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Second Circuit Court of Appeals Opens the Door for Extraterritorial RICO Claims

Taking a step back from the recent trend to limit the extraterritorial application of US law, an influential federal appellate court has reinstated claims by the European Community and several member states against RJR Nabisco, Inc. ("RJR"), alleging that RJR directed and controlled a global money-laundering scheme involving sales of cigarettes. Seemingly contrary to an earlier case that held that the federal racketeering statute, the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, did not apply extraterritorially, the US Court of Appeals for the Second Circuit held in *European Community v. RJR Nabisco, Inc.* that the US Congress "unmistakably" intended for RICO to apply extraterritorially, at least where the underlying racketeering activity involves statutes (such as foreign money laundering) clearly intended to reach foreign conduct.[1] The Second Circuit's decision in *European Community* opens the door for RICO claims premised upon cross border or foreign conduct. Because RICO provides a private cause of action and treble damages provision, plaintiffs seeking rich recoveries will likely seize this opportunity to attempt to bring RICO claims based upon largely foreign schemes into US courts.

Morrison and *Norex*

The 2010 *Morrison v. National Australia Bank*[2] case was a so-called "foreign-cubed" securities case – involving claims by Australian investors who purchased shares of an Australian company on an Australian exchange. The investors claimed that the

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1 No. 11-2475, 2014 WL 1613878, at *5 (2d Cir. Apr. 23, 2014).
2 561 U.S. 247 (2010).

Australian company had defrauded them through misleading financial statements. The US Supreme Court rejected the argument that the Securities Exchange Act of 1934 ("Exchange Act") applied to these extraterritorial claims. The Court applied the "presumption against extraterritoriality," under which a federal statute is deemed to apply extraterritorially only if the US Congress has clearly stated that it should. In *Morrison*, the Supreme Court held that the Exchange Act only reaches claims involving a purchase or sale of securities in the United States, including securities purchased or sold on US stock exchanges, and not to the purchase or sale of securities abroad.

Morrison has been highly influential in the lower courts, which have applied its presumption against extraterritoriality to rein in suits involving parties and conduct outside the United States. The Supreme Court itself applied the presumption to hold that the Alien Tort Statute (which provides a cause of action to aliens for violations of human rights) does not apply to conduct wholly outside the United States.[3] With specific respect to RICO, in 2010 the Second Circuit held in *Norex Petroleum Ltd. v. Access Industries, Inc.* that the presumption barred claims by a Russian company that several Russian defendants conspired to illegally take control of Yugraneft, a Russian oil company owned by Norex, through a widespread racketeering and money laundering scheme.[4] Observing that RICO was silent as to extraterritorial application, the Second Circuit held that RICO could not apply extraterritorially based upon the slim contacts with the United States that had been alleged.

The *European Community* Allegations

The plaintiffs in the *European Community* case, the European Community and 26 of its member states, accused RJR of engaging in complex, multi-step, international schemes to launder money through the sale of cigarettes through third parties. According to the plaintiffs, the schemes began with Colombian and Russian criminal organizations smuggling illegal drugs into Europe. The drugs were then allegedly sold, producing revenue in Euros, which European money brokers then laundered into the domestic currency of the criminal organization's home country. The money brokers, in turn, allegedly sold the Euros to cigarette importers at a discounted rate, and the cigarette importers, in turn, used the Euros to purchase cigarettes from wholesalers who had purchased the cigarettes from RJR. Although the alleged scheme largely involved foreign conduct, the plaintiffs did allege some US connections. For example, Plaintiffs alleged that in some of the schemes, RJR employees travelled from the US to South America to receive payments for cigarettes, which they wired to RJR's accounts in the US. Plaintiffs also alleged that RJR communicated internally and with its co-conspirators by means of US interstate and international mail and wires.

Plaintiffs brought several claims against RJR, including a claim under RICO. To prove a RICO violation, a plaintiff must establish that the defendant has engaged in a "pattern of racketeering activity" by violating a number of federal criminal statutes that are incorporated by reference into RICO. In *European Community*, the plaintiffs alleged that RJR engaged in a number of these "predicate" racketeering acts including mail fraud, wire fraud, money laundering, violations of the Travel Act, 18 U.S.C. § 1952, and providing material support to foreign terrorist organizations.[5]

The Second Circuit's Decision

Originally filed in 2002, the European Community case was still pending when the Supreme Court decided *Morrison* and the Second Circuit decided *Norex*. Based on these precedents, RJR sought to dismiss the case, and the trial court agreed that *Norex* foreclosed the plaintiffs' claims.

In a surprise ruling on appeal, the Second Circuit held that the presumption against extraterritorially did not bar the RICO claim – focusing not on RICO itself, but on the extraterritorial nature of several of the predicate criminal statutes. In fact, the Second

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3 *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1669 (2013).
4 31 F.3d 29 (2d Cir. 2010).
5 2014 WL 1613878, at *2.

Circuit observed that some of the predicates for RICO liability can apply *only* to conduct outside the United States. For example, one RICO predicate, a federal terrorism statute criminalizing the killing of a US national overseas (18 U.S.C. § 2332(a)), by definition only applies while the national "is outside the United States." Similarly, other RICO predicates, such as the federal statute criminalizing hostage taking (18 U.S.C. § 1203(b)), explicitly state that they apply to conduct that occurs outside the United States if certain conditions are met. The Second Circuit held that by incorporating these and other similar statutes into RICO, Congress "clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serves as a basis for RICO liability."[6] The Court therefore concluded that "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate."[7]

The Second Circuit then considered whether the specific predicates alleged by the *European Community* plaintiffs applied to extraterritorial conduct. The Court found that both the money laundering (18 U.S.C. §§ 1956-7) and material support for terrorism (18 U.S.C. § 233913) statutes explicitly state that they apply extraterritorially under certain circumstances, and the court held that the complaint sufficiently alleged that such circumstances existed. Thus, the court reinstated plaintiffs' RICO claims based upon money laundering and material support for terrorism predicates.

Conversely, the Second Circuit held that the mail fraud, wire fraud, and Travel Act statutes *do not* contain a manifestation of congressional intent to apply extraterritorially. Still, the Court found that the plaintiffs had alleged domestic conduct—conduct that satisfied every essential element of a mail fraud, wire fraud, and Travel Act claim—such that the plaintiffs had alleged domestic (not extraterritorial) violations of these statutes. Accordingly, the Second Circuit has signaled that the presumption against extraterritoriality analysis for RICO claims should be conducted in a nuanced, claim-by-claim manner, with the result that certain extraterritorial RICO claims will be allowed to proceed while others will not.

Implications

The Second Circuit's decision in *European Community* stands in stark contrast to *Norex*, which stated that "RICO is silent as to *any* extraterritorial application." *Norex Petrol. Ltd. v. Access Indus.*, 631 F.3d 29, 32-33 (emphasis added). Notably, because the Second Circuit found that Congress did, in fact, intend for RICO to apply extraterritorially in some instances, the presumption against the extraterritorial application of U.S. statutes had been overcome.

The Court's opinion opens up a clear path for civil RICO claims premised upon foreign conduct where a complaint alleges underlying predicate violations of statutes that are explicitly intended to apply extraterritorially, although much uncertainty remains for RICO claims based upon predicate violations that are *not* explicitly intended to apply extraterritorially. Practically speaking, however, the *European Community* case re-opens the door to plaintiffs seeking substantial damages for RICO claims premised upon wide-ranging foreign schemes, only recently thought to be foreclosed.

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6 *Id.* at *5.
7 *Id.* at *4.