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'RJR Nabisco' and the Future of Extraterritoriality

The Supreme Court's ruling further limits the ability to seek redress for wrongs occurring abroad.

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Much has already been written about the Roberts Court and its jurisprudential direction, particularly in light of the perceived conservative leanings of five of the justices (now four, after the passing of Justice Antonin Scalia). One discernible trend concerns the "extraterritoriality" of U.S. statutes, i.e. whether U.S. laws apply to events occurring abroad.

The Roberts Court has tended to rule against extraterritorial application. The latest decision, *RJR Nabisco v. European Community*, continues this trend. But given the present composition of the court, and the closeness of the vote in the case, this may be the last in the line.

The *RJR Nabisco* case addressed the extent which the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 et seq.—enacted in 1970 to target organized crime—should apply extraterritorially. The litigation began 16 years ago when the European Community filed a complaint in the U.S. District Court for the Eastern District of New York alleging that the defendants operated a complex money launderingscheme, selling cigarettes to Colombian and Russian drug dealers, who then smuggled those cigarettes into Europe. (The European Community handles external trade affairs for all 28 EU member states—or 27, if and when the U.K. triggers its exit from the EU.)

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In 2011, after a complicated procedural history, the district court dismissed the European Community's complaint, holding that the claims were impermissibly extraterritorial. This decision cited a number of recent U.S. Supreme Court decisions that reflected a presumption against extraterritorial application, including *Morrison v. National Australia Bank*, in which the court held that statutes should not be construed as applying extraterritorially if silent or unclear on the subject.

The U.S. Court of Appeals for the Second Circuit, however, reinstated the action, holding that "Congress ha[d] clearly manifested an intent" that certain RICO predicates apply extraterritorially. The Second Circuit found the predicate actions alleged by the European Community had extraterritorial application.

In its petition seeking certiorari, RJR Nabisco drew on recent jurisprudence that had limited extraterritorial application. They cited

the court's 2013 decision in *Kiobel v. Royal Dutch Petroleum*, in which a five-justice majority applied the presumption against extraterritoriality to dismiss an action brought under the Alien Torts Statute for actions committed in Nigeria. RJR Nabisco also cited the court's 2015 unanimous decision in *Daimler v. Bauman*, in which it held that, absent "specific" jurisdiction over foreign companies, "general jurisdiction" could only be exercised over a defendant headquartered in the U.S.

On June 20, by a 4-3 vote, the Supreme Court reversed the Second Circuit (due to Scalia's death and Justice Sonia Sotomayor's recusal, only seven justices participated). In an opinion by Justice Samuel Alito and joined by Chief Justice John Roberts and Justices Anthony Kennedy and Clarence Thomas, the court held that 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." Alito focused on whether RICO's substantive provisions in Section 1962 "appl[ied] to conduct occur[ring] in foreign countries" and whether the private right of action under Section 1964(c) "appl[ied] to injuries that are suffered in foreign countries."

The court began by setting up a two-step framework for addressing issues of extraterritoriality. First, a court must determine if the presumption against extraterritoriality has been rebutted through "a clear, affirmative indication that [the statute] applies extraterritorially." If not, the court then must determine "whether the case involves a domestic application of the statute" by looking to the statute's "focus" and the conduct at issue. Only if the relevant conduct occurred within the United States is the case is deemed an acceptable domestic application.

Applying this test to Section 1962, the court found that while some RICO predicates may apply abroad, "many do not." The court determined that sections 1962(b) and (c) overcame the presumption of extraterritoriality and assumed that the alleged predicate offenses either occurred domestically or were permissibly extraterritorial. The court held, however, that RICO's private cause of action did not apply extraterritorially. Absent extraterritorial application, the European Community was thus required, as a private plaintiff, to "allege and prove a domestic injury to its business or property," to proceed in U.S. courts.

In dissent, Justice Ruth Bader Ginsburg (joined by Justices Stephen Breyer and Elena Kagan) disagreed with the majority because Section 1964(c) "is triggered" by a violation of Section 1962 and therefore, in her view, it too applies extraterritorially. In her view, the majority's opinion worked a "double standard," whereby "U.S. defendants commercially engaged here and abroad would be answerable civilly to U.S. victims of their criminal activities," whereas "foreign parties similarly injured would have no RICO remedy."

In holding that a plaintiff may not assert a private cause of action under RICO unless it can demonstrate a "domestic" U.S. injury, *RJR Nabisco* has further limited the ability of litigants to seek redress in U.S. courts for wrongs occurring abroad. *RJR* arguably continues the trend against extraterritoriality begun by *Morrison* and *Kiobel*. But the closeness of the vote (and the fact that a majority was perhaps only achievable because Sotomayor recused herself), a question arises as to whether the anti-extraterritorial "trend" will long continue. This is but one of many issues that will interest court watchers in the months and years ahead, after the current vacancy is filled.



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