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Further Limiting the Extraterritorial Reach of US Law, the US Supreme Court Limits the Use of the RICO Statute in *RJR Nabisco v. European Community*

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In *RJR Nabisco, Inc. v. European Community*, the US Supreme Court not only limited the conduct outside the United States that might be subject to the Racketeer Influenced and Corrupt Organizations Act ("RICO") statute in both criminal and civil cases, but placed even stricter limits on the extraterritorial reach of civil damage claims under RICO. The decision is important because RICO's treble damage and fee-shifting provisions have attracted non-US plaintiffs seeking to magnify the value and threat of US commercial litigation. The decision will significantly limit the ability of non-US plaintiffs to use RICO to reach non-US claims, will further limit the reach of civil damage claims arising under all other federal laws, and is also likely to influence how US states interpret the reach of state laws to non-US conduct.

Here, RJR Nabisco, acting from the United States, allegedly helped launder money in Europe for European drug traffickers with the goal of ultimately boosting cigarette imports into the European Community ("EC"). Twenty-six EC nations sued for damages under RICO, 18 USC. §§ 1961-1968. The EC claimed various damages occurring in Europe, including lost tax revenue and increased law enforcement costs. *RJR Nabisco, Inc. v. European Community*, No. 15-138, slip op. at 4-5 (US June 20, 2016) (hereinafter the "*Op.*").

Background

In addressing the extraterritorial reach of RICO, the Supreme Court applied two earlier decisions regarding how federal courts should decide whether federal law could reach non-US conduct. In *Morrison v. Nat'l Austl. Bank*, 561 US 247 (2010), the Supreme Court considered the extent to which non-US conduct could be reached by the anti-fraud provisions of the US securities law. In *Morrison*, the Court held that in assessing the potential extraterritorial reach of a statute, rules of statutory interpretation require a court to look for an "affirmative and unmistakable instruction" that the statute should apply extraterritorially. 561 US at 261. "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 255. In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the Court extended the reasoning of *Morrison* to a law (the so-called Alien Tort Statute, allowing claims in US courts for alleged violations of international law) that created federal jurisdiction as opposed to a law that regulated specific conduct.

The RICO statute presented a new twist on the issue of extraterritoriality. RICO creates both criminal and civil remedies. The heart of the statute, Section 1962, describes the conduct proscribed by RICO, and defines criminal offenses relating to the actions of organized criminal groups (RICO's principal legislative purpose). Those offenses require that a defendant commit one or more so-called "predicate" acts listed in Section 1961— which provides a long list of federal (and state) crimes that may serve as RICO predicate acts, and which includes federal mail and wire fraud. Section 1962(c) makes it a RICO crime to engage in a pattern of predicate acts.

In addition to criminal remedies under Section 1962, RICO also created a civil cause of action that may be used by private litigants (or, as here, parties other than the United States). Under Section 1964(c), "[a]ny person injured . . . by reason of a violation" of Section 1962, may seek treble damages and attorneys' fees. Given the potential for enhanced civil damages under Section 1964, civil RICO claims premised on alleged business frauds (typically relying on the federal mail or wire fraud laws as predicates—i.e., the sending of information or money by mail or electronically across state lines) have become a staple of US commercial litigation over the last thirty years.

The Court's Unanimous Ruling

The Court first addressed whether Section 1962 (which defines what conduct may be actionable under RICO) applied to conduct abroad. In applying *Morrison* and *Kiobel*, the Court articulated a two-part analysis: (i) does the statute give a clear indication of extraterritorial effect (*Op.* at 8); and (ii) if not, does the complaint or claim involve "a permissible domestic [i.e., US] application" of the law in question based on the US contacts alleged? (*Id.* at 8-9). In answering the second part, a court may consider "the focus of congressional concern" in enacting a law. If the conduct relevant to the statute's focus takes place outside the United States then "the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in US territory." *Id.* at 9.

Significantly, with respect to RICO's special structure, the Court then held: "We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or confers jurisdiction." *Op.* at 9. Thus, to the extent RICO regulates conduct in Section 1962 and creates a separate private right of action in Section 1964, each of those sections must be analyzed under the two-part analysis set forth in *Morrison* and *Kiobel*.

With respect to Section 1962(c), the Court noted that some of the predicate acts listed in Section 1961 by their terms applied to non-US conduct. (For example, 18 USC. §2332, forbids killing a US national abroad.) Other offenses, however, are not by their terms clearly extraterritorial, such as the mail and wire fraud statutes. Accordingly, the Court held 7-0 (Justice Sotomayor recused herself, having ruled on this case while on the Second Circuit) that offenses committed abroad only may be used to create RICO liability if the underlying predicate offense (i.e., the statute listed in Section 1961 upon which a claim is based) applies extraterritorially. *Op.* at 10-12. As the Court noted, "if a particular statute does not apply extraterritorially, then conduct committed abroad is not 'indictable' for RICO purposes under that statute" and so cannot qualify as a RICO predicate. *Id.* at 12. Therefore, offenses committed abroad can only give rise to RICO liability "provided that each of those offenses violates a predicate statute that is itself extraterritorial." *Id.* at 13.

In *RJR*, the predicate offenses alleged were (i) money laundering; (ii) material support of foreign terrorist organizations; (iii) mail fraud; (iv) wire fraud; and (v) violations of the Travel Act. *Op.* at 17. Citing the lower court decision, the Supreme Court noted, without deciding, that the money laundering and material support statutes "expressly provide for extraterritorial application in certain circumstances." *Id.* The Court also noted without deciding that the fraud and Travel Act statutes do not contain a clear indication sufficient to overcome the presumption against extraterritoriality, but that RJR did not dispute that the EC had otherwise alleged US conduct satisfying every essential element of claims under those laws. Accordingly, the Court accepted that the conduct alleged by the EC as violating Section 1962(c) did not involve an impermissible extraterritorial application of RICO. *Id.* at 17-18.

The Court then noted two other points that could be significant. First, the Court noted that due to its unusual structure, with Section 1961 listing predicate crimes which must then satisfy the pattern or other requirements of Section 1962, "RICO [is] the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality." *Op.* at 13. This suggests that all seven members of the Court participating in this case agree that such a "clear indication" that Congress intended a statute to apply extraterritorially is required under *Morrison*, which will help defendants in other cases arguing to further limit the extraterritorial scope of federal law. Second, the Court noted that it need not interpret the so-called "enterprise requirement" under RICO—which requires that the pattern of RICO predicate acts alleged under Section 1962(c) be committed through an "enterprise" made up of entities in addition to the defendant. *Id.* at 14-17. Although refusing to decide that a RICO enterprise had to be located in the United States (and seeing good reasons why that should not be the case), the Court noted that a RICO enterprise "must engage in, or affect in some significant way" US commerce "directly." *Id.* at 17. "Enterprises whose activities lack that anchor to US commerce cannot sustain a RICO violation." *Id.* This is likely to further complicate the pleading burden in RICO actions relying on non-US conduct or involving non-US defendants.

The Court's Split Decision

Having analyzed the extent to which RICO Section 1962 reached conduct occurring abroad, the Court then separately analyzed whether a plaintiff can recover civil damages for RICO injuries suffered abroad. Noting that the creation of a private right of action raises issues beyond what "primary conduct" should be allowed to plead a claim, the Court held that Section 1964(c) must be analyzed separately from Section 1962, and then held that a civil plaintiff must allege and prove a domestic injury to establish civil RICO liability. *Op.* at 18. In so holding, the Court raised the specter of US law interfering with foreign law, and noted another principle of statutory construction under which US laws should be construed "to avoid unreasonable interference with other nations' sovereign authority where possible." *Id.* at 19-20 & n. 9. Likening the treble damages available under RICO to the remedies allowed under US antitrust laws, the Court noted the longstanding and significant friction that US antitrust cases have caused with other nations. *Id.* at 21-26 (a factor not mitigated here, where the plaintiffs happened to be foreign sovereigns). In the lower courts, the EC-plaintiffs waived their damage claims for US domestic injury. Accordingly, since Section 1964(c) "does not allow recovery for foreign injuries" (*id.* at 27), the Court concluded that the EC's claims had to be dismissed because the EC's damage claims were based solely on damages suffered abroad. The Court decided this issue 4-3, with Justices Ginsberg, Breyer and Kagan arguing that Section 1964(c) (the provision conferring a private right of action for RICO violations) should not be analyzed separately from the provision governing what conduct is proscribed under the RICO statute, and that this case presented a straightforward application of the RICO statute to US conduct that was properly cognizable in US courts.

Implications

RJR will have important ramifications for US commercial litigation. In the RICO context, *RJR* will make it much harder for non-US plaintiffs to plead RICO claims because (i) most civil RICO claims rely on alleged mail and wire fraud—statutes that have been held not to have extraterritorial application; and, in any event (ii) it is unclear what a domestic RICO injury is, and what types of facts will establish a "domestic injury" under Section 1964(c)—especially in cases where the alleged misconduct occurs abroad under predicate statutes that apply to extraterritorial conduct. Given the Court's discussion regarding "enterprise," it is unclear to what extent a RICO injury must have a direct and substantial relation to US commerce (as is the case under US antitrust laws), or whether a non-US entity could suffer a "domestic injury."

Beyond RICO, *RJR* represents a further tightening of the limits on the extraterritorial application of US law. The Supreme Court has made clear that the extraterritoriality analysis must be conducted whether a federal law regulates conduct, creates jurisdiction, *or* creates a private right of action distinct from criminal claims that may be prosecuted by the US government. The Court also made clear that "an express statement of extraterritoriality" (or some other "clear indication" that Congress intended extraterritorial application) is required to overcome the presumption against extraterritoriality. While this was implicit in *Morrison* and *Kiobel*, by making this express, the unanimous Court has made it harder for plaintiffs to argue that any given federal law reaches extraterritorial conduct or claims. Finally, with its extended discussion of the international friction that has arisen from US antitrust cases involving non-US conduct and parties, the Court has sent a strong signal to the lower federal courts that federal laws should be interpreted so as to minimize interference with non-US legal systems. Taken as a whole, the *RJR* decision will significantly limit the ability of non-US plaintiffs to use RICO to reach non-US claims, will further limit the reach of civil damage claims arising under all other federal laws, and will likely influence how US states interpret the reach of state statutes to non-US conduct.

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