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## RICO

### Jurisdiction

In *RJR Nabisco Inc. v. European Cmty*, the U.S. Supreme Court held that the presumption against extraterritorial application of U.S. laws applies to RICO's private right of action claims involving foreign conduct. It explained that a private RICO plaintiff must prove a domestic injury for federal courts to have jurisdiction over their claim, but didn't say how to do that. Attorneys from Gibson Dunn suggest that other federal statutory schemes, federal personal jurisdiction case law and state doctrines on claim accrual and personal jurisdiction may be helpful in analyzing whether an injury is sufficiently domestic.

### Potential Sources to Guide Interpretation of *RJR's* Domestic Injury Requirement



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**T**he U.S. Supreme Court's decision in *RJR Nabisco Inc. v. European Cmty*, 84 U.S.L.W. 4450, 2016 BL 196077 (U.S. June 20, 2016), clarified the application of the Racketeer Influenced & Corrupt Organizations Act ("RICO") to foreign conduct.

Reaffirming its recent jurisprudence on extraterritoriality, the Court held that there is a presumption against the extraterritorial application of U.S. laws and outlined a "two-step framework" for analyzing extraterritoriality issues: (1) a court must first ask whether the normal "presumption against extraterritoriality" has been rebutted by a "clear, affirmative indication

that [the statute] applies extraterritorially,” and (2) only if there is no such indication, then the court must ask whether the case otherwise involves a domestic application of the statute by looking to the statute’s “focus.” *Id.* at \*\*\*8.

In applying the second step, the Court explained that if conduct relevant to the statute’s focus occurred in the United States, then the case may involve a domestic application of the statute “even if other conduct occurred abroad.” *Id.*

If the conduct relevant to the statute’s focus occurred abroad, however, “then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.” *Id.*

Following the two-step framework, the Court held that RICO’s incorporation of predicate acts that apply extraterritorially manifested a “clear, affirmative indication that § 1962 applies to foreign racketeering activity,” but that RICO applies extraterritorially “only to the extent that the predicates alleged in a particular case themselves apply extraterritorially.” *Id.* at \*\*\*9.

The Court, however, did not conclude its analysis of RICO there.

It also held—for the first time by any court—that the presumption against extraterritoriality applies equally to RICO’s private right of action in § 1964(c). *Id.* at \*\*\*15.

Finding no indication in the text of § 1964(c) that it was meant to apply extraterritorially, the Court concluded that “[a] private RICO plaintiff therefore must allege and prove a domestic injury to its business or property.” *Id.*

The Court recognized that “[t]he application of this rule in any given case will not always be self-evident,” but declined to announce a rule or provide any guidance for how courts should analyze the domestic nature of RICO injuries. *Id.* at \*\*\*18.

While the Court declined to clarify the issue, existing legal doctrines and case law may provide guidance for courts in determining whether a RICO plaintiff has adequately alleged a domestic injury consistent with *RJR*.

In particular, other federal statutory schemes, such as the Sherman Act and the Foreign Sovereign Immunities Act, may be helpful in analyzing whether an injury is sufficiently domestic.

Federal personal jurisdiction case law may also provide direction.

Similarly, courts may want to consult state doctrines on claim accrual and personal jurisdiction to determine where an injury is suffered.

Finally, courts may opt for a “bright-line” rule that focuses not on the residency of the plaintiff, but rather on the location of the “business or property” alleged to have been injured.

## Federal Statutory Schemes

The U.S. antitrust laws may provide a template for deciding whether a plaintiff has adequately alleged a domestic injury consistent with *RJR*.

The Foreign Trade Antitrust Improvements Act (“FTAIA”) limits the extraterritorial application of the Sherman Act to conduct that “has a direct, substantial, and reasonably foreseeable effect” on U.S. commerce, and where that effect is “of a kind that antitrust law considers harmful, *i.e.*, the ‘effect’ must ‘giv[e] rise to a

[Sherman Act] claim.’” *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004).

This doctrine is known as the antitrust “domestic-injury exception.”

In *Empagran*, the U.S. Supreme Court considered the scope of the antitrust domestic-injury exception and its application to foreign conduct and harm.

That case involved foreign anti-competitive price-fixing activity that created some domestic antitrust injury (higher domestic prices), but that also “independently cause[d]” the “separate foreign injury” out of which some of the plaintiffs’ claims arose. *Id.* at 158.

The Court ultimately concluded that “a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a [foreign] purchaser . . . could not bring a Sherman Act claim based on foreign harm.” *Id.* at 159.

In so holding, the Court focused on the location of the plaintiff at the time of the alleged harm—that is, the Court found an adequate domestic effect where the plaintiff was in the United States and suffered a “domestic injury” there, but not where the plaintiff was situated abroad.

The Court did not address other potentially relevant data points, such as where the anti-competitive conduct at issue took place or was directed.

Notably, the Court’s reasoning in *Empagran* was based on considerations similar to those animating the Court’s decision in *RJR*.

The *Empagran* court held that the application of U.S. antitrust laws to foreign conduct and foreign harm would present international comity issues, “creat[ing] a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.” *Id.* at 165; *see also id.* at 167-68 (discussing foreign remedies).

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Citing these same concerns (as well as *Empagran* itself), the *RJR* court held that “[a]llowing recovery for foreign injuries in a civil RICO action, including treble damages, presents the same danger of international friction” as in the antitrust context. *RJR*, at \*\*\*15. Courts, therefore, may turn to the principles in U.S. antitrust law to determine whether an alleged injury is domestic or foreign in nature.

While some of the reasoning underlying the decisions is the same, the Court in *RJR* rejected the argument that RICO’s private right of action should apply extraterritorially because it was modeled after Section 4 of the Clayton Act, another U.S. antitrust statute, and that cause of action does “allow[] recovery for injuries suffered abroad.” *RJR*, at \*\*\*5.

U.S. courts are also often asked to determine whether a plaintiff suffered domestic or foreign harm in the context of the Foreign Sovereign Immunities Act (“FSIA”), specifically with regard to the commercial activity exception to foreign sovereign immunity.

That exception provides, in relevant part, that jurisdiction over a foreign sovereign may be based on a foreign act that “causes a direct effect in the United States.” 28 U.S.C. § 1605(a)(2).

In determining where the “direct effect” is felt for purposes of the FSIA, “courts often look to the place where legally significant acts giving rise to the claim occurred.” *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152-53 (2d Cir. 1991), *aff’d*, 504 U.S. 607 (1992); *see also Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (holding that the “legally significant” act must occur in the United States).

For corporations, injuries “occur[] in some legally significant situs, for instance, the place of incorporation, or a place designated for performance of a contract.” *Int’l Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11 (2d Cir. 1989).

Courts, however, have declined to “limit[] the situs of an effect to the foreign plaintiff’s domicile, place of incorporation, or principal place of business.” *Weltover*, 941 F.2d at 152.

Thus courts, using the FSIA as a guidepost for analyzing the nature of RICO injuries, may look to the place where “legally significant acts giving rise to the claim occurred.”

In practice this may often be the plaintiff’s state of residence or incorporation, but courts may also look to other legally significant locations, such as where the principal conduct occurred.

Courts may also consult federal due process considerations to determine the location of an alleged RICO injury.

In *Calder v. Jones*, 465 U.S. 783, 788-89 (1984), for example, the Supreme Court considered whether conduct that was directed from outside the forum state could be sufficient to confer personal jurisdiction over the defendants based in part on the effects of that conduct on and in the forum.

The Court recited the defendants’ various contacts with the forum—namely, the fact that the allegedly libelous article “concerned the California activities of a California resident” and allegedly affected the plaintiff’s career, which was “centered in California”—and noted that “the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California.” *Id.*; *see also id.* at 789-90 (“[Petitioners] knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation.”).

But the continued viability of the *Calder* effects test has been called into question by recent Supreme Court decisions. *See, e.g., Walden v. Fiore*, 82 U.S.L.W. 4097, 2014 BL 49900 (U.S. Feb. 25, 2014) (holding that minimum contacts must exist between the defendant and the forum, not the plaintiff).

Courts, however, may still look to the Court’s reasoning in *Calder* regarding the harm suffered by the plaintiff, in particular its location.

In applying this doctrine, known as the “effects test,” courts have noted that “jurisdictionally sufficient harm may be suffered in multiple forums,” and that “in appropriate circumstances a corporation can suffer economic harm both where the bad acts occurred and where the corporation has its principal place of business.” *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d

1218, 1231-32 (9th Cir. 2011) (internal quotation marks and citations omitted).

## State-Law Doctrines

State-law doctrines may also be instructive.

In *Bascuñan v. Elsaca*, for example, a Chilean national brought a RICO action against other Chileans alleging, *inter alia*, that the defendants stole money from the plaintiff, including from a bank deposit box in New York. No. 15-cv-2009, 2016 BL 320652, at \*2-3 (S.D.N.Y. Sept. 28, 2016).

The court looked to New York law to determine the location of the injury and adopted the test proposed by the defendants, which relied on the “accrual rules applied under New York State’s choice-of-law statute.” *Id.* at \*4.

Because the case involved an economic injury, the court applied New York’s rules as to where an economic injury accrues, which turn on “two common-sense questions: ‘[1] who became poorer, and [2] where did they become poorer.’” *Id.*

This inquiry “usually focuses upon ‘where the economic impact of the injury was ultimately felt,’ and that is “‘normally the state of plaintiff’s residence.’” *Id.* (citations omitted). *See Baena v. Woori Bank*, No. 05 CIV. 7018 (PKC), 2006 BL 145655, at \*6 (S.D.N.Y. Oct. 11, 2006), “If the injured party is a corporation, then the place of residence for the purposes of CPLR § 202 is traditionally the state of incorporation or the corporation’s principal place of business.”

The court rejected an alternate state-law test proposed by the plaintiff, based on New York’s long-arm statute, which would have turned on the “situs” of the injury, which “is the location of the original event which caused the injury, not the location where the resultant damages are felt by the plaintiff.” *Id.* at \*5 (internal quotation marks and citations omitted).

The court rejected this test because it focused on the defendant’s conduct, not the damages suffered by the plaintiff. *Id.* at \*6-7.

## Location of Business or Property

Finally, two federal courts that have interpreted *RJR*’s domestic-injury requirement have taken a seemingly bright-line approach, focusing on the location of the “business or property” allegedly injured.

In *Uthe Technology Corp. v. Allen*, the court dismissed a RICO claim based on the failure to adequately allege a domestic injury where “the business in question” that was injured, a wholly owned subsidiary of the plaintiff, was a foreign corporation. No. C 95-02377, 2016 BL 279990, at \*2 (N.D. Cal. Aug. 26, 2016).

Without elaborating, the court held that the complained-of injury, “the surreptitious depletion of the assets of Uthe Singapore,” occurred abroad, and refused to assign that injury to the U.S. parent company because that injury would have been “deriv[ative].” *Id.* at \*4.

Similarly, in *Garcia v. Lion Mexico Consolidated, L.P.*, the court cited the Supreme Court’s decision in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985), and noted that a plaintiff may only sue “if . . . he has been injured in his business or property.” No. 15-cv-1116, 2016 BL 352379, at \*6 n.1 (W.D. Tex. Oct. 21, 2016).

Because the property and relevant conduct were located abroad, the court held that the alleged injuries were “entirely extraterritorial” because they “relate[d] exclusively to damages and losses that occurred extraterritorially, in Mexico.” *Id.* at \*4.

### **Conclusion**

The *RJR* decision did not explain how courts should determine whether a plaintiff adequately alleged a domestic RICO injury, but existing legal doctrines provide courts with several building blocks for a ready-made framework for undertaking that analysis.

Federal statutory schemes such as the Sherman Act and the Foreign Sovereign Immunities Act already re-

quire courts to analyze where the effects of foreign conduct are felt, as do federal personal jurisdiction principles.

Similarly, state law rules on claim accrual and long-arm statutes instruct courts to evaluate where the injuries of foreign conduct are felt. And some courts that have already interpreted *RJR*'s domestic-injury requirement have focused on the location of the “business or property” alleged to have been injured by the defendant’s conduct.

Whichever methods courts use to analyze the “domestic injury” requirement, the lack of current clear guidance by the Supreme Court guarantees that this issue will be hotly contested going forward.