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THE RECORDER

SCOTUS Clarified RICO's Domestic Injury Requirement, Did Not Create New Civil Right of Action for Enforcing Arbitration Awards

By Daniel Pascucci and Michael Godwin
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The U.S. Supreme Court's June 22 decision in *Yegiazaryan v. Smagin*, No. 22-381, resolved a circuit court split over whether the Racketeer Influenced and Corrupt Organizations Act (RICO) is available to foreign plaintiffs, and embraced a nuanced case-by-case analysis that considers the domestic property and activities of a foreign plaintiff in determining whether its alleged injury was suffered in the United States.

In the days since the decision, analysts have heralded it as a sweeping change, opining the justices have opened a new path for enforcement of foreign arbitration awards and suggesting that civil RICO claims are now available to creditors enforcing such awards.

Smagin did not, however, create any new claims or paths to recovery. It provided an important resolution to a dispute among circuits over whether RICO's domestic injury requirement (announced in the court's 2016 decision in *RJR Nabisco v. European Community*, 579 U.S. 325 (2016)) prohibits foreign plaintiffs from bringing civil RICO claims (it does not), but otherwise left the onerous substantive requirements of a civil RICO claim fully intact.

Post-*Smagin*, civil RICO remains a narrow and burdensome path for any plaintiff and, while perceptions of the high court's tacit approval may incentivize new test cases, filing longshot racketeering claims will do more harm than good to an asset recovery campaign. Foreign creditors chasing assets hidden behind fraudulent schemes still need to scrutinize carefully whether theirs is the rare case supporting civil RICO liability.

Courtesy photos

Daniel Pascucci, left, and Michael Godwin, right, of Mintz.

Civil RICO Has Long Been a Powerful Tool for Enforcement of Judgments and Awards in Exceptional Cases

Civil RICO has been available to enforce arbitration awards (foreign or domestic) since long before *Smagin*. Indeed, in *Tatung v. Shu Tze Hsu*, 217 F. Supp. 3d 1138 (C.D. Cal. 2016), a Taiwanese company successfully used civil RICO to enforce a California arbitration award against the Taiwanese family of the CEO of an arbitration defendant. Tatung,

however, was one of very few civil RICO cases in the country to survive to trial, and the plaintiff had to overcome 35 motions to dismiss and summary judgment motions to get there. As discussed below, most civil RICO cases (98% by one survey's count) fail somewhere along the way, leaving aggressive plaintiffs with nothing to show for their efforts and significant legal expenses. However, for extraordinary cases with the right facts, civil RICO—particularly when coupled with the broad reach of district court discovery—has been and remains a powerful tool in the campaign to locate and recover assets to satisfy an award or judgment.

The Impact and Fallout of 'RJR Nabisco'

In 2016, the Supreme Court published its *RJR Nabisco* decision, where it addressed the judicial presumption against extraterritorial reach of U.S. laws and the application of the presumption to RICO. The court held that, while provisions of the statute authorizing government action overcame the presumption, the private right of action set forth in 18 U.S.C. Section 1964(c) did not. Finding that allowing civil RICO to redress foreign injuries presents a "danger of international friction" with countries providing their own redress for such injuries, Justice Samuel Alito, writing for the majority, held that "Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries." *RJR Nabisco*, 579 U.S. at 348, 354.

The fallout of *RJR Nabisco* was immediate and disparate. In California, a nuanced case-by-case application immediately followed. Tatung was scheduled for trial and the defendants there promptly raised the newly-announced domestic injury requirement, arguing summary judgment was appropriate because the plaintiff, a Taiwanese company, sustained any injury in Taiwan and thus lacked standing under RICO. However, the U.S. District Court for the Central District of California (U.S. District Judge David Carter) ultimately found that a foreign plaintiff could in fact establish a domestic injury under civil RICO, recognizing:

"It cannot be the case that the mere fact that a loss is economic means that foreign corporations are unable to avail themselves of the protections of civil RICO, even in cases where all of the actions causing the injury took place in the United States." *Tatung,* 217 F. Supp. 3d at 1115.

Carter described the plaintiff's extensive connection to the United States throughout the underlying arbitration and its efforts to enforce the resulting judgment and concluded, "It would be absurd to find that such activity did not result in a domestic injury to plaintiff." Id. at 1156.

Since then, a split among the circuits emerged. The U.S. Court of Appeals for the Second Circuit held in 2017 that "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." *Bascuñán v. Elsaca*, 874 F.3d 806, 814 (2d Cir. 2017).

The following year, the U.S. Court of Appeals for the Seventh Circuit took the opposite approach and adopted a bright line rule that "a party experiences or sustains injuries to its intangible property at its residence." *Armada (Singapore) v. Amcol International*, 885 F.3d 1090, 1094 (7th Cir. 2018) (emphasis added).

The U.S. Court of Appeals for the Third Circuit entered the fray and rejected this bright-line approach, adopting instead a nuanced case-by-case approach:

"Although a litigant's residence or principal place of business is obviously a relevant consideration, and perhaps a useful place to begin a § 1964(c) inquiry, it does not necessarily determine the ultimate question of whether there has been a domestic injury. It is merely one factor that informs our inquiry." *Humphrey v. GlaxoSmithKline*, 905 F.3d 694, 709 (3d Cir. 2018).

The analysis came full circle back to California in the appellate decision underlying *Smagin*, where the U.S. Court of Appeals for the Ninth Circuit adopted a context-specific inquiry and found that "for purposes of standing under RICO, the California judgment exists as property in California" and fraudulent activities and other predicate acts designed to thwart enforcement of a California judgment cause injury in California. *Smagin v. Yegiazarian*, 37 F.4th 562, 567-68 (9th Cir. 2022).

'Smagin' Endorsed the California Interpretation of 'RJR Nabisco', Restored the Post-'Tatung' Status Quo

The Supreme Court affirmed the Ninth Circuit's context-specific inquiry, holding "courts should look to the circumstances surrounding the alleged injury to assess whether it arose in the United States." Slip. op. 8. The court specifically recognized that allegations of fraudulent activity in the United States aimed at subverting a plaintiff's rights to enforce a California judgment were sufficient to allege a domestic injury. See id. at 9-10.

However, the Supreme Court's decision and analysis was limited to the domestic injury requirement, and the court did not address or in any way modify the myriad additional hurdles in the path of any civil RICO plaintiff. Nor did the court hold that civil RICO is, as a matter of course, available to enforce foreign arbitration awards.

Post-'Smagin', the Onerous Burden and Long Odds of Success in Civil RICO Remain

In the wake of *Smagin*, civil RICO remains a longshot claim with heavy burdens and discouraging odds. *Smagin* neither changes the complex substantive standards applicable to civil RICO claims nor increases a plaintiff's chances of prevailing on the merits of such claims. Instead, the Supreme Court merely confirmed that foreign plaintiffs can meet the domestic injury requirement, which is but one of the many requirements needed to substantiate a civil RICO claim.

Would-be plaintiffs still must overcome highly-burdensome challenges inherent in civil RICO claims, including exacting requirements to establish a RICO enterprise, a pattern of racketeering activity and the elements of specifically-enumerated predicate acts. When claims are fraud-based (most civil RICO theories are), the heightened specificity requirements of Rule 9 of the Federal Rules of Civil Procedure compound each of these burdens.

Such challenges have led numerous courts to note that "plaintiffs asserting RICO frequently miss the mark." See, e.g., *J.T. v. de Blasio*, 500 F. Supp. 3d 137, 165 (S.D.N.Y. 2020). Indeed, after a survey of 145 civil RICO actions over a three-year period showed that only 2% of plaintiffs "achieved a final victory." One district judge examined all civil RICO claims in the U.S. District Court for the Southern District of New York over a four-year period and determined that "all resulted in judgments against the plaintiffs." See *Gross v. Waywell*, 628 F. Supp. 2d 475, 479-80 (S.D.N.Y. 2009). Notably, none even made it to trial. See id. at 480.

The closest *Smagin* comes to crafting a new path to recovery is its endorsement of the Ninth Circuit's finding that having a United States judgment can confer civil RICO standing where the racketeering activity is designed to thwart that judgment. Post-*Smagin*, creditors of arbitration awards (foreign and domestic) and foreign judgments will and, in the right cases, should seek judgments in the United States recognizing and enforcing those claims.

United States district courts can be powerful allies in asset recovery litigation even without RICO claims, but civil RICO can add an "unusually potent weapon" and the "litigation equivalent of a thermonuclear device." See, e.g., *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996), aff'd, 113 F.3d 1229 (2d Cir. 1997). In the right cases, establishing a domestic judgment can be an important first step in setting up these impactful claims, but creditors building an asset recovery strategy should continue to scrutinize potential RICO claims and assert such claims only after painstakingly confirming they have the evidence to thread RICO's narrow needles.

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