine the meaning, if any, of the court of appeals' statement that Bascuñán's claim under the General Anacapri Investment Fraud and Dividend Schemes alleged injuries abroad because, in part, it "did not arise from any preexisting connection between Bascuñán and the United States."[25]

Other potentially more significant issues exist with respect to the court of appeals' analysis, however. In RJR Nabisco, the Supreme Court reaffirmed that determining the extraterritorial reach of a federal statute has two steps: In the first step, a statute might be found on its face to apply extraterritorially. If it is not, a different inquiry must be made:

If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.[26]

Whatever may be said of the Second Circuit's holding that an injury to tangible property occurs where the property is located, the panel doesn't arrive at it by determining the "focus" of Section 1964(c). The statute provides a remedy for injuries to a person's business or property "by reason of" a substantive RICO violation. Whether and how this phrase informs the "focus" of the remedial provision was not addressed in the Bascuñán opinion. Nor, of course, did the panel consider the potential role played by the specific RICO violations and RICO predicate acts alleged.[27] Certainly the Supreme Court did not answer the question itself in RJR Nabisco simply by saying that courts must look to where an injury was "suffered"; identifying where a RICO injury occurred was not addressed except to say that the answer might "not always be self-evident."[28] Nor is the RJR Nabisco test satisfied in substance by the court of appeals' several references to the policies behind the general principle of extraterritoriality. Those policies are entirely distinct from the ones made relevant by the "focus" of the specific statute at issue. In the 2014 Loginovskaya case, for example, a different panel of the Second Circuit determined that the private remedy under the Commodity Exchange Act was limited to "transactions occurring in the territory of the United States" by analyzing that provision's language and determining its "focus."[29] No comparable analysis was undertaken here.

Conclusion

Bascuñán is not alone among court decisions in failing to apply the second step of the extraterritoriality analysis for RICO claims described in the RJR Nabisco case. Perhaps that is why the law remains unsettled, and why the Second Circuit's decision seems challenging to apply outside of its facts. We can expect more uncertainty in the months to come.

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rmation purposes and is not intended to be and should not be taken as legal advice.

[1] Bascuñán v. Elsaca, 2017 WL 4872400 (2d Cir. Oct. 30, 2017).

[2] RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016).

[3] Bascuñán, 2017 WL 4872400, at *5.

[4] Id.

[5] Id. at *2

[6] Id. at *3.

[7] Bascuñán v. Elsaca, 2016 WL 5475998 (S.D.N.Y. Sept. 28, 2016).

[8] RJR Nabisco, 136 S. Ct. at 2103.

[9] Id. at 2106.

[10] Bascuñán, 2017 WL 4872400, at *7.

[11] Robert P. Reznick, David M. Goldstein, Logan Quinn Dwyer, Deciphering RJR Nabisco's "Domestic Injury" Requirement, Law360, January 5, 2017

[12] Bascuñán, 2017 WL 4872400, at *8.

[13] Id. at *9.

[14] Id. at *8.

[15] Id. at *9, citing RJR Nabisco, 136 S. Ct. at 2106.

[16] Id. at *9.

[17] Id. at *10.

[18] Id. at *11.

[19] Id.

[20] Id. at *12, citing Restatement (Second) of Conflicts of Laws § 147 cmt. c.

[21] Id. at *12.

[22] Id., citing Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98 (2d Cir. 2016).

[23] Id. at *12.

[24] Id. at *13. The court of appeals did not explain why a New York statute should otherwise govern the substantive interpretation of the federal RICO statute.

[25] Id. at *9.

[26] RJR Nabisco, 136 S. Ct. at 2101.

[27] Indeed, the court of appeals does not even identify the RICO subsection(s) allegedly violated, an omission made potentially significant by the fact that RJR Nabisco left open the question whether and how the RICO subsection proscribing conspiracy, 18 U.S.C. § 1962(d), applies extraterritorially. See RJR Nabisco, 136 S. Ct. at 2103.

[28] Id. at 2111; see also Bascuñán, 2017 WL 4872400, at *7 (noting that the Court's guidance "regarding what constitutes a domestic injury is admittedly sparse").

[29] Loginovskaya v. Batratchenko, 764 F.3d 266, 272 (2d Cir. 2014).