

***RICO Report: Extraterritoriality*****Host: Cal Stein****Recorded: 10/08/24****Cal Stein:**

Hello, and thank you for joining me on this latest installment of the *RICO Report*. My name is Cal Stein and I'm a partner in the white collar and litigation practice groups at Troutman Pepper. I represent clients in white collar criminal and government investigation matters, as well as in complex civil lawsuits including a lot of RICO litigation. Today we are going to tackle a question that I get all the time about RICO, and it has to do with the statute's limits and its reach. More specifically, we're going to discuss the issue of extraterritoriality or put more simply, we are going to answer the question, does the RICO statute reach conduct that occurred outside the United States?

Now, you may be asking yourself, Cal, come on, how often does this really come up? I'm here to tell you that it comes up far more frequently than you would think. It has come up for me in my RICO cases multiple times over the past year. And in fact, I'm actually dealing with this very issue right now in a RICO case that was filed in federal court in Oklahoma, but which involves conduct that largely occurred in Canada. And look, you don't need to take my word for it. Just look at the case law. If you do, what you'll see are federal courts addressing the extraterritorial application of RICO with more and more frequency, which all makes sense. Businesses and individuals are doing more work globally, which means more claims that cross international borders, which means more RICO claims and RICO allegations that cross international borders. And this is an issue that really requires careful attention from the lawyers but also from the court because the RICO statute itself does not explicitly address its extraterritorial application. It does not say one way or the other in the text of the statute.

Seems like it should or at least could, but it doesn't. And the law surrounding the extraterritorial application of a federal statute in general is a complex issue. And the extraterritorial application of RICO is no exception. Perhaps unsurprisingly, this issue has seen a lot of federal court and appellate court decisions, all of which have led to a handful of critical Supreme Court decisions, including one from 2023, the *Yegiazaryan v. Smagin* case that we addressed previously on this podcast back in August of 2023 in an episode titled RICO and Foreign Arbitration Enforcement. But really perhaps more than any other area of RICO law, the ultimate answer to this question of extraterritorial application has been built up, brick by brick, federal court decision by federal court decision. So to truly understand the question, we need to understand the history of how federal courts have analyzed and addressed the issue of extraterritoriality.

So today here on the *RICO Report*, we are going to do something of a history lesson that is focused on this issue. Now, as loyal listeners of the *RICO Report* know, we here at the *RICO Report* like to start our discussions with the text of the RICO statute. And today we could start our history lesson way back in 1970 when Congress enacted RICO. But the reality is, as I just mentioned that back in 1970, Congress made the choice to decline to put anything in the RICO text that specifically addresses whether it applies or does not apply extraterritorially. Again, Congress certainly could have done this and I believe should have done this, but they didn't, for whatever reason. And in any event, going back 50 plus years and stretching forward to present

would take more time than we have on this episode. So what we're going to do is we're going to actually fast forward and start our history lesson in 2010, a mere 14 years ago, and we're going to start with a case called *Morrison v. National Australia Bank Limited*.

And interestingly, this isn't even a RICO case. This is a Supreme Court case that addressed whether Section 10B of the Securities Exchange Act of 1934 provided a cause of action to a foreign plaintiff to sue for alleged misconduct in connection with securities that were traded on foreign exchanges. Now, importantly, the Securities Exchange Act at issue in the *Morrison* case like RICO is silent on the issue of extraterritorial application. The statute itself does not say one way or the other. So we can start to see why we are talking about this non-RICO case on a RICO podcast. In terms of impact on RICO, the *Morrison* holding from the Supreme Court is pretty straightforward. The Supreme Court in that case held that there is a presumption that statutes are not to be applied extraterritorially unless the statute itself indicates otherwise. Now, importantly, the Supreme Court did not require there to be statutory text explicitly stating that the statute applies extraterritorially. But without that type of explicit text, the statutory context would need to indicate a congressional intent for it to apply outside the United States.

With respect to the Securities Act at issue, there was no statutory text, no context indicating congressional intent. So the Supreme Court found it did not apply to extraterritorial conduct like transactions on foreign securities exchanges. Like I said, *Morrison* not a RICO case, but an important decision nonetheless. And almost immediately after the Supreme Court hands down this *Morrison* decision, federal courts across the United States start applying it to the RICO statute. And the center of this action was in New York, the Southern District of New York, to be exact. Later in 2010, so the same year that the Supreme Court issued its decision in *Morrison*, we have a case called *Cedeño v. Intech Group*. And in this case, the Southern District of New York examined the extraterritorial application of RICO and came to the conclusion that RICO, like the Securities Act, is silent on its extraterritorial application, and therefore a presumption exists pursuant to the *Morrison* decision that RICO does not apply outside the United States.

Relying on *Morrison*, the Southern District of New York said RICO does not apply where the alleged enterprise and impact of the predicate activity upon it are entirely for it. The court went on to examine what it called the appropriate inquiry, which should be the focus of congressional concern in enacting the statute. And for RICO, the court found that that statute is focused on how a pattern of racketeering affects an enterprise. The court said RICO does not evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality, that presumption, of course, coming from the Supreme Court's decision in *Morrison*. So the *Cedeño* case gets appealed and the 2nd Circuit gets a chance to weigh in. But the 2nd Circuit largely punts, but only for a very short time. Second, Circuit did not really dig in on this issue in the *Cedeño* case, but it did later that year.

So we're still in 2010, and the 2nd Circuit gets another case called *Norex Petroleum Limited v. Access Industries Inc.* and the 2nd Circuit does not punt this time. 2nd Circuit goes back to the Supreme Court ruling in *Morrison*, which the 2nd Circuit says "wholeheartedly embraces the application of the presumption against extraterritoriality", which of course it does. That's exactly what the Supreme Court said in *Morrison*. The 2nd Circuit took it a step further though. They went as far as to call the *Morrison* rule a bright line rule. When a statute gives no clear indication of extraterritorial application, it has none. And the 2nd Circuit went on to say, because RICO is silent as to any extraterritorial application, it fell squarely within the scope of *Morrison* and thus had no extraterritorial application.

Okay, let's pause here. So here we are in 2010, we've had one Supreme Court decision, not on RICO, but on the Securities Act that underscores the presumption against extraterritorial application unless the statute overcomes it either through text or through context. And now we have this movement led by the 2nd Circuit that applies that rule hook, line and sinker to RICO to deny any sort of extraterritorial application. And let's think about this. Who do we think didn't like that rule? We spend a lot of time on this podcast talking about civil RICO claims, but RICO is of course both a civil and a criminal statute. So who didn't like it? The Department of Justice didn't like it. That rule against extra territoriality was going to make it harder to prosecute criminal RICO cases. In response to the 2nd Circuit's decision in *Norex Petroleum*, the Department of Justice filed the request for clarification. The 2nd Circuit ultimately added a paragraph to its decision, but that really didn't change anything. But the seeds of doubt were sowed and you can see how it develops from there.

Okay, so let's now jump ahead from 2010 to 2011, and once again, we find ourselves in federal district court in New York this time, the Eastern District of New York, in a case that is now famous, *European Community v. RJR Nabisco, Inc.* The Eastern district was dealing with extra territoriality. And it said, in determining whether a claim seeks an extraterritorial application of a federal statute, the court must look to the focus of the statute. The Eastern district examined RICO and determined for the first time that the enterprise was the focus of the RICO statute, not the damages, not the racketeering activity, but the enterprise. And therefore the Eastern District found that a RICO enterprise must be a domestic enterprise for civil RICO to apply. It said, "An analysis of the territoriality of an enterprise should focus on the decisions effectuating the relationships and common interests of its members and how those decisions are made." Once again, case gets appealed to the 2nd Circuit, and this time the 2nd Circuit reverses it. And this is in 2014. The 2nd Circuit explicitly rejects the Eastern District's focus on the enterprise, whether it is domestic or whether it is for it.

The 2nd Circuit finds for the first time that there was at least some congressional intent that RICO applied extraterritorially. In so finding the court relied on the fact that Congress in defining racketeering activity, which we have discussed at length on this podcast, in defining racketeering activity, it included certain federal criminal statutes that apply outside the United States. The examples the 2nd Circuit gave were money laundering and supporting terrorism. On that basis, the 2nd Circuit read in some congressional intent that the statute ought apply extraterritorially. Of course, this case then gets appealed to the Supreme Court, and in October of 2015, the Supreme Court decides to hear it.

By that time, a genuine circuit split had emerged concerning the extraterritorial reach of RICO and whether the focus of that determination should be on one, the enterprise, two, the underlying predicate acts, or three, the pattern of racketeering activity. So by this time, federal case law is kind of all over the place, so it was very necessary for the Supreme Court to come in and it did, and that's why the *RJR Nabisco* case has become one of the most oft-cited RICO cases. The Supreme Court decides the case in 2016. In a unanimous decision, the court finds that RICO can in fact have extraterritorial application if the predicate offenses that were committed abroad violate a statute that is itself extraterritorial. Basically, the Supreme Court decides, you know what? We're going to look at the predicate acts. We're going to look at the statutes in that section. We're going to look at what is alleged to have been violated. And if that predicate act, if that statute applies extra-territorially, then we get to the next step in our analysis here, if it doesn't, then we don't. In doing so, the Supreme Court absolutely rejected the

requirement that you'll look at the enterprise and that you have to have a domestic enterprise, that is absolutely rejected.

But in focusing on the predicate acts, the Supreme Court was clear that look, some of the predicate acts enumerated in the RICO statute encompass extraterritorial conduct but that does not mean that they all do. Not all of the predicate acts apply extraterritorially. That is where the determination ultimately needs to be made. And this was and is the clearest ruling on the applicability of RICO extraterritorially to date, but it could never be that easy, right? In announcing this rule, the Supreme Court also added a new requirement. They said, "Look, sometimes it can apply extraterritorially. We've given you the test for that. But even if it does, the plaintiff in a civil RICO case, still needs a domestic injury." What does and does not constitute a domestic injury? Well, that became the next question that courts needed to answer because of course the Supreme Court announced this rule but didn't necessarily delineate all the things that fall on the domestic versus non-domestic side of the ledger.

Right after the supreme Court's decision in *RJR Nabisco* where they said, "The statute can apply extra-territorially, but you need this domestic injury," federal district courts begin interpreting the domestic injury requirement. And once again, as you might expect, this led to a whole bunch of different interpretations, which led to conflicting results, which ultimately led to another genuine circuit split, which again required Supreme Court intervention. And the Supreme Court did intervene again. This time in 2023 in the *Yegiazaryan* case. This is the case I mentioned earlier that we discussed. We devoted a whole episode to this case when it came out. So I'm not going to go through the details of that case again. Listeners can certainly go back and listen to the episode devoted to this case. But basically, the Supreme Court holding in that *Yegiazaryan* case boils down to the following. Supreme Court rejected any sort of bright line rule on what is and is not a domestic injury.

There were some circuits and some federal district courts that had tried to create various bright line rules. The Supreme Court said no to all of them. Instead, the Supreme Court said, "Look, to determine whether a plaintiff has alleged or proven a domestic injury, the courts have to use a context specific approach." It said, "When the circumstances surrounding the injury indicate it arose in the United States, then there will be a domestic injury." But of course, in classic Supreme Court fashion, the court did not identify all or really any of the context specific factors that courts should consider. At most, the Supreme Court says things like, look at the nature of the injury. Look at the racketeering activity that caused the injury. Look at the injurious aims and the effects of the racketeering activity to conduct this context specific analysis. Not incredibly helpful, but what it did do is it gave lower courts a lot of different ways to justify its decision on whether a domestic injury existed or did not. And that is what we are seeing play out across the country.

So that brings us mostly up to date here. We've seen federal district courts, particularly in New York, have their say. Then we've seen circuit courts having their say, which led to circuit splits, which paved the way for the Supreme Court to weigh in, not once but twice, at least since 2010 in the *Morrison* decision, which was applicable, but not a RICO case. So where does all of this leave us? What is the CliffsNotes version listeners should take away from this podcast episode about when and if RICO applies extraterritorially? I think the question boils down to this. Yes, RICO absolutely can and does apply extraterritorially, but only if one, the racketeering activity is properly extraterritorial, i.e., the statute violated applies extra-territorially. And two, there is a domestic injury, notwithstanding the fact that the conduct is largely for it. Those are the

requirements that a plaintiff must meet, and those are the requirements which if not pleaded and proven, a defendant can and should seize upon in either a motion to dismiss or a summary judgment motion to get a RICO claim tipped. And those are the factors and requirements that I always look at to determine whether the claim is susceptible to attack on these grounds.

And with that, I'm going to bring this discussion to a conclusion. I really want to thank everyone for listening. If you have any thoughts or if you have any comments about this series or about today's episode on the extraterritorial application of RICO, I invite you to contact me at [callan.stein@troutman.com](mailto:callan.stein@troutman.com). You can subscribe and listen to other Troutman Pepper podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening.

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