RECENT CASES

FOREIGN RELATIONS LAW — JUDGMENT RECOGNITION — SECOND CIRCUIT UPHOLDS EQUITABLE RELIEF FROM A FOREIGN JUDGMENT UNDER RICO. — *Chevron Corp. v. Donziger*, Nos. 14-0826(L), 14-0832(C), 2016 WL 4173988 (2d Cir. Aug. 8, 2016).

Foreign judgments, unlike domestic interstate judgments, are not entitled to full faith and credit under the Constitution.[1] Rather, a plaintiff seeking to enforce a foreign judgment within the United States must first have it recognized by a domestic court.[2] For years, foreign judgment recognition was governed under federal general common law.[3] Since *Erie Railroad Co. v. Tompkins*[4] and *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[5] however, foreign judgment recognition has been governed by state law.[6] Commentators have questioned the wisdom of leaving recognition to the states.[7] Some have called for the political branches to federalize judgment recognition law through statute or treaty.[8] Others have argued that courts could treat judgment recognition as part of the federal common law of foreign relations.[9] Now, the Second Circuit has pointed the way to another approach to federalization: adapting extant federal statutory law to serve recognition-related ends.

Recently, in *Chevron Corp. v. Donziger*,[10] the Second Circuit held that a corporation facing liability for a multi-billion dollar Ecuadorian

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[1] *See* Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912).

[2] *See* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 154 (2013).

[3] *See* Hilton v. Guyot, 159 U.S. 113, 205–06 (1895) (articulating a judicial standard for determining the effect of a foreign judgment).

[4] 304 U.S. 64 (1938) (eliminating federal general common law).

[5] 313 U.S. 487 (1941) (applying *Erie* to state choice-of-law rules).

[6] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. a (AM. LAW INST. 1987); Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 262 n.31 (1991) (collecting cases).

[7] *See, e.g.*, John B. Bellinger III & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 VA. J. INT'L L. 501 (2014); Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 HARV. INT'L L.J. 459 (2013).

[8] *See, e.g.*, AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006); Violeta I. Balan, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. MARSHALL L. REV. 229 (2003); S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45 (2014).

[9] *See, e.g.*, Willis L.M. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 788 (1950); Albert A. Lindner, Comment, *Judgments Rendered Abroad — State Law or Federal Law?*, 12 VILL. L. REV. 618, 626 (1967).

[10] Nos. 14-0826(L), 14-0832(C), 2016 WL 4173988 (2d Cir. Aug. 8, 2016).

judgment obtained through fraud and racketeering could sue the foreign-judgment creditors' attorney under the Racketeer Influenced and Corrupt Organizations Act[11] (RICO) for preemptive equitable relief, including a nationwide injunction prohibiting future attempts to enforce the judgment.[12] In doing so, the Second Circuit refashioned a statute designed to combat organized crime into a tool for preemptively challenging corrupt foreign judgments in federal court. Although the court's application of RICO may prove narrow in practice, its resourceful approach presents a potential model for paving federal inroads into state judgment recognition law.

In 1964, Texaco received permission to produce oil in the Lago Agrio region of Ecuador in the Amazon rainforest.[13] In 1993, a group of Lago Agrio plaintiffs (LAPs) represented by New York lawyer Stephen Donziger brought a class action against Texaco in the Southern District of New York seeking billions of dollars in damages for alleged environmental harm and personal injury resulting from Texaco's drilling practices.[14] Texaco successfully moved for dismissal based on forum non conveniens,[15] and, in 2003, the LAPs filed suit in Ecuador against Chevron, which had acquired Texaco.[16]

In Ecuador, the litigation took a turn for the scandalous. Among other things, Donziger used an inflated damages figure to try to pressure Chevron into a settlement[17] and submitted fraudulent expert reports to the court.[18] In 2011, Judge Zambrano awarded the LAPs a $17.292 billion judgment consisting of $8.646 billion in compensatory damages and $8.646 billion in punitive damages.[19] But Judge Zambrano did not write the judgment.[20] The LAPs' trial team did,[21] after agreeing to pay Judge Zambrano $500,000.[22]

In 2011, Chevron sued Donziger, his law firm, and the named LAPs in the Southern District of New York, alleging that the Ecuado-

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[11] 18 U.S.C. §§ 1961–1968 (2012).

[12] *Donziger*, 2016 WL 4173988, at *55, *58–59, *64–65. The Second Circuit contributed to an existing split between the Seventh and Ninth Circuits on whether RICO authorizes courts to grant equitable relief to private parties. *Compare* Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 695 (7th Cir. 2001) (holding it does), *rev'd on other grounds*, 537 U.S. 393 (2003), *with* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1088–89 (9th Cir. 1986) (holding it does not).

[13] *Donziger*, 2016 WL 4173988, at *3.

[14] *Id.*

[15] *See* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002).

[16] *See Donziger*, 2016 WL 4173988, at *4.

[17] *Id.* at *6–7.

[18] *Id.* at *8. Donziger also coerced then-presiding Judge Yanez into appointing a "neutral" expert who cooperated with the LAPs in exchange for under-the-table payments. *Id.* at *10–16.

[19] *Id.* at *20.

[20] *Id.* at *24.

[21] *Id.*

[22] *Id.* at *31.

rian judgment was procured through bribery, extortion, and other illegal means.[23] On March 7, 2011, Judge Kaplan issued a global preliminary injunction prohibiting Donziger and the LAPs from enforcing the judgment anywhere outside of Ecuador.[24] The Second Circuit vacated the preliminary injunction, reversed the district court's judgment, and remanded.[25] Meanwhile, both sides appealed the Ecuadorian judgment in the Ecuadorian appellate courts, which eliminated the punitive damages but largely confirmed the judgment.[26]

On remand from the Second Circuit, Judge Kaplan chronicled the corrupt Ecuadorian litigation history[27] and found that Donziger and the LAPs' trial team constituted an "enterprise" that had engaged in a "pattern of racketeering activity" in violation of § 1962(c).[28] After finding that Donziger had committed numerous RICO predicate acts — including extortion, wire fraud, money laundering, and obstruction of justice[29] — Judge Kaplan found that equitable relief was warranted because Chevron had no adequate remedy at law.[30] To prevent the possibility of future abusive proceedings,[31] Judge Kaplan issued a nationwide injunction forbidding Donziger and the representative LAPs from initiating related enforcement actions in the United States and established a constructive trust through which any assets received by Donziger and the representative LAPs in connection with the Ecuadorian judgment would be returned to Chevron.[32]

The Second Circuit affirmed.[33] Writing for a unanimous panel, Judge Kearse[34] began her analysis by considering and rejecting a series of arguments against the justiciability of Chevron's claims.[35] After establishing that the case could proceed, the court held that Chevron was entitled to equitable relief against Donziger under RICO.[36] Judge Kearse reiterated the district court's uncontested findings regarding

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[23] *Id.* at *4.

[24] *See* Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011), *rev'd and remanded sub nom.* Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012).

[25] *Naranjo*, 667 F.3d at 247.

[26] *Donziger*, 2016 WL 4173988, at *32–34.

[27] *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 386–546 (S.D.N.Y. 2014).

[28] *Id.* at 575–600.

[29] *Id.* at 576–94.

[30] *Id.* at 636–39.

[31] *See id.* at 636–38.

[32] *Id.* at 639–42.

[33] *Donziger*, 2016 WL 4173988.

[34] Senior Judge Kearse was joined by Senior Judges Parker and Wesley.

[35] The court held that Chevron had Article III standing, *Donziger*, 2016 WL 4173988, at *38–40, that Chevron's claims were not mooted by the Ecuadorian appellate courts' decisions, *id.* at *41–43, that Chevron was not judicially estopped from contesting the validity of the judgment, *id.* at *43–45, and that the Second Circuit's prior reversal did not foreclose the relief sought, *id.* at *45–47.

[36] *Id.* at *55.

the merits of Chevron's RICO claims[37] before reaching the issue of RICO causation. Rejecting the LAPs' contention that the Ecuadorian appellate opinions served as an intervening cause between the corruption in the trial court and Chevron's current liability, Judge Kearse reasoned that the appellate opinions lacked the independence necessary to sever proximate causation.[38] Finally, Judge Kearse addressed the split between the Seventh and Ninth Circuits on whether RICO authorizes the grant of equitable relief to private parties.[39] Siding with the Seventh Circuit, she held that it did.[40]

The court also held that the equitable relief against Donziger and the LAPs was authorized by New York common law.[41] Judge Kearse observed that New York courts traditionally possessed equitable powers to grant relief to victims of fraudulently attained judgments.[42] Because New York's Recognition Act was not intended to limit those powers, the district court was free to provide the relief that it did.[43] Moving to the international context, the court held that the district court's remedies did not violate international principles of comity.[44] First, the court upheld the nationwide injunction on the grounds that it was confined to the United States and applied only to Donziger and the named LAPs.[45] Second, the court upheld the constructive trust on the grounds that it targeted the fraud allegations "on which the Ecuadorian courts have essentially deferred to the courts of the United States."[46] Turning to the remaining issues, the court held that the district court had personal jurisdiction over the LAPs,[47] that the actions of Donziger and his firm were imputed to the LAPs through traditional principles of attorney-client agency,[48] and that the district court's grant of equitable relief was appropriate under the circumstances.[49]

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[37] *Id.* at *47–50.

[38] *Id.* at *50–52.

[39] *Id.* at *52.

[40] Judge Kearse observed that § 1964(a) constitutes a broad grant of equitable judicial discretion that is limited by §§ 1964(b)–(c). *Id.* at *53–54. In Judge Kearse's view, the structure of § 1964 provides the government with a monopoly on preliminary injunctions and private parties with a monopoly on treble damages, but it does not thereby limit the government to pursuing only preliminary injunctions or private parties to pursuing only treble damages. *Id.* at *54.

[41] *Id.* at *57.

[42] *Id.* at *55.

[43] *Id.* at *56–57.

[44] *Id.* at *59.

[45] *Id.* at *58.

[46] *Id.*

[47] *Id.* at *63. The district court had stricken the named LAPs' right to challenge personal jurisdiction as a sanction for refusing to comply with jurisdiction-related discovery orders. *Id.* at *60.

[48] *Id.* at *63–64.

[49] *Id.* at *65.

By sustaining equitable relief from a foreign judgment under RICO, the court adapted a statute designed to combat organized crime into a tool for preemptively challenging a corrupt foreign judgment in federal court. Though limited in practice, the court's application of RICO presents a creative approach to federalizing judgment recognition law by repurposing unrelated statutes to cover recognition issues in individual cases.

Much ink has been spilt about the challenges inherent in leaving the question of foreign judgment recognition to the states. At the domestic level, variations in state law can undermine uniformity and predictability.[50] At the international level, variations can prevent the United States from speaking with one voice in foreign affairs[51] and may jeopardize the enforcement of U.S. judgments abroad.[52] In response to these concerns, some commentators have called for action by the political branches,[53] but so far neither branch has produced anything close to a comprehensive federal judgment recognition policy.[54] Others have suggested a judicial approach to federalization.[55] The Supreme Court has never explicitly addressed whether federal or state law governs foreign judgment recognition post-*Erie*,[56] leaving open arguments for treating judgment recognition law as federal common

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[50] *See, e.g.*, Bellinger & Anderson, *supra* note 7, at 513–20 (describing procedural, substantive, and structural problems with the current state law system); Strong, *supra* note 8, at 85–92 (addressing similar procedural and substantive problems).

[51] *See* Saad Gul, *Old Rules for a New World? The Constitutional Underpinnings of U.S. Foreign Judgment Enforcement Doctrine*, 5 APPALACHIAN J.L. 67, 83–87 (2006).

[52] *See* Rachel B. Korsower, Comment, Matusevitch v. Telnikoff*: The First Amendment Travels Abroad, Preventing Recognition and Enforcement of a British Libel Judgment*, 19 MD. J. INT'L L. & TRADE 225, 237–38 (1995) ("[T]he fact that the United States does not have a uniform federal law in this area makes it difficult for an American litigant to satisfy foreign reciprocity requirements." *Id.* at 237.).

[53] *See generally* sources cited *supra* note 7.

[54] *See* Brand, *supra* note 6, at 258 (noting the lack of "guidance in this area from Congress or the executive branch in the form of legislation or treaty" (footnotes omitted)). Although the United States pursued a multilateral judgment recognition treaty between 1992 and 2001, those efforts have fizzled, *see* Bellinger & Anderson, *supra* note 7, at 518, and appear to lack the domestic support necessary for them to regain traction, Zeynalova, *supra* note 2, at 189–90. Perhaps the most closely related federal statute is the SPEECH Act, 28 U.S.C. §§ 4101–4105 (2012), which bars domestic enforcement of foreign defamation judgments unless the rendering jurisdiction affords the defendant adequate free speech protections, *id.* § 4102(a)(1).

[55] *See, e.g.*, Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 79–80 (1985) (discussing the unlikelihood of congressional action, the absence of relevant treaties, and the Supreme Court's ability to intervene through federal common law); Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599, 1607 (1966) (suggesting the Supreme Court might adopt a "more rigorous view" of foreign judgment recognition based on "federal supremacy in the area of foreign relations").

[56] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (AM. LAW INST. 1971, amended 1988).

law.[57] These arguments, based on the logic of the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*,[58] rely on the identification of a uniquely federal interest in foreign affairs unmoored from any specific statute or treaty,[59] which may explain courts' hesitance to embrace them.[60]

Donziger represents an alternative approach to federalization that does not depend on new legislation or an expansion of freestanding federal common law, but on extant statutes. Although the court did not address the validity of the Ecuadorian judgment directly,[61] it held the judgment to be "wrongful debt" that served as an "injury" caused by Donziger's RICO violations.[62] Further, the remedies the court upheld under RICO served the express purpose of terminating Donziger's interest in the judgment[63] and preventing him from initiating future enforcement proceedings in the United States.[64] Thus, with respect to Donziger, the court effected de facto, if not formal, nonrecognition. Considering the court upheld the same remedies under state law,[65] it made an exception to "the standard judicial practice of deciding a case on the narrowest possible grounds"[66] and showed a willingness to federalize judgment recognition law, even where doing so would not affect the outcome of the case. The upshot is that federalization is back on the table, and one surprising source for that feder-

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[57] *See* Brand, *supra* note 6, at 257–58; Michael Traynor, *Conflict of Laws, Comparative Law, and the American Law Institute*, 49 AM. J. COMP. L. 391, 400–01 & nn.20–22 (2001).

[58] 376 U.S. 398 (1964) (holding that the act of state doctrine finds its source in structural federal common law, *id.* at 427, and pointing to "[v]arious constitutional and statutory provisions" that reflect "a concern for uniformity in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions," *id.* at 427 n.25). For an exposition of the potential implications of *Sabbatino* for foreign judgment recognition, see generally Brand, *supra* note 6, at 315–18.

[59] *See, e.g.*, Brand, *supra* note 6, at 304–05; Gul, *supra* note 51, at 86–87.

[60] *See, e.g.*, Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009 (E.D. Ark. 1973). For an illustration of the possibility that the federal common law argument requires a federal interest with more positive-law teeth, see *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), in which the Ninth Circuit refused to apply state law to the recognition of a tribal judgment because "Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an 'intricate web of judicially made Indian law,'" *id.* at 813 (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978)).

[61] *See Donziger*, 2016 WL 4173988, at *64.

[62] *Id.* at *50; *see also id.* at *50–51.

[63] *See id.* at *36–37. Donziger's financial interests in the judgment included his contingency fee and stock in the entity set up to distribute the proceeds from the judgment. *Id.* at *37.

[64] *See id.* at *36–37.

[65] *See id.*

[66] Brand, *supra* note 6, at 258 (observing that this practice has constrained the development of federal common law).

alization has been available since 1970 in the form of a racketeering statute designed for prosecuting organized crime at home.[67]

Plaintiffs have tried the *Donziger* approach before. In *Commissions Import Export S.A. v. Republic of the Congo*,[68] the D.C. Circuit rejected one such attempt when a judgment debtor contended that the Federal Arbitration Act's[69] (FAA) implementation of the New York Convention governing arbitration awards preempted the D.C. Recognition Act's more generous statute of limitations when applied to a foreign judgment that itself recognized an arbitration award.[70] This case may appear to cut against the *Donziger* model, but only because the federal source was invoked in a way that failed to produce a meaningful conflict between recognition and the federal interest embodied by the statute. The *Commissions Import Export* court emphasized that the New York Convention implemented by the FAA was designed to promote, rather than limit, the recognition of arbitration awards.[71] But imagine a judgment rendered by a foreign court after *refusing* to give effect to an arbitration agreement between parties. Might recognition of such a judgment conflict with the FAA and the "federal policy favoring arbitration"?[72] In that scenario, the FAA might well provide a statutory basis for *Donziger*-style piecemeal federalization. Likewise, Professor Michael Traynor has identified the Communications Decency Act[73] and the Digital Millennium Copyright Act[74] as "federal statutes that might be invoked as defenses when pertinent to enforcement of a foreign country judgment."[75] The point here is not to identify the range of possible statutes and fact patterns that might follow from the Second Circuit's approach, but rather to show that the aims of federal statutory law can overlap with the aims of state judgments law. When they do, courts have an opportunity to engage in piecemeal federalization grounded in positive enactments rather than freestanding foreign-affairs interests.

As a practical matter, the court's specific use of RICO will prove difficult, but perhaps not impossible, to replicate. On one hand, the

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[67] *See generally* Daniel Hoppe, Comment, *Racketeering After* Morrison*: Extraterritorial Application of Civil RICO*, 107 NW. U. L. REV. 1375 (2013) (describing the motivation behind and passage of RICO).

[68] 757 F.3d 321 (D.C. Cir. 2014).

[69] 9 U.S.C. §§ 1–16 (2012).

[70] *Comm'ns Imp. Exp.*, 757 F.3d at 332–33.

[71] *Id.* at 328.

[72] *Cf.* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989)) (holding that questions of state contract law must be resolved with due regard for the federal policy in favor of arbitration).

[73] 47 U.S.C. § 230 (2012).

[74] Pub. L. No. 105–304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 and 28 U.S.C.).

[75] Traynor, *supra* note 57, at 401 n.22.

breadth of RICO's predicate statutes makes it an ideal instrument for victims of corrupt foreign proceedings to target process crimes likely to be associated with litigation.[76] On the other, putative judgment debtors pursuing RICO relief will have to clear the hurdle of extraterritoriality. Under the Supreme Court's recent decision in *RJR Nabisco, Inc. v. European Community*,[77] RICO claimants will have to show both that the judgment debtors experienced "a domestic injury"[78] and that the judgment creditors committed a predicate violation within the United States.[79] Further, preemptive suits brought under RICO will require a showing of personal jurisdiction over the judgment creditor.[80] The usual difficulties of establishing personal jurisdiction over a putative foreign defendant[81] will only be compounded by the circuit split on whether RICO authorizes equitable relief to private parties. In suits focused on foreign proceedings, the result of the extraterritoriality and personal jurisdiction analyses will not always be as inevitable as in *Donziger*, where the entire racketeering operation was conducted from New York by a New York attorney and a domestic consulting firm.[82]

The specific door opened by *Donziger* may be narrow. But in the absence of further action by the political branches, the court's use of RICO presents an inventive approach to federalization for courts hesitant to embrace judgment recognition as freestanding federal common law. By periodically grounding recognition-related remedies and defenses in tangential federal statutory law, courts can create conservative federal inroads into an area traditionally left to the states. With repurposing comes the task of sorting out any doctrinal wrinkles embedded in the adapted statute — in RICO, extraterritoriality and personal jurisdiction. But enterprising judgment creditors and debtors hoping to bolster their positions with federal statutory law have an incentive, and now a roadmap, to mine the United States Code for material to fuel a statutory, piecemeal federalization of state judgments law.

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[76] *Cf.* Pamela Bucy Pierson, *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. REV. 213 (2013) (describing the purpose and structure of RICO and arguing that its civil cause of action is underutilized). For example, the mail fraud statute, 18 U.S.C. § 1341 (2012), has been called the "government's number-one weapon," Kristen Kate Orr, Note, *Fencing in the Frontier: A Look into the Limits of Mail Fraud*, 95 KY. L.J. 789, 789 (2007), thanks to "its ease of applicability to new factual situations," *id.* at 789–90.

[77] 136 S. Ct. 2090 (2016).

[78] *Id.* at 2106 (emphasis omitted).

[79] *Id.* at 2102. Alternatively, claimants could show the defendant violated an extraterritorial predicate statute.

[80] *Cf. Donziger*, 2016 WL 4173988, at *60–63 (treating personal jurisdiction as essential to the court's affirmance of the equitable relief granted against the LAPs).

[81] *See* Robert B. von Mehren, *Transnational Litigation in American Courts: An Overview of Problems and Issues*, 3 DICK. J. INT'L L. 43, 44–45 (1984).

[82] *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 574–75 (S.D.N.Y. 2014).