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Laurence A. Steckman, Esq.

Adam J. Rader, Esq.

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**RICO EXTRATERRITORIALITY, *RJR NABISCO* AND  
SHAREHOLDER RESIDENCE – A KEY CONSIDERATION IN  
DETERMINING RICO DOMESTIC INJURY**

*Laurence A. Steckman, Esq.\**  
*Adam J. Rader, Esq.\*\**

In *RJR Nabisco, Inc. v. European Community*,<sup>1</sup> the Supreme Court held that a private plaintiff alleging claims under the Racketeer

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\* Laurence Steckman is a principal attorney with Offit Kurman, PA and has been litigating securities and complex commercial cases for more than thirty years. In July 2006, Super Lawyers Magazine identified Mr. Steckman as one of New York's first "Super Lawyers" in securities and business litigation, an honor he has received six times since then. He has authored or been principal co-author of more than fifty published works on the law, and book chapters, and a co-authored volume on existential psychology. He is an entrepreneur involved in the infrastructure and energy sectors. Mr. Steckman pursued doctoral studies in philosophy at Columbia University prior to attending law school after he received his undergraduate degree *summa cum laude* in classic guitar. He graduated Touro Law School in 1988, with honors, and began his law career in the litigation department of Shea & Gould in New York City.

\*\* Adam J. Rader is a principal attorney with the law firm Offit Kurman, PA and has been litigating and arbitrating complex commercial domestic and international business cases in state courts, federal courts, and arbitral fora for more than twenty-five years. He handles criminal and civil cases, including matters ranging from international trade and extradition to trademark and Native American law. He has handled high profile matters ranging from representation of a prominent German real estate developer in extradition proceedings to representing an Azerbaijani law professor accused of attempting to sell artwork allegedly stolen during World War II. He recently defended a high-profile Russian oligarch fighting extradition to the U.S. to respond to allegations of Foreign Corrupt Practices and RICO violations in connection with India investments. Mr. Rader is a graduate of University of Wisconsin-Madison Law School.

<sup>1</sup> *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016). In *RJR*, the European Community and twenty-six of its member states sued RJR Nabisco ("RJR") alleging that RJR directed, managed, and controlled a global money-laundering enterprise in violation of the RICO statute. The European Community claimed Colombian and Russian criminal organizations imported illegal drugs into European countries, where they produced revenue in euros which was laundered back into the

Influenced and Corrupt Organizations Act (“RICO”),<sup>2</sup> must overcome a presumption against extraterritorial application of that statute,<sup>3</sup> by alleging a “domestic injury” to plaintiff’s business or property.<sup>4</sup> Because plaintiff withdrew its claims for domestic injury,<sup>5</sup> the Court provided little guidance as to how courts should determine when a “domestic injury” is incurred.<sup>6</sup> The issue is important in cases involving complex, international frauds which, as the world effectively shrinks, are posing increasingly significant risks to international investors and markets.<sup>7</sup>

Some courts have held that the location of a business entity plaintiffs should be the sole factor in determining whether a RICO claim with extraterritorial implications can be heard in U.S. courts, at least with respect to claims involving injury to intangible assets.

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currency of the criminal organizations’ home countries while the euros were sold to cigarette importers at a discounted rate to purchase RJR’s cigarettes. The lawsuit alleged that RJR controlled this operation which committed numerous violations of the RICO statute as well as violations of New York state law. The district court granted defendants’ dismissal motion based on the presumption that U.S. statutes do not apply extraterritorially absent express Congressional intent so indicating. The U.S. Court of Appeals for the Second Circuit reversed and held that claims under the RICO statute can apply extraterritorially when the RICO claim is a violation of a predicate statute that Congress clearly intended to apply extraterritorially. The Supreme Court then reversed the Second Circuit, and a four-justice majority (Justice Sotomayor did not participate in the discussion or decision of the case) held that RICO’s private right of action did not rebut the presumption of extraterritoriality, and therefore a plaintiff must allege there was a “domestic injury” for the lawsuit to proceed. Because plaintiffs waived their damages claims for domestic injuries, their remaining claims were based on injuries suffered abroad requiring dismissal.

<sup>2</sup> 18 U.S.C.A §§ 1961 (1)-(10) (West 2016).

<sup>3</sup> 136 S. Ct. at 2102-03.

<sup>4</sup> 18 U.S.C.A § 1964(c) (West 2019) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee...”).

<sup>5</sup> 136 S. Ct. at 2111 n.13.

<sup>6</sup> See *Bascuñan v. Elsaca*, 874 F.3d 806, 817 (2d Cir. 2017) (“The guidance from the Supreme Court in *RJR Nabisco* regarding what constitutes a domestic injury is admittedly sparse.”).

<sup>7</sup> For a concise summary of how extraterritoriality issues are being applied in RICO, securities law, Foreign Corrupt Practices Act, Commodity Exchange Act, and Antitrust Law contexts, see DANIEL SILVER & BENJAMIN A. BERRINGER, *THE PRACTITIONER’S GUIDE TO GLOBAL INVESTIGATIONS VOLUME I: GLOBAL INVESTIGATIONS IN THE UNITED KINGDOM AND THE UNITED STATES* (Judith Seddon et al., ed. 3d. ed. 2019) (available online at <https://globalinvestigationsreview.com/chapter/1153246/extraterritoriality-the-us-perspective>).

Others, rejecting this view, have applied a multi-factor approach to determine whether, in a particular case, injury to intangible property should be deemed to constitute a “domestic injury” for the purposes of evaluating whether a foreign entity plaintiff has a sufficient connection to the U.S. to rebut the presumption against extraterritorial statutory application.

Exclusive emphasis on a business entity plaintiff’s location to determine whether plaintiff has suffered a “domestic injury” is not a sound way to determine whether extraterritorial RICO actions can be maintained in U.S. courts. Where, for example, a foreign company is doing business in the U.S., and is damaged by U.S. actors’ bad conduct in the U.S., it makes little sense to preclude rebuttal of the presumption against extraterritorial application, *ab initio*, just because plaintiff is incorporated in another jurisdiction. The problem is clearly illustrated in cases where a company, for example, has many U.S. shareholders derivatively but necessarily injured as a direct consequence of damage to the corporation in which they are invested. The location of a foreign corporation’s shareholders should be among the factors used to determine whether the presumption against extraterritoriality is rebutted.

While courts routinely and wisely deny shareholders the right to assert RICO claims on behalf of a corporation, shareholder rights are, nevertheless, protected by the corporation’s ability to bring claims through which the individual shareholders will benefit on a *pro rata* basis, with each shareholder benefiting in proportion to the number of owned shares. This “Corporate Standing Doctrine” compensates for the individual shareholders’ general inability to assert corporate claims. Sole reliance on a corporation’s residence or place of incorporation to determine whether a “domestic injury” exists may lead to harsh results particularly where, for example, a substantial number of the corporation’s shareholders are located in the U.S. Consideration of the location of a corporation’s shareholders as a substantial factor in a multi-factor analysis of whether the injury suffered in an extraterritorial RICO claim constitutes a “domestic injury” makes good sense and should become part of “domestic injury” jurisprudence.

Part I discusses the RICO statute, *RJR*, and certain pre-*RJR* precedents that have addressed how to determine whether a “domestic injury” exists. Part II discusses Second and Seventh Circuits’ post-*RJR* cases on “domestic injury” in the context of alleged injury to tangible and intangible property. Part III discusses post-*RJR* cases in the Ninth and Third Circuits which have, to some extent, rejected the

approaches taken in the Second and Seventh Circuits. Part IV discusses whether shareholder residence should be considered in extraterritoriality analysis in RICO cases, in light of the Corporate Standing Doctrine, which consolidates shareholder litigation rights into the owned company, for prudential purposes, to assure all shareholders are benefitted by a potential corporation recovery.<sup>8</sup>

## I. PART I

### A. The RICO Statute and its Remedies – Causation, Direct Injury and Standing

Congress, in enacting the RICO statute, provided a remedy for “[a]ny person injured in his business or property by reason of a violation of section 1962.”<sup>9</sup> To recover under RICO, plaintiff must establish, among other elements,<sup>10</sup> RICO loss causation (which is roughly equivalent to securities fraud loss causation and/or common law “proximate causation”), as between the alleged RICO predicate criminal act(s) and the injury plaintiff alleges was suffered, as commentators

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<sup>8</sup> See Laurence A. Steckman and Kenneth Moltner, *Recent Developments in Direct Injury Analysis in the Second Circuit: An examination of the Injury and Causation Elements of RICO Standing*, NEW YORK LAW JOURNAL, Jan. 5, 1992, at 1, col. 1, reprinted 15 RICO L. REP. 274, Feb. 1992.

<sup>9</sup> 18 U.S.C.A § 1964 (c).

<sup>10</sup> RICO makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C.A § 1962(c). Section 1964(c) confers a private right of action to “[a]ny person injured in his business or property by reason of” such a violation. *Id.* § 1964(c). See generally *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, 2018 U.S. Dist. LEXIS 215143; 2018 WL 6725387 (S.D.N.Y Dec. 21, 2018). To state a claim for a civil violation of RICO, plaintiff must plead defendant engaged in “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity and, additionally, must establish that (5) the defendant caused injury to plaintiff’s business or property.” *Chaset v. Fleer/Skybox Int’l, LP*, 300 F.3d 1083, 1086 (9th Cir. 2002); 18 U.S.C. §§ 1962(c), 1964(c).

have made clear.<sup>11</sup> RICO remedies include treble damages and the cost of suit, including a reasonable attorney's fee.<sup>12</sup>

### B. The Key Pre-RJR cases of Morrison and Kiobel

*RJR* was decided following a two decades-plus trend in which the number of cases brought under statutes with possible extraterritorial impact substantially increased.<sup>13</sup> This increase caused concern among some international law scholars that extraterritoriality had gone too far.<sup>14</sup> During the six years prior to the *RJR* decision, the Court addressed the presumption against extraterritoriality twice.<sup>15</sup>

Extraterritoriality issues in the securities law and RICO contexts often refer to *Morrison v. Nat'l. Austl. Bank Ltd.*,<sup>16</sup> a 2010

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<sup>11</sup> See generally Laurence A. Steckman and Robert E. Conner, *Loss Causation Under Rule 10b-5, a Circuit-by-Circuit Analysis: When Should Representational Misconduct be Deemed the Cause of Legal Injury Under the Federal Securities Law?*, LAW REPORTER, 1998 SECURITIES ARBITRATION, Vol. 1, Ch. 16, (P.L.I. 1998), reprinted RICO Vol. 28, No. 2, at 173 (Aug. 1998), reprinted PRIVATE SECURITIES LITIGATION REFORM ACT REPORTER, Vol. 5, No. 6, at 897 (Sept. 1998).

<sup>12</sup> *Id.*

<sup>13</sup> See Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 818 (2009).

<sup>14</sup> *Id.* at 874 (“...in the long run, extraterritoriality is not a sustainable way to solve global challenges.”).

<sup>15</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665, 1669 (2013); See *Morrison v. Nat'l. Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

<sup>16</sup> *Morrison*, 561 U.S. 247 (2010). In *Morrison*, the National Australia Bank (“NAB”), an Australian company, acquired an American company, Homeside Lending Inc. (“Homeside”), in 1998. In 2001, NAB announced it would incur a \$450 million write-down for inaccurately calculating fees Homeside would generate for servicing mortgages, which had been calculated as present assets. Its stock price dropped five percent. Later that year, NAB announced a second write-down of \$1.75 billion to amend other inaccurate calculations booked as present assets. NAB's stock price tumbled an additional thirteen percent. Subsequently, four NAB stockholders filed suit against NAB and Homeside alleging violations of the Securities and Exchange Act of 1934. Three plaintiffs purported to represent a class of non-American purchasers of NAB stock because they bought their shares abroad. The district court held that it lacked subject matter jurisdiction over the class of non-American purchasers. On appeal, the United States Court of Appeals for the Second Circuit affirmed, reasoning that subject matter jurisdiction exists over claims only “if the defendant's conduct in the United States was more than merely preparatory to fraud, and particular acts or culpable failures to act with the United States directly caused losses to foreign investors abroad.” *Morrison v. Nat'l. Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008). The Court noted that (1) the issuance of fraudulent statements from NAB's corporate headquarters in Australia were more central to the fraud

decision which concerned the extraterritorial effect of U.S. securities laws. Foreign and U.S. plaintiffs sued foreign issuers for losses on transactions on foreign exchanges alleging violations of the Securities Exchange Act of 1934.<sup>17</sup> Plaintiff's claims were based on the 1998 purchase by National Australia Bank of Home Side Lending, a mortgage servicing company in Florida. Plaintiffs sought to apply Exchange Act §10(b) anti-fraud provisions to conduct on the Australian stock exchange engaged in by defendant National Australia Bank ("NAB").<sup>18</sup>

In July 2001, NAB announced a USD 450 write-down in assets due to losses associated with Home Side Lending, and a further USD 1.75 billion write-down in September of that year. Plaintiffs claimed the write-downs were caused by Home Side Lending's intentionally overly-optimistic assumptions, which were part of a scheme to defraud. By the time the case reached the Supreme Court, only Australian investors remained as plaintiffs.<sup>19</sup>

The Court held that the presumption against extraterritoriality cannot be overturned by simply alleging the existence of *some* domestic activity and it applied a test requiring that the "focus" of the relevant statute be pertinent to regulating foreign regulations.<sup>20</sup> Because the plain language of section 10(b) applies only to U.S. securities, the Court held it should not be read to apply to non-U.S. securities, even if traded among U.S. investors, on foreign exchanges. The Court thus reversed the Second Circuit, stating:

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than Homeside's manipulation of financial data on which NAB based its statements, (2) there was no effect on U.S. capital markets, and (3) the lengthy chain of causation from NAB receiving inaccurate information from Homeside before passing the information along to its investors suggested that the district court lacked subject matter jurisdiction. The Court affirmed, insofar as it agreed that the case should be dismissed, but held that the Second Circuit had erred when it based its decision on the question of subject matter over the case. Instead, the Court held that the Securities and Exchange Act does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign stock exchanges because "longstanding principle" dictated that Congressional legislation, unless expressly stating otherwise, only applies within the territorial jurisdiction of the United States.

<sup>17</sup> *Id.* at 250-251.

<sup>18</sup> *Id.*

<sup>19</sup> The case was named for Morrison, a U.S. party, whose claims were dismissed, for reasons not related to extraterritoriality, prior to the matter reaching the Supreme Court.

<sup>20</sup> *Id.*

[T]he Second Circuit believed the Exchange Act's silence about §10(b)'s extraterritorial application permitted the court to 'discern' whether Congress would have wanted the statute to apply. This disregard of the presumption against extraterritoriality has occurred over many decades in many courts of appeals and has produced a collection of tests for divining congressional intent that are complex in formulation and unpredictable in application. The results demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, this Court applies the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.<sup>21</sup>

The Court continued to retract the scope of extraterritorial application of statutes in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>22</sup> which held that the Alien Tort Claims Act ("ATS") presumptively does not apply extraterritorially.<sup>23</sup> A group of Nigerian citizens sued the Dutch oil corporation for allegedly aiding and abetting the Nigerian government in violating international law during the 1990s. The ATS allows non-U.S. citizens to file civil actions against organizations violating international law or U.S. treaties. The Court ruled the ATS did not apply because "all the relevant conduct took place outside the United States."<sup>24</sup> It further held that: "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."<sup>25</sup>

The *Kiobel* ruling created the "touch and concern" test, which, in extraterritorial cases, requires a foreign organization's conduct to have taken place and/or created significant repercussions in the U.S.<sup>26</sup> After *Kiobel*, there was confusion over whether it had failed to apply the "focus" test or if the use of the language "touch and concern" called for a different conclusion, at least in the ATS context.<sup>27</sup>

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<sup>21</sup> *Id.* at 248.

<sup>22</sup> 133 S. Ct. 1659.

<sup>23</sup> 28 U.S.C.A § 1350 (West 2019).

<sup>24</sup> *Kiobel*, 133 S. Ct. at 1669.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1669-70.



### C. **RJR, the Domestic Injury Requirement and Methodology**

In *RJR*, the Court held that a RICO plaintiff must allege a “domestic” injury to recover RICO remedies. However, since the plaintiff waived its claims for domestic injuries,<sup>28</sup> the *RJR* Court did not need to set forth a precise test of how to determine whether a “domestic injury” existed.<sup>29</sup> However, the Court provided at least some methodological guidance to courts examining extraterritoriality questions.

Essentially, courts begin with the presumption that federal statutes apply only within the territorial jurisdiction of the U.S.,<sup>30</sup> a “presumption against extraterritoriality.”<sup>31</sup> The presumption is intended to prevent “unintended clashes between our laws and those of other nations which could result in international discord.”<sup>32</sup> Courts begin by asking whether the presumption against extraterritoriality has been rebutted,<sup>33</sup> and rebuttal is deemed to have occurred only if the statutory text provides a “clear indication of an extraterritorial application.”<sup>34</sup>

If the presumption against extraterritoriality is not rebutted, the court then asks “whether the case involves a domestic application of the statute.”<sup>35</sup> To determine whether a domestic application is involved requires the court to identify the statute’s “focus” and, in particular, to determine whether conduct relevant to that “focus” occurred in the U.S.<sup>36</sup> If so, the case will be deemed to involve a permissible “domestic application” of the statute.<sup>37</sup> The Court explained that a statute’s focus is “the objec[t] of [its] solicitude,”<sup>38</sup> which can include the conduct it seeks to regulate, as well as the parties and interests it

<sup>28</sup> *RJR Nabisco*, 136 S. Ct. at 2111.

<sup>29</sup> *Id.* See also *Humphrey v. GlaxoSmithKline PLC*, 905 F.3d 694, 700 (3d Cir. 2018) (“...since the plaintiffs in *RJR Nabisco* had waived their claims for domestic injuries, the Court did not need to explain how courts should determine whether an alleged injury has been suffered domestically or abroad.”).

<sup>30</sup> *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

<sup>31</sup> *RJR Nabisco*, 136 S. Ct. at 2100.

<sup>32</sup> *EEOC v. Arabian American Oil Co.*, 499 U. S. 244, 248 (1991).

<sup>33</sup> *RJR Nabisco*, 136 S. Ct. at 2093-94.

<sup>34</sup> *Morrison v. National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010).

<sup>35</sup> *RJR Nabisco*, 136 S. Ct. at 2093-94.

<sup>36</sup> *Id.* at 2094.

<sup>37</sup> *Id.*

<sup>38</sup> *Morrison*, 561 U.S. at 267 (quoting *Superintendent of Ins. of N. Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971)).

seeks to protect or vindicate.<sup>39</sup> “If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application” of the statute.<sup>40</sup> This will be true “even if other conduct occurred abroad.”<sup>41</sup> But if the relevant conduct occurred in another country -- “then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U. S. territory.”<sup>42</sup> When determining the focus of a statute, if the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions.<sup>43</sup> Otherwise, the Court reasoned, it would be impossible to accurately determine whether the application of the statute in the case is a “domestic application.”<sup>44</sup>

#### D. RJR, the Dissent and Subsequent Judicial Interpretations of Domestic Injury

Justice Ginsburg concurred in part, dissented in part, and dissented from the judgment in *RJR*. Joined by Justices Breyer and Kagan, she wrote: “[d]enying respondents a remedy under RICO, the Court today reads into §1964(c) a domestic-injury requirement for suits by private plaintiffs nowhere indicated in the statute’s text.”<sup>45</sup> She recited the facts constituting the alleged scheme to illustrate why “pinning a domestic-injury requirement onto §1964(c) makes little sense.”<sup>46</sup> In contrast to the majority, she noted that the alleged racketeering activity, directed and managed from the U.S. and involving conduct occurring in the U.S. -- “has the United States written all over it.”<sup>47</sup> The dissenting Justices also pointed out that RICO’s private

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<sup>39</sup> *Morrison*, 561 U.S. at 267.

<sup>40</sup> *RJR Nabisco*, 136 S. Ct. at 2094.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2105.

<sup>44</sup> *Id.* at 2108; *See generally* Dandong Old N.-E. Agric. & Animal Husbandry Co. v. Hu, 2017 U.S. Dist. LEXIS 122471, 2017 WL 3328239 (S.D.N.Y. August 3, 2017) (“After *RJR*, putative RICO violations are construed narrowly to adhere to the well-established presumption against extraterritoriality.”).

<sup>45</sup> *RJR Nabisco*, 136 S. Ct. at 2112 (Ginsburg, J., dissenting, joined by Breyer and Kagan, J.J.).

<sup>46</sup> *Id.* at 2114 (Ginsburg, J., dissenting, joined by Breyer and Kagan, J.J.).

<sup>47</sup> *Id.* at 2114-2115 (Ginsburg, J., dissenting, joined by Breyer and Kagan, J.J.).

damages remedies were based upon the Clayton Act, which applies to foreign injuries.<sup>48</sup>

As discussed below, application of *RJR's domestic injury requirement* in the district courts is very much in flux. The extent to which courts rely heavily or solely on a corporate plaintiff's residence, as opposed to a wider array of factors, will determine whether RICO cases involving foreign corporate plaintiffs which "ha[ve] the United States written all over" them will be able to maintain otherwise actionable RICO scheme in U.S. courts. Notably, the *RJR* majority did not explain what constitutes "domestic injury,"<sup>49</sup> and courts have, since then, recognized there is "no established test for determining whether an injury to business or property occurs domestically."<sup>50</sup>

In a heavily cited district case, *Akishev v. Kapustin*,<sup>51</sup> an allegedly fraudulent Internet used car ring was operating out of Russia and misrepresenting an inventory of cars in the U.S. The district judge acknowledged that *RJR* set different standards of extraterritoriality for RICO's reach as a criminal statute versus that of a private civil cause of action. For criminal actions, the RICO enterprise must be engaged in commerce with the U.S., and the predicate acts must either occur in the U.S. or must themselves apply extraterritorially.<sup>52</sup> For private civil actions, focus is not on the enterprise, but "where the private RICO plaintiff suffered his injury."<sup>53</sup>

*RJR* had held: "'Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries.'"<sup>54</sup> The *Akishev* opinion pointed out that the Court had itself cautioned that "[t]he 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

<sup>48</sup> *Id.* at 2113-2114 (Ginsburg, J., dissenting, joined by Breyer and Kagan, J.J.).

<sup>49</sup> *Elsevier Inc. v. Grossman*, 2016 U.S. Dist. LEXIS 103444, at \*26 (S.D.N.Y. Aug. 4, 2016) (citing *European Community*, 136 S. Ct. at 2111), *corrected on other grds.*, 2016 U.S. Dist. LEXIS 167211 (S.D.N.Y. Dec. 2, 2016).

<sup>50</sup> *Elsevier Inc.*, 2016 U.S. Dist. LEXIS 103444, at \*34.

<sup>51</sup> *Akishev v. Kapustin*, 2016 U.S. Dist. LEXIS 169787 (D.N.J. Dec. 8, 2016).

<sup>52</sup> *Akishev*, 2016 U.S. Dist. LEXIS 169787, at \*15 (citing and quoting *European Community*, 136 S. Ct. at 2015); *See also* *Elsevier Inc. v. Grossman*, 2016 U.S. Dist. LEXIS 103444, at \*27-28 (S.D.N.Y. Aug. 4, 2016) (noting and quoting *European Community*, 136 S. Ct. at 2015 "'Congress did not limit RICO to domestic enterprises.'").

<sup>53</sup> *Akishev*, 2016 U.S. Dist. LEXIS 169787, at \*15.

<sup>54</sup> *Id.* at \*16 (quoting *European Community*, 136 S. Ct. at 2111).

is ‘foreign’ or ‘domestic.’”<sup>55</sup> Rejecting the contention that the plaintiff’s residence in Russia was determinative of the site of injury, the district court held that the *locus delicti* of the crime (internet offerings of used cars allegedly located in New Jersey and Pennsylvania), was sufficient to qualify as a “domestic injury.” Some courts have since held that the domestic injury may be determined solely by the legal site of plaintiff’s injury, and not by the place of defendant’s conduct,<sup>56</sup> whereas other courts have rejected this view in favor of a multi-factor analysis which includes whether foreign conduct targeted plaintiff in the U.S.<sup>57</sup>

## II. PART II

The Second Circuit, in 2017, in *Bascuñan v. Elsacan*,<sup>58</sup> addressed *RJR* and the standards to be applied in evaluating the “domestic injury” requirement in RICO cases.<sup>59</sup> Plaintiff, a resident of Chile, sued for civil RICO damages arising from four schemes, each involving theft of funds and/or shares. Defendants argued *RJR*’s extraterritoriality test compelled dismissal because the foreign plaintiff had to be deemed to have suffered injury in the country of its residence, and, thus, plaintiff could not allege a “domestic injury.”<sup>60</sup> Judge Daniels dismissed the case, applying a “residency test,”<sup>61</sup> but the Second Circuit, observing it is not always “self-evident” when an injury is “domestic,” reversed.<sup>62</sup>

<sup>55</sup> *Akishev*, 2016 U.S. Dist. LEXIS 169787, at \*16–17 (quoting *European Community*, 136 S. Ct. at 2111).

<sup>56</sup> *See, e.g., Bascuñan v. Elsaca*, 2016 U.S. Dist. LEXIS 133664, at \*\*17-18 (S.D.N.Y. Sept. 28, 2016), *rev’d and remanded*, 874 F.3d 809 (2d Cir. 2017).

<sup>57</sup> *See, e.g., Tatung Co., Ltd. v. Shu Tze Hsu*, 217 F. Supp. 3d 1138, 1155 (C.D. Cal. 2016) (disagreeing with and expressly refusing to follow the district court decision in *Bascuñan*). Subsequent to the *Tatung* decision, the Second Circuit reversed the district court’s dismissal of all claims in *Bascuñan*. The district court had held that plaintiff could not establish domestic injury, because plaintiff was a citizen and resident of Chile. The Second Circuit reversed with respect to injury to “tangible property,” holding injury to tangible property located in the United States constitutes a “domestic injury” for the purposes of a RICO claim. However, the Second Circuit also held the plaintiff’s injuries to intangible property did not constitute a “domestic injury| in view of plaintiff’s foreign citizenship and residence.

<sup>58</sup> 874 F.3d 806 (2d Cir. 2017).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 809.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 817.

At that time, no Circuit level court had considered exactly how to determine whether a civil RICO claim was “domestic,” a critical issue the Second Circuit needed to resolve. The Second Circuit held that two of the alleged schemes failed to allege “domestic injury.” What was relevant to those schemes was that defendant stole funds owned by a foreign corporation, held in a foreign bank account and, although defendant transferred the funds through U.S. located accounts as part of its effort to conceal the thefts, no “domestic injury” was alleged because the only domestic connections were defendant’s acts. The key extraterritoriality question, the Circuit held, was *where plaintiff was injured, not where defendant was located when plaintiff was injured*, even if proximately, by defendant’s RICO-violating misconduct.

The other two schemes survived an *RJR*-dismissal because *tangible* property, money and bearer shares, were physically located in the U.S., when stolen. Distinguishing injury to tangible and intangible property, *Bascuñan* held that where tangible property is located in the U.S., injury occurs where the property is located, regardless of where plaintiff is located, and regardless of where defendant’s alleged injury-causing actions occurred. *Bascuñan* thus held that, in some circumstances, a foreign plaintiff can allege “domestic injury” sufficient to benefit from RICO remedies, rejecting the proposition that a residency-based test is sufficient, in all cases, to determine extraterritoriality. *Bascuñan* thus makes clear that the test for whether an injury is “domestic” is fundamentally factual and may depend on issues including whether the damaged property is appropriately characterized as “tangible” or “intangible,” a characterization which may itself require factual hearing, depending on the facts in issue.

In *Armada (Singapore) PTE Ltd. v. Amcol Int’l Corp.*<sup>63</sup> the Seventh Circuit held that a “tangible asset” is one “that has a physical existence and is capable of being assigned a value.”<sup>64</sup> A dispositive question was whether a judgment (or a cause of action) was a “tangible asset.” The Seventh Circuit explained that although a judgment is documented by a piece of paper, the “judgment” really does not have a “physical existence.” Rather, as property, a judgment is an “intangible

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<sup>63</sup> 885 F.3d 1090 (7th Cir. 2018).

<sup>64</sup> *Id.* at 1094 (citing definition of “Tangible Asset,” BLACK’S LAW DICTIONARY (9th ed. 2009)).

asset,” one that “can be amortized or converted to cash, such as patents ... or a right to something, such as services paid for in advance.”<sup>65</sup>

The Seventh Circuit continued:

The Second Circuit’s reasoning in *Bascuñán* focused on how to address situations involving tangible property. Here, we must determine where to locate an injury to intangible property. As we noted above, the Supreme Court directs us to focus on where the injury is suffered. To “suffer” is “[t]o experience or sustain ... [an] injury.” Suffer, Black’s Law Dictionary (9th ed. 2009). It is well understood that a party experiences or sustains injuries to its intangible property at its residence, which for a corporation like Armada is its principal place of business.”<sup>66</sup>

In a heavily cited case, *Elsevier Inc. v. Grossman (Elsevier III)*,<sup>67</sup> a foreign plaintiff was held entitled to trial on the issue of whether it suffered “domestic injury” where defendants allegedly engaged in scheme to obtain journal subscriptions at discounted rates and resell the subscriptions to institutions otherwise obligated to pay full price, where journals shipped from the U.S. and/or were authorized for shipment by plaintiff’s employees in the U.S.<sup>68</sup> The defense argued any competitive injury must have occurred outside the U.S. because plaintiff neither established it parted with journals in the U.S., nor had employees in the U.S. that authorized journal shipments to Brazil. Plaintiff ultimately proved 48 of 51 fraudulent subscriptions were shipped from the U.S. or were authorized for shipment by an Elsevier employee in the U.S. Because 48 of 51 subscriptions were “linked to the United States,” plaintiff obtained summary judgment:

Elsevier relinquished control of the journals in the United States under false pretenses and thereby suffered the effects of Grossman’s conduct in the States... Even if Elsevier were a foreign entity, this harm would suffice to constitute a domestic injury for RICO

<sup>65</sup> *Id.* at 1094 (referencing not only the definition of “intangible asset” in BLACK’S LAW DICTIONARY (9th ed. 2009), but also referencing *Blodgett v. Silberman*, 277 U.S. 1, 12 (1928) (concluding that right to receive money was “a chose in action, and an intangible”).

<sup>66</sup> *Id.* at 1094.

<sup>67</sup> 12 Civ. 5121, 2017 U.S. Dist. LEXIS 182859, 2017 WL 5135992 \*1 (S.D.N.Y. Nov. 3, 2017).

<sup>68</sup> *Id.* at \*\*9-10.

purposes...[J]ournal sales are Elsevier’s stock-in-trade, and by sending those goods to Grossman (and, in turn, undisclosed Brazilian institutions) through U.S. channels under the false pretense that Grossman sought the journals for personal use. Elsevier suffered injury in the United States. Elsevier is thus entitled to judgment as a matter of law on its RICO claim, as its only unsatisfied element was that of domestic injury.<sup>69</sup>

*Elsevier* does not provide general guidance as to how to determine whether an injury is “domestic” or “foreign,” but it does make clear “extraterritoriality” analysis is highly fact sensitive.<sup>70</sup> In *Elsevier*, the domestic nature of the injury was only determined after a trial. In some cases, even very substantial numbers of detailed predicates have been found insufficient.<sup>71</sup>

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<sup>69</sup> *Id.* at \*\*11-12.

<sup>70</sup> *Id.* at \*\*7-12.

<sup>71</sup> See, e.g., *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, No. 15-CV-3538, 2018 U.S. Dist. LEXIS 215143; 2018 WL 6725387 (S.D.N.Y. Dec. 21, 2018) (allegation that 50 wires were used insufficient -- “Defendants used U.S. wires to deliver false Sterling LIBOR submissions into the U.S. by Thomson Reuters, (CAC 33); (2) Deutsche Bank engaged in “‘Monday Risk Calls,’ in which traders in New York, London, Tokyo, and Frankfurt discussed with a supervisor their trading positions and strategies in relation to LIBOR rates,” and received directives “promoting manipulation . . . , collusion, and other improper conduct” from this supervisor, (CAC 58); (3) Defendant RBS transacted in Sterling LIBOR-based derivatives with counterparties in the United States, (*id.* 71); (4) “at least one senior UBS manager in its Stamford, Connecticut headquarters directly manipulated UBS’s LIBOR submissions,” and “directed UBS LIBOR submitters to similarly manipulate LIBOR submissions,” (*id.* 85); (5) Defendants Barclays, UBS, RBS, and Deutsche Bank engaged in LIBOR-based transactions from within the United States during the Class Period, (*id.* 93–94, 96); (6) Defendant Deutsche Bank’s conduct “originated from within its Global Finance and Foreign Exchange (‘GFFX’) business unit,” which “extended to GFFX desks abroad including in New York,” (*id.* 14); (7) in a settlement with the New York State Department of Financial Services, Deutsche Bank admitted that its New York Branch manipulated the Sterling LIBOR, (*id.* 53, 55); and (8) Defendant RBS employs traders responsible for trading LIBOR-based instruments in New York, (*id.* 69) – these allegations fell “short of demonstrating that the acts of wire fraud in this case were domestic in nature.” Judge Broderick, holding that it was “clear that the scheme was principally foreign in nature and only incidentally touched the United States” and citing *Petróleos*, explained that “[s]imply alleging some domestic conduct occurred cannot support a claim of domestic application” of RICO. *Sonterra Capital*, 2018 U.S. Dist. LEXIS 215143 at \*\* 71-72 (*citing Petróleos Mexicanos*, 572 F. App’x at 61).

Courts continue to look where the misconduct occurred as a factor in determining whether a domestic injury is alleged,<sup>72</sup> but courts have taken different analytical approaches as several have recognized.<sup>73</sup>

In *Dandong Old N.-E. Agric. & Animal Husbandry Co. v. Hu*,<sup>74</sup> for example, plaintiff alleged RICO domestic injuries based on defendants' alleged price-inflation scheme including damage to Plaintiff's reputation in the U.S. soybean market. Plaintiff alleged that actions causing the injury took place primarily in the U.S., that scheme

<sup>72</sup> See, e.g., *Akishev v. Kapustin*, No. 13-CV-7152, 2016 U.S. Dist. LEXIS 169787 (D.N.J. Dec. 8, 2016), 2016 WL 7165714, at \*8 (U.S.D.C., N.J. Dec. 8, 2016) (domestic injury found where foreign plaintiff defrauded by U.S.-based internet car dealers where "the *locus delicti* of the crimes is committed in the United States.").

<sup>73</sup> See, e.g., *Dandong Old N.-E. Agric. & Animal Husbandry Co. v. Hu*, No. 15 Civ. 10015, 2017 U.S. Dist. LEXIS 122471, 2017 WL 3228239 (S.D.N.Y. August 3, 2017) at \*\*27-28, ("[RJR]... left open the question of determining what constitutes a domestic injury, and federal district courts 'have diverged in their analysis thereof.'" Citing *Elsevier III*, 2017 U.S. Dist. LEXIS 69677, at \*4. In general, courts have adopted one of two lines of reasoning: "[t]he first line ... focuses on where the alleged injury was suffered. The second line ... focuses on where the conduct occurred that caused the injury." *Id.* (citing *Cevdet Aksüt Oğullari Koll. Sti v. Cavusoglu*, No. 14-CV- 3362, 2017, U.S. Dist. LEXIS 45325, at \*4 (D.N.J. Mar. 28, 2017)). In an earlier case, this Court reviewed both lines of reasoning and adopted the former, locus-of-effects approach. See *Elsevier, Inc. v. Grossman*, 199 F. Supp. 3d 768, 781-92 (S.D.N.Y. 2016) ("Elsevier II"), *order clarified sub nom. Elsevier Inc. v. Grossmann*, No. 12 Civ. 5121 (KPF), 2016 WL 7077037 (S.D.N.Y. Dec. 2, 2016). This approach determines the existence of a domestic injury by focusing on where the plaintiff felt the effects of the injury, and not where the defendant committed the injury-inducing acts. A two-step analysis determines where a plaintiff suffered an injury. First, the Court determines "what type of injury a RICO plaintiff has suffered." *Id.* at 786. Second, if the plaintiff has suffered an injury to its business, then the Court asks, "where substantial negative business consequences occurred." *Id.* Other courts in this District have similarly concluded that a domestic injury is determined with reference to where the plaintiff feels the extent of the harm. See, e.g., *Bascuñan v. Daniel Yarur ELS Amended Complaint A*, No. 15 Civ. 2009 (GBD), 2016 WL 5475998, at \*4 (S.D.N.Y. Sept. 28, 2016) (observing that when determining "where an economic injury accrued, courts typically ask two common-sense questions: [1] who became poorer, and [2] where did they become poorer.' ... This inquiry usually focuses upon where the economic impact of the injury was ultimately felt." (internal citations omitted)). These courts have generally found that a domestic injury to a plaintiff's business accrues "where the loss is suffered, which in the fraud context, is where the economic impact is felt, normally the plaintiff's residence." *City of Almaty*, 226 F. Supp. 3d at 282 (internal quotation marks omitted) (citing *Gorlin v. Bond Richman & Co.*, 706 F. Supp. 236 (S.D.N.Y. 1989).").

<sup>74</sup> *Dandong Old N.-E. Agric. & Animal Husbandry Co. v. Hu*, No. 15-CV-10015, 2017 U.S. Dist. LEXIS 122471, \*1 (S.D.N.Y. Aug. 3, 2017).



participants were U.S. domiciled (and employed in the U.S.), that the soybeans were grown and purchased in the U.S., and that defendants garnered much of their illicit profits in the U.S.<sup>75</sup> Plaintiff relied largely on *Tatung Co. v. Shu Tze Hsu*,<sup>76</sup> which “squarely rejected the view that a domestic injury occurs only where a foreign corporation feels the effects wrongful conduct.” *Dandong*, however, noted courts in New York’s Southern District had repeatedly rejected the legal underpinnings of *Tatung* which expressly declined to follow the Second Circuit’s decision in *Bascuñan*, after determining a domestic injury occurs where defendant directs his fraudulent acts.<sup>77</sup> *Dandong* continued:

Judge Nathan, in the *Almaty* decision, “share[d] the *Tatung* court’s hesitation to broadly endorse an absolutist version of the [domestic injury] rule that would, for example, categorically preclude foreign corporations with business operations or property interests maintained in the U.S. from bringing RICO actions to recover for injuries to those assets.” *City of Almaty, Kazakhstan v. Ablyazov*, 226 F. Supp. 3d 272, 284 (S.D.N.Y. 2016), *motion to certify appeal denied*, No. 15 Civ. 5345 (AJN), 2017 WL 1424326 (S.D.N.Y. Apr. 20, 2017). This Court finds that the facts of this case, as did the facts in *Almaty*, “present[] no such circumstances”... *Bascuñan*... defined a domestic injury to occur “where the plaintiff suffered the injury, not at all where the defendant’s alleged conduct took place.” *Id.*<sup>78</sup>

Plaintiff argued a domestic injury is incurred if the fraud “had some effect on . . . relationships with actual or prospective [United States] customers,” under *Elsevier II*,<sup>79</sup> as it claimed defendants’ scheme damaged plaintiff’s relationship with U.S. soybean suppliers, causing harm to its “business reputation within the insular soybean community.” The court, however, distinguished *Elsevier*, observing that in the case before it, plaintiff claimed a domestic injury with respect to soybean contracts shipped outside the U.S. -- so any

<sup>75</sup> 2017 U.S. Dist. LEXIS 122471 at \*36.

<sup>76</sup> 217 F.Supp.3d 1138, 1154 (C.D. Cal. 2016).

<sup>77</sup> *Dandong*, 2017 LEXIS 122471 at \*30.

<sup>78</sup> *Id.* at \*30, n.7.

<sup>79</sup> 199 F. Supp. 3d 768, 788 (S.D.N.Y. 2016).

deprivation of plaintiff's money was felt in China.<sup>80</sup> It was not deprived of property in the U.S. because plaintiff received all the soybeans for which it contracted with U.S. suppliers that shipped the commodity outside the U.S.<sup>81</sup>

So, the court explained, while Defendants' conduct may have impaired Plaintiff's later ability to secure soybean suppliers in the U.S., loss of potential business opportunities is not a RICO cognizable domestic injury -- the expectation of continued contract counterparties among U.S. soybean suppliers is "far too attenuated to suffice" as a domestic injury under RICO. The court similarly rejected plaintiff's argument that defendants' price manipulation caused it specific monetary losses in the form of overpayment on each soybean contract and increased costs associated with letters of credit, interest, and insurance so that by the conclusion of the scheme, damage to plaintiff's reputation led to its processing plant closing for a month and operating at a substantially reduced capacity. The court also noted that in *Cevdet*, the district court rejected the reasoning in *Tatung* in favor of *Elsevier*, agreeing that the "more persuasive" domestic injury test looks to where the plaintiff suffered the injury, not where the RICO predicate acts occurred.<sup>82</sup> The court also cited *Exeed Indus., LLC v. Younis*,<sup>83</sup> wherein it was determined that an industrial material supplier did not suffer a domestic injury because "the initial injury that impacted Plaintiffs" occurred in the United Arab Emirates "where [its] business and economic operations [were] centered".<sup>84</sup> The court concluded that, like the Turkish food supplier in *Cevdet*, which "only felt the harmful effects of the food importer's conversion scheme at its Turkish home base, Plaintiff here only felt the effects of Defendants' overpricing scheme in China."<sup>85</sup>

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<sup>80</sup> *Dandong*, No. 15 Civ. 10015, 2017 U.S. Dist. LEXIS 122471, 2017 WL 3228239 at \*\*32-33.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at \*35.

<sup>83</sup> No. 15-CV- 14, 2016 U.S. Dist. LEXIS 154487, 2016 WL 6599949, at \*3 (N.D. Ill. Nov. 8, 2016).

<sup>84</sup> 2016 U.S. Dist. LEXIS 154487 at \* 8.

<sup>85</sup> *Dandong*, No. 15 Civ. 10015, 2017 U.S. Dist. LEXIS 122471, 2017 WL 3228239 at \*14. The court explained that after Defendants allegedly overpriced the soybean contracts and siphoned the excess funds, plaintiff terminated ninety employees and reduced its soybean production in its Dandong City factory and while plaintiff incurred attorneys' fees in the U.S., those expenses were paid from China -- so regardless of where the conspirators' conduct took place, plaintiff's injury was felt in China, the only place its business had ever been located. *Id.* at \*36.

In the Seventh Circuit case of *Armada (Singapore) PTE Ltd. v. Amcol Int'l Corp.*,<sup>86</sup> plaintiff, a Singapore shipping company sued an Illinois defendant for impairing its efforts to recover on contract breach claim. Relying on the rule that a party experiences or sustains injury to its property at its residence, the Seventh Circuit, with little commentary, held that because plaintiff's principal place of business was Singapore, any harm to its intangible bundle of litigation rights must have been suffered in Singapore and so plaintiff lacked a domestic injury.<sup>87</sup> Its singular focus on residence, however, has been rejected by the Third Circuit as too narrow an inquiry to be helpful in more complex cases raising extraterritoriality issues, as discussed in detail in Part III.<sup>88</sup>

In a particularly interesting recent district court decision arising in the First Circuit, *Government of Bermuda v. Lahey Clinic, Inc.*,<sup>89</sup> the Government of Bermuda ("Bermuda") sued a clinic and hospital alleging bribes and other misconduct. Plaintiff, alleging three RICO schemes, argued its claims were a permissible domestic application of § 1964(c), relying on *Tatung Co., Ltd. v. Shu Tze Hsu*,<sup>90</sup> and *Akishev v. Kapustin*.<sup>91</sup> The court, observing that most courts did not focus on where the RICO predicate acts occurred, but where plaintiffs' injuries were felt, a point it noted was made in *Cevdet Aksut Ogullari Koll. Sti v. Cavusoglu*,<sup>92</sup> did not find plaintiff's arguments persuasive. The case illustrates some of the difficulties in applying the rules the courts have articulated.

The first scheme, referred to as the "scanning scheme," involved defendants conducting medically unnecessary scans at two on-island clinics (the "Brown Clinics") and interpreting imaging results forwarded electronically from the Brown Clinics in Bermuda to Lahey, in Massachusetts. Patient referrals for diagnostic scanning at the

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<sup>86</sup> 885 F.3d 1090 (7<sup>th</sup> Cir. 2018).

<sup>87</sup> *Id.* at 1095.

<sup>88</sup> *Humphrey v. GlaxoSmithKline PLC*, 905 F.3d 694, 709 (3d Cir. 2018) ("...we think the *Armada* rule is too inflexible to be used in resolving cases where the nature of the injured property interest is not 'self-evident.'").

<sup>89</sup> No. 17-cv-10242-IT, 2018 U.S. Dist. LEXIS 3896, 2018 WL 1243954 \*1 (D.MA Mar. 8, 2018).

<sup>90</sup> 217 F. Supp. 3d 1138, 1155 (C.D. Cal. 2016) (foreign corporation suffered a domestic injury when it was harmed "in the course of doing business" in the U.S.).

<sup>91</sup> No. CV 13-7152(NLH) (AMD), U.S. Dist. LEXIS 169787, 2016 WL 7165714 \*1 (D.N.J. Dec. 8, 2016) (finding domestic injury when foreign plaintiffs "traveled" to the U.S. via the internet and purchased cars falsely advertised on a U.S.-based website that were never delivered or were otherwise misrepresented).

<sup>92</sup> 245 F. Supp. 3d 650, 657 (D.N.J. 2017).

Brown Clinics were obtained through local physician kickbacks resulting in thousands of medically unnecessary tests, at Bermuda's expense. These tests were paid for by Bermuda public insurers, causing the Standard Premium Rate for the Standard Health Benefits package provided to each Bermudian citizen to more than doubled between fiscal 2007 and 2016 and, therefore, insured Bermudians paid higher premiums and Bermuda paid higher subsidies. The court, rejecting plaintiff's argument, found payments for the scans were made by the Brown Clinics out of their own accounts so the "relevant property always remained abroad, and these injuries did not arise from any pre-existing connection between [the plaintiff] and the United States."<sup>93</sup> The transactions, moreover, allegedly resulted in unnecessary payments *in Bermuda* and so did not cause injury to U.S. business or property as the complaint did not allege these payments, i.e., money (tangible property), were made from U.S. bank accounts.<sup>94</sup> Citing *Bascuñán*, it held the original geographic location of misappropriated funds was controlling, and, no domestic injury existed as there was no U.S. misappropriation of domestic funds.<sup>95</sup> The alleged increase on premium costs paid by the insured population and level of subsidies Bermuda paid were not a "domestic injury" because Bermuda did not allege the Standard Health Benefits or Standard Premium Rate applied to reimbursements outside Bermuda, and did not allege insurance reimbursements for scans conducted in Bermuda were paid from U.S.-based accounts.<sup>96</sup>

The second scheme, referred to as the "Bidding Scheme," involved two subcontracts, the first, to develop a long-term healthcare strategy for the island and "revamp" Bermuda's state-run hospital, King Edward Memorial Hospital ("KEMH") and, the other, to develop "FutureCare," a Bermudian public insurance plan. With respect to the latter subcontract, Brown allegedly used his "influence and connections" to ensure that Lahey was favored over other potential U.S. healthcare providers, including Johns Hopkins, for contracts relating to "FutureCare."

The court held that assuming the alleged conduct inflicted the type of "competitive injury" prohibited by RICO's substantive

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<sup>93</sup> *Bascuñán v. Elsaca*, 874 F. 3d 806, 819 (2d Cir. 2017).

<sup>94</sup> *Gov't. of Bermuda v. Lahey Clinic, Inc.*, 2018 U.S. Dist. LEXIS 38696 at \*\*12-15.

<sup>95</sup> *Id.* at \*14.

<sup>96</sup> *Id.* at \*\*14-15.

provisions, both projects involved Bermuda-based work whose effects were felt in Bermuda. Plaintiff did not allege payments for the Kurron America project or any other KEMH-related work were made from Bermuda's U.S.-based bank accounts.<sup>97</sup> Although Bermuda alleged Lahey physicians traveled to Bermuda from Massachusetts, saw patients at the *state-run hospital* and that Lahey secured a prestigious appointment as a Clinical Advisor for KEMH's General Surgery and Outpatient Care services, these were Bermuda-based.<sup>98</sup> Although Bermuda alleged Brown used influence to assure Lahey was favored over other potential U.S. healthcare providers, including Johns Hopkins, for "FutureCare" contracts, FutureCare was a Bermudian public insurer reimbursing healthcare costs of Bermudian residents.<sup>99</sup> No injury arose from these contracts in the U.S. Although Johns Hopkins, whose domestic profits might have been competitively injured might have a domestic injury, Bermuda did not.<sup>100</sup>

In the third scheme, referred to as the "Preferred Provider Scheme," Bermuda public insurers made Lahey a "preferred provider" of medically necessary services not available in Bermuda and, as a result, Lahey treated "[h]undreds of Bermudians" who travel to Lahey in Massachusetts each year for treatment, and it services Bermudians remotely from its campus in Massachusetts. Bermuda claimed injury to U.S. property based on Bermuda's payment of tens of millions of dollars from and through U.S. bank accounts to Lahey, in the U.S., for services Lahey corruptly obtained and carried out in the U.S. Because Bermuda alleged payment for these services was made "from and/or through Bermuda's bank accounts, or those of its agents, in the United States,"<sup>101</sup> the court found the domestic injury requirement was met, on the assumption payment through a domestic agent is analogous to domestic payment by a principal.<sup>102</sup>

However, Bermuda claimed it was injured by paying for "overseas services in the United States tainted by bribes."<sup>103</sup> This basically meant, the court held, that because Lahey "potentially obtained a greater opportunity to service Bermudian residents by becoming a preferred provider through bribery, paying Lahey for even

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<sup>97</sup> *Id.* at \*\*15-17.

<sup>98</sup> *Id.* at \*16.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*17.

<sup>101</sup> *Id.* at \*\*17-20.

<sup>102</sup> *Id.* at \*17.

<sup>103</sup> *Id.* at \*18.

medically *necessary* services is inherently injurious to Bermuda.”<sup>104</sup> The court held that Bermuda failed to show the preferred provider scheme led to an economic injury.

Although, as a preferred provider, Lahey provided “medically necessary services not available in Bermuda” to Bermudians traveling abroad, Bermuda did not allege Bermuda paid more for Lahey’s services than it would have, with another provider, or that Bermudian patients received lower-quality services, or that Bermuda paid for any services for which it would not have paid otherwise.<sup>105</sup> It held that Bermuda’s involvement in the claims adjudication process illustrates Lahey’s provision of these services did not injure Bermuda economically. Bermuda “negotiate[d] agreements for covered services and established rates with overseas providers,”<sup>106</sup> and each claim for services was adjudicated “pursuant to policies set by the Bermudian Government” by Bermuda’s claims processing agents who “specialize in cost containment.”<sup>107</sup>

The court concluded that while a case might be brought by a plaintiff who could allege competitive injury as a result of this scheme, such as by Lahey’s U.S. competitors, Bermuda failed to allege it suffered costs it would not have otherwise incurred.<sup>108</sup>

The court dismissed the RICO claims.

### III. PART III

#### A. The Third Circuit -- *Humphrey v. GlaxoSmithKline PLC*

While *Bascuñan* held that a foreign corporation’s place of incorporation should be the sole determinant of whether an intangible injury should be labeled a “domestic injury,” and other cases cited in Part II above also require that a plaintiff’s place of incorporation be the determining factor in evaluating whether injury to intangible property constitutes a “domestic injury,” other cases have employed a multi-factor analysis. The rationale for using a multi-factor analysis is perhaps most clearly stated in *Humphrey v. GlaxoSmithKline PLC*,<sup>109</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at \*19.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at \*\*19-20.

<sup>109</sup> 905 F.3d 694 (3d Cir. 2018).

where plaintiff alleged that the reputation and goodwill of its Chinese business was destroyed by defendants' fraudulent acts and the RICO question before the court was whether plaintiff's injury was domestic or foreign. Noting that *RJR* provided little guidance as to how to determine *where* an injury was suffered,<sup>110</sup> and that the Second Circuit, construing *RJR*, had rejected a bright-line rule limiting RICO claims to U.S. residents based solely on the "location of the plaintiff's corporation,"<sup>111</sup> it concluded that "[a] domestic injury under § 1964(c) is found where the relevant factors, appropriately weighed, establish that the alleged harm was suffered in the United States."<sup>112</sup> The Third Circuit noted some courts applied a "locus of effects" test, focused on where plaintiff felt the effects of injury, rather than where the injurious acts took place and, so, largely focused on plaintiff's residence or principal place of business; others focused on where misconduct was "targeted" or "directed."<sup>113</sup>

Discussing *Bascuñan*, it noted that the Second Circuit was addressing *tangible* property in the U.S. and, therefore, reasoned plaintiff had a right to expect U.S. laws to apply to any damage to that property – similar reasoning suggested that rule should extend to a foreign plaintiff with U.S.-located property.<sup>114</sup> Noting that Humphrey's alleged injuries were to *intangible* business interests, i.e., reputation and goodwill, it observed that relying on *tangible* factors such as location of lost funds, damage to property or plaintiff's residence would be of little analytical use and it stated could even be "very misleading."<sup>115</sup>

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<sup>110</sup> *Id.* at 700. ("...since the plaintiffs in *RJR Nabisco* had waived their claims for domestic injuries, the Court did not need to explain how courts should determine whether an alleged injury has been suffered domestically or abroad. Moreover, as the District Court observed here, there is a dearth of case law grappling with the *RJR Nabisco* decision. In addition, those courts that have considered whether an alleged injury was suffered in the United States have applied varying standards. Thus, there is no consensus on what specific factors must be considered when deciding whether an injury is domestic or foreign.")

<sup>111</sup> *Id.* at 704 (eschewing reliance on "location of the plaintiff's residence or the defendant's alleged misconduct") (citing *Bascuñan v. Elsaca*, 874 F.3d 809, 820-21 (2d Cir. 2017).

<sup>112</sup> *Id.* at 707.

<sup>113</sup> *Id.* at 701-02.

<sup>114</sup> *Id.* at 703.

<sup>115</sup> *Id.* at 702.

Rejecting a bright-line, one-size-fits-all approach,<sup>116</sup> the Third Circuit held a court should employ a fact-sensitive “multi-factor” test that examines, among other things: plaintiff’s residency, the location of plaintiff’s principal place of business, where plaintiff performs services, where agreements are entered and what law governs those agreements, where underlying factual events – such as meetings or fraudulent statements occurred,<sup>117</sup> and whether plaintiff has assets and offices in the U.S., with no factor being presumptively dispositive.<sup>118</sup>

Noting plaintiffs lived in China (the location of their principal place of business), that services were provided in China, that the relevant consultancy agreement was entered into in China and that Chinese law was designated to apply (in fact, a case cover sheet indicated the

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<sup>116</sup> *Id.* at 707 (“...the applicable factors depend on the plaintiff’s allegations; no one factor is presumptively dispositive.”).

<sup>117</sup> *Id.* The court discussed *Cevdet Aksut Ogullari Koll Sti v. Cavusoglu*, 245 F.Supp.3d 650 (D.N.J. 2017) in which the District Court, focusing on the fact the business was located and operated out of Turkey, found no domestic injury occurred even though plaintiff claimed it lost U.S.-based customers. That court, nevertheless, held, in principle, that a foreign corporation with “substantial business operations within the United States” could, hypothetically, assert a RICO domestic injury because the injury could be felt in the U.S.” *Id.* at 704. (citing and quoting *Cevdet*). On appeal to the Third Circuit, the *Cevdet* Court explained that while harm to physical property is deemed to occur where the property is located, where injury is to intangible business interests, the focus should be on where the *effects* of the predicate acts are experienced, citing the *Humphrey* factors. *Cevdet Askut Ogullari Koll Sti v. Cavusoglu*, 2018 U.S. App. LEXIS 32492, 2018 WL 6016549 (3d Cir. November 16, 2018). The Third Circuit in *Humphrey* also discussed *Elsevier*, 199 F.Supp.3d 768, 786 (S.D.N.Y. 2016) noting that, there, the District Court, observing that although a domestic injury could be shown by alleging an “effect” on Plaintiffs’ relationships with actual or prospective U.S. customers, no such allegations were pleaded. *Elsevier*, 199 F.Supp.3d at 788. On post-trial motions, the court held that because plaintiff relinquished control of the journals in the U.S., it suffered the effects in the U.S. and, therefore, a domestic injury occurred. *Elsevier* explained “[i]f the plaintiff has suffered an injury to his or her *business*, the court should ask where substantial negative business consequences occurred. By contrast, if the plaintiff has suffered an injury to his or her *property*, the court should ask where the plaintiff parted with the property or where the property was damaged.” 905 F.3d at 705, n.72.

<sup>118</sup> The court also discussed *Dandong Old N.-E. Agric. & Animal Husbandry Co. v. Hu*, No. 15 Civ. 10015, 2017 U.S. Dist. LEXIS 122471, 2017 WL 3328239 (S.D.N.Y. August 3, 2017), discussed above, *supra* notes 44, 73-75, 77-78, 80-81, and 85 and accompanying text, disregarding location of predicate acts, focusing only on where the effects of the predicates were felt – the Third Circuit stated it found *Dandong*’s analysis “particularly helpful” because it was “nuanced” and had considered the “totality of circumstances,” without relying on any single circumstance. *Humphrey*, 905 F.3d at 706.



underlying incident occurred in China), and the fact that plaintiffs did not allege they had any offices, assets or other property in the U.S., the Third Circuit concluded plaintiffs had failed to allege a domestic injury, even though they alleged injury to good will and the loss of (un-identified) actual and prospective U.S. customers.<sup>119</sup>

The Third Circuit expressly stated it was aware the approach it was taking in *Humphrey* had been rejected by the Seventh Circuit in *Armada (Singapore) PTE Ltd. v. Amcol Int'l Corp.*<sup>120</sup> It explained that *Armada's* approach, reliant on the rule that a party experiences or sustains injury to its intangible property at its residence, was neither “helpful” nor “persuasive,” on the facts before it.<sup>121</sup> Although *Armada's* residence-based rule is frequently applied, as the Third Circuit observed, it noted that it has rarely been applied in the RICO context to injuries extending beyond U.S. borders and even less frequently to alleged RICO injuries to intangible property.<sup>122</sup> Thus, although a litigant’s residence or principal place of business is often a good starting point, as the *Humphrey* Court explained, it is just one factor that may be used to inform inquiry and, where the nature of injured property interest is not self-evident, the concept of “residence” is too “inflexible” to be useful.<sup>123</sup>

*Humphrey* noted the residency-based rule would preclude all foreign plaintiffs alleging intangible injuries from recovering under §1964 (c) regardless of their alleged connection to the U.S, even where all injury-causing action took place in the U.S.<sup>124</sup> From a policy perspective, reading a rigid rule of residence as the determining factor as to where a person is injured seems incompatible with the policies underlying RICO, generally, i.e., to provide a RICO remedy for any [every] person injured in their business or property by RICO predicate crimes, as well as the Corporate Standing Doctrine, which is designed to protect all company owners of a business entity (against asset exhaustion by a single plaintiff shareholder),<sup>125</sup> and, as well, extraterritoriality, itself, which is intended to help identify when a claim bears a

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<sup>119</sup> *Humphrey*, 905 F.3d at 708.

<sup>120</sup> *Id.* (discussing *Armada (Sing.) PTE, Ltd. v. Amcol Int'l Corp.*, 885 F.3d 1090 (7th Cir. 2018)).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 709.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> 18 U.S.C. §1964 (c); *See also infra* n. 157.

sufficiently strong relationship to the U.S. as to justify invoking RICO remedies.<sup>126</sup>

In *Akishev v. Kapustin*,<sup>127</sup> discussed above, District Judge Hillman held that merely because plaintiffs resided in Russia and never physically travelled to the U.S. did not automatically “classify” their injuries as “foreign.”<sup>128</sup> Domestic injury existed, it held, because the foreign plaintiff was defrauded by U.S.-based internet car dealers and “the *locus delicti* of the crimes was committed in the United States.”<sup>129</sup> The location of the fraudulent conduct was an important factor in determining whether injury was “domestic,” as sales were on-line. The Third Circuit, in *Humphrey*, noted that other courts had observed that the *Akishev* Court appeared to focus on where the plaintiffs’ injuries were felt, which it found was on defendant’s U.S. based website -- and, therefore, in the U.S. Its conclusion was partly policy based. Finding that the injury was not “domestic,” the *Akishev* Court stated would, in effect “allow the United States to become a haven for internet fraud.”<sup>130</sup> It held:

Plaintiffs should be afforded the same remedies available to a United States citizen who purchased a car from defendants in the exact same manner and were defrauded in the exact same scheme... Plaintiffs ...have come to the place where they were induced by fraud to spend their money and where those ill-gotten proceeds were realized and retained.<sup>131</sup>

### **B. District Decisions in the Ninth Circuit -- *Tatung Co. Ltd. v. Shu Tze Hsu***

In *Tatung Co. Ltd. v. Shu Tze Hsu*,<sup>132</sup> plaintiffs maintained a business “hub” in the U.S. and extended credit and delivered goods to

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<sup>126</sup> The *Humphrey* court noted that although courts examining extraterritoriality issues have rarely explicitly stated they are engaged in a multi-factor inquiry, this is, in fact, what they have been largely doing. 905 F.3d at 707.

<sup>127</sup> No. 13 Civ. 7152, 2016 U.S. Dist. LEXIS, 2016, 2016 WL 5475998 (D.N.J. Dec. 8, 2016). *See also* *Matyev v. Kapustin*, No. 16 Civ. 530, 2017 U.S. Dist. LEXIS 58626, 2017 WL 1398648 (D.N.J. April 18, 2017) (companion case to *Akishev*).

<sup>128</sup> *Akishev*, 2016 WL 5475998 at \*16.

<sup>129</sup> *Id.* at \*\*20-21.

<sup>130</sup> *Id.* at \*19.

<sup>131</sup> *Id.* at \*20.

<sup>132</sup> 217 F. Supp. 3d 1138 (C.D. Cal. 2016).

a defendant in the U.S.<sup>133</sup> Defendant defaulted on a credit obligation and plaintiff obtained an arbitration judgment in California. Plaintiff alleged that defendants conspired to prevent collection of the judgment, targeting their conduct at California, to impair plaintiff's rights.<sup>134</sup> Defendants relied almost exclusively on the analysis in the then recent district decision in *Bascuñan* for the proposition that whether an injury is domestic for civil RICO purposes depends exclusively on where plaintiff suffered injury, not where defendant's alleged conduct took place.<sup>135</sup> Plaintiff's RICO claim had to fail, they argued, because plaintiff was a foreign corporation and could not suffer a domestic injury under *RJR*.<sup>136</sup>

District Judge Carter disagreed and declined to follow *Bascuñan*.<sup>137</sup> He began by noting that in *RJR*, the Court expressly avoided defining "domestic" and "foreign" injury and that the parties in *RJR* had stipulated plaintiffs' injuries were not domestic.<sup>138</sup> This is why, in that case, he explained, it made sense for the Court to couch its analysis in terms of "injuries suffered outside of the United States" and "entirely . . . abroad."<sup>139</sup> While *RJR* observed that RICO lacks "foreign-oriented language," which weighed towards finding extraterritoriality, it, nevertheless, explained that the absence of such language "does not mean that foreign *plaintiffs* may not sue under RICO."<sup>140</sup> Judge Carter held plaintiff could plausibly argue its U.S. business was harmed by defendants' misconduct, with injury felt in the U.S., where plaintiff had a U.S. judgment, entitled to U.S. law protection. Defendant's conduct so clearly occurred in California, he held, that "[it] would be absurd to find that such activity did not result in a domestic injury to Plaintiff."<sup>141</sup>

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<sup>133</sup> *Id.* at 1155-56.

<sup>134</sup> *Id.* at 1156.

<sup>135</sup> *Id.* at 1154.

<sup>136</sup> *Id.* ("Defendants rely almost exclusively on *Bascuñan* for the proposition that whether an injury is domestic for the purposes of civil RICO depends exclusively on where the plaintiff suffered the injury, not at all on where the defendant's alleged conduct took place.")

<sup>137</sup> *Id.* at 1155. ("...this Court declines to follow *Bascuñan*...[T]his Court finds that *RJR Nabisco* does not bar foreign plaintiffs who have suffered only economic injuries from bringing suit pursuant to civil RICO's private right of action.")

<sup>138</sup> *Id.* at 1154-55.

<sup>139</sup> *Id.* (quoting *RJR Nabisco*, 136 S. Ct. at 2108, 2111).

<sup>140</sup> *Id.* at 1155 (quoting *RJR Nabisco*, 136 S. Ct. at 2110, n.12 (emphasis added)).

<sup>141</sup> *Id.* at 1156.

Judge Carter further stated his concern that *Bascuñan* would amount to an immunity for U.S. companies which, acting entirely in the U.S., violate civil RICO at the expense of foreign corporations doing business in this country.<sup>142</sup> It cannot be the case, he stated, that “the mere fact that a loss is economic means that foreign corporations are unable to avail themselves of the protections of civil RICO, even in cases where all of the actions causing the injury took place in the United States.”<sup>143</sup> He continued:

It is ludicrous to think that a foreign individual could not sue under civil RICO for financial injuries incurred while they are working, traveling, or doing business in this country as the result of an American RICO operation. But, this is the logical application of the *Bascuñan* rule.<sup>144</sup>

Judge Carter found a domestic injury existed. Plaintiff was a foreign corporation doing business in the U.S., with a corporation, wholly owned by an American company,<sup>145</sup> and, although foreign, plaintiff maintained a “hub” in the U.S.<sup>146</sup> In the course of doing business, Plaintiff extended credit and delivered goods to its creditor in the U.S. and, when plaintiff was not paid by its creditor, it pursued arbitration in the U.S. under a binding arbitration agreement requiring arbitration in Los Angeles.<sup>147</sup> The arbitration demand was delivered to the creditor at their California address and, after three years of arbitration, Plaintiff finally received an award, which was confirmed by a state court in California, and which was enforceable in California.<sup>148</sup>

Plaintiff was unable to collect on its judgment because, allegedly, its creditor and many others engaged in a RICO conspiracy to render the creditor an “empty shell” by siphoning assets out of the creditor through fraudulent transfers.<sup>149</sup> Seven of the alleged individual conspirators were American citizens, as were six entity conspirators - at least one of the eventual transferees was an American corporation.<sup>150</sup> The litigation was Plaintiff’s attempt to hold responsible

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<sup>142</sup> *Id.* at 1155.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1156.

<sup>146</sup> *Id.* at 1555.

<sup>147</sup> *Id.* at 1156.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

those entities and individuals who conspired to prevent Plaintiff from recovering its funds.

Quoting plaintiff's briefing, Judge Carter held that "defendants specifically targeted their conduct at California" with the aim of "thwarting Tatung's rights in California" and he concluded it "would be absurd to find that such activity did not result in a domestic injury to Plaintiff."<sup>151</sup> He further noted that his decision was consistent with other decisions in the Ninth Circuit that interpret *RJR Nabisco's* domestic injury requirement, including *Uthe Tech. Corp. v. Harry Allen and Aetrium, Inc.*, which reached a different result on different facts, as detailed below.<sup>152</sup>

#### IV. PART IV

##### A. The Corporate Standing Doctrine

Another rationale for applying a multi-factor analysis exists where a foreign corporation has a large number of U.S. shareholders who are necessarily and, thus, inevitably injured as result of injury to the business entity in which they are invested. RICO standing analysis has traditionally deemed shareholder to be "derivative" of injury suffered by the corporate entity and, hence, to be causally "remote." Nevertheless, shareholders stand to benefit from RICO claims brought by

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<sup>151</sup> *Id.*

<sup>152</sup> *Tatung Co., Ltd.*, 217 F.Supp. at 1156-57 (discussing *Uthe Tech. Corp. v. Harry Allen and Aetrium, Inc.*, No. C 95-02377 WHA, 2016 WL 4492580 (N.D. Cal. Aug. 26, 2016)). Judge Carter distinguished *Uthe* on the ground that in that case, plaintiff was an American corporation which owned 100% of a Singaporean corporation and alleged a scheme to siphon business from its wholly-owned subsidiary. In *Uthe*, alleged fraudulent activity occurred in Singapore, perpetrated by Singaporean defendants and plaintiff's only injury was the diminution in value of its stake in the Singaporean corporation, an injury the court characterized as "domestic." *Uthe*, 2016 WL 4492580, at \*2. However, the court found that as to injury to the Singaporean corporation, its "claims . . . flowed only from a foreign conspiracy" namely "siphoning [that] occurred a third of the way around the globe" with no injury occurring in the U.S. *Id.* at \*3. *Uthe* dismissed the RICO claim because a shareholder cannot bring a RICO action where the wrong alleged was a "fraud on the corporation." *Id.* at \*1-2. In *Tatung*, the Corporate Standing Rule was not involved, some of the alleged conspirators were American and many of the actions constituting part of the RICO scheme took place in California, not, to quote the court -- a "third of the way around the globe from our shore." See *Uthe*, 2016 WL 4492580, at \*3. *Uthe* is discussed in more detail immediately below in Part IV, addressing in more detail the Corporate Standing Doctrine.

the corporation in which they hold an ownership interest. Although the shareholders lack individual standing to bring legal claims to protect their interests, damage to their ownership is compensated through the entity recovery.

In the context of RICO extraterritorial analysis, damage to the intangible ownership rights of a substantial number of U.S. shareholders may have a far greater domestic impact than a similar intangible injury suffered by a foreign corporation with all foreign shareholders.

The Corporate Standing Doctrine concentrates all of a company's shareholders' rights of action into the entity of which they are owners.<sup>153</sup> It does so to protect shareholders, collectively, against the potential exhaustion of assets which might be effected if a single shareholder were to recover on its claim and exhaust a company's assets through enforcement of a damage award.<sup>154</sup> Where the entity recovers, the shareholders benefit, collectively, and they will recover, *pro rata*, based on the impact that the recovery has on the value of their shares,<sup>155</sup> in direct proportion to the percentage of shares that shareholder owns in the corporation.<sup>156</sup>

All owners are, thus, protected, proportionally and equitably, a point RICO commentators have observed in discussions of standing and direct injury in RICO litigation.<sup>157</sup>

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<sup>153</sup> Courts have generally held that a plaintiff lacks standing to bring a RICO action for injuries which are derivative of an injury to another entity, such as the injuries a shareholder might suffer from financial harm inflicted upon a corporation. *See, e.g.,* *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993) ("Since the shareholder's injury, like that of the creditor, generally is derivative of the injury to the corporation, the shareholder's injury is not related directly to the defendant's injurious conduct." (citing *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 269-70 (1992))).

<sup>154</sup> Laurence A. Steckman and Kenneth Moltner, *Recent Developments in Direct Injury Analysis in the Second Circuit: An examination of the Injury and Causation Elements of RICO Standing*, NEW YORK LAW JOURNAL, Jan. 5, 1992, at 1, col. 1, reprinted 15 RICO L. REP. 274, Feb. 1992.

<sup>155</sup> *Id.* at 277.

<sup>156</sup> *Id.*

<sup>157</sup> The Corporate Standing Doctrine implicitly recognizes that entity shareholders are injured by RICO misconduct by assuring they will experience a *pro rata* recovery for injury to their shares. Although the Corporate Standing Doctrine denominates the entity as having exclusive standing to recover for injury to the company, this merely defines a mechanism to assure the shareholders, who own the business, will have their own rights vindicated, in an efficient matter, that does not favor any particular shareholder who might be inclined to file a suit, for his personal benefit. *See generally* Steckman and Moltner, *supra* n. 154, at 275-277.

The above described rule, which we refer to as a “Shareholder Standing Rule,” implicitly recognizes that where entity shareholders are injured as a result of corporate losses, shareholder rights must be protected. This is equitably accomplished by allowing the corporation to recover its losses, through which the shareholder recovers proportionately the loss of value of shares. The Standing Rule thus creates a mechanism which assures the shareholder owners of a business will have their individual rights vindicated in an efficient manner that does not favor any particular shareholder who or which might be inclined to file a suit and exhaust, for personal benefit, what assets exist.<sup>158</sup>

Courts analyzing RICO causation have recently focused on the directness of injury rather than on foreseeability of an injury. In *Hemi Group LLC v. City of New York*,<sup>159</sup> the majority rejected the view of dissenting Justice Breyer who would have held that foreseeability was a sufficient basis for proximate causation (i.e., defendant intended to inflict the foreseeable tax loss injuries upon plaintiff),<sup>160</sup> by pointing

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<sup>158</sup> If a shareholder could recover for injury to a corporation, the shareholders who were not part of the legal action would be left out of any recovery. Conversely, when the corporation recovers for an injury it has suffered, the benefit to the corporation as a result of the recovery is shared by the shareholders in proportion to the percentage of shares they hold.

<sup>159</sup> *Hemi Group LLC v. City of New York*, 559 U.S. 1 (2010).

<sup>160</sup> *Id.* at 12. In *Hemi*, the City of New York sued internet tobacco sellers for engaging in a scheme which involved failure to file Jenkins Act reports which required tobacco sellers to report their customers to the appropriate state authorities. The cigarette end-buyer was responsible to pay the tax. However, only through receipt of the Jenkins Act reports could the State (or New York City) identify the taxpayers. The *Hemi* Defendants specifically advertised that they would not file Jenkins Reports and would not disclose its customer lists to government agencies. As a result, internet cigarette buyers who wanted to avoid paying high New York state cigarette taxes could buy their cigarettes over the internet knowing the purchases would not be reported and they would not have to pay taxes on their cigarette purchases. Because the State shared the Jenkins Reports with the City, it was foreseeable that the *Hemi* Defendants open flouting of the Jenkins Report requirements would result in the cigarette purchasers’ non-payment of state and local taxes, which would prevent the City of New York from identifying the internet cigarette purchasers who owed state taxes, preventing the City from collecting state taxes as the *Hemi* Defendants’ business model involved attracting customers who wished to avoid state and local taxes by advertising they would not report their information to the authorities. The *Hemi* Defendants’ refusal to file Jenkins Reports effectively prevented the City from identifying those *Hemi* Defendants customers who owed taxes. Despite obvious foreseeability, the majority (or plurality) in *Hemi* held foreseeability alone insufficient to establish proximate cause. *Hemi* further held that, notwithstanding foreseeability, the indirectness of the City’s injury compelled dismissal on the ground that there was

out that foreseeability was not mentioned in either of the opinions in the leading RICO opinions *Anza v. Ideal Steel Supply Corp.*,<sup>161</sup> or *Holmes v. Securities Investor Prot. Corp.*<sup>162</sup> Some courts have taken this exchange as a formal rejection of foreseeability concepts as relevant to RICO proximate causation analysis.<sup>163</sup> However, the *Hemi* Court did not completely reject any consideration of foreseeability; rather, it held that the dissent's reliance solely on foreseeability was inadequate, in itself, to establish proximate causation.<sup>164</sup> Its focus on directness of injury in RICO actions,<sup>165</sup> however, has resulted in criticism,<sup>166</sup> with some commentators strongly favoring Justice Ginsberg's

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no proximate cause between the *Hemi* Defendants' conduct and the City's injury because New York State had a more direct injury than the City. Notably, it did not determine whether the State would have had standing if it rather than the City had sued. *Id.* at 5-6, 9, 11-12, 16, 17.

<sup>161</sup> *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

<sup>162</sup> *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258.

<sup>163</sup> DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO 6.04, at 15 (2018) ("Some lower courts have taken this exchange as a formal rejection of foreseeability concepts-typically considered under common-law causation theory- in determining proximate causation for RICO claims."). *See also id.* at n. 25.34 (citing *Koch v. Royal Wine Merchants, Ltd.*, 907 F. Supp. 2d 1332, 1340 (S.D. FL 2012); 2012 U.S. Dist. LEXIS 172480, at \*13 (S.D. Fla. Dec. 5, 2012) ("...the Supreme Court specifically rejected an interpretation of proximate cause that would turn on foreseeability.")).

<sup>164</sup> *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 12 (2010).

<sup>165</sup> *Id.* ("[T]he focus is on the directness of the relationship between the conduct and the harm."). *See also* *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) ("The direct-relation requirement avoids the difficulties..."); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006) ("The requirement of a direct causal connection is especially warranted..."); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) ("[P]roximate cause" requires some direct relation between the injury asserted and the injurious conduct alleged). *See generally* *Kaiser Foundation Health Plan, Inc. v. Pfizer, Inc. (In re Neurontin Mktg. & Sales Practices Litig.)*, 712 F.3d 21 (1<sup>st</sup> Cir. 2013) (describing Supreme Court precedent).

<sup>166</sup> *See, e.g.*, THE SUPREME COURT, 2009 TERM: LEADING CASES: III. Federal Statutes and Regulations: F. RICO Act, 124 HARV. L. REV. 390, 396-397 ("...[w]hile the plurality and the dissent take conflicting positions with regard to how proximate causation should be assessed - with the plurality considering the number of steps between the defendant's action and the resultant harm to the plaintiff, and the dissent considering the foreseeability of the defendant's actions causing harm to the plaintiff - it is not clear that either approach convincingly leads to the conclusions that the plurality and dissent reach in this case. One might quite reasonably argue that one standard is preferable to the other as a policy matter. But regardless of the standard applied, causation is a legal concept that a court can easily manipulate in order to achieve a particular outcome. A 'directness' standard provides definitive



preference for a foreseeability test,<sup>167</sup> on either procedural,<sup>168</sup> or other grounds, some suggesting *Hemi* actually established a new, binding doctrine.<sup>169</sup>

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legal conclusions only if there is a metric for assessing the ‘directness’ of a causal chain. The plurality opinion provides the illusion of utilizing some sort of definitive metric when it notes the general unwillingness of courts to ‘go beyond the first step.’ But the Court has certainly demonstrated its willingness to go more than one step in RICO suits. Even if the Court were to definitively establish a maximum number of intervening steps in a causal chain after which it could not be said that one actor had proximately caused harm to another, the ultimate finding of causation would still turn on the way in which the causal chain was described.”)

<sup>167</sup> See, e.g., *id.* at 400 (“...Justice Ginsburg’s concurrence emerges as the most laudable of the three opinions issued by the Court. Refusing to engage in the exercise of defining proximate causation, Justice Ginsburg expressly stated her reasons for dismissing the City’s claim: she was reluctant to allow the City - an entity that, as a first matter, could not constitutionally impose a tax on out-of-state sellers like Hemi - to recover damages for a violation of an Act in which Congress declined to include a private right of action. In so doing, she provided a measure of transparency. One might argue, of course, that allowing the judiciary to make policy judgments in lieu of strict legal analysis undermines the rule of law and has antidemocratic implications. But while the Court might attempt to define proximate causation and the state-city relationship in a way that provides less interpretive flexibility, such definitions have proven elusive for generations of jurists. Some legal questions may always be indeterminate. In such cases, courts can and should rely on policy considerations. When they do so, however, they need not mask their thought process, but should, as Justice Ginsburg did in *Hemi*, lay bare their reasons for holding as they do. Such transparency increases the legitimacy of judicial decisions made in areas ‘not amenable to bright-line rules.’”).

<sup>168</sup> See, e.g., G. Robert Blakely and Michael Gerardi, *Eliminating Overlap, or Creating a Gap? Judicial Interpretation of the Private Securities Litigation Reform Act of 1995 and RICO*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 435 (2014) (Discussing *Hemi Group, LLC*, – “In cases where no majority opinion exists, the narrowest rationale in support of the judgment governs.”) See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ....’”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 69 n.15 (1976) (plurality opinion)).

<sup>169</sup> See, e.g., *id.* at 447 (“[S]ome of the circuit courts of appeal have erroneously treated Chief Justice Robert’s plurality opinion as a majority opinion that states a new binding doctrine.”). See, e.g., *CDX Liquidating Trust v. Venrock Assoc.*, 640 F.3d 209, 214 (7th Cir. 2011) (“A common definition of [proximate cause] is that there must be proof of ‘some direct relation between the injury asserted and the injurious conduct alleged.’”) (quoting *Hemi Group, LLC*, 559 U.S. 1, 9); John K. Cornwell, *RICO Run Amok*, 71 SMU L. REV. 1018, 1034-5, Fall 2018 (“Because Justice Sotomayor did not participate in the case, *Hemi Group* provides no clear guidance on the role of foreseeability in civil RICO’s proximate cause analysis. Four members of

As a practical reality, it is extremely difficult to entirely divorce the concept of foreseeability from an analysis of “directness.” *Hemi* left open the possibility that the State of New York might have a RICO claim because its injury was “more direct” than the City’s injury. Nevertheless, the State’s injury was not entirely direct as the Hemi Group’s refusal to file Jenkins Reports with the State resulted in the State being unable to identify taxpayers who were refusing to pay tax on their cigarette purchases – the most direct cause of the State’s injury, therefore, was actually the taxpayer’s refusal to pay taxes. However, the Hemi Group’s failure to file Jenkins Reports (with the State) made the injury foreseeable and the injury to the State was more direct than the injury to the City. But for the Hemi Group’s refusal to file the reports with the State, neither the State nor City would have suffered their injuries as they would have known the identities of the consumers who owed taxes on their internet purchased cigarettes.<sup>170</sup>

Where a shareholder is injured by a RICO defendant’s acts taken against the corporation in which he holds shares, damage is foreseeable and more direct than the injury suffered by the City of New York in *Hemi* as there are no intervening causes or intervening parties. The RICO wrongdoer causes harm to a corporation and, necessarily, its shareholders. The shareholder is usually precluded from taking direct action against the alleged wrongdoer but “...the inability of derivatively injured plaintiffs in the typical direct injury cases to bring direct actions for derivative injuries does not preclude their own

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the Court unequivocally rejected it; one refused to join in that rejection; three affirmatively embraced it; and one has taken no official position on the issue but tends to side with those who favored it. In light of this uncertain terrain, it should come as no surprise that lower courts have struggled to understand how best to articulate proximate cause requirements in this context.”).

<sup>170</sup> See *Hemi Group, LLC v. City of New York*, 559 U.S. at 25 [Breyer, J. dissenting] (“...[t]he majority claims that ‘directness,’ rather than foreseeability, should be our guide in assessing proximate cause, and that the lack of a ‘direct’ relationship in this case precludes a finding of proximate causation... (citation omitted). But courts used this concept of directness in tort law to expand liability [for direct consequences] *beyond* what was foreseeable, not to eliminate liability for what was foreseeable. Thus, under the ‘directness’ theory of proximate causation, there is liability for both ‘all “direct” (or “directly traceable”) consequences *and those indirect consequences that are foreseeable.*’ Prosser and Keeton § 42, at 273 [emphasis added].”).

*derivative recoveries* under RICO.”<sup>171</sup> Injured corporation shareholders are protected under RICO and can recover for their injuries.<sup>172</sup>

Whether deemed direct or indirect, proximate or derivative, traditionally corporate shareholders are protected under the Corporate Standing Doctrine. Singular or primary reliance on where a corporate plaintiff resides may deprive domestic shareholders of foreign corporations of the ability to recover for RICO injuries caused by RICO misconduct directed at foreign corporations despite the fact that, potentially, a foreign corporation could be substantially owned by U.S.-based shareholders injured in their business or property. However, this is not to say plaintiffs alleging derivative injuries should be able to bring direct actions for those injuries.<sup>173</sup>

In *Uthe Tech. Corp. v. Aetrium Inc.*,<sup>174</sup> plaintiff alleged it was injured by defendant’s theft of its customers, harming its Singaporean subsidiary’s business, reducing the company’s share value. The court determined that the injury was derivative in nature and, on appeal, plaintiff tried to change its theory to claim a direct injury based on

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<sup>171</sup> See Laurence A. Steckman and Kenneth Moltner, *Recent Developments in Direct Injury Analysis in the Second Circuit: An examination of the Injury and Causation Elements of RICO Standing*, NEW YORK LAW JOURNAL, Jan. 5, 1992, at 1, col. 1, reprinted 15 RICO L. REP. 274, Feb. 1992.

<sup>172</sup> *Id.* (“...[i]n the typical types of contexts where the direct injury requirement has been applied, plaintiffs’ rights to recover in each case are protected. Any recovery by the corporation against the RICO wrongdoer will be distributed pro rata on a share basis to the corporation’s derivatively injured owners...[t]hus the inability of derivatively injured plaintiffs in the typical direct injury cases to bring direct actions for derivative injuries does not preclude their own *derivative recoveries* under RICO.”).

<sup>173</sup> See generally 1 CIVIL RICO *supra*, note 163 at § 6.04, § 5 (ii) The Injury Requirement; The Derivative Injuries of Shareholders and Others (“The prohibition on bringing suit for derivative injuries can be traced back to early antitrust standing jurisprudence, and it can be considered one aspect of a direct injury requirement for standing, but it also has been considered a limitation imposed by proximate causation analysis under RICO... every circuit to address the question has borrowed for civil RICO claims the standing doctrine that appeared in antitrust precedent as early as 1910, that ‘neither a creditor nor a stockholder of a corporation that was injured by a violation of the antitrust laws could recover treble damages.’ The prohibition ... that ‘neither a creditor nor a stockholder of a corporation that was injured by a violation of the antitrust laws could recover treble damages.’ ... has been uniformly applied to RICO suits brought by shareholders... the mere diminution in the value of a corporation’s stock as a result of a defendant’s racketeering conduct will not support shareholder standing to bring suit; instead, only the corporation, as the directly injured party, has standing to recover.”).

<sup>174</sup> *Uthe Tech. Corp. v. Aetrium Inc.*, 739 Fed. Appx. 903 (9th Cir. 2018).

defendant's "theft" of the business. The Ninth Circuit explained derivative injuries occur where all of a corporation's stockholder are harmed solely because they are stockholders, e.g., where a corporation is injured by losing assets, the equity owners suffer injury "indirect" and "derivative" of the entity's injury – the sole and sufficient cause of their loss is the injury to company shares, in their hands. The Ninth Circuit held plaintiff had no standing to recover for the derivative injuries that were basis of its pleading because the injuries inflicted were on a different legal entity, i.e., the corporation, through which it was only indirectly affected, and it was not be permitted to belatedly try to change its theory to allege a direct injury.<sup>175</sup>

The plaintiff in *Uthe* was a U.S. corporation, which had been the sole shareholder of its Singapore subsidiary. In addition to moving for summary judgment on the basis that the plaintiff had no standing to bring a RICO derivative action, the defendant in *Uthe* had filed a separate summary judgment motion arguing that *Uthe's* alleged injury -- the harm caused to its subsidiary's business and the resulting diminution of the value of the company's shares -- was not a "domestic injury" within the meaning of *RJR Nabisco*.<sup>176</sup> Notwithstanding defendant's summary judgment motion based on the absence of any "domestic injury" (as required by *RJR*), the district court granted defendant's summary judgment "on the sole ground that *Uthe's* alleged injuries were derivative and, as a result, *Uthe* did not have standing to pursue its RICO claim."<sup>177</sup>

Accordingly, the Ninth Circuit decision in *Uthe* was based solely on a review of the district court's dismissal due to *Uthe's* inability to seek recovery for a derivative injury suffered as a result of harm to its Singaporean subsidiary.<sup>178</sup> By refusing to dismiss on the basis of the absence of a "domestic injury," the district court implicitly (if not explicitly) found that injury to the plaintiff (which was the domestic shareholder of a Singapore entity) did constitute a "domestic injury."<sup>179</sup> If the Singaporean subsidiary had filed a RICO action then, theoretically it could seek a recovery which would have benefited its

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<sup>175</sup> *Id.* at 905.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 907.

<sup>179</sup> *Uthe Tech. Corp. v. Allen*, No. C 95-02377, 2016 U.S. Dist. LEXIS 115016, 2016 WL 4492580 at \*3 (N.D. CA, Aug. 26, 2016) (holding that "*Uthe's*...domestic injury is not cognizable as a claim under Civil RICO" because "*Uthe's* injury plainly derived from the injury to its former subsidiary.").

shareholders (putting aside, for the purpose of this hypothetical, that Uthe has sold its shares). However, in light of *RJR* a foreign corporation with U.S. shareholders could be barred from pursuing RICO remedies because of an inability to meet the “domestic injury” requirement.

The question of what factors should be considered in extraterritoriality analysis to determine “domestic injury” is not co-extensive with the question of whether a person who suffers a derivative injury should have standing to sue for that injury.<sup>180</sup> Because damage to the company necessarily damages its owners in their business or property,<sup>181</sup> RICO remedies should be available, to them, through the vehicle the law makes available under the Corporate Standing Doctrine. The widely accepted rule barring shareholders from bringing direct actions, however, should not mean that when the company sues to protect its (and necessarily its shareholder’s) injuries, that the location of shareholder injury not be taken into account in extraterritoriality analysis under a statute that provides a remedy for any person injured by a statutory violation.

To the contrary if, for example, the majority of owners are located in the U.S., there is every reason to find their business or property (their ownership rights) are compromised and that compromise is felt where they are located, at their U.S. residences, regardless of where their shares, if any,<sup>182</sup> happen to be located. This scenario indicates yet another reason why using the location of the foreign plaintiff as the sole factor in determining whether there has been a “domestic injury” is problematic.<sup>183</sup> In the context of using a multi-factor test to

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<sup>180</sup> See 1 CIVIL RICO *supra*, note 163 at 6.04, § 1 Introduction (“[F]or the most part, the standing issues involved in civil RICO litigation will be answered by a determination of the scope of RICO’s statutory language authorizing a suit by ‘any person injured in his business or property by reason of a violation of Section 1962.’”).

<sup>181</sup> See Steckman and Moltner, *supra* note 154, at 277 (“...the inability of derivatively injured plaintiffs in the typical direct injury cases to bring direct actions for derivative injuries does not preclude their own *derivative recoveries* under RICO.”) (*italics in original*).

<sup>182</sup> *Dandong*, 2017 WL 3228239 at \*30 (injury occurs where injured party suffers injury which, in the case of injury to intangible property, is the place where the injured party resides).

<sup>183</sup> See *Humphrey*, 905 F.3d at 707 (“...the applicable factors depend on the plaintiff’s allegations; no one factor is presumptively dispositive.” See also *Dandong*, 2017 U.S. Dist. LEXIS 122471 at \*30, note 7 (S.D.N.Y. August 3, 2017); *Tatung Co.* 217 F. Supp. 3d at 1155 (C.D. Cal. 2016); *Akishev*, 2016 U.S. Dist. LEXIS 169787 at \* 16-17 (D.N.J. Dec. 8, 2016).

determine whether there is a “domestic injury” for purposes of RICO extraterritoriality analysis, granting a high degree of significance to the existence of domestic shareholders in a foreign corporation provides an elegant solution to the possibility of U.S. shareholders being barred from any RICO recovery through application of both the Corporate Standing Doctrine and a determination of RICO extraterritoriality which relies solely on a corporation’s residence to determine whether the company may properly allege a domestic injury, as it sues not only on behalf of its self, but necessarily on behalf of its injured shareholders.

### **B. Location of Injury, Standing and RICO Domestic Injury — an Elegant Solution**

In cases adjudicating corporation wrongdoing, where a foreign plaintiff is involved, plaintiff is frequently deemed injured where he/it is resident and, so, injury is deemed to coincide with the foreign residence. Outside the extraterritoriality context, the location of injury is not necessarily fatal to the ability to maintain a substantive claim, but it may be a basis of dismissal, for example, on procedural/jurisdictional grounds.<sup>184</sup>

As indicated above, under the RICO statute, any (every) person (including legal persons) may recover for injury to their “business or property.” The test of “injury to business or property” is, and has been, a test of RICO causation.<sup>185</sup> Efforts to engraft the Standing Rule, i.e.,

<sup>184</sup> See, e.g., *Kiobel*, 133 S. Ct. at 1669 (dismissing claims brought by Nigerian nationals under Alien Tort Statute alleging Dutch, British and Nigerian corporations aided and abetted the Nigerian government in committing violations of Nigerian law because “all of the relevant conduct took place outside of the United States.”); In re Royal Dutch/Shell Transp. Sec. Litig., 522 F.Supp. 712, 724 (D. N.J. 2007) (dismissing federal securities claims filed by Non-U.S. Purchasers because of lack of sufficient conduct within the U.S. on the part of Defendants); *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018); (“[t]he focus of a statute is ‘the object[t] of [its] solicitude,’ which can include the conduct it ‘seeks to regulate,’ as well as the parties and interests it ‘seeks to protect’ or vindicate.” (brackets omitted) (quoting *Morrison*, 561 U.S. at 267)).

<sup>185</sup> See generally *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (“When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff’s injuries.”); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992) (“...a plaintiff’s right to sue...required a showing that the defendant’s violation not only was a ‘but for’ cause of his injury, but was the proximate cause as well.”); In re *EpiPen (Epinephrine Injection, USP) Mktg., Sales Practice & Antitrust Litig.*, 336

which denies individual standing to individual shareholders to protect them all, as a group, should not be allowed to become a shield protecting a wrongdoer from RICO liability merely because a U.S. shareholder happens to invest in a foreign corporation. Such engrafting would represent an unprecedented and unwise expansion of current extraterritoriality analysis. In other words, the fact that a U.S. shareholder cannot individually sue to recover for a foreign corporation injury does not mean the shareholder has not suffered “injury to business or property” within the meaning of the RICO statute.<sup>186</sup>

Where a company is victimized, shareholder injury can be foreseen (satisfying the foreseeability test of RICO loss causation),<sup>187</sup> injury is direct (few intervening causes),<sup>188</sup> and that damage represented

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F.Supp. 3d 1256, 1320 (D. KS 2018) (“Section 1964 (c)’s causation requirement requires a RICO plaintiff to allege ‘that the defendant’s violation not only was a ‘but for’ cause of his injury, but was the proximate cause as well.’” (citations omitted)); *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, No. 06-CV-5774, 2009 U.S. Dist. LEXIS 58900, 2009 WL 2043604 (D.N.J. July 10, 2009) (“To assert a RICO claim based on mail and wire fraud, a plaintiff must demonstrate that the injury to plaintiff’s business or property was caused ‘by reason of a violation’ of RICO.”); *See Sedima*, 473 U.S. at 496 (To establish causation, a plaintiff is required to show that the RICO violation “not only was a ‘but for’ cause of his injury but was the proximate cause as well.”); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992) (Proximate cause requires “some direct relation between the injury asserted and the injurious conduct alleged.”)

<sup>186</sup> *See generally* Laurence A. Steckman and Robert E. Conner, *Loss Causation Under Rule 10b-5, a Circuit-by-Circuit Analysis: When Should Representational Misconduct be Deemed the Cause of Legal Injury Under the Federal Securities Law?*, LAW REPORTER, 1998 SECURITIES ARBITRATION, Vol. 1, Ch. 16, (P.L.I. 1998), reprinted RICO Vol. 28, No. 2, at 173 (Aug. 1998), reprinted PRIVATE SECURITIES LITIGATION REFORM ACT REPORTER, Vol. 5, No. 6, at 897 (Sept. 1998).

<sup>187</sup> *See Henneberry v. Sumitomo Corp. of Am.*, 415 F. Supp. 2d 423, 440 (S.D.N.Y. 2006) (“Thus, an individual shareholder lacks standing to bring his or her claim where ‘the duty owed to the shareholder [] is . . . indistinguishable from the duty owed to the corporation.’ Absent an independent duty, the shareholder’s perceived injury is deemed to be considered the same injury as that to the corporation and, consequently, the shareholder maintains no separate right of action separate and apart from the corporation’s.”) (citing *Vincel v. White Motor Corp.*, 521 F.2d 1113, 1121 [2d Cir. 1975, *Shapolsky*, 279 N.Y.S.2d at 751, and *Fifty States*, 396 N.Y.S.2d at 927) (emphasis added).

<sup>188</sup> *See Hemi*, 559 U.S. at 11 (finding no foreseeability because “the conduct directly responsible for the City’s harm was the customers’ failure to pay their taxes. And the conduct constituting the alleged fraud was Hemi’s failure to file Jenkins Act reports. Thus, as in *Anza*, the conduct directly causing the harm was distinct from the conduct giving rise to the fraud.”).

the materialization of a non-market risk (effected the wrongdoer).<sup>189</sup> The purpose of the RICO extraterritoriality bar is to prevent claims that have little to do with the U.S. from filling U.S. courts,<sup>190</sup> it is not intended to bar claims that have everything to do with RICO misconduct perpetrated, for example, in the U.S., by U.S. citizens, and injuring, *inter alia*, other U.S. citizens whose property (their ownership interests), are compromised, based solely on the happenstance of where the injured foreign (corporate) person happens to be resident. If a case is U.S.-focused, a RICO claim should neither be barred by *RJR* nor cases like *Bascuñan*.<sup>191</sup>

Flood gate arguments are not persuasive in this context. No rule says a single (or a few U.S. shareholders) can or should defeat extraterritoriality, in a given case. If every shareholder of a plaintiff company were a U.S. citizen and the company was foreign but defrauded by RICO crimes injuring all the U.S. citizens in the U.S., through U.S. located fraudulent conduct, it would be illogical to assert these RICO-injured persons should be unable to obtain recovery through the company's case, even if it was the most efficient means of

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<sup>189</sup> Materialization of risk is a test of loss causation used primarily in securities-fraud cases where damages arise from a materialization of a concealed risk. *See, e.g.,* Ohio Public Employees Retirement System v. Federal Home Loan Mortgage Corp., 830 F.3d 376, 384-385 (6<sup>th</sup> Cir. 2016) (“[a] decisive majority of circuits have also recognized the alternative theory of materialization of the risk whereby a plaintiff may allege proximate cause on the ground that negative investor inferences, drawn from a particular event or disclosure, caused the loss and were a foreseeable materialization of the risk concealed by the fraudulent statement.”) (citations and quotations omitted); *In re Harman Int'l Inc. Sec. Litig.*, 791 F.3d 90, 110 (D.C. Cir. 2015); (“[a] plaintiff may survive a motion to dismiss ...by alleging...the loss was foreseeable and caused by the materialization of the risk concealed by the fraudulent statement.”); *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005) (“[T]his court's cases...require both that the loss be foreseeable *and* that the loss be caused by the materialization of the concealed risk.”).

<sup>190</sup> *RJR Nabisco, Inc.*, 136 S. Ct. at 2111 (“Section 1964 (c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries.”).

<sup>191</sup> *Humphrey*, 905 F.3d at 709 (RICO claim must involve domestic injury, but “ [i]t cannot be the case that the mere fact that a loss is economic means that foreign corporations are unable to avail themselves of the protections of civil RICO, even in cases where all of the actions causing the injury took place in the United States.”) (citing *Tatung Co., Ltd.*, 217 F.Supp. at 1155.); *But see RJR Nabisco Inc.*, 136 S. Ct. at 2114-2115 (Ginsburg, J., dissenting, joined by Breyer and Kagan, J.J.) (disagreeing with domestic injury requirement as it will result in dismissal of RICO claims on extraterritorial grounds even where a claim “has the United States written all over it.”).



recovery, merely because the company happened to be incorporated outside the U.S. and owned no specific tangible property in the U.S. In the context of a RICO extraterritoriality dismissal motion, the location of shareholder owners of a company should be counted in the consideration of whether a sufficient domestic injury exists because they are among the persons injured in their business or property and derivative causation is not incompatible with RICO proximate causation.<sup>192</sup>

Assume a foreign company 1, with no U.S. shareholders, has one New York trading account. Assume defendants' mail and wire fraud RICO predicates outside the U.S. damage the account and plaintiff sues under RICO based on injury to its N.Y. account. Because the property is in the U.S., even though plaintiff and all its owners are foreign, and all the misconduct took place outside the U.S., despite the lack of any substantial U.S. connection, other than an adverse effect on one account, the injury would be deemed domestic and RICO standing would exist.

Contrast a foreign company 2, with all its shareholders in the U.S., claiming damage by virtue of defendants' mail and wire fraud, inside the U.S., damaging the value of its shares. This company would fail to satisfy extraterritoriality, for lack of domestic injury, even though the purpose of the extraterritoriality is to distinguish cases in which the injurious conduct has a substantial relationship to the U.S. from those that do not, an absurd result.<sup>193</sup> Singular focus on "where" the injury occurs does not, in all cases, bear a substantial relationship to the central concern and purpose of the extraterritoriality doctrine, which is why the multi-factor approach of the Ninth and Third Circuits makes sense.

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<sup>192</sup> See *Vincel v. White Motor Corp.*, 521 F.2d 1113, 1121 (2d Cir. 1975) ("the duty owed to the shareholder[] is... indistinguishable from the duty owed to the corporation."); *Henneberry*, 415 F. Supp. 2d at 440 ("[a]bsent an independent duty, the shareholder's perceived injury is deemed to be considered the same injury as that to the corporation...") (emphasis supplied).

<sup>193</sup> *Humphrey*, 905 F.3d at 709 (RICO claim must involve domestic injury, but "[i]t cannot be the case that the mere fact that a loss is economic means that foreign corporations are unable to avail themselves of the protections of civil RICO, even in cases where all of the actions causing the injury took place in the United States." (quoting *Tatung Co., Ltd.*, 217 F.Supp. at 1155)). See also *RJR*, 136 S. Ct. at 2114-2115 (Ginsburg, J., dissenting, joined by Breyer and Kagan, J.J.) (disagreeing with domestic injury requirement as it will result in dismissal of RICO claims on extraterritorial grounds even where a claim "has the United States written all over it.").

### C. Consideration of Shareholder Residence – an Elegant Solution

After *Bascuñan*, commentators observed potential problems stemming from the RICO extraterritorial analysis,<sup>194</sup> not only with respect to which types of property will be treated as tangible property (which, if located in the U.S. would provide a basis for extraterritoriality) and which types of property will be treated as intangible property (in which case the place of injury for RICO extraterritorial purposes would be determined by the residence of the plaintiff),<sup>195</sup> but stemming from *Bascuñan*'s observation that a U.S. shareholder is injured in its place of residency when the value of the shares is diminished. As one commentator observes the Second Circuit -- "may have unintentionally given the green light for U.S.-based shareholders RICO suits regardless of the company whose shares the U.S. investor owns,"<sup>196</sup> recognizing that U.S. resident shareholders of the foreign corporation could be frozen out of any recovery even if their injury is felt within the U.S.,<sup>197</sup> just because of the Standing Rule.<sup>198</sup>

<sup>194</sup> See, e.g., Nicholas M. Rose, *Second Circuit Clarifies Civil Rico "Domestic Injury" Requirement*, (Nov. 7, 2017), <https://www.bakerlaw.com/alerts/second-circuit-clarifies-civil-rico-domestic-injury-requirement>.

<sup>195</sup> *Id.* ("We anticipate that the Second Circuit's tangible/intangible distinction will be difficult to apply on a principled basis...[G]oing forward, it will be difficult to predict which sorts of property are 'analogous' to tangible property such that they will be treated as tangible property.").

<sup>196</sup> *Id.* ("U.S.-based shareholders of international companies should carefully consider the potential for lucrative recoveries under RICO following the Second Circuit's indication that a U.S. shareholder's residency satisfies the domestic injury requirement due to 'the diminished value of [its] ownership interest in a company.'").

<sup>197</sup> Pursuant to the Corporate Standing Doctrine, if each U.S. shareholder could bring a separate action for their damage as a shareholder, this would likely result in disproportionate recoveries and exhaustion of corporate assets. Moreover, corporation shareholders generally lack standing to bring direct claims to recover for damages that they suffer as a result of a diminution of assets of the corporation(s) in which they hold shares. See, e.g., *Manson*, 11 F.3d at 1130 ("Since the shareholder's injury, like that of the creditor, generally is derivative of the injury to the corporation, the shareholder's injury is not directly related to the defendant's injurious conduct.") (citing *Holmes*, 503 U.S. at 269).

<sup>198</sup> See *Uthe*, 739 Fed. Appx. at 906 (plaintiff alleging theft of its customers, harming its Singaporean subsidiary's business, and thus reducing the company's share value, lacked RICO standing because its alleged injuries were derivative and a plaintiff may not use the civil RICO statute to recover for derivative injuries.); *Warren v. Manufacturers Nat'l Bank*, 759 F.2d 542, 544 (6<sup>th</sup> Cir. 1985) ("diminution in value of the corporate assets is insufficient direct harm to give the shareholder standing to

Concerns have been raised by commentators regarding the viability and workability of the tests proposed in *Bascuñan* including with respect to injured shareholders:

[A]lthough the Second Circuit rejected the district court's residency based rule, the Second Circuit's test nevertheless relied on choice of law principles—just as the District Court had—in determining how to identify the location of the injury. While the District Court looked to New York's borrowing statute, the Second Circuit relied on the “Second Restatement's presumptive choice-of-law rule regarding ‘Injuries to Tangible Things.’” As we observed in our analysis of the District Court's ruling, choice of law rules and principles vary across jurisdictions. Continued reliance on choice of law rules and principles to determine how to identify the location of a RICO injury may, therefore, result in different “location of the injury” tests across the different jurisdictions, incentivizing forum shopping to find the jurisdiction that has the most favorable rules for determining the location of the specific injury in question.

Second, and perhaps most importantly, the Second Circuit limited the application of its “location of the property” test to *tangible* property (or property that is analogous to tangible property): bearer shares located in a New York safety deposit box and funds held in a New York bank account, which the Court treated as tangible property for the purposes of the case. *That test does not appear to apply to other sorts of property interests, such as ownership of shares in a company. Indeed, the Court reaffirmed its holding from a different case—Atlantic Holdings - that a shareholder's injury (in the form of “the diminished value of ownership interest in a company”) occurs in “the shareholder's place of residence.”* In other words, while the district court's “place of residence test” does not apply to tangible (or

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sue in his own right.”); *Manson*, 11 F.3d at 1130 (Since the shareholder's injury, like that of the creditor, generally is derivative of the injury to the corporation, the shareholder's injury is not directly related to the defendant's injurious conduct.) (citing *Holmes*, 503 U.S. at 269).

analogously tangible) property, it does apply to certain other types of property. (Emphasis added).<sup>199</sup>

There is wide variation in how courts determine whether there is a “domestic injury” for purposes of RICO extraterritorial analysis.<sup>200</sup> If RICO is to be interpreted to assure any person who suffers a RICO-predicate caused injury to their business or property, the multi-factor Third Circuit approach makes good sense.<sup>201</sup> *Humphrey’s* multi-factor analysis identifies several non-exhaustive factors to be considered in determining whether a domestic injury exists, factors which, in application, will certainly vary from case-to-case.<sup>202</sup> Where a foreign corporation asserts claims under RICO, the existence of domestic shareholders of such a corporation injured by the alleged RICO predicate crimes should be considered in determining whether there is a domestic injury for purposes of RICO extraterritoriality.

Commentators have echoed concerns Justice Ginsburg raised in her *RJR* dissent, noting not only contradictions in Justice Alito’s majority opinion, but the possibility that civil RICO cases which, in Justice Ginsburg’s words “ha[ve] the United States written all over” them will not be able to be litigated in U.S. courts, contrary to RICO’s language that provides a remedy of any (every) person injured.<sup>203</sup> That

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<sup>199</sup> Rose, *supra* note 194.

<sup>200</sup> *Humphrey*, 905 F.3d at 700 (“...since the plaintiffs in *RJR Nabisco* had waived their claims for domestic injuries, the Court did not need to explain how courts should determine whether an alleged injury has been suffered domestically or abroad.... . . . those courts that have considered whether an alleged injury was suffered in the United States have applied varying standards. Thus, there is no consensus on what specific factors must be considered when deciding whether an injury is domestic or foreign.”). See also Rose, *supra* note 194 (*Bascuñan* “appears to raise more questions than it answers.”).

<sup>201</sup> *Humphrey*, 905 F.3d at 707 (“Whether an alleged injury to an intangible interest was suffered domestically is a particularly fact-sensitive question requiring consideration of multiple factors. These include, but are not limited to, where the injury itself arose; the location of the plaintiff’s residence or principal place of business; where any alleged services were provided; where the plaintiff received or expected to receive the benefits associated with providing such services; where any relevant business agreements were entered into and the laws binding such agreements; and the location of the activities giving rise to the underlying dispute.”).

<sup>202</sup> *Id.*

<sup>203</sup> See, e.g., Jake Elijah Struebling, *Federal Criminal Law and International Corruption: An Appraisal of the FIFA Prosecution*, 21 NEW CRIM. L. R. 1, 19-20 (discussing the Justice Ginsburg dissent, joined by Justice Breyer and Justice Kagan, criticizing the majority’s imposition of a domestic injury requirement, as follows: “One cannot extract such a limitation from the text of § 1964(c), which affords a

risk, however, can be mitigated through consideration of a multiple factor extraterritoriality analysis including, where appropriate, the location of an injured company's U.S. shareholders.<sup>204</sup> Notably, *RICO* does not distinguish between injuries suffered through an entity, from those not so derived, so long as proximate cause can be established, as it can for derivative injuries, under RICO causation tests.

Consideration of the residence of shareholders, i.e., the situs of their injury to business or property, is supported by a number of considerations. First, if RICO cannot be accessed to remedy shareholder injuries for lack of domestic injury, a derivative suit would be ineffective because the derivative suit would be to compel the company to sue under RICO – yet if the company already sued and was barred by extraterritoriality issues, it could not be compelled to do more than what it already did, namely sue – and in the absence of a “totality of the circumstances” analysis, such a suit could be barred solely due to the corporate residence of the plaintiff. Second, even if it would be possible for an individual shareholder to sue in a private action, essentially because the corporation could not bring the action, that would potentially allow the shareholder to exhaust defendant assets, which is precisely what the Corporate Standing Doctrine is meant to eliminate, as

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right of action to “[a]ny person injured in his business or property by reason of a violation of section 1962.” Section 1962, at least sections (b) and (c), all agree, encompasses foreign injuries. How can § 1964(c) exclude them when, by its express terms, § 1964(c) is triggered by “a violation of section 1962?” [citing Justice Ginsburg's dissent in *RJR*]. Justice Ginsburg's question is a good one. The Court does not satisfactorily explain how a foreign violation of one of RICO's predicates is not cognizable under section 1964(c)--especially where the predicate offense has extraterritorial application and is actionable by reference to RICO's substantive provisions. Indeed, the Court denies its own logic that RICO's extraterritoriality should be coextensive with that of the underlying predicate offenses. Even as a practical matter, a domestic-injury requirement ‘makes little sense’ where ‘[a]ll defendants are U.S. corporations, head-quartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving conduct occurring in the United States.’ The Court effectively immunizes U.S. enterprises operating in foreign nations from civil liability under RICO -- a result that seems ‘hardly solicitous of international comity or respectful of foreign interests.’”

<sup>204</sup> See generally *City of Almaty v. Ablyazov*, 226 F.Supp. 272, 284 (S.D.N.Y. 2016) (citing *RJR Nabisco*, 136 S. Ct. at 2215-16 [Ginsburg, J. dissenting] and noting that the Justice Ginsburg opined that the “[Supreme] Court’s domestic-injury rule means that ‘U.S. defendants commercially engaged here and abroad would be answerable civilly to U.S. victims of their criminal activities, but foreign parties similarly injured would have no RICO remedy’”).

well as portend potential double recovery, if the class subsequently sued, or inconsistent outcomes.

In other words, the policies underlying the broad coverage of RICO remedies (to provide a remedy for any (every) person injured in their business or property – which include U.S. resident shareholders), extraterritoriality analysis (to eliminate those cases with little connection to the U.S., but not others), and the Corporate Standing Doctrine (to protect all shareholders, *pro rata*, by concentrating the right of recovery for the injuries of all owners into the entity), are all benefitted by consideration of shareholder residence as a factor in a multi-factor analysis of domestic injury. Smart policy strongly suggests courts should consider the location of shareholders whose ownership interests have been injured by RICO misconduct in a totality of circumstances analysis of all factors relevant to the application of the RICO statute.

Support for this theory recently received additional support in *Aviles v. S&P Glob., Inc.*,<sup>205</sup> in which District Judge Oetken, citing *dicta* in *Bascuñán v. Elsaca* for the proposition that when the injury alleged involves diminished value of ownership interest in a company, the locational nexus of the injury for extraterritorial purposes was the shareholder's place of residence.<sup>206</sup> He noted the Second Circuit's reliance on *Atlantica Holdings* which applied a residence-based rule for cases in which the harm alleged was diminished value of shares. While finding that rule inapposite on the facts of *Bascuñán*, he nevertheless, held that where a shareholder's "ownership interest in a company" suffers a drop in value, the "clear locational nexus" is "the shareholder's place of residence."<sup>207</sup>

## V. CONCLUSION

No sound argument supports the view that courts should effectively over-rule a legislature that enacted RICO remedies for any person injured in their business or property by engrafting a standing rule that would disable U.S. shareholders from maintaining a statutory action to seek a remedy Congress plainly wanted them to have. Certainly, this should not be achieved by applying a corporate law standing rule designed to assure all injured shareholders are protected by an efficient, fair mechanism, allowing them to recover, *pro rata*,

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<sup>205</sup> 380 F. Supp. 3d 221, 267 (S.D.N.Y. 2019).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

consistent with to their equity interests, for injury to their business or property. There is no basis for any court to hold, as an unprecedented add-on to extraterritoriality analysis, a rule that might block a substantial number of U.S. shareholders and the company, whose shares were injured in the U.S., from recovering under RICO just because the entity in which they were invested is incorporated in a place other than the U.S.

The Second Circuit has explained: “The principal justification for the domestic injury requirement, according to *RJR Nabisco*, is the need to avoid ‘international friction,’” which might be caused by allowing foreign plaintiffs without U.S. domestic injuries from accessing RICO’s remedial scheme rather than limiting their efforts to seek remedies under their own foreign laws.<sup>208</sup> Allowing foreign entities to demonstrate the existence of a “domestic injury” sufficient to confer RICO standing by proving the residence of their owners violates neither the above-stated principal policy nor the justification for a remedy intended to provide relief for all persons injured in their business or property.<sup>209</sup>

<sup>208</sup> *Bascuñan v. Elsacan*, 874 F.3d 806, 821 (2d Cir. 2017).

<sup>209</sup> Several cases since this article’s initial publication have addressed extraterritoriality issues. See, e.g., *Doe v. Tapang*, No. 18-cv-07721-NC, 2019 U.S. Dist. LEXIS 131901 (N.D. Cal. Aug. 6, 2019) (U.S., plaintiffs failed to overcome presumption against RICO extraterritoriality where they could not overcome deficiency by pleading additional facts); *Bascuñan v. Elsaca*, 927 F.3d 108 (2d Cir. 2019) (*Bascuñan II*) (remand of the *Bascuñan* case in which a second amended complaint alleged defendants stole money from New York bank accounts that were part of an Estate, domestic injury existed; modification of District Court decision on remand did not at the Second Circuit’s analysis in *Bascuñan I* -- modification in *Bascuñan II* was not based on a different analysis regarding how to determine domestic injury but, rather, on new facts interposed in an amended pleading); *Roe v. Howard*, 917 F.3d 229 (4th Cir. 2019) (where former housekeeper sued American working in Yemen under the Trafficking Victims Protection Act (TVPA) alleging sexual abuse, TVPA’s remedy provision applied because TVPA more clearly targets foreign conduct than does RICO, as demonstrated by its international scope and Congress’s repeated expansions of extraterritorial reach, discussing *RJR*); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (court properly held foreign nationals who alleged they or their family members were injured by terrorist attacks could not bring claims under the Alien Tort Statute against a Jordanian bank allegedly used to transfer funds to terrorist groups -- following *Kiobel*, the presumption against extraterritoriality applies to the Alien Tort Statute claims and even where claims touch and concern U.S. territory, they must do so with sufficient force to displace presumption against extraterritorial application); *Martin Hilti Family v. Knoedler Gallery, LLC*, 386 F. Supp. 3d 319 (S.D.N.Y. 2019) (RICO claim arising from a New York art gallery’s alleged sale of forged works was dismissed for failure to demonstrate “domestic injury” to the trust

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-- the Trust was injured in Liechtenstein where the funds constituting the purchase price for the subject forged work of art was transferred from the Trust's Liechtenstein bank to the Gallery's New York Bank Account -- notwithstanding funds were transferred to a bank account in New York, Judge Gardephe strictly applied *Bascuñán's rule* that "domestic injury" analysis turns on the location of the plaintiff's property when it was harmed, *not* on the location where the defendant's misconduct took place -- accordingly, he held the "...injury occurred where it relinquished control over its property. Because the Trust relinquished control over its money in Liechtenstein -- when it authorized a transfer of funds from its Liechtenstein bank account to Knoedler's New York account -- the Trust's injury was suffered in Liechtenstein." *Martin Hilti Family v. Knoedler Gallery, LLC*, 386 F. Supp. 3d 319, 347-48 (S.D.N.Y. 2019). This interpretation leaves no room for any multi-factor test nor for any consideration as to *where* the underlying conduct comprising the RICO violation occurred, but would not necessarily impact the question of whether shareholder residence should be factored into a determination of whether a foreign corporation with a substantial number of shares held by U.S. residents may have suffered a "domestic injury" by virtue of the residence of its shareholders); *Catano v. Capuano*, No. 18-20223-Civ-TORRES, 2019 U.S. Dist. LEXIS 146443 (S.D. Fla. May 28, 2019) (plaintiff properly alleged domestic injury to real property in the state of Florida, citing, *Bascuñán*, 874 F.3d at 822 ("[T]reating injuries involving tangible property located within the jurisdiction of the United States as 'domestic,' accords with" the principles underlying the federal RICO statute).