New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 14
THURSDAY, JULY 21, 2016

Outside Counsel

Expert Analysis

'RJR Nabisco': Supreme Court Rules on RICO Extraterritoriality

By **Amber Wessels-Yen**

And **Karl Geercken**

On June 20, the Supreme Court issued its much-anticipated decision in *RJR Nabisco v. European Community*,[1] applying its new extraterritoriality analysis to RICO claims. The result is an opinion that addresses some disputes among the lower courts, leaves others unaddressed, and breaks new ground to limit the availability of U.S. courts to decide intrinsically foreign civil disputes.

Morrison Decision

For almost four decades, lower courts—led by the U.S. Court of Appeals for the Second Circuit—applied a complex and nuanced "conduct and effects" test to determine whether section 10(b) of the Securities Act should apply in securities fraud cases with extraterritorial scope. This test balanced "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens" and "whether the wrongful conduct occurred in the United States."[2]

In 2009, however, the Supreme Court granted cert in *Morrison*, in which Australian plaintiffs had purchased Australian stock and alleged that they had been damaged by securities fraud occurring in Australia and the United States. Both the Southern District of New York and the Second Circuit had dismissed the litigation using the conduct and effects test.[3]

> The Supreme Court has shown that it is willing to break new ground to limit the use of U.S. courts in intrinsically foreign disputes.

Although the court affirmed this result, it demolished this analysis in favor of a new bright-line test.[4]

This new test is that when a federal statute "gives no clear indication of an extraterritorial application, it has none." If the statute has no extraterritorial scope, then the court must analyze whether the litigation is sufficiently domestic, using a skeptical eye, since "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case." The court provided a bright-line application of this test to these Securities Act claims: "only transactions in securities listed on domestic exchanges, and domestic transactions in other securities" can be brought in U.S. courts. However, the decision did not apply this new test to any other federal statutes.

In the 2013 Kiobel decision, the court applied *Morrison* to the Alien Tort Statute, which provides federal court jurisdiction to foreigners alleging torts committed in violation of international law.[5] Wiping away 35 years of lower court decisions to the contrary, the court held that the U.S. courts have no jurisdiction over cases alleging abuses occurring extraterritorially unless those abuses "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application."

Application to RICO Litigation

RICO (Racketeer Influenced and Corrupt Organizations Act) was designed to address organized crime, but has also become popular in civil cases, in part because it

AMBER WESSELS-YEN *and* KARL GEERCKEN *are partners at Alston & Bird's New York office and co-chair the firm's international litigation practice.*

grants treble damages to successful plaintiffs. In a nutshell, a criminal or civil RICO complaint must allege that defendants engage in a pattern of "racketeering activity," (e.g., violations of underlying federal criminal statutes, or "predicate acts") and that defendants' actions are affecting an "enterprise." Federal courts, including those in the Second Circuit, struggled with two applications of the Morrison extraterritoriality analysis to the idiosyncratic RICO context.

The first issue with applying *Morrison* was the extent to which the relevant federal statutes gave a clear indication that they should be applied extraterritorially. While the Second Circuit, for example, had previously held that the RICO statute itself was silent on any extraterritoriality in *Al-Turki* (dismissing an extraterritorial RICO complaint which predated the Morrison opinion),[6] many courts have since gone on to also analyze the extent to which the federal criminal statutes that define RICO's underlying predicate acts apply extraterritorially. Most of those courts, after parsing through the statutes, held that some underlying predicate statutes allowed extraterritorial application, but that the more common predicates such as mail fraud and wire fraud could only extend to sufficiently "domestic" actions.

The second application where lower courts disagreed was in determining the domestic connections that a RICO complaint needed to allege in order to survive the presumption against extraterritorial application of these domestic predicates. Some decisions focused on whether the defendants' pattern of racketeering activity—the violations of the underlying statutes—took place primarily in the United States or abroad. Others focused on whether the "enterprise" affected by the activity was essentially domestic or extraterritorial in nature, but then struggled with analyzing where the enterprise was based. The U.S. government took the position that the extraterritoriality analysis was satisfied if either the pattern or the enterprise was sufficiently domestic.

The Second Circuit was the first appellate court to apply *Morrison* to the RICO context in *Norex Petroleum*, which dismissed an extraterritorial RICO complaint. However, the Norex decision did not shed much light on either of these two controversial issues. The opinion noted that the Second Circuit had previously applied the conduct and effects test to RICO, but that *Morrison* abrogated that test. It then simply: (1) cited *Al-Turki* to hold that the RICO statute itself was silent on any extraterritoriality, without looking into language of underlying statutes; and (2) held that the alleged "slim contacts with the United States" were insufficient to allow the case to survive the presumption against extraterritoriality, without any further details on the nature of those contacts.[7]

RJR Nabisco Holdings

In 2000, the European Community and 26 European countries first brought RICO claims against RJR Nabisco and related corporate entities in the Eastern District of New York, claiming they had participated in an international scheme to smuggle narcotics, launder money, and sell RJR cigarettes in violation of international sanctions. After several district court and appellate decisions, the district court finally dismissed the litigation in its entirety.[8] The dismissal interpreted *Norex* to hold that, because the overarching RICO statutes did not apply extraterritorially, all RICO claims (regardless of the underlying predicate statutes) must be subjected to the extraterritoriality analysis. It then analyzed the location of the enterprise and held that the "nerve center" of the enterprise was with criminal organizations located abroad.

A panel of the Second Circuit then reversed that dismissal.[9] It held that each underlying predicate statute should be reviewed for extraterritorial language and that the proper extraterritoriality analysis should focus on individual alleged predicate act violations rather than the location of the enterprise (or on the "pattern" of predicate acts). It then applied this analysis to hold that: (1) the alleged money laundering and material support of terrorism predicate statutes applied extraterritorially; (2) the remaining mail fraud, wire fraud, and Travel Act predicate statutes did not contain extraterritorial language; and (3) the complaint sufficiently alleged domestic conduct for all claims involving these three domestic predicate statutes.

Defendants sought rehearing from the panel's decision reviving the litigation, asserting that RICO also required civil plaintiffs to allege a domestic injury. The panel denied rehearing and issued a separate short opinion that civil plaintiffs face no additional domestic injury requirement.[10]

Finally, the full Second Circuit denied an en banc rehearing of the panel's holdings. However, individual judges wrote one concurrence and four separate dissenting opinions regarding the circuit's refusal to perform a full en banc review of the decision. It was not surprising that the Supreme Court decided to review the panel's holding.

Supreme Court's Analysis

The first issue that the court tackled was the extent to which RICO's extraterritoriality should be analyzed

using the underlying predicate statutes pleaded by plaintiffs.[11] Here, the court upheld the Second Circuit panel's decision and validated many lower court decisions by holding unambiguously that the predicate act statutes must be analyzed on a case-by-case basis for their extraterritorial effect. If an underlying statute applies to extraterritorial actions, then no further analysis needs to be made.

Next, the court discarded defendants' argument that the extraterritoriality analysis requires every RICO complaint (regardless of underlying predicate acts) to allege a domestic enterprise. In doing so, the court described weaknesses in the nerve center analysis used by the district court and in trying to determine the location of an association-in-fact enterprise. However, the court did not conclusively rule out using any enterprise-based analysis; instead, it held that the weaknesses "simply reinforce[d]" its conclusion that RICO's extraterritoriality should be analyzed using the underlying statutes rather than a blanket requirement of domestic enterprise.

The court's application of these holdings to the complaint at issue unfortunately will do little to resolve the underlying controversy regarding whether domestic predicate statutes should be analyzed using the location of predicate acts, patterns, or relevant enterprises. The court only very briefly mentioned the Second Circuit's holdings distinguishing between extraterritorial and domestic predicates and determining that the complaint alleged domestic violations of the domestic predicates. It then "assume[d] without deciding" that both the alleged pattern of racketeering and the alleged enterprise were sufficiently domestic. It concluded that "on these premises," the allegations were not impermissibly extraterritorial under RICO's §§1962(b) and (c).

Most controversially, however, a slim majority[12] of the court went on to raise the bar for civil RICO actions by adopting defendants' novel argument—which had not been adopted by any lower courts, but which was adopted by the U.S. government in its amicus brief—that civil RICO suits should be subject to a separate presumption against extraterritoriality. The court held that a civil plaintiff alleging RICO violations must now "allege and prove a domestic injury to its business or property." The court cited its Morrison and Kiobel opinions to emphasize that the policy basis for this new holding, as with these previous extraterritoriality decisions, is to reduce the chance of offending the sovereignty of foreign nations by reducing the number of U.S. suits that may conflict with foreign remedies.

In her dissent, Justice Ruth Bader Ginsburg argued that the forum non conveniens doctrine and the recently raised bar for general personal jurisdiction over a foreign defendant provide sufficient safeguards to comity, and that "[m]aking such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests."

Conclusion

Just as it did with *Morrison* and *Kiobel*, the Supreme Court has shown that it is willing to break new ground to limit the use of U.S. courts in intrinsically foreign disputes. The biggest losers in the new RJR Nabisco opinion are foreign plaintiffs seeking treble-damage recovery in civil litigation, who may have difficulty showing domestic injury. However, the U.S. government has retained its broad powers to bring criminal RICO litigation, and the ability of U.S. plaintiffs to bring RICO suits may not be severely impacted.

Unfortunately, litigants will still have grounds to debate whether, for domestic predicate statutes, the court should: (1) examine the pattern of predicate acts; (2) examine the location of the enterprise; (3) allow the suit to proceed if either the predicate acts or the enterprise is sufficiently domestic; or (4) require some combination or balancing of (1) and (2).

1. *European Community v. RJR Nabisco*, No. 15-138, 2016 WL 3369423, __ U.S. __ (2016).
2. *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003).
3. *Morrison v. Nat'l Australia Bank*, 547 F.3d 167 (2d Cir. 2008); *In re Nat'l Australia Bank Securities Litigation*, No. 03-CV-6537, 2006 WL 384465 (S.D.N.Y., Oct. 25, 2006).
4. *Morrison v. Nat'l Australia Bank*, 561 U.S. 247 (2010).
5. *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. __, 133 S. Ct. 1659 (2013).
6. *North South Finance Corp. v. Al-Turki*, 100 F.3d 1046 (2d Cir. 1996).
7. *Norex Petroleum v. Access Industries,* 631 F.3d 29 (2d Cir. 2010).
8. *European Community v. RJR Nabisco*, No. 02-CV-5771, 2011 WL 843957 (E.D.N.Y. March 8, 2011).
9. *European Community v. RJR Nabisco*, 764 F.3d. 129 (2d Cir. 2014).
10. *European Community v. RJR Nabisco*, 764 F.3d 149 (2d Cir. 2014).
11. *European Community v. RJR Nabisco,* No. 15-138, 2016 WL 3369423, __ U.S. __ (2016).
12. Because Justice Sonia Sotomayor recused herself, *RJR Reynolds* was decided by seven justices. All of these justices joined in most of the opinion's holdings, but only Justices John Roberts, Anthony Kennedy and Clarence Thomas joined in Justice Samuel Alito's opinion section imposing the civil domestic injury requirement and in the result.