What Happens In Europe, Stays In Europe? Applying RICO To Foreign Injury, Conduct

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Recently, the U.S. Supreme Court handed down its decision in *RJR Nabisco, Inc. v. European Community, et. al.*, clarifying—in part—the extent to which injuries sustained outside the United States and racketeering acts committed abroad give rise to civil claims for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1964. The group most definitively affected as a result of the opinion is private RICO plaintiffs who have not suffered an injury inside the United States. For them, the decision forecloses the possibility of civil RICO recovery. The case is also certain to be cited in forthcoming criminal RICO cases, since the Supreme Court analyzed the extraterritoriality of RICO's substantive criminal conduct provisions using the same analysis as when it separately assessed RICO's private civil claims. And since the decision does not conclusively resolve all questions as to whether or not *each* RICO predicate act applies extraterritorially, lower courts likely will get to tackle those specific questions for years to come. The specific facts giving rise to the suit involve global money laundering schemes, organized crime, and narcotics and tobacco sales. According to the European Community, foreign drug traffickers smuggled and sold narcotics in Europe, thereafter using the proceeds from narcotics sales to import and sell RJR cigarettes throughout Europe. The plaintiffs also claimed that RJR conducted business with drug organizations directly, among other alleged wrongful acts. Claiming that RJR had engaged in several alleged patterns of predicate acts, including mail fraud, wire fraud, money laundering and providing support to foreign terrorist organizations, the plaintiffs filed suit in a U.S. District Court for the Eastern District of New York under 18 U.S.C. § 1964(c), which is the RICO provision permitting private plaintiffs to pursue civil RICO claims. Since the alleged injuries occurred exclusively in Europe, members of the Supreme Court needed to determine whether or not the European Community could even sue under § 1964(c) at all. The Court began its analysis by applying the presumption against extraterritoriality to § 1964(c), but further analyzing the plain text of the statute for indicia that Congress intended for § 1964(c) to apply extraterritorially. According to the Court, § 1964(c)'s language that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court" did not provide the requisite indicia. As interpreted by the Court, neither "any person" nor "business or property" demonstrated Congress's intent to apply RICO extraterritorially for private civil RICO plaintiffs not injured in the U.S. As a result, private RICO plaintiffs must assert a domestic injury in order to recover for RICO violations. While the Court was clear as it concerns RICO *injuries* occurring abroad, it was less definitive concerning RICO *conduct* occurring abroad. According to the Court, whether or not a predicate act occurring outside the United States falls within RICO's ambit depends on whether or not the predicate act's statutory language sufficiently rebuts the presumption against extraterritoriality. The Court proved a few examples of predicate act statutes which contain language sufficient to rebut the presumption against extraterritoriality. These include (1) engaging in monetary transactions in criminally derived property, (2) assassination of

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government officials, (3) killing a national of the United States while such national is outside the United States, and (4) hostage taking. However, the Court did not exhaustively analyze *all* RICO predicate act statutes, meaning that it will be up to the lower courts to decide which specific predicate acts apply extraterritorially and which do not. The case's impact on RICO jurisprudence is immediate. By limiting private RICO claims to only those where injury is sustained in the United States, the case also precludes RICO claims by foreign parties with no ties to the United States. The holding also leaves the U.S. government as the sole entity to enforce RICO violations for conduct occurring beyond U.S. borders that does not cause injury in the United States, and even then only where the alleged RICO predicate statutes express clear intent to apply extraterritorially. In addition, the case demonstrates the high burden of showing that Congress intended laws to apply to conduct occurring beyond U.S. borders. While "an express statement of extraterritoriality is not essential," the Court noted that RICO "is the rare statute that clearly evidences extraterritorial effect despite lacking an express statement." In the future, litigants should expect reviewing courts to meet with skepticism claims that congressional statutes apply to foreign conduct.