

US Supreme Court Continues to Limit Extraterritorial Application of US Laws

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Adding to a line of decisions limiting the extraterritorial application of U.S. statutes, the U.S. Supreme Court yesterday issued its decision in *RJR Nabisco v. European Community*. In a 4-3 decision, the Court held that to assert a claim under the Racketeer Influenced and Corrupt Practices Act (RICO), 18 U.S.C. § 1961 *et seq.*, a private plaintiff must demonstrate “a domestic injury to its business or property” and clarified that the statute “does not allow recovery for foreign injuries.”

Since 2010, the Court has narrowly construed the extraterritorial reach of a number of statutes, including the Alien Tort Statute, the Torture Victim Protection Act and the Securities and Exchange Act of 1934, and it has limited the ability of the U.S. courts to exercise general personal jurisdiction over foreign corporations for foreign activities based on the unrelated contacts of their wholly owned U.S. subsidiaries.¹ The *RJR* decision further reduces the ability of litigants to seek redress in the U.S. courts for torts occurring outside of the United States.

The *RJR* Case

Enacted in 1970 as an initiative for fighting organized crime in the United States, RICO seeks to curtail certain forms of sustained criminal activity. Under this statute, an “enterprise” that commits two or more specified “predicate” offenses within a 10-year period is deemed to have engaged in pattern of racketeering activity and may be subject to civil RICO liability.² Relevant to *RJR*, § 1962 prohibits activities that affect interstate or foreign commerce and § 1964(c) provides individuals injured by such action with a private cause of action.³ Over time, litigants have attempted to invoke RICO in a variety of civil litigation contexts, not all of which fit the traditional conceptions of racketeering.⁴

In *RJR*, the European Community originally filed a civil RICO suit in 2000 in the U.S. District Court for the Eastern District of New York, alleging a complex money-laundering scheme. The European Community alleged that RJR sold cigarettes to Colombian and Russian drug dealers, who then smuggled those cigarettes into Europe. The European Community claimed that this injured stated-owned cigarette businesses, led to lost tax revenue and harmed European financial institutions.⁵

The Lower Courts’ Rulings

The *RJR* case has had a protracted and circuitous route through U.S. federal courts. The European Community first brought the case in the U.S. District Court for the Eastern District of New York in 2000. The U.S. Court of Appeals for the Second Circuit held that the complaint, as originally drafted, primarily sought to enforce foreign tax laws

¹ See *Daimler AG v. Bauman*, 571 U.S. ___ (2014); *Kiobel v. Royal Dutch Petroleum Co.*, 596 U.S. ___ (2013); *Morrison v. National Australia Bank*, 561 U.S. 247 (2010). For a discussion of *Bauman*, see the Skadden publication “US Supreme Court Further Limits Jurisdictional Reach of the US Courts Over Foreign Torts” (2014). For a discussion of *Kiobel*, see the Skadden publication “US Supreme Court Greatly Restricts Scope of Alien Tort Claims: Holds Statute Does Not Apply Extraterritorially” (April 23, 2013).

² 18 U.S.C. § 1961(5).

³ 18 U.S.C. §§ 1962, 1964(c).

⁴ See, e.g., *Nasik Breeding & Research Farm Ltd. v. Merck & Co.*, 165 F. Supp. 2d 514, 537 (S.D.N.Y. 2001) (“courts must always be on the lookout for the putative RICO case that is really nothing more than an ordinary fraud case clothed in the Emperor’s trendy garb” (citation omitted)); *Katzman v. Victoria’s Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y.1996), *aff’d*, 113 F.3d 1229 (2d Cir.1997) (“Civil RICO is an unusually potent weapon — the litigation equivalent of a thermonuclear device Because the ‘mere assertion of a RICO claim ... has an almost inevitable stigmatizing effect on those named as defendants, ... courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.” (citations omitted)).

⁵ *European Cmty v. RJR Nabisco, Inc.*, 579 U.S. ___, slip op. at 4-5 (2016).

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that fell outside the purview of RICO, and remanded the case for dismissal.⁶ The European Community thereupon amended its complaint to include further claims based on RICO.⁷ In 2011, the district court again dismissed the European Community's claims, this time holding that the claims were impermissibly extraterritorial.⁸

On appeal of this ruling, the Second Circuit disagreed. The Second Circuit held that "Congress ha[d] clearly manifested an intent" that certain RICO predicates apply extraterritorially.⁹ Specifically, the court found that some of the predicates that the European Community alleged, such as money laundering and material support of terrorism, expressly applied extraterritorially while other alleged conduct occurred within the United States.¹⁰ The Second Circuit subsequently denied RJR's request for rehearing and clarified that RICO predicates that apply extraterritorially do not require a showing of domestic injury.¹¹

The Supreme Court's Decision

On June 20, 2016, the Supreme Court reversed the Second Circuit and held that in order to state a private cause of action under RICO, a plaintiff must demonstrate "a *domestic* injury to its business or property," and that the statute "does not allow recovery for foreign injuries."¹² Writing for the majority, Justice Alito focused on whether RICO's substantive provisions in § 1962 "appl[ie]d to conduct occur[ring] in foreign countries" and whether the private right of action under § 1964(c) "appl[ie]d to injuries that are suffered in foreign countries."¹³

The Court began by setting up a two-step framework for addressing issues of extraterritoriality application of U.S. statutes. It stated that, first, a court must determine if the presumption against extraterritoriality has been rebutted through "a clear, affirmative indication that [the statute] applies extraterritorially."¹⁴ If the statute does not apply extraterritorially, the court then must go on to determine "whether the case involves a domestic application of the statute" by looking to the statute's "focus" and

the conduct at issue.¹⁵ If the relevant conduct occurred within the United States, even if some conduct occurred abroad, the case is deemed an acceptable domestic application of the statute.¹⁶ On the other hand, if the conduct that is the statute's focus occurred abroad, extraterritorial application is not permitted.¹⁷

Applying this test to § 1962, the Court found that "a pattern of racketeering activity may include or consist of offenses committed abroad in violation of a predicate statute for which the presumption against extraterritoriality has been overcome."¹⁸ Thus, while some RICO predicates may apply abroad, "many do not."¹⁹ The Court determined that § 1962(b), which makes it illegal to acquire an interest in an enterprise through a pattern of racketeering, and § 1962(c), which makes it illegal for an enterprise to engage in a pattern of racketeering, overcame the presumption of extraterritoriality.²⁰ However, the Court held that § 1962(a), which makes it illegal to invest income derived from impermissible racketeering in an enterprise, extended only to investments made domestically.²¹ The Court went on to clarify that the statute's reference to "foreign commerce" means that "a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States."²²

With respect to the predicate offenses alleged by the European Community, including money laundering, support of foreign terrorist organizations, mail fraud, wire fraud and Travel Act violations, the Court assumed that the alleged predicate offenses were either committed within the United States or, to the extent extraterritorial, were within the permissible scope of a claim.²³ It thus concluded that the European Community's allegations under § 1962(b) and § 1962(c) did not involve an impermissible extraterritorial application of RICO.²⁴

In applying the test to RICO's private cause of action, however, the Court determined that the case failed the first step of its test and did not overcome the presumption against extraterritoriality.²⁵ Absent extraterritorial application, the European Community was required as a private plaintiff to "allege and prove a *domestic* injury to its business or property," before its suit could proceed in U.S. courts.²⁶ Accordingly, regardless of whether the

⁶ *European Cmty v. RJR Nabisco, Inc.*, 424 F.3d 175 (2d Cir. 2005).

⁷ See *European Cmty v. RJR Nabisco, Inc.*, No. 02-CV-5771(NGG)(VPP), 2011 WL 843957, at * 3 (E.D.N.Y. March 11, 2011).

⁸ *Id.*

⁹ *European Cmty v. RJR Nabisco, Inc.*, 764 F.3d 129, 133 (2d Cir. 2014).

¹⁰ *Id.* at 139-40.

¹¹ *European Cmty v. RJR Nabisco, Inc.*, 764 F.3d 149 (2d Cir. 2014) (*per curiam*).

¹² *European Cmty v. RJR Nabisco, Inc.*, 579 U.S. ___, slip op. at 27 (2016). The Supreme Court's opinion, in which four justices joined, was authored by Justice Alito. Due to Justice Scalia's death and Justice Sotomayor's recusal, only seven justices participated. Justice Ginsburg, joined by Justice Breyer and Justice Kagan, dissented and disagreed with the majority that § 1964(c) did not apply extraterritorially. In her view, because § 1964(c) "is triggered" by a violation of § 1962, it too applies extraterritorially. Dissenting Opinion, slip op. at 3.

¹³ Majority Opinion, slip op. at 7.

¹⁴ *Id.* at 9.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 11.

¹⁹ *Id.*

²⁰ *Id.* at 13.

²¹ *Id.*

²² *Id.* at 17.

²³ *Id.* at 18.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

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plaintiff had properly alleged a violation of an extraterritorial RICO predicate, it could not assert a private cause of action unless it also had demonstrated that it had suffered domestic injury.

The Court reasoned that the “danger of international friction” was too great to allow recovery of foreign injuries under RICO “without clear direction from Congress.”²⁷ The Court, therefore, rejected the European Community’s arguments that such concerns were not applicable when the plaintiffs were not private actors, but rather were states, holding that “[w]e reject the motion that we should forego the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign.”²⁸

²⁷ *Id.* at 21.

²⁸ *Id.* at 21-22.

RJR has significant implications for both U.S. corporations that operate abroad and foreign litigants that find themselves sued in the U.S. courts. Although the decision indicates that some RICO predicate acts may be based on foreign conduct, the Court now has made clear that a plaintiff may not assert a private cause of action under RICO unless it can demonstrate a “domestic” U.S. injury. The case thus represents a further extension of the Supreme Court’s jurisprudence limiting the ability of litigants to seek redress in the U.S. courts for tortious conduct occurring outside of the United States.