

CIVIL RICO CLAIMS AFTER YEGIAZARYAN V. SMAGIN: A NEW LITIGATION TOOL FOR CHAPTER 15 FOREIGN REPRESENTATIVES IN THE UNITED STATES?



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Introduction

The Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted by the United States Congress and signed into law in 1970 as a tool to combat organized crime in the US. In addition to substantial criminal penalties for violations, the RICO statute authorizes the filing of civil claims to enable the victims of “predicate acts” of interstate racketeering activity (often mail or wire fraud) to recover treble damages and attorneys’ fees for injury to their business or property caused by that activity.

The Yegiazaryan case

A recent decision of the United States Supreme Court in *Yegiazaryan v. Smagin*¹ opens the door for plaintiffs that do not reside in the US to pursue RICO claims when seeking to enforce a judgment or assert claims against US parties for injuries suffered or sustained in the US. Specifically, the Court adopted a context-specific inquiry to determine a plaintiff’s standing to bring civil RICO claims that looks to the nature and location(s) of the alleged bad acts, as well as the nature and location of the property damaged. In adopting this context-specific approach, the Court rejected the bright-line residency-based rules proposed by Petitioners (defendants in the underlying action) - and adopted by prior lower court decisions - that barred foreign plaintiffs entirely from bringing US RICO claims. Importantly, although the *Yegiazaryan* case involved enforcement of a foreign arbitration award confirmed into a U.S. Judgment, the Court’s holding demonstrates that any foreign plaintiff who suffered US injury - likely including the foreign representative of a foreign debtor in a Chapter 15 case in which recognition has been granted to an underlying foreign proceeding - will have legal standing to pursue claims under US civil RICO statutes.

Because civil RICO claims allow for the recovery of

treble damages and attorneys’ fees, the Court’s decision opens a new door to a powerful tool for Chapter 15 foreign representatives to pursue claims arising from the illicit transfer of assets from foreign jurisdictions to or within the United States. While the implications of the *Yegiazaryan* case will be explored and more precise legal tests developed in the lower courts for years to come, Chapter 15 foreign representatives and other foreign plaintiffs with interests in US business or property targeted by US defendants now have a powerful remedial tool available to protect those interests.

Background: the RICO statutes

In recent years, civil RICO claims have been asserted and upheld to redress injury sustained as a result of criminal activity.²

Under United States law, there is a presumption against the extraterritorial application of a federal statute, absent a clear indication of intention that the law applies extraterritorially. *E.g.*, *Morrison v. Nat’l Australia Bank Ltd.*, 561 US 247, 270 (2010) (limiting extraterritorial application of federal securities laws in order to prevent the US from becoming “the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.”)

Addressing this question in respect of the RICO statutes in *RJR Nabisco v. European Community*, 579 US 325, 346, 136 S. Ct. 2090 (2016), the Supreme Court held that the *criminal* provisions of the RICO statutes applied extraterritorially, but required a *civil* claimant to plead and prove a “domestic injury” to establish standing to assert a RICO claim. Because the foreign plaintiffs in that case had waived all claims for recovery of damages based on domestic injuries, the Court held that those plaintiffs lacked standing to assert their civil RICO claims. Limiting its decision to the facts before it, the Court left open the question of how to define “domestic injury”

¹ 143 S. Ct. 1900 (June 22, 2023).

² See, e.g., *Fleetwood Servs., LLC v. Ram Capital Funding, LLC*, No. 22-1885-cv, 2023 WL 3882697, at *4 (2d Cir. June 8 2023) (upholding civil RICO claims); see also, *see also Fleetwood Servs., LLC v. Ram Capital Funding, LLC* o. 20-cv-5120 (LJL) 2023 WL 112429, at *8-*9 and *36 (S.D.N.Y Jan. 5, 2023) (awarding treble damages and fees for RICO claims).

sufficient to confer RICO standing. *RJR Nabisco*, 573 US at 354.

Addressing that open question two years later in *Armada (Sing.) PTE Ltd. v. Amcol Int'l Corp.*, 885 F.3d 1090 (2018), the Seventh Circuit Court of Appeals established a strict bright-line rule that barred foreign holders of US judgments (and perhaps all foreign plaintiffs claiming injury to intangible property) from asserting civil RICO claims. Opting to follow that bright-line rule, the District Court for the Central District of California dismissed plaintiff Smagin's civil RICO claim. On appeal, the Ninth Circuit Court of Appeals declined to follow the *Armada* decision and reversed the District Court, adopting a context-specific rule that permitted the courts to consider, among other things, where the conduct alleged to violate the RICO laws occurred and where the targeted property was located.

In the face of this developing split of authority among the Circuit Courts³ on the question of what constitutes a "domestic injury" under *RJR Nabisco*, the Supreme Court granted *certiorari* in *Yegiazaryan* to decide whether a foreign plaintiff suffering harm to intangible property (in this case, a California judgment) could successfully allege a domestic injury under RICO. In a 6-3 decision handed down on June 23, 2023, the Supreme Court agreed with the Ninth Circuit's approach, adopting the context-specific inquiry for RICO standing and holding that Mr. Smagin's alleged injury to his property - a US judgment entered and enforceable in California - caused by the defendants' alleged conduct that occurred in or was targeted at California constituted a domestic injury.

This rejection of the bright-line rule barring a foreign plaintiff from bringing RICO claims based on harm to intangible property opens the door to a wide variety of future claims by foreign-domiciled plaintiffs, including a Chapter 15 representative authorized to sue on behalf of a foreign debtor.

Qualification of the foreign representative and recognition of the foreign proceeding

While the United States codification of the UNCITRAL Model Law on Cross-Border Insolvency as Chapter 15 of the Bankruptcy Code is well-known to many international practitioners, a brief recitation of the critical steps is in order here. A foreign representative⁴ appointed in a foreign proceeding⁵ commences a case under Chapter 15 by filing a petition for recognition of the foreign

proceeding in which the foreign representative has been appointed.⁶ Upon satisfaction of the requirements of section 1517(a) of the Bankruptcy Code,⁷ the bankruptcy court in which the petition is filed will enter an order granting recognition of the foreign proceeding, either as a foreign main or foreign non-main proceeding.⁸ In either event, "if the court grants recognition under section 1517, the foreign representative has the capacity to sue and be sued in a court in the United States."⁹

This general grant of "capacity" to a foreign representative under section 1509(a) presumes but does not address the standing required to maintain any specific cause of action, for which additional requirements may exist. For example, other Code sections make clear that a foreign representative cannot pursue avoidance claims arising or vested in a trustee under the Bankruptcy Code, such as for preferences or fraudulent transfers, in a Chapter 15 case,¹⁰ but must file a plenary case under another Chapter of the Code in order to assert such claims.¹¹ Given these limitations, creative US counsel for foreign representatives have resorted to various "workarounds" in the form of other claims to recover assets or damages, whether at common law or equity - such as for breach of fiduciary duty, unjust enrichment, imposition of a constructive trust over diverted assets, or where available, avoidance claims under the law of the jurisdiction in which the foreign proceeding is pending.

The Supreme Court's decision in *Yegiazaryan* adds significantly to that arsenal of workarounds by opening the door to the assertion of claims arising under the civil RICO statutes. Until *Yegiazaryan*, the Circuit Courts were split on whether a foreign-domiciled plaintiff such as a Chapter 15 foreign representative could assert such claims. Even within a single Circuit, courts issued conflicting decisions on the legal standing of a foreign representative to maintain such an action.¹² *Yegiazaryan* resolves this uncertainty by clarifying the "domestic injury" requirement for standing to bring a civil RICO claim.

Implications

The Supreme Court's decision in *Yegiazaryan* has a number of implications for future actions by Chapter 15 foreign representatives who may be considering claims in US courts. Previous standards that used the plaintiff's domicile as the primary factor for determining domestic injury created material standing issues for foreign

3 The Third Circuit also weighed in on the issue, holding in *Humphrey v. GlaxoSmithKline*, 805 F.3d 694, 709 (3d Cir. 2018) that the *Armada* residency rule was too inflexible, and instead employing its own multi-factor approach to civil RICO claims alleging injuries to *business* that nevertheless found the residency of the plaintiff as the most important factor. In contrast, for alleged injuries to *tangible property*, the Second Circuit focused on the location of the property that was allegedly misappropriated. *Bascunan v. Elsaca*, 927 F.3d 108, 126 (2d Cir. 2019).

4 Defined in Bankruptcy Code section 101(24) as "a person or body authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).

5 Defined in Bankruptcy Code section 101(23) as "a collective judicial or administrative proceeding in a foreign country under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. §101(23).

6 Bankruptcy Code sections 1509(a), 1515(a), 11 U.S.C. §§1509(a), 1515(a).

7 11 U.S.C. §1517(a).

8 See Bankruptcy Code section 1517(b), 11 U.S.C. §1517(b).

9 Bankruptcy Code section 1509(b), 11 U.S.C. §1509(a).

10 Bankruptcy Code section 1521(a)(7), 11 U.S.C. §1521(a)(7) (authorizing court to grant discretionary relief to foreign representative "except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)").

11 Bankruptcy Code section 1523(a), 11 U.S.C. §1523(a).

12 *Compare Pearson v. Deutsche Bank AG*, No. 21-cv-22437, 2022 WL 951316, at *30-33 (S.D. Fla. Dist. March 29, 2022) (dismissing foreign representative's civil RICO claims for lack of standing to assert domestic injury under *RJR Nabisco*) with *Stower v. Cornide, et al. (In re Premier Assurance Group SPC Ltd.)*, No. 22-01260-RAM (S. Dist. Bankr. Fla. May 10, 2023) (Mark, J.) [Doc. 98] (sustaining civil RICO claims brought by foreign representatives based on context-specific approach adopted weeks later in *Yegiazaryan*).

representatives seeking to assert civil RICO claims, even if the scheme was conducted entirely within the US and targeted entirely US property. With the Supreme Court explicitly rejecting a bright-line, residency-based test in favor of a context-specific inquiry, the door to the remedial scheme provided in RICO is now definitively open to foreign representatives.

Chapter 15 bankruptcy cases often may involve allegations of illicit transfers of assets to or within the United States; now, the foreign representative in such a case has standing to bring a civil RICO claim in a US court - typically an adversary proceeding in the bankruptcy court handling the Chapter 15 case - based on identifiable RICO predicate acts that touch the United States. The ability to assert civil claims seeking treble damages under RICO can substantially increase the recovery for key stakeholders – as well as the leverage in potential settlement negotiations with targeted wrongdoers.

What kinds of claims might we expect in cases by foreign representatives seeking treble damages for domestic U.S. injuries to property? Most civil RICO claims are grounded in fraud, specifically the RICO predicate federal criminal wire fraud statute, 18 U.S.C. § 1343, which underlies the other federal criminal RICO

predicates of money laundering and transportation of stolen funds (18 U.S.C. §§1957, 1952 and 2314). These and other criminal statutes for violation of which civil claims may be asserted under RICO encompass a broad variety of fact patterns, as nearly every sophisticated scheme uses wire transfers or interstate communication (e.g., email or phone calls) of some sort.

One can envision foreign representatives asserting civil RICO claims arising out of transactions in violation of these provisions that have had an adverse effect on funds or other assets of a foreign debtor in the US in many ways. For example, a foreign plaintiff may state a civil RICO claim where a wrongdoer obtained property through a pattern of theft or other fraud in the United States, or transferred property to the US in violation of money laundering or the illegal transportation statutes referenced above. While it may be difficult to catalogue the many other fact patterns that could support a RICO claim in light of the newfound flexibility of the domestic injury requirement, it is clear is that the Supreme Court's decision in *Yegiazaryan* offers a new and meaningful tool to Chapter 15 foreign representatives to recover enhanced damages from defendants whose conduct in violation of the RICO statutes may have caused harm to the foreign debtor, wherever that debtor may be located.