

CLIENT ALERT

Supreme Court Clarifies the Extraterritorial Application of RICO and the Availability of Private Civil Claims for Foreign Injuries

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Earlier this week, the Supreme Court issued an important decision clarifying the scope of the Racketeer Influenced and Corrupt Organizations Act (RICO). In *RJR Nabisco, Inc., v. European Community*, No. 15-138, the Court held that while certain substantive provisions of RICO do apply to foreign conduct, the provision providing for a private right of action under RICO does not allow civil plaintiffs to sue for injuries outside the United States.

RICO's § 1962 makes it a crime to engage in a "pattern of racketeering activity" to infiltrate, control, or operate an enterprise. RICO defines "racketeering activity" to include a number "predicate acts." A defendant must have engaged in at least two predicate acts within a ten-year period in order for there to be a violation. RICO violations are subject to criminal penalties and also may be addressed by the government through civil actions. In addition, § 1964(c) provides for a private right of action, allowing "any person injured in his business or property" resulting from a violation of RICO to sue in federal court to recover treble damages, costs, and fees.

In November 2000, the European Community and 26 member states filed a private civil action alleging that RJR and related entities participated in a global smuggling and money laundering scheme, in violation of RICO. Under the alleged scheme, traffickers smuggled drugs into Europe that were sold for euros, which were used to pay for large shipments of cigarettes into Europe. In its complaint, the European Community alleged a variety of injuries suffered by member states as a result of the scheme, including competitive harm to their state-owned cigarette businesses, lost tax revenue, instability of currency, and increased costs for law enforcement.

RJR moved to dismiss the European Community's claims on the ground that RICO does not apply to racketeering activity occurring outside the United States or to foreign enterprises. The district court granted the motion, but the Second Circuit reversed and held that RICO applied to the claims. The Supreme Court granted certiorari to address the question of extraterritorial application.

In an opinion by Justice Alito, the Court confirmed that RICO's substantive provisions in § 1962 may apply to certain conduct in foreign countries. This portion of Court's opinion was unanimous, save for Justice Sotomayor, who recused herself from this case. Justice Alito explained that under the principle known as the "presumption against extraterritoriality," federal laws generally do not apply beyond our Nation's borders absent an expressed intent by Congress to the contrary. In RICO, however, Congress included a number of predicate acts that plainly encompass foreign conduct. For example, the prohibition on killing a U.S. national outside of the United States is a predicate act

that necessarily applies to foreign conduct. Thus, the Court held that a violation of § 1962 may be based on a pattern of racketeering outside the United States, as long as the predicate acts that form the basis of the RICO violation either took place within the United States or took place elsewhere but still constituted a violation of a U.S. law that itself applies extraterritorially.

Although the Court ruled for the European Community on that critical issue, it ultimately rejected the claims on other grounds. Justice Alito, now writing only for a four-justice majority, explained that even though RICO's substantive provisions may apply to foreign conduct, there is nothing in § 1964(c) that expresses Congress's intent that the private right of action extend to foreign injuries. In addition, the Court reasoned that allowing private lawsuits in federal courts for foreign conduct would create the very real possibility of international conflict. To the extent that a foreign violation arises, it would need to be addressed in a criminal or civil action by the Department of Justice, which presumably can be charged with managing such conflicts. Accordingly, the Court held that RICO's private right of action in § 1964(c) requires private RICO plaintiffs to allege and prove a domestic injury and does not extend to foreign injuries.

Justice Ginsburg, joined by Justices Breyer and Kagan, dissented from the majority regarding whether § 1964(c) requires a domestic injury. Justice Ginsburg explained that nothing in RICO's text suggests that the private right of action was so limited. Because § 1964(c) permits private civil suits when there is a violation of § 1962, to the extent that § 1962 may apply extraterritorially as the Court holds, the private right of action should extend to foreign injuries as well. In addition, Justice Ginsburg noted that the European Community's case illustrates why requiring a domestic injury makes little sense, as the case has the "United States written all over it." As she explained, RJR is a United States corporation headquartered in the United States, the alleged activity was directed from the United States, and it involved alleged predicate acts occurring in the United States.

Justice Breyer dissented separately to further note that because the Government could not provide examples and had not consulted with foreign governments regarding the potential risk of international friction, he could not accept its argument—submitted in an amicus brief—that allowing suits for foreign injuries under § 1964(c) presented a danger of international conflicts. Accordingly, he would not give the Government's assertion the same controlling weight as the majority opinion did.

As the European Community had previously waived its domestic claims for damages, all of its remaining RICO claims rested solely on damages resulting from foreign injuries. Accordingly, the Court's decision brought an end to this long-standing litigation.

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