South Carolina Journal of International Law and Business

Volume 20 | Issue 1 Article 8

2023

RICO'S LONG ARM

Randy D. Gordon

RICO'S LONG ARM

*Randy D. Gordon**

ABSTRACT

RICO has for over 50 years presented something of a parlor game for lawyers, mostly because its text leaves wide latitude in interpretation. And, as is often the case with RICO, resolution of one question begets more. The Supreme Court's recent decision in Yegiazaryan v. Smagin proves no exception. Here, the Court brought some clarity to a question left open by RJR Nabisco: viz, what must one plead and prove to satisfy the "domestic injury" requirement necessary to invoke an extraterritorial application of RICO. The Court held that a foreign plaintiff can indeed, given the right facts and circumstances, establish a domestic injury. But it declined to establish a bright line test—or really any test, leaving that to the lower courts to flesh out. The Court also declined to engage the question of whether RICO is an appropriate vehicle for enforcing all (or perhaps international) arbitral awards. And—more generally—domestic judgments. Those and many other questions remain for another day.

---

*Ph.D. Edinburgh (Law); Ph.D. Kansas (English). Executive Professor, School of Law, Department of History, and School of Performance, Visualization & Fine Arts, Texas A&M University; Office Managing Partner (Dallas and Fort Worth), Duane Morris, LLP. I wish to thank Kathryn Keating, my research assistant, a student at Texas A&M School of Law and Editor in Chief of the Law Review, for her considerable contribution to the arguments and authorities cited below. The views expressed in this Article are mine alone and do not necessarily represent those of Texas A&M, Duane Morris, or my clients.

Introduction

For decades, American courts have struggled with the question of if and when to apply US law to conduct involving foreign actors or injuries. This question arises because "other nations" hold "legitimate sovereign interests."[1] Often, but not always, the question narrows to whether it is "it reasonable to apply [US] laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*"[2] In the context of antitrust laws, "[n]o one denies that . . . foreign conduct can interfere with a foreign nation's ability independently to regulate its own commercial affairs."[3] One might therefore ask, "[w]hy should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?"[4] The answer depends on reasonableness, and therefore "courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."[5]

Extraterritoriality and RICO

As with antitrust law, there are often questions as to the extraterritorial reach of RICO. The relevance of antitrust law to RICO comes from the fact that the language of § 1964(c) of RICO is derived from § 4 of the Clayton Act,[6] both of which give private plaintiffs standing to sue for otherwise criminal violations that cause them injury.[7] Because the meaning of § 4 had been

---

[1] *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).
[2] *Id*. at 165.
[3] *Id*.
[4] *Id*.
[5] *Id*. at 156
[6] HERBERT HOVENCAMP, FEDERAL ANTITRUST POLICY § 16.1, 804 (5th ed. 2016) ("By its language, § 4 appears to give a cause of action to every person who is injured by a cartel or overcharging monopolist. The courts have concluded that the statute cannot be as broad as it purports to be, however, and they have devised ways to limit its scope."); *see also, e.g.*, *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977) (holding that, in the context of illegal overcharging, only the overcharged direct purchaser—and not others down the line—constitute a person "injured in his business or property"). The same may be said of RICO. *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 267 (1992) ("[w]e have repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws [and] § 4 of the Clayton Act, which reads in relevant part that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."); *Id.* at 266 ("This construction is hardly compelled, however, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading."). *See* Clayton Act of 1914, ch. 323, § 4, 38 Stat. 731 (codified as amended at 15 U.S.C. § 15).
[7] The federal antitrust laws—at least as interpreted by the courts after the 1970s—have migrated from a model condemning a wide range of conduct to one condemning only conduct that causes deleterious economic effects. Broadly stated, "Congress's objectives included not only the economic goal of low prices and high quality brought about through competition, but also social and political ends." David F. Shores, *Antitrust Decisions and Legislative Intent*, 66 MO. L. REV. 725, 747 (2001). We see this view enshrined in the earliest cases, which found all restraints—reasonable or not—illegal. *See, e.g.*, United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897). This view quickly eroded in favor of condemning only "unreasonable" restraints, and by the time we arrive at the late the 1970s, the Supreme Court migrated to the view that antitrust claims must be grounded in "demonstrable economic effect." Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

litigated for over half a century at the time of § 1964(c)'s adoption, it's reasonable to ask whether the two sections should be viewed in the same light. Both sections provide that "any person injured in his business or property by reason of" a substantive antitrust or RICO violation may seek treble damages.[8] But this apparent simplicity "belies the complexity of the many questions it has raised."[9] Read literally, any person injured, even remotely or unforeseeably, by prohibited conduct can state a claim under either statute. But courts have concluded that the right to sue cannot be so open ended and to staunch the litigation flow have erected multiple embankments to steer many potential claims away from the docket.[10]

Despite the acknowledgement of common ancestry, courts have not universally interpreted Section 4 and Section 1962(c) in tandem. Some of this can be explained not only by different statutory aims (regulation of competition versus racketeering), but also by amendments to the antitrust law. For instance, "the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act 'shall not apply to conduct involving trade or commerce . . . with foreign nations.'"[11] But "[i]t then creates exceptions to the general rule, applicable where, roughly speaking, that conduct significantly harms imports, domestic commerce, or American exporters."[12] RICO, by contrast, benefits from no such statutory guidance.

RJR Nabisco and the Limits of Extraterritorial Application of RICO

In *RJR Nabisco, Inc. v. European Community*,[13] the Supreme Court sought to construct a framework for analyzing extraterritorial issues under RICO. It did so by posing two questions that must be answered: "First, do RICO's substantive prohibitions, contained in § 1962, apply to conduct that occurs in foreign countries? Second, does RICO's private right of action, contained in § 1964(c), apply to injuries that are suffered in foreign countries."[14] As a default, the "basic

---

[8] 18 U.S.C. § 1964(c). As further evidence of shared DNA, both Section 4 of the Clayton Act and 1964(c) of the RICO Act contain the same "causation" language found in Section 7 of the Sherman Act, as originally adopted in 1890. *See generally*, *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906) (quoting language from Section 7 of the Sherman Act).

[9] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 16.1, 804 (5th ed. 2016).

[10] I have written extensively on these issues over the years. *See e.g.*, *RICO Had a Birthday! A 50-Year Retrospective of Questions Answered and Open*, 105 MARQUETTE L. REV. 131 (2021 [hereinafter *RICO Had a Birthday*]; *Of Gangs and Gaggles: Can a Corporation Be Part of an Association-in-Fact RICO Enterprise?*, 16 U. PA. J. BUS. L. 973 (2014); *Clarity and Confusion: RICO's Recent Trips to the United States Supreme Court*, 85 TULANE L. REV. 677 (2011); *Crimes That Count Twice: A Reexamination of RICO's Nexus Requirements Under 18 U.S.C. § 1962(c) and 1964(c)*, 32 VT. L. REV. 171 (2007); *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims under 18 U.S.C. § 1962(c)*, 39 USF L. REV. 319 (2005).

[11] *Empagran*, 542 U.S. at 155 (quoting 15 U.S.C. § 6a).

[12] *Id*. at 158.

[13] 579 U.S. 325 (2016). I first wrote on this case shortly after it was decided and then later as part of a RICO retrospective. *See* Gordon, *supra* note 9; *Making Meaning: Towards a Narrative Theory of Statutory Interpretation and Judicial Justification*, 12 OHIO ST. BUS. L. J. 1 (2017) [hereinafter *Making Meaning*]. So, at this point, I am somewhat repeating myself. But there is no way to understand *Yegiazaryan* without having a summary of *RJR Nabisco* at hand.

[14] *Id.* at 335.

premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'"[15]

The case arrived at the Supreme Court against a complicated procedural and factual backdrop. In terms of procedure, the European Community ("EC") and six of its member states first sued RJR and several related entities for RICO violations in 2000.[16] The litigation spawned at least three separate actions and multiple oscillations between federal district and appellate courts.[17] Of immediate concern was the district court's dismissal of the case, followed by the Second Circuit's reinstatement.[18]

Reduced to the essentials, the EC alleged that RJR and organized criminal organizations "participated in a global money-laundering scheme."[19] In one thread of the scheme, Colombian and Russian "drug traffickers smuggled narcotics into the [EC]," sold the drugs for euros, and then used these proceeds to purchase large blocks of RJR cigarettes that were sold into the EC.[20] In another thread of the alleged scheme, RJR conspired with South American drug traffickers and money launderers and—in violation of international sanctions—sold cigarettes to Iraq.[21] The EC also alleged that RJR's acquisition of Brown & Williamson Tobacco Corporation was ostensibly for the purpose of expanding the pattern of illegality.[22]

Cast in RICO's statutory terms, the EC alleged that RJR engaged in a pattern of racketeering activity rooted in predicate acts ranging from money laundering to support of foreign terrorist organizations, mail and wire fraud, and Travel Act violations.[23] RJR and its cohorts "allegedly formed an association in fact" enterprise dubbed the "RJR Money-Laundering Enterprise."[24] Once assembled, these factual bits constitute an averment that RJR violated all four of RICO's criminal prohibitions: (1) using income derived from the pattern of racketeering to invest in, acquire an interest in, and operate the RJR Money-Laundering Enterprise in violation of § 1962(a); (2) acquiring and maintaining control of the enterprise through the pattern of racketeering in violation of § 1962(b); (3) operating the enterprise through the pattern of racketeering in violation of § 1962(c); and (4) conspiring with other schemers in violation of § 1962(d).[25] These violations allegedly caused the EC harm, "including . . . competitive harm to their state-owned cigarette businesses, lost tax revenue from black-market cigarette sales, harm to European financial institutions, currency instability, and increased law enforcement costs."[26]

---

[15] *Id.* (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).
[16] *See Eur. Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771, 2011 WL 843957, at *1 (E.D.N.Y. March 8, 2011) (cataloguing the case's procedural twists and turns).
[17] *See id.* at *1–2.
[18] *Compare id.* at *1 (dismissing RICO claims), *and Eur. Cmty. RJR Nabisco, Inc.*, 814 F. Supp. 2d 189, 192 (E.D.N.Y. 2011) (dismissing state-law claims), *with Eur. Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 133 (2d Cir. 2014) (reversing the district court's dismissal of all claims).
[19] *RJR Nabisco, Inc., v. Eur. Comm.*, 579 U.S. 325, 325 (2016).
[20] *Id.* at 332.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*. at 333.
[25] *Id.*
[26] *Id*.

The Court had at its disposal a previously developed "two-step framework for analyzing extraterritoriality issues."[27] The first step entails a look at a statute's language to see whether it gives an unequivocal, affirmative indication of extraterritorial reach.[28] If not, then the second step determines whether the facts alleged push the case into the statute's "focus."[29] RICO presents a particular challenge because—although nothing in § 1962 itself makes an unequivocal statement of extraterritorial application—many of the "predicate acts" that may alleged to demonstrate a "pattern of racketeering"[30] do expressly apply with extraterritorial force.[31] This was enough for the Court to conclude that "Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity."[32] What this means is that § 1962 *can* apply extraterritorially, but only to the extent "that the predicates alleged in a particular case themselves apply extraterritorially."[33] Stated differently, RICO covers *some* foreign racketeering activity—viz., "a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial."[34]

So we know that foreign conduct can support a substantive, criminal violation of RICO. But this doesn't end the inquiry with respect to a civil claim under § 1964(c), to which the Court found that it must "separately apply the presumption against extraterritoriality to RICO's [civil] cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions."[35] The European Union invited the Court to interpret § 1964(c) *in pari materia* to its direct ancestor, § 4 of the Clayton Act, which—under the Court's precedents—allows recovery for injuries suffered abroad.[36] But the Court declined the invitation, noting that—although the Clayton Act sometimes offers "guidance in construing § 1964(c)"—it had "not treated the two statutes as interchangeable."[37] As the matter now stands, absent a *domestic* injury, a prosecutable criminal RICO violation will fail as a civil claim.[38] But, as we will

---

[27] *Id.* at 337.
[28] *Id.*
[29] *Id.*
[30] There are at least three interpretive and application problems with the statute. Structurally, it's complicated: to state a civil RICO claim a plaintiff must show that he was injured "by reason of" a criminal RICO violation, which entails pleading such a violation, which in turn requires him to identify the predicate commission of certain specified crimes (e.g., mail or wire fraud) and to satisfy certain defined terms (e.g., pleading the existence of an "enterprise"). *See* Gordon, *supra* note 9.
[31] *RJR Nabisco*, 579 U.S. at 339.
[32] *Id.*
[33] *Id.* at 326.
[34] *Id.* at 340.
[35] *Id.* at 346.
[36] *Id.* at 351–52. (referencing 18 U.S.C.S § 1964 (c); jurisdiction of courts; duty of US attorneys; and 15 U.S.C. § 4.)
[37] *Id.* at 352.
[38] To see how lower courts have ruled on the domestic injury requirement post *RJR Nabisco*, *see City of Almaty v. Khrapunov*, 956 F.3d 1129, 1132 (9th Cir. 2020) ("The Ninth Circuit has not yet addressed the question of how to determine whether an injury is domestic or foreign after *RJR Nabisco*, and we need not do so today. That is because Plaintiff's alleged injury is merely a consequential effect of its admittedly foreign injury, and not an independent injury cognizable under § 1964(c)."); *Humphrey v. GlaxoSmithKline PLC*, 905 F.3d 694 (3d Cir. 2018) (holding that an investigations firm that assisted foreign companies, doing business in China, with American anti-bribery regulations compliance did not suffer a domestic injury as required to establish a civil RICO claim when in their allegation that a multinational healthcare company destroyed their business and prospective business ventures as result of its bribery practices in China); *see also Bascuñán v. Elsaca*, 874 F.3d 806, 806–07 (2d Cir. 2017) (holding that an alleged scheme to: (1) steal funds held in a foreign bank account and launder stolen money using bank

now see, determining what counts as a "domestic injury" is a debatable matter, one that the Supreme Court recently—but only partly—settled.

Problems in Extraterritoriality: Who Can Sue Under RICO

Vitaly Smagin holds a multimillion-dollar California judgment against Ashot Yegiazaryan, a California resident.[39] The road to this judgment is tangled, as is its aftermath, but at least some background is necessary to understand its intersection with RICO.

For a number of years in the 2000s, Yegiazaryan allegedly committed fraud and stole Smagin's shares in a real estate venture worth more than $84 million.[40] Russian authorities indicted Yegiazaryan for these acts, and to avoid a criminal prosecution, he fled to the US and took up residence in a Beverly Hills mansion.[41] He was convicted in absentia and sentenced to prison.[42] As the Court saw the salient facts:

> In 2014, Smagin, who lives in Russia, won an arbitration award in London against Yegiazaryan for the misappropriation of his real estate investment (London Award). Yegiazaryan refused to pay that award, . . .[43]
>
> Seeking to collect, Smagin filed an enforcement action in the California federal court to confirm and enforce the London Award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[44] The District Court issued a temporary protective order, followed by a preliminary injunction, freezing Yegiazaryan's California assets.[45]
>
> In his application for injunctive relief, Smagin informed the District Court that Yegiazaryan had received a sizeable arbitration award in an unrelated proceeding against another Russian businessman, Suleymon Kerimov (Kerimov Award).[46] At the time, Yegiazaryan had received no funds in satisfaction of that award, but Smagin was concerned that when they were paid, Yegiazaryan would transfer them out of Smagin's reach.[47]
>
> [Smagin's worries became reality:] in May 2015, Yegiazaryan received a $198 million settlement that satisfied the Kerimov Award.[48] To avoid the District Court's asset freeze, Yegiazaryan accepted the money through the London office of an American law firm headquartered in Los Angeles.[49] Yegiazaryan then created 'a complex web of offshore

---

accounts in the United States and elsewhere did not allege a domestic injury, (2) misappropriate funds held in New York bank account owned by plaintiff did allege a domestic injury, and (3) misappropriate bearer shares owned by principal did allege a domestic injury).

[39] *Yegiazaryan v. Smagin*, 599 U.S. 533, 536 (2023). By way of full disclosure, I participated in a moot court on behalf of the Respondent, which was held at the Texas A&M School of Law, just prior to oral argument.

[40] *Id.*

[41] Brief of Respondent at 3, *Yegiazaryan v. Smagin*, 599 U.S. 533(2023) (No. 22-381).

[42] *Id.*

[43] *Yegiazaryan*, 599 U.S. at 537.

[44] *Id.* (citing June 10, 1958, 21 U.S. T. 2517, T.I.A.S. No. 6997, as implemented by 9 U.S.C. §§201–08).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 538.

[49] *Id.*

> entities to conceal the funds,' and ultimately transferred the funds to a bank account with CMB Monaco.[50]
>
> [Along the way], Yegiazaryan also directed those in his inner circle to file fraudulent claims against him in foreign jurisdictions, which he would not oppose, . . . that would encumber the [Kerimov Award], thereby blocking Smagin's access to it.[51]
>
> Around the same time, Yegiazaryan hid his assets in the United States through a system of "shell companies" owned by family members.[52] [For example, his brother owned a Nevada company, that was] "created for the purpose of sheltering [Yegiazaryan's] U. S. assets from his creditors, including Smagin."[53]
>
> Smagin did not learn about the [Kerimov Award], [or] Yegiazaryan's efforts to hide it, . . . until February 2016, when Smagin . . . intervene[d] in Yegiazaryan's California divorce proceedings.[54] [Shortly thereafter], the California District Court . . . granted Smagin's motion for summary judgment on his petition for confirmation of the [London] Award and entered judgment against Yegiazaryan for $92 million, including interest.[55] The court also issued several postjudgment [sic] orders barring Yegiazaryan and [his cohorts] from preventing collection on the judgment.[56]
>
> For failing to comply with those orders, the District Court subsequently found Yegiazaryan in contempt of court. To avoid [complying], however, Yegiazaryan falsely claimed he was too ill, and submitted a forged doctor's note to the District Court.[57] When Smagin . . . [sought] to depose the doctor . . ., Yegiazaryan used "intimidation, threats, or corrupt persuasion" to get the doctor to avoid service of the subpoena.[58]

Against this backdrop, Smagin filed a RICO claim.[59] As already noted, RICO provides a private right of action to "'[a]ny person injured in his business or property by reason of a violation of' a substantive RICO provision."[60] Under that provision, Smagin sued Yegiazaryan and CMB Bank (and ten other defendants who did not petition the Supreme Court),[61] asserting that each defendant operated or managed an enterprise through a pattern of racketeering, in violation of § 1962(c), and conspired to do so in violation of § 1962(d). In short, Smagin alleged that the

---

[50] *Id.* (citing *Smagin v. Yegiazaryan*, 37 F.4th 562, 565 (9th Cir. 2022)).
[51] *Id.*
[52] *Id.* (citing Joint Appendix, 2023 WL 2348472 (U.S.), at 61a).
[53] *Id.* (citing Joint Appendix, 2023 WL 2348472 (U.S.), at 44a).
[54] *Id.*
[55] *Id*
[56] *Id.*
[57] *Id.* at 538–39.
[58] *Id.* at 539 (citing Joint Appendix, 2023 WL 2348472 (U.S.), at 82a).
[59] *Id.*
[60] *Id.* (quoting 18 U.S.C. § 1964(c)).
[61] *See generally Id.* at 539 note 1 ("Only Yegiazaryan and CMB Bank petitioned for the Court's review. The other defendants include three family members (Suren Yegiazaryan, Artem Yegiazaryan, and Stephan Yegiazaryan); an alleged Russian accomplice (Vitaly Gogokhia); French, Russian, and Luxembourger individuals who have been administrators of the trust holding the $198 mil- lion (Natalia Dozortseva, Murielle Jouniaux, and Alexis Gaston Thielen); an allegedly corrupt Russian bankruptcy officer (Ratnikov Evgeny Niko-laevich); and a registered company hired by Yegiazaryan (Prestige Trust Company, Ltd.) and its U.S. lawyer (H. Edward Ryals).

defendants frustrated Smagin's efforts to collect on the California judgment through a pattern of wire fraud and other predicate acts, including witness tampering and obstruction of justice.

The district court dismissed the complaint because—in its view—Smagin had "fail[ed] to adequately plead a domestic injury," as required by *RJR Nabisco*.[62] The district court "place[d] great weight on the fact that Smagin [was] a resident and citizen of Russia and therefore experience[d] the loss from his inability to collect on his judgment in Russia."[63]

The Ninth Circuit reversed, declining Yegiazaryan's invitation to follow the domestic-injury approach of the Seventh Circuit, "which has adopted a rigid, residency-based test for domestic injuries involving intangible property" that would arguably include a judgment.[64]

Because the Seventh Circuit's approach locates an injury to intangible property at the plaintiff's residence, Smagin could not allege a cognizable domestic injury by virtue of his Russian residence.[65] The Ninth Circuit eschewed this rule and instead adopted a "context-specific" approach that it found in harmony with the approaches of the Second and Third Circuits.[66]

The Ninth Circuit thus concluded that Smagin had pleaded a domestic injury by alleging that his efforts to execute on a California judgment in California against a California resident were foiled by racketeering acts that largely "occurred in, or [were] targeted at, California" and were "designed to subvert" enforcement of a California judgment in California.[67]

The Supreme Court granted certiorari to resolve the circuit split and answer whether a foreign plaintiff can state a civil RICO claim when its efforts to enforce a U.S. judgment are thwarted by racketeering acts in the U.S.[68] To answer this question, the Court had to determine the meaning of the "'domestic-injury' requirement for private civil RICO suits" set forth in *RJR Nabisco*.[69]

In the Court's view, the question presented in *RJR Nabisco* was whether RICO applies extraterritorially.[70] To answer that question, the *RJR Nabisco* Court "employed the presumption against extraterritoriality, which 'represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate.'"[71]

---

[62] *Smagin v. Compagnie Monegasque De Banque*, No. 220CV11236RGKPLA, 2021 WL 2124254, at *6 (C.D. Cal. May 5, 2021); *see RJR Nabisco*, 579 U.S. 325, 334 ("A private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property").
[63] *Yegiazaryan*, 599 U.S. at 540 (internal quotations omitted).
[64] *Smagin v. Yegiazaryan*, 37 F.4th 562, 568, 570 (citing Armada (Sing.) *PTE Ltd. v. Amcol Int'l Corp.*, 885 F.3d 1090, 1091 (7th Cir. 2018)).
[65] *Id.* at 570.
[66] *Id.* at 568–70; *see also Bascuñán* v. Elsaca, 874 F.3d 806, 809 (2d Cir. 2017); *and Humphrey* v. *GlaxoSmithKline PLC*, 905 F.3d 694, 696 (3d Cir. 2018).
[67] *Smagin*, 37 F.4th at 567–68.
[68] *Yegiazaryan*, 599 U.S. 533, 540 (2023).
[69] *Id.* at 542.
[70] *Id.* at 541.
[71] *Id*. (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).

Thus, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[72]

To assess whether allowing a plaintiff in Smagin's shoes to invoke RICO would offend the presumption, the Court looked to the "[d]ual rationales support[ing] the presumption against extraterritoriality."[73] One rationale reflected "concerns of international comity" and avoiding "unintended clashes between our laws and those of other nations which could result in international discord"; while the other was "informed by 'the commonsense notion that Congress generally legislates with domestic concerns in mind.'"[74]

The Court acknowledged that *RJR Nabisco* distilled the presumption into two steps: "the first asks 'whether the statute gives a clear, affirmative indication that it applies extraterritorially.'"[75] An affirmative finding rebuts the presumption and obviates the need to proceed to step two.[76] But if the presumption is not rebutted, then "step two asks whether the case involves a domestic application of the statute, which is assessed 'by looking to the statute's "focus."'"[77]

But the *RJR Nabisco* inquiry was only marginally relevant to the matter at hand. This is so because the *RJR Nabisco* Court was concerned first with the extraterritoriality of two of RICO's substantive provisions, a matter not contested at the pleadings stage of Smagin's suit. And with regard to § 1964(c), RICO's private right of action, the *RJR Nabisco* Court's conclusion is somewhat off-point. That is, the *RJR Nabisco* Court determined that § 1964(c) does not overcome the presumption at step one because there is no "clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States."[78] Thus framed, the *RJR Nabisco* Court concluded that "[a] private RICO plaintiff . . . must allege and prove a *domestic* injury to its business or property."[79] But in announcing the domestic injury requirement, "the Court did not have occasion to explain what constitutes a 'domestic-injury,' because the plaintiffs in *RJR Nabisco* had stipulated that they were not seeking redress for domestic injuries."[80] Therefore, "the question now before the Court [wa]s whether Smagin has alleged a domestic injury."[81] In other words, invoking the *RJR Nabisco* holding begs the question presented here.

What a proper domestic-injury inquiry should entail reduces to a choice between two alternatives: (1) a bright-line, plaintiff's-residence rule, much like that announced by the Seventh Circuit; or (2) a facts-and-circumstances approach, much like that taken by the Ninth Circuit.[82]

---

[72] *Id.* (quoting *RJR Nabisco, Inc. v. Eur. Comm.*, 579 U.S. 325, 335 (2016)) (internal quotation marks omitted).
[73] *Id.* (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013)) (internal quotation marks omitted).
[74] *Id.* (quoting *Smith v. United States*, 507 U.S. 197, 204 n. 5 (1993)).
[75] *Id.* (quoting *RJR Nabisco*, 579 U.S. at 337).
[76] *Id.* at 542.
[77] *Id.* (citing *RJR Nabisco*, 579 U.S. at 337).
[78] *RJR Nabisco*, 579 U.S. at 328.
[79] *Id.* at 346 (emphasis added).
[80] *Yegiazaryan*, 599 U.S. at 542.
[81] *Id.*
[82] *Id.* at 540.

Defendants presented the Court with two alternatives for a bright-line rule: one broad, one narrow.[83] Under the broad version "*any* injury cognizable under § 1964(c) is necessarily suffered at the plaintiff's residence because the private cause of action remedies only economic injuries, and a plaintiff necessarily suffers that injury at its residence where the economic injury is felt."[84] Under the narrow version, "at least when the alleged injury involves *intangible* property, such as the judgment here, relevant common-law principles locate the intangible property at the plaintiff's place of residence, such that the injury is also located there."[85] On either version of the proposed rule, Smagin's claim fails for want of a domestic injury because he lives in Russia.[86]

Smagin, by contrast "defend[ed] a contextual approach that considers all case-specific facts bearing on where the injury 'arises,' not just where it is 'felt.'"[87] As applied to his claims, "Smagin argue[d] that he ha[d] stated a domestic injury because he has alleged that he was injured in his ability to enforce a California judgment, against a California resident, through racketeering acts that were largely designed and carried out in California and were targeted at California."[88]

The Court ultimately agreed with Smagin and the Ninth Circuit that "determining whether a plaintiff has alleged a domestic injury for purposes of RICO is a context-specific inquiry that turns largely on the particular facts alleged in a complaint."[89] So going forward, "courts should look to the circumstances surrounding the alleged injury to assess whether it arose in the United States. In this suit, that means looking to the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity."[90]

To the Court, this approach to analyzing domestic injury has a couple of signal virtues. First, it is consistent with *RJR Nabisco*, which had already noted that the domestic-injury requirement "does not mean that foreign plaintiffs may not sue under RICO."[91] Second, and as the *RJR Nabisco* Court also noted, "application of [the domestic-injury] rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic.'"[92] All told, then, the *RJR Nabisco* Court already staked a path "toward a case-specific inquiry that considers the particular facts surrounding the alleged injury."[93] In making a plaintiff's residence outcome determinative, the bright-line rule wholly discounts just this subtlety, "thus barring all foreign plaintiffs, exactly as *RJR Nabisco* said it was not doing."[94]

The Court also suggested that the contextual approach better reflects the genesis of the domestic-injury requirement, which sprung from an examination to the statute's "focus," which *RJR Nabisco* located in § 1964(c)'s emphasis on injuries in "business or property by reason of a

---

[83] *Id.* at 543.
[84] *Id.* (emphasis in original).
[85] *Id.* (emphasis in original).
[86] *Id.*
[87] *Id.*
[88] *Id.* (internal quotations omitted).
[89] *Id.* (internal quotations and alteration omitted).
[90] *Id.* at 543–44.
[91] *Id.* at 544 (citing *RJR Nabisco, Inc.* 579 U.S. at 353).
[92] *Id.* (citing *RJR Nabisco*, 579 U.S. at 354).
[93] *Id.*
[94] *Id.*

violation of RICO's substantive provisions."[95] This means that "§ 1964(c)'s focus is on the injury, not in isolation, but as the product of racketeering activity," which demands "a case-specific analysis that looks to the circumstances surrounding the injury."[96] Thus, if the circumstances "ground the injury in the United States, such that it is clear the injury arose domestically, then the plaintiff has alleged a domestic injury."[97]

The downside of this approach is that "no set of factors can capture the relevant considerations for all cases" because "RICO covers a wide range of predicate acts and is notoriously expansive in scope."[98] As a consequence, "what is relevant in one case to assessing where the injury arose may not be pertinent in another."[99]

Applying this reasoning to the facts of the case, the Court found that "[w]hile it may be true, in some sense, that Smagin has felt his economic injury in Russia, focusing solely on that fact would miss central features of the alleged injury."[100] As we've already seen, Smagin alleged that Yegiazaryan's domestic actions injured him by thwarting his efforts to collect his massive judgment.[101] To be sure, parts of the scheme occurred abroad, but even those foreign acts "were devised, initiated, and carried out . . . through acts and communications initiated in and directed towards Los Angeles County, California, with the central purpose of frustrating enforcement of [the] California judgment."[102] But even more to the point, "the injurious effects of the racketeering activity largely manifested in California," because the judgment was obtained in California and the rights associated with the judgment exist only in California, "including the right to obtain post judgment discovery, the right to seize assets in California, and the right to seek other appropriate relief from the California District Court."[103] And because the alleged RICO scheme thwarted those rights and thereby undercut the orders of the California District Court and Smagin's collection efforts, Smagin sufficiently alleged domestic injury.[104]

Where is Injury to Property Felt?

In something of an aside, given its holding, the Court paused to consider Defendants' common law arguments, which appear to tilt in favor of a bright line test.[105] The gist of the *Smagin* defendants' argument was that, because Smagin alleged an "economic injury" or an "injury in intangible property," common law principles dictate "the situs" of such injuries, which then informs the determination of whether those injuries are foreign or domestic.[106] In support, with respect to economic injuries, Defendants pointed to the Restatement (First) of Conflict of Laws Sec. 377, from which they derived the notion that "a fraud plaintiff suffers an economic loss at the

---

[95] *Id.* (quoting 18 U.S.C.A. § 1964) (internal alterations omitted).
[96] *Id.* at 545.
[97] *Id.*
[98] *Id.* (internal quotations omitted).
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 545–46.
[103] *Id.* at 546.
[104] *Id.*
[105] *Id.* at 546–48.
[106] *Id.* at 546.

plaintiff's domicile."[107] As to intangible injuries, Defendants relied on the principle of *mobilia sequuntur personam*, which in their view "generally locat[es] intangible property at the domicile of its owner."[108] Under both principles, so the argument goes, Smagin's was injured at his residence.[109]

But the Court was unpersuaded that these principles were relevant, let alone determinative.[110] The Court apparently was persuaded by an amicus brief filed by Professor George Bermann.[111] In that brief, Professor Bermann opined that Defendants' argument was at once off-point and wrong.[112] First, "[r]ather than directly identify the place of injury, within the meaning of RICO, Petitioners turn[ed] to general choice-of-law principles applicable to claims sounding in tort, as if the matter were a question of determining the applicable law in a tort case, rather than determining the applicability of RICO to the case at hand."[113] Even if, however, conflicts principles were deemed relevant, Defendants misread the relevant materials.[114] This is so because, at the time that RICO was adopted in 1970, the relevant conflicts principles were unsettled.[115] Professor Bermann noted:

> [T]he First Restatement was superseded in full in 1971 by the *Restatement (Second) of Conflict of Laws* ("Second Restatement"). [T]he Second Restatement fully repudiated its predecessor, flatly rejecting the notion that the law applicable in tort is necessarily the law of the victim's domicile. This position reflects the more general view taken by the Second Restatement that the law applicable to a given claim is not reducible to the law of a single predetermined jurisdiction, as under the First Restatement, without regard to the contacts the parties and the transaction may have with other jurisdictions.
>
> Instead, the Second Restatement enshrined the principle that, for all categories of claims, the applicable law is the law of the jurisdiction having the most significant interest in the issue to be decided, and further, that the applicable law should be determined in accordance with a series of factors laid down, for each category of claim, in the Restatement itself. By following this essentially "multi-factor" approach, the Second Restatement distanced itself entirely from the First Restatement's attachment to fixed choice-of-law rules.[116]

---

[107] *Id*. at 546–47 (citing Sack v. Low, 478 F. 2d 360, 366 (Cal.App.2d 1973)) ("Under the First Restatement, 'loss from fraud is deemed to be suffered where its economic impact is felt, normally the plaintiff's residence.'").
[108] *Id.* at 547.
[109] *Id*.
[110] *Id.*
[111] *Id.* at 547 note 4. The Court noted:
> Although the First Restatement was in effect in 1970, when RICO was enacted, numerous jurisdictions had by then moved away from the First Restatement's methodology and toward a "'most significant relationship'" test, which resembles "the kind of 'multi-factor' analysis the Court of Appeals conducted here." Brief for George A. Bermann as *Amicus Curiae* 15. This shift was reflected in §145 of the Restatement (Second) of Conflict of Laws, which superseded the First Restatement the following year in 1971. Thus, even assuming choice-of-law principles are relevant, petitioners' identification and application of those principles is questionable.

[112] Brief for George A. Bermann as *Amicus Curiae* at 15, *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023) (No. 22-381).
[113] *Id.* at 5. Of course, civil RICO is a statutory tort. *See e.g.*, 74 AM. JUR. 2D *Torts* § 5.
[114] Brief for George A. Bermann, *supra* note 109, at 5. *See e.g.*, 74 AM. JUR. 2D *Torts* § 5.
[115] *See id.* at 6.
[116] *Id.* at 6.

In sum, Professor Bermann found Defendants' position "shockingly outdated" and based on a flawed understanding of how Restatements are intended to guide judicial decision making.[117] That is, Defendants' notion that "the prevailing choice-of-law rules that were in operation at the time of RICO's . . . enactment" were somehow incorporated into RICO ab initio is without foundation.[118] Rather, "[i]t nearly goes without saying that, if a court chooses to be guided in its decision-making by a Restatement of Conflict of Laws, it consults the Restatement in effect at the time it makes its decision."[119]

At an even more basic level, the Court found the Defendants' position unavailing.[120] The court noted that "[t]he core problem with petitioners' approach is that it is unmoored from the presumption against extraterritoriality."[121] That is, "[w]hile legal fictions regarding the situs of economic injuries and intangible property have their justifications in other areas of law, those justifications do not necessarily translate to the presumption against extraterritoriality, with its distinctive concerns for comity and discerning congressional meaning."[122]

In a final stab to Defendants' situs-infused arguments, the Court offered a *reductio ad absurdum*:

> On petitioners' primary view, a business owner who resides abroad but owns a brick-and-mortar business in the United States can-not bring a § 1964(c) suit even if an American RICO organization burns down her storefront. Perhaps aware of how odd this seems, petitioners offer a fallback rule for intangible property. That rule fares no better. It provides that if racketeering activity targets the intangible business interests of two U.S. businesses, one owned by a U.S. resident and one owned by someone living abroad, only the former business owner can bring a § 1964(c) suit. There is no evidence Congress intended to impose such a double standard, especially because doing so runs its own risks of generating international discord. These implausible consequences are strong evidence that petitioners have gone astray in assessing the focus of §1964(c) and thus, the meaning of "domestic injury" as contemplated by *RJR Nabisco*.[123]

The Problem with Facts-and-Circumstances Approaches

Defendants' final argument—one the *Yegiazaryan* dissent embraced—is that a contextual approach "is unworkable because it does not provide a bright-line rule."[124] But, in the majority's view, "[a]n approach is not unworkable . . . merely because it directs courts to consider the case-specific circumstances surrounding an injury when assessing where it arises."[125] In fact, although a bright-line rule may have some facial allure, "a look beneath the surface quickly reveals that the

---

[117] *Id.* at 6–7.
[118] *Id.*
[119] *Id.*
[120] *Yegiazaryan*, 599 U.S. at 547–48.
[121] *Id.* at 547.
[122] *Id.* at 547–48.
[123] *Id.* at 548.
[124] *Id.* at 536.
[125] *Id.*

test is inconsistent with *RJR Nabisco,* the presumption against extraterritoriality, and the thrust of §1964(c) itself."[126]

Justice Alito's dissent does not go quite so far as to sponsor the defendants' proffered bright-line test.[127] Rather, it suggests that "the Court's decision resolves very little. It holds only that ascertaining the site of intangible injuries for purposes of civil RICO requires a court to consult a variety of factors and that two factors it identifies show that respondent has suffered a domestic injury."[128] Justice Alito states that the majority holding "offers virtually no guidance to lower courts, and it risks sowing confusion in our extraterritoriality precedents" and "[r]ather than take this unhelpful step, [he] would dismiss the writ of certiorari as improvidently granted."[129]

In positing that the Court should shy from cases in which it is unable to establish a "rule" or at least a set of standards easier to follow than a consideration of "facts and circumstances," Justice Alito is tacitly acknowledging the view that the Supreme Court is what Brian Leiter has called a "super-legislature"—there to make rules, not do individual justice.[130] Anthony D'Amato elaborates on the idea, contending that the Supreme Court "is no longer a court that decides cases [and] has become . . . a legislative body which uses a case simply as a serendipitous vehicle for enacting social legislation."[131] This state of affairs is "exacerbated, of course, because the Supreme Court selects its docket—it picks the cases it wants to hear . . . and picks the cases where the federal circuits conflict or where the law is up for grabs . . ."[132]

Justice Scalia thus posited that—given this situation—a "common-law, discretion-conferring approach is ill suited . . . to a legal system in which the Supreme Court can review only an insignificant proportion of . . . decided cases."[133] Thus, "when an appellate judge comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding."[134] Consequentially, in his view, "once we have taken the law as far as it can go, . . . once there is nothing left to be done but to determine [something] from the totality of the circumstances," then the Court should "leave that essentially factual determination to the lower courts."[135] This chimes quite well with Justice Alito's worry that "lower courts must . . . decide whether and how today's cryptic decision binds them, rather than continuing to think through unencumbered when intangible-property injuries are the basis of a domestic application of . . . RICO."[136]

---

[126] *Id.*
[127] *See id.* at 549 (Alito, J., dissenting).
[128] *Id.*
[129] *Id.*
[130] Brian Leiter, *Constitutional Law, Moral Judgment and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601, 1601-17 (2015).
[131] Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NORTHWESTERN L. REV. 113, 116 (1990); *see* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").
[132] Leiter, *supra* note 127, at 1608; *see also* Sup. Ct. R. 10 (setting forth "the character of the reasons the Court considers" in exercising its discretion to grant a petition for writ of certiorari).
[133] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).
[134] *Id.* at 1180–81.
[135] *Id*. at 1186.
[136] *Yegiazaryan*, 599 U.S. at 552 (Alito, J., dissenting).

In fairness, of course, we must acknowledge that the majority did resolve a circuit split and lower courts will, going forward, have the opportunity to devise standards for evaluating injuries to intangible property in an international setting. Justice Alito would counter, though, that "it is not worth our deciding a case when we provoke so many more questions than we provide answers."[137] But those of us who have studied RICO cases for decades would remark that that always seems to be the case with RICO decisions. Perhaps what seems to be an infinite regress of answers begetting questions is a consequence of RICO's complicated structure, ambiguous language and syntax, and conflicting policy goals inherent in RICO's criminal and civil aspects.

What Next?

The Court's ruling is confined to just one aspect of the question upon which it had granted cert.: namely, whether a foreign plaintiff—because of his or her "foreignness"—can ever state a civil RICO claim.[138] That is, the Court did not engage the adjacent issues that the parties and amici joined, ranging from case-specific issues like whether the Plaintiff suffered cognizable RICO injury to more general issues like whether RICO is an appropriate vehicle for enforcing an international arbitral award. On the latter question, Professor Bermann thought "yes;" other amici and the Defendants disagreed. To Professor Bermann, RICO is not limited, as Defendants urged, "to cases involving 'criminal infiltration of legitimate enterprises . . . .'"[139] This falls in line with decades of court opinions holding that, although RICO is an anti-Mafia statute, it is not just an anti-Mafia statute.[140] But Professor Bermann is on shakier ground in opining that "[t]he statute contains no limitation on the spheres of activity to which it may be applied." Indeed, plenty of courts have found that some fraudulent and illegal conduct fall beyond RICO's ambit.[141] For the moment, let's set aside whether RICO should be available to redress acts that don't look like gangster acts and consider whether there are reasonable grounds to dispute whether RICO should be available to enforce an international arbitral award. For a couple of reasons, Professor Bermann thinks it should be.[142]

First, he frames a negative argument: i.e., nothing in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") suggests that recourse to RICO as an enforcement mechanism is improper.[143] Second, the New York Convention "establishes the right of an award creditor to enforcement of an award rendered in its favor, as well as imposing an affirmative obligation on courts of Contracting States to enforce those awards, absent a Convention defense to enforcement."[144] How this works in the US is pursuit of a judgment confirming the award,[145] followed by execution "upon the judgment against the debtor's locally

---

[137] *Id.*
[138] *See id.* at 542.
[139] Brief for George A. Bermann as *Amicus Curiae, supra* note 110, at 21 (quoting Brief of Petitioner at 55, *Yegiazaryan* v. Smagin, 599 U.S. 533 (No. 22-381)).
[140] *See* Gordon, *supra* note 9; *see also* Gordon, *supra* note 12.
[141] Brief for George A. Bermann as *Amicus Curiae, supra* note 110, at 21–22.
[142] *See id.* at 22.
[143] *Id.*
[144] *Id.* (citing Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, Art. III [*hereinafter* New York Convention]).
[145] *Id*. (citing 9 U.S.C. § 207); *Pao Tatneft v. Ukraine,* 21 F.4th 829, 835 (D.C. Cir. 2021), *cert. denied*, 143 S. Ct. 290 (2022) ("The New York Convention in general requires American courts to enforce international arbitral awards.").

situated assets, as it would with any domestic judgment."[146] Although Professor Bermann does not pursue the latter point, it does call the question (which we will take up later) whether RICO would be a proper enforcement mechanism for a *domestic* arbitral award.

Despite the New York Convention being mostly concerned with recognition and enforcement of international arbitral awards, "it also indirectly addresses execution of the judgments by which awards are enforced . . ." by requiring "contracting States to enforce awards in accordance with their domestic rules of procedure."[147]

There is no debate that judgment execution thus forms a critical part of the award enforcement process and that signatory States are authorized to deploy their domestic rules in enforcing international awards.[148] But when Professor Bermann opined that, "[i]n the United States, RICO is precisely one such means of redress where, as here, the award (and judgment) debtor is alleged to have engaged in activities constituting a RICO violation in an effort to defeat effective enforcement," that sentence ends in a period, not a citation. My point here is that it's an open question—not settled law—whether RICO can be used in aid of execution on a judgment confirming an international arbitral award.

If we assume that US law authorizes RICO as a judgment enforcement mechanism, Professor Bermann's conclusion that, "[a]lthough RICO was certainly not established for the specific purpose of ensuring that arbitral awards are enforced and judgments of enforcement executed, if the requirements of the RICO statute are satisfied, a civil RICO claim represents one such means of enforcement under US law within the meaning of Article VII" and does not exhaust

---

[146] *Id.* (citing Fed. R. Civ. P. 69(a)) (providing for enforcement of monetary judgments by writ of execution); *Ministry of Def. & Support for the Armed Forces of the Islamic Rep. of Iran v. Cubic Def. Sys. Inc.,* 665 F.3d 1091, 1094 n.1 (9th Cir. 2011) (once a foreign arbitration award is reduced to judgment, it "has the same force and effect of a judgment in a civil action and may be enforced by the means available to enforce any other judgment").

[147] *Id.* (citing New York Convention, Art. III ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . .")); *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.,* 850 F.3d 58, 75 (2d Cir. 2017) (explaining that Article III of the New York Convention leaves the availability of "a theory of alter ego liability, or any other legal principle concerning the enforcement of awards or judgments" to "the law of the enforcing jurisdiction").

[148] *Id*. ("Article VII of the Convention expressly provides that a party seeking enforcement of a Convention award may avail itself, alongside the Convention, of any remedy in aid of enforcement of an award available under domestic law."); New York Convention, art. VII ("The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."). The New York Convention thus invites award creditors to make use, in addition to the Convention itself, of any other means available under the law of the place of enforcement to effectuate a foreign arbitral award. Comm'ns Import Export S.A. v. Congo, 757 F.3d 321, 328 (D.C. Cir. 2014) ("the underlying rationale of Article VII is that the 'Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon.'") (quoting Albert Jan van den Berg, *The New York Convention of 1958: An Overview, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 39, 66 (Emmanuel Gaillard & Domenico Di Pietro, eds., 2008)); *In re Arb. of Chromalloy Aeroservs., a Div. of Chromalloy Gas Turbine Corp. v. Arab Rep. of Egypt,* 939 F. Supp. 907, 910 (D.D.C. 1996) ("[U]nder the Convention, [the award creditor] maintains all rights to the enforcement of this Arbitral Award that it would have in the absence of the Convention."); *Photopaint Tech., LLC v. Smartlens Corp.,* 335 F.3d 152, 159 (2d Cir. 2003) (explaining that "an action at law offers an alternative remedy to enforce an arbitral award").

the related lines of argument.[149] In particular, questions remain with respect to RICO's place in the international order and the related comity concerns espoused in *RJR Nabisco*. These questions animate the amicus brief of several private international law scholars.

RJR Nabisco noted the presumption against extraterritoriality is rooted in the "potential for international friction . . . by merely applying U.S. substantive law to that foreign conduct."[150] As examples, the Court held up antitrust and securities laws: "[W]e have observed that [t]he application . . . of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy in other nations, even when those nations agree with U.S. substantive law on such things as banning price fixing."[151] The principal worry is that "to apply [U.S.] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody."[152] More specifically, "[m]ost foreign countries proscribe securities fraud" but "have made very different choices with respect to the best way to implement that proscription," such as "prefer[ring] 'state actions, not private ones' for the enforcement of law."[153] The same may be said of RICO: "Allowing recovery for foreign injuries in a civil RICO action, including treble damages, presents the same danger of international friction."[154] It is against this backdrop that the International Scholars opined.[155]

According to the International Scholars, "[i]n the context of foreign arbitral award enforcement, a private action under [RICO] is fundamentally different from what the laws of the UK and EU countries allow."[156] That is,

> [w]hen a judgment or award debtor dissipates their assets to obstruct the creditor's right to payment, there is no private cause of action akin to RICO in the UK or EU countries, and there is no possibility of treble damages. The closest analogues in English law are the tort law causes of action for "unlawful means conspiracy" and the so-called "*Marex* tort." Damages under both causes of action are strictly compensatory in nature. In addition, if

---

[149] In something of a throw-away, Defendants complained that Smagin was improperly seeking multi-jurisdictional enforcement, specifically in Liechtenstein and the United States. Professor Bermann argued:

> However, the New York Convention has never been understood to bar a creditor from seeking enforcement in multiple jurisdictions, provided double recovery is not awarded. *E.g. Salini Costruttori S.P. A. v. Kingdom of Morocco,* 233 F. Supp. 3d 190, 201 (D.D.C. 2017) ("The New York Convention scheme for enforcement of an arbitral award explicitly allows for confirmation of an award in multiple jurisdictions."). No support can be found for the contrary proposition. A creditor is not required to confine its enforcement efforts under the Convention to a single jurisdiction, and no Convention State can escape its enforcement obligations on the ground that enforcement has been sought, and possibly achieved, elsewhere, again assuming no double recovery.

Brief for George A. Bermann as *Amicus Curiae, supra* note 110, at 25–26.

[150] *RJR Nabisco, Inc.*, 579 U.S. at 347.
[151] *Id.* (internal quotations omitted).
[152] *Id.* (internal quotations omitted).
[153] *Id.* at 348 (quoting Brief for Rep. of Fr. as Amicus Curiae at 20 *Morrison*, 561 U.S. 247 (2010) (No. 08-1191).); *see id*. ("Even when foreign countries permit private rights of action for securities fraud, they often have different schemes" for litigating them and "may approve of different measures of damages").
[154] *Id.*
[155] *See* Brief of Private Int'l L. Scholars as Amici Curiae Supporting Petitioner at 2, *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023) (No. 22-381).
[156] *Id.*

> called upon to enforce a RICO multiple-damages judgment, courts in the UK and EU countries would generally decline to do so as contrary to public policy—a public policy evident in a broad range of substantive laws, ranging from recognition of foreign judgments to competition to choice of law.[157]

So viewed, a court facing an extraterritoriality issue must employ the "canon of statutory construction known as 'prescriptive comity,' [which] 'cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'"[158] This doctrine smooths the way when—as is often the case—nations agree that certain conduct (e.g., price fixing or securities fraud) should be unlawful yet "disagree dramatically about appropriate remedies."[159] The issue becomes particularly pointed when a US statutory scheme authorizes treble or punitive damages.[160]

To the International Scholars, "the use of Section 1964(c) in the context of arbitral award enforcement—including in the context of intentional evasion by the award debtor—contrasts sharply with the approaches of other nations."[161] In especial, it is the automatic treble damages aspect of 1964(c) that triggers concern, principally (contra Professor Bermann) under the New York Convention because most European jurisdictions "do *not* provide a private cause of action akin to RICO, or any other mechanism which leads to treble damages."[162] Competing public policies lurk behind the US-UK/EU divide with respect to damages enhancements. First, the UK/EU states are hostile to non-compensatory remedies under the belief that "the aims of punishment and deterrence underlying treble and punitive damages are proper to criminal law rather than to civil law, as they interfere with the state's monopoly on penalization."[163] Second, the aim of private enforcement is and should be limited to compensation. [164]

---

[157] *Id.* at 2–3.
[158] *Id.* at 3 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–65 (2004)).
[159] *Id.* (quoting *Empagran*, 542 U.S. at 167 and citing *RJR Nabisco*, 579 U.S. at 347) (internal quotations omitted).
[160] *Id.* (citing *Empagran*, 542 U.S. at 167–68 (citing amicus briefs submitted by Germany, Austria, Japan, and Canada)); *RJR Nabisco*, 579 U.S. at 346–47, 347 n.9; *Hartford Fire Ins. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).
[161] Brief of Private Int'l L. Scholars as Amici Curiae Supporting Petitioner, *supra* note 153, at 4.
[162] *Id*. (discussing *Lakatamia Shipping Co. v. Su* [2021] EWHC 1907 (Comm)).
[163] *Id*. (citing Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, 118 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 312 (Ger.)) (holding that it is a fundamental legal principle of German law to award damages with the sole objective of reimbursing what the victim has lost).
[164] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014 O.J. (L 349) art. 3(2) ("[f]ull compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed" and expressly excluding "overcompensation, whether by means of punitive, multiple or other types of damages"); *See generally* Rome II Regulation 161 (choice-of-law instrument for the determination of the law applicable to noncontractual obligations, including international torts) These sentiments are expressed in a variety of other contexts, ranging from choice-of-law instruments to national blocking statutes; *Id.* (citing Rome II Regulation 164 (choice-of-law instrument for the determination of the law applicable to noncontractual obligations, including international torts)); British Protection of Trading Interests Act of 1980, ch. 11 ("direct[ing] British courts not to enforce treble damage awards against British firms"); *Swiss Life v. Kraus*, EWHC (QB) (2015) (describing history of and policy against multiple damages) UK courts have applied this policy to judgments issued to private parties under RICO; *Lewis v. Eliades* WLR 692 (2003) (severing trebled and compensatory portions of RICO

The Court dodged the concerns over the comity aspects of the case, probably because comity was not fully implicated on the facts. That is, it is one thing to subject a foreign citizen to punitive US law for acts taken abroad but quite another to grant a foreign resident access to the US legal regime to redress injury caused by acts taken in the US by a US resident. All this is to say that a RICO suit to enforce an international arbitral award with only tenuous connections to the US may present a fresh opportunity to challenge this enforcement tactic.

With respect to the ultimate success of the suit, we must first recall how circumscribed the Supreme Court's opinion is. It declined the invitation to venture beyond the question of whether Smagin—as a foreign resident—had standing to sue.[165] As the case stands, Smagin will still have to establish all aspects of his substantive RICO claims, including, for example, the existence and continuity of a cognizable RICO enterprise and the various "nexus" aspects needed to prove a pattern of racketeering, as well as other aspects of § 1964(c) standing not taken up by the Court like third-party fraud. In this latter connection, it bears mentioning that, at oral argument, Justice Jackson drew a distinction between injury to a judgment itself (the property) and "conduct to injure or interfere with the execution of the judgment."[166] She appeared to suggest that the two types of injury converged on the facts alleged, but it is a point worth further exploration. Smagin received a judgment for $92 million, an amount that still stands. So what is the nature of the injury to the property itself, given that "a showing of injury requires proof of concrete financial loss, and not mere injury to a valuable intangible property interest[?]"[167] Perhaps one avenue would be to offer expert testimony sufficient to show that there is a market for buying and selling judgments and that Smagin's judgment, which is saddled with collection difficulties, is worth only some fraction of its face value.[168] In any event, the case is intriguing for a host of reasons and will doubt offer copious opportunities for commentary as it progresses.

Conclusion

RJR Nabisco mandated that, to establish standing, a civil RICO plaintiff allege and prove that it suffered a "domestic" injury.[169] But that decision left open what would qualify as a domestic injury when a case involves some foreign parties and acts.[170]

In *Smagin*, the Court partially closed the loop in holding that a civil RICO "plaintiff has alleged a domestic injury for purposes of §1964(c) when the circumstances surrounding the injury indicate it arose in the United States."[171] And because Smagin alleged that he was (1) "injured in California because his ability to enforce a California judgment in California against a California

judgment); Service Temps Inc. v. MacLeod CSOH 162 (2013) (declining to enforce Texas judgment with compensatory and enhanced aspects).

[165] *See Yegiazaryan*, 599 U.S. at 533.

[166] Transcript of Oral Argument at 58, *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023) (No. 22-381).

[167] Gomez v. Wells Fargo Bank, N.A., 676 F.3d 665, 660 (8th Cir. 2012) (quoting Regions Bank v. J.R. Oil Co., 387 F.3d 721, 728 (8th Cir. 2004)).

[168] *The Ultimate Guide to Have Someone Buy Your Judgmen*t, HALF DOME CAPITAL JUDGMENT COLLECTION (last visited Sept. 12, 2023), https://californiajudgments.com/buy-judgment/ (last visited Sept. 12, 2023), [https://perma.cc/7AZC-33R7].

[169] *RJR Nabisco, Inc.*, 579 U.S. at 346.

[170] *Id.* at 325.

[171] *Yegiazaryan*, 599 U.S. at 536.

resident"; and (2) that "was impaired by racketeering activity that largely occurred in or was directed from and targeted at California," he then stated a domestic injury.[172]

[172] *Id.* at 545–46.