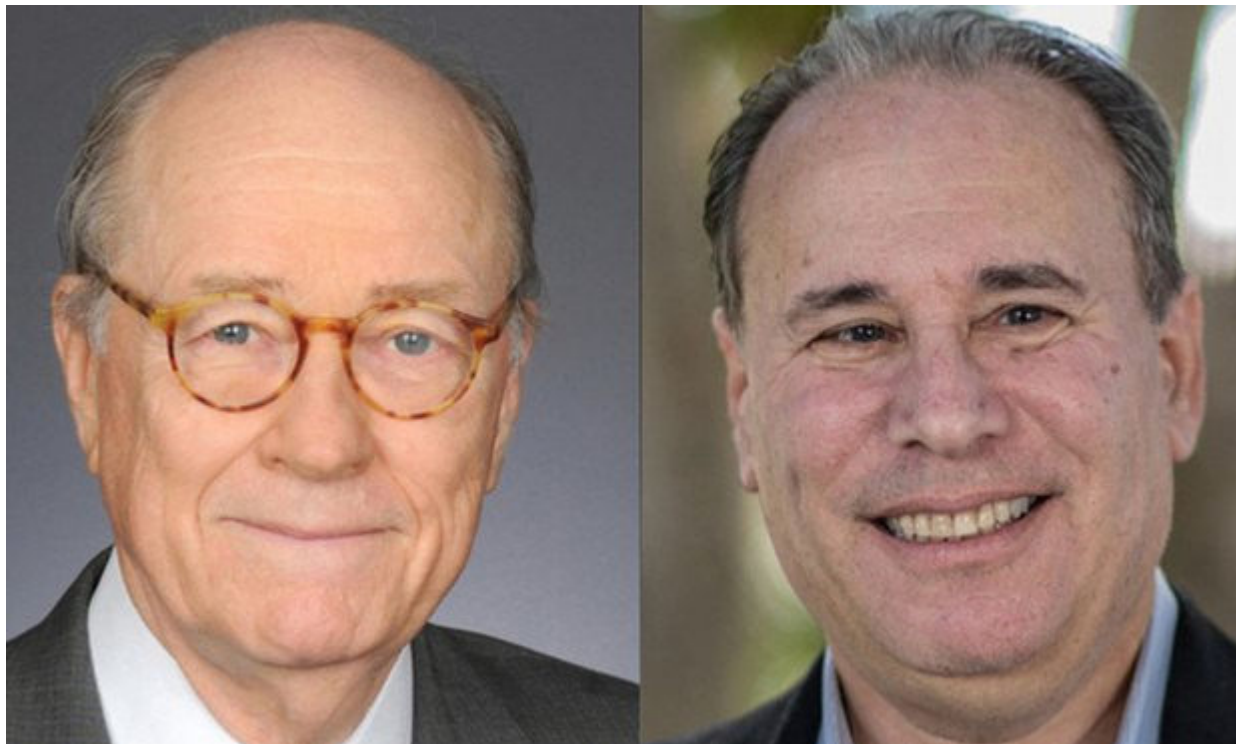


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Foreign Residents Have New Opportunities to Sue in US Courts for RICO Violations

This article discusses the *Smagin v. Yegiazaryan* case and addresses how circumstances under which compensable domestic RICO injuries may arise can provide guidance to would-be foreign-based putative plaintiffs in determining whether the circumstances in their cases give rise to domestic RICO injuries.

By **Lawrence W. Newman and David Zaslow** | August 24, 2023 at 12:00 PM



There was a time when there was no special limitation on non-U.S. parties bringing claims in U.S. courts for treble damages for violations of the Racketeering Influenced and Corrupt Organizations (RICO) Act of 1970, 18 U.S.C 1964(c), other than ordinary jurisdictional requirements.

In *European Community v. RJR Nabisco*, 579 U.S. 325, 334 (2016), however, the U.S. Supreme Court—applying the presumption against extraterritoriality as a canon of construction under which, “in the absence of congressional intent to the contrary, federal law will be construed to have only domestic application”—limited the extent to which foreign parties may obtain civil damages under RICO. It did not apply the presumption to the extraterritorial application of RICO in criminal cases, but found it to be applicable to RICO Section 1964(c), which permits lawsuits for the recovery of treble damages and attorney fees for persons injured by violations of RICO.

The Supreme Court expressed a concern, as communicated by the U.S. government in an amicus brief, as to the potential for international discord arising out of civil RICO lawsuits brought by foreign plaintiffs because similar such relief was not available in courts outside the United States. The court had no such concern as to criminal cases because government prosecutors have discretion as to whether and how they bring criminal cases, whereas plaintiffs and their counsel are not so subject to public interest issues.

In *RJR Nabisco*, the Supreme Court applied the “two-step framework” that it had applied in prior decisions in other statutory contexts and held that, although the substantive criminal provisions of RICO could apply to conduct outside the United States, the private claims provision (section 1964(c)), applies extraterritorially only to the extent that a claimant suffers an injury to “his business or property” in the United States.

The court said, “... we conclude that section 1964(c) does not overcome the presumption against extraterritoriality. A private RICO plaintiff therefore must allege and prove a domestic injury to its business or property.” 579 U.S. 325, 136 S.Ct. 2090, 2108 (2016).

Over the seven years following the *RJR Nabisco* decision, circuit courts adopted differing analytical approaches as to the injuries to a foreign plaintiff’s property that may give rise to RICO civil pecuniary relief. Late last month, the Supreme Court, having granted certiorari because of the conflict in the circuits, issued its opinion in *Yegiazaryan v. Smagin*, __U.S.__ (June 22, 2023) (Doc. No. 22-387), in which it adopted the U.S. Court of Appeals for the Ninth Circuit’s analytical approach to injury to property for purposes of civil RICO.

The *Yegiazaryan* case originated with an arbitration award in favor of Smagin from an arbitral tribunal in London that was thereafter domesticated as a judgment by a court in California, where Yegiazaryan resides to the present day. Smagin endeavored to enforce and execute the California judgment but his efforts were met with a variety of obstructionist maneuvers in various parts of the world and, in particular, California.

Eventually, Smagin commenced a civil RICO action in federal court in California against Yegiazaryan and other alleged conspirators under section 1964(c) seeking treble damages and attorney’s fees based on the alleged pattern of racketeering activity engaged in by Yegiazaryan and his co-conspirators.

The Supreme Court focused on the racketeering activity by Yegiazaryan, using a contextual approach defended by Smagin that considers “all case-specific facts bearing on where the injury ‘arises,’ not just where it is ‘felt.’” Opinion, p. 8. Thus, it said that, when determining whether an alleged injury arose in the United States in a civil RICO case, courts should look to the nature of the injury alleged, the racketeering activity that directly caused it and “the injurious aims and effects of that activity.” Opinion, pp. 8-9.

The court determined that, in the case before it, “Much of the alleged racketeering activity that caused the injury occurred in the United States ... [although] [i]t is true that other components of the scheme occurred abroad.” But, as Smagin alleged, even the wrongful acts and plans that occurred abroad were “devised, initiated, and even carried out through acts and communications initiated in Los Angeles. ...” Opinion, p. 10. It referred to the domestic actions taken by Yegiazaryan that allegedly included “... creating U.S. shell companies to hide his U.S. assets, submitting a forged letter to a California District Court, and intimidating a U.S.-based witness.”

The Supreme Court rejected the argument by Yegiazaryan that a “bright line” should be drawn to bar all foreigners from seeking relief under civil RICO because the RICO private right of action remedies only economic injuries, which, he said, are felt only at the place of residence of the plaintiff.

It also rejected Yegiazaryan’s secondary position that the damages incurred by Smagin were intangible and therefore suffered by him only at his residence in Moscow, depriving him of a statutory basis to sue under RICO in the United States.

The Supreme Court said that the contextual approach that it applied considers “all case-specific facts bearing on where the focus of section 1964(c) is “on the injury, not in isolation, but as the product of racketeering activity.” Opinion, p. 9. It quoted from its decision in its seminal RICO opinion in *Sedima S.P.R.L v. Rexco*, 473 U.S. 497 (1985), in which it said, “the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern ...” Opinion, p. 9. The court concluded that there had been alleged a domestic RICO injury to Smagin, stating:

In sum, Smagin's interests and his California judgment against Yegiazaryan, a California resident, were directly injured by racketeering activity either taken in California or directed from California with the aim and effect of subverting Smagin's rights to execute on that judgment in California.

Justice Samuel Alito, in a dissent in which Justice Clarence Thomas joined and Justice Neil Gorsuch joined in part, complained that the court's "totality-based inquiry," which he also described as an "all-factors-considered" approach, provides insufficient guidance to lower courts in their ascertaining the site of intangible injuries for purposes of civil RICO. Dissent, p. 4. Justices Alito and Thomas referred to the acknowledgement by the majority that a bright-line rule "would be preferable," but offered no suggestion as to what the content might be of such a rule. Dissent, p. 5. Better, Justice Alito said, if the court had stayed away from the case to begin with; it should have determined that it improvidently granted certiorari.

The fact that a foreign plaintiff in *Yegiazaryan* passed the extraterritorial test by alleging harm to his property in the intangible form of a domestic judgment and related domestic activities may incentivize other foreign parties to bring civil RICO lawsuits in the United States. Such lawsuits could be based on injuries to such other intangible domestic assets as intellectual property, bank accounts or interests in business enterprises—when racketeering injuries are alleged to have been carried out domestically with respect to them.

What kinds of claims might we expect in cases by foreign parties seeking treble damages for domestic U.S. injuries to intangible 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 statutory RICO predicates of money laundering and the transportation of stolen funds (18 U.S.C. §§1957, 1952 and 2314).

One can envision RICO civil claims arising out of transactions in violation of these provisions that have had an adverse effect on funds or other assets of a foreign plaintiff in the United States if, for example, a wrongdoer obtained property through a pattern of theft or other fraud in the United States or brought it to the United States in violation of money laundering or the illegal transportation statutes referred to.

Thus, the focus in *Yegiazaryan* on the circumstances under which compensable domestic RICO injuries may arise can provide guidance to would-be foreign-based putative plaintiffs in determining whether the circumstances in their cases give rise to domestic RICO injuries.

Time will tell, of course, the extent to which complaints by foreign residents will be seeking to take advantage of the wider opening given by the Supreme Court for them to obtain civil RICO relief in this country.

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