

# Client Alert

June 2016

## Restricting RICO's Reach: The United States Supreme Court Limits the Extraterritorial Application of RICO

On June 20, 2016, the United States Supreme Court issued its ruling in *RJR Nabisco, Inc. v. European Community*, No. 15-138, 579 U.S. \_\_\_ (2016), in which a 4-3 majority held that the Racketeer Influenced and Corrupt Organizations Act ("RICO") does not apply extraterritorially to injuries that are suffered outside the United States, although it does apply to "some foreign racketeering injury."

### The Supreme Court's Decision

The Supreme Court noted that the question of RICO's extraterritorial application really involves two questions. First, do RICO's substantive prohibitions, contained in 18 U.S.C. § 1962, apply to conduct that occurs in foreign countries? Second, does RICO's private right of action, contained in § 1964(c), apply to injuries that are suffered in foreign countries?

With respect to whether RICO applies to extraterritorial "conduct," the Court noted that while there is a presumption against the extraterritorial application of RICO, that presumption may be rebutted. As a result, a RICO claim may be "based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial." Slip op. at 13. The Court also considered the question of whether RICO applies to foreign enterprises and observed that "it is easy to see why Congress did not limit RICO to domestic enterprises," as such a requirement "would lead to difficult line-drawing problems and counter-intuitive results." *Id.* at 15. For example, a domestic enterprise requirement would exclude from RICO's reach foreign enterprises that operate within the United States.<sup>1</sup> *Id.* Applying these principles, the Court affirmed the Second Circuit's conclusion that the complaint did not allege impermissibly extraterritorial violations of RICO, as the presumption against extraterritorial application had been rebutted with respect to certain applications of the statute. Specifically, the Court noted that the alleged pattern of racketeering activity consisted entirely of predicate offenses that were either committed in the United States or committed in a foreign country in violation of a predicate statute that applies extraterritorially. Further, the alleged enterprise had a sufficient tie to US commerce, as its members included US companies and its activities depended on sales conducted through the United States.

The Court, however, disagreed with the Second Circuit's conclusion that RICO's presumption against extraterritoriality did not apply to actions for injuries brought under RICO's private cause of action provided in § 1964(c). Noting that nothing in that section "provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States," the Court concluded that § 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business

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<sup>1</sup> The Court did, however, caution that although "we find that RICO imposes no domestic enterprise requirement, this does not mean that every foreign enterprise will qualify" and specifically noted its belief that RICO's substantive provisions require proof of enterprises that have an anchor to US commerce. *Id.* at 17.

or property and does not allow recovery for foreign injuries. *Id.* at 27. The Court observed that allowing recovery in a civil RICO action in a US court for foreign injuries would present the danger of international friction and could offend the sovereign interests of foreign nations by allowing citizens to bypass their own remedial schemes. Because the European Union's "remaining RICO damages claims rested entirely on injury suffered abroad," the Court found that they must be dismissed and reversed the Second Circuit's opinion upholding those claims. *Id.* at 32.

Justice Alito delivered the opinion of the Court, in which Justices Roberts, Kennedy and Thomas joined, and in which Justices Ginsburg, Breyer and Kagan joined as to Parts I, II and III. Parts I, II and III provided the procedural background and addressed whether RICO's substantive prohibitions in § 1962 apply to conduct that occurs in foreign countries. Justice Ginsburg filed an opinion concurring in part, dissenting in part and dissenting from the judgment, in which Justices Breyer and Kagan joined. Justice Breyer filed an opinion concurring in part, dissenting in part and dissenting from the judgment. Justice Sotomayor took no part in the consideration or decision of the case.

### **The Dissents**

Justice Ginsburg agreed with the Court's conclusion that when the predicate crimes underlying a claim have extraterritorial application, so, too, does RICO § 1962. She, however, disagreed with the Court that the private right of action authorized by § 1964(c) requires a domestic injury to a person's business and does not allow recovery for foreign injuries. She "would not distinguish, as the Court does, between the extraterritorial compass of a private right of action and that of the underlying proscribed conduct." Slip op., Ginsburg, at 6. In so concluding, Justice Ginsburg observed: "This very case illustrates why pinning a domestic-injury requirement on §1964(c) makes little sense. All defendants are U.S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving conduct occurring in the United States .... In short, this case has the United States written all over it." *Id.* at 6-7. Justice Ginsburg also disagreed that imposing a domestic-injury requirement for private RICO plaintiffs is necessary to avoid international friction. Rather, she argued that any comity concerns raised by the extraterritorial application of RICO could be met through alternative doctrines, such as the doctrines of *forum non conveniens*. *Id.* at 8. In conclusion, Justice Ginsburg would have affirmed the Second Circuit's decision.

Like Justice Ginsburg, Justice Breyer contended that the private right of action under § 1964(c) has extraterritorial application. He noted that this case does not involve the kind of purely foreign facts where "the plaintiffs are foreign, the defendants are foreign, and all relevant conduct occurred abroad." Slip op., Breyer, at 1. Instead, he agreed with Justice Ginsburg that "this case has the United States written all over it" and similarly rejected the government's argument in its *amicus curiae* brief that allowing recovery in this action would present the danger of international friction. *Id.* at 1-2.

### **Practical Implications**

The Supreme Court's holding, which resolves an ongoing split among the circuits on this issue,<sup>2</sup> is plainly a significant pronouncement regarding the extraterritorial application of RICO and makes it clear that foreign plaintiffs wishing to bring RICO claims in US courts must base those claims on injuries suffered in the United States. However, in ruling that RICO does apply to "some foreign racketeering injury," the Court leaves the door open for foreign plaintiffs to sue corporations in US courts based on foreign racketeering activity, so long as that conduct violated a predicate statute that has extraterritorial application, or a foreign enterprise, so long as it engages in, or significantly affects, commerce directly involving the United States. Corporations should take care to ensure that their activities, both in the

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<sup>2</sup> Compare *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014) (holding that RICO may apply extraterritorially) with *U.S. v. Chao Fan Xu*, 706 F.3d 965, 974-975 (9th Cir. 2013) (holding that RICO does not apply extraterritorially; collecting cases).

United States and abroad, comport with US laws and do not violate any of the predicate crimes listed in RICO.

Hunton & Williams LLP's litigation team has extensive experience litigating RICO lawsuits, and it will continue to monitor these issues. If you need legal assistance in these areas, please contact us.

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