

Litigation News Alert

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The Second Circuit Clarifies the Presumption against Extraterritoriality in *European Community v. RJR Nabisco, Inc.*

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On April 23, 2014, the Second Circuit issued an opinion that could be straight from a modern international-spy novel. *European Community v. RJR Nabisco, Inc.* involves Colombian and Russian cartels, drug smuggling and money laundering, and a suit by the European Community against U.S. tobacco companies under the federal RICO statute.

In its decision, the Second Circuit applied and clarified the presumption against extraterritoriality of U.S. statutes in the context of a complex conspiracy allegedly orchestrated by RJR Nabisco, Inc. and its affiliates to turn drug proceeds into profits for the cigarette makers. The court held that whether RICO claims can be asserted based on conduct that occurred outside the United States depends on the alleged RICO predicate acts, not the location of the RICO enterprise. Some federal statutes that supply RICO predicate acts apply extraterritorially, while others do not.

The court also held that the presumption against extraterritoriality is irrelevant when the defendant engages in domestic conduct that satisfies every essential element of the statute. In such a case, the court is not applying the statute extraterritorially.

The European Community's Claims against RJR

In a long-running case brought by the European Community (the "EC") before it was replaced by the European Union, the EC alleges that RJR Nabisco and its affiliates ("RJR") directed and controlled a complex scheme involving narcotics smuggling and money laundering. The EC claims that Colombian and Russian criminal organizations smuggled narcotics into Europe. The proceeds from the sale of the drugs were then laundered through money brokers, which exchanged the euros acquired in the drug sales for the currency of the criminals' home countries. The money brokers sold the exchanged euros to cigarette importers at a discounted rate, and the cigarette importers bought RJR cigarettes from wholesalers. The wholesalers, in turn, purchased the cigarettes sold to the importers from RJR.

Although the scheme allegedly involved drug importing and money laundering in Europe, the EC alleges a number of U.S.-related activities. Among other things, it claims that RJR employees traveled from the United States to further the conspiracy, wired funds to RJR in the United States, and filed fraudulent documents with the U.S. Customs Service and the Bureau of Alcohol, Tobacco and Firearms. The coconspirators also allegedly communicated via U.S. interstate and international mail and wires.

The EC claims that RJR violated RICO based on predicate acts including mail and wire fraud, money laundering, the Travel Act, and material support to terrorists. The EC also alleges state-law claims not relevant to this Client Alert.

The United States District Court for the Eastern District of New York granted RJR's motion to dismiss the RICO claim because it concluded that RICO does not reach extraterritorial conduct, and that the alleged enterprise was foreign such that the conduct alleged was extraterritorial.

The Second Circuit vacated the judgment of the district court and reinstated the RICO claim.

Application of the Presumption against Extraterritoriality

As the U.S. Supreme Court emphasized in *Morrison v. National Australia Bank Ltd.*, U.S. statutes are presumed not to apply to conduct that occurs outside the United States. That presumption, however, may be overcome if Congress clearly manifests a contrary intent. The Second Circuit agreed that the presumption applies to RICO, but disagreed with the district court as to which statute – RICO itself or the statutes incorporated in RICO as predicate acts – must be examined to find Congress's intent.

The Second Circuit held that "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate." The court explained that, by incorporating

statutes into RICO which clearly applied to extraterritorial conduct, Congress signaled its intent to apply RICO to extraterritorial conduct prohibited by those statutes.

The Second Circuit reviewed the language of the statutes on which the EC relied for predicate RICO acts and found some of them to reach extraterritorial conduct: money laundering and material support to terrorists. The money-laundering and material-support statutes both expressly convey "extraterritorial jurisdiction."

The court concluded that other alleged predicate acts – wire and mail fraud and the Travel Act – did not overcome the presumption against extraterritoriality. With regard to those predicate acts, however, the court held that the EC had alleged sufficient U.S.-based conduct to render the presumption against extraterritoriality inapplicable.

U.S. Conduct Sufficient

In a second important holding, the Second Circuit addressed when the presumption against extraterritoriality is inapplicable because the defendant engaged in sufficient U.S.-based conduct. It explained that where the conduct that allegedly occurred in the United States gives rise to a claim under the statute without reference to extraterritorial conduct, the claim is not barred merely because the statute does not apply extraterritorially.

The court cited the allegations in the complaint that RJR orchestrated the scheme from the United States, including through the use of U.S. mails and wires, and that RJR frequently sent employees to and from the United States to commit illegal acts in furtherance of the conspiracy. The court concluded that this domestic conduct, if proved, would violate the mail and wire fraud statutes and the Travel Act.

The court declined to determine whether domestic conduct that satisfied some, but not all, of a statute's essential elements could violate a statute that does not apply extraterritorially.

Conclusion

European Community v. RJR Nabisco, Inc. is another example of the Second Circuit's application of the presumption against extraterritoriality to specific federal statutes. In clarifying the presumption's application to RICO, the court also established important precedent on the extraterritorial scope of certain RICO predicate acts and explained when the presumption need not be applied at all because the defendant engaged in sufficient domestic conduct to state a claim.

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