

# Second Circuit Clarifies Civil RICO Domestic Injury Requirement Following Supreme Court's *RJR Nabisco* Decision

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On October 30, 2017, in a matter of first impression in any Court of Appeals, the Second Circuit held in *Bascuñán v. Elsaca*<sup>1</sup> that plaintiffs who allege injuries to tangible property located within the United States can satisfy the domestic injury requirement for claims brought under Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (“RICO”).<sup>2</sup> The decision was the first time that a Court of Appeals identified what constitutes a “domestic injury” after the Supreme Court’s June 20, 2016 decision in *RJR Nabisco, Inc. v. European Community*,<sup>3</sup> which 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.”<sup>4</sup> The Second Circuit’s decision brings more clarity to the domesticity standards that plaintiffs must meet in order to assert a RICO claim against individuals or corporations, although certain questions still remain open.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or one of the following authors.

**NEW YORK**

One Liberty Plaza  
New York, NY 10006-1470  
T: +1 212 225 2000  
F: +1 212 225 3999

**Jonathan I. Blackman**

+1 212 225 2490  
[jblackman@cgsh.com](mailto:jblackman@cgsh.com)

**Carmine D. Boccuzzi, Jr.**

+1 212 225 2508  
[cboccuzzi@cgsh.com](mailto:cboccuzzi@cgsh.com)

**Rahul Mukhi**

+1 212 225 2912  
[rmukhi@cgsh.com](mailto:rmukhi@cgsh.com)

**Matthew M. Karlan**

+1 212 225 2845  
[mkarlan@cgsh.com](mailto:mkarlan@cgsh.com)

**KC Ellis**

+1 212 225 2712  
[kellis@cgsh.com](mailto:kellis@cgsh.com)

<sup>1</sup> No. 16-3626-cv, \_\_\_ F.3d \_\_\_, 2017 WL 4872400 (2d Cir. Oct. 30, 2017).

<sup>2</sup> 18 U.S.C. §§ 1961-1968.

<sup>3</sup> 136 S. Ct. 2090 (2016).

<sup>4</sup> *Id.* at 2111.



## Background

RICO imposes criminal liability under Section 1962 on persons who engage in a “‘pattern of racketeering activity’—a series of related predicates that together demonstrate the existence or threat of continued criminal activity.”<sup>5</sup> RICO’s “predicate acts” include dozens of specified state and federal offenses that together can constitute a pattern of racketeering activity. In addition, RICO’s Section 1964(c) creates a private civil cause of action that allows “[a]ny person injured in his business or property by reason of a violation of section 1962” to sue in federal district court and recover treble damages, costs, and attorney’s fees.<sup>6</sup> In recent years, civil plaintiffs have sought opportunities to assert RICO claims against corporate defendants given the statute’s broad scope and potential for significant damages.

In *RJR Nabisco*, the Supreme Court considered whether RICO applies extraterritorially. The Court decided that RICO’s substantive prohibitions under Section 1962 can be applied extraterritorially “but only to the extent that predicates alleged in a particular case themselves apply extraterritorially.”<sup>7</sup> Despite concluding that the presumption against extraterritoriality was overcome for certain of the substantive provisions of RICO, the Court nevertheless decided that RICO’s private right of action in Section 1964(c) does not apply extraterritorially, and therefore “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.”<sup>8</sup> Because the plaintiffs in *RJR Nabisco* had conceded that there was no domestic injury in that case, the Court left open the question of how courts should determine whether an alleged injury was foreign or domestic, stating only that “[t]he application

of this rule in any given case will not always be self-evident.”<sup>9</sup>

## The District Court’s Decision

*Bascuñán v. Elsaca* arose from a civil RICO action brought in March 2015 in the Southern District of New York by Jorge Bascuñán, a citizen and resident of Chile, against his cousin, Daniel Elsaca, also a citizen and resident of Chile, and several co-defendants.<sup>10</sup> Bascuñán alleged that after he appointed Elsaca as the financial manager of his substantial fortune and granted him power of attorney, Elsaca stole roughly \$64 million from Bascuñán through four separate financial schemes. In particular, Bascuñán alleged that Elsaca (1) transferred funds between two different New York trust accounts solely to generate sham investment and legal fees for himself and his co-defendants;<sup>11</sup> (2) illegally transferred large sums of money to accounts and entities under his control after laundering the assets through bank accounts in New York and elsewhere;<sup>12</sup> (3) used his power of attorney to seize bearer shares stored in a safety deposit box in New York;<sup>13</sup> and (4) diverted dividend payments from an account held in Chile to his personal investment accounts in New York.<sup>14</sup>

After the Supreme Court issued its decision in *RJR Nabisco*, Bascuñán sought leave to file a second amended complaint. The district court denied the motion as futile, and granted defendants’ motion to dismiss on the ground that Bascuñán had failed to allege a domestic injury. In doing so, the district court did not consider each of the alleged fraudulent schemes separately but instead characterized Bascuñán’s injury as a single \$64 million “economic loss.”<sup>15</sup> Analogizing to tort accrual rules under New York’s borrowing statute,<sup>16</sup> the district court then reasoned that plaintiffs typically suffer economic

<sup>5</sup> *Id.* at 2096-97 (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989)).

<sup>6</sup> 18 U.S.C. § 1964(c).

<sup>7</sup> 136 S. Ct. at 2102.

<sup>8</sup> *Id.* at 2111.

<sup>9</sup> *Id.*

<sup>10</sup> *Bascuñán v. Daniel Yarur ELS*, No. 15-cv-2009 (GBD), 2016 WL 5475998, at \*1 (S.D.N.Y. Sept. 28, 2016), *rev’d in*

*part, vacated in part sub nom. Bascuñán v. Elsaca*, 2017 WL 4872400.

<sup>11</sup> *Bascuñán*, 2017 WL 4872400, at \*3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at \*4.

<sup>14</sup> *Id.*

<sup>15</sup> *See Bascuñán*, 2016 WL 5475998, at \*6.

<sup>16</sup> N.Y. C.P.L.R. 202.

losses at their place of residence, and therefore concluded that Bascuñán, a resident of Chile, had alleged only a foreign injury.<sup>17</sup>

### The Second Circuit’s Decision

The Second Circuit reversed the district court, concluding that in determining that Bascuñán’s injury was entirely foreign, the district court had erred in relying too heavily on Bascuñán’s residence and on its own characterization of the injury as an “economic” injury. The Second Circuit also faulted the district court for not conducting a separate domesticity analysis for each alleged injury. The Second Circuit stated that, “[i]f one of the alleged injuries is domestic, then the plaintiff may recover for that particular injury even if all of the other injuries are foreign.”<sup>18</sup>

The Second Circuit then proceeded to consider what factors should determine whether an alleged injury qualifies as “domestic.” The court held that “[w]here the injury is to tangible property, we conclude that, absent some extraordinary circumstance, the injury is domestic *if the plaintiff’s property was located in the United States when it was stolen or harmed*, even if the plaintiff himself resides abroad.”<sup>19</sup> Notably, the court rejected the argument that in applying this rule, money or other “financial property” should be distinguished from other forms of property such as real property or chattels.<sup>20</sup>

At the same time, the court made an important clarification, stating that while an injury to a plaintiff’s tangible property is generally a domestic injury if the property is physically located in the United States, “*a defendant’s use of the U.S. financial system to conceal or effectuate his tort does not, on its own, turn an otherwise foreign injury into a domestic one.*”<sup>21</sup> In particular, the court stated that “the use of bank accounts located within the United States to facilitate or conceal the theft of property located outside of the

United States does not, on its own, establish a domestic injury.”<sup>22</sup> In so holding, the Second Circuit explicitly recognized that as a result of “the primacy of American banking and financial institutions, particularly those in New York, a transnational RICO case is often likely to involve in *some* way, however insignificant, financial transactions with American institutions.”<sup>23</sup> As a result, “[h]olding that a defendant’s mere use of a domestic bank account could transform an otherwise foreign injury into a domestic one might well effectively eliminate the effect of the domestic injury requirement in a large number of cases.”<sup>24</sup>

Applying these rules to the four alleged schemes at issue, the Second Circuit found that Bascuñán had sufficiently alleged domestic injuries with respect to two.<sup>25</sup> Specifically, it held that the scheme involving the misappropriation of plaintiff’s funds from an account in New York and the scheme involving the theft of bearer shares held in a safety deposit box in New York each sufficiently alleged a domestic injury.<sup>26</sup> With respect to the remaining two fraudulent schemes—laundering money through New York bank accounts and diverting funds from an account in Chile to an account in New York—the Second Circuit held that Bascuñán had failed to allege a domestic injury because the only domestic elements alleged were that Elsaca (one of the defendants) transferred stolen funds to his own accounts in New York or laundered stolen money using bank accounts in the United States.<sup>27</sup>

### Takeaways

The Second Circuit’s decision in *Bascuñán v. Elsaca* goes a long way towards filling one of the gaps left open by the Supreme Court in *RJR Nabisco*. Under the Second Circuit’s holding, if the alleged RICO injury is to tangible business or property—including money—located within the United States, a plaintiff is

<sup>17</sup> *Bascuñán*, 2016 WL 5475998, at \*6.

<sup>18</sup> *Bascuñán*, 2017 WL 4872400, at \*8.

<sup>19</sup> *Id.* at \*10 (emphasis added).

<sup>20</sup> *Id.* at \*12.

<sup>21</sup> *Id.* at \*9 (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 14.

<sup>26</sup> *Id.* at \*10-14.

<sup>27</sup> *Id.* at \*8-10.

likely to meet the domesticity requirements for a civil RICO claim. If, on the other hand, tangible property is not located within the United States when it is stolen or harmed, then a defendant’s subsequent transfer, funneling or use of that property in the United States is unlikely to be sufficient to render the injury “domestic.” Thus, defendants in the Second Circuit will likely have strong arguments that any federal civil RICO claims should be dismissed if the only allegation of a domestic nexus is the defendant’s use of the U.S. financial system.

While the decision provides clarity when a civil RICO plaintiff alleges tangible property was stolen or harmed, what about property that is not “tangible”? The Second Circuit was careful to note that it did “not hold that a plaintiff’s place of residence is *never* relevant to the domestic injury inquiry required by *RJR Nabisco*,” and that “[a] plaintiff’s residence may often be relevant—perhaps even dispositive—in determining whether certain types of business or property injuries constitute a domestic injury.”<sup>28</sup> While the court did not specify what circumstances it had in mind, its analysis hints that injuries to *intangible* property—including a plaintiff’s economic interest in a company—may be judged domestic or foreign based, at least in part, on the plaintiff’s residence. Indeed, the court stressed that, with respect to the theft of bearer shares, “Bascuñán does not allege that Elsaca’s RICO activity caused a drop in the economic value of these shares,” instead contending “that these shares were, in effect, stolen—*physically* stolen—from a safety deposit box in New York,”<sup>29</sup> and distinguished other circumstances (in the separate context of the Foreign Sovereign Immunities Act) that “involved the diminished value of ownership interest in a company, for which the clear locational nexus was the shareholder’s place of residence.”<sup>30</sup> Thus, in future cases alleging injuries to intangible economic interests, the Second Circuit may well look

to the plaintiff’s residence as a key factor in determining whether the injury is domestic.

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CLEARY GOTTlieb

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<sup>28</sup> *Id.* at \*13.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at \*12 (discussing *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 493 (2016)).