RJR Nabisco, Inc. v. European Community: Supreme Court Limits Extraterritorial Application of RICO

On June 20, 2016, in a 4-3 decision the Supreme Court decided *RJR Nabisco, Inc.* v. *European Community*[1] holding that certain substantive prohibitions of RICO can have extraterritorial application if the conduct at issue violates an underlying predicate statute that itself has extraterritorial application. The Court further held that, in order to state a claim under RICO for injury to business or property, private civil plaintiffs must allege a domestic injury. Equitable relief under RICO based on foreign injuries is necessarily foreclosed by the Court's holding that RICO's private cause of action requires a domestic injury to business or property.

I. Background and Procedural Posture

The Racketeering Influenced and Corrupt Organizations Act ("RICO")[2] generally prohibits conduct involving a "pattern of racketeering activity" in relation to an "enterprise." RICO Sections 1962(a)-(d) create substantive prohibitions punishable by criminal sanctions and civil actions brought by the Attorney General. Section 1964(c) provides a civil cause of action to private parties injured by violations of Sections 1962(a)-(d). Congress defined "enterprise" as any individual, partnership, association, corporation or other legal entity.[3] "Racketeering activity" includes acts that are indictable under more than 100 federal criminal statutes, known as predicate offenses.[4] Many of these predicate offenses apply extraterritorially when prosecuted independently of RICO.

The European Community and 26 Member States alleged RJR Nabisco and various affiliates (collectively "RJR") participated in a money-laundering scheme coordinated from the United States to sell cigarettes as a means to launder the proceeds of illegal drug trafficking taking place within Europe. The European Community also alleged RJR sold cigarettes within terrorist-controlled areas of Iraq and used the proceeds of this alleged scheme to acquire Brown & Williamson Tobacco Corporation to facilitate the alleged illegal activities.

The European Community filed a complaint in the Eastern District of New York alleging that RJR violated RICO by participating in a pattern of racketeering activity and engaging in the predicate offenses of money laundering, providing support to foreign terrorists, mail fraud, wire fraud, and violations of the Travel Act[5] in relation to an enterprise.

The District Court, citing *Morrison* v. *National Australia Bank Ltd.*,[6] granted RJR's motion to dismiss, holding that RICO does not apply to activity outside of the United States. The Second Circuit reversed, holding that Congress intended for the predicate statutes to apply extraterritorially, and that therefore substantive

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[1] *RJR Nabisco, Inc.* v. *European Community*, 579 U.S. __, slip op. (2016), *available at* http://www.supremecourt.gov/opinions/15pdf/15-138_5866.pdf.

[2] 18 U.S.C. § 1962 et seq.

[3] 18 U.S.C § 1961(4).

[4] Brief for Respondents at 4, *RJR Nabisco, Inc.* v. *European Community* 579 U.S.___ slip op. (2016) (No. 15-138); *RJR Nabisco, Inc*, 579 U.S. at 1-2.

[5] 18 U.S.C. §1952.

[6] *Morrison* v. *National Australia Bank Ltd.,* 561 U.S. 247 (2010) (reaffirming the presumption against extraterritoriality and setting forth a two-step extraterritoriality analysis).

violations of RICO can be enforced extraterritorially when racketeering activities are predicated on those statutes—even when the enterprise and injuries are not domestic.

II. Supreme Court Holds That Only Certain RICO Provisions Apply Extraterritorially

The Supreme Court reversed the Second Circuit and held that while certain substantive prohibitions under RICO apply extraterritorially, private causes of action under RICO do not apply extraterritorially and must allege a domestic injury. According to the presumption against extraterritoriality, U.S. laws are not generally enforced outside the jurisdiction of the United States unless Congress has affirmatively expressed a contrary intent.[7] The court found that the substantive provisions of RICO, but not the private cause of action, rebutted this presumption.

Justice Alito, writing for the majority, employed a two-step framework developed in *Morrison* and *Kiobel* v. *Royal Dutch Petroleum Co.*[8] for resolving questions of extraterritoriality. First, the court must determine whether, through clear and affirmative indications, the statute rebuts the presumption against extraterritoriality. If the statute does not rebut the presumption, then a court must determine if there is a permissible domestic application by looking at the statute's "focus" and if the conduct relevant to the statute's focus occurred within the United States. If the statute rebuts the presumption against extraterritoriality, then there is no need to conduct the second part of the test and the statute can be applied up to the limit Congress imposed on its foreign application.[9]

The majority analyzed the extraterritoriality of RICO's substantive prohibitions of Section 1962(a)-(d) separately from the private right of action provided by Section 1964(c). Justice Alito found that the inclusion of predicate offenses that involve foreign conduct indicates Congress's clear intention that the substantive prohibitions of RICO apply extraterritorially.[10] The Court clarified that only foreign conduct implicating a predicate offense that applies extraterritorially can be the basis for extraterritorial application of RICO.[11]

The extraterritoriality of the substantive prohibitions of RICO applies equally to domestic and foreign enterprises engaged in commerce involving the United States. Justice Alito explained the practical limitations that guided the Court's holding. He wrote that requiring a domestic enterprise under RICO actions would insulate foreign enterprises operating in the United States from prosecution for their illegal activities. Justice Alito also commented on the difficulty in determining whether an enterprise is foreign or domestic for RICO purposes. Not all foreign enterprises are covered under RICO however. The RICO enterprise must "engage in, or affect in some significant way, commerce directly involving the United States."[12]

However, the majority found that Section 1964(c)'s private civil cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962"[13] does not apply extraterritorially. Relying on

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[7] *See Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

[8] *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (holding that presumption against extraterritoriality applies to claims under the Alien Tort Statute).

[9] *RJR Nabisco, Inc.*, 579 U.S. at 9-10.

[10] For example, included among the predicate offenses are those which only apply extraterritorially—the prohibition against "killing a national of the United States, while such national is outside the United States." 18 U.S.C. §2332(a).

[11] While rebutting the presumption against extraterritoriality "requires a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential."[11] *RJR Nabisco, Inc.*, 579 U.S. at 12.

[12] *Id.* at 17.

[13] *Id.* at 22.

Kiobel,[14] the Court analyzed Section 1964(c) separately from the substantive prohibitions of RICO, "despite [finding] that the presumption has been overcome with respect to RICO's substantive prohibitions."[15] The Court found that neither the language of §1964(c) nor other considerations illustrate a clear congressional intent to create a private cause of action for injuries outside of the United States. Justice Alito warned that allowing recovery for foreign injuries in civil RICO actions might lead to "international friction" with other sovereigns. This potential for friction requires that the Court strictly and uniformly enforce the presumption absent clear direction from Congress to the contrary.

Justice Ginsburg (joined by Justices Kagan and Breyer)[16] issued a dissent in which she agreed with the majority's holding on the extraterritoriality of RICO's substantive prohibitions, but disagreed with the majority's refusal to extend extraterritorial application to private causes of action. Justice Ginsburg would not separate the underlying prohibited acts under RICO from private civil action remedies. She wrote that the text and legislative history of Section 1964(c) indicate Congress intended for it to apply to foreign injuries. Justice Ginsburg did not find the majority's concern over "international friction" persuasive. Preventing private plaintiffs from bringing suit, she argued, would create international comity concerns. Justice Breyer, in a separate dissent, also disagreed with the majority's concern over international friction.

III. Significance of the Decision

This is the latest in a series of cases in which the Court has strictly applied the presumption against extraterritoriality to limit the extraterritorial application of several federal statutes.[17] The decision preserves the federal government's ability to bring RICO suits for conduct occurring abroad in limited circumstances—when based on a predicate statute with clear extraterritorial application. Private plaintiffs must now allege domestic injury in order to bring RICO suits.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.

[14] *Kiobel* held that the presumption against extraterritoriality applies equally to statutes regulating conduct and those that provide causes of action.

[15] *RJR Nabisco, Inc.*, 579 U.S. at 19.

[16] Justice Sotomayor did not participate in the decision.

[17] *See Morrison,* 561 U.S. 247 (2010); *Kiobel,* 133 S. Ct. 1659 (2013); *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014); *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004).