

4 Takeaways From The High Court's New Rule On RICO's Reach

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On June 20, 2016, the U.S. Supreme Court reversed the Second Circuit's decision in *RJR Nabisco Inc. v. European Community*,^[1] ruling that the federal Racketeer Influenced and Corrupt Organizations Act has limited extraterritorial application, and that even when it does a private litigant must allege a domestic U.S. injury in order to state a claim. Previously, a three-way circuit split had left the viability of RICO claims very much dependent upon the district in which they were brought — imposing the risk of inconsistent outcomes on RICO claims arising out of international activities. The court's decision rejects all of the prevailing rulings on extraterritoriality and offers some new takes on the court's prior jurisprudence in that area as well as antitrust law.



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Background

Justice Samuel Alito delivered the opinion of the court, in which Chief Justice John Roberts, Justices Anthony Kennedy and Clarence Thomas joined, and in which Justices Ruth Bader Ginsburg, Stephen Breyer and Elena Kagan joined in part, dissented in part, and dissented in the judgment. Justice Sonia Sotomayor did not participate.

Respondents the European Community and 26 member states brought this litigation, spanning 16 years and a complicated procedural path, against the petitioner RJR Nabisco Inc. and related entities. The operative complaint alleged a complex global money-laundering scheme in which Colombian and Russian drug traffickers smuggled drugs into Europe, with the proceeds from sales ultimately used to fund the importation of large shipments of RJR cigarettes into Europe.

The defendants' conduct allegedly constituted a number of violations of RICO predicate statutes ("racketeering activity" in RICO parlance), including money laundering, providing support of foreign terrorist organizations, mail and wire fraud, and violations of the Travel Act, and did so in a manner that constituted a "pattern of racketeering activity." The complaint contends that RJR, acting in concert with other participants, constituted an association-in-fact RICO "enterprise," and that the defendants' conduct violated each of the three subsections of the federal RICO statute, 18 U.S.C. §§ 1962(a)-(c).

By the time the case arrived most recently at the Second Circuit, the principal issue was whether RICO applies "extraterritorially" to racketeering activity that occurred outside the United States, or to foreign "enterprises." Previously, courts had concluded uniformly that RICO had no extraterritorial application. But then a split in authority arose: In purported reliance upon *Morrison v. National Australia Bank*

Ltd.[2], courts sought to determine the “focus” of the RICO statute, with some finding it to be the “enterprise” and some the “pattern of racketeering activity.” In either case, RICO claims could proceed only if an often complex and international set of activities could be characterized as principally “domestic,” and thus not impermissibly extraterritorial in nature. Different outcomes followed from whether a court’s focus was the “enterprise” or the “pattern.”

The Second Circuit charted an altogether different course, concluding that RICO could be given extraterritorial effect to the extent a complaint alleged violations of RICO predicate statutes that independently possessed extraterritorial application. If a RICO violation was pleaded, a private right of action for treble damages and attorneys’ fees automatically would lie. Applying this new rule, the Second Circuit reversed the dismissal of the plaintiffs’ complaint. Including the denial of rehearing and rehearing en banc, the litigation generated seven opinions in the Second Circuit alone.

The Supreme Court reversed, in a 4-3 opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy and Thomas (Justice Sotomayor did not participate). The court began with a discussion of *Morrison*, its seminal decision on extraterritoriality, which articulated as a first analytical step the general presumption that Congress did not intend to extend U.S. law “to conduct in foreign countries”[3] absent a clear indication of congressional intent to the contrary. The court found the requisite intent in RICO, “but only with respect to certain applications of the statute.”[4] The “most obvious textual clue”[5] that certain RICO prohibitions necessarily must apply to foreign conduct was the existence of “a number of predicates that plainly apply to at least some foreign conduct,”[6] including prohibitions involving the assassination of government officials, hostage taking, and even one which would apply only to conduct outside the U.S. (the killing of a U.S. national abroad).

The court concluded that inclusion of such extraterritorial predicate offenses “gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity — but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially.”[7] Indeed, the court noted that RICO is “the rare statute that clearly evidences extraterritorial effect despite lacking an express statement.”[8] Notably, the court limited its holding to §§ 1962(b) and (c), which proscribe, respectively, the acquisition or maintenance of control of an “enterprise” or the conduct of the “enterprise’s” affairs through a “pattern of racketeering activity.” The court did not address the “thornier question”[9] whether § 1962(a) is violated only if proceeds from a “pattern of racketeering activity” are invested in the United States.

The court then rejected RJR’s argument that, even if RICO applied to foreign patterns of racketeering, it does not apply to foreign enterprises because the statute’s “focus” is the enterprise being corrupted, which consistent with principles of extraterritoriality, must be domestic. In so doing, the court commented on the second analytical step in *Morrison*, noting that the need to identify a statute’s “focus” arises only where the statute is found not to have extraterritorial effect, which is not the case with RICO. The court cited various practical problems attendant to RJR’s proposed methodology for determining whether an “enterprise” was properly domestic and, while not suggesting that they were probative of congressional intent, said that they “reinforced”[10] the results of the textual and contextual analysis. The absence of a domestic “enterprise” requirement does not, the court went on to say, undermine the statutory requirement that an “enterprise” be involved in U.S. commerce or commerce between the United States and foreign countries.

Applying its ruling to RJR Nabisco, the court agreed with the Second Circuit that the European Commission had alleged a “pattern of racketeering activity” comprising predicate acts having extraterritorial application or U.S. acts violating statutes that had only a domestic reach.

The majority disagreed with the Second Circuit, however, that injuries caused by a substantive RICO violation were necessarily subject to redress under RICO's private right of action, 18 U.S.C. § 1964(c). The court first concluded that the presumption against extraterritorial application of the laws should apply independently to RICO's remedial provisions. It discussed at length the "international friction" that it believed might result if foreign individuals, bypassing their home country's less generous remedies, were permitted to sue in the United States under RICO for treble damages. It distinguished this concern from that attendant to governmental actions that do not depend on § 1964(c) and so would not be subject to a domestic injury requirement: in such cases, "prosecutorial discretion"[11] would be available to address the concern. The court noted the irony of raising these concerns in a case brought by foreign sovereigns themselves, but responded simply that it needed to make one rule for all private plaintiffs.

Applying the presumption against extraterritorial application of U.S. laws, the court found no "clear indication"[12] that Congress intended to offer a remedy for RICO injuries suffered abroad. The private remedy applies to "[a]ny person injured in his business or property," but the court concluded that this general reference was insufficient to overcome the presumption against extraterritoriality. Critically, the court addressed the scope of the private remedy under the antitrust laws, to which it said it had "often"[13] looked in construing § 1964(a). In *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978), the court held that § 4 of the Clayton Act allowed recovery for antitrust injuries suffered abroad. But the adherence of RICO's remedy to that of antitrust is imperfect, and the court both distinguished *Pfizer* and suggested that it may not be up to the contemporary extraterritoriality jurisprudence as described in *Morrison*.

The court also referred to the Foreign Trade Antitrust Improvements Act of 1982, which it said excluded from the reach of the antitrust private remedy "most conduct 'that causes only foreign injury.'"[14] The 1982 statute (the scope of which is itself the subject of much disagreement among courts nationwide) "obviously"[15] does not limit § 1964(c), but still was cited as "underscoring"[16] the majority's decision not to import principles from the older antitrust case law "that are at odds with our current extraterritoriality doctrine." [17]

Finding the requisite U.S. injury not plead, the court dismissed the complaint, reversing the Second Circuit panel.

Justice Ginsburg, joined by Justices Breyer and Kagan, concurred in the majority's decision that RICO applied extraterritorially to the extent of "patterns of racketeering activity" based on predicate acts having extraterritorial effect, but concluded that § 1964(c) should not be read to incorporate a domestic injury requirement. The minority saw no textual basis to distinguish the scope of the remedy from that of the violation, nor a compelling policy reason to do so because U.S. interests were implicated by the RICO claims: "this case has the United States written all over it." [18] The justices said that the concerns identified by the majority could be addressed on a case-by-case basis, through due process limitations on jurisdiction, as well as application of the *forum non conveniens* doctrine. Writing a separate opinion, Justice Breyer distinguished the case at bar from one in which the U.S. had no real connection at all, and believed that the majority's concerns over comity with other nations were overblown.

Discussion

The court's decision brings welcome clarity to an unsettled and important area of the law that has left many RICO plaintiffs and defendants at the mercy of geography for the outcomes of their cases. Here

are some top-line takeaways:

1. The New Requirement of a Domestic U.S. Injury Will Affect Private Litigants, Not U.S. Enforcement Efforts

The court's introduction of a U.S. injury requirement was effected through construction of RICO's private right of action, not of substantive provisions of the statute that limit U.S. enforcement efforts. The court has drawn such a distinction on other occasions, including, as it noted, with the requirement that a private litigant (but not the United States) show an "antitrust injury" to qualify for treble damages. In this key respect, the majority respected a central interest advanced by the United States that the case not be a vehicle for limiting the government's war on terror.

2. Private RICO Claims as a Group Will Likely be More Limited

The RJR Nabisco decision defies the usual categorization of pro-plaintiff or pro-defendant: allowing RICO to have extraterritorial effect might be seen as an example of the former (although the number of predicate statutes having extraterritorial effect is not large), while the domestic injury requirement reflects the latter. Moreover, the prior three-way circuit split itself was difficult to handicap in the abstract. In any given case, the focus under any of the analyses could block claims permitted under one or both of the others. Step Two (the requirement of a U.S. injury) appears likely to result in more dismissals, but certainly not cases in which extraterritorial violations of law caused demonstrable injury in the United States.

3. Private RICO Claims Must Hew More Closely to U.S. Interests

The court's opinion continues the Roberts court's tendency to prune federal statutes of their applicability to disputes that do not significantly affect U.S. interests. The court's treatment of RICO and antitrust precedent is illustrative and revealing. Prior RICO decisions that appeared to sanction complaints that would not meet the new domestic injury requirement are distinguished to the extent a good-faith basis exists to do so. The court's analogy to antitrust claims is particularly telling. In reaction to some court decisions, Congress limited the extraterritorial reach of the Sherman Act by passing the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), but in doing so carved out foreign conduct that in some circumstances has U.S. effects.

Although Congress has taken no such action with respect to RICO, the court used Congress's adoption of the FTAIA to support its analysis that its "current extraterritoriality doctrine"[19] requires a domestic injury for RICO claims. Occasionally a Supreme Court decision will take full advantage of the court's freedom to recast its precedents; this is one of them. For many years, Justice Ginsburg's suggestion that avoidance of disputes that do not adequately implicate U.S. interests could be protected by jurisdictional requirements and the forum non conveniens rule might well have garnered another vote.

4. The Analysis of "Domestic" Disputes Having International Elements Remains Unsettled

The court relied upon, without independently reviewing, the Second Circuit's conclusion that the complaint alleged a "domestic" violation of certain RICO predicate statutes that have no extraterritorial effect. Most federal statutes have no extraterritorial effect, and yet are routinely found by courts to apply to transactions and conduct reaching across international borders. The conclusions are often impressionistic and follow widely varying analyses that at times appear to defy consistent application. An assessment of the law in this area will need to await a subsequent case.

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[1] RJR Nabisco Inc. v. European Community, No. 15-138, 579 U.S. ____ (June 19, 2016).

[2] Morrison v. National Australia Bank Ltd., 561 U. S. 247 (2010).

[3] RJR Nabisco, 579 U.S. ____, slip op. at 7.

[4] Id. at 10.

[5] Id.

[6] Id.

[7] Id. at 11.

[8] Id. at 12.

[9] Id. at 13 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

[10] Id. at 16.

[11] Id. at 19.

[12] Id. at 22.

[13] Id. at 24.

[14] Id. at 26-27 (quoting *F. Hoffman-La Roche Ltd. v. Empagran SA*, 542 U.S. 155, 158 (2004)).

[15] Id. at 27.

[16] Id. at 26.

[17]Id. at 27.

[18]RJR Nabisco, 579 U.S. ____ (2016) (slip op., at 7) (Ginsburg, J., dissenting).

[19] RJR Nabisco, slip op. at 27.

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