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Deciphering RJR Nabisco's 'Domestic Injury' Requirement

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Law360, New York (January 5, 2017, 12:47 PM EST) -- Last June, in RJR Nabisco v. European Union,[1] a deeply divided U.S. Supreme Court resolved a three-way split among the federal courts to define the extraterritorial reach of the Racketeer Influenced and Corrupt Organizations Act. The court held that extraterritorial conduct generally can be prosecuted by the government as a criminal or civil RICO violation to the same extent as the underlying violations of law that form the requisite "pattern of racketeering activity." But the court, erecting a higher hurdle for private plaintiffs, also held that the statutory provision authorizing private civil RICO claims, 18 U.S.C. § 1964(c), only provides a remedy for U.S. "domestic injuries."[2]

Since then, courts have grappled with the Supreme Court's articulation of the "domestic injury" requirement, and their analyses and conclusions as to where an "injury" has occurred are all over the map. The likely cause is the courts' uniform failure to apply to RICO's private right of action the analysis specified by RJR Nabisco for determining the geographic reach of a statute that does not apply extraterritorially on its own terms or in context: An examination of the "focus" of § 1964(c) and the substantive RICO violation at issue in any particular case.

Unsurprisingly, these decisions have brought neither clarity nor consensus to one of the critical practical questions determining the scope of one of the most important sources of litigation risk for U.S. businesses and executives. We explain below the disparate district court decisions applying § 1964(c) in light of RJR Nabisco.

Background

RJR Nabisco resolved a three-way conflict in which various courts had ruled that the extraterritorial reach of the substantive RICO violations set forth in 18 U.S.C. § 1962 should be based on the geographic scope of (a) the alleged "pattern of racketeering activity,"[3] (b) the alleged "enterprise;"[4] or (c) the statutes or common law whose alleged violation constituted the requisite "racketeering activity."[5]

The first two approaches purported to follow the seminal Morrison case, which examined the "focus" of § 10(b) of the Securities Exchange Act — the principal U.S. securities fraud law — to determine its geographic scope.[6] The third approach, adopted by the Second Circuit in the case at bar, relied instead on language in the statutes constituting RICO predicate offenses that clearly reached conduct outside the United States. The court of appeals found this language demonstrated Congress's intent that substantive RICO violations could be based on extraterritorial conduct to the same extent as the underlying RICO predicate offenses that made up the alleged "pattern of racketeering activity." The Supreme Court agreed.

In so doing, the court emphasized that Morrison analyzed the "focus" of § 10(b) only because the statute — unlike § 1962 — was first found not to apply extraterritorially. A second step was thus necessary to define the elements of a "domestic" violation to determine whether a viable claim had been pled.[7]

The Supreme Court disagreed with the Second Circuit, however, as to the extraterritorial reach of RICO's private right of action. The court of appeals concluded that a private RICO claim, like one brought civilly or criminally by the government, has the same extraterritorial reach as the underlying RICO violation. But the Supreme Court separately applied to § 1964(c) the presumption against extraterritoriality and concluded that it was not overcome by either the statute's specific language or context. It held, therefore, that only plaintiffs that had suffered a "domestic injury" can bring a private RICO claim.[8]

In RJR Nabisco, the plaintiffs waived any claim of U.S. "domestic injury" and the court therefore had no occasion to discuss how to determine whether one was suffered.[9] But the court made clear that the analysis must consider the "focus" of the private right of action, as that is the required "second step" once a statute is found not to apply to extraterritorial conduct.[10] Beyond this, however, the court's guidance on the critical issue of how the "focus" of § 1964(c) informs the determination of whether there is a "domestic injury" is unclear.

For example, Justice Ruth Bader Ginsburg's dissent characterizes the majority opinion as limiting private RICO suits to U.S. plaintiffs, while the majority opinion expressly notes (if somewhat cryptically) that § 1964(c)'s requirement of a "domestic injury" "does not mean that foreign plaintiffs may not sue under RICO."[11] We are largely left with the court's acknowledgement that application of the "domestic injury" requirement "in any case will not always be self-evident."[12] In the six months since RJR Nabisco was decided, little clarity has been brought to the requirement by the lower courts.[13]

"Domestic Injury" in the Wake of RJR Nabisco

Most courts have foregone entirely an examination of the "focus" of § 1964(c), as required by the second step of the RJR Nabisco analysis. In Akishev v. Kapustin, for example, a district court in New Jersey considered the "labyrinthine" case of Eastern European plaintiffs who claimed that they were defrauded by U.S.-based defendants into purchasing over the internet falsely described or nonexistent cars for delivery to Eastern Europe.[14] The plaintiffs, who "never set foot in the United States," wired money to the U.S. defendants from foreign bank accounts that was never subsequently returned.[15] After reviewing the RJR Nabisco decision (but no later authority), the court articulated a broad construction of the "domestic injury" requirement: "The key to this case is that plaintiffs suffered their injuries the moment they clicked the computer mouse — on a United States-based website representing United States-based car dealerships — and ordered and paid for a car whose condition was materially misrepresented or did not even exist at all."[16]

The court found compelling policy arguments to support a view of the injury requirement that also

focused on the conduct of the defendants: “To rule this case outside § 1964(c) would allow the United States to become a haven for internet fraud despite Congress’ dual intent both to create a private cause of action under RICO and incorporate predicate acts of mail and wire fraud which extend expressly to transactions affecting foreign commerce ... Plaintiffs should be afforded the same remedies available to a United States citizen who purchased a car from defendants in the exact same manner and were defrauded in the same exact scheme.”[17] The court noted that a different result would attach had the plaintiffs purchased their cars from the Russian branch of an American car dealer, and “[i]mportantly” that the plaintiffs had not engaged in forum-shopping to avoid more appropriate local remedies.[18]

Other cases have followed disparate paths while similarly failing to examine the “focus” of the relevant RICO provisions. In Bascuñan v. Elsaca, a district court in the Southern District of New York considered the geographically challenging case of a Chilean citizen and resident who claimed that his inherited fortune had been stolen from him by relatives and others exercising fraudulently obtained powers of attorney.[19] Some of the allegedly stolen funds, including physical stock certificates, had been held in accounts and safe-deposit boxes in New York banks. To determine whether a “domestic injury” existed, the court parsed the language of RJR Nabisco, concluding that the location where the plaintiff “suffered” its injury was dispositive for purposes of applying § 1964(c).[20] The court then found that the location of an injury should be determined under New York law, as the parties had proposed — specifically, where an “economic” claim accrues for purposes of applying New York’s choice of law rule.[21] That test — asking “who became poorer” and “where did they become poorer” — pointed to Bascuñan, whose Chilean citizenship and residency caused the injury he allegedly suffered not to be a U.S. “domestic injury.”[22]

But this analysis did not persuade a district court in the Central District of California, which less than two months later in Tatung Co. Ltd. v. Hsu expressly rejected what it understood to be Bascuñan’s rule that foreign plaintiffs cannot suffer a “domestic injury.”[23] Tatung, a Taiwanese corporation, alleged that the defendants violated RICO in the course of stripping the assets from a California company against which Tatung had won an arbitration award. The court found that Tatung’s claim could proceed despite its citizenship, noting that a contrary rule would afford “immunity for U.S. corporations who, acting entirely in the United States, violate civil RICO at the expense of foreign corporations doing business in this country.”[24] In finding that Tatung had been injured in the United States, the court noted that its arbitration judgment was “property,” but also focused on the defendants’ conduct, and the fact that they had “specifically targeted their conduct at California with the aim of thwarting Tatung’s rights in California.”[25]

Elsevier Inc. v. Grossman, a decision from the Southern District of New York, applied a “focus” analysis, but not to the question of whether a “domestic injury” had occurred. [26] There, foreign publishing companies alleged that a foreign national defrauded them when purchasing subscriptions by paying the lower rate for individuals rather than the higher rate for the institutions actually subscribing.[27] The foreign subscriber established a business in New York from which payment was made for the subscriptions and where some publications were mailed to foreign customers.[28] The mail fraud statute identified as the RICO predicate offense had been found elsewhere not to have extraterritorial effect, and the court analyzed the statute’s “focus” to determine that the facts alleged stated a permissible substantive domestic violation.[29] But then the court separately asked whether the plaintiff had suffered an injury “on U.S. soil,” concluding that a “flexible inquiry” should be conducted. Doing so, and with no further reference to the “focus” of § 1964(c), § 1962, or the RICO predicate offenses, it held that the location of (1) a “business” injury is “where substantial negative business consequences occurred,” and (2) an injury to property is “where the plaintiff parted with the property or where the property was damaged.”[30]

Where is a RICO Injury Suffered?

We believe that courts applying RJR Nabisco to date have failed to abide the direction of RJR Nabisco that the "focus" of § 1964(c) first be considered in determining the meaning of a "domestic injury." To be sure, this task is neither "self-explanatory" in the context of RICO, as the court allowed, or easy. Section 1964(c) creates a remedy for "[a]ny person injured in his business or property by reason of a violation of Section 1962 of this chapter." The "by reason of" language implies both a proximate cause requirement and a linkage between the private right of action and the substantive RICO violations alleged from among the four subsections of § 1962.[31] The "focus" of §1964(c) would appear to vary with — and to be limited by the metes and bounds of — the specific subsections of § 1962 alleged to have been violated. In simplified form, those provisions proscribe:

- Subsection 1962(a): Acquiring an interest in an "enterprise" through funds obtained through "racketeering activity";

- Subsection 1962(b): Acquiring or maintaining an interest in or control over an "enterprise" through a "pattern of racketeering activity";

- Subsection 1962(c): Conducting the affairs of an "enterprise" through a "pattern of racketeering activity"; and

- Subsection 1962(d): Conspiring to violate any of the foregoing provisions.

Each RICO subsection addresses a different wrong, and many appellate cases have held that the nature of damages recoverable in a private suit will depend on the subsection claimed to have been violated.[32] Indeed, even the term "enterprise" is used differently in different RICO subsections to denote "either the 'prize,' 'instrument,' 'victim' or 'perpetrator' of the racketeers."[33] All of these considerations would seem to be part of the required analysis of whether the plaintiff suffered a "domestic injury."[34]

Conclusion

Courts applying the "domestic injury" requirement of RJR Nabisco to the facts before them may well have reached the right results, but they have not, as required by that case and Morrison, examined the "focus" of RICO's private right of action and the underlying RICO violations alleged. Until courts follow the path laid out by the Supreme Court's contemporary extraterritoriality cases and apply a consistent analysis, whether a private RICO claim presenting cross-border facts satisfies the requirement of a "domestic injury" will be anybody's guess.

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[1] RJR Nabisco Inc. v. European Cmty., 136 S. Ct. 2090 (2016) (4-3 decision).

[2] The court did not address the unsettled question whether equitable relief is available under RICO, concluding that relief of any kind for a private plaintiff would require a "domestic injury." See id. at 2111 n.13.

[3] See, e.g., United States v. Xu, 706 F.3d 965, 977 (9th Cir. 2013).

[4] See, e.g., Bhari Info Tech. Sys. Private Ltd. v. Sriram, 984 F. Supp. 2d 498, 504 (D. Md. 2013); Le-Nature's Inc. v. Krones Inc., No. 9-MC-162, 2011 U.S. Dist. LEXIS 56682, at *18 (W.D. Pa. May 26, 2011).

[5] See, e.g., European Cmty. v. RJR Nabisco, 764 F.3d 129, 139 (2d Cir. 2014)

[6] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

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

[8] See id. at 2106-11.

[9] Id. Interestingly, the court dismissed RJR Nabisco's proposed test that would require the existence of a U.S. "enterprise" in part because the plaintiff "offers no satisfactory way of determining whether an enterprise is foreign or domestic." Id. at 2104.

[10] Id. at 2101, 2106.

[11] Compare id. at 2115 (Ginsburg, J., dissenting) with id. at 2110 n.12 (majority opinion).

[12] Id.

[13] In this respect, the court's decision is similar to its decision in FTC v. Actavis Inc., 133 S. Ct. 223 (2013), which found that certain "reverse payment" settlements are subject to the Sherman Act's rule of reason, but provided little guidance as to the intended reach of its holding. Although perhaps understandable as a matter of judicial practice, the nearly inevitable consequence is protracted litigation, inconsistent results, and substantial transaction costs for all concerned. See, e.g., R. Reznick, D. Goldstein, A. Okuliar, and R. Goldstein, 1st Circ. Charts Conservative Post-Actavis Course in Loestrin (2016). As this article demonstrates, the same can be expected here.

[14] Akishev v. Kapustin, No. 13-7152(NLH)(AMD), 2016 U.S. Dist. LEXIS 169787, at *1 (D.N.J. Dec. 8, 2016).

[15] Id. at *17.

[16] Id.

[17] Id. at *19-20.

[18] Id. at *20.

[19] Bascuñan v. Elsaca, No. 15-cv-2009 (GBD), 2016 U.S. Dist. LEXIS 133664, at *3-6 (S.D.N.Y. Sept. 28, 2016).

[20] Id. at *17.

[21] Id. at *19.

[22] Id. at *12, *18.

[23] Tatung Co. Ltd. v. Hsu, No. SA CV 13-1743 (DOC) (ANx), 2016 U.S. Dist. LEXIS 157450, at *17 (C.D. Cal. Nov. 14, 2016)

[24] Id. at *18.

[25] Id. at *22. Other decisions that have failed to conduct a "focus" analysis have come no closer to establishing a consensus as to the meaning of a "domestic injury," and the test to be employed in looking for one. See, e.g., Union Commercial Services Ltd. v. FCA Int'l Operations LLC, No. 16-cv-10825, 2016 U.S. Dist. LEXIS 156098, at *12-15 (E.D. Mich. Nov. 10, 2016) (following rule in antitrust cases rejected in Elsevier, "domestic injury" occurs where "substantial effects" of defendants were felt in the United States); Uthe Tech. Corp. v. Allen, No. C 95-02377 WHA, 2016 U.S. Dist. LEXIS 115016, at *8-9 (N.D. Cal. Aug. 26, 2016) (foreign conspiracy to siphon funds from Singaporean subsidiary of U.S. company not a "domestic injury"); Exeed Indus. LLC v. Younis, No. 15 C 14, 2016 U.S. Dist. LEXIS 154487, at *7, *8 (N.D. Ill. Nov. 8, 2016) (noting "domestic injury ... arises where it was initially suffered by the plaintiff and holding certain U.S.-based acts inadequate to establish "domestic injury" because "the bulk of the illegal racketeering activities are alleged to have occurred abroad").

[26] Elsevier Inc. v. Grossman, No. 12 Civ. 5121 (KPF), 2016 U.S. Dist. LEXIS 103444 (S.D.N.Y. Aug. 4, 2016).

[27] Id. at *4-7.

[28] Id. at *5-7.

[29] Id. at *30-32.

[30] Id. at *34-39.

[31] Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457 (2006).

[32] See, e.g., id. at 457 (compensable injury for violation of § 1964(c) is injury stemming from commission of predicate acts); Sybersound Records Inc. v. UAV Corp., 517 F.3d 1137, 1149-50 (9th Cir. 2008) (private damages claim under § 1962(a) requires injury from proscribed investment "separate and

distinct from the injury flowing from the predicate act"); Lightening Lube Inc. v. Witco Corp., 4 F.3d 1153, 1188, 1190 (3d Cir. 1993) (same, and stating private claim under § 1962(b) must allege "injury from the defendant's acquisition or control of an interest in a RICO enterprise, in addition to injury from the predicate acts").

[33] NOW v. Scheidler, 510 U.S. 249, at 259 n.5 (1994) (citing G. Robert Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 307-25 (1982)).

[34] Moreover, when assessing private RICO claims based on foreign conduct under any subsection of §1962, the underlying RICO predicate violations must be examined, at the very least to determine whether the conduct making up the "pattern of racketeering activity" is within their geographic scope. RJR Nabisco, 136 S. Ct. at 2101-2103.
