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3d Cir. Creates Split Regarding Domestic Injury Requirement for a Civil RICO Claim



By **Justin J. Santolli**

The Third Circuit in *Humphrey v. GlaxoSmithKline PLC*, __F.3d __, 2018 U.S. App. Lexis 27433 (3d Cir. Sept. 26, 2018), adopted a multifactor analysis to determine whether a civil RICO plaintiff adequately alleged a domestic injury to business or property under the Supreme Court's decision in *RJR Nabisco v. European Community*, 136 S.Ct. 2090 (2016). The Third Circuit's decision to adopt a multifactor analysis to examine whether an injury to intangible property is domestic creates an explicit split with the approach adopted by the Seventh Circuit in *Armada (Singapore) PTE Ltd. v. Amcol International*, 885 F.3d 1090 (7th Cir. 2018), which looked solely at the location of plaintiff's residence to determine where injury to intangible property had occurred. Id. at 1095. The current circuit split between the Third and Seventh Circuit regarding the proper analytical framework for the application of the domestic injury requirement in cases of intangible property may ultimately require Supreme Court intervention. The Third Circuit's recent decision only serves to underscore that, as was highlighted in my prior article commemorating *RJR Nabisco*'s two-year anniversary, the law regarding the domestic injury requirement is still evolving and needs to be carefully monitored by those involved with or considering bringing RICO claims.

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Third Circuit Embraces A Multifactor Test

The plaintiffs in *Humphrey* cofounded an investigations firm that assisted companies doing business in China with anti-bribery compliance. *Humphrey*, 2018 U.S. App. LEXIS 27433, at *2. The plaintiffs alleged that GlaxoSmithKline engaged in a pattern of bribery in China to obtain a commercial advantage, but that in 2011 a whistleblower informed regulators in China of a purported pattern of bribery. Id. at *2-3. The plaintiffs were engaged by GlaxoSmithKline to assist in connection with its internal investigation related to that alleged bribery. Id. at *3. The agreement between the plaintiffs and GlaxoSmithKline provided that it was governed by Chinese law and provided for any dispute to be resolved by arbitration in China. Id. at *3-4. As part of its engagement, the plaintiffs investigated certain

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individuals that GlaxoSmithKline believed had provided information to Chinese regulatory agencies as well as seeking information about certain Chinese government agencies that may have had involvement with the investigation. Id. at *2-4.

In July 2013, the plaintiffs were arrested by the Chinese authorities, and were ultimately convicted and imprisoned in China. Id. at *4. The Chinese government also fined GlaxoSmithKline almost $500 million in connection with "bribery practices" in the region. Id. In addition, GlaxoSmithKline entered into a settlement agreement with the SEC regarding its conduct. Id. The CEO of GlaxoSmithKline's Chinese business operations was convicted and imprisoned in China for bribing physicians. Id. at *4.

Following their release from prison in China, the plaintiffs brought suit against certain GlaxoSmithKline entities asserting RICO claims as well as state law claims, claiming, among other things, "that their business was destroyed and their prospective business venture eviscerated as a result of Defendants' misconduct." Id. at *4-5 (internal quotations omitted). The plaintiffs further alleged that they "lost numerous ongoing contracts and engagements with U.S. law firms and companies—purportedly destroying Plaintiffs' business ... and their prospective business ventures." Id. at *13.

In its analysis of whether the plaintiffs alleged a domestic injury, the Third Circuit recognized that the domestic injury inquiry "must focus principally on where the plaintiff has suffered the alleged injury." Id. at *24. Because of the alleged intangible nature of the injuries sustained by the plaintiffs, the Third Circuit determined that the "inquiry must focus primarily upon where the effects of the predicate acts were experienced." Id. at *25. The Third Circuit believed that this approach would "better allow for appropriate consideration of multiple factors." Id.

The Third Circuit stated that "[w]hether an alleged injury to an intangible interest was suffered domestically is a particularly fact-sensitive question requiring consideration of multiple factors," including but not limited to: (1) "where the injury itself arose;" (2) "the location of the plaintiff's residence or principal place of business;" (3) "whether any alleged services were provided;" (4) "where the plaintiff received or expected to receive the benefits associated with providing such services;" (5) "where the relevant business agreement were entered into and the laws binding such agreements;" and (6) "the location of the activities giving rise to the underlying dispute." Id. at *25-26. The Third Circuit noted that "no one factor is presumptively dispositive." Id. at *26. The Third Circuit held that a domestic injury can be found "where the relevant factors, appropriately weighed, establish that the alleged harm was suffered in the United States." Id. at *26.

Applying its totality of the circumstances analysis to the plaintiffs' allegations, the Third Circuit determined that the complaint failed to allege a domestic injury and noted that the case, unlike others, did not require the "split[ting] of jurisdictional hairs." Id. at *25. The Third Circuit concluded that the alleged injury was sustained in China—not the United States. Id. at *27. The Third Circuit noted that during the relevant time period the plaintiffs lived in China, had their principal place of business in China, provided services in China, entered into the contractual arrangement with the defendants in China, met with representatives of the defendants in China, and indicated on the civil cover sheet in the District Court that the incident occurred in China. Id. The Third Circuit noted that the plaintiffs alleged the loss of goodwill and U.S.-based customers but found those allegations were insufficient to establish a domestic injury. Id. The Third Circuit held that such allegations were "not enough to overcome the Supreme Court's caution against extraterritorial application of domestic law in *RJR Nabisco*." Id.

Third Circuit Rejects Seventh Circuit's Analysis

In adopting its multifactor analysis, the Third Circuit explicitly

rejected the Seventh Circuit's approach to determining the location of injury for intangible property. See *Humphrey*, 2018 U.S. App. LEXIS 27443, at *28-31. The Seventh Circuit in cases involving intangible property adopted a bright-line test based on the residency of the civil RICO plaintiff to determine the location of the injury. The Third Circuit noted that using the Seventh Circuit's approach "would not necessarily lead to a different result here because Plaintiffs resided in China when Defendants are alleged to have engaged in conduct Plaintiffs rely upon for RICO liability." Id. at *29 n.105.

The circuit split regarding the proper analytical framework for evaluating the domestic injury requirement as applied to intangible property may require Supreme Court review to resolve.

The Third Circuit elected not to adopt the Seventh Circuit's approach because it believed that approach was "too inflexible to be useful in resolving cases where the nature of the injured property interests is not self-evident." Id. at *30 (internal quotations omitted). The Third Circuit also noted that the Seventh Circuit's "residency-based rule also effectively precludes all foreign plaintiffs alleging intangible injuries from recovering under §1964(c) regardless of their alleged connection with the United States." Id. The Third Circuit found that there was no Congressional intent to preclude foreign entities or individuals from bringing claims under civil RICO. Id. at *31. The Third Circuit also noted that the Seventh Circuit's approach conflicted with the Supreme Court's statement that "Congress did not limit RICO to domestic enterprises." Id. Accordingly, the Third Circuit found that the residency of the plaintiff in a civil RICO case was only one factor to be considered in the domestic injury requirement. Id. at *30. The plaintiffs have not sought panel rehearing or en banc review by the Third Circuit to address the circuit split.

Conclusion

The current absence of a uniform standard in evaluating whether an injury to intangible property satisfies the domestic injury requirement may encourage civil RICO plaintiffs to engage in forum shopping. Under the Seventh Circuit's bright line approach, a resident of the United States alleging harm to intangible property will always sustain a domestic injury, while an individual or entity residing outside the United States will never have a domestic injury in connection with intangible property. Unlike the Seventh Circuit, the Third Circuit's multifactor analysis potentially permits non-U.S. residents to successfully bring and maintain a civil RICO claim if they are able to show that the totality of circumstances supports the conclusion that the harm was suffered in the United States, and does not guarantee that a U.S. resident will always satisfy the domestic injury requirement.

The circuit split regarding the proper analytical framework for evaluating the domestic injury requirement as applied to intangible property may require Supreme Court review to resolve. Given that there have only been three appellate court decisions addressing the domestic injury requirement and that the outcome in the *Humphrey* case is likely the same under the approach of either the Third Circuit or the Seventh Circuit, the Supreme Court may ultimately elect to wait for further developments at the circuit court level before it decides to provide further guidance on the domestic injury requirement.

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