

## Remain Seated For A High Court Reading Of RICO's Reach

*Law360, New York (October 15, 2015, 10:45 AM ET) --*

On Oct. 1, the U.S. Supreme Court agreed to take up the case of *European Community v. RJR Nabisco Inc.*,<sup>[1]</sup> and in the process to resolve questions about the extraterritorial reach of the federal Racketeer Influenced and Corrupt Organizations Act that have created a three-way split among the circuits and seven opinions in the Second Circuit alone.

The *RJR Nabisco* case represents the first appellate decision holding that RICO may, depending on the violations alleged, apply extraterritorially to conduct occurring entirely outside the United States. Even apart from the potential for expanding the scope of a statute that already imposes substantial litigation costs and risks on legitimate businesses, the creation of yet a third test for liability can only lead to uncertainty and mischief. The various

extraterritoriality tests create the real possibility that motions to dismiss RICO claims will be granted or denied based on where a case has been filed. Given RICO's nationwide service of process, this critical criminal and civil statute has become a forum shopper's delight.



Robert P. Reznick

### RICO and Extraterritoriality

Most court decisions addressing the extraterritoriality of federal statutes don't actually focus on *whether* the statute should be given extraterritorial effect. Following the U.S. Supreme Court's *Morrison*<sup>[2]</sup> decision in 2010, statutes are presumed not to have extraterritorial effect absent a clear indication of congressional intent to the contrary. Courts generally have not agonized over application of the *Morrison* test, requiring a clear textual link to extraterritorial conduct (and usually not finding it). Most of the discussion, rather, has considered the lawyerly if not metaphysical question whether claims that involve some domestic conduct and some international conduct should be *characterized* as domestic.

Until recently, this was the story with RICO. RICO violations involve a combination of a few unique statutory elements. First, certain violations of state and federal criminal law, often encountered in organized crime activities, are denominated "racketeering activity" (or, in RICO parlance, "predicate offenses").<sup>[3]</sup> Two or more instances of "racketeering activity" can constitute a "pattern of racketeering activity," if supplemented by the requirements of "relationship and continuity."<sup>[4]</sup> All RICO violations require the existence of such a "pattern of racketeering activity." They also require the existence of an "enterprise," which is a legal entity or even an informal association of individuals that constitutes "a

continuing unit that functions with a common purpose.”[5] Notably, the nature of the required “enterprise” depends on the violation alleged. For example, the RICO provision most often cited in complaints, 18 U.S.C. Section 1962(c), makes it unlawful “to conduct or participate, directly or indirectly, in the conduct of [an] enterprise’s affairs through a pattern of racketeering activity.” The “enterprise” in such case is one with an illegal purpose.[6] Section 1962(b), by contrast, provides that it shall be unlawful “for any person through a pattern of racketeering activity ... to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.” The focus of this provision is the infiltration of legitimate business by organized crime — the “enterprise,” in other words, may well be a legal one.[7]

Prior to the *RJR Nabisco* case, courts reviewing the language of the RICO statute “uniformly” found no basis to overturn the *Morrison* presumption against extraterritorial application.[8] But concluding that RICO applied only domestically was only the start of the analysis, as courts had yet to determine how the geographic location of a claim was to be assessed. In *Morrison*, the court found the Securities Exchange Act of 1934 did not have extraterritorial effect and applied that rule to the location of purchases and sales of securities, rather than where the alleged deception occurred, because the former was the “focus” of the statute.[9] Applying the “focus of the statute” test to RICO’s unique and complicated structure, however, led to the adoption of at least two tests in the federal circuits. Some courts concluded that the “focus” of RICO was the “pattern of racketeering activity” required for any RICO violation, and looked to where that conduct occurred; other courts looking at the same statute concluded that the location of the “enterprise” was a more appropriate test.[10] The Tenth Circuit summarized the uncertain state of the law by observing that the plain language of RICO does not provide a “conspicuous” understanding of Congress’s intent.[11]

### ***European Community Litigation***

Until April 23, 2014, the disparate “enterprise” and “pattern of racketeering activity” approaches represented a somewhat troubling uncertainty in the application of a statute whose criminal and treble damages civil remedies have proved to be a potent litigation risk even for legitimate businesses. On that date, the Second Circuit issued its decision in the *European Community* case, compounding the risk and the uncertainty by creating yet a third test — one that introduced genuine extraterritoriality for RICO claims.

*European Community* involved a claim by the European community and 26 of its member states (collectively, “EC”) that RJR Nabisco and affiliates (“RJR”) had orchestrated an international money laundering scheme with organized crime groups. In somewhat simplified form, the scheme allegedly had these multiple steps: The sale of illegal narcotics in Europe by Russian and Colombian criminal organizations; the “laundering” of the proceeds through the conversion of Euros into local currencies of Russia and Colombia by money brokers; the brokers’ sale of the Euros at discounted rates to cigarette importers; the importers’ purchase of RJR cigarettes from wholesalers; and the wholesalers’ purchase of the cigarettes from RJR, with the funds ultimately wired to RJR accounts in New York.[12] RJR was alleged to have committed criminal violations including mail fraud, wire fraud, money laundering and providing material support to foreign terrorist organizations.[13] In the terminology of the RICO violation described in 18 U.S.C. Section 1962(c), the complaint alleged among other things the existence of an “enterprise” comprised of various cigarette distributors, shippers and money dealers, and that RJR “participated in the management” of this enterprise through the commission of various crimes.[14] These crimes, referred to as RICO predicate acts, were alleged to have been committed in such a related manner so as to constitute a “pattern of racketeering activity,” injuring the EC in the process.[15]

The district court dismissed the complaint, which it characterized as “a structureless morass of allegations, devoid of any sequential series of events.”[16] Relying on the Second Circuit’s decision in the *Norex Petroleum*[17] case, the district court concluded that RICO does not apply extraterritorially, and that the focus of the geographic determination to be made was the RICO “enterprise” whose presence was an element of the violation alleged.[18] The court considered the complaint to allege an enterprise located and directed outside the United States, and therefore one that is outside of RICO’s reach.[19]

A panel of the Second Circuit reversed, in a unanimous opinion written by Senior Circuit Judge Pierre N. Leval. Judge Leval concluded that RICO should be given an extraterritorial reach consistent with the predicate violations that establish the required “pattern of racketeering activity”:

[W]hen a RICO claim depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially, RICO will apply to extraterritorial conduct, too, but only to the extent that the predicate would. Conversely, when a RICO claim depends on violations of a predicate statute that does not overcome *Morrison's* presumption against extraterritoriality, RICO will not apply extraterritorially either.[20]

In reaching this conclusion, the court relied principally on the presence of RICO predicate offenses that could apply only to conduct outside the United States. This, the court concluded, showed that Congress “unmistakably intended RICO to apply extraterritorially,” at least where a predicate violation applied outside the country.[21]

The court of appeals concluded its work, as relevant here, by finding that the complaint properly alleged violations of predicate offenses relating to both domestic and international conduct.[22] It concluded that allegations of foreign conduct satisfied the predicate offenses of money laundering and material support of terrorism, and that adequate allegations of domestic conduct supported the alleged violations of wire fraud, mail fraud and the Travel Act.[23]

The court of appeals disagreed with the citation of *Norex Petroleum* by the district court (and by other courts) for the proposition that RICO had no extraterritorial effect and that the proper frame of reference for assessing a complaint should be the “enterprise.”[24] Judge Leval wrote that the question whether extraterritoriality might be found on a case-by-case basis had not been foreclosed; rather, it was a question of first impression.[25] He thus did not acknowledge any conflict between its decision and those of other courts. Indeed, he observed that the panel’s rejection of an enterprise-based theory of extraterritoriality comported with the Ninth Circuit’s decision in the *Chao Fan Xu* case,[26] albeit “on different reasoning.”[27] This is a somewhat indulgent characterization of a coordinate appellate decision holding that RICO is not extraterritorial.

The panel denied a petition for rehearing on Aug. 20, 2014, concluding that the EC need not allege a U.S. injury in order state a claim. On April 13, 2015, the full Second Circuit denied a petition rehearing *en banc*, by a vote of 9-5. Four separate dissents were filed.

### **What to Expect From the Supreme Court**

There is no doubt that a clear statement of the extraterritorial reach of RICO would be welcomed. But a number of factors could limit the scope of a Supreme Court decision in the *European Community* case. For one, there is an unusually divergent view of the allegations of the complaint. While the petitioners

characterized the case as a “foreign-cubed” dispute — one involving “*foreign* patterns of racketeering, conducted through *foreign* enterprises and causing *foreign* injuries,”[28] the panel’s own opinion identifies much U.S. cause and effect and even the allegation of violations of three predicate statutes based on purely domestic conduct. The court of appeals’ assertion that it was addressing a question of first impression would also suggest a view that there is no conflict among the circuits to resolve. Whether and the extent to which the Supreme Court’s decision to accept the case for review reflects a contrary judgment remains to be seen.

The endlessly confounding RICO statute may also take its toll. A search for the “focus” of congressional intent will not be easy for a statute seeking to address so wide a range of problems. “Enterprises” can be both victims and vehicles for crime, as noted above, and even the question whether damages from the commission of a “pattern of racketeering activity” are recoverable by a private plaintiff varies from section to section.[29] Indeed, it is not self-evident how to assess the presence of a “pattern” where only certain of the alleged acts may properly be considered. There is also the question of RICO’s parallel civil and criminal remedies. The holding in *Norex* was itself limited to the civil context, and the question whether *Morrison* even applies in the criminal context has not been definitively settled.[30]

Expect a decision this term.

—By Robert P. Reznick, Orrick Herrington & Sutcliffe LLP

*Robert Reznick is a partner in the Washington, D.C., office of Orrick Herrington & Sutcliffe. Reznick is managing editor of "The World in U.S. Courts: Orrick's Quarterly Review of Decisions Applying U.S. Law to Global Business and Cross-Border Activities."*

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[1] *European Cmty. v. RJR Nabisco*, 764 F.3d 129 (2d Cir. 2014), cert. granted, No. 15-138 (U.S. Oct. 1, 2015).

[2] *Morrison v. Nat’l Austl. Bank Ltd.*, 130 U.S. 247 (2010).

[3] See 18 U.S.C. § 1961(1).

[4] *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 250 (1989); see 15 U.S.C. § 1961(5).

[5] *Boyle v. United States*, 556 U.S. 938, 948 (2009).

[6] See *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249, 259 (1994).

[7] *Id.*

[8] *United States v. Chao Fan Xu*, 706 F.3d 965, 974 (9th Cir. 2013).

[9] *Morrison*, 561 U.S. at 266.

[10] See *CGC Holding Co. LLC v. Hutchens*, 773 F.3d 1076, 1097 (10th Cir. 2014) (collecting cases).

[11] *Id.*

[12] *European Cmty.*, 764 F.3d at 133.

[13] *Id.* at 134.

[14] *Id.* at 133.

[15] Violations of New York law were also alleged. *Id.* The state law claims were most pertinent to whether the EC's presence in the case deprived the court of diversity jurisdiction under 28 U.S.C. § 1332, a question not presented in RJR's petition for certiorari and not discussed here. *Id.*

[16] *European Cmty. v. RJR Nabisco*, No. 02-cv-5771, 2011 U.S. Dist. LEXIS 23538, at \*3 (E.D.N.Y. Mar. 8, 2011).

[17] *Norex Petroleum Ltd. v. Access Indus. Inc.*, 631 F.3d 29 (2d Cir. 2010).

[18] *European Cmty.*, 2011 U.S. Dist. LEXIS 23538 at \*2-3.

[19] *Id.* at \*5-7.

[20] *European Cmty.*, 764 F.3d at 136.

[21] *Id.*

[22] *Id.* at 139-42.

[23] *Id.*

[24] *Id.* at 135-36.

[25] *Id.* Judge Leval's position on RICO's extraterritorial scope largely adopted the position taken by the United States appearing as *amicus curiae* in the *Norex Petroleum* case. *Id.* In its *amicus* brief in the *European Community* case, the United States reminded the court of its prior position, but accepted that *Norex Petroleum* was binding precedent to the contrary. See Brief of the United States as Amicus Curiae in Support of Neither Party at 9-10 n.3, *European Cmty. v. RJR Nabisco*, 764 F.3d 129 (2d Cir. 2014), *cert. granted*, No. 15-138 (U.S. Oct. 1, 2015) (11-2475-CV). Assuming the applicability of that precedent, the position of the United States was that "a RICO claim is territorial either if the enterprise is located or operating in the United States or if a pattern of racketeering activity occurs within the United States." See *id.* at 9-10 n.3, 12.

[26] *Chao Fan Xu*, 706 F.3d at 977.

[27] *European Cmty.*, 764 F.3d at 139 n.6.

[28] Petition for Writ of Certiorari at 12, 23, *RJR Nabisco v. The European Cmty.*, No. 15-138 (July 27, 2015) (emphasis in original).

[29] See, e.g., *Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1190 (3d Cir. 1993) (noting that RICO claims under 18 U.S.C. § 1962(b), unlike that under § 1962(c), must allege injury distinct from those arising from commission of predicates acts constituting a “pattern of racketeering activity.”).

[30] See *Norex*, 631 F.3d at 33; *United States v. Vilar*, 729 F.3d 62, 70-74 (2d Cir. 2013).

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