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Litigation & Arbitration Group Client Alert: Second Circuit Shifts Focus from Enterprise to Predicates in Evaluating RICO Extraterritoriality

In *European Community v. RJR Nabisco, Inc.*,[1] the latest decision to address the extraterritorial application of the federal RICO statute,[2] the Second Circuit ruled last week that the question of what is or is not an impermissible application of RICO beyond domestic borders turns *not* on the location of the "enterprise," but on the scope and reach of the statutes that form the underlying predicate violations. In so doing, the Circuit rejected the principle—previously adopted by certain district courts—that RICO's reach depends on the location of the enterprise, and it paved the way for RICO claims involving a purely foreign enterprise.

LEGAL BACKGROUND

In *Morrison v. National Australian Bank Ltd.*, decided in 2010, the Supreme Court addressed whether plaintiffs impermissibly sought extraterritorial application of Section 10(b) of the Securities Exchange Act of 1934. At the outset, the Court reaffirmed the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." It then explained that, in the absence of such intent, one must look to the "focus" of the statute at issue—*i.e.*, "the activities the statute seeks to regulate [and] parties or prospective parties to those [activities] that the statute seeks to protect"—to determine whether the claim in question is improperly extraterritorial.[3] The *Morrison* Court found that Section 10(b) focused "not upon the place where the deception originated, but upon purchases and sales of securities in the United States." Because the sales of securities at issue occurred outside the U.S., the Court

[1] No. 11-2475-CV, 2014 WL 1613878 (2d Cir. Apr. 23, 2014).
[2] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et. seq*.
[3] *Morrison v. Nat'l Australian Bank Ltd.*, 130 S. Ct. 2869, 2877, 2881-84 (2010).

rejected plaintiffs' argument that they sought merely to enforce a domestic claim since the deceptive conduct was alleged to have occurred in Florida.[4]

Three months later, in *Norex Petroleum Ltd. v. Access Industries, Inc.*,[5] the Second Circuit applied *Morrison* to a private RICO claim. The Court observed that RICO was "silent" as to extraterritorial application and is thus presumed to apply only within the territorial jurisdiction of the U.S. Among other things, it also rejected plaintiff's argument that the RICO statute applies extraterritorially for all of its predicates merely because certain RICO predicate statutes specifically apply to foreign conduct.[6]

Norex, however, did not articulate an overall standard for determining when a RICO claim is sufficiently domestic or improperly extraterritorial. Thereafter, district courts in the Second Circuit took different approaches to evaluating RICO claims. Some focused on the location of the alleged enterprise,[7] others concentrated on the location of the purported pattern of racketeering activity (or predicate acts),[8] and still others considered a combination of factors.[9]

EUROPEAN COMMUNITY

Background

In *European Community*, plaintiffs alleged that RJR Nabisco, Inc. and related entities ("RJR") managed and controlled a global money-laundering scheme involving organized criminal factions in Russia and Colombia. According to plaintiffs, these organizations smuggled narcotics into Europe, earning revenue in Euros. The Euros were then laundered: first, using money brokers, the Colombian and Russian organizations exchanged the Euros for various domestic currencies; second, the brokers sold the Euros to cigarette importers at a discounted rate; and third, the importers used the Euros to purchase RJR cigarettes from wholesalers, who in turn purchased the cigarettes from RJR. Plaintiffs also alleged, *inter alia*, that RJR employees travelled from the U.S. to Europe, Central America and other locations to facilitate the scheme, repatriated foreign profits from the scheme to accounts in the U.S., communicated with coconspirators *via* interstate and international mail and

[4] *Id*. at 2883-84, 2888.
[5] 631 F.3d 29 (2d Cir. 2010).
[6] *Id*. at 31, 33.
[7] *See, e.g., Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 73-74 (S.D.N.Y. 2010); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 731-32 (S.D.N.Y. 2013).
[8] *See, e.g., Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 243-45 (S.D.N.Y. 2012).
[9] *See, e.g., Tymoshenko v. Firtash*, 11-CV-2794, 2013 WL 1234821, at *11-13 (S.D.N.Y. Mar. 26, 2013).

wires, and defrauded certain government agencies, such as the U.S. Customs Service.

Based on these allegations, plaintiffs asserted violations of RICO predicated on mail fraud, wire fraud, money laundering, providing material support to foreign terrorist organizations, and violations of the Travel Act.[10]

District Court's Ruling

Following the approach in *Morrison*, the District Court analyzed the RICO statute and found that it focused on the purported enterprise, not the alleged (pattern of) predicate acts. The District determined that the alleged enterprise was located and directed from *outside* the U.S. and thus dismissed the claims as improper attempts to apply RICO extraterritorially.[11] In essence, the Court ruled that RICO allegations involving a *foreign* enterprise cannot, as a matter of law, form the basis for RICO liability. While the Court devoted little substantive attention to *Norex*, it cited the case for the proposition that RICO "is silent as to any extraterritorial application," and, given *Morrison*, "this silence prohibits any extraterritorial application of RICO."[12]

Second Circuit's Decision

The Second Circuit reversed, holding that the lower court had erred in finding that RICO cannot apply to a foreign enterprise or to foreign conduct.[13] The Court found that the District Court had mistakenly construed the rejection of plaintiff's arguments in *Norex* as a blanket holding that RICO can never have extraterritorial reach in *any* of its applications. It also rejected the enterprise-based approach in favor of a predicate-statute-based test, holding that RICO applies extraterritorially if, but only if, "liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate" —even where the enterprise itself is outside the U.S. As the Second Circuit put it, "[w]hen . . . a RICO charge is based on an incorporated predicate that manifests Congress's clear intention to apply extraterritorially, the presumption against extraterritorial application of U.S. statutes is overcome."[14]

Next, the Court held that the statutory language of two of the predicate violations alleged by plaintiffs—money laundering and providing material

[10] *European Cmty.*, 2014 WL 1613878, at *1-2.
[11] *European Cmty. v. RJR Nabisco, Inc.*, 02-CV-5771, 2011 WL 843957, at *4-5, 7 (E.D.N.Y. Mar. 8, 2011).
[12] *Id*. at *4.
[13] *European Cmty*., 2014 WL 1613878, at *7.
[14] *Id*. at *4-5.

support to foreign terrorist organizations—expressly apply beyond the geographic borders of the U.S. in certain circumstances—including those alleged by plaintiffs—and thus overcome the presumption against extraterritorial application. The money laundering statute, for example, criminalizes transactions in criminally derived property valued at greater than $10,000 where, among other things, the conduct "takes place *outside* the United States" but "the defendant is a United States person." Similarly, Section 2399B of Title 18 expressly prohibits "'knowingly provid[ing] material support or resources to a *foreign* terrorist organization,'" and expressly extends "extraterritorial Federal jurisdiction over an offense under this section."[15]

The Court found that that the remaining predicates do not apply extraterritorially. The mail fraud statute, the Court noted, contains no provision at all for transnational application, and the reference to "interstate or foreign" commerce in the wire fraud statute and Travel Act is too generic to defeat the presumption against extraterritoriality.[16]

Notwithstanding its ruling that the mail and wire fraud statutes and the Travel Act cannot be applied extraterritorially, the Court did not dismiss the RICO claims predicated thereon, finding that the complaint alleged sufficient *domestic* conduct in violation of those statutes. While the Court catalogued such allegations, it refused to state "precisely how to draw the line between domestic and extraterritorial applications of the wire fraud statute, mail fraud statute, and Travel Act." The Court found that "wherever that line should be drawn, the conduct alleged here clearly states a domestic cause of action" because "plaintiffs have alleged conduct in the United States that satisfies every essential element of" those statutes.[17]

IMPLICATIONS

The *European Community* decision clarified the ruling in *Norex*. It also rejected the location-of-the-enterprise test in favor of a predicate-statute-based standard to determine the appropriate reach of RICO. Thus, RICO claims may apply to a foreign enterprise *and* foreign predicate conduct if the text of the predicate statute evinces specific and direct Congressional intent to reach beyond U.S. borders. Likewise, RICO claims may proceed notwithstanding the fact that the enterprise at issue is foreign, and even if the predicate statute does not overcome the presumption against extraterritorially, if the conduct alleged to violate that statute is sufficiently domestic.

[15] *Id*. at *8 (quoting, discussing and analyzing the statutes noted above).
[16] *See id.* (quoting, discussing and analyzing the statutes noted above).
[17] *Id*. at *9-10.

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