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Client briefing June 2016

U.S. Supreme Court Holds RICO Statute Has Extraterritorial Reach, but Does Not Apply to Injuries Outside the United States

The U.S. Supreme Court has held in *RJR Nabisco, Inc. v. The European Community* that the Racketeer Influenced and Corrupt Organizations Act ("RICO") may apply to conduct that occurs outside the United States, but in a significant move the Court has imposed a "domestic injury" requirement for private civil RICO claims.

The RICO statute was originally intended to combat organized crime, but has become a potent tool for civil plaintiffs in all manner of business disputes and fraud cases in U.S. courts, principally because of the possibility of recovering treble damages. The Supreme Court's decision in *RJR Nabisco* significantly limits the extent to which this tool can be used in private civil litigation involving conduct that occurs outside the United States, and overrules the decisions of some lower courts holding that the statute does not require a domestic injury. This decision continues an important trend in the Supreme Court of limiting the reach of U.S. courts in civil actions to matters with a significant relationship to the United States. Notably, by anchoring its ruling in the "private civil action" provision of Section 1964(c), the Supreme Court restricted private civil actions while leaving for another day the ability of U.S. prosecutors to continue to bring criminal RICO cases for offshore conduct.

Background

RICO imposes criminal sanctions on, and provides a civil cause of action against, a person or entity that engages in a "pattern of racketeering activity" in association with an "enterprise." 18 U.S.C. § 1962, 1964(c). "Racketeering activity" consists of various federal and state criminal offenses, such as mail and wire fraud, that are incorporated by reference into RICO and are commonly referred to as RICO "predicate acts." 18 U.S.C. § 1961(1). In deciding whether and the extent to which these provisions apply to foreign activities and injuries, the Court applied the framework for determining the extraterritorial application of U.S. statutes established in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) (holding that the Securities Exchange Act of 1934 did not apply to purely extraterritorial conduct), and further developed in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __, 133 S. Ct. 1659 (2013) (holding that the Alien Tort Claims Act did not apply to purely extraterritorial conduct that does not "touch and concern" the United States).

In *RJR Nabisco*, the European Community ("EC") (now the European Union) and 26 of its Member States alleged that RJR Nabisco Inc. ("RJR"), a U.S. company, and its affiliates were involved in a drug-trafficking and money-laundering operation that spanned the globe. The EC alleged an elaborate scheme: Drugs trafficked from Afghanistan, Colombia, and Russia were sold in Europe by Russian and Colombian criminal organizations; these criminal organizations exchanged the Euros received for local currencies on the black market; the black market money brokers sold the Euros at a discounted rate to illicit cigarette importers; the illicit cigarette importers used the Euros to purchase cigarettes from U.S. and European wholesalers; and the wholesalers

purchased cigarettes from RJR. The EC argued that RJR engaged in an active and purposeful role in this scheme – including using special companies to handle the transactions, giving special handling instructions intended to conceal the true purchaser of the cigarettes, and traveling and communicating around the world to negotiate business agreements with and supervise the other participants in the scheme – which formed a "pattern of racketeering activity" consisting of Travel Act violations, mail fraud, wire fraud, money laundering, and providing material support to a foreign terrorist organization.

RJR moved in the U.S. District Court for the Eastern District of New York to dismiss the RICO claims, arguing that the statute does not extend to activities occurring outside the United States. The district court granted RJR's motion, applying the two-step analysis set forth in *Morrison*. Under *Morrison*, a court must first determine whether Congress intended for the relevant statute to apply extraterritorially, and when a statute "gives no clear indication of an extraterritorial application, it has none." 561 U.S. at 255. The district court concluded that RICO is silent as to any extraterritorial application. *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 (NGG)(VVP), 2011 WL 843957, at *4 (E.D.N.Y. Mar. 8, 2011).

Under *Morrison*'s second step, to distinguish a permissible domestic application of a statute from an impermissible foreign application, the court must identify the statute's "focus." 561 U.S. at 266. The district court found that RICO's "focus" is on the criminal "enterprise," and thus a RICO plaintiff must allege a U.S.-based enterprise. *RJR Nabisco*, 2011 WL 843957, at *5. Concluding that the EC had instead alleged a foreign enterprise, the district court dismissed the complaint. *Id.* at *7.

On appeal, the Second Circuit reversed. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014). The appellate court reasoned that, by incorporating by reference various criminal statutes that apply extraterritorially, Congress indicated its intent that RICO would apply to at least some types of foreign conduct. *Id.* at 136-37. The court concluded that RICO's "extraterritorial application [is] coextensive with the extraterritorial application of the relevant predicate statutes." *Id.* at 139. Applying this rule, the Second Circuit held that the money-laundering and material support statutes apply extraterritorially and that with respect to the remaining predicate violations alleged by the EC – violations of the mail and wire fraud statutes and the Travel Act – the complaint alleged sufficiently important domestic conduct. *Id.* at 139-43. That is, the complaint alleged that RJR "essentially orchestrated a global money laundering scheme from the United States by sending employees and communications abroad" and "repatriated the profits of its unlawful activity into the United States," and therefore alleged a claim within the RICO statute. *Id.*at 141-43.

RJR sought rehearing by the panel and *en banc*, arguing that a civil RICO plaintiff must allege a domestic injury. The panel denied rehearing, and issued a supplemental opinion holding that RICO does not require a domestic injury. *European Cmty. v. RJR Nabisco, Inc.,* 764 F.3d 149 (2d Cir. 2014). After a divided Second Circuit voted 8-5 to deny rehearing *en banc*, RJR filed a petition for certiorari, noting that other circuits had reached different conclusions. In October 2015, the Supreme Court granted certiorari.

The Court's Ruling

Justice Alito, writing for the majority in a 4-3 decision,[1] agreed with the Second Circuit that RICO applies extraterritorially to the same extent as the predicate acts of racketeering, but reversed the Second Circuit's holding that RICO's civil action does not require a domestic injury. *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. __, No. 15-138, slip op. at 8, 10 (2016).

First, the Court reaffirmed its jurisprudence addressing the extraterritorial application of U.S. statutes. Noting that "[i]t is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world,'" the Court explained that, under *Morrison* and *Kiobel*, U.S. courts must first "ask whether the presumption against extraterritoriality [of a U.S. statute] has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* at

[1] The Court currently has eight Justices. Of those eight, Justice Sotomayor recused herself, presumably because she participated in Second Circuit decisions earlier in the case's history.

7, 9. This inquiry pertains "regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction." *Id.* at 9. Only if the court concludes that a statute does not apply extraterritorially does it become necessary to identify whether the case involves a domestic application of the statute, with a view toward the statute's "focus."

The Court then separately analyzed RICO's substantive prohibitions, contained in Section 1962, and the statute's private right of action, contained in Section 1964(c). As to Section 1962, the Court held that, unlike the statutes at issue in *Morrison* and *Kiobel*, the presumption against extraterritoriality was rebutted in cases where the alleged pattern of racketeering activity was premised on predicate offenses that themselves apply extraterritorially. The Court cited examples of RICO predicates that expressly apply to foreign conduct, such as the prohibitions against money laundering, hostage taking, and the killing of a U.S. national while that national is outside the United States. *Id.* at 10-11.

The Court rejected RJR's argument that because "RICO itself" does not refer to extraterritorial application, the statute could have none. The Court explained that, because Congress defined "racketeering activity" to encompass violations of predicate statutes that expressly apply to conduct outside the United States, "[s]hort of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect." *Id.* at 12. The Court also rejected RJR's argument that RICO requires a domestic "enterprise," because (among other things) there was "no satisfactory way of determining whether an enterprise is foreign or domestic." *Id.* at 14-16. Accordingly, a RICO violation may occur based on conduct that implicates RICO predicate statutes that apply extraterritorially.

As to when a private party can sue for a RICO violation under Section 1964(c), however, the Court reached a different conclusion. The Court concluded that the presumption against extraterritoriality was not rebutted for the private civil action provision, and therefore a private civil RICO plaintiff must allege an injury occurring in the United States – a "domestic injury." *Id.* at 18. The Court explained that, in view of the "potential for international friction" inherent in the provision of a private civil remedy for foreign conduct, the presumption against extraterritoriality must be separately applied to RICO's private right of action. *Id.* at 19, 21. The Court rejected the EC's suggestion that the presumption should apply with less force because the RICO plaintiffs in this case were foreign governments, and not private citizens. *Id.* at 21-22.

Although the language of Section 1964(c) is relatively broad – providing a cause of action to "[a]ny person injured in his business or property" – it was not enough to displace the presumption against extraterritoriality. *Id.* at 22-23. The Court rejected the EC's attempt to rely on the Court's jurisprudence interpreting the private cause of action contained in the antitrust statute, Section 4 of the Clayton Act, 15 U.S.C. § 15, because the RICO civil remedy provision lacks language that the Court had found to be "critical" in holding that the Clayton Act applied to foreign injuries, and because Congress had subsequently acted to limit the Clayton Act's application to foreign injuries. *Id.* at 25-27. Thus, because the EC had waived its domestic damages claims in a stipulation filed in the district court, its remaining claims resting on injuries suffered abroad must be dismissed. *Id.* at 27.

Implications

The ruling continues the Supreme Court's trend of scrutinizing and limiting the foreign reach of U.S. statutes by giving the "presumption against extraterritoriality" substantial weight. The Court adhered strictly to *Morrison*'s two-step framework and re-emphasized that, under *Kiobel*, each part of a statute, including its remedial provisions, must be evaluated to determine whether Congress intended the provision to be applied extraterritorially.

For the foreign RICO defendant, the Court's ruling provides some measure of protection, although the protection is not complete. The Court left in place the U.S. government's ability to prosecute criminal RICO cases based on conduct occurring outside the United States, so long as the charge is based on a criminal predicate statute with extraterritorial effect. Thus, foreign entities still risk facing U.S. criminal liability based on activities such as money laundering or drug trafficking. However, the ruling limits, potentially significantly, a foreign party's exposure to civil liability in the United States because the plaintiff must allege a domestic injury. Going forward, because the Supreme Court declined to provide any guidance on how to distinguish between

"foreign" and "domestic" injuries, whether the ruling can stem the tide of civil RICO cases against foreign defendants will depend in large part on how lower courts address that question.

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