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Note – RICO's Extraterritoriality After Morrison: Where Should We Go From Here?

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RICO's Extraterritoriality After *Morrison*: Where Should We Go From Here?

ANNEKA HUNTLEY*

In 2010 the Supreme Court addressed the extraterritorial application of U.S. securities law in Morrison v. National Australia Bank Ltd., and held that U.S. laws could not be applied to stocks bought and sold on foreign markets. The holding also invalidated the “conduct and effects” test that lower courts had used to assess the extraterritoriality of securities laws, and mandated that courts look to a statute’s focus to determine if Congress intended the law to apply abroad. Prior to Morrison, courts had also used the conduct and effects test to assess the extraterritorial application of the Racketeering Influenced and Corrupt Organizations Act (“RICO”). Since the Supreme Court’s ruling, lower courts have struggled to identify RICO’s focus and formulate a new test for the extraterritorial application of RICO. Three approaches have emerged: the enterprise approach, the “predicate acts” approach, and the “pattern of activity” approach.

This Note argues that the enterprise approach is the best approach. This Note discusses the history of the conduct and effects test in RICO jurisprudence, the landmark Supreme Court decision in Morrison, and the resulting lower court confusion regarding extraterritorial applications of RICO. This Note then illuminates the flaws in the predicate acts and pattern of activity approaches, and argues that the enterprise approach is the clearest, most easily applicable approach and should thus be adopted by lower courts.

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INTRODUCTION

Securities law scholars widely considered the 2010 Supreme Court ruling in *Morrison v. National Australia Bank Ltd.* to be game-changer in American securities law jurisprudence.¹ Less obvious at the time, perhaps, was the upheaval the ruling would later cause in cases involving the extraterritorial application of a completely different area of law: the Racketeering Influenced and Corrupt Organizations Act ("RICO"). RICO is a set of federal statutes designed to create criminal and civil liability for the act of organizing a crime, even if the actor never took part in the crime itself.² RICO has clear domestic applications, but the statute itself is silent as to any extraterritorial application. Before

1. *Morrison v. Nat'l Austl. Bank Ltd.*, 560 U.S. 247 (2010). See, e.g., Elizabeth Cosenza, *Paradise Lost: § 10(b) after Morrison v. Australia National Bank*, 11 CHI. J. INT'L L. 343 (2011); George T. Conway III, *Extraterritoriality's Watchdog After Morrison v. National Australia Bank*, 105 AM. SOC'Y INT'L L. PROC. 394 (2011); Genevieve Beyea, *Morrison v. Australia National Bank and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537 (2011).

2. *United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974).

Morrison, courts had seemed to settle on the “conduct and effects” test to determine when RICO could be applied to extraterritorial acts.³ *Morrison* specifically invalidated that test and the case holdings that created the test.⁴ Because RICO jurisprudence borrows heavily from securities jurisprudence, and it borrowed the conduct and effects test in particular, the ruling in *Morrison* threw courts into turmoil over how to apply RICO to enterprises and transactions that occur abroad. The *Morrison* ruling also reaffirmed the longstanding presumption against extraterritoriality.⁵ The presumption holds that statutes that do not say they apply abroad will be assumed to have no foreign application.⁶ Accordingly, a statute will only have extraterritorial reach if Congress specifically states that it intends for the statute to be applied to acts that occur outside of the United States.⁷

RICO itself is silent as to its extraterritorial application. With the conduct and effects test invalidated in *Morrison*, courts have struggled to craft a test for determining the location of a RICO scheme (and thus, determining whether U.S. courts have jurisdiction) that avoids any foreign application. The Supreme Court’s ruling in *Morrison* mandates that courts look to a statute’s “focus” to determine extraterritorial application.⁸ The RICO statute names two foci: “enterprises” and “patterns of activity.”⁹ A third focus on “predicate acts” has developed in the case law.¹⁰ Thus, three approaches have emerged to assist courts in determining the extraterritorial reach of RICO: (1) the enterprise approach, using the location where defendants crafted the RICO scheme; (2) the “predicate acts” approach, using the location of the acts; and (3) the “pattern of activity” approach, considering the set of actions as whole, including acts occurring abroad. The enterprise approach is also sometimes coupled with the “nerve center” test, borrowed from corporate law,¹¹ which narrows the criteria for determining the location of a RICO scheme to where the scheme is directed, controlled, and coordinated.¹²

3. Schoenbaum v. Firstbrook, 405 F.2d 200, 205 (2d Cir. 1968); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1333–39 (2d Cir. 1972); Itoba Ltd. v. Lep Grp. PLC, 54 F.3d 118, 124 (2d Cir. 1995).

4. *Morrison*, 560 U.S. at 253–54.

5. *Id.*

6. *Id.* at 255.

7. *Id.*

8. *Id.* at 266.

9. 18 U.S.C. § 1962 (2012).

10. CGC Holding Co. v. Hutchens, 824 F. Supp. 2d 1193 (D. Colo. 2011).

11. European Cmty. v. RJR Nabisco, Inc., No. 02-CV-5771 NGG VVP, 2011 WL 843957, at *5 (E.D.N.Y. Mar. 8, 2011).

12. *Id.* at *5–6.

The Ninth Circuit adopted the pattern of activity approach in the beginning of 2013.¹³ This is the only test adopted by an appellate court thus far. However, it is also the least clear and the most difficult to apply by lower courts. The pattern of activity approach ignores the presumption against extraterritoriality and crafts a test that instead favors extraterritoriality more than any other test. However, the predicate acts approach is similarly unworkable because it relies on a re-framed version of the conduct and effects test invalidated in *Morrison*. The predicate acts approach also ignores the presumption against extraterritoriality. This Note argues that the enterprise approach is the clearest and most easily applicable test for extraterritorial application of RICO because it is the test most likely to produce predictable results, it has wider support among the courts than any other test, and it is in keeping with both the presumption against extraterritoriality and Congress's focus on domesticity in RICO schemes.

Part I of this Note addresses the extraterritorial application of RICO before *Morrison*. Part II discusses the Supreme Court's invalidation of the conduct and effects test and the Court's new emphasis on the focus of federal statutes. Part III addresses judicial attempts to craft a new test for RICO extraterritoriality with the enterprise approach, the predicate acts approach, and the Ninth Circuit's pattern of activity approach. Finally, Part IV explains why the enterprise approach is the best of the three tests and should be adopted in the future.

I. EXTRATERRITORIAL APPLICATION OF RICO BEFORE *MORRISON*

RICO is a federal law designed to punish the heads of criminal organizations who order their subordinates to commit crimes.¹⁴ Before the Supreme Court's 2010 ruling in *Morrison*, most courts used a conduct and effects test crafted by the Second Circuit to determine whether American securities statutes could be applied to actions that occurred abroad.¹⁵ Later courts considering RICO's extraterritorial reach *then* borrowed the conduct and effects test from securities jurisprudence and applied it to RICO cases.¹⁶

13. *United States v. Chao Fan Xu*, 706 F.3d 965, 973 (9th Cir. 2013).

14. *United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974).

15. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004) (“[T]he tests used to assess the extraterritorial application of the securities laws provide useful guidelines for evaluating whether the jurisdictional minimum exists . . .”); *see, e.g.*, *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424–25 (9th Cir. 1983); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987).

16. *See N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996); *Poulos*, 379 F.3d at 663; *Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1351–52 (11th Cir. 2008); *Robinson v. TCI/U.S. W. Commc'n Inc.*, 117 F.3d 900, 902 (5th Cir. 1997).

A. A NOTE ON THE RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT

Congress originally passed RICO in 1970 to target and punish the leaders of criminal organizations who ordered crimes to be committed but never took part in the crimes themselves.¹⁷ RICO prohibits “patterns”¹⁸ of criminal activity and criminalizes a specific and articulated set of actions, with a special focus on organized crime.¹⁹ In order for crimes to be punishable under RICO, the offender must commit at least two crimes from RICO’s defined list of thirty-five crimes, and the crimes must form a pattern of activity.²⁰ In other words, two unrelated or sporadic criminal acts do not fall under the RICO umbrella.²¹ RICO further requires that the crimes be committed as part of an “enterprise,”²² meaning an “individual, partnership, corporation, [or] any union or group of individuals”²³ that share a common purpose and at least some continuity of structure or personnel.²⁴ Because Congress mandated that RICO’s terms be “construed liberally,”²⁵ courts have considerable leeway to interpret the meaning of the word “enterprise” and have held that a broad variety of associations qualify as enterprises under RICO.²⁶ RICO’s drafters originally intended the act to be used to punish mob bosses, but it has been used expansively to pursue other organizations—such as the tobacco industry,²⁷ the Catholic Church

17. 18 U.S.C. §§ 1961–1968 (2012); *Parness*, 503 F.2d at 439.

18. 18 U.S.C. § 1961(5) (2012).

19. *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974).

20. 18 U.S.C. §§ 1961–1962 (2012). The prohibited activities list includes crimes such as murder, robbery, theft, extortion, embezzlement, counterfeiting, money laundering, drug trafficking, and fraud, and receiving any income or profits from any of those acts. *Id.* In order to form a pattern of activity, the acts must also be related in some way and must establish a threat of continuing activity; thus, the courts look to the factor of “continuity plus relationship” in the acts. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 528 (1985)

21. *Sedima*, 473 U.S. at 496 n.14; *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

22. 18 U.S.C. §§ 1962(a)–(c) (2012).

23. *Id.* § 1961(4).

24. *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083 (9th Cir. 2000).

25. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 942.

26. *See, e.g.*, *United States v. Tocco*, 200 F.3d 401, 425 (6th Cir. 2000) (Cosa Nostra organized crime family); *United States v. Torres*, 191 F.3d 799, 807 (7th Cir. 1999) (enforcers in a street gang who collected drug debts); *United States v. Richardson*, 167 F.3d 621, 625 (group of armed robbers convicted of a series of assaults and robberies); *Handeen v. Lemaire*, 112 F.3d 1339, 1353 (8th Cir. 1997) (defendant’s bankruptcy estate that defendant attempted to use to defraud his judgment creditor); *United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985) (judge and bag-men who organized kickbacks for judicial favors); *United States v. Mazzei*, 700 F.2d 85, 88 (2d Cir. 1983) (college basketball game fixers).

27. *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 134 (D.D.C. 2000).

in its child sexual abuse scandal,²⁸ and pro-life organizations that physically blocked access to abortion clinics.²⁹

Nothing in the text of RICO states whether Congress intended the statute to have extraterritorial application—that is, whether RICO applies to acts or conduct occurring outside of the United States.³⁰ The Supreme Court has made clear that where there is no express extraterritorial intent in the text of a statute, lower courts are to construe the statute as having no extraterritorial effect.³¹ According to the Court, if Congress intends a U.S. law to apply extraterritorially, it must say so explicitly; otherwise, the statute will only be applicable to acts occurring in the United States.³² If Congress states that a law applies outside the United States, courts will apply that law according to its terms, even when the law violates international law.³³ However, “[i]t is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”³⁴ As the Supreme Court asserted in *Morrison*, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”³⁵

B. THE CONDUCT AND EFFECTS TEST

Before the Supreme Court’s 2010 ruling in *Morrison*, courts determined RICO’s extraterritorial reach differently.³⁶ Some courts held that RICO was not applicable extraterritorially at all.³⁷ A majority of

28. *Hall v. Tressic*, 381 F. Supp. 2d 101 (N.D.N.Y. 2005); Amended Complaint, *Hoatson v. N.Y. Archdiocese*, No. 05-CV-10467, 2006 WL 548198 (S.D.N.Y. Jan. 10, 2006); *Herakovic v. Catholic Diocese of Cleveland*, No. 85467, 2005 WL 3007145 (Ohio Ct. App. Nov. 10, 2005); *Doe v. Archdiocese of Cincinnati*, 852 N.E.2d 157 (Ohio 2004).

29. *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249 (1994).

30. *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996).

31. *Morrison v. Nat’l Austl. Bank Ltd.*, 560 U.S. 247, 255 (2010).

32. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

33. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *The Nereide*, 13 U.S. 388, 421 (1815) (U.S. courts are bound by the “law of nations” unless the government “manifests its will” to disregard them “by passing an act of Congress.”). For a concise discussion of how the two concepts relate to each other, see *United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003).

34. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284 (1949)).

35. *Morrison*, 560 U.S. at 255.

36. *Compare Jose v. M/V Fir Grove*, 801 F. Supp. 349, 357 (D. Or. 1991) (“[T]he presumption against extraterritorial application of federal statutes has not been overcome by clearly expressed congressional intent within the RICO statutes or legislative history.”), *with United States v. Noriega*, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990) (“The Act thus permits no inference that it was intended to apply only to conduct within the United States. Such a narrow construction would frustrate RICO’s purpose”).

37. *M/V Fir Grove*, 801 F. Supp. at 357.

courts that considered the issue, however, applied a “conduct and effects” test borrowed from securities jurisprudence.³⁸

The conduct and effects test was crafted by the Second Circuit, first as two distinct tests in *Schoenbaum v. Firstbrook*³⁹ and *Leasco Data Processing Equipment Corp. v. Maxwell*,⁴⁰ which were later combined in *Itoba Ltd. v. Lep Group PLC*.⁴¹ The test was then imported into RICO jurisprudence in the Second Circuit in *North South Finance Corp. v. Al-Turki*,⁴² in the Ninth Circuit in *Poulos v. Caesars World Inc.*,⁴³ and in the Eleventh Circuit in *Liquidation Commission of Banco Intercontinental SA v. Renta*.⁴⁴

1. The Conduct and Effects Tests in the Second Circuit’s Securities Jurisprudence

In the second half of the twentieth century, the Second Circuit developed two distinct conducts and effects tests in two groundbreaking cases.⁴⁵ The Second Circuit later combined these tests into one new test.⁴⁶ Because of its clarity and ease of use, the Second Circuit and other courts used the new test to assess the extraterritorial reach of American securities law.

In 1968, the Second Circuit held in *Schoenbaum v. Firstbrook* that the Securities Exchange Act (“SEA”) could be applied to foreign transactions if the effect of those transactions was felt in the United States.⁴⁷ In *Schoenbaum*, the court considered a claim under section 10(b) of the SEA that American shareholders were defrauded during an international sale of stock in a Canadian company.⁴⁸ The court held that

38. *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996) (considering the new test, but ultimately choosing not to apply it); *Liquidation Comm’n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1351–52 (11th Cir. 2008) (applying the conduct test to a Florida businessman’s fraud perpetrated against a Dominican bank); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004) (applying the conduct and effects test to casinos aboard cruise ships in international waters); *Robinson v. TCI/U.S. W. Commc’ns Inc.*, 117 F.3d 900, 902 (5th Cir. 1997) (applying conduct test to American company’s claim that it was defrauded during the sale of an English company); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 689 (S.D. Tex. 2009) (applying the conduct and effects test to a human trafficking scheme).

39. *Schoenbaum v. Firstbrook*, 405 F.2d 200, 205 (2d Cir. 1968).

40. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1333–39 (2d Cir. 1972).

41. *Itoba Ltd. v. Lep Grp. PLC*, 54 F.3d 118 (2d Cir. 1995).

42. *Al-Turki*, 100 F.3d at 1052.

43. *Poulos*, 379 F.3d at 663.

44. *Renta*, 530 F.3d at 1351–52.

45. *Leasco*, 468 F.3d at 1333–39 (establishing the conduct test for extraterritorial application of RICO; if the conduct occurred in the United States, U.S. law applied); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208–09 (2d Cir. 1972) (establishing the effects test for extraterritorial application of RICO; if the effects were felt in the United States, U.S. law applied).

46. *Itoba*, 54 F.3d at 122.

47. *Schoenbaum*, 405 F.2d at 206.

48. *Id.* at 205–06.

the presumption against extraterritoriality did not apply because the Canadian company traded its stocks on the American stock exchange, injuring American investors.⁴⁹ U.S. securities law applied because the investors felt the effects of the foreign transaction in the United States.⁵⁰

In 1972, the Second Circuit held in *Leasco Data Processing Equipment Corp. v. Maxwell* that American securities law applied if the conduct in question occurred in the United States.⁵¹ There, the British defendants allegedly committed fraud in the sale of shares of a British company to a U.S.-based corporation.⁵² The court held that, although the transaction occurred on a foreign stock exchange and the investors did not feel any effects inside the United States, domestic law applied because a substantial amount of the misrepresentations took place inside the United States.⁵³ Thus, if the misconduct occurs in the United States, the behavior is subject to American law.⁵⁴

In 1995, the Second Circuit expressly combined the two aforementioned tests in *Itoba Ltd. v. Lep Group PLC*.⁵⁵ The court considered whether the SEA applied to fraud allegedly occurring during the sale of shares of a British company, Lep, to other overseas companies.⁵⁶ Lep's shares traded partly on British stock exchanges and partly on NASDAQ,⁵⁷ and U.S. citizens in Connecticut allegedly made some of the misrepresentations.⁵⁸ The court stated: "There is no requirement that these two tests be applied separately and distinctly from each other. Indeed, an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court."⁵⁹ The court held that a "sufficient combination of ingredients of the conduct and effects tests is present in the instant case to justify the exercise of jurisdiction."⁶⁰ As the Supreme Court would later note in *Morrison*, the combined conduct and effects test was not necessarily "easy to administer" and sometimes resulted in uneven application.⁶¹ Despite this later observation, courts embraced the Second Circuit's

49. *Id.* at 206.

50. *Id.*

51. *Leasco*, 468 F.3d at 1334-35.

52. *Id.* at 1330. The court left unresolved the question of whether the American company was, in reality, owned and controlled by a Dutch company.

53. *Id.* at 1334-35.

54. *Id.*

55. *Itoba Ltd. v. Lep Grp. PLC*, 54 F.3d 118, 122 (2d Cir. 1995).

56. *Id.* at 120-21.

57. *Id.* at 120.

58. *Id.* at 121.

59. *Id.* at 122.

60. *Id.* at 124.

61. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 258 (2010).

approach because it provided guidance in what was otherwise a very difficult field.⁶²

2. *Lower Courts Apply the “Conduct and Effects” Test to RICO Cases*

As previously noted, RICO extraterritoriality jurisprudence borrows heavily from securities law jurisprudence.⁶³ Commentators have noted that the tests used in SEA cases are easily transferable to RICO cases because the nature and purpose of the two statutes are similar.⁶⁴ Thus, RICO cases after *Itoha* attempted to borrow its combined conduct and effects test. In 1996, the Second Circuit first considered the combined conduct and effects tests in the RICO context in *North South Finance Corp. v. Al-Turki*.⁶⁵ In *Al-Turki*, the Second Circuit ultimately sidestepped the issue, affirming the lower court’s dismissal of the plaintiff’s claim on jurisdictional grounds without affirming the court’s use of the conduct and effects test.⁶⁶ According to the court, the defendants in *Al-Turki* had decidedly attenuated links to the United States, and the court declined to extend U.S. jurisdiction over them.⁶⁷ The court noted the extremely unsettled nature of this area of the law: “specifying the test for the extraterritorial application of RICO is delicate work. That work has not been done, [and] we need not do it now.”⁶⁸

The Ninth Circuit used the conduct and effects test in the RICO context in 2004 in *Poulos v. Caesars World, Inc.*⁶⁹ There, the court assessed whether RICO applied to a line of cruise ships—operating in

62. See *SEC v. Berger*, 322 F.3d 187, 192–93 (2d Cir. 2003); *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991); *SEC v. Kasser*, 548 F.2d 109, 113 (3d Cir. 1977); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998); *Cont’l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 415 (8th Cir. 1979).

63. *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) (“Although there is little caselaw in this circuit regarding the extraterritorial application of RICO, guidance is furnished by precedents concerning subject matter jurisdiction for international securities transactions and antitrust matters.” (citation omitted)).

64. Kristen Neller, *Extraterritorial Application of RICO: Protecting U.S. Markets in a Global Economy*, 14 MICH. J. INT’L L. 357, 377 (1993) (“[T]he purpose behind the enactment of RICO is comparable to that of Rule 10b-5 of the Securities and Exchange Act. Congress adopted Rule 10b-5 to combat securities fraud and protect American investors and the market as a whole, while RICO was enacted to combat racketeering activity and protect American businesses and industry. For each statute, the prohibited activity’s impact on the U.S. economy as a whole was the primary concern of Congress.”); *but cf. Al-Turki*, 100 F.3d at 1052 (“We therefore do not assume that congressional intent in enacting RICO justifies a similar approach to the statute’s foreign application.”).

65. *Al-Turki*, 100 F.3d at 1052.

66. *Id.* at 1052–53.

67. *Id.*

68. *Id.* at 1052.

69. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663–64 (9th Cir. 2004). The Ninth Circuit also used the conduct and effects test in *Butte Mining PLC v. Smith*, 76 F.3d 287, 292 (9th Cir. 1996), and *Doe I v. Unocal Corp.*, 395 F.3d 932, 961 (9th Cir. 2002).

both U.S. and international waters—that had been accused of RICO violations in their onboard casinos.⁷⁰ The court held that RICO applied because the activities of the defendants took place substantially within the United States, and affected U.S. citizens and commerce.⁷¹ After the Supreme Court abrogated the conduct and effects test used in *Schoenbaum*, *Leasco*, and *Itoba* with its *Morrison* decision, the Ninth Circuit crafted a new and confusing test for the extraterritorial application of RICO that will be difficult for lower courts to apply.⁷²

More recently, in 2008, the Eleventh Circuit considered the conduct and effects test in the RICO context in *Liquidation Commission of Banco Intercontinental SA v. Renta*.⁷³ The court considered the extraterritoriality of RICO as a matter of first impression for that Circuit.⁷⁴ Borrowing from *Al-Turki* and *Poulos*, the *Renta* court stated that RICO would 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.”⁷⁵ The court held that “[s]ignificant amounts” of the defendants’ conduct in “furtherance of the RICO conspiracy,” though aimed at defrauding banks in the Dominican Republic, had occurred inside the United States.⁷⁶

A majority of courts that considered RICO’s extraterritoriality before *Morrison* applied the conduct and effects test.⁷⁷ Like the conduct and effects test in securities law, the test provided some guidance in a largely unsettled area of the law.⁷⁸ Without this guidance, questions of RICO’s extraterritoriality became muddy questions of policy.⁷⁹

II. SUPREME COURT JURISPRUDENCE CHANGES THE LANDSCAPE OF RICO EXTRATERRITORIALITY

The Supreme Court’s 2010 ruling in *Morrison* significantly changed the landscape of SEA extraterritoriality jurisprudence. There, the Court expressly abrogated the Second Circuit’s holdings in *Schoenbaum*, *Leasco*, and *Itoba*,⁸⁰ the three cases that created the combined conduct

70. *Poulos*, 379 F.3d at 663–64.

71. *Id.* The claim was dismissed on other grounds. *Id.* at 672.

72. *See infra* Part III.C.

73. *Liquidation Comm’n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339 (11th Cir. 2008).

74. *Id.* at 1351.

75. *Id.* at 1351–52.

76. *Id.*

77. *See, e.g.*, *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 689 (S.D. Tex. 2009); *Renta*, 530 F.3d at 1352; *Poulos*, 379 F.3d at 663; *Robinson v. TCI/U.S. W. Commc’n Inc.*, 117 F.3d 900, 905 (5th Cir. 1997); *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996). A small number of courts considering the issue chose not to use the test. *See Doe I v. State of Isr.*, 400 F. Supp. 2d 86, 114–16 (D.D.C. 2005); *Jose v. M/V Fir Grove*, 801 F. Supp. 349, 357 (D. Or. 1991).

78. *Renta*, 530 F.3d at 1531; *Al-Turki*, 100 F.3d at 1052.

79. *Robinson*, 117 F.3d at 907; *Doe I*, 400 F. Supp. 2d at 116; *Jose*, 801 F. Supp. at 354.

80. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 257–58, 266 (2010).

and effects test used in securities jurisprudence.⁸¹ The *Morrison* ruling created a new emphasis on the “focus” of a statute.⁸² Because RICO cases also relied on the conduct and effects tests, the *Morrison* ruling threw the tests for extraterritorial application of RICO into flux, forcing courts to look to Congress’s “focus” in crafting RICO.

A. THE SUPREME COURT’S RULING AND EMPHASIS ON FOCUS IN *MORRISON V. NATIONAL AUSTRALIA BANK LTD.*

In *Morrison*, the Supreme Court abrogated the tests previously used in SEA extraterritoriality cases, instead mandating that courts look to the focus of a statute when determining whether Congress intended the law to apply to activities that occurred abroad. The Court considered the extraterritorial reach of American securities law in a case concerning fraud committed during the international sale of an American company.⁸³ National, an Australian bank, purchased Homeside Lending, a U.S. company, to the eventual detriment of Australian shareholders of National. Homeside was a mortgage service company based in Florida.⁸⁴ Mortgage companies like Homeside can generate a substantial revenue stream from mortgage service fees.⁸⁵ The estimated value of that income stream is dependent on how likely mortgagors are to pay off their loans on or ahead of schedule.⁸⁶ Homeside used income predictions from the mortgage accounts it serviced to assess the value of the accounts, and in turn to assess its own value as a company.⁸⁷ When National purchased Homeside in 1998, the estimated value of Homeside appeared in National’s financial statements as well as in public statements made by National, which its Australian shareholders used to make investing decisions.⁸⁸ In 2001, National announced that it was writing down⁸⁹ the value of Homeside by 2.2 billion dollars, causing the price of its stock to fall.⁹⁰

81. See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.3d 1326, 1333–39 (2d Cir. 1972) (establishing the conduct test for extraterritorial application of RICO); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208–09 (2d Cir. 1968) (establishing the effects test for extraterritorial application of RICO); *Itoba Ltd. v. Lep Grp. PLC*, 54 F.3d 118 (2d Cir. 1995) (expressly combining the two tests).

82. *Morrison*, 561 U.S. at 266.

83. *Id.* at 251–52.

84. *Id.* at 251.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. A write down is a method of accounting where an asset’s book value is revised downward to reflect a new market value less than the previous estimated book value. The amount by which a company reduces the book value of an asset will be charged against its earnings as a loss or expense. BLACK’S LAW DICTIONARY 1609 (6th ed. 1990).

90. *Morrison*, 561 U.S. at 251–52.

Petitioners, all Australian shareholders in National, brought a complaint in U.S. court against Homeside and National.⁹¹ Petitioners sued under section 10(b) of the SEA and SEC rule 10b-5,⁹² which protects investors from fraud or misrepresentations made in connection with the purchase or sale of any security.⁹³ The complaint alleged that Homeside purposefully manipulated the financial models it used to predict the likelihood of early mortgage payments, making the rates of early repayment “unrealistically low” and inflating the total value of Homeside Lending, and its parent company National.⁹⁴ Thus, Homeside and National allegedly lied to and defrauded its Australian investors.⁹⁵ The Supreme Court granted certiorari to address the question of whether American securities law covers fraud in transactions made on Australian stock exchanges that harm only Australian shareholders.⁹⁶

The Supreme Court held that the SEA only applies to stock transactions on domestic exchanges and domestic transactions in other securities.⁹⁷ The Court first reaffirmed the presumption against extraterritoriality,⁹⁸ stressing Congress’s focus on domestic rather than foreign affairs.⁹⁹ Interpreting the text of section 10(b) and rule 10b-5, the Court concluded that nothing indicated that Congress meant them to apply abroad.¹⁰⁰ The Court then gutted the Second Circuit’s previous securities jurisprudence.¹⁰¹ The Court stated that the circuit had continually ignored the presumption against extraterritoriality, instead presuming to “discern” whether Congress would have wanted [its] statute[s] to apply” in a given situation.¹⁰² The Court further stated that the circuit “produced a collection of tests” for divining congressional intent that are “complex in formulation and unpredictable in application”¹⁰³ and that this “demonstrate[d] the wisdom of the presumption against extraterritoriality.”¹⁰⁴ In particular, the Court derided the Second Circuit’s conduct and effects tests (both separately and combined),¹⁰⁵ and the resulting extraterritorial application of U.S. securities law to fraudulent schemes that occurred abroad, which other

91. *Id.* at 252.

92. *Id.*

93. 15 U.S.C. § 78j(b) (2010); 17 C.F.R. 240.10b-5 (2014).

94. *Morrison*, 561 U.S. at 252.

95. *Id.*

96. *Id.*

97. *Id.* at 273.

98. *Id.* at 248 (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

99. *Id.* at 260–61.

100. *Id.* at 248.

101. *Id.* at 255.

102. *Id.*

103. *Id.* at 255–56.

104. *Id.* at 261.

105. *Id.* at 257–58.

circuits had subsequently followed.¹⁰⁶ The Court stated, “[u]sing congressional silence as a justification for judge-made rules violates the traditional principle that silence means no extraterritorial application.”¹⁰⁷

In response to petitioner’s argument that U.S. citizens made the misrepresentations in the United States, the Court looked to the “focus” of the SEA, which it stated was “not upon the place where the deception originated, but upon purchases and sales of securities in the United States,” essentially the securities transactions affected by the deceitful conduct.¹⁰⁸ Thus, “only transactions in securities listed on domestic exchanges, and domestic transactions in other securities” fall under the purview of the SEA.¹⁰⁹ According to the Court, if the purchase and sale of the affected securities is not in the United States, then the Exchange Act does not apply.¹¹⁰ In this case, while the misrepresentations occurred in Florida, the affected transactions took place abroad.¹¹¹ Thus, because the SEA’s focus is domestic, it did not apply.¹¹² Accordingly, the Court dismissed the claim.¹¹³

B. HOW THE “FOCUS” TEST AFFECTS RICO JURISPRUDENCE

The Court’s emphasis on Congress’s “focus” when crafting legislation is not new,¹¹⁴ but the affirmation of the importance of legislative focus has far reaching implications.¹¹⁵ The focus test requires a court to determine a statute’s focus by deciding what Congress intended the statute to accomplish when it created it.¹¹⁶ Before *Morrison*, the Court looked at focus when assessing the extraterritoriality of U.S. employment laws in *E.E.O.C. v. Arabian American Oil Co.*¹¹⁷ and concluded that Congress meant for Title VII to have a “purely domestic focus”; thus, it did not apply abroad.¹¹⁸ In the RICO context, courts were forced to determine the congressionally intended focus of RICO. However, RICO jurisprudence—and the consideration of RICO’s

^{106.} *Id.* at 259.

^{107.} *Id.* at 261; see John D. Kelly, Note, *Let There Be Fraud (Abroad): A Proposal for A New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts*, 28 *LAW & POL’Y INT’L BUS.* 477, 492–493 (1997).

^{108.} *Morrison*, 560 U.S. at 266.

^{109.} *Id.* at 267.

^{110.} *Id.*

^{111.} *Id.* at 251–53.

^{112.} *Id.* at 273.

^{113.} *Id.*

^{114.} See *E.E.O.C v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 283 (1949).

^{115.} Patricia A. Leonard & Gerardo J. Rodriguez-Albizu, *Do Extraterritorial RICO Claims Still Exist in a Post-Morrison World?*, 59 *Fed. Law.* 60, 60–61 (Oct./Nov. 2012).

^{116.} *Id.*

^{117.} *Aramco*, 499 U.S. at 255.

^{118.} *Id.*

extraterritoriality—has always borrowed heavily from securities jurisprudence.¹¹⁹ As noted, courts generally used the conduct and effects test.¹²⁰ After *Morrison*, courts have struggled to craft a new test for RICO applicability abroad. Any new test for RICO, according to *Morrison*, must incorporate what Congress thought the focus of the law was when they crafted it.¹²¹ Prior to *Morrison*, courts identified three different, possibly overlapping, foci for RICO: the enterprise, the pattern of activity, and organized crime.¹²²

Section 1962 of the RICO statute names two foci: “enterprise[s]” and “patterns of activity.”¹²³ The Seventh Circuit, in *United States v. Neapolitan*, stated that “[t]he central role of the concept of enterprise under RICO cannot be overstated.”¹²⁴ The Supreme Court seemed to affirm the importance of a “pattern of activity” in *Sedima, S.P.R.L. v. Imrex Co., Inc.*¹²⁵ The Court reversed the lower court’s dismissal of the plaintiff’s complaint and remanded the case, highlighting the need for future plaintiffs to show a “pattern of racketeering activity.”¹²⁶ In *H.J. Inc. v. Northwestern Bell Telephone Co.*, the Supreme Court also clearly stated that RICO’s third focus is organized crime.¹²⁷ The Court stated that Congress enacted RICO due to “the perceived need to combat organized crime,”¹²⁸ and also noted that “although it had organized crime as its focus, [it] was not limited in application to organized crime.”¹²⁹ As previously noted, no matter what Congress intended the focus of RICO to be, the presumption against extraterritoriality still applies because the statute is silent as to its extraterritorial application.¹³⁰ A claimant will need to overcome that presumption for RICO ever to apply to acts or effects felt abroad.

119. *N. S. 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); *Neller*, *supra* note 64, at 377–78.

120. *See supra* Part II.A.

121. *Morrison v. Nat’l Austl. Bank Ltd.*, 560 U.S. 241, 266 (2010).

122. *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237 (1989).

123. 18 U.S.C. § 1962 (2012).

124. *Neapolitan*, 791 F.2d at 500.

125. *Sedima*, 473 U.S. at 500.

126. *Id.*

127. *See H.J. Inc.*, 492 U.S. at 237.

128. *Id.* at 248.

129. *Id.*

130. *Morrison v. Nat’l Austl. Bank Ltd.*, 560 U.S. 241, 255 (2010).

III. THE EXTRATERRITORIALITY OF RICO AFTER THE RULING IN *MORRISON*

U.S. district courts have struggled to determine the true focus of RICO, and how it should be applied to acts and effects felt abroad.¹³¹ Courts have taken two approaches: the “enterprise” approach, and the “predicate acts” approach. Both approaches leave RICO with almost no extraterritorial application. The enterprise approach focuses on the location of the enterprise, or where the “brains” of the operation are located.¹³² The predicate acts approach focuses on where the defendants carried out the acts and activities prohibited by RICO.¹³³

A. THE “ENTERPRISE” APPROACH

The enterprise approach to the extraterritorial application of RICO was crafted by a New York district court, and lower courts subsequently applied the approach in Washington D.C., Florida, Pennsylvania, and California. Shortly after the Supreme Court’s ruling in *Morrison*, the Southern District of New York considered RICO’s extraterritoriality in *Cedeño v. Intech Group, Inc.*¹³⁴ The plaintiff, a Venezuelan citizen, brought suit under RICO against a group of Venezuelan defendants, alleging that they used U.S.-based banks in a money laundering scheme to hold, move, and conceal the monetary fruits of fraud, extortion, and private abuse of public authority.¹³⁵ The scheme’s only connection with the United States was the passing of funds through American banks.¹³⁶

The court, specifically noting *Morrison*’s repudiation of the Second Circuit’s conduct and effects test, looked to the focus of RICO to determine whether Congress meant for it to apply abroad.¹³⁷ The court concluded that the focus of RICO is indeed on an enterprise of racketeering activity, as “it is these [enterprises] that the statute labels the ‘Prohibited activities.’”¹³⁸ The court reasoned that the wording of the statute does not “evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality.”¹³⁹ On appeal, the Second Circuit declined to expressly endorse the enterprise-based reasoning, instead holding that

131. “It is unclear how *Morrison*’s logic, which evaluates the ‘focus’ of the relevant statute, precisely translates to RICO.” *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 914 (C.D. Cal. 2011).

132. *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 NGG VVP, 2011 WL 843957, at *5 (E.D.N.Y. Mar. 8, 2011).

133. *CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d 1193, 1198–200 (D. Colo. 2011).

134. *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471 (S.D.N.Y. 2010).

135. *Id.* at 472 (internal citations omitted).

136. *Id.*

137. *Id.* at 473.

138. *Id.*

139. *Id.* Plaintiffs also attempted to make a “predicate acts” argument, which the court ultimately rejected. *Id.* at 473–74.

under either the enterprise or predicate acts test the result would have been the same.¹⁴⁰

Other courts, however, have adopted the New York District Court's enterprise-based reasoning.¹⁴¹ In 2011, the district court for the District of Columbia adopted the enterprise approach in *United States v. Philip Morris*.¹⁴² In a 2009 ruling before *Morrison*,¹⁴³ the D.C. District Court found a group of defendants liable for RICO violations for conspiring to defraud American tobacco smokers, basing RICO liability on the scheme's "tremendous impact on the United States."¹⁴⁴ BATCo, a Welsh tobacco company with its primary place of business in England, moved for reconsideration, arguing that its case be considered separately in light of the intervening ruling in *Morrison*.¹⁴⁵ BATCo argued that *Morrison* "rejected the 'effects' test for extraterritoriality, thereby invalidating the basis for BATCo's liability under RICO."¹⁴⁶

The *Philip Morris* court agreed that *Morrison* invalidated the court's previous holding.¹⁴⁷ Looking to the extensive findings of fact in the underlying case, the court noted that the facts showed that BATCo's enterprise was located abroad.¹⁴⁸ Thus, *Morrison* invalidated the basis for the previous ruling against BATCo, which relied on the effects test.¹⁴⁹ Citing *Cedeño*, the court agreed that the text of the statute makes its focus on enterprises clear.¹⁵⁰

A California district court later followed this line of reasoning. The District Court for the Central District of California, in *In re Toyota Motor Corp.*, considered the companion case to a large domestic multi-district litigation brought following the highly publicized case dealing with the unintended acceleration of certain Toyota vehicles.¹⁵¹ Foreign plaintiffs brought suit alleging that the defendants had conspired to hide information about the unintended acceleration from foreign buyers, artificially inflating the value of their cars, and thus defrauded the foreign

140. *Cedeño v. Castillo*, 457 F. App'x 35, 38 (2d Cir. 2012).

141. *See, e.g.*, *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23 (D.D.C. 2011); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883 (C.D. Cal. 2011); *Sorota v. Sosa*, 842 F. Supp. 2d 1345 (S.D. Fla. 2012); *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 NGG VVP, 2011 WL 843957 (E.D.N.Y. Mar. 8, 2011); *In re Le-Nature's, Inc.*, No. 9-1445, 2011 WL 2112533 (W.D. Pa. May 26, 2011); *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, No. 8-299, 2012 WL 2093997 (W.D. Pa. June 11, 2012); *Mitsui O.S.K. Lines, Ltd. v. Seamasster Logistics, Inc.*, 871 F. Supp. 2d 933, 940 (N.D. Cal. 2012).

142. *Philip Morris*, 783 F. Supp. 2d at 28–29.

143. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 43 (D.D.C. 2006).

144. *Id.* at 873.

145. *Philip Morris*, 783 F. Supp. 2d at 26.

146. *Id.*

147. *Id.* at 29.

148. *Id.*

149. *Id.*

150. *Id.* (citing *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010)).

151. *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883 (C.D. Cal. 2011).

buyers.¹⁵² The *Toyota* court looked to *Cedeño* and “agree[d] in principle that ‘the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity.’”¹⁵³

Interestingly, unlike the majority of other RICO extraterritoriality cases, the defendants in *Toyota* were located in the United States.¹⁵⁴ The court ultimately determined that the plaintiffs lacked sufficient factual allegations to invoke domestic RICO liability.¹⁵⁵ However, the court left open the possibility for future foreign plaintiffs to bring a domestic RICO claim if they could adequately show that a domestic enterprise had economic effects abroad.¹⁵⁶ The court noted that even if every other action occurred abroad (in this case, the “marketing, purchase, sale, or lease of Toyota vehicles”¹⁵⁷), plaintiffs could still bring a successful RICO claim “as long as the enterprise, which engaged in a pattern of racketeering activity, operated domestically.”¹⁵⁸ Thus, a RICO scheme planned out of the United States but put into effect internationally would still be covered by RICO. While the holding conforms to *Morrison*’s presumption against extraterritoriality, it leaves the door open for some limited extraterritorial application of RICO. This limited extraterritorial application would still be grounded in a domestic enterprise in keeping with the ruling in *Morrison*.

In 2012, a Florida district court followed the enterprise approach in *Sorota v. Sosa*.¹⁵⁹ The court specifically abrogated its 2008 holding in *Liquidation Commission of Banco Intercontinental SA v. Renta* because of the intervening *Morrison* ruling.¹⁶⁰ In *Renta*, the Eleventh Circuit had applied the conduct and effects test to find RICO applicable to conduct aimed at defrauding a Dominican bank.¹⁶¹ The district court ultimately dismissed Sorota’s RICO claim: “The issue here is whether the extraterritoriality holding of *Renta* has been overruled—or, more accurately, undermined to the point of abrogation—by the Supreme Court’s subsequent decision in *Morrison* Reluctantly, the Court

152. *Id.* at 897.

153. *Id.* at 914 (citing *Cedeño*, 733 F. Supp. 2d at 474).

154. *Id.* at 896.

155. *Id.* at 914–15.

156. *Id.*

157. *Id.* at 915.

158. *Id.* (“[W]ere foreign Plaintiffs to bring a RICO claim against an alleged enterprise operating in the United States, consisting largely of domestic ‘persons,’ engaging in a pattern of racketeering activity in the United States, and damaging Plaintiffs abroad, these foreign Plaintiffs might well state a claim consistent with *Morrison*’s holding.”)

159. *Sorota v. Sosa*, 842 F. Supp. 2d 1345 (S.D. Fla. 2012).

160. *Id.* at 1349.

161. *Liquidation Comm’n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1352 (11th Cir. 2008).

concludes that it has.”¹⁶² Following in the footsteps of *Cedeño*, *Philip Morris*, and *Toyota*, the court concluded that the focus of RICO was the enterprise, which in this case, was located in Peru.¹⁶³ Citing those cases, the court further agreed RICO does not apply extraterritorially¹⁶⁴ and dismissed Sorota’s claim.

The enterprise approach crafted in *Cedeño* was made easier to apply with the addition of the “nerve center” test borrowed from corporate law.¹⁶⁵ In *European Community v. RJR Nabisco Inc.*, another New York district court held that the focus of RICO is on the enterprise, but noted the difficulty of determining the location of an enterprise.¹⁶⁶ The court then applied a nerve center test for determining the location of a RICO enterprise, a test borrowed from Supreme Court jurisprudence on determining the location of a corporation.¹⁶⁷ The nerve center test focuses on the “brains” of the operation; the enterprise’s location is where the decisions effectuating the scheme are made.¹⁶⁸ The addition of the nerve center test makes determining the location of an enterprise simpler. Additionally, the enterprise test has enjoyed support from other commentators because of its clarity and the ease with which lower courts can apply it.¹⁶⁹

The only circuit court to apply anything like an enterprise test was the Second Circuit in *Norex Petroleum Ltd. v. Access Indus., Inc.* That court decided *Norex* just three months after the Supreme Court’s decision in *Morrison*.¹⁷⁰ *Morrison* essentially invalidated appellant’s arguments on appeal. The *Norex* court sidestepped the issue of RICO’s focus, holding that under any focus, RICO extraterritorial reach did not cover the defendants.¹⁷¹

162. *Sorota*, 842 F. Supp. 2d at 1348–49 (internal citations omitted). *Renta* applied the conduct and effects test and held that enough of the defendant’s conduct had occurred in the United States for RICO to apply. *Renta*, 530 F.3d at 1352.

163. *Sorota*, 842 F. Supp. 2d at 1349–50.

164. *Id.* at 1349.

165. *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 NGG VVP, 2011 WL 843957, at *5–6 (E.D.N.Y. Mar. 8, 2011). The “enterprise” approach was also followed by a federal district court in Pennsylvania. *In re Le-Nature’s, Inc.*, 9-MC-162, 2011 WL 2112533, at *3 (W.D. Pa. May 26, 2011); *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, Civ. Action No. 8-299, 2012 WL 2093997, at *2–6 (W.D. Pa. June 11, 2012). Additionally, the “enterprise” plus “nerve center” approach was followed by a California federal court in *O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 940 (N.D. Cal. 2012).

166. *RJR Nabisco*, 2011 WL 843957, at *5–6.

167. *Id.*

168. *Id.* at *6.

169. *See, e.g.*, Leonard & Rodriguez-Albizu, *supra* note 115, at 63.

170. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010).

171. *Id.*

B. THE PREDICATE ACTS APPROACH

Two other court decisions since *Morrison* have determined that RICO's focus is not on "enterprises," but is instead on the "predicate acts" that form the pattern of racketeering activity. In *CGC Holding Co., LLC v. Hutchens*, the District of Colorado determined that RICO's focus was on the acts and conduct that made up the RICO scheme.¹⁷² The Southern District of New York followed this approach in *Chevron Corp. v. Donziger* because the court felt the new approach better exemplified congressional intent in crafting RICO.¹⁷³ However, some commentators have called the predicate acts approach "merely a reincarnation of the 'conducts' and 'effects' test that the Supreme Court expressly rejected in *Morrison*."¹⁷⁴

In *CGC Holding Co.*, the court considered allegations that Hutchens, a Canadian resident and citizen, had orchestrated a phony loan scheme based in Canada to defraud American plaintiffs.¹⁷⁵ The plaintiffs brought RICO allegations in Colorado against the Canadian defendants and the "loan" companies, and the defendants moved to dismiss on the grounds that RICO has no extraterritorial applicability.¹⁷⁶

The court agreed with the *Cedeño* line of cases that, "RICO provides no indication of an extraterritorial application."¹⁷⁷ The court disagreed, however, with the determination of the focus of RICO. The court instead determined that RICO's focus was on the predicate acts: "The focus of the statute is the racketeering activity, i.e., to render unlawful a pattern of *domestic* racketeering activity perpetrated by an enterprise."¹⁷⁸ Although the enterprise was essentially organized and run in Canada, the court determined that "the conduct of the enterprise within the United States was a key to its success."¹⁷⁹ Thus, the *Hutchens* court crafted a new test that looks not to the location of the enterprise, but instead to where the predicate acts of racketeering occurred. The court focused on the defendants' conduct and effects that occurred in the United States, essentially crafting a new test based on the rationale that had already been rejected in *Morrison*.

In 2012, another court followed the faulty logic from *Hutchens*. In *Chevron Corp. v. Donziger*, the same court that crafted the enterprise test in *Cedeño* two years earlier rejected the enterprise-based reasoning from that line of cases, instead following the "predicate acts" reasoning

172. *CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d 1193 (D. Colo. 2011).

173. *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 245 (S.D.N.Y. 2012).

174. Leonard & Rodriguez-Albizu, *supra* note 115, at 63.

175. *CGC Holding Co.*, 824 F. Supp. 2d at 1200-01.

176. *Id.* at 1197.

177. *Id.* at 1208.

178. *Id.* at 1209 (emphasis in original).

179. *Id.* at 1210.

from *Hutchens*.¹⁸⁰ The court considered extraterritorial RICO claims stemming from a massive judicial settlement against Chevron in Ecuador.¹⁸¹ Chevron alleged that Steven Donziger, a New York lawyer associated with the case, extorted and defrauded the company from his New York office.¹⁸² Donziger moved to dismiss on the basis that it was an impermissible attempt to apply RICO extraterritorially.¹⁸³

The *Donziger* court was, of course, not bound by *Cedeño*, and no appellate court above it had (nor has) weighed in on the correct test for determining extraterritorial RICO claims. After examining the reasoning used in *Cedeño* (and noting the other cases that followed it), the court found that its emphasis on the domestic or foreign “enterprise” of a RICO claim was not “persuasive or helpful” because only domestic enterprises would be covered.¹⁸⁴ The court focused on the perceived inequality of applying RICO to domestic enterprises alone, leaving international enterprises untouched.¹⁸⁵ Applying the *Hutchens* reasoning, the court concluded that RICO was unavailable because the alleged predicate acts had occurred in the United States, and denied Donziger’s motion to dismiss.¹⁸⁶ The obvious flaw in the *Donziger* court’s reasoning is the well-established presumption that Congress “ordinarily legislates with domestic effect”; if Congress wishes its laws to have foreign effect it must specifically say so.¹⁸⁷ RICO has no such specific intent, so courts must only apply RICO to domestic enterprises, leaving foreign and international enterprises beyond RICO’s reach.

180. *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229 (S.D.N.Y. 2012).

181. *Id.* at 236.

182. *Id.* at 240 (Donziger was accused of “(1) bringing a lawsuit in Ecuador; (2) fabricating (principally in the United States) evidence for use in that lawsuit in order to obtain an unwarranted judgment there; (3) exerting pressure on Chevron to coerce it to pay money not only by means of the Ecuadorian litigation and judgment, but also by subjecting Chevron to public attacks in the United States and elsewhere based on false and misleading statements; (4) inducing U.S. public officials to investigate Chevron; and (5) making false statements to U.S. courts and intimidating and tampering with witnesses in U.S. court proceedings to cover up their improper activities.”).

183. *Id.* at 239.

184. *Id.* at 241.

185. *Id.* at 243.

186. *Id.* The “predicate acts” line of reasoning has been followed in at least two other cases. In 2012, an Illinois district court analyzed both the “enterprise” and “predicate acts” lines of cases in *Borich v. BP, P.L.C.*, and concluded that it was persuaded by the “predicate acts” reasoning. 904 F. Supp. 2d 855 (N.D. Ill. 2012). In 2013, in *Republic of Iraq v. ABB AG*, the Southern District of New York—the same court that issued both the *Cedeño* and *Donziger* decisions—noted the inability of the court to decide on the correct approach: “The U.S. Court of Appeals for the Second Circuit has not yet determined the objects of the RICO statute’s solicitude The district judges in this Circuit have not reached agreement on the issue, either.” *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 544 (S.D.N.Y. 2013). The court ultimately declined to decide the issue, holding that under either approach the plaintiffs were seeking an inappropriate extraterritorial application of RICO, and dismissed the claim. *Id.* at 552.

187. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

A minority of courts have rejected the enterprise approach, opting, instead, to use a predicate acts approach that looks to the location of the alleged acts and activities. This test is essentially a re-working of the conduct and effects test, a test invalidated by *Morrison*. The *Donziger* court based its reasoning on a flawed understanding of a basic concept of statutory interpretation—the presumption against extraterritoriality. In 2013, the Ninth Circuit crafted a third approach.

C. THE NINTH CIRCUIT’S NEW APPROACH IN *UNITED STATES V. CHAO FAN XU*

In 2013, the Ninth Circuit identified a third method of interpreting RICO’s extraterritorial application, focusing on the “pattern of activity.”¹⁸⁸ The test creates the possibility that RICO may be applicable to some conduct that occurs abroad so long as enough of the acts in the “pattern” occurred in the United States.¹⁸⁹ In *Chao Fan Xu*, the court considered a “multinational” RICO scheme aimed at defrauding international banks, in which some conduct occurred in the United States.¹⁹⁰ The court focused on the defendant’s conduct as a whole, regarding the entire set of actions as a “pattern” under RICO.¹⁹¹ This ruling created a third approach, which only muddies the already unclear waters of RICO’s extraterritorial effect.

In *Chao Fan Xu*, four Chinese nationals appealed their RICO convictions for crimes committed as part of a scheme to defraud the Bank of China.¹⁹² The four defendants were two couples who legally married in China.¹⁹³ The husbands were both managers at the Kaiping sub-branch of the Bank of China.¹⁹⁴ From 1994 to 2001, they allegedly engaged in three types of fraud to funnel money out of the bank and into a conduit company: foreign exchange speculation, out-of-book unrecorded loans, and false loans.¹⁹⁵ The fraudulent conduct resulted in a total loss of around \$420 million.¹⁹⁶ According to the charges, the defendants avoided detection by falsifying bank records, even though the Chinese government audited the bank.¹⁹⁷

To avoid Chinese law enforcement in the event the fraud was ever discovered, all four defendants entered into allegedly false marriages

188. *United States v. Chao Fan Xu*, 706 F.3d 965, 977–78 (9th Cir. 2013).

189. *Id.* at 978.

190. *Id.* at 972–73.

191. *Id.* at 978–79.

192. *Id.* at 972.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 973.

with American residents who held valid U.S. residency.¹⁹⁸ The purpose of the marriages was to gain U.S. passports and residency status because China does not have an extradition treaty with the United States. As such, the fraudulently acquired passports would aid the defendants in avoiding prosecution in China.¹⁹⁹ The defendants used their fraudulently acquired passports to travel to the United States, where they funneled their stolen funds through Las Vegas casinos and into personal accounts for their own use at American banks.²⁰⁰

In 2001, when the Bank of China finally changed its accounting procedures and discovered the fraud, the defendants fled to the United States using their fraudulent passports and immigration status.²⁰¹ Federal officials arrested a fifth conspirator in Los Angeles who informed them of the entirety of the scheme.²⁰² The federal officials then arrested the defendants in Kansas and Oklahoma in 2004 and eventually convicted them of RICO conspiracy, money laundering conspiracy, conspiracy to transport stolen money, and use of fraudulently obtained passports and visas.²⁰³ The defendants appealed the conviction on the grounds that their RICO convictions were invalid because their crimes were committed in China and RICO cannot be applied extraterritorially.²⁰⁴ The defendants based their appeal on the theory that their enterprise had two parts: part one, the conspiracy, which occurred in China; and part two, the immigration fraud, which occurred in the United States.²⁰⁵

The court noted at the outset of its opinion that it was “consider[ing] RICO’s application in a multinational context,”²⁰⁶ and that it was necessary to determine whether RICO could be lawfully applied to any, or all, of the defendant’s foreign conduct.²⁰⁷ The court then turned to the tests crafted by previous courts. Looking at the analysis in the *Cedeño* line of cases, the court acknowledged that the cases “concluded that the focus of RICO is on the enterprise—specifically, domestic enterprises.”²⁰⁸ The court also examined the “nerve center” test used in *European Community* and *Mitsui O.S.K. Lines* before rejecting it along with the enterprise approach because it targeted only one aspect of the conspiracy.²⁰⁹

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 973–74.

204. *Id.* at 974.

205. *Id.* at 975.

206. *Id.* at 974.

207. *Id.*

208. *Id.* at 976.

209. *Id.* at 977.

The *Chao Fan Xu* court addressed the “predicate acts that form a pattern of racketeering activity” approach and found this approach to be more convincing.²¹⁰ However, the court focused more on the “pattern of activity” language and ultimately settled on a new test.²¹¹ The court looked to previous Supreme Court cases to determine that the focus of RICO is the pattern of activity.²¹² The court also looked to RICO’s legislative history and noted that Congress passed the law to impose new sanctions on the unlawful activities of those engaged in organized crime.²¹³ The court determined that “it is highly unlikely that Congress was unconcerned with the actions of foreign enterprises where those actions violated the laws of this country while the defendants were in this country.”²¹⁴ Therefore, the court decided that it should look “at the pattern of defendants’ racketeering activity taken as a whole.”²¹⁵ This reasoning ignores the presumption against extraterritoriality and chooses to include foreign actions where the presumption should otherwise shut them out.

In applying the pattern of activity test to this case, the court reasoned that the entirety of the defendant’s action should be taken into account:

The dual parts of Defendants’ enterprise were necessarily conjoined in pursuit of that goal—i.e., to steal large sums of money from the Bank of China and to get away with it in the United States. Defendants intended to use the immigration fraud to consummate the purpose of the enterprise: to acquire the money and safely enjoy it in the United States, beyond the reach of Chinese law. Without the immigration fraud, the bank fraud would have been a dangerous failure.²¹⁶

Thus, while the court based its affirmation of the RICO conviction on the defendant’s domestic immigration fraud, it considered the pattern of activity as a whole, including predicate acts perpetrated abroad.²¹⁷ The court essentially affirmed that RICO has no extraterritorial application²¹⁸ and then applied the law to a pattern of activity that took place abroad.²¹⁹ This created a new, entirely unnecessary approach that is counter to the well-established presumption against extraterritoriality. The new focus, while borrowing language from previous cases that used the predicate acts approach, leaves more room for extraterritorial

210. *Id.* at 975–79.

211. *Id.*

212. *Id.*; see *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 236 (1989).

213. *Chao Fan Xu*, 706 F.3d at 978.

214. *Id.*

215. *Id.*

216. *Id.* at 978–79.

217. *Id.*

218. *Id.* at 978.

219. *Id.* at 979.

applicability than the other two tests. If Congress wanted RICO to have extraterritorial effect, it would (and is indeed required to) have specifically stated so. The Ninth Circuit has attempted to circumvent basic concepts in statutory interpretation and give RICO an extraterritorial effect Congress never meant it to have.

IV. *CEDENO'S* "ENTERPRISE" APPROACH IS THE CLEAREST AND MOST EASILY APPLIED APPROACH

The Ninth Circuit ruling unnecessarily muddied the waters of RICO's extraterritorial applicability. The ruling crafted a third possible approach to RICO extraterritoriality, which will be difficult for lower courts to apply. The enterprise approach crafted in *Cedeño* is a clearer test that already enjoys a high level of support in the lower courts, and should be adopted by appellate courts going forward.

The enterprise approach looks to the location of the RICO scheme, where the "brains" of the operation were located. Coupled with the nerve center test applied in *European Community v. RJR Nabisco Inc.*, this approach cuts RICO's extraterritorial application along clear lines: RICO applies to enterprises located in the United States, but not to enterprises located abroad. The predicate acts approach is simply a reworking of the invalid conduct and effects test and is counter to the presumption against extraterritoriality.

The major problem with the *Chao Fan Xu* ruling is the lack of clarity concerning the line between domestic and foreign patterns of activity.²²⁰ The Ninth Circuit would likely not have settled on a pattern of activity approach if the contacts with the United States were significantly less than they were in *Chao Fan Xu*, but the court provides no guidance as to how much of the pattern of activity need take place in the United States for a court to find that the entire pattern and predicate acts occurred domestically. Under the Ninth Circuit's test, courts will still be able to find that some foreign acts constitute a pattern. What the court left unclear, however, is how much of the activity must take place in, or have a connection with, the United States for the entire pattern, foreign acts included, to be considered domestic. This leaves courts in the Ninth Circuit with a largely open-ended test likely to create wildly different results in different courtrooms. The lack of a clear test in the Second Circuit is similarly concerning, although far more courts in the Second Circuit have endorsed the enterprise approach.

A better alternative is the enterprise test crafted in *Cedeño*. This test focuses simply on the location of the enterprise, essentially where the

220. The *Donziger* court made a similar argument about the "enterprise" approach coupled with the "nerve center" test, but this argument is unpersuasive because that court ignored the presumption against extraterritoriality. See *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 243 (S.D.N.Y. 2012).

“brains” of the scheme are located.²²¹ The approach is also consistent with the presumption against extraterritoriality, as it only covers schemes with enterprises located within the United States. It is clear that Congress intended enterprises to be a focus of RICO, as enterprises are listed in the very wording of the statute as an element of the crimes covered.²²² “Enterprises” are defined in the statute using the plain meaning, but “patterns of activity” are only defined as requiring “two or more acts” without any further clarification of what makes a “pattern.”²²³ The enterprise approach leaves no need to divine legislative intent any further, as the courts using the predicate acts and pattern of activity approaches have done. Additionally, the enterprise approach leaves the statute with no, or almost no, extraterritorial application, which is in keeping with the presumption against extraterritoriality and Congress’s presumed focus on domestic affairs.²²⁴ Note that the *Toyota* court left open the possibility for foreign plaintiffs to bring a successful RICO suit if the enterprise is domestic but its effects are felt abroad.²²⁵ A foreign plaintiff could bring an extraterritorial RICO claim if the scheme was hatched in the United States but every other aspect occurred abroad.²²⁶ This possibility is still consistent with congressional intent that RICO have domestic effect—a RICO enterprise planned in the United States should be punishable under U.S. law. On the other hand, a foreign enterprise should be beyond RICO’s reach.

One valid criticism of the enterprise approach is the difficulty of determining the locus of the enterprise. However, the *European Community* court provided a straightforward approach borrowed from Supreme Court jurisprudence: the nerve center test.²²⁷ This test looks to where the “brains” of an operation were located, as opposed to its “brawn,” or where the acts were carried out.²²⁸ Because of district courts’ familiarity with the nerve center test, it should be relatively easy to apply.²²⁹ Additionally, because of its clarity, the enterprise approach and the nerve center test are likely to produce similar results across jurisdictions, leading to relative stability in RICO extraterritoriality jurisprudence.

221. *See Hertz v. Friend*, 559 U.S. 77, 95 (2010); *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 NGG VVP, 2011 WL 843957, at *6 (E.D.N.Y. Mar. 8, 2011).

222. 18 U.S.C. § 1962(a)–(c) (2012).

223. 18 U.S.C. § 1961(4)–(5) (2012).

224. *See E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

225. *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883 (C.D. Cal. 2011).

226. *Id.*

227. *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 NGG VVP, 2011 WL 843957, at *5–6 (E.D.N.Y. Mar. 8, 2011); *see Hertz v. Friend*, 559 U.S. 77, 78 (2010).

228. *RJR Nabisco*, 2011 WL 843957, at *6.

229. *See Hertz*, 559 U.S. at 90.

CONCLUSION

Prior to the Supreme Court's decision in *Morrison*, courts considering the extraterritorial reach of RICO borrowed the conduct and effects test established by the Second Circuit securities jurisprudence. The *Morrison* ruling expressly invalidated that test and mandated that courts look to the "focus" of each statute to divine its extraterritorial application. After *Morrison*, lower courts have struggled to apply the Supreme Court's reasoning to cases implicating extraterritorial applications of RICO. Over the past several years, three foci for RICO have emerged in determining RICO's applicability to acts occurring abroad: the location of the enterprise, predicate acts, and the pattern of activity. Due to the weaknesses inherent in the predicate acts and pattern of activity approaches, courts should apply the enterprise approach moving forward.

The predicate acts approach is flawed because it is simply a refabricated version of the conduct and effects test, which was invalidated by *Morrison*. This approach also ignores the presumption against extraterritoriality. Further, the test is designed to treat enterprises that are located abroad and those that are located domestically the same. That concept flies in the face of the presumption because it gives an extraterritorial reach to RICO where Congress has not specified that the statute should have any extraterritorial reach.

The pattern of activity approach is also flawed. It similarly ignores the presumption against extraterritoriality by attempting to extend RICO to multinational schemes where Congress has not given the statute any international effect. Congress can mandate that its laws have extraterritorial effect, but it has not done so with RICO. The pattern of activity approach is an unnecessary version of an already flawed predicate acts approach.

Future courts should adopt the enterprise test for RICO extraterritoriality because it is the easiest approach for lower courts to apply. The enterprise test creates clear lines for RICO's extraterritorial applicability: an enterprise located in the United States is covered, but an enterprise located abroad is not. The addition of the nerve center test makes locating the enterprise especially clear, as it requires courts to engage in the common inquiry of where the brains of the scheme were located—that is, where defendants made decisions and coordinated their operation. The enterprise approach is also the test most likely to produce predictable results because of its clarity, and it enjoys the widest amount of support among courts. Lastly, the enterprise approach is consistent with both the presumption against extraterritoriality and congressional intent in passing RICO.