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RICO’S EXTRATERRITORIALITY

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This article examines the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act (RICO). Federal courts commonly analyzed RICO’s extraterritoriality prior to 2010 by borrowing from securities jurisprudence. That borrowing entailed application of the “conduct” and “effects” tests used to determine whether federal securities laws applied extraterritorially. In 2010 the United States Supreme Court decided Morrison v. National Australia Bank, which rejected use of the conduct and effects tests and thus overruled four decades of extraterritoriality analysis by federal appellate courts in securities cases. This article examines the conflicting paths courts have taken post-Morrison when confronted with extraterritoriality issues in RICO cases. The article proposes a new framework for resolving such issues.

Introduction

This article examines the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act (RICO).1 Prior to 2010, federal courts commonly analyzed RICO’s extraterritoriality by borrowing from securities jurisprudence. That borrowing entailed application of two tests (“conduct” and “effects”) that were used to determine whether federal securities laws applied extraterritorially. In 2010, the United States Supreme Court decided Morrison v. National Australia Bank (Morrison),2 which rejected four decades of extraterritoriality analysis in securities cases. Specifically, Morrison rejected use of the conduct and effects tests and mandated use of a transactional test to determine extraterritoriality of the federal securities laws. Since Morrison was decided, lower federal courts have struggled with application of the decision in securities cases and other kinds of cases. This article examines the conflicting paths courts have taken post-Morrison in RICO cases when confronted with extraterritoriality issues. The article proposes a new framework for resolving those issues.

The article proceeds in five parts. Part I provides an introduction to RICO. Part II examines RICO’s extraterritorial application prior to Morrison. Part III analyzes the Morrison decision. Part IV examines the application of Morrison to RICO by courts during the period 2010-2012. Part V proposes a new framework for analyzing RICO’s extraterritoriality.

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2 130 S. Ct. 2869 (2010).
I. Introduction to RICO

RICO (Title IX of the Organized Crime Control Act of 1970) is widely regarded as the single most important piece of organized crime legislation ever enacted, but its significance extends far beyond that context. Congress specified in RICO that its provisions “shall be liberally construed to effectuate its remedial purposes." The Supreme Court and lower federal courts have frequently noted that Congress intended for them to apply RICO broadly, and they have generally adhered to that guidance. Since enactment in 1970 RICO has been expansively applied to combat both organized crime and other misconduct.

A. Background

RICO is both a criminal and civil statute and it provides for a private right of action in 18 U.S.C. § 1964(c). The model for this private right, which, as the Supreme Court has observed, was designed to turn citizen victims into private attorneys general, is Section 4 of the Clayton

6 Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 660 (2008) ("We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe."); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985) ("RICO is to be read broadly."); Brown v. Cassens Transport Co., No. 10-2334, 2012 WL 1139059, at *9 (6th Cir. Apr. 6, 2012); United States v. Bergrin, 650 F.3d 257, 267-68 (3d Cir. 2011) ("In numerous instances, the [Supreme] Court has been asked to impose limits on how RICO may be applied, and it has consistently declined to do so. Instead, the Court has repeatedly pointed to RICO’s legislative history and § 904(a) of the Organized Crime Control Act of 1970 as evidence that Congress intended to create a broad and powerful new statutory weapon for the federal government to wield. . . .").
7 See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985) ("We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."); Haroco Inc. v. American Nat’l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), aff’d, 473 U.S. 606 (1985) ("[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."); Elizabeth C. Peterson & Catherine E. Moreno, The Expanding Territorial Reach of RICO: It’s Not Just for U.S.-Based Organized Crime Anymore, BLOOMBERG LAW REPORTS (May 25, 2010), http://www.wsgr.com/publications/PDFSearch/bloomberg0510.pdf ("Although RICO was intended to reach organized crime perpetrated by the Mafia, in the four decades since its inception, RICO has been used to reach conduct as varied as municipal tax evasion, civil fraud, and even terrorism."). One increasingly common application of the statute outside the context of organized crime is RICO’s use in civil suits based on underlying violations of the Foreign Corrupt Practices Act. See Gideon Mark, Private FCPA Enforcement, 49 AM. BUS. L.J. 419, 464-72 (2012).
8 See Rotella v. Wood, 528 U.S. 549, 557 (2000) ("The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, ‘private attorneys general,’ dedicated to eliminating racketeering activity."). See also John D. Corrigan, Note, Restricting RICO under FSIA, 84 ST. JOHN’S L. REV. 1477, 1487-88 (2010) (explaining private attorney general function of RICO). Black’s Law Dictionary defines the phrase “private attorney general” in these terms: “The ‘private attorney general’ concept holds that a successful private party plaintiff is entitled to recovery of his legal expenses, including attorneys fees, if he has advanced the policy inherent in public interest legislation on behalf of a significant class of persons.” BLACK’S LAW DICTIONARY 129 (9th ed. 2009). While the concept has been derided, it remains widely accepted. See, e.g., Geraldine Scott Moohr, The Balance Among Corporate
Act of 1914. The two statutes are similar in purpose and structure, and RICO’s legislative history provides clear evidence of congressional intent to model RICO’s civil enforcement provision on the Clayton Act. Both statutes provide for treble damages and attorneys’ fees for successful private plaintiffs. Courts often use Clayton Act case law for guidance in construing RICO’s provisions.

The opportunity to recover treble damages no doubt drives a significant portion of private RICO and antitrust litigation. There are approximately ten private federal antitrust cases for every case brought by the Department of Justice (DOJ) or Federal Trade Commission. Similarly, the vast majority of RICO litigation is initiated by private plaintiffs, although this has not always been true. Private RICO suits were rare in the 1970s and early 1980s, but they have substantially increased since then. During the period 2001 to 2006, an average of 759 federal civil RICO suits was filed annually. During the 12 months ending March 31, 2011, 917 federal RICO suits were commenced – 916 of them were filed by private plaintiffs and only one was filed by the United States.

Criminal Liability, Private Civil Suits, and Regulatory Enforcement, 46 AM. CRIM. L. REV. 1459, 1470 (2009) (“The idea that individuals can act as private attorneys general to enforce the law is generally accepted, and Congress has authorized private civil suits to achieve the community interest in redressing harm and deterring unlawful conduct. The private attorney general concept recognizes that in pursuing remedial actions, private plaintiffs also represent the public interest. Private suits supplement public enforcement by adding more eyes to the task of monitoring business conduct, and the public interest is furthered when private civil suits expose business misconduct.”).

See Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267 (1992) (“We have repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act,” (citations omitted)). Holmes held that proximate cause is required for plaintiff to recover under RICO’s treble damages provision. Id. at 268. This holding was the first restriction on civil RICO’s scope imposed by the Supreme Court since the statute was enacted more than twenty years earlier. PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL §2.05[B] (3d ed. 2011).


RICO has served as a model for state counterparts. Beginning in the early 1970s, RICO-based statutes were enacted by 33 states, Puerto Rico, and the Virgin Islands.\textsuperscript{17} These statutes typically track the general provisions of the federal RICO statute\textsuperscript{18} but often have significantly broader civil and criminal applications.\textsuperscript{19} Many state RICO statutes provide for civil liability, criminal liability, and forfeiture.\textsuperscript{20} State RICO claims provide an alternative or supplement to federal RICO claims and increasingly plaintiffs utilize the state statutes. The trend for plaintiffs to file state RICO claims has been accelerated by enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA).\textsuperscript{21} Section 107 of the PSLRA (the so-called “RICO Amendment”) bars private federal RICO actions based upon conduct that would have been actionable as fraud in the purchase or sale of securities, whether or not the complaint includes an express claim under the federal securities laws (unless the defendant has been criminally convicted in connection with the fraud).\textsuperscript{22} This federal bar has spurred numerous state RICO claims.\textsuperscript{23}

Section 1962 of RICO generally criminalizes four types of conduct involving a pattern of racketeering activity. Section 1962(c) is the provision of RICO most widely used by prosecutors and private parties.\textsuperscript{24} That section makes it unlawful “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”\textsuperscript{25} To plead a RICO claim under § 1962(c), plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.\textsuperscript{26} A


\textsuperscript{18} See, e.g., In re Schering Plough Corp. Intron/Temodar Consumer Class Action, Nos. 10-3046, 10-3047, 2012 WL 1700836, at *8 (3d Cir. May 16, 2012) (noting that the federal and New Jersey RICO statutes are intended to be coextensive). \textit{Cf.} Etan Mark & Monica F. Rossbach, \textit{Qué RICO? Discarding the Fallacy that Florida and Federal RICO are Identical}, 86 FLA. B.J. 11, 11 (Jan. 2012) (noting that courts in Florida have routinely – but erroneously – suggested that there is no meaningful difference between Florida RICO and federal RICO).


\textsuperscript{20} Floyd, \textit{supra} note 17, at 1.


\textsuperscript{23} See David M. Zensky & Joseph L. Sorkin, \textit{State RICO and the PSLRA}, NAT’L L.J., Mar. 31, 2008 (“With increasing frequency, however, plaintiffs have attempted to end-run Congress’ prohibition and, through state RICO claims, are seeking the RICO-type remedies Congress sought to eliminate with the PSLRA.”).


\textsuperscript{25} 18 U.S.C. § 1962(c).

pattern of racketeering activity requires at least two predicate acts of racketeering activity within a ten-year period.\textsuperscript{27} The most common RICO predicate acts are federal mail fraud (18 U.S.C. § 1341) and federal wire fraud (18 U.S.C. § 1343).\textsuperscript{28} Section 1962(d) criminalizes conspiracy to engage in activity proscribed by § 1962(c).\textsuperscript{29} In appropriate circumstances RICO cases may be pursued as class actions.\textsuperscript{30}

\section*{B. RICO Enterprises}

Section 1961(4) defines an “enterprise” to include “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”\textsuperscript{31} In most RICO cases the alleged enterprise will be associated-in-fact.\textsuperscript{32} In \textit{United States v. Turkette}\textsuperscript{33} the Supreme Court held that an enterprise is a “group of persons associated together for a common purpose of engaging in a course of conduct,”\textsuperscript{34} which is “proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”\textsuperscript{35} The Supreme Court thus acknowledged that RICO’s definition of enterprise includes associated-in-fact enterprises.

The enterprise as such generally faces no § 1962(c) liability. Indeed, the enterprise may be the innocent vehicle through which unlawful activity is conducted.\textsuperscript{36} When the enterprise is an association-in-fact, members of the association may be both part of the enterprise and liable as

\textsuperscript{27} 18 U.S.C. § 1961(5).
\textsuperscript{28} R. Douglas Rees & Sean P. Tarantino, \textit{An Overview of Federal RICO Law in Civil Cases}, BLOOMBERG LAW REPORTS – WHITE COLLAR CRIME (2009); 18 U.S.C. § 1961(1) (delineating what the phrase “racketeering activity” means, and setting forth exhaustive list of predicate offenses). To state a claim for violation of the federal mail fraud or wire fraud statutes a plaintiff must allege: (1) a scheme to defraud, (2) participation by the defendant in the scheme, (3) specific intent to defraud, and (4) use of the U.S. wires or mail in furtherance of the scheme. \textit{See, e.g.}, U.S. v. Denson, Nos. 11-1042, 11-1043, 2012 WL 3125111, at *2 (1st Cir. Aug. 8, 2012); U.S. v. Meredith, 685 F.3d 814, 820 (9th Cir. 2012).
\textsuperscript{29} 18 U.S.C. § 1962(d). It is unclear whether the existence of an enterprise is necessary to establish a conspiracy. \textit{See United States v. Smith}, 454 F. App’x 686, at *8 (10th Cir. Feb. 2, 2012) (discussing, but not deciding, the issue); United States v. Applins, 637 F.3d 59, 75 (2d Cir. 2011) (suggesting that “the establishment of an enterprise is not an element of the RICO conspiracy offense.”).
\textsuperscript{32} J. Douglas Grimes & C. Bailey King, Jr., \textit{Defending RICO Claims After Boyle v. United States}, 53 No. 2 DRI FOR THE DEFENSE (Feb. 2011).
\textsuperscript{33} 452 U.S. 576 (1981).
\textsuperscript{34} \textit{Id.} at 583.
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{See Cedric Kushner Promotions, Ltd. v. King}, 533 U.S. 158, 164 (2001) (“RICO both protects a ‘legitimate’ enterprise from those who would use unlawful acts to victimize it, and also protects the public from those who would unlawfully use an ‘enterprise’ (whether legitimate or illegitimate) as a ‘vehicle’ through which ‘unlawful . . . . activity is committed.’”) (quoting \textit{Turkette}).
“persons” under RICO if they conduct the enterprise’s affairs through a pattern of racketeering activity.\(^{37}\)

After *Turkette*, the federal circuits split sharply on what was required to establish the existence of a RICO enterprise. The First,\(^{38}\) Second,\(^{39}\) Ninth,\(^{40}\) and Eleventh\(^{41}\) Circuits held that an enterprise did not require a particular organizational structure. The majority of circuits, however, held that under *Turkette* an enterprise was required to have (1) some ascertainable structure for the making of decisions, whether hierarchical or consensual, that was distinct from the pattern of racketeering activity and (2) some mechanism for controlling and directing the affairs of the group on an on-going basis.\(^{42}\) The Supreme Court resolved this split in 2009 in *Boyle v. United States*.\(^{43}\) The Court explained that an associated-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.\(^{44}\) These requirements are interpreted flexibly. An associated-in-fact enterprise need not have a hierarchical structure or a chain of command, and decisions may be made on an ad hoc basis and by any number of methods.\(^{45}\)

II. **RICO’s Extraterritoriality Prior to *Morrison***

The RICO statute is silent regarding any extraterritorial application.\(^{46}\) Prior to *Morrison*, federal courts split as to whether RICO has such application. A minority of courts to consider the issue held that RICO does not apply extraterritorially, essentially because Congress did not

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\(^{38}\) See United States v. Patrick, 248 F.3d 11, 18-19 (1st Cir. 2001) (“[W]e refuse to import an ‘ascertainable structure’ requirement into jury instructions.”).

\(^{39}\) See United States v. Bagaric, 706 F.2d 42, 56 (2d Cir. 1983) (“[I]t is logical to characterize any associative group in terms of what it does, rather than by abstract analysis of its structure.”).

\(^{40}\) See Odom v. Microsoft Corp., 486 F.3d 541, 550 (9th Cir. 2007) (“[A]n associated-in-fact enterprise under RICO does not require any particular organizational structure.”).

\(^{41}\) United States v. Cagnina, 697 F.2d 915, 921 (11th Cir. 1983) (“Turkette did not suggest that the enterprise must have a distinct, formalized structure.”).


\(^{43}\) 556 U.S. 938 (2009).

\(^{44}\) Id. at 945.

\(^{45}\) Id. at 948; United States v. Bingham, 653 F.3d 983, 992 (9th Cir. 2011) (“[T]he AB [gang] need not have employed any particular structure, or the same structure, to be a continuing unit with common purpose.”); United States v. Hutchinson, 573 F.3d 1011, 1021 (10th Cir. 2009) (“[A]fter Boyle, an association-in-fact enterprise need have no formal hierarchy or means for decision-making.”).

explicitly provide for it.\textsuperscript{47} A majority of courts to consider RICO’s extraterritoriality applied the same two tests that most federal courts utilized prior to \textit{Morrison} to determine whether Section 10(b) of the Securities Exchange Act (Exchange Act)\textsuperscript{48} and companion Rule 10b-5\textsuperscript{49} have extraterritorial application.\textsuperscript{50} Some of these courts in RICO cases also borrowed the extraterritoriality analysis set forth in antitrust cases.\textsuperscript{51}

Pursuant to the majority approach, RICO applied extraterritorially if (1) conduct material to the completion of the racketeering occurred in the United States and directly caused a foreign injury, or (2) significant effects of the racketeering were felt in the United States.\textsuperscript{52} Pursuant to (1), RICO did not apply extraterritorially when conduct occurring in or directed at the United States was not central to the consummation of the racketeering. Conduct was not central where,

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\textsuperscript{47} See, \textit{e.g.}, Jose v. M/V Fir Grove, 801 F. Supp. 349, 357 (D. Or. 1991) (“[T]he language and legislative history of RICO fail to demonstrate clear Congressional intent to apply the statutes beyond U.S. boundaries.”). \textit{See also} Kelly Christie, \textit{Commentary, To Apply or Not to Apply: Extraterritorial Application of Federal RICO Laws}, 8 \textit{Fla. J. Int’l L.} 131 (1993) (criticizing the Jose decision).
\textsuperscript{48} 15 U.S.C. §§ 78j(b) (2010).
\textsuperscript{49} 17 C.F.R. § 240.10b-5. Rule 10b-5 makes illegal the following conduct: (1) employing any device, scheme or artifice to defraud; (2) making any untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (3) engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. \textit{Id}.
\textsuperscript{50} See, \textit{e.g.}, Liquidation Comm’n of Banco Intercont’l, S.A. v. Renta, 530 F.3d 1339, 1351-52 (11th Cir. 2008); North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996); Poulos v. Caesars World, Inc., 379 F.3d 654, 663 (9th Cir. 2004) (“Although the RICO and the securities fraud contexts are not precisely analogous, the tests used to assess the extraterritorial application of the securities laws provides useful guidelines for evaluating whether the jurisdictional minimum exists. . . .”); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988) (en banc) (holding that court had jurisdiction over RICO claim where “[t]he effect on the commerce of the United States of engaging in [the fraud was] palpable”). \textit{See also} Joshua L. Boehm, Note, \textit{Private Securities Fraud Litigation After Morrison} v. National Australia Bank: \textit{Reconsidering a Reliance-Based Approach to Extraterritoriality}, 53 \textit{Harv. Int’l L.J.} 249, 277 (2012) (“Because RICO is silent on extraterritorial scope, courts had traditionally followed Sec. 10(b) jurisprudence pre-Morrison and applied a conducts-effects test to determine how the statute would apply abroad.”).
\textsuperscript{51} See, \textit{e.g.}, North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996) (“In antitrust cases, the analysis proceeds along similar lines, but there is more emphasis on the effects of the relevant conduct in the United States, and less emphasis on where that conduct took place.”).
\textsuperscript{52} Liquidation Comm’n of Banco Intercont’l, S.A. v. Alvarez Renta, 530 F.3d 1339, 1351-52 (11th Cir. 2008); North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996) (referencing the conduct and effects tests for guidance in assessing RICO’s extraterritoriality, but declining to engage in the “delicate work” of selecting a test); United States v. Noriega, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990) (“Given [RICO’s] broad construction and equally broad goal of eliminating the harmful consequences of organized crime, it is apparent that Congress was concerned with the effects and not the locus of racketeering activity.”). \textit{See also} \textit{Does the RICO Act Apply Extraterritorially?}, 27 No. 13 \textit{Civ. RICO Rep.} 2 (Mar. 2012) (noting that prior to \textit{Morrison}, “the most widely accepted view by circuit courts was that ‘RICO may apply extraterritorially if conduct material to the completion of the racketeering occurs in the United States, or if significant effects of the racketeering are felt here’”).
for example, the sole nexus was utilization of United States mail or wires to prepare for or cover up a fraud scheme perpetrated by foreigners against other foreigners.\(^{53}\)

III. **Morrison**

A. **Background**

In *Morrison* the Supreme Court decided whether Section 10(b) of the Exchange Act provides a cause of action to foreign plaintiffs suing foreign issuers in American courts for violations of American securities laws based on securities transactions in foreign countries (so-called “f-cubed” cases). Section 10(b) is the most important anti-fraud provision of the Exchange Act— in 2011, 71 percent of the securities class action complaints filed in federal court included allegations of Section 10(b) and Rule 10b-5 violations.\(^{54}\)

*Morrison* was the Court’s first decision regarding the extraterritorial reach of U.S. securities laws, and it swept away more than four decades of appellate court jurisprudence.\(^{55}\) During those four decades the Second,\(^{56}\) Third,\(^{57}\) Seventh,\(^{58}\) Ninth,\(^{59}\) and D.C.\(^{60}\) Circuits all adopted some variation of the conduct and effects tests to determine the extraterritoriality of the federal securities laws. While the precise formulation of the tests varied, in general Section 10(b) applied if (1) acts done in the United States directly caused the losses suffered by investors outside this country (conduct test),\(^{61}\) or (2) extraterritorial conduct produced substantial effects within the United States (effects test).\(^{62}\) While satisfaction of either test typically permitted application of Section 10(b),\(^{63}\) the Second Circuit (the most influential court in the development

\(^{53}\) See Liquidation Comm’n of Banco Intercont’d, S.A. v. Alvarez Renta, 530 F.3d 1339, 1352 (11th Cir. 2008); North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1052-53 (2d Cir. 1996).


\(^{56}\) See, e.g., SEC v. Berger, 322 F.3d 187, 192-93 (2d Cir. 2003). Four seminal Second Circuit cases form the origins of the conduct and effects tests, although none of the cases uses those terms. The cases are Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), rev’d in part en banc on other grounds, 405 F.2d 215 (2d Cir. 1968); Leasco Data Processing Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975); and IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975).


\(^{58}\) See, e.g., Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998).

\(^{59}\) See, e.g., Grunenthal GmbH v. Hotz, 712 F.2d 421, 424-25 (9th Cir. 1983).

\(^{60}\) See, e.g., Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 30 (D.C. Cir. 1987).

\(^{61}\) Id.

\(^{62}\) Id.

of securities case law) sometimes applied the tests in tandem, on the ground that their combination presented a better picture of whether there was sufficient United States involvement to justify the exercise of jurisdiction by an American court.

**Morrison** rejected use of the conduct and effects tests and adopted a transactional test to determine extraterritoriality. The Supreme Court held that Section 10(b) does not provide a cause of action in f-cubed cases because it applies only to “transactions in securities listed on domestic exchanges . . . and domestic transactions in other securities.” The Court rejected the conduct and effects tests because they lacked any textual or extratextual basis, were difficult to administer, and improperly ignored the presumption against extraterritoriality. The Court criticized the Second Circuit for its longtime “disregard” of the presumption against extraterritoriality in federal securities cases and held that a statute has no extraterritorial application unless Congress clearly expressed its affirmative intention to give the statute such an application. The Supreme Court held: “When a statute gives no clear indication of an extraterritorial application, it has none.” This was not a “clear statement rule” – the Court

65 Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 122 (2d Cir. 1995). While the Second Circuit and other federal courts treated the question of Section 10b-5’s extraterritorial application as one of subject matter jurisdiction, in Morrison the Supreme Court corrected this error. The Supreme Court made clear that the issue was one of merits, rather than jurisdiction. Morrison, 130 S. Ct. at 2876-77.
66 Morrison, 130 S. Ct. at 2884. The Supreme Court’s opinion provides slim guidance as to what constitutes a domestic purchase or sale under the second prong of the new transactional test, and lower courts have since adopted three different approaches to resolving this issue. See John D. Roesser & Louis A. Russo, How ‘Morrison’ Inadvertently Broadens Extraterritorial Actions, N.Y.L.J., Aug. 17, 2012. Absolute Activist Value Master Fund Ltd. v. Ficeto, No. 11-0221-CV, 2012 WL 661771 (2d Cir. Mar. 1, 2012) illustrates one of the approaches. In this case the Second Circuit held that transactions involving securities that are not traded on a domestic exchange are domestic if irrevocable liability is incurred or title passes within the United States. Id. at *5. Other lower court decisions have clarified other issues raised by Morrison. See, e.g.,., In re Vivendi Universal, S.A. Sec. Litig., 2012 WL 280252, at *5 (S.D.N.Y. Jan. 27, 2012) (holding that Morrison also applies to claims asserted under the Securities Act of 1933); Securities and Exchange Commission v. Goldman Sachs & Co., No. 10 Civ. 3229(BSJ)(MHD), 2011 WL 2305988, at *7 (S.D.N.Y. June 10, 2011) (applying Morrison to claims asserted by the SEC). Morrison does not bar claims against foreign company defendants whose shares are traded on U.S. exchanges, and thus securities lawsuits against foreign companies have not declined post-Morrison. Indeed, securities class action filings against foreign issuers sharply increased in 2011. They jumped to 36.2 percent of all securities class action filings, up from an average of 13.4 percent during the period 2008 to 2010. Cornerstone Research, Securities Class Action Filings: 2011 Year in Review 10 (Jan. 2012), http://securities.stanford.edu/clearinghouse_research/2011_YIR/Cornerstone_Research_Filings_2011_YIR.pdf.

67 Morrison, 130 S. Ct. at 2878-79.
68 Id. at 2878.
69 Id. at 2877-78.
70 In the last few decades the Supreme Court has increasingly construed statutes “in light of constitutionally inspired ‘clear statement rules,’ which insist that Congress speak with unusual clarity when it wishes to affect a
specified that “assuredly context can be consulted as well,” although it did not elaborate what this means and it not appear to consult context when it concluded that there was no clear or affirmative indication in the Exchange Act that Section 10(b) applies extraterritorially, it does not so apply.\footnote{Morrison, 130 S. Ct. at 2883. AccorD Tianrui Group Co. v. Int’l Trade Comm’n, 661 F.3d 1322, 1329 n.2 (Fed. Cir. 2011) (“Even when the presumption against extraterritoriality applies, the Supreme Court has not treated the presumption as a ‘clear statement rule,’ but has noted that ‘context can be consulted as well.’”). \textit{See also} William S. Dodge, \textit{Understanding the Presumption Against Extraterritoriality}, 16 BERKELEY INT’L L.J. 85, 110 (1998) (noting that lower courts “have been unanimous in concluding that the presumption against extraterritoriality is not a clear statement rule.”).}

\textit{Morrison} referenced the judicially-crafted concept of “‘focus’ of congressional concern.”\footnote{Morrison, 130 S. Ct. at 2883.} The Court stated: “[W]e think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”\footnote{Id. at 2884 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 255 (1991)).} Such transactions “are the objects of the statute’s solicitude.”\footnote{Id. at 2884.} This focus analysis “is a new addition to the landscape of legislative jurisdiction analysis.”\footnote{Austen L. Parrish, \textit{Evading Legislative Jurisdiction}, 87 NOTRE DAME L. REV. 1673, 1699 (2012). \textit{AccorD} Lea Brilmayer, \textit{The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law}, 40 SW. L. REV. 655, 661 (2011) (noting that the focus analysis “is a relative newcomer to the jurisprudence of extraterritoriality”). Legislative jurisdiction is a nation state’s authority to prescribe or regulate conduct. Restatement (Third) of the Foreign Relations Law of the United States § 401(b)-(c) (1987); Willis L.M. Reese, \textit{Legislative Jurisdiction}, 78 COLUM. L. REV. 1587, 1587 (1978) (defining legislative jurisdiction as “the power of a state to apply its law to create or affect legal interests”). \textit{See} Lea Brilmayer, \textit{The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law}, 40 SW. L. REV. 655, 668 (2011).} How “focus” is to be determined under \textit{Morrison} is unclear, but the determination likely excludes consulting Congress’ affirmative intent concerning extraterritoriality.\footnote{Morrison, 130 S. Ct. at 2884.}

The Supreme Court also emphasized that merely alleging some domestic activity does not state a claim for domestic application of a statute: “[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.”\footnote{Morrison, 130 S. Ct. at 2883.}
The Supreme Court’s invocation in *Morrison* of a presumption against extraterritoriality was consistent with *American Banana Co. v. United Fruit Co.*,\(^{79}\) decided by the Court in 1909, but inconsistent with many of its other pre-*Morrison* decisions. *American Banana* applied the presumption and held that the Sherman Act\(^ {80}\) does not apply extraterritorially to cover injurious acts done outside the United States.\(^ {81}\) Justice Holmes wrote in that case: “[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”\(^ {82}\) But Holmes’s statement was subsequently limited\(^ {83}\) and then effectively overruled in 1945 in the landmark case of *United States v. Aluminum Co. of America (Alcoa)*\(^ {84}\) by the Second Circuit, acting as the court of last resort because the Supreme Court lacked a quorum of non-conflicted Justices. In *Alcoa* Judge Learned Hand concluded that the Sherman Act applies extraterritorially if an anticompetitive agreement has an intended effect on imports.\(^ {85}\)

The Second Circuit’s adoption of the effects test for use in antitrust cases was later repeated by other circuits, some of which modified the test. Between the 1940s and the 1970s most courts applied some variation of *Alcoa’s* approach.\(^ {86}\) The Supreme Court also endorsed the effects test for use in antitrust cases\(^ {87}\) and the test was codified (but limited) in 1982 in the Foreign Trade Antitrust Improvements Act (FTAIA).\(^ {88}\) The FTAIA clarified that U.S. antitrust law does not apply to conduct involving trade or commerce with foreign nations unless such conduct has a “direct, substantial, and reasonably foreseeable effect” in the United States.\(^ {89}\) This

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82. *Id*.
83. See, e.g., *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (affirming federal antitrust jurisdiction with respect to anticompetitive effects within the United States, notwithstanding applicable foreign statute).
84. 148 F.2d 416, 443-44 (2d Cir. 1945).
85. *Id*. Judge Hand declared that “it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its border that has consequences within its borders that the state reprehends.” *Id.* at 443.
89. *Id.*, § 6a(1)(A). See Animal Science Prod., Inc. v. China Minmetals Corp., 654 F.3d 462, 466 (3d Cir. 2011) (noting that FTAIA’s bar on extraterritorial application of the Sherman Act “is inapplicable if the defendants’ ‘conduct has a direct, substantial and reasonably foreseeable effect’ on domestic commerce, import commerce, or certain export commerce and that conduct ‘gives rise’ to a Sherman Act claim.”) See also Max Huffman, *A Retrospective on
provision does not require a subjective intent to affect American domestic commerce. It has been interpreted by courts to require proof of injury both to plaintiff and the trade or commerce of the United States.

The Supreme Court twice addressed the extraterritoriality of U.S. antitrust laws following enactment of the FTAIA, with inconsistent results. In *Hartford Fire Ins. Co. v. California*, decided in 1993, the Court declined to place any weight on the FTAIA, rejected *American Banana*’s territorial approach, endorsed *Alcoa*’s core holding, and concluded that the Sherman Act governs when the foreign conduct “was meant to produce and did in fact produce some substantial effect in the United States.” *Hartford Fire* also established a bright-line rule which provided for deference by U.S. courts to another country’s jurisdiction under the principle of international comity only where there was a “true conflict” between domestic and foreign law which prevented defendant from abiding by both laws. The Court’s majority opinion did not discuss or even mention the presumption against extraterritoriality. Justice Scalia’s dissent concluded that the presumption was not at issue because of “well established” case law holding that the presumption was overcome in the case of the Sherman Act.

The Supreme Court revisited antitrust’s extraterritoriality eleven years later, in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, when it relied on the Restatement (Third) of Foreign Relations Law to narrowly construe the FTAIA’s reach. The Court held in *Empagran* that the FTAIA did not provide for subject matter jurisdiction where foreign plaintiffs’ claims against foreign defendants were based on foreign injuries wholly independent of any effect on U.S. domestic commerce. *Empagran*’s holding reflected a shift from *Hartford Fire*’s bright-line framing of comity toward an open-ended balancing of foreign and domestic interests and a

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*Twenty-Five Years of the Foreign Trade Antitrust Improvements Act, 44 HOUS. L. REV. 285, 286-98 (2007) (observing that FTAIA introduced confusion to an area of the law that was already confused and unsettled).*
*Id.*
*509 U.S. 764 (1993).*
*Id. at 796 n.23.*
*Id. at 795-96.*
*Id. at 798.*
*542 U.S. 155 (2004).*
*Restatement (Third) of the Foreign Relations Law of the United States (1987) provides in § 403(1) that even where a possible basis for prescriptive jurisdiction exists, international law forbids its exercise if it would be “unreasonable” in light of all relevant factors. Section 403(2) sets forth a list of factors relevant to the “unreasonableness” inquiry. These factors include, *inter alia*: (1) the link between the activity and the territory of the regulating country; (2) the character of the activity; (3) the degree of international agreement on the need for regulation; (4) the importance of regulation to the international political, legal, or economic system; and (5) the possibility of conflict with regulation by another country.*
*Empagran*, 542 U.S. at 169.
concomitant restriction of private rights of action under the federal antitrust laws. This balancing was intended to provide courts with a basis for determining whether the exercise of legislative jurisdiction is unreasonable, but it has been criticized as unpredictable and inherently indeterminate. Since Empagran the Supreme Court has neither applied the Restatement test again, nor explained how it relates to the presumption against extraterritoriality, nor indicated whether Empagran has application outside the antitrust context.

Both before and after Empagran the Supreme Court has applied the presumption against extraterritoriality in various contexts outside of antitrust, with a similar absence of consistency and predictability. For example, in EEOC v. Arabian American Oil Co. (Aramco) the Court held that Title VII of the Civil Rights Act of 1964 did not apply extraterritorially to torts committed by U.S. employers against U.S. citizens employed abroad. The Court stated: “We assume that Congress legislates against the backdrop of the presumption against extraterritoriality.” But Aramco cannot be reconciled with other decisions of the Court in which it has concluded that certain laws apply extraterritorially to actions that have substantial effects in the United States.

In short, it is no exaggeration to say that in the last century “the Supreme Court has alternatively embraced and rejected” the presumption against extraterritoriality. In Morrison

100 Developments in the Law–Extraterritoriality, Comity and Extraterritoriality in Antitrust Enforcement, 124 HARV. L. REV. 1269, 1273 (2011). Post-Empagran, criminal enforcement of U.S. antitrust law against foreign actors has significantly increased, but this trend has been off-set, at least in part, by a corresponding comity-driven decrease in civil enforcement against foreign defendants. Id. at 1274-77.
103 Id. at 246-47.
104 Id. at 248.
105 See, e.g., Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (holding that U.S. patent laws apply extraterritorially). See also John H. Knox, A Presumption Against Extrajurisdictionality, 104 AM. J. INT’L L. 351, 392 (2010) (“[The Supreme Court] has never defined the scope of an ‘effects’ exception to the presumption against extraterritoriality, or even made clear whether on exists, and allowing any exception at all seems to be inconsistent with decisions such as Aramco that emphasize the importance of the presumption.”).
the Court invigorated the presumption once again, and in the process “took a sledgehammer to decades of case law on the application of United States securities laws abroad.”107 Since then, lower federal courts have applied Morrison aggressively in securities cases,108 with the result that numerous securities cases involving non-U.S. companies that previously would have advanced in U.S. courts have been dismissed.109 One example of this aggressive application is the uniform judicial rejection of so-called “f-squared” claims – claims asserted by U.S. purchasers of foreign issuers’ securities on foreign exchanges.110 Morrison also has been widely applied by lower federal courts in cases not involving the federal securities laws.111

The Supreme Court’s first application of Morrison may take place in 2013 in connection with the U.S. Alien Tort Statute (ATS).112 The ATS provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the

application. A second relevant canon is the Charming Betsy rule, which may apply even when the presumption does not. The rule is derived from a nineteenth century case and provides that a law of Congress should never be construed to conflict with the laws of other nations if any other possible interpretation of the statutory language remains. See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). The rule requires that Congress express its intent to apply statutes abroad. If any interpretation of a statute avoids conflict with the laws of other nations, then that interpretation must prevail. If the statute is ambiguous, the ambiguity must be resolved in a manner that “avoids unreasonable encroachment on the sovereign authority of other nations.” Elizabeth Cosenza, Paradise Lost: § 10(b) After Morrison v. National Australia Bank, 11 CHI. J. INT’L L. 343, 351-52 (2011). The Charming Betsy rule has given rise to a presumption against extrajurisdictionality – a presumption that federal law does not extend beyond the jurisdictional limits set by international law. See John H. Knox, A Presumption Against Extrajurisdictionality, 104 AM. J. INT’L L. 351, 352 (2010).


law of nations or a treaty of the United States.”\textsuperscript{113} The ATS is a statute specifically directed at non-U.S. persons and entities, and most ATS claims involve incidents that occur outside of the United States.\textsuperscript{114} It was promulgated in the Judiciary Act of 1789\textsuperscript{115} (primarily to reassure foreign sovereigns that their interests would be adequately protected in U.S. courts),\textsuperscript{116} lay dormant for nearly 200 years,\textsuperscript{117} and then, beginning in the 1980s, “became a linchpin of international human rights activism”\textsuperscript{118} as corporations increasingly were named as defendants. More than 150 ATS cases have been filed against corporations in federal courts during the modern resurgence of the ATS that commenced in 1980.\textsuperscript{119}

The Second Circuit created a circuit split in 2010 by holding in \textit{Kiobel v. Royal Dutch Petroleum Co.}\textsuperscript{120} that the ATS does not create a cause of action against corporations.\textsuperscript{121} The Second Circuit’s decision conflicts with decisions from the Seventh, Ninth, Eleventh, and D.C. Circuits.\textsuperscript{122} The Supreme Court granted certiorari in \textit{Kiobel}\textsuperscript{123} and following oral argument in March 2012 ordered supplemental briefing and re-argument on an issue not presented in the petition for certiorari – whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.\textsuperscript{124} Indeed, \textit{Kiobel} is an f-cubed case – it involves litigation “by foreigners against foreigners for conduct that took place entirely abroad and has no

\begin{itemize}
  \item \textsuperscript{113} Id.
  \item \textsuperscript{115} See https://www.arsenic.org/\textit{extraterritoriality/}
  \item \textsuperscript{116} Alan O. Sykes, \textit{Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis}, 100 Geo. L.J. 2161, 2191 (2012).
  \item \textsuperscript{117} Gary Clyde Hufbauer & Nicholas K. Mitrokostas, \textit{International Implications of the Alien Tort Statute}, 16 St. Thomas L. Rev. 607, 609 (2004) (noting that ATS was used only twenty-one times during the period 1789 to 1980).
  \item \textsuperscript{120} 630 F.2d 876 (2d Cir. 1980).
  \item \textsuperscript{121} 621 F.3d 111 (2d Cir. 2010).
  \item \textsuperscript{122} Id. at 149.
  \item \textsuperscript{123} See Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (distinguishing \textit{Morrison} and holding that the ATS does have extraterritorial application); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011).
  \item \textsuperscript{124} 132 S. Ct. 472 (2011).
\end{itemize}
particular effect on the U.S.”125 Re-argument, likely to take place in October or November 2012,126 may well encompass Morrison’s application.127

B. Dodd-Frank Wall Street Reform and Consumer Protection Act

Congress immediately responded to Morrison in 2010 by adding Sections 929P(b)(2) and 929Y of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).128 Section 929P(b)(2) restores to federal district courts jurisdiction129 over enforcement actions brought by the Securities and Exchange Commission (SEC) and DOJ if the fraud involves: (1) conduct within the United States that constitutes a significant step in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.130 These provisions do not apply to private actions,131 but Section 929Y directed the SEC to solicit public comment and then conduct a study to consider the extension of the cross-border scope of private actions similar to the extension made in enforcement actions in Section 929P(b)(2), or in some narrower manner.132 Section 929Y further required the SEC’s study to consider and analyze the potential implications for international comity and the potential economic costs and benefits of extending the cross-border scope of private actions.133

In response to the SEC’s request for public comments, as of January 1, 2012 it had received 72 non-duplicative original comment letters. Of these, 44 supported enactment of the conduct and effects tests or some modified version thereof, while 23 supported retention of Morrison’s transactional test.134 The SEC issued the mandated study in April 2012. The SEC’s

126 Giannini & Farbstein, supra note 124.
129 It has been widely noted that this purported restoration of jurisdiction is a misnomer, because the issue in Morrison was not jurisdictional. Rather, it was a question of merits. See, e.g., Richard Painter, Douglas Dunham & Ellen Quackenbos, When Courts and Congress Don’t Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act, 20 MINN. J. INT’L L. 1, 2-4 (2011).
133 Id.
“Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 (Cross-Border Study)” failed to make a specific recommendation. Instead, it outlined a range of options that included enactment of conduct and effects tests for Section 10(b) private actions similar to the test enacted in Dodd-Frank for SEC and DOJ enforcement actions. A second option was enactment of a modified conduct test that would require plaintiffs to demonstrate that their injuries resulted directly from conduct within the United States. The SEC had recommended this approach as a matter of public policy in Morrison, and its Cross-Border Study asserted that the SEC had not altered its favorable view. A third option was enactment of conduct and effects tests only for U.S. resident investors. Finally, the Cross-Border Study set forth four options to supplement and clarify Morrison’s transactional test.

The same day that the SEC issued its Cross-Border Study, SEC Commissioner Luis Aguilar issued a sharply worded dissenting statement criticizing the Study for failing to provide a specific recommendation and failing to recognize the harm to investors resulting from Morrison. Aguilar’s dissenting statement included the following points, which, as discussed below, are relevant to Morrison’s application in RICO litigation: (1) the SEC lacks sufficient resources to effectively police transnational security fraud and thus it is essential that investors have private rights of action to complement and complete the SEC’s efforts, (2) the Cross-Border Study overstates the international comity concerns associated with restoring investors’ rights to assert private transnational Section 10(b) claims, and (3) prior to Morrison, fewer than ten percent of securities fraud actions filed were against foreign issuers, so restoring a private right of action to assert transnational claims would not unleash a flood of litigation in U.S. courts.

The foregoing points also have been noted by a number of observers and

136 See id. at vi.
137 See id.
138 See id. at vii.
139 See id. at vii.
141 Id. at 3.
142 Id. at 4.
143 Id. at 5.
scholars, some of whom have focused on the increasingly global dimension of securities markets.¹⁴⁴

IV. RICO’s Extraterritoriality After Morrison

Morrison concluded that when a statute gives no clear indication of extraterritorial application, it has none. RICO is silent as to its extraterritorial application.¹⁴⁵ This is not unusual – Congress rarely specifies the geographic scope of the laws it enacts.¹⁴⁶ Given this silence, a number of federal courts have applied Morrison and held that the presumption against extraterritorial application governs in RICO cases. The Second Circuit¹⁴⁷ and district courts in the Central District of California,¹⁴⁸ District of Columbia,¹⁴⁹ Southern District of Florida,¹⁵⁰ Eastern District of New York,¹⁵¹ and Southern District of New York¹⁵² have so held.

¹⁴⁴ See, e.g., Hannah L. Buxbaum, Remedies for Foreign Investors Under U.S. Federal Securities Law, 75 LAW & CONTEMP. PROBS. 161, 185 (2012) (“In this environment, it is implausible that national securities regulators have resources sufficient to police the markets adequately.”).


¹⁴⁶ Austen Parrish, The Effects Test: Extraterritoriality’s Fifth Business, 61 VAND. L. REV. 1455, 1463 (2008); Lea Brilmayer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal, 50 LAW & CONTEMP. PROBS. 11, 15, 17 (1987) (“In certain statutes, Congress has specified the proper extraterritorial reach. More commonly, however, it has not. In the resulting exercise in statutory construction, courts often find little guidance in the legislative history about the extent to which the statute was designed to apply to transnational disputes.”).

¹⁴⁷ See Norex Petrol. Ltd. v. Access Indus., Inc., 631 F.3d 29, 31-33 (2d Cir. 2010) (applying Morrison and dismissing private RICO claim alleging a widespread racketeering and money laundering scheme with the goal of seizing control over most of the Russian oil industry); Stephen R. Smerek & Jason C. Hamilton, Extraterritorial Application of United States Law After Morrison v National Australia Bank, 5 DISPUTE RES. INT’L 21, 27 (2011) (“The Second Circuit’s decision in Norex confirms the broad application of the Supreme Court’s reasoning in Morrison: federal courts will not apply any US laws extraterritorially without a clear, statutory expression of Congressional intent.”).


¹⁵⁰ See Sorota v. Sosa, No. 11-8080897-Civ, 2012 WL 313530, at *4 (S.D. Fla. Jan. 31, 2012). In Sorota the court concluded that plaintiff had alleged a foreign RICO enterprise, with the only connection to the United States being the funds it possessed originating from (and possibly returning to) a Florida bank account. Id at *5. The court expressed agreement with the post-Morrison decisions “uniformly holding that RICO does not apply extraterritorially.” Sorota also determined that Morrison undermined the earlier Eleventh Circuit decision in Liquidation Comm’n of Banco Intercont’l S.A. v. Renta, 530 F.3d 1339 (11th Cir. 2008), which had held that RICO may have extraterritorial application. Sorota determined that Morrison undermined Renta because Renta adopted the conduct and effects tests, which Morrison rejected.

Conversely, a few federal district courts have declined to apply the presumption where the subject enterprise was domestic.\textsuperscript{153}

The foregoing decisions raise a number of issues, which are explored in detail below. First, assuming that a general presumption against extraterritorial application of U.S. laws applies absent an affirmative congressional intent to the contrary, does RICO’s text, history or context provide such affirmative congressional intent? Second, assuming that the presumption applies, should it apply to both civil and criminal RICO? Third, assuming that the presumption applies, how should courts determine whether a particular RICO case involves proscribed extraterritorial application?

A. Congressional Intent

The first key issue raised by the post-\textit{Morrison} RICO cases is whether Congress intended for RICO to have extraterritorial application. The decisions in these cases have uniformly concluded that Congress did not so intend, but such conclusions are dubious. The Supreme Court specified in \textit{Morrison} that text, legislative history, and context could be consulted in determining congressional intent with regard to the Exchange Act’s extraterritoriality.\textsuperscript{154} RICO’s

\textit{Community} each involved predicate acts in the United States but no domestic enterprise and no domestic effects. Given RICO’s focus on domestic enterprises, each was properly dismissed under Morrison.”).

\textsuperscript{152} See \textit{Chevron v. Donziger}, No. 11 Civ. 0691 (LAK), 2012 WL 1711521, at *4 (S.D.N.Y. May 14, 2012); \textit{Cedeño v. Intech Group, Inc.}, 733 F. Supp.2d 471, 474 (S.D.N.Y. 2010), \textit{aff’d sub nom.}, Cedeño v. Castillo, 457 F. App’x 35 (2d Cir. 2012) (applying \textit{Morrison} and dismissing RICO claim against persons and entities associated with the government of Venezuela because the alleged enterprise and the impact of the predicate activity upon it were foreign).

\textsuperscript{153} See \textit{Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.}, No. 11-2861 SC, 2012 WL 1657108 (N.D. Cal. May 10, 2012) (denying motions to dismiss RICO complaint after concluding that subject enterprise was domestic); \textit{CGC Holding Co., LLC v. Hutchens}, Civ. Action No. 11-CV-01012-RBJ-KLM, 2011 WL 5320988, at **12-14 (D. Colo. Nov. 1, 2011) (refusing to dismiss RICO claims because conduct of the enterprise was domestic); \textit{Le-Nature’s, Inc. v. Krones, Inc.}, WDPA No. 9-MC-162, MDL No. 2021, No. 9-1445, 2011 WL 2112533, at *3 (W.D. Pa. May 26, 2011) (“[T]he principles of \textit{Morrison} do not bar a RICO claim if a complaint avers a domestic enterprise.”). \textit{See also} Jonathan C. Cross, \textit{RICO’s Post-\textit{Morrison} Reach: Will Other Courts Adopt the 2\textsuperscript{nd} Circuit’s Approach?}, \textsc{Law.com} (Nov. 12, 2010), \url{http://www.law.com/jsp/article.jsp?id=1202474772016&rss=newswire&slreturn=1&hblogin=1} (noting that after \textit{Morrison}, “courts will likely apply RICO only to enterprises that are located within the United States.”). Similarly, in 2011 a federal district court in California denied a motion, based on \textit{Morrison}, to dismiss charges under the federal Travel Act, where defendants’ alleged conduct constituted a domestic activity even though the targets of the bribery scheme were located abroad. See Debevoise & Plimpton, 3 (No. 3) \textsc{FCPA Update 1, The Use of the Travel Act to Prosecute Foreign Commercial Bribery: A Review of the Denial of the Defense Motion in United States v. Carson} (Oct. 2011), \url{http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=64730281-500e-48e2-85ca-630f30a991ee}, (The Travel Act, 18 U.S.C. § 1952 (2006), proscribes travel in interstate or foreign commerce or use of the mail or any facility in interstate or foreign commerce with the intent to promote, manage, establish, carry on, or facilitate any unlawful activity, with subsequent performance or attempted performance of such activity. \textit{See} Randy J. Curato, Note, \textit{Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption, 58 Notre Dame L. Rev.} 1027, 1028 (1983)).

\textsuperscript{154} \textit{Morrison}, 130 S. Ct. at 2878.
text, history, and context strongly suggest that the statute was designed to encompass both domestic and foreign enterprises. The text of the statute does not impose a domestic injury requirement, and broadly permits recovery “by any person injured in his business or property.”\textsuperscript{155} In any event, a domestic injury requirement would not establish congressional intent to exclude RICO’s extraterritorial application. The Sherman Act, for example, applies extraterritorially notwithstanding a domestic injury requirement.\textsuperscript{156}

Similarly, RICO’s text does not impose a domestic enterprise limitation. RICO’s unequivocal language covers “any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.”\textsuperscript{157} The Supreme Court has suggested, at least in dicta, that similar language is indicative of intended extraterritorial application.\textsuperscript{158} The broad scope of the term “enterprise” is reinforced by RICO’s directive that the statute be liberally construed to effectuate its remedial purposes.\textsuperscript{159}

It is true that the Organized Crime Control Act was described by Congress as “[a]n Act relating to the control of organized crime in the United States.”\textsuperscript{160} But the Supreme Court has repeatedly looked to RICO’s legislative history for guidance in interpreting the statute,\textsuperscript{161} and the history confirms that Congress was concerned with the harmful impact of organized crime on the American economy, as opposed to the impact solely on domestic enterprises. The Second Circuit explained 36 years prior to Morrison in United States v. Parness:\textsuperscript{162} “[RICO’s] legislative history leaves no doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises.”\textsuperscript{163}

To buttress its conclusion the Second Circuit cited both the floor debate on the legislation\textsuperscript{164} and the Statement of Findings and Purpose set forth in the preface to Title IX. The Statement noted that organized crime in the United States annually drains billions of dollars from America’s economy by unlawful conduct, weakens the stability of the American economic system, harms innocent investors, and undermines the general welfare of the United States and

\textsuperscript{155} 18 U.S.C. § 1964(c).
\textsuperscript{157} 18 U.S.C. § 1962(a)–(d).
\textsuperscript{158} See Pasquantino v. United States, 544 U.S. 349, 371-72 (2005) (noting that a statute that “punishes frauds executed ‘in interstate or foreign commerce,’ . . . is surely not [one] in which Congress had only domestic concerns in mind.”) (internal quotations and citations omitted).
\textsuperscript{159} See 84 Stat. 947, § 904(a); United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979).
\textsuperscript{162} 503 F.2d 430 (2d Cir. 1974).
\textsuperscript{163} Parness, 503 F.2d at 439.
\textsuperscript{164} Id.
its citizens.\textsuperscript{165} The Second Circuit concluded in \textit{Parness} that RICO’s salutary purposes would be frustrated by a construction that limited coverage of RICO to domestic enterprises. Such a construction “would permit those whose actions ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gain in a foreign enterprise.”\textsuperscript{166} The Second Circuit did not rely on either the conduct or effects test to reach this conclusion.\textsuperscript{167} Other federal courts, including the Seventh Circuit,\textsuperscript{168} agreed with the Second Circuit pre-\textit{Morrison} that RICO’s coverage extends to foreign enterprises.

In support of this pre-\textit{Morrison} approach several federal courts underscored RICO’s broad construction and equally broad goal of eliminating the harmful consequences in the United States of organized crime operating abroad. As noted in \textit{United States v. Noriega},\textsuperscript{169} in the context of narcotics activities the greatest threat to the welfare of the United States stems from enterprises located outside the United States – in particular, foreign drug cartels: “Keeping in mind Congress’ specific instruction that RICO be applied to liberally to effect its remedial purpose, the Court cannot suppose that RICO does not reach such harmful conduct simply because it is extraterritorial in nature.”\textsuperscript{170}

The foregoing observation about the threat posed to the United States by foreign drug cartels is as true today as it was when made in 1990. Many observers agree that the global war on drugs has been an epic failure, and the cartels – which have been operating for decades\textsuperscript{171} -- are more powerful than ever. The global market for illicit drugs has been estimated at $500 billion to $1 trillion annually\textsuperscript{172} -- accounting for up to 1.4 percent of the global economy.\textsuperscript{173} This market is largely controlled by transnational organized crime\textsuperscript{174} -- which today comprises as

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\item \textsuperscript{166} \textit{Parness, 503 F.2d at 439. Accord Alfadda v. Fenn, 935 F.2d 475, 479 (2d Cir. 1991) ("The mere fact that the corporate defendants are foreign entities does not immunize them from the reach of RICO."); United States v. Altise, 542 F.2d 104, 107 n.5 (2d Cir. 1976).}
\item \textsuperscript{167} \textit{See Parness, 503 F.2d at 438-40.}
\item \textsuperscript{168} \textit{United States v. Lee Stoller Enterprises, Inc., 652 F.2d 1313, 1317 (7th Cir. 1981) ("The statute is so broad that it applies to foreign enterprises as well as to domestic ones."). Accord United States v. Marzook, 426 F. Supp. 2d 820, 825 n.2 (N.D. Ill. 2006) ("[A] foreign organization may be a RICO enterprise. . . .").}
\item \textsuperscript{169} \textit{746 F. Supp. 1506 (S.D. Fla. 1990), aff'd on other grounds, 117 F.3d 1206 (11th Cir. 1997).}
\item \textsuperscript{170} \textit{Id. at 1517.}
\item \textsuperscript{171} Craig A. Bloom, \textit{Square Pegs and Round Holes: Mexico, Drugs and International Law,} 34 HOUS. J. INT’L L. 345, 350 (2012).
\item \textsuperscript{174} \textit{WAR ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY} 4 (June 2011), \url{available at http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf}.}
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much as 15 percent of the world’s gross domestic product\textsuperscript{175} -- and exhibits no signs of contraction. The Global Commission on Drug Policy concluded in 2011: “Vast expenditures on criminalization and repressive measures directed at producers, traffickers and consumers of illegal drugs have clearly failed to effectively curtail supply or consumption. Apparent victories in eliminating one source of trafficking organizations are negated almost instantly by the emergence of other sources and traffickers.”\textsuperscript{176}

Four decades into America’s war on drugs, its primary strategy of interdiction\textsuperscript{177} and incarceration of drug offenders has proven to be as unsuccessful as the global war. Americans consume $65 billion worth of illegal drugs annually, approximately what they spend on higher education.\textsuperscript{178} This consumption has tremendous costs. The DOJ estimated in 2011 that direct and indirect economic costs attributable to illicit drug use in the United States total approximately $193 billion annually, with the majority of costs attributable to lost productivity.\textsuperscript{179} This economic cost places illicit drug use on par with other serious health problems in this country. Diabetes costs the United States more than $174 billion per year\textsuperscript{180} and smoking is responsible for at least $157 billion annually in health-related economic costs.\textsuperscript{181} Moreover, drug-related deaths in the United States more than doubled in a decade to exceed 37,000 in 2009, surpassing the number of traffic fatalities.\textsuperscript{182} Thousands of these deaths were cocaine-related.\textsuperscript{183}

The United States is the world’s biggest consumer of cocaine.\textsuperscript{184} The cocaine that kills thousands of Americans every year is primarily exported to this country by foreign drug cartels and ninety percent of all the cocaine that is imported into the United States passes through Mexico.\textsuperscript{185} Indeed, Mexican-based cartels and their associates dominate the supply and

\textsuperscript{175} Estimates range from a low of 3.6% to a high of 15%. See Testimony of Douglas Farah (Senior Fellow, International Assessment and Strategy Center), Senate Foreign Relations Comm., Subcomm. on Western Hemisphere, Peace Corps, and Global Narcotics Affairs: Iran’s Influence and Activity in Latin America, Feb. 16, 2012, at 7 & n.11.


\textsuperscript{178} Tim Padgett, Day of the Dead, TIME, July 11, 2011, at 24, 27.


\textsuperscript{180} Id.

\textsuperscript{181} Id.


\textsuperscript{183} Id.

\textsuperscript{184} The Tormented Isthmus, THE ECONOMIST, Apr. 16, 2011, at 25.

\textsuperscript{185} Jesse Bogan, et al., The Drug War, FORBES, Dec. 22, 2008, at 73.
wholesale distribution of most illicit drugs in the United States.\textsuperscript{186} Annually, more than 200 tons of cocaine, 1,500 tons of marijuana, 15 tons of heroin, and 20 tons of methamphetamines are exported from Mexico to the United States.\textsuperscript{187}

Mexico has been a producer of, and transit route for, illegal drugs for generations.\textsuperscript{188} Its drug trafficking is currently controlled by seven major cartels (Sinaloa Cartel, Los Zetas, Gulf Cartel, Juárez Cartel, BLO, LFM, and Tijuana Cartel (also known as the Arellano Felix Organization)) that are engaged in an ultra-violent battle for control of the highly lucrative smuggling corridors leading into the U.S.\textsuperscript{189} This struggle resulted in more than 50,000 drug-related murders in Mexico between 2006 and 2012.\textsuperscript{190} Mexico’s carnage, which has spilled across the border into Texas and Arizona,\textsuperscript{191} threatens the stability of one of the U.S.’s most important trade and security partners.

Mexican-based cartels do not operate exclusively in Mexico. Such cartels were operating in 1,286 U.S. cities during 2009 and 2010, more than five times the number reported in 2008 and exponentially up from only 50 U.S. cities in 2006.\textsuperscript{192} The Mexican cartels often collaborate with street, prison and outlaw motorcycle gangs, which remain in control of most of the retail

\textsuperscript{187} Craig A. Bloom, Square Pegs and Round Holes: Mexico, Drugs and International Law, 34 HOU S. INT’L L. 345, 352 (2012).
\textsuperscript{190} Randal C. Archibold & Damien Cave, Numb to Carnage, Mexicans Find Diversions, and Life Goes On, N.Y. TIMES, May 15, 2012, http://www.nytimes.com/2012/05/16/world/americas/mexicans-unflinching-in-face-of-drug-wars-carnage.html?pagewanted=all. Newly-elected Mexican President Felipe Calderón began a military assault on the cartels immediately after he took office, in December 2006. He pursued a failed kingpin strategy similar to the “deck of cards” that the U.S. used in post-Saddam Iraq. William Finnegan, The Kingpins, THE NEW YORKER, July 2, 2012, at 40, 42. In 2009 Mexico listed its 37 most-wanted drug lords. By mid-2012 Mexico had captured or killed 22 of them, but the most pronounced result “has been the fragmentation of narco-trafficking into smaller, warring, ultraviolent factions.” Id. Today organized crime in Mexico “holds hostage large areas of the country, including major cities, such as Monterrey, and terrorizes the rest with performances of stupefying violence.” Id. at 47. Calderón left office in 2012.
\textsuperscript{191} The extent of the spillover violence is disputed, partly because the definition of the term is disputed. The current federal interagency definition of Mexican spillover violence excludes trafficker on trafficker violence, whether perpetrated in Mexico or the United States. Many state officials disagree with this definition, because cartel shootouts in Texas, Arizona and other states have placed civilians in danger and in fear for their lives. Debate Rages over Mexico ‘Spillover Violence’ in U.S., MSNBC.msn.com, June 8, 2012, http://dailynightly.msnbc.msn.com/_news/2012/03/15/10701978-debate-rages-over-mexico-spillover-violence-in-us?lite.
distribution of drugs throughout much of the United States, especially in major and midsize cities.\textsuperscript{193} At least 15 U.S. gangs collaborated with Mexican cartels during 2010, conspiring to traffic cocaine, heroin, methamphetamine, and marijuana in this country.\textsuperscript{194} Most U.S. gangs with Mexican-based cartel ties are in a business relationship that involves purchasing drugs from cartel members or associates for distribution by the gang.\textsuperscript{195} Other U.S. gangs form partnerships with Mexican traffickers and distribute drugs for the cartels, or act as franchises.\textsuperscript{196} In the franchise model, the U.S. gangs operate as extensions of the Mexican cartels in the United States.\textsuperscript{197}

The infiltration of the Mexican cartels into the United States economy has had a significant impact on drug prices and rates of drug abuse in this country. A prime example is methamphetamine. In the 1990s Mexican cartels began seizing control of methamphetamine production from U.S. motorcycle gangs, who had largely controlled the trade until then.\textsuperscript{198} Mexico is now the primary source of the U.S. methamphetamine supply\textsuperscript{199} and in the last few years prices have dropped dramatically. From July 2007 to September 2010, the price per pure gram of methamphetamine in the U.S. plunged 60.9 percent – from $270.10 to $105.49.\textsuperscript{200} Lower prices for drugs are correlated with higher rates of drug abuse and higher economic costs in terms of lost productivity, criminal justice system costs, and health-care costs. The DOJ reported in 2011 that the demand for most illicit drugs in the United States is rising, particularly among young people,\textsuperscript{201} and the number of individuals initiating methamphetamine use rose substantially in 2009 (the most recent year for which statistics then were available).\textsuperscript{202}

Consistent with RICO’s original emphasis on combating organized crime, RICO continues to be used by the United States as a tool against foreign drug cartels. In April 2012,

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\textsuperscript{194} \textit{Id.}

\textsuperscript{195} \textit{Id.} at 12.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{Id.}


for example, the United States announced RICO indictments for 24 leaders of the Sinaloa Cartel,\(^{203}\) Mexico’s oldest and traditionally most powerful gang,\(^{204}\) with control over most of Mexico’s Pacific Coast.\(^{205}\) Subsequently, in May 2012, one of the top leaders of the Arellano Felix Organization, characterized by the United States Drug Enforcement Agency as one of the world’s most brutal drug trafficking networks,\(^{206}\) was arraigned on RICO and drug-related charges.\(^{207}\)

The use of RICO to combat the substantial threat posed to the United States by foreign drug cartels is inarguably consonant with applying the statute to accomplish its remedial purpose, as emphatically expressed by Congress both in RICO’s floor debates and in RICO’s statutory Statement of Findings and Purpose, of reducing the substantial negative impact on America of organized crime. The Mexican drug cartels are an undeniable and inescapable modern manifestation of organized crime. To this extent, then, Congress did intend for RICO to apply extraterritorially. As noted by the federal district court in 2012 in *Chevron Corp. v. Donziger*,\(^{208}\) with reference to drug distribution by the Sicilian Mafia in the United States: “[F]oreign enterprises have been at the heart of precisely the sort of activities—committed in the United States—that were exactly what Congress enacted RICO to eradicate.”\(^{209}\) RICO meets *Morrison’s* requirement of a clear indication of an extraterritorial application.\(^{210}\)

### B. *Bowman* and Criminal RICO

*Morrison* reaffirmed an oscillating principle of American law that legislation of Congress, unless a contrary intent appears, is presumed to apply only within the territorial jurisdiction of the United States. For the reasons set forth above, the presumption is inapplicable to RICO, because Congress did intend for the statute to apply extraterritorially. But suppose the


\(^{208}\) No. 11 Civ. 0691(LAK), 2012 WL 1711521 (S.D.N.Y. May 14, 2012).

\(^{209}\) Id. at *6.

\(^{210}\) There is some contrary evidence. Congress did not provide a mechanism for overseas enforcement of RICO, insofar as the statute’s civil investigative demand provisions can be enforced and challenged only in the judicial district in which a person served with a demand resides, is found, or transacts business. 18 U.S.C. § 1968(g), (h). Also, RICO makes no provision for service of process in a foreign country, and efforts to provide for international service of process have failed. See, *e.g.*, S.1523, 100th Cong. (1987); H.R. 2983, 100th Cong. (1987).
evidence of intent is insufficient and the presumption does apply. Should it apply to both civil and criminal RICO?

1. **Exceptions to the Presumption**

The presumption has two exceptions. First, as explained by the Supreme Court in 1922 in *United States v. Bowman*, the presumption does not apply to criminal statutes that are “not logically dependent on their locality for the government’s jurisdiction, but are enacted because the right of the government to defend itself against obstruction, or fraud wherever perpetrated.” Second, ancillary statutes, such as those criminalizing conspiracy, or establishing aiding and abetting liability, apply extraterritorially whenever the underlying statute does.

Consistent with *Bowman*, where the Supreme Court held that the crime of conspiring to defraud a government-owned corporation applied to conduct on the high seas, criminal statutes may apply extraterritorially even absent an explicit statement of congressional intent. In *United States v. Yousef*, the Second Circuit underscored that “Congress is presumed to intend extraterritorial application” of statutes that comply with *Bowman*’s test.

Does *Morrison* conflict with *Bowman*? *Morrison* neither expressly overrules *Bowman* nor even mentions the case. Accordingly, all courts to have considered the issue by August 2012 held that *Bowman* survives *Morrison* and must be followed by federal courts unless and until it is overruled by the Supreme Court.

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211 260 U.S. 94 (1922).
212 Id. at 98.
213 United States v. Yousef, 327 F.3d 56, 87-88 (2d Cir. 2003) (“[I]f Congress intended United States courts to have jurisdiction over the substantive crime . . . it is reasonable to conclude that Congress also intended to vest in United States courts the requisite jurisdiction over an extraterritorial conspiracy to commit that crime.”).
214 United States v. Yakou, 428 F.3d 241, 252 (D.C. Cir. 2005); United States v. Hill, 279 F.3d 731, 739 (9th Cir. 2002); United States v. Ali, Crim. No. 11-0106, 2012 WL 28700263, at *3 (D.D.C. July 13, 2012) (“In addition, courts have concluded that the presumption against extraterritoriality does not apply to the federal statutes establishing aiding and abetting and conspiratorial liability where the statute setting forth the underlying substantive offense applies outside U.S. borders.”).
215 327 F.3d 56 (2d Cir. 2003).
216 Id. at 87.
While there is a consensus that Bowman survives Morrison, ninety years after the decision was issued there is no consensus as to the extent of the Bowman exception. Some courts and commentators have interpreted the exception narrowly. Pursuant to this interpretation, which is consistent with the limited “protective principle” of jurisdiction, extraterritorial jurisdiction should be allowed under Bowman only if the United States government is the target or the victim of a criminal act. Many other courts and commentators have viewed Bowman much more expansively. Such courts “have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm.” Still other courts have been even bolder, holding that criminal statutes have extraterritorial application if they apply to enterprises that engage in or affect foreign commerce, regardless of whether the crime is directed against the government itself; or there is no presumption against extraterritorial application “where the legislation implicates concerns that are not inherently domestic.”

Splits concerning the proper interpretation of Bowman also have emerged within courts.

construing Morrison have not extended its reasoning to criminal cases, and “the relevant analysis to determine a criminal statute’s extraterritorial application is guided by” Bowman: Charles Doyle, Extraterritorial Application of American Criminal Law 9, Congressional Research Service (Feb. 15, 2012), http://www.hsdl.org/?view&did=707421 (noting consensus view that Morrison does not cast doubt on Bowman’s continued vitality).


United States v. Baker, 603 F.2d 134, 136 (5th Cir. 1980). See also United States v. Plummer, 221 F.3d 1298, 1304-05 (11th Cir. 2000) (citing numerous cases from the Third, Fifth, Ninth, and Eleventh Circuits).


United States v. Corey, 232 F.3d 1166, 1170 (9th Cir. 2000)

Compare United States v. al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (“The presumption that ordinary acts of Congress do not apply extraterritorially does not apply to criminal statutes.”) with United States v. Gatlin, 216 F.3d 207, 211 n.5 (2d Cir. 2000) (stating that Bowman rule is inapplicable where defendant has committed a crime against a private individual) and Kollias v. D & G Marine Maintenance, 29 F.3d 67, 71 (2d Cir. 1994) (holding that Bowman “should be read narrowly,” such that only “criminal statutes, and perhaps only those relating to the government’s power to prosecute wrongs committed against it, are exempt from the presumption [against extraterritoriality]”); John H. Knox, A Presumption Against Extraterritoriality, 104 AM. J. INT’L L. 351, 393 n.261 (2010) (noting splits).
The broader view of Bowman, which has never been disapproved by the Supreme Court, provides strong support for extraterritorial application of criminal RICO. In United States v. Noriega\textsuperscript{224} the court relied on Bowman\textsuperscript{225} to hold that Congress implicitly authorized RICO’s worldwide application. The court noted the breadth of RICO’s prohibitions\textsuperscript{226} and concluded: “As long as the racketeering activities produce effects or are intended to produce effects in this country, RICO applies.”\textsuperscript{227}

Extraterritorial application of criminal RICO also finds support by analogy to antitrust. The Supreme Court has not decided a case on the extraterritorial limits of criminal enforcement of the Sherman Act, but in United States v. Nippon Paper Indus. Co.\textsuperscript{228} the First Circuit held that the DOJ may prosecute foreign firms and officials for activities committed abroad which have a substantial and intended effect within the United States.\textsuperscript{229}

Assuming that criminal RICO has extraterritorial application under Bowman, this raises the question whether a compelling case can be made to treat criminal RICO and civil RICO disparately with regard to extraterritorial application. In Nippon Paper the First Circuit applied Bowman and settled principles of statutory construction to conclude there was no reason to treat criminal and civil antitrust differently with regard to extraterritoriality. The First Circuit noted that Bowman nowhere suggested that a different presumption regarding extraterritoriality arises in criminal cases\textsuperscript{230} and it is a fundamental interpretive principle that identical words or terms used in different parts of the same act are intended to have the same meaning.\textsuperscript{231}

2. Comity

One possible reason to treat criminal and civil RICO differently relates to comity. The Supreme Court expressed concern in Morrison about the probability of a substantive conflict between the securities laws of the United States and those of other countries.\textsuperscript{232} This concern

\textsuperscript{224} 746 F. Supp. 1506 (S.D. Fla. 1990), aff’d on other grounds, 117 F.3d 1206 (11th Cir. 1997).
\textsuperscript{225} Id. at 1515.
\textsuperscript{226} Id. at 1516-17.
\textsuperscript{227} Id. at 1517.
\textsuperscript{228} 109 F.3d 1 (1st Cir. 1997).
\textsuperscript{229} Id. at *9.
\textsuperscript{230} Id. at *6.
\textsuperscript{231} Id. at *4. This is not an inflexible rule. For example, “enterprise” is used differently in various subdivisions of Section 1962 of RICO. See Nat’l Org. for Women v. Scheidler, 510 U.S. 249, 259 (1994).
\textsuperscript{232} Morrison, 130 S. Ct. at 2885-86. See also Merritt B. Fox, Securities Class Actions against Foreign Issuers, 64 STAN. L. REV. 1173, 1271 (2012) (“By ruling that section 10(b) only reaches conduct in connection with transactions in securities listed on a U.S. exchange or other securities transactions in the United States, the Court appears to have sought to reduce tensions with other countries.”). While the Supreme Court in Morrison noted that the Exchange Act’s potential incompatibility with the applicable laws of other countries should be considered in assessing its extraterritorial reach, elsewhere in the opinion the Court was more ambivalent. The Court stated that the presumption against extraterritorial application applies “regardless of whether there is a risk of conflict between the American statute and a foreign law.” Morrison, 130 S. Ct. at 2877-78.
implicated the principle of international comity, a somewhat murky canon of jurisdictional deference that applies when there is a true conflict between the law of the U.S. and the law of another country. There is no conflict for purposes of comity where a person subject to regulation by two countries can comply with the laws of both. Comity may be more of an issue in civil enforcement than in criminal enforcement of RICO, because the civil aspects of law are more likely than the criminal aspects to conflict across borders, and civil enforcement of RICO is much more common than criminal enforcement. This may furnish a basis for disparate extraterritorial analysis.

However, such a basis is flimsy at best. The dissenting statement issued by SEC Commissioner Aguilar in response to the SEC’s Cross-Border Study, noted above, underscored the Study’s exaggeration of comity concerns in transnational securities litigation. As Aguilar observed, there is little or no evidence that comity was undermined by the application of the conduct and effects tests in the four decades of transnational private securities fraud cases prior to Morrison. Moreover, comity “does not require that the U.S. tolerate or protect fraudulent conduct that emanates from or has significant effects within its borders.” So too with regard to RICO. There is little or no evidence that comity was undermined by the application of the conduct and effects tests in the four decades of private RICO cases prior to Morrison. And comity does not require that the U.S. tolerate or protect racketeering conduct that emanates from

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233 See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993). The Supreme Court has explained that comity “is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). The foregoing explanation is not especially helpful, and more than a century later comity continues to exist in the canonical ether. See, e.g., Turner Ent. Co. v. Degeto Film, 25 F.3d 1512, 1519 n.10 (11th Cir. 1994) (“Scholarship on the meaning and proper force of the principles known as international comity is rather sparse and indefinite. . . . [I]nternational comity is a rather nebulous set of principles that may be applicable whenever a court’s decision will have ramifications beyond its territorial jurisdiction and into that of another nation.”); Developments in the Law—Extraterritoriality, Comity and Extraterritoriality in Antitrust Enforcement, 124 HARV. L. REV. 1269, 1272 (2011) (describing comity as a canon that has gained salience but not cogency in recent years).


235 See, e.g., U.S. v. Leija-Sanchez, 602 F.3d 797, 800 (7th Cir. 2010) (“Nations differ in the way they treat the role of religion in employment; they do not differ to the same extent in the way they treat murder.”).


or has significant effects within its borders, especially insofar as comity “is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation.”

Another important aspect of the comity analysis is the distinction between purely private law and public policy. In areas of law regarded as private, such as common law, concern for the conflicting policies of foreign nations weighs heavily. But where American interests covered by American public policy are substantially affected, these policies should be given as much weight by an American court as the conflicting policies of foreign nations. Accordingly, “to the extent the federal antitrust laws represent the economic public policy of the United States, there may be little room for considerations of comity at all.” Again, so too with regard to RICO, which represents American public policy with regard to the fight against organized crime.

Finally, the application of the forum non conveniens doctrine offers an effective solution to any comity problems associated with extraterritorial application of civil RICO. Forum non conveniens is a common law doctrine rooted in the inherent power of courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. Pursuant to the doctrine, a U.S. court has the discretion to refuse to hear a case if the court concludes it would be more appropriate for the dispute to be resolved in a foreign forum. Courts often exercise that discretion by applying some combination of factors or engaging in a multi-step test. The Second Circuit, for example, uses the following three-step test: (1) a determination by the court of the degree of deference properly accorded the plaintiff’s choice of forum; (2) a consideration by the court as to whether the alternative forum proposed by the defendants is adequate to adjudicate the parties’ dispute; and (3) a balancing by the court of the private and public interests implicated in the choice of forum. Forum non conveniens offers an effective solution to potential comity problems associated with extraterritorial application of U.S. securities laws, as well as

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240 Id. But cf. Developments in the Law – Extraterritoriality, 124 Harv. L. Rev. 1226, 1231 (2011) (“On the civil side, courts have limited the extraterritorial use of antitrust statutes’ private rights of action on the basis of comity . . . . In contrast, criminal enforcement of U.S. antitrust law overseas has expanded, and the comity-driven restrictions on civil suits seem not to apply.”).
extraterritorial application of civil RICO. In short, comity is not a sound basis for treating criminal and civil RICO differently with regard to extraterritorial application.245

3. A Flood of Litigation?

The dissenting statement issued by SEC Commissioner Aguilar in response to the SECs Cross-Border Study also refuted the notion that federal courts will be flooded with private securities lawsuits against foreign defendants if Congress reinstates the conduct and effects tests rejected by the Supreme Court. As he observed, prior to Morrison fewer than ten percent of private securities lawsuits were filed against foreign issuers.246 It was not until 2011, the first year after Morrison was decided, that the share of total securities class action filings made against foreign issuers exceeded 20 percent in any year since the PSLRA was enacted in 1995.247 Federal courts have not been flooded with securities lawsuits against foreign issuers, and similarly they have not been flooded with civil RICO suits against foreign defendants. The filing of civil RICO suits against foreign defendants began to increase in the 1980s,248 but there is no evidence of a torrent of such litigation. In any event, most civil RICO lawsuits are dismissed via Rule 12(b) motions,249 so the burden on federal courts presented by such suits is minimized.250


249 Fed. R. Civ. P., Rule 12(b). For example, of one hundred and forty-five cases filed in the Southern District of New York from 2004 to 2007 in which the complaints asserted civil RICO claims, all thirty-six cases that had been resolved on the merits by 2009 resulted in judgments against plaintiffs. Thirty cases were dismissed on Rule 12(b)(6) motions to dismiss, three were dismissed by the district court sua sponte for lack of merit, and three were dismissed on summary judgment for defendants. Only five appeals of dismissals were taken and the Second Circuit affirmed each. Gross v. Waywell, 628 F. Supp. 2d 475, 480 (S.D.N.Y. 2009). As noted by the federal district court that conducted the survey, “experience bears out that overwhelmingly the RICO plaintiffs’ gilded vision of threefold damages and attorney’s fees dispels into a mirage.” Id. An earlier survey produced similar results. The survey, of one hundred and forty-five appellate decisions nationwide rendered from 1999 to 2001 in connection with RICO civil actions, found that plaintiffs achieved a final victory in only three such cases. See Pamela H. Bucy, Private Justice, 76 S. CAL. L. REV. 1, 22 (2003). Seventy percent of the cases were resolved on defendants’ motions to dismiss or for summary judgment, plaintiffs obtained a favorable verdict after a jury trial in only 9.6 percent of the cases, and only twenty-five percent of the judgments for plaintiffs were affirmed on appeal. Id. Overall, plaintiffs had a “stunningly awful” final success rate of two percent. Id.

250 If Morrison continues to block access to federal courts for RICO plaintiffs, such plaintiffs may increasingly turn to state courts. As indicated supra, more than 30 states have adopted their own versions of RICO, none of which are governed by Morrison and many of which may be attractive to plaintiffs unable to assert federal claims. So
C. Is Extraterritorial Application Required?

As set forth above, substantial evidence suggests that Congress intended for RICO to have extraterritorial application. But assuming it did not, how should courts determine whether a particular RICO case involves proscribed extraterritorial application? In *Morrison* the Supreme Court instructed that to determine whether domestic conduct is covered by a statute that does not apply extraterritorially, a court should consider the “focus” of the statute, or “the objects of the statute’s solicitude.”

It is not at all clear how *Morrison*’s logic translates to RICO. Nevertheless, most of the post-*Morrison* federal courts to consider the issue have agreed that while the object of the Exchange Act’s solicitude is domestic securities transactions, the enterprise is the object of RICO’s solicitude and the focus of the statute. For example, in *Cedeño v. Intech Group, Inc.*, the federal district court remarked that “the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity.” Similarly, in *European Community v. RJR Nabisco, Inc.* the federal district court observed that RICO “seeks to regulate ‘enterprises’ by protecting them from being victimized by or conducted through racketeering activity.” These same courts have uniformly concluded that post-*Morrison*, RICO coverage extends only to domestic enterprises.

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*Morrison* may operate to re-direct RICO litigation to state court. See Steve T. Cottreau & Ha-Thanh Nguyen, *The Implications of Morrison on Federal RICO Claims – Will State Courts be More Hospitable?*, 8 (Issue 2) A.B.A. BUSINESS TORTS & RICO NEWS (Winter 2011). This phenomenon may be minimized to the extent that state courts find federal decisions on RICO’s extraterritoriality persuasive. For example, in *El Instituto Costarricense de Electricidad v. Alcatel-Lucent*, No. 10-25859 CA 13 (11th Cir. Fla. Jan. 18, 2011), a Florida state court dismissed a Florida RICO claim after citing to *Norex Petroleum Ltd v. Access Indus. Inc.*, 631 F.3d 29 (2d Cir. 2010), an influential federal decision which applied *Morrison* and held that RICO has no extraterritorial application. The Florida court stated: “Plaintiff has no Florida RICO claims because civil RICO claims do not apply extraterritorially to a foreign plaintiff’s foreign injury for bribes made abroad to foreign officials.”

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251 *Morrison*, 130 S. Ct. at 2884.
252 See *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 914 (C.D. Cal. 2011) (“[I]t is unclear how Morrison’s logic, which evaluates the ‘focus’ of the relevant statute, precisely translates to RICO.”).
254 Id. at 474.
256 Id. at *5.
The foregoing analysis is problematic in at least two respects. First, it discounts the critical fact that RICO has three foci – the enterprise, the pattern of racketeering activity, and – more broadly – organized crime. Second, it raises the difficult issue of determining the location of an enterprise. Those issues are considered separately below.

1. **RICO’s Three Foci**

   It is readily apparent that one focus of RICO is on enterprises. An essential element of each substantive prohibition of Section 1962 is an enterprise. Section 1962 makes it unlawful to invest in an enterprise any income derived from a pattern of racketeering activity, to acquire control of an enterprise through a pattern of racketeering activity, to conduct an enterprise’s affairs through a pattern a racketeering activity, or to conspire to do any of the foregoing. RICO’s focus on enterprises is undeniable.

   But it is equally clear that a second focus of RICO is on a pattern of racketeering activity. RICO does not criminalize isolated or discrete acts. Instead, RICO proscribes certain conduct if, and only if, it is associated with a “pattern of racketeering,” which requires at least two acts of racketeering activity. The proscribed conduct is a pattern of related criminal acts that amount to, or otherwise constitute a threat of, continuing racketeering activity. The Supreme Court has observed that “[t]he heart of any RICO complaint is the allegation of a pattern of racketeering” and the object of civil RICO is the elimination of racketeering activity. With respect to civil RICO, the Supreme Court has noted that Congress’ objective was to encourage civil litigation to supplement federal efforts to deter and penalize the prohibited practices. The Court stated in Rotella v. Wood: “The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, ‘private attorneys general,’ dedicated to eliminating racketeering activity.” Accordingly, RICO’s second focus is on a pattern of racketeering, even

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258 Cedeño v.Intech Group, Inc., 733 F. Supp.2d 471, 474 (S.D.N.Y. 2010), aff’d sub nom., Cedeño v. Castillo, 457 F. App’x 35 (2d Cir. 2012) (“[T]he focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity.”).
263 See United States v. Neapolitan, 791 F.2d 489, 500 (7th Cir. 1986) (“The central role of the concept of enterprises under RICO cannot be overstated.”).
270 id. at 557.
though each RICO pattern and each predicate act that comprises the pattern is independently unlawful.271

RICO’s focus on a pattern of racketeering is especially significant because many of RICO’s predicate crimes expressly apply extraterritorially. 18 U.S.C. § 1961(1)(G) includes as a RICO predicate any act that is indictable under any provision listed in 18 U.S.C. § 2332b(g)(5)(B), and this includes almost two dozen acts criminalized by statutes expressly providing for extraterritorial jurisdiction.272 Some of these involve conduct that can occur only outside the United States.273 Moreover, 18 U.S.C. § 1961(1)(B) includes as RICO predicate acts at least nine crimes enumerated by statutes which expressly provide for extraterritorial jurisdiction or create offenses involving wholly extraterritorial conduct.274 Finally, 18 U.S.C. § 1961(1)(D) includes as RICO predicate acts offenses involving controlled substances which expressly provide for extraterritorial jurisdiction.275

It also is evident that RICO has a third focus, which is organized crime. The Supreme Court has underscored that Congress “had organized crime as its focus” in enacting RICO.276 RICO’s Statement of Findings and Purpose leaves no doubt about this point. The Statement noted the severe harm caused by organized crime -- the billions of dollars of damage done annually to the American economy, the harm caused to innocent investors, and the undermining of the general welfare of the U.S. and its citizens.277

Because RICO has multiple foci, a RICO claim should be cognizable if the enterprise is located or operates in the United States, or the pattern of racketeering activity occurs in the United States through any enterprise, whether it is foreign or domestic.278 An example of the latter would be the Sicilian Mafia running money-laundering operations through U.S. banks.

273 See, e.g., 18 U.S.C. § 37(b) (providing for jurisdiction over acts of violence at an international airport, where the “prohibited activity takes place outside of the United States,” if the offender is found in the United States or if the offender or victim is a national of the United States); 18 U.S.C. § 831(c) (criminalizing certain transactions in nuclear material occurring outside the United States if the defendant is found in the United States).
278 Some scholars have urged a narrower application of RICO under Morrison. See, e.g., John C. Coffee, Jr., What Hath ‘Morrison’ Wrought?, N.Y.L.J., Sept. 16, 2010 (“Based on 1962(c), the statute should apply if, and only if, the ‘pattern of racketeering activities’ injures persons in the United States.”). See also R. Davis Mello, Note, Life After
Treating RICO as having three foci, rather than a single focus on enterprises, is fully congruent with Congress’ primary objective, when it enacted RICO, of combating organized crime. In order to most effectively prosecute such crime, it is appropriate to treat as a domestic offense the commission of a pattern of domestic racketeering activity through any enterprise, foreign or domestic. Treating RICO as having three foci also is consistent with RICO jurisprudence not specifically raising extraterritoriality issues. The Second Circuit noted in *United States v. Russotti*:279 “[I]t is neither the enterprise standing alone nor the pattern of racketeering activity by itself which RICO criminalizes. Rather, the combination of these two elements is the object of punishment under RICO.”280 Other cases are in accord.281

Post-Morrison, most courts analyzing RICO’s extraterritoriality have disregarded RICO’s focus on racketeering activity and discounted the significance of predicate acts with extraterritorial scope. For example, in *Norex Petroleum Ltd. v. Access Indus. Inc.*,282 decided in 2010, the Second Circuit’s widely cited opinion affirmed the dismissal of RICO claims as extraterritorial despite well-pled allegations that defendants committed numerous predicate offenses in the United States and operated and directed the racketeering activity from within the United States.283 The court characterized the alleged acts as having “slim contacts with the United States”284 and held that such conduct is insufficient to support a territorial application of civil RICO.285 The Second Circuit made no effort to explain how it derived the “slim contacts” test from the text, legislative history, or context of RICO; what quality or quantity of contacts would qualify an enterprise as domestic rather than foreign under *Morrison*;286 or why it chose to

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279 717 F.2d 27 (2d Cir. 1983).
280 717 F.2d 27 (2d Cir. 1983).
281 See, e.g., *United States v. Pizzonia*, 577 F.3d 455, 463 (2d Cir. 2009).
282 631 F.3d 29 (2d Cir. 2010).
283 *Norex Petroleum Ltd. v. Access Indus., Inc.*, 540 F. Supp. 2d 438, 440 (S.D.N.Y. 2007), aff’d, 631 F.3d 29 (2d Cir. 2010). The Second Circuit stated: “*Morrison* . . . forecloses Norex’s argument that because a number of RICO’s predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.” 631 F.3d at 33.
284 631 F.3d at 33.
285 In *Norex* the Second Circuit declined to comment on the possible extraterritorial reach of RICO’s criminal provisions. The court’s amended opinion on rehearing stated: “Because Norex brought a private lawsuit pursuant to 18 U.S.C. § 1964(c), we have no occasion to address—and express no opinion on—the extraterritorial application of RICO when enforced by the government pursuant to Sections 1962, 1963 or 1964(a) and (b).” Id.
disregard RICO’s second focus on racketeering activity. Similarly, the court held in United States v. Philip Morris USA, Inc. that “whether or not a criminal enterprise committed a predicate act with extraterritorial scope . . . there is no evidence that Congress intended to criminalize foreign racketeering activities under RICO.”

2. Determining the Location of an Enterprise

To ascertain where an enterprise is located, several courts in RICO cases have turned to the “nerve center” test adopted by the Supreme Court for determining the state citizenship of a corporation for purposes of diversity jurisdiction. In Hertz Corp. v. Friend, decided in 2010, the Supreme Court construed the federal diversity jurisdiction statute, which since 1958 has provided that a corporation “shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. The Supreme Court unanimously held that the phrase “principal place of business” refers to the place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities. As noted by the Court, lower federal courts had often metaphorically called that place the corporation’s “nerve center.” Prior to Hertz a nerve center analysis had been used by some of

Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. National Australia Bank, 92 B.U. L. Rev. 535, 547 (2012) (“Norex is a reasonable interpretation of Morrison; the Morrison court seems to suggest that the presumption against extraterritoriality should guide all further understanding of the scope of federal law, past practice and case law (including the anomaly of Hartford Fire) notwithstanding.”).

Subsequently, in 2012, in its non-precedential summary order in Cedeño v. Castillo, 457 F. App’x 35 (2d Cir. 2012), the Second Circuit found it unnecessary to decide what constitutes the object of RICO’s solicitude, and whether RICO focuses on patterns of racketeering in addition to, or instead of, domestic enterprises, because plaintiff’s complaint alleged inadequate conduct in the United States. Id. at 37. The Second Circuit noted that the enterprise Cedeño alleged was almost exclusively Venezuelan and thus “patently foreign.” Id. The court also noted that the only connection between the alleged pattern of racketeering that occurred in the United States (money laundering) and Cedeño’s injuries was that the Venezuelan government used the former as a pretext for his subsequent arrest. Accordingly, even if the location of the racketeering was RICO’s focus, Cedeño failed to allege that domestic predicate acts proximately caused his injuries. Id. at 38.

Id. at 29. In this case the district court identified more than one hundred predicate acts spanning more than a half-century, following a nine-month bench trial. See United States v. Philip Morris USA Inc., 2012 WL 3055523, at *1 (D.C. Cir. July 27, 2012).


130 S. Ct. 1181 (2010).

28 U.S.C. § 1332(c) (1).

Hertz, 130 S. Ct. at 1186.

Id.
the circuits to resolve questions concerning principal place of business for diversity purposes.\textsuperscript{295} Other circuits had utilized competing tests, including (1) the locus of operations (focusing on the bulk of the corporation’s actual physical operations) and (2) the center of corporate activity – i.e., where day-to-day management takes place.\textsuperscript{296} The use of these multiple tests was precipitated by Congress’ failure to define “principal place of business” when it amended the diversity statute.\textsuperscript{297}

\textit{Hertz’s} adoption of the nerve center approach provided a uniform test for courts to apply when determining the principal place of business for diversity purposes. That test is imperfect, as the Supreme Court noted,\textsuperscript{298} but it is superior to its alternatives. A corporation’s nerve center is usually found at a single location. As \textit{Hertz} observed, typically that location is the corporation’s headquarters,\textsuperscript{299} provided that the headquarters is the actual center of direction, control, and coordination, and not simply an office where the corporation holds its board meetings.\textsuperscript{300} \textit{Hertz’s} interpretation of the diversity statute to require identification of a single place for a corporation’s principal place of business was supported by the statute’s text, its legislative history, and the desirability of administrative simplicity.

The nerve center test may be suitable for ascertaining the location of formal enterprises, such as corporations, in RICO litigation. But the test is poorly suited for application to associated-in-fact enterprises, which are the most common kinds of enterprises in RICO cases.\textsuperscript{301} Such an enterprise need not have a hierarchical structure or a chain of command, and decisions may be made on an ad hoc basis and by any number of methods -- by majority vote, consensus, a show of strength, or other method.\textsuperscript{302} Given these characteristics, it is likely that a de facto RICO enterprise will have multiple locations and may have a domestic presence even if some participants in the enterprise are outside of the United States. It also may be the case that an associated-in-fact RICO enterprise will have no nerve center.\textsuperscript{303}

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\item See, e.g., Harris v. Rand, 682 F.3d 846, 851 (9th Cir. 2012); Topp v. CompAir Inc., 814 F.2d 830, 834 (1st Cir. 2005). \textit{But cf.} J.A. Olson Co. v. City of Winona, 818 F.2d 401, 410 (5th Cir. 1987) (noting that different tests are complementary rather than mutually exclusive); CHARLES ALAN WRIGHT, ET AL., 13 FED. PRACT. & PROC. JURIS. § 3625 (3d ed.) (database updated Apr. 2012) (noting that competing tests are reconcilable).
\item Hertz, 130 S. Ct. at 1192.
\item Id. Accord Central West Virginia Energy Co. v. Mountain State Carbon, LLC, 636 F.3d 101, 107 (4th Cir. 2011) (holding that corporation’s principal place of business for diversity purposes was Dearborn, Michigan, where nearly all of the high-level officers worked, made significant corporate decisions, and set corporate policy.)
\item Hertz, 130 S. Ct. at 1192.
\item Boyle, 556 U.S. at 948.
\item See R. Davis Mello, Note, \textit{Life After Morrison: Extraterritoriality and RICO}, 44 VAND. J. TRANSNAT’L L. 1385, 1407-08 (2011) (“Because ‘enterprise’ is so liberally defined in the RICO statute, it is all but inevitable that some ‘enterprises’ sued under RICO will lack any form of official organization at all.”). \textit{See also} Michael E. Chaplin,
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apply to Mexican drug cartels, which in 2009 and 2010 were operating in more than 1,200 U.S. cities.\textsuperscript{304} The cartels have a domestic presence in the U.S. even if their operations are controlled in Mexico, and they may well have no nerve center.

Using the nerve center test to determine an enterprise’s location in RICO cases also makes little sense in the context of 18 U.S.C. §§ 1962(a) and (b). The former subdivision proscribes the use and investment of racketeering proceeds to acquire, purchase and subsidize domestic entities.\textsuperscript{305} The latter subdivision proscribes acquiring and maintaining an interest in and control of an enterprise through a pattern of racketeering activity.\textsuperscript{306} Under neither of those subdivisions does the enterprise direct the unlawful activity. Instead, the enterprise is the \textit{victim} of unlawful activity. The victim of racketeering is not the center of direction, control and coordination contemplated by \textit{Hertz}. Conversely, under § 1962(c) the enterprise is generally (but not always) the \textit{vehicle} through which the pattern of racketeering activity is committed, rather than the victim of the activity.\textsuperscript{307} The Supreme Court has recognized that the term “enterprise” is used differently in the various subdivisions of Section 1962\textsuperscript{308} and lower courts have agreed.\textsuperscript{309} This recognition is consistent with an argument that the nerve center test has no cogent application to claims asserted under §§ 1962(a) and (b).

Overall, the choice by several post-\textit{Morrison} courts to determine whether RICO cases involve proscribed extraterritorial application of RICO is flawed in several respects. First, those courts have incorrectly decided that RICO has a single focus, which is the enterprise. This decision ignores the fact that RICO has three foci – the enterprise, the pattern of racketeering activity, and organized crime. Second, the courts have compounded their initial error by choosing to fix the location of enterprises by application of the nerve center test adopted by the Supreme Court to determine a corporation’s principle place of business in diversity actions. This choice is flawed, in part because it ignores the reality that most RICO enterprises are associated-in-fact, and such enterprises may well have no nerve center. The choice also is flawed because a

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\textit{Resolving the Principal Place of Business Conundrum: Adopting a Single Test for Federal Diversity Jurisdiction,} 30 \textsc{Rev. Litig.}, 75, 95 (2010) (noting that nerve center test may be inappropriate “where command and control functions are widely dispersed”).
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\textsuperscript{305} 18 U.S.C. § 1962(a).
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\textsuperscript{306} 18 U.S.C. § 1962(b).
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\textsuperscript{308} See \textit{id.} at 258-59 (“The term ‘enterprise’ in subsections (a) and (b) plays a different role in the structure of those subsections than it does in subsection (c). . . . The ‘enterprise’ referred to in subdivisions (a) and (b) is . . . the victim of unlawful activity. . . . By contrast, the ‘enterprise’ in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity.”).
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\textsuperscript{309} See, e.g., U.S. v. Browne, 505 F.3d 1229, 1273 (11th Cir. 2007).
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judicial focus on an enterprise’s nerve center makes little sense in the context of 18 U.S.C. §§ 1962(a) and (b).

V. A New Framework

For all of the reasons set forth above, a presumption that RICO has no extraterritorial application should not be applied by federal courts. How then should civil and criminal RICO apply? The conduct and effects tests were rejected by the Supreme Court for use in securities cases, in favor of a transactional test. But a transactional test has no viability in the RICO context, and it should not be used.

Courts in pre-Morrison RICO cases did not rely exclusively on conduct and effects tests that were borrowed from securities cases in order to resolve questions of extraterritoriality. Some courts also referenced the effects test as it has been used in antitrust cases.\(^{310}\) That test has been endorsed by the Supreme Court, codified in the FTAIA, and applied by the Supreme Court subsequent to the FTAIA’s enactment. This situation raises the obvious question whether it makes sense, post-Morrison, for federal courts to employ two radically different approaches to resolving extraterritoriality issues in Sherman Act cases and Exchange Act cases, when both types of cases involve global, integrated markets.\(^{311}\) Of course, it could be argued that antitrust is different than securities, because use of the effects test was codified by Congress in the FTAIA. By that codification merely incorporated, in modified form, what many federal courts had been doing for many years prior to the FTAIA’s enactment. Those courts had been using an effects test, and the Supreme Court approved.

An effects test should be used in both civil and criminal RICO cases to resolve extraterritoriality issues, as it is in antitrust cases. RICO should be applied extraterritorially if (1) racketeering activity that occurs outside the United States has a direct, substantial and reasonably foreseeable effect in this country, (2) the enterprise is located or operates in the United States, or (3) the pattern of racketeering activity occurs in the United States through any enterprise, whether it is foreign or domestic.

Critics have argued that the effects test is flawed in certain respects. It has not been uniformly applied in antitrust,\(^{312}\) Lanham Act,\(^{313}\) or pre-Morrison RICO\(^{314}\) cases. Application of

\(^{310}\) See, e.g., North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996) (“In antitrust cases, the analysis proceeds along similar lines, but there is more emphasis on the effects of the relevant conduct in the United States, and less emphasis on where that conduct took place.”); Poulo v. Caesars World, Inc., 379 F.3d 654, 663-64 (9th Cir. 2004) (court looks to antitrust and securities cases to apply effects test to RICO).


the test may be fact-intensive and thus inherently unpredictable.\textsuperscript{315} Fact-intensive determinations are not amenable to judgment on the pleadings and may necessitate extensive and expensive pre-trial discovery that has a coercive effect on settlements.\textsuperscript{316} It also has been argued that the effects test provides no meaningful constraint on the exercise of jurisdiction, lacks doctrinal clarity, and is irreconcilable with democratic principles.\textsuperscript{317}

A few of the foregoing objections have some merit. Most have none.\textsuperscript{318} The effects test has been used for many years in antitrust with satisfactory results, and it has been endorsed by Congress and the Supreme Court. Moreover, use of the effects test is superior to the status quo in RICO litigation. The current approach forecloses virtually all extraterritorial application of RICO, and thus totally undermines Congress’ objective, when it enacted the statute, of defeating organized crime. The current approach also has forced an untenable distinction between extraterritorial application of criminal and civil RICO, and it has prompted various courts to apply rules of corporate citizenship to RICO enterprises that fit poorly at best.

**Conclusion**

\textsuperscript{313} 15 U.S.C. §§ 1051-1141 (2006). In Steele v. Bulova Watch Co., 344 U.S. 280, 287-88 (1952), the Supreme Court distinguished American Banana and applied the Lanham Act extraterritorially. Since then some courts in Lanham Act cases have required a showing that foreign conduct has a substantial or significant effect on U.S. commerce, while other courts have disagreed and held that “some effect” suffices. Compare Int’l Café, S.A.L. v. Hard Rock Café Int’l (U.S.A.), 252 F.3d 1274, 1289 (11th Cir. 2001) (per curiam) and Atlantic Richfield Co. v. Arco Globus Int’l Co., 150 F.3d 189, 192 (2d Cir. 1998) with Am. Rice, Inc. v. Arkansas Rice Growers Co-op. Ass’n, 701 F.2d 408, 414 n.8 (5th Cir. 1983).

\textsuperscript{314} Compare Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988) (en banc) (holding that government of Philippines could maintain RICO action against its former president based on effect of his domestic investment of assets fraudulently obtained abroad) with Aerovias de Mexico, S.A. v. De Prevoisin, 224 F.3d 766, at *1 (5th Cir. 2000) (per curiam) (holding that Mexican corporation could not maintain RICO action against its former chairman who was accused of converting his employer’s assets and using them to purchase property in the U.S.).

\textsuperscript{315} See Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 n.2 (D.C. Cir. 1987) (noting that tests whose application turns on welter of specific facts are inherently unpredictable).


Prior to 2010, federal courts commonly analyzed RICO’s extraterritoriality by borrowing from securities jurisprudence. That borrowing entailed application of the conduct and effects tests used to determine whether federal securities laws applied extraterritorially. In 2010 the United States Supreme Court decided *Morrison*, which rejected use of the conduct and effects tests and thus overruled four decades of extraterritoriality analysis by federal appellate courts in securities cases. *Post-Morrison*, federal courts have struggled when confronted with extraterritoriality issues in RICO cases. The result has been a jumble of dubious and inconsistent decisions. This article proposes a new framework for resolving extraterritoriality issues in RICO cases. The new framework provides a template for resolving such issues.