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Although a Presumption Against Extraterritoriality Generally Precludes a Foreign Plaintiff from Recovering a Debtor's Assets in a Civil RICO Claim, that Presumption Can be Overcome to Hold a Foreign Defendant Liable for a Preference Claim

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Introduction

The civil portion of the Racketeer Influenced and Corrupt Organizations Act ("RICO") permits any individual "injured in his business or property by reason of a violation of the statute's criminal provisions" to pursue a cause of action against a tortfeasor.¹ For a party to pursue a civil remedy for economic injury under the civil portion of the statute, its criminal portion must first be violated through illegal activity, such as numerous acts of mail and wire fraud.² In *RJR Nabisco, Inc. v. European Community* ("*RJR Nabisco*"), the Supreme Court held that RICO's private right of action under 18 U.S.C. § 1964(c) does not apply extraterritorially.³

Because section 1964(c) of the RICO Act does not apply extraterritorially, a foreign plaintiff must allege and prove a domestic injury to its business or property.⁴ For a corporate

¹ 18 U.S.C. § 1964(c) (2012). The criminal portion of the RICO statute states it is "unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain any interest" affecting interstate or foreign commerce. 18 U.S.C. § 1962(b) (2012).

² See *Armada (Sing.) Pte Ltd. v. Amcol Int'l Corp.*, 244 F. Supp. 3d 750, 753-54 (N.D. Ill. 2017).

³ 136 S. Ct. 2090, 2106 (2016).

⁴ *RJR Nabisco*, 136 S. Ct. at 2106, 2111.

entity, economic injury generally occurs in its principal place of business.⁵ This element may prove challenging for foreign plaintiffs with a principal place of business overseas. The first issue is whether a foreign creditor would be precluded from recovering a debtor's assets when the debtor engages in racketeering and fraud in the transfer of assets that were or would have otherwise been part of the bankruptcy estate. If so, the second issue is whether a similar presumption against extraterritoriality of the United States Bankruptcy Code, codified under title 11 of the United States Code (the "Bankruptcy Code") can be overcome in a case involving a foreign defendant.

Part I of this memorandum explores how a presumption against extraterritoriality under the civil RICO statute prevents most foreign plaintiffs from recovering a debtor's illegally transferred assets. Part II examines how a debtor or trustee may recover a claim against a foreign defendant relating to the avoidance of preferential transfers under section 547 of the Bankruptcy Code, despite a similar presumption against extraterritoriality.

I. Foreign Plaintiffs May Fail to Recover a Debtor's Assets because section 1964(c) Does Not Apply Extraterritorially

The congressional purpose of enacting RICO was to "eradicate criminal racketeering."⁶ Because congressional intent was focused on criminal activity, only the criminal portion of the RICO statute, section 1962, was found to apply to foreign activity "to the extent that the predicates alleged in a particular case themselves apply extraterritorially."⁷ This finding reflects how "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."⁸

⁵ See *Armada (Sing.) Pte Ltd.*, 244 F. Supp. 3d at 755.

⁶ See *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1019 (7th Cir. 1992).

⁷ *RJR Nabisco*, 136 S. Ct. at 2106.

⁸ *Id.* at 2093 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)).

Accordingly, a plaintiff can only state a claim under section 1964(c) if a “domestic injury” is alleged and proven.⁹ Economic injury would only be actionable if the plaintiff’s principal place of business was located within the United States.¹⁰ Therefore, most foreign plaintiffs with a principal place of business in foreign jurisdictions fail to recover in a civil RICO claim.

A. The Domestic Injury Requirement Under a Civil RICO Claim Requires More Than the Mere Use of Domestic Bank Accounts

The purpose of the domestic injury requirement in a civil RICO claim is to avoid “unjustifiably permit[ing]” foreign plaintiffs from bypassing their own country’s “less generous remedial schemes.”¹¹ In general, a plaintiff must allege and prove that the injury to its business or property was felt in the United States.¹² Each injury should be analyzed separately to examine whether each was a domestic or foreign injury.¹³ Moreover, the plaintiff must show that the injured property or its injured principal place of business is located in the United States because mere contact with the U.S. at the time of injury does not “suffice[] to make an injury domestic.”¹⁴

The fact that a property or even a business located outside of the United States was injured by a defendant’s use of the American banking system does not “transform an otherwise foreign injury into a domestic one” for the purposes of a civil RICO claim.¹⁵ In one of the most cited cases, the *Bascuñán* court found two injuries involving the illegal transfer of foreign funds

⁹ *RJR Nabisco*, 136 S. Ct. at 2111.

¹⁰ *Armada (Sing.) Pte Ltd.*, 244 F. Supp. 3d at 755.

¹¹ *RJR Nabisco*, 136 S. Ct. at 2106-07.

¹² *Id.* at 2111.

¹³ *See Bascuñán v. Elsaca*, 874 F.3d 806, 814 (2d Cir. 2017).

¹⁴ *Id.* at 810.

¹⁵ *Bascuñán*, 874 F.3d at 810.

into or through United States bank accounts to be insufficient to amount to a domestic injury.¹⁶ However, the court held the injury to a foreign plaintiff's property located within the United States at the time it was harmed or stolen to be a domestic injury.¹⁷ The court reasoned this holding was consistent with the Supreme Court's concern for avoiding "international friction" in implementing the domestic injury requirement because "[f]oreign 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."¹⁸

B. Economic Injury Occurs in a Corporate Entity's Principal Place of Business

If the economic injury is to a foreign plaintiff's business, that corporate entity "generally suffers economic harm in its principal place of business."¹⁹ It is generally insufficient to show that a foreign entity's economic injuries were caused by the defendant's actions conducted within the United States.²⁰ Economic injury to a foreign entity occurs in its principal place of business regardless of whether its funds were "tied up" in the United States.²¹

In a recent chapter 15 bankruptcy case, foreign-plaintiff Armada (Singapore) Pte Ltd. ("Armada") was precluded from recovering a debtor's illegally transferred assets in a civil RICO claim.²² After debtor-Ashapura filed for bankruptcy in the Southern District of New York in October 2011, Armada, a creditor, received two default judgments from an arbitration decision in the United Kingdom in the amount of seventy million dollars against Ashapura, and

¹⁶ *Id.* at 818.

¹⁷ *Id.* at 820-21 (recognizing a plaintiff's place of residence may often be dispositive in other cases involving injury to a business).

¹⁸ *Id.* at 821.

¹⁹ *Armada (Sing.) Pte Ltd.*, 244 F. Supp.3d at 755.

²⁰ *Id.* See *RJR Nabisco*, 136 S. Ct. at 2101 (emphasizing that if "the conduct relevant to the statute's 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.").

²¹ *Exeed Industries, LLC v. Younis*, 15 C 14, 2016 WL 6599949, at *3 (N.D. Ill. Nov. 8, 2016).

²² *Armada (Sing.) Pte Ltd.*, 244 F. Supp. 3d at 750.

filed an adversary proceeding against Amcol and its affiliates.²³ Armada claimed the defendants violated the criminal portion of the RICO statute by engaging in racketeering through numerous acts of mail and wire fraud in an attempt to transfer debtor-Ashapura's assets abroad.²⁴

According to Armada, the defendants misled the bankruptcy court in failing to disclose and by illegally transferring sixty million dollars of Ashapura's assets to a foreign affiliate.²⁵ Because Armada alleged an economic injury to its business, the court held it failed to allege a domestic injury because its principal place of business was in Singapore.²⁶

The rule that a foreign business feels its economic injury in its principal place of business for purposes of a civil RICO claim may result in foreign plaintiffs failing to recover a debtor's illegally transferred assets, unlike domestic creditors similarly situated.²⁷ Also, the holding that the defendant's tortious actions within the United States is insufficient to establish a domestic economy injury denies additional foreign plaintiffs recovery.

II. A Focus on the Initial Transfer as Opposed to the Injury May Permit Plaintiffs to Overcome a Presumption Against Extraterritorial Application of the Bankruptcy Code

Like the civil RICO statute, there is a presumption against extraterritoriality in the application of the Bankruptcy Code absent explicit congressional intent to the contrary.²⁸ In

²³ *Id.* at 752-54.

²⁴ *Id.* at 753-54.

²⁵ *Id.*

²⁶ *Id.* at 755. *See, e.g.,* Kamel v. Hill-Rom Co., 108 F.3d 799, 805 (7th Cir. 1997) (holding the plaintiff suffered economic injury in Saudi Arabia and not in the United States because its principal place of business was in Saudi Arabia).

²⁷ *See, e.g.,* *RJR Nabisco*, 136 S. Ct. at 2115-16 (Justice Ginsburg stressing in her dissenting opinion that defendants "commercially engaged here and abroad would be answerable civilly to U.S. victims of their criminal activities, but foreign parties similarly injured would have no RICO remedy.").

²⁸ *In re Maxwell Commun. Corp. PLC*, 186 B.R. 807, 814 (S.D.N.Y. 1995), *aff'd sub nom.*, 93 F.3d 1036, 1051-52 (2d Cir. 1996) (holding that England had "a stronger interest than the United States in applying its own avoidance law" to the preferential transfers and that the presumption

determining whether this presumption against extraterritoriality applies, a court must first determine the “focus of the statute.”²⁹ Then, a court must determine “whether the activity that is the focus of the statute had taken place in the United States or overseas.”³⁰

Unlike the focus of injury to property in the civil RICO statute, the focus of section 547 of the Bankruptcy Code is the initial transfer that depleted the property that would have otherwise become part of the bankruptcy estate.³¹ While the use of U.S. banks for transfers is insufficient to establish a domestic injury for a civil RICO claim, it may be sufficient to overcome a presumption against extraterritoriality in a claim relating to the avoidance of preferential transfers.³² The creditors’ committee in *In re Arcapita Bank* brought an adversary proceeding against foreign defendants to avoid preferential transfers of U.S. dollars that were made through correspondent bank accounts in New York.³³ The court stated the *Bascuñán* court’s holding that the mere use of U.S. banks was insufficient to establish a domestic injury was inapplicable to a case involving the avoidance of preferential transfers using U.S. banks because the focus of section 547 is on the initial transfer and not on the injury.³⁴ The *Arcapita* court held that the creditor’s committee overcame the presumption against extraterritoriality because it demonstrated that the initial transfer of property occurred in the United States through the foreign defendants’ use of correspondent bank accounts in New York.³⁵

against extraterritoriality was not overcome by minor domestic effects in the reduction of the debtor’s assets pooled in the U.S. for English creditors).

²⁹ *Arcapita Bank B.S.C. (c) v. Bahrain Islamic Bank B.S.C. (c) (In re Arcapita Bank B.S.C. (c))*, 12-11076 (SHL), 2018 WL 718399, at *2 (Bankr. S.D.N.Y. Feb. 5, 2018) (*citing generally* *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010)).

³⁰ *Id.*

³¹ *In re Arcapita Bank*, 2018 WL 718399, at *2.

³² *Id.*

³³ *Id.* at *1.

³⁴ *Id.* at *2.

³⁵ *Id.*

If the transfer at issue is primarily foreign, the plaintiff cannot overcome the presumption against extraterritoriality.³⁶ The trustee in *In re CIL Ltd.* brought an adversary proceeding against foreign defendants to avoid equity transfers.³⁷ The court reasoned these equity transfer interests in a United Kingdom entity to be primarily foreign because the stocks were issued using a Cayman Islands company instead of U.S. banks.³⁸ Because the transfer was made outside of the United States, the court held the presumption against extraterritoriality applied.³⁹

Conclusion

The denial of a foreign plaintiff's recovery of a debtor's assets under a civil RICO claim stems from the domestic injury requirement and a presumption against extraterritorial application of 18 U.S.C. § 1964(c). Under this rule, a foreign plaintiff may be precluded from recovery because the illegal transfer of a debtor's assets results in an economic injury to the foreign entity's business. Because this injury is felt in the entity's principal place of business, a successful civil RICO claim is highly improbable, if not impossible, for a foreign plaintiff whose principal place of business is usually located overseas. A foreign plaintiff would also fail to recover where the fraudulent transfers occurred using U.S. banks because the focus of the civil RICO statute is on the injury as opposed to on the transfer itself.

There is a more promising chance of recovery against a foreign defendant under section 547 of the Bankruptcy Code because the focus of that statute is on the location where the transfer of the assets occurs rather than on the location where the injury is felt. Accordingly, a debtor or trustee may successfully allege a claim against a foreign creditor under section 547 if

³⁶ *In re CIL Ltd.*, 582 B.R. 46, 95-96 (Bankr. S.D.N.Y. 2018).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

the transfers were domestic in origin through the use of U.S. banks.