DLA PIPER

LETTER FROM AMERICA

NON-US COMPANIES AND EXECUTIVES AT RISK FROM US RICO LAW

More frequently than ever before, American plaintiffs and prosecutors are using U.S. laws to target conduct that has little, if any, connection to the United States. Potential exposure to criminal and civil liability under U.S. law must now be considered by businesses no matter where they are headquartered and operate. Mitigating that liability exposure requires diligent compliance effort and comprehensive compliance systems and policies. This Letter alerts you to a new development in this area: an expansive interpretation of a U.S. law targeting money laundering and other racketeering crimes conducted outside of the United States.

The Racketeer Influenced and Corrupt Organization law ("RICO") imposes significant criminal and civil penalties on those engaged in a pattern of racketeering activity conducted as part of an ongoing criminal enterprise.[1] It was enacted in 1970 to combat organized crime, but since that time, prosecutors and plaintiffs have routinely invoked RICO's broad provisions against defendants bearing little resemblance to the crime families initially targeted by the statute. Typical RICO defendants now include publicly-traded companies and corporate executives.[2] A plaintiff who prevails in a civil RICO action may recover treble damages and attorney's fees.

A recent decision of the Second Circuit Court of Appeals, denying *en banc* review in *European Community v. RJR Nabisco, Inc.*, further expands the reach of RICO by permitting the assertion of claims against defendants for conduct that occurred outside of the United States.[3] One member of the Court, writing in dissent, has concluded that the decision is in "direct tension" with recent decisions of the United States Supreme Court that limit extraterritorial claims and has predicted "a new litigation industry exposing business activities abroad to civil claims of 'racketeering'; [that] . . will invite our courts to adjudicate civil RICO claims grounded on extraterritorial activities anywhere in the world."[4]

"Racketeering activity," as defined by the RICO statute, involves the commission of a "predicate act." A predicate act includes any "act . . . which is chargeable under State law and punishable by imprisonment for more than one year" and any "act which is indictable" under numerous specified provisions

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* The authors of this Letter have extensive experience litigating cross border civil claims in the U.S. federal courts. They secured the first summary judgment victory in a civil terrorism case brought against a corporate defendant (a foreign bank) under the U.S. Anti-Terrorism Act, an extraterritorial statute, provisions of which have been incorporated as predicate acts under RICO.

1 18 U.S.C. § 1961–1968.

2 *See generally* A. Darby Dickerson, *Curtailing Civil RICO's Long Reach*, 75 Neb. L. Rev. 476, 483-94 (1996) (discussing how use of the RICO statute has extended beyond Congress's original intentions); Virginia M. Morgan, *Civil RICO: The Legal Galaxy's Black Hole*, 22 Akron L. Rev. 107, 107 (1988) (same).

3 *European Community v. RJR Nabisco, Inc.,* 764 F.3d 129 (2d Cir. 2014) ("*RJR Reynolds II*"), *rehr'g en banc denied* 783 F.3d 123 (2d Cir. 2015) ("*RJR Reynolds III*"). The unpublished district court opinion below is available through Westlaw at *European Community v. RJR Nabisco, Inc.,* No. 02-CV-5771 (NGG) (VVP), 2011 WL 843957, (E.D.N.Y. Mar. 8, 2011) ("*RJR Reynolds I*").

4 *RJR Nabisco III*, 783 F.3d at 129 (Cabranes, J., dissenting). Judge Cabranes' dissent was joined by Judges Dennis Jacobs, Reena Raggi, and Debra Ann Livingston.

of federal law.[5] After September 11, 2001, Congress added to RICO approximately 30 predicate racketeering acts that expressly apply to foreign conduct. Nearly all of these newly added acts relate to "international terrorism directed against United States interests," including statutes criminalizing the provision of material support or resources to foreign terrorist organizations.[6]

THE SECOND CIRCUIT'S DECISION IN *RJR NABISCO*

The claims against RJR derived from predicate acts that involved foreign conduct. The European Community and its 26 member states alleged that RJR was part of a complicated scheme: Russian and Colombian criminal organizations allegedly smuggled narcotics into Europe and sold them for euros; they then laundered those euros through money-brokers, for domestic currency, who in turn sold these euros to cigarette importers at a discounted rate; finally, the importers used those euros to order RJR's cigarettes from wholesalers, who in turn purchased the cigarettes from RJR.[7]

Plaintiffs alleged that through this conduct, RJR "committed various predicate racketeering acts in violation of RICO, including . . . money laundering . . ., and providing material support to foreign terrorist organizations,"[8] since some of the cigarettes implicated in this scheme were allegedly "sold through the EU and into Iraq [and] fueled and financed the Saddam Hussein regime and terrorist groups, including the PKK [(Kurdistan Workers' Party)], which is a 'Foreign Terrorist Organization.'"[9]

The district court dismissed the complaint, holding that the activity alleged was extraterritorial, and that RICO did not reach such conduct.[10] The court relied upon the United States Supreme Court's ruling in *Morrison v. National Australia Bank, Ltd.*, which held that "when a statute gives no clear indication of an extraterritorial application, it has none,"[11] and the Second Circuit's ruling in *Norex Petroleum Ltd. v. Access Indus., Inc.*, which found that "RICO is silent as to any extraterritorial application,"[12] and held that it had none.

On appeal, the Second Circuit reversed. The court held that its earlier decision in *Norex* did not conclude that RICO could never be applied to extraterritorial conduct. Instead, the court found, *Norex* left open the possibility that RICO could apply extraterritorially in some contexts "if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate."[13] Because two "predicate acts" alleged by the plaintiffs involved statutes that were expressly extraterritorial in application—money laundering, in violation of 18 U.S.C. §§ 1956-57,[14] and providing material support to foreign terrorist organizations, in violation of 18 U.S.C. § 2339B—the court reinstated those claims.[15] RJR then sought *en banc* review.

THE DENIAL OF *EN BANC* REVIEW

The Second Circuit refused to hear the case *en banc*. Its denial of review generated four dissenting opinions and one concurrence, a rarity for the court. One of the dissenting judges noted that the panel opinion was in "taut tension" with *Norex* and predicted "litigation on the fault lines of *Norex* and *RJR Nabisco*." Another dissenting judge saw more alarming consequences in the future; he remarked that the European Commission had achieved "a pyrrhic victory, and one that the Community's constituents will have a great cause to regret in the years ahead . . . . [b]ecause its citizens, natural and corporate, are among the likely targets of future RICO actions under the panel's interpretation of the statute."[16]

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[5] "A pattern of racketeering activity" is established by proving that a defendant committed *at least* two predicate acts within a ten year time period. 18 U.S.C. § 1961(5)., An "enterprise, " as referenced in the statute, "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

[6] *RJR Nabisco III*, 783 F.3d at 125 (Hall, J., concurring).

[7] *RJR NabiscoII*, 764 F.3d at 133.

[8] *Id.* at 134.

[9] *See* Pls.' *RJR Nabisco* Appellate Br., at 18-19 (Sept. 27, 2011), available through Westlaw at 2011 WL 4543199.

[10] *RJR Reynolds I*, 2011 WL 843957, at *4.

[11] 130 S.Ct. 2869, 2873 (2010).

[12] 631 F.3d 29, 32-33 (2d Cir. 2010).

[13] *RJR Reynolds II*, 764 F.3d at 136.

[14] The extraterritorial provision of the money laundering statute provides: "There is extraterritorial jurisdiction over the conduct prohibited by this section if—(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000." 18 U.S.C. § 1956(f).

[15] The panel held that plaintiffs' claims based on allegations of mail fraud, wire fraud and violations of the Travel Act did *not* involve statutes that apply extraterritorially but reversed the district court's dismissal of these claims as well, concluding that because plaintiffs alleged "that all elements of the wire fraud, money fraud, and Travel Act violations were completed in the United States or while crossing U.S. borders . . . the Complaint states domestic RICO claims based on violations of those predicates." *RJR Reynolds II*, 764 F.3d at 139.

[16] *RJR Nabisco III*, 783 F.3d at 128-29 (Cabranes, J., dissenting).

Yet another dissenting judge challenged the panel's conclusion that Congress intended to create private RICO claims arising from extraterritorial conduct merely because certain statutes included as predicate acts had extraterritorial application.[17] These statutes authorized criminal proceedings, not private actions, Judge Raggi noted; moreover, the "focus" of RICO's proscriptions consisted of "specified interactions between an identified enterprise and a pattern of racketeering, " and not the commission of discrete predicate acts.[18] Where those interactions were international, rather than domestic, in character, she observed, RICO should have no application.[19] But Judge Lynch, another dissenter, was troubled by such an "enterprise" focused approach, reasoning that Congress would be "astonish[ed]" to learn that operatives of a foreign enterprise could not be held accountable under RICO for a pattern of predicate crimes that violated statutes with express extraterritorial reach, especially in light of Congress' clear intention to apply RICO to foreign terrorist groups.[20]

CONCLUSIONS

As Judge Lynch acknowledged, the intended audience of these many dissenting opinions is the Supreme Court. For the time being, however, *RJR Nabisco* remains the law of the Second Circuit. Plaintiffs may file civil RICO claims based on injuries resulting from conduct that occurred outside of the United States whenever that conduct violates one of the extraterritorial federal statutes included as predicate acts under RICO. Most of the extraterritorial predicate statutes proscribe terrorism-related crimes, including the provision of material support or resources to a terrorist organization. In *RJR Nabisco*, the European Commission alleged violation of one such predicate statute, claiming that sales of cigarettes were used to finance the regime of Saddam Hussein and terrorist groups operating in Iraq.

Civil terror-related claims against foreign commercial enterprises have proliferated in recent years, and often take the form of alleging material support of terrorist organizations. Such claims have been asserted against global banks (accused of providing financial services to charities and individuals with alleged ties to terrorist organizations), agricultural and mining companies (accused of making payments to terrorist organizations in exchange for ensuring the security of their facilities and employees), oil companies (accused of violating sanctions by dealing with state sponsors of terrorism), and media organizations (accused of broadcasting content that assisted terror organizations in carrying out their crimes), among others. A number of these claims, filed by foreign plaintiffs under the Alien Tort Statute, have been dismissed in the wake of the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*,[21] which found that statute to have no extraterritorial application. It remains to be seen whether the RICO statute will be used by alien plaintiffs' as an "end-run" around *Kiobel*, as one of the dissenting judges in *RJR Nabisco* suggested.[22] One thing seems certain, however: *RJR Nabisco* represents a dramatic shift in the RICO landscape.

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[17] *Id.* at 134-36 (Raggi, J., dissenting). Judges Jacobs, Cabranes and Livingston joined Judge Raggi's dissent.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 141-44 (Lynch, J., dissenting).

[21] 133 S. Ct. 1659 (2013).

[22] *RJR Nabisco III*, 783 F.3d at 129 (Cabranes, J., dissenting).