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## Life After Morrison: Extraterritoriality and RICO

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# Life After *Morrison*: Extraterritoriality and RICO

## ABSTRACT

*For years, the federal courts of appeals have borrowed heavily from securities law jurisprudence in developing a framework for analyzing claims under the Racketeer Influenced and Corrupt Organizations Act (RICO). Last year, in the case of Morrison v. National Australia Bank, the Supreme Court issued a ground-breaking opinion that rejected decades of lower court precedent related to the extraterritorial application of U.S. securities laws and reemphasized the vitality of the presumption against extraterritoriality. Because of the parallel development of securities law and RICO jurisprudence, Morrison will have significant consequences for the application of RICO in cases involving foreign defendants and criminal activity conducted overseas. In the immediate wake of Morrison, two lower courts issued opinions with differing interpretations of how to analyze extraterritoriality in the RICO context. This Note considers the evolution of judicial treatment of extraterritoriality in the securities law context, the fundamental principles of RICO jurisprudence, and the historical RICO jurisprudence regarding extraterritoriality. This Note then discusses the two approaches taken by the lower courts in light of Morrison before ultimately endorsing a third approach, which is both more doctrinally sound and more practically workable.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1386
II.	THE SECURITIES EXCHANGE ACT OF 1934 .....	1389
	A. <i>Pre-Morrison: Extraterritoriality and the Exchange Act of 1934</i> .....	1389
	B. <i>The Decision in Morrison</i> .....	1392
III.	THE RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT .....	1393
	A. <i>The RICO Statute</i> .....	1393
	B. <i>Extraterritoriality and RICO: Pre-Morrison Jurisprudence</i> .....	1398
	C. <i>Extraterritoriality and RICO: Post-Morrison Jurisprudence</i> .....	1401

IV.	ANALYZING THE POST- <i>MORRISON</i> RICO	
	JURISPRUDENCE .....	1404
	A. <i>The Domestic Enterprises Approach</i>	
	<i>of Cedeño</i> .....	1405
	B. <i>The "Contacts" Approach of Norex</i> .....	1408
V.	A BETTER ALTERNATIVE.....	1410
	A. <i>The Need for a Third Alternative</i> .....	1410
	B. <i>A Complete Pattern of Racketeering</i>	
	<i>Activity in the United States</i> .....	1411
VI.	CONCLUSION.....	1413

## I. INTRODUCTION

In light of the United States Supreme Court's recent decision in *Morrison v. National Australia Bank*,<sup>1</sup> lower courts have begun to reevaluate how they handle issues of extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>2</sup> *Morrison* arose under federal securities law,<sup>3</sup> but for decades courts have borrowed from securities law jurisprudence to address extraterritoriality issues under RICO.<sup>4</sup> After *Morrison* dramatically altered the jurisprudential landscape of extraterritoriality and the securities laws,<sup>5</sup> courts must now reconsider the extraterritorial reach of RICO.

In *Morrison*, the Supreme Court rejected decades of lower court precedent to hold that courts must look to where the relevant transaction occurred to determine whether a securities fraud claim could be brought in the United States under § 10(b) of the Securities Exchange Act of 1934 (Exchange Act).<sup>6</sup> *Morrison* involved a securities fraud claim brought against an Australian bank in connection with

1. *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869 (2010).

2. See *Norex Petrol. Ltd. v. Access Indus. Inc.*, 631 F.3d 29 (2d Cir. 2010) (per curiam) (holding that the question raised is whether a U.S. federal court can provide relief, not whether there is subject matter jurisdiction); *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) (“[N]owhere does the statute evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality.”). RICO is codified at 18 U.S.C. §§ 1961–1968 (2006).

3. *Morrison*, 130 S. Ct. at 2884.

4. See, e.g., *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.”).

5. See *infra* Part II.B.

6. *Morrison*, 130 S. Ct. at 2884. Section 10(b) of the Securities Exchange Act is codified at 15 U.S.C. § 78j(b) (2006).

its mortgage servicing operations in the United States.<sup>7</sup> The bank's stock was not traded on U.S. exchanges.<sup>8</sup> The Court held that § 10(b) did not provide a cause of action "to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."<sup>9</sup> The Court emphasized that absent "the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, courts must presume that legislation "is meant to apply only within the territorial jurisdiction of the United States."<sup>10</sup> The Court was careful to clarify that the claim in *Morrison* was not jurisdictionally barred but simply failed to state a claim under § 10(b) because the statute applies only to transactions in securities listed on domestic exchanges and domestic transactions in other securities.<sup>11</sup>

The *Morrison* decision has important implications beyond the § 10(b) context. The Court's revitalization of the presumption against extraterritoriality will reverberate through established jurisprudence applying RICO. Courts have used the same conduct and effects test that was rejected in *Morrison* to apply RICO to extraterritorial activity.<sup>12</sup> Because lower courts have already held that the text of the RICO statute does not contemplate extraterritorial application,<sup>13</sup> *Morrison* would seem to dictate that RICO does not create a cause of action arising out of extraterritorial activity.<sup>14</sup> In fact, the Second Circuit recently relied on *Morrison* in dismissing a RICO claim filed by a Canadian shareholder in a Russian oil company against foreign persons and entities.<sup>15</sup>

The Supreme Court's recent rejection of the conduct and effects tests in favor of a "transactional" test in the § 10(b) context raises the

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7. *Morrison*, 130 S. Ct. at 2875–76.

8. *Id.* at 2875.

9. *Id.* at 2875, 2883.

10. *Id.* at 2877.

11. *Id.* at 2877, 2884.

12. See *Liquidation Comm'n of Banco Intercont'l, S.A. v. Alvarez Renta*, 530 F.3d 1339, 1351–52 (11th Cir. 2008) (adopting the "widely accepted view . . . 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"); see also *Morrison*, 130 S. Ct. at 2878–81 (endorsing adherence to the presumption against extraterritoriality in all cases, rather than engaging in the Second Circuit's individualized conduct and effects analysis in each case).

13. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004) ("RICO itself is silent as to its extraterritorial application."); *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) ("The RICO statute is silent as to any extraterritorial application.")

14. See *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 31 (2d Cir. 2010) (per curiam) (affirming the district court's dismissal of the RICO claim on the grounds that RICO does not apply extraterritorially because the statute is silent on the matter); *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) ("[N]owhere does the statute evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality.")

15. *Norex*, 631 F.3d at 31.

question of how to define extraterritoriality in RICO cases.<sup>16</sup> The Court reinvigorated the presumption against extraterritoriality in *Morrison*, but the threshold issue in a RICO case involving extraterritorial conduct is whether the claim seeks extraterritorial, or merely domestic, application in the first place. The transaction in a § 10(b) case is a discrete event, and courts can readily determine where the transaction occurred. In RICO cases, however, by definition, the underlying activity giving rise to the plaintiff's claim is a series of events—specifically, a “pattern of racketeering activity.”<sup>17</sup> In *Norex Petroleum Ltd. v. Access Industries Inc.*, the first post-*Morrison* decision by an appellate court to address extraterritoriality and RICO, the Second Circuit was dismissive of the allegation that some of the alleged RICO violations occurred in the United States, stating that “simply alleging that some domestic conduct occurred cannot support a claim of domestic application.”<sup>18</sup> It is not clear that *Morrison* dictates such a result in the RICO context, however; in fact, courts should embrace a more practical approach in considering the reach of RICO's domestic application. While there is language in the *Morrison* opinion suggesting that certain contacts with the United States will exist in many, if not all, cases of extraterritorial application of the securities laws,<sup>19</sup> extraterritoriality in the RICO context requires some separate consideration due to the very different nature of the activity prohibited by RICO.

This Note explores the development of judicial doctrine in the extraterritorial application of securities laws and of the RICO statute. This Note ultimately considers three alternative views of extraterritoriality and RICO under the new *Morrison* paradigm. One approach to defining extraterritoriality in the RICO context, evident in a recent decision from the Southern District of New York, would apply RICO to domestic enterprises, but not to foreign enterprises.<sup>20</sup> A second approach, seemingly endorsed by the Second Circuit, would determine the applicability of RICO based on whether a substantial part of the alleged racketeering scheme, viewed as one cohesive unit, took place in the United States.<sup>21</sup> Based on a more plain reading of the statute and a more practical view of what constitutes domestic

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16. See *Morrison*, 130 S. Ct. at 2888 (Stevens, J., concurring) (rejecting the conduct and effects test).

17. 18 U.S.C. §§ 1961(5), 1962(85) (2006).

18. *Norex*, 631 F.3d at 33.

19. *Morrison*, 130 S. Ct. at 2884 (“For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.”).

20. See *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) (“But nowhere does the statute evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality.”).

21. See *Norex*, 631 F.3d at 33 (“The slim contacts with the United States alleged by *Norex* are insufficient to support extraterritorial application of the RICO statute.”).

application, this Note endorses a third approach, which would apply RICO domestically in any case where a plaintiff alleges that at least two acts of racketeering activity (that otherwise satisfy RICO's "pattern" requirement)<sup>22</sup> occurred in the United States within a ten-year time period.<sup>23</sup>

## II. THE SECURITIES EXCHANGE ACT OF 1934

In 1934, Congress enacted the Securities Exchange Act, which includes the now ubiquitous anti-fraud provision of § 10(b), to regulate aftermarket securities trading.<sup>24</sup> Because the federal courts would ultimately model their approach to extraterritoriality and RICO on the analogous securities law jurisprudence, it is necessary to examine briefly the development of that § 10(b) extraterritoriality jurisprudence, culminating in the recent *Morrison* decision.

### A. Pre-Morrison: *Extraterritoriality and the Exchange Act of 1934*

For at least the last fifty years, federal courts have wrestled with the application of the Securities Exchange Act to international securities transactions.<sup>25</sup> "It 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."<sup>26</sup> Early international securities cases recognized the legislative silence concerning extraterritorial application of the Exchange Act, and § 10(b) claims "were thought to be available only to investors defrauded in transactions conducted within the territorial limits of this country."<sup>27</sup>

In 1967, the Second Circuit took "an important first step" in expanding the extraterritorial reach of § 10(b) in *Schoenbaum v. Firstbrook*.<sup>28</sup> *Schoenbaum* involved the sale in Canada of a Canadian

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22. See *infra* text accompanying notes 73–102 (discussing the pattern requirement).

23. See *infra* Part V (outlining this Note's proposal).

24. 15 U.S.C. § 78b (2006).

25. See John F. Zimmerman, Jr., *Extra Territorial Application of Section 10(b) and Rule 10b-5*, 34 OHIO ST. L.J. 342, 342 (1973) (citing cases as early as 1960 in discussion of the early § 10(b) jurisprudence related to extraterritorial application).

26. Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting in part *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)) (internal quotation marks omitted).

27. *Id.*; see also *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2878 (2010) ("As of 1967, district courts at least in the Southern District of New York had consistently concluded that, by reason of the presumption against extraterritoriality, § 10(b) did not apply when the stock transactions underlying the violation occurred abroad." (citations omitted)).

28. Zimmerman, *supra* note 25, at 342.

corporation's treasury stock to other foreign entities.<sup>29</sup> The corporation's common stock was traded on both the American Stock Exchange and the Toronto Stock Exchange.<sup>30</sup> Despite the fact that the statute was silent as to extraterritorial application, the court discerned that "Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."<sup>31</sup> The court held that § 10(b) applied to foreign securities transactions "at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors."<sup>32</sup>

Five years later, the Second Circuit further expanded the extraterritorial reach of § 10(b) in *Leasco Data Processing Equipment Corp. v. Maxwell*.<sup>33</sup> *Leasco* involved a stock purchase made by a foreign subsidiary of an American entity on the London Stock Exchange.<sup>34</sup> While seeking to be acquired by Leasco, the defendant British corporation made a series of false and misleading statements and disclosures to Leasco, a number of which occurred in the United States, by telephone with at least one party in the United States, or by mail delivered to the United States.<sup>35</sup> At the urging of, and upon false information provided by, the defendants, Leasco purchased a substantial number of shares of the defendant corporation on the London Stock Exchange.<sup>36</sup> The court held that, even though the transactions occurred in England, the fact that substantial misrepresentations were made in the United States "tips the scales in favor of applicability."<sup>37</sup>

Having laid the groundwork in *Schoenbaum* and *Leasco*, the Second Circuit continued to develop its jurisprudential approach to determining when § 10(b) had extraterritorial effect. Soon after *Leasco*, the court directed that, in a case revolving around

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29. *Schoenbaum v. Firstbrook*, 405 F.2d 200, 204-05 (2d Cir. 1967).

30. *Id.* at 204.

31. *Id.* at 206.

32. *Id.* at 208. The court explained that the "impairment of the value of American investments by sales by the issuer in a foreign country" has "a sufficiently serious effect upon United States commerce to warrant [application of the statute] for the protection of American investors." *Id.* at 208-09. The Second Circuit analyzed this extraterritorial application as a question of subject matter jurisdiction. *Id.* at 208. The Supreme Court in *Morrison* expressly rejected this analysis, holding that the proper inquiry as to extraterritorial application was whether the plaintiff stated a claim to relief under § 10(b). *Morrison*, 130 S. Ct. at 2877.

33. *Morrison*, 130 S. Ct. at 2878.

34. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1330-33 (2d Cir. 1972).

35. *Id.*

36. *Id.* at 1332.

37. *Id.* at 1337.

“predominantly foreign” transactions, courts “must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than [to] leave the problem to foreign countries.”<sup>38</sup> Under this guidance, the court “consistently looked at two factors: (1) whether the wrongful conduct occurred in the United States [i.e., the ‘conduct test’], and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens [i.e., the ‘effects test’].”<sup>39</sup>

Each of these tests had developed certain guiding principles. The conduct test ultimately provided that a federal court had jurisdiction over foreign securities transactions “if (1) the defendant’s activities in the United States were more than ‘merely preparatory’ to a securities fraud conducted elsewhere, and (2) these activities or culpable failures to act within the United States ‘directly caused’ the claimed losses.”<sup>40</sup> The effects test, as characterized in *Leasco*, provided that U.S. courts had jurisdiction over foreign securities transactions if fraudulent conduct outside the United States caused an effect in U.S. territory (e.g., a detrimental effect on American investors).<sup>41</sup> The court declined to analyze the conduct and effects factors “separately and distinctly,” however, instead employing “an admixture or combination of the two” to determine “whether there [was] sufficient United States involvement to justify the exercise of jurisdiction by an American court.”<sup>42</sup>

The Second Circuit’s approach was widely influential among the federal circuit courts, even though courts’ specific decisional mechanics varied from circuit to circuit.<sup>43</sup> The D.C. Circuit’s deference to the Second Circuit’s approach, despite expressing dissatisfaction with the appropriateness of the conduct and effects analysis, is emblematic of the influence that the Second Circuit has had in § 10(b) extraterritoriality jurisprudence.<sup>44</sup> Prior to the

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38. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975).

39. *Sec. Exch. Comm’n v. Berger*, 322 F.3d 187, 192–93 (2d Cir. 2003).

40. *Itoba Ltd. v. LEP Grp. PLC*, 54 F.3d 118, 122 (2d Cir. 1995) (citation omitted); *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991) (citations omitted). For a discussion of the ambiguity and complexity existing in the “conduct test” jurisprudence, see *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2879 (2010).

41. *Leasco Data Processing*, 468 F.2d at 1333–34.

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

43. See, e.g., *Morrison*, 130 S. Ct. at 2880 (citing *Sec. Exch. Comm’n v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977)); *Continental Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 421–22 (8th Cir. 1979) (agreeing with policy rationales of the Third Circuit in *Kasser*); see also *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424–25 (9th Cir. 1983) (following the test set forth by the Eighth and Third Circuits); see also *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998) (identifying the same mid-ground as the Second and Fifth Circuits).

44. See *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987) (deferring to the Second Circuit’s approach because of “the Second Circuit’s



*Morrison* decision, what had emerged from these cases was a nationwide amalgam of “vaguely related variations on the ‘conduct’ and ‘effects’ tests.”<sup>45</sup>

### B. *The Decision in Morrison*

The *Morrison* case involved Australian shareholders suing an Australian bank, its Florida-based subsidiary, and officers of both companies for violation of several provisions of the 1934 Act, including § 10(b).<sup>46</sup> The *Morrison* plaintiffs had purchased shares of Australian National Bank (National) on foreign exchanges.<sup>47</sup>

In 1998, National purchased HomeSide Lending, Inc. (HomeSide), a Florida mortgage servicing company.<sup>48</sup> As part of its mortgage servicing business, HomeSide received fees for collecting mortgage payments.<sup>49</sup> The rights to receive these fees represent “a valuable income stream” to a company like HomeSide, and the value of these rights “depends, in part, on the likelihood that the mortgage to which it applies will be fully repaid before it is due, terminating the need for servicing.”<sup>50</sup> HomeSide calculated the present value of these mortgage-servicing rights, and these figures then appeared in National’s financial statements, which “touted the success of HomeSide’s business” from 1998 through 2001.<sup>51</sup> But in July 2001, National announced a \$450 million write-down of HomeSide’s assets, and less than two months later, National announced that it was writing down the value of HomeSide’s assets by another \$1.75 billion.<sup>52</sup>

The *Morrison* plaintiffs had purchased National’s shares in 2000 and 2001, prior to the write-downs.<sup>53</sup> In the litigation, they alleged that the defendants had “manipulated HomeSide’s financial models to make the rates of early repayment unrealistically low in order to cause the mortgage-servicing rights to appear more valuable than they really were.”<sup>54</sup> Because the alleged manipulation of HomeSide’s models occurred in Florida and several allegedly misleading public statements were made in Florida, the plaintiffs argued that they sought “no more than domestic application” of § 10(b).<sup>55</sup>

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preeminence in the field of securities law, and our desire to avoid a multiplicity of jurisdictional tests”).

45. *Id.*

46. *Morrison*, 130 S. Ct. at 2875–76.

47. *Id.* at 2875.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 2875–76.

53. *Id.* at 2576.

54. *Id.*

55. *Id.* at 2883.

Applying the conduct and effects test, the district court ruled that it lacked subject matter jurisdiction because the acts in the United States were, “at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad.”<sup>56</sup> The Second Circuit affirmed, noting that “[t]he acts performed in the United States did not ‘compris[e] the heart of the alleged fraud.’”<sup>57</sup>

The Supreme Court first clarified that the analysis of extraterritorial application of § 10(b) was a merits question under Federal Rule of Civil Procedure 12(b)(6), rather than a jurisdictional question under Rule 12(b)(1).<sup>58</sup> The Court went on to hold that absent a clear statement by Congress that § 10(b) was to apply extraterritorially, courts should only apply the statute within the territorial borders of the United States.<sup>59</sup> In drawing the line between domestic and extraterritorial application of § 10(b), the Court rejected the conduct and effects test, holding 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.”<sup>60</sup> Emphasizing this “focus of the Exchange Act,” the Court held that the location of the purchase and sale of the security determines whether a particular case involves domestic or extraterritorial application—i.e., § 10(b) only applies to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”<sup>61</sup>

### III. THE RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT

#### A. *The RICO Statute*

In 1970, Congress enacted the Racketeering Influenced and Corrupt Organizations Act (RICO)<sup>62</sup> to prohibit patterns of racketeering activity in or affecting commerce, particularly in the form of organized crime.<sup>63</sup> All RICO claims have at least two common elements: an “enterprise” and a “pattern of racketeering activity.”<sup>64</sup> Specifically, RICO prohibits any person from (1) using any income derived from a pattern of racketeering activity to invest in any

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56. *In re Nat'l Austl. Bank Sec. Litig.*, No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at \*8 (S.D.N.Y. Oct. 25, 2006).

57. *Morrison*, 130 S. Ct. at 2876 (second alteration in original) (quoting *Morrison v. Nat'l Austl. Bank*, 547 F.3d 167, 175–76 (2d Cir. 2008)).

58. *Id.* at 2877.

59. *Id.* at 2877, 2888.

60. *Id.* at 2884.

61. *Id.*

62. Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1969 (2006).

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

64. 18 U.S.C. § 1962.

enterprise engaged in, or affecting, interstate or foreign commerce;<sup>65</sup> (2) acquiring, through a pattern of racketeering activity, any interest in any enterprise engaged in, or affecting, interstate or foreign commerce;<sup>66</sup> (3) participating, through a pattern of racketeering activity, in the conduct of the affairs of any enterprise engaged in, or affecting, interstate or foreign commerce;<sup>67</sup> or (4) conspiring to violate any of the previous three provisions.<sup>68</sup>

The statute defines an "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>69</sup> Consistent with the inclusiveness of the statutory language, the courts have construed the enterprise requirement very broadly.<sup>70</sup>

The RICO statute meticulously defines "racketeering activity."<sup>71</sup> "Racketeering activity" includes a broad range of federal crimes and other serious crimes, including bribery, counterfeiting, mail fraud, wire fraud, obstruction of justice, the interstate transportation of stolen property, the sale of stolen goods, bankruptcy fraud, fraud in the sale of securities, and extortion.<sup>72</sup>

Congress was more ambiguous as to the meaning of a "pattern" of racketeering activity. Under the statute, a "pattern of racketeering activity" consists of "at least two acts of racketeering activity" committed within a ten-year time period.<sup>73</sup> As innocuous as the statutory language sounds, disputes over the meaning of the pattern requirement have "dominated civil RICO litigation" since at least 1985.<sup>74</sup> The meaning of the "pattern of racketeering activity" requirement has significant implications in demarcating the line between domestic and extraterritorial applications of RICO.<sup>75</sup>

The "'pattern of racketeering activity' requirement came to prominence" in 1985 in the Supreme Court's opinion in *Sedima*,

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65. *Id.* § 1962(a).

66. *Id.* § 1962(b).

67. *Id.* § 1962(c).

68. *Id.* § 1962(d).

69. *Id.* § 1961(4).

70. *See, e.g.*, *United States v. Turkette*, 452 U.S. 576, 580–81 (1981) (including legitimate and illegitimate enterprises within the scope of § 1962); *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974) (finding that Congress intended the meaning of "enterprise" to be interpreted broadly).

71. *See* 18 U.S.C. § 1961(1) (setting forth the detailed meaning of "racketeering activity" in the statute).

72. *Id.*

73. *Id.* § 1961(5).

74. Gregory M. Wasson, "Pattern of Racketeering Activity" Under the Racketeer Influenced and Corrupt Organizations Act (RICO), 10 AM. JUR. PROOF OF FACTS 3D 289, § 5 (2010).

75. *See infra* Part V (arguing that RICO should have domestic application whenever there exists enough of a pattern of racketeering activity in the United States to state a claim).

*S.P.R.L. v. Imrex Co.*<sup>76</sup> While RICO was primarily intended to “provid[e] litigants with a potent new weapon to use against organized crime,”<sup>77</sup> private parties had begun exploiting the civil remedies available under RICO, with the result that RICO was “evolving into something quite different from the original conception of its enactors.”<sup>78</sup> *Sedima* presented an ideal case in which the Court could limit the civil application of RICO because it merely involved allegations of simple commercial fraud.<sup>79</sup>

In 1979, petitioner *Sedima*, a Belgian corporation, entered into a joint venture with respondent *Imrex Co.* to provide electronic components to a Belgian firm. The buyer was to order parts through *Sedima*; *Imrex* was to obtain the parts in this country and ship them to Europe. The agreement called for *Sedima* and *Imrex* to split the net proceeds. *Imrex* filled roughly \$8 million in orders placed with it through *Sedima*. *Sedima* became convinced, however, that *Imrex* was presenting inflated bills, cheating *Sedima* out of a portion of its proceeds by collecting for nonexistent expenses.<sup>80</sup>

The district court dismissed *Sedima*'s suit for failure to state a claim, holding that a RICO plaintiff must allege some “racketeering injury” independent of the injury caused by the individual predicate acts.<sup>81</sup> The Second Circuit affirmed the dismissal for failure to allege a racketeering injury.<sup>82</sup> The appellate court also stated a second ground for dismissing the complaint, holding that the complaint was “defective for not alleging that the defendants had already been criminally convicted of the predicate acts of mail and wire fraud, or of a RICO violation.”<sup>83</sup>

The Supreme Court reversed, holding that RICO does not require a separate “racketeering injury” and that criminal conviction for the predicate offenses is not a prerequisite to bringing a civil RICO action,<sup>84</sup> but the greater significance of the opinion for the “pattern of racketeering activity” requirement lies in a single footnote.<sup>85</sup> Writing for the Court, Justice White noted in footnote 14 that:

[T]he definition of a “pattern of racketeering activity” differs from the other provisions in § 1961 in that it states that a pattern “requires at least two acts of racketeering activity,” not that it “means” two such acts. The implication is that while two acts are necessary, they may not

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76. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); Wasson, *supra* note 74, § 5.

77. Ethan M. Posner, *Clarifying a “Pattern” of Confusion: A Multi-Factor Approach to Civil RICO’s Pattern Requirement*, 86 MICH. L. REV. 1745, 1745 (1988).

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

79. Wasson, *supra* note 74, § 5.

80. *Sedima*, 473 U.S. at 483–84.

81. *Id.* at 484.

82. *Id.* at 484–85.

83. *Id.* at 485.

84. *Id.* at 500.

85. Wasson, *supra* note 74, § 5.

be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern."<sup>86</sup>

Justice White also cited RICO's legislative history, which, he determined, "supports the view that two isolated acts of racketeering activity do not constitute a pattern."<sup>87</sup> Justice White quoted from the Senate Report: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one racketeering activity and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern."<sup>88</sup>

While the *Sedima* decision brought the "pattern of racketeering activity" requirement to the forefront by suggesting that a "pattern" requires "continuity plus relationship," the Court did not actually offer much in the way of specific guidance.<sup>89</sup> In the years following the *Sedima* decision, federal courts formulated a number of different tests for determining what constitutes a "pattern of racketeering activity."<sup>90</sup> The "relationship" prong of the pattern requirement has been largely uncontroversial in the lower courts.<sup>91</sup> However, prior to 1989, the courts came up with a number of different approaches to the "continuity" prong of the pattern analysis.<sup>92</sup>

In 1989 the Supreme Court confronted the pattern requirement in *H.J., Inc. v. Northwestern Bell Telephone Co.*<sup>93</sup> The case involved allegations by Northwestern Bell customers that Northwestern Bell had

sought to influence members of the [Minnesota Public Utilities Commission (MPUC)] in the performance of their duties—and in fact caused them to approve rates for the company in excess of a fair and reasonable amount—by making cash payments to commissioners, negotiating with them regarding future employment, and paying for

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86. *Sedima*, 473 U.S. at 497 n.14 (citing 18 U.S.C. § 1961 (2006)).

87. *Id.*

88. *Id.* (internal quotation marks omitted) (citing S. REP. NO. 91-617, at 158 (1969)).

89. *See* Wasson, *supra* note 74, § 5 (noting that footnote fourteen did not constitute a holding in the opinion, but that it opened the door for lower courts to begin developing various tests to determine whether a pattern existed).

90. *Id.* § 6.

91. *Id.* Generally, courts "have adopted similar multifactor tests, examining the circumstances of each case to determine whether the predicate acts share similar purposes, results, participants, victims, and methods of commission, and requiring that the predicate acts be committed somewhat closely in time to one another, involve the same victim, or involve the same kind of misconduct." *Id.*

92. *Id.* The four tests that emerged in the wake of *Sedima* are generally known as the "multiple schemes," the "multiple episodes," the "multiple acts," and the "multiple factors" (case-by-case) approaches, respectively. *See* Patrick J. Ryan, *The Civil RICO Pattern Requirement: Continuity and Relationship, a Fatal Attraction?*, 56 FORDHAM L. REV. 955, 965-66 (1988) (explaining the emergence of four views of the pattern requirement).

93. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989).

parties and meals, for tickets to sporting events and the like, and for airline tickets.<sup>94</sup>

The federal district court dismissed the complaint because “[e]ach of the fraudulent acts alleged by [petitioners] was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell’s ratepayers.”<sup>95</sup> The Eighth Circuit Court of Appeals affirmed, “confirming that under Eighth Circuit precedent [a] single fraudulent effort or scheme is insufficient to establish a pattern of racketeering activity, and agreeing with the District Court that petitioners’ complaint alleged only a single scheme.”<sup>96</sup>

The Supreme Court reversed the Eighth Circuit in *H.J.*, holding that “although proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant’s racketeering activity, it is implausible to suppose that Congress thought continuity might be shown *only* by proof of multiple schemes.”<sup>97</sup> In addition to rejecting outright the position taken by some lower courts that continuity be demonstrated by proof of multiple criminal schemes (i.e., the “multiple schemes” approach), the Court also rejected a simplistic test that would require only two racketeering acts in order to find a pattern (i.e., the “multiple acts” approach).<sup>98</sup> The Court held that the language of § 1961(5) merely sets a *minimum* standard of “at least two acts of racketeering activity,” and that the RICO statute “assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts involved.”<sup>99</sup>

Declaring that Congress intended the courts to “take a flexible approach” in identifying “patterns” of racketeering activity, the Court held that “a plaintiff or prosecutor must prove . . . continuity of racketeering activity, or its threat.”<sup>100</sup> While acknowledging the difficulty of formulating any one general test, the Court elaborated that continuity could be either a closed or open-ended concept. In a closed-ended case, a plaintiff can demonstrate continuity by showing the commission of predicate acts over “a substantial period of time”; in an open-ended case, a plaintiff can demonstrate continuity by showing the commission of predicate acts over a shorter period of time if the threat of continuity still exists.<sup>101</sup>

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94. *Id.* at 233.

95. *H.J., Inc. v. Nw. Bell Tel. Co.*, 648 F. Supp. 419, 425 (D. Minn. 1986), *aff’d*, 829 F.2d 648 (8th Cir. 1987), *rev’d*, 429 U.S. 229 (1989).

96. *H.J.*, 492 U.S. at 234–35 (alteration in original) (citations and internal quotation marks omitted).

97. *Id.* at 240.

98. *Id.* at 237–38.

99. *Id.*

100. *Id.* at 238, 241.

101. *Id.*

In the wake of the *H.J.* decision, the various lower courts have abandoned the “multiple schemes” approach altogether, altered the “multiple acts” approach to require relatedness and continuity, and continued to support some form of a multi-factor analysis.<sup>102</sup> In sum, while the Supreme Court has endorsed a “flexible” approach to the statute’s pattern requirement, RICO essentially provides a cause of action for a plaintiff who can demonstrate that a defendant, in connection with an enterprise, has engaged in continued criminal activity or is engaging in criminal activity that threatens to become “continuous.”

### B. Extraterritoriality and RICO: Pre-Morrison Jurisprudence

Like § 10(b) in the securities law context, the RICO statute is silent as to any extraterritorial application.<sup>103</sup> In light of this legislative silence, some courts have concluded that RICO does not apply extraterritorially at all.<sup>104</sup> The approach that a majority of courts had taken prior to *Morrison*, however, was to apply essentially the same conduct and effects test that they used in the § 10(b) context to determine whether subject matter jurisdiction existed.<sup>105</sup> Under

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102. Wasson, *supra* note 74, §§ 12–14. For example, in *Atlas Pile Driving Co. v. DiCon Financial Co.*, the Eighth Circuit recognized that the Supreme Court had rejected the “multiple schemes” approach and employed a multi-factor analysis. *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 993–94 (8th Cir. 1989). The Second, Fifth, Ninth, and Tenth Circuits have all tightened up the requirements under the so-called “multiple acts” approach to demand something more than simply two predicate acts. Wasson, *supra* note 74, § 13. Those courts have read *H.J.* to require some kind of long-term continuity in addition to multiple predicate acts. *Id.* Several circuits have reached different conclusions regarding the “multiple factor” approach. The Seventh Circuit has upheld its multi-factor approach as in keeping with *H.J.* See *Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 51 (7th Cir. 1989). The Third Circuit has issued contradictory opinions alternately upholding its multi-factor analysis as consistent with *H.J.*, and supporting a multi-factor approach but repudiating its own formulation of the relevant factors. See *Shearin v. E.F. Hutton Grp., Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989) (stating that, in *H.J.*, the Supreme Court had “developed the inquiry to include a multifactor approach”); *Swistock v. Jones*, 884 F.2d 755, 757–58 (3d Cir. 1989) (supporting a multi-factor approach but repudiating the Third Circuit’s formulation of relevant factors). The First Circuit has apparently abandoned the “multiple factors” approach in favor of a “bifurcated framework for determining continuity,” holding that “[a] party may establish continuity by demonstrating that the predicate acts amount to continued criminal activity . . . [or] by demonstrating that the predicate acts, though not continuous, threaten to become so.” *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 446 (1st Cir. 1990).

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

104. See, 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.”).

105. See, e.g., *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663–64 (9th Cir. 2004) (listing several cases that have applied the conducts and effects test); *Al-Turki*, 100 F.3d at 1051 (“Although there is little caselaw in this Circuit regarding the extraterritorial application of RICO, guidance is furnished by precedents concerning

this approach, 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 [in the United States].”<sup>106</sup>

As stated, these legal principles beg the underlying question of what exactly constitutes “extraterritorial application.” In other words, how do courts determine when a plaintiff is seeking to apply RICO extraterritorially, rather than domestically? Arguably, the conduct and effects test actually works to distinguish between extraterritorial and domestic application, rather than operating to classify different cases of extraterritorial application,<sup>107</sup> but there does not appear to be a clearly or consistently articulated answer as to what exactly constitutes “extraterritorial application” in the pre-*Morrison* RICO jurisprudence.<sup>108</sup>

For almost two decades after RICO’s enactment, courts failed to articulate any analytical framework regarding RICO’s extraterritorial applicability.<sup>109</sup> The Second Circuit did hold, however, in *Alfadda v. Fenn*, that “the mere fact that the corporate defendants are foreign entities does not immunize them from the reach of RICO.”<sup>110</sup> At least one commentator argued that courts should treat RICO like § 10(b) and apply the statute extraterritorially in certain circumstances because of the similarities between the purposes and judicial interpretations of RICO and federal securities laws.<sup>111</sup>

Beginning with the Second Circuit in 1996, federal courts began to develop modes of analysis for determining whether a particular case involved the extraterritorial application of RICO.<sup>112</sup> The Second Circuit first established a test for determining the extraterritorial

subject matter jurisdiction for international securities transactions and antitrust matters.”).

106. Liquidation Comm’n of Banco Intercont’l, S.A. v. Alvarez Renta, 530 F.3d 1339, 1351–52 (11th Cir. 2008).

107. Regardless of how one conceptualizes the conduct and effects test, the problem of identifying “extraterritorial application” (*vis-à-vis* domestic application) must be the primary inquiry, especially in light of *Morrison*’s strict holding that statutes have no extraterritorial application in the absence of an express legislative statement. *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2878 (2010).

108. See *Alvarez Renta*, 530 F.3d at 1351–52 (phrasing the question presented as whether RICO applies “to conduct occurring outside the United States,” but holding that RICO applied “extraterritorially” because “significant amounts of conduct in furtherance of the RICO conspiracy occurred in . . . the United States . . .”); *Al-Turki*, 100 F.3d at 1051 (suggesting that “extraterritorial application” of RICO means the application of the statute against “foreign entit[ies]”).

109. See *Al-Turki*, 100 F.3d at 1051 (recognizing, seventeen years after RICO’s enactment, that there was “little caselaw in this Circuit regarding the extraterritorial application of RICO”).

110. *Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir. 1991).

111. Kristen Neller, *Extraterritorial Application of RICO: Protecting U.S. Markets in a Global Economy*, 14 MICH. J. INT’L L. 357, 377–78, 380 (1993).

112. See *Al-Turki*, 100 F.3d at 1051 (borrowing the conduct and effects tests from transnational securities fraud jurisprudence).



application of RICO in *North South Finance Corp. v. Al-Turki*.<sup>113</sup> The controversy in *Al-Turki* revolved around the sale of a French bank.<sup>114</sup> The foreign holding companies that previously owned, and eventually sold, the bank alleged RICO violations by two French investment banking groups that acquired the bank.<sup>115</sup> The allegations were essentially that the acquirers:

- (1) artificially depressed the sale price of SEB by corrupting the bank's general manager in Paris, who then understated the bank's liquidity for financial and regulatory purposes and misused information drawn from company sources (including a New York office); and
- (2) manipulated post-sale transactions (some of them executed in New York) so that contingent payments of the purchase price would be fraudulently reduced or eliminated.<sup>116</sup>

Among the specific allegations was the claim that some of the communications between the acquirers and the bank's general manager occurred by telephone from France to New York.<sup>117</sup>

The Second Circuit affirmed the lower court's finding that the plaintiffs' allegations did not support subject matter jurisdiction under RICO.<sup>118</sup> To determine the extraterritorial reach of RICO in this case, the district court asked "whether the conduct of the defendants in the United States was material to the completion of a racketeering act."<sup>119</sup> Neither party challenged this conduct test on appeal, and the Second Circuit affirmed its validity.<sup>120</sup> However, the court explicitly left open the possibility that other tests might be available.<sup>121</sup>

As recently as 2008, the Eleventh Circuit confronted the issue of extraterritorial application of RICO for the first time in *Liquidation Commission of Banco Intercontinental SA v. Renta*.<sup>122</sup> The court surveyed the case law that had developed in other circuits before adopting the "more widely accepted view . . . 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."<sup>123</sup>

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113. *Id.*

114. *Id.* at 1048.

115. *Id.*

116. *Id.*

117. *Id.* at 1049.

118. *Id.* at 1050.

119. *Id.* at 1048 (internal quotation marks omitted).

120. *Id.* at 1050.

121. *Id.* at 1052.

122. *Liquidation Comm'n of Banco Intercont'l, S.A. v. Renta*, 530 F.3d 1339, 1351 (2008). ("The first question . . . is whether RICO applies extraterritorially at all.")

123. *Id.* at 1351-52.

*Renta* primarily involved an allegedly fraudulent scheme in which the defendant (*Renta*) negotiated with a Dominican bank<sup>124</sup> to take out loans on behalf of corporations that were controlled by the defendant and subsequently transferred those funds to himself in a personal capacity, leaving the debtor corporations unable to repay the loans.<sup>125</sup> The parties disputed whether these transfers were fraudulent, or whether they were in essence repayments to the defendant for loans that he had made to the companies that he controlled.<sup>126</sup> A jury found for the Commission, and *Renta* appealed a \$177 million judgment.<sup>127</sup>

On appeal, the Eleventh Circuit held that RICO applied in this case because “[s]ignificant amounts of conduct in furtherance of the RICO conspiracy occurred in both the United States as well as the Dominican Republic.”<sup>128</sup> Specifically, the court determined that “the conduct occurring in, or directed at, the United States . . . was not an insubstantial or preparatory part of the overall looting scheme, but the actual means of its consummation.”<sup>129</sup>

However, notwithstanding its willingness to apply RICO in this case, the court made a point of noting that “the conduct test is borrowed from the securities laws” and that “American courts will not exercise jurisdiction over a transnational securities fraud suit if the conduct occurring in the United States is preparatory or far removed from the consummation of the fraud.”<sup>130</sup> The court extrapolated that principle of securities law jurisprudence to the RICO context:

Likewise, extraterritorial RICO jurisdiction may not be appropriate when conduct occurring in or directed at the United States is not central to consummation of the racketeering, for example, where the sole nexus is utilization of American mail or wires to prepare for or cover up a fraud scheme perpetrated by foreigners against other foreigners.<sup>131</sup>

### C. *Extraterritoriality and RICO: Post-Morrison Jurisprudence*

The Supreme Court’s decision in *Morrison* is sure to shake up this jurisprudence that the lower courts had developed in the context of the extraterritorial application of RICO. Only two months after the Supreme Court handed down the *Morrison* decision, the federal

124. The bank had collapsed prior to the litigation, and the plaintiff (the Commission) in this litigation was a receivership established by the Dominican government to manage the bank’s affairs. *Id.* at 1343.

125. *Id.* at 1344–46.

126. *Id.* at 1347–49.

127. *Id.* at 1343.

128. *Id.* at 1352.

129. *Id.*

130. *Id.*

131. *Id.* (citing *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052–53 (2d Cir. 1996)).

district court for the Southern District of New York issued an opinion in *Cedeño v. Intech Group, Inc.* that applied *Morrison* in the RICO context.<sup>132</sup> In *Cedeño*, the defendants were foreign entities; their only connection to the United States was their alleged use of U.S. banks to “hold, move and conceal the fruits of fraud, extortion, and private abuse of public authority by Venezuelan government officials and their confederates.”<sup>133</sup>

Implicitly recognizing that *Morrison* abrogated the contrary holding in *Alfadda v. Fenn*,<sup>134</sup> the court held that in the absence of any specific statutory mention of “foreign enterprises,” the presumption against extraterritoriality dictated that RICO did not apply to foreign enterprises.<sup>135</sup> Specifically, the court interpreted the RICO statute as focusing not on prohibiting criminal activity, but rather on the relationship between that activity and an enterprise.

RICO is not a recidivist statute designed to punish someone for committing a pattern of multiple criminal acts. Rather, it prohibits the use of such a pattern to impact an enterprise in any of three ways: by using the proceeds of a pattern of predicate acts to invest in an enterprise; by . . . using a pattern of predicate acts to obtain or maintain an interest in an enterprise; or by . . . using the enterprise itself as a conduit for committing a pattern of predicate acts. Thus, the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity.<sup>136</sup>

One month after the *Cedeño* decision, the Second Circuit became the first appellate court to revisit the issue of extraterritorial application of RICO in light of *Morrison* in *Norex Petroleum Ltd. v. Access Industries, Inc.*<sup>137</sup> Norex Petroleum, a Canadian corporation, alleged violations of RICO in connection with “a widespread racketeering and money laundering scheme whose principal purpose [was] to take over a substantial portion of the Russian oil industry.”<sup>138</sup> Essentially, Norex claimed that the defendants orchestrated a scheme to illegally seize control of a Russian oil company in which Norex had owned a controlling stake, to illegally divert oil flows from companies that had outstanding oil debts to Norex, and to launder illegally diverted oil profits and to accomplish a “massive United States, United Kingdom, and Russian tax fraud through offshore ‘Slush Fund’ arrangements.”<sup>139</sup> The allegations

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132. *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473–74 (S.D.N.Y. 2010).

133. *Id.* at 472 (internal quotation marks omitted).

134. *See infra* note 166.

135. *Cedeño*, 733 F. Supp. 2d at 473.

136. *Id.* at 473–74 (citing 18 U.S.C. § 1962(a)–(c) (2006)).

137. *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32–33 (2d Cir. 2010) (per curiam).

138. *Norex Petrol. Ltd. v. Access Indus., Inc.*, 304 F. Supp. 2d 570, 572 (S.D.N.Y. 2004).

139. *Id.* at 573.

consisted largely of corruption and bribery of Russian government officials and judicial proceedings.<sup>140</sup>

The Second Circuit affirmed the dismissal of Norex's RICO claim.<sup>141</sup> Without offering much guidance as to what *might* constitute domestic application, the court held that "simply alleging that some domestic conduct occurred *cannot* support a claim of domestic application."<sup>142</sup> The court found that the "slim contacts with the United States" alleged in *Norex* were "insufficient to support extraterritorial application of the RICO statute."<sup>143</sup>

In the months following the *Norex* decision, several more federal district courts have addressed the problem of RICO's extraterritorial reach in light of *Morrison*. In *European Community v. RJR Nabisco, Inc.*, the district court for the Eastern District of New York embraced *Cedeño's* holding that RICO's focus is on the enterprise and dismissed the plaintiffs' RICO claims for the stated reason that they were extraterritorial in nature,<sup>144</sup> although in reality, the court's reasoning was much more convoluted.<sup>145</sup> The district court in *United States v.*

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140. *Id.* at 572–75.

141. Although the Second Circuit affirmed, it was on different grounds than the district court because *Morrison* dictated that the extraterritoriality inquiry was a merits question, rather than a jurisdictional question. *See Morrison v. Austl. Nat'l Bank*, 130 S. Ct. 2869, 2876 (2010); *Norex*, 631 F.3d 29 at 32–33.

142. *Norex*, 631 F.3d at 33 (emphasis added).

143. *Id.* Of course, the court's rather imprecise language somewhat confuses the issue. Under *Morrison*, no amount of contacts with the United States could be "sufficient to support extraterritorial application" of RICO; only a statutory mandate could support extraterritorial application. *See generally Morrison*, 130 S. Ct. at 2883–85 ("We know of no one who thought that the Act was intended to regulat[e] *foreign* securities exchanges—or indeed who even believed that under established principles of international law Congress had the power to do so." (alteration in original)) (quoting in part 15 U.S.C. § 78(a) (2006)) (internal quotation marks omitted). Presumably, the Second Circuit here means to say that the slim contacts with the United States in this case were insufficient to characterize this claim as seeking only domestic application of RICO.

144. *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 (NGG) (VVP), 2011 WL 843957, at \*4 (E.D.N.Y. Mar. 8, 2011) (holding that extraterritorial application of RICO is prohibited).

145. After concluding that the enterprise was the focus of RICO, the court stated that it must apply the "nerve center" test to determine the location of the enterprise. *Id.* at \*4–6. "The nerve center test 'identif[ies] the place where overall corporate policy originates or the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objectives.'" *Id.* at \*6 (quoting *Royal Indem. Co. v. Wyckoff Heights Hosp.*, 953 F. Supp. 460, 462–63 (E.D.N.Y. 1996)). The court then determined that the nerve center of the RICO enterprise alleged by the plaintiffs actually consisted of foreign entities other than the defendants in the litigation. *Id.* at \*7. In other words, the court determined that the domestic defendants did not have RICO liability because even if they were complicit in RICO violations, they were not responsible for masterminding the entire scheme. Essentially, the court treated all of the enterprises engaged in different transactions alleged by the plaintiffs as one collective "enterprise," determined that its "corporate policy" originated overseas with groups other than the defendants, and so reached the bizarre twin conclusions that

*Philip Morris USA, Inc.* reversed both itself and the D.C. Circuit upon reconsideration but held only that the effects test was no longer good law after *Morrison*.<sup>146</sup> In *In re Toyota Motor Corp.*, the District Court for the Central District of California suggested that the domestic nature of the defendant enterprise is necessary, but not necessarily sufficient, to establish RICO liability.<sup>147</sup> In *In re Le-Nature's, Inc.*, the District Court for the Western District of Pennsylvania followed *Cedeño*, holding that a domestic enterprise was subject to RICO liability because the focus of RICO was on the enterprise.<sup>148</sup> However, the court in *Le-Nature's* went out of its way to state that it had no occasion in this case to opine as to whether the defendants' conduct or effects alone would have been sufficient to subject them to RICO liability if the enterprise involved had not been domestic, or as to the treatment of "associated-in-fact" (i.e., not legally organized) enterprises.<sup>149</sup> In other words, the court acknowledged that the facts in *Le-Nature's* were relatively straightforward and clarified that its opinion was not intended to address a more controversial fact pattern.

#### IV. ANALYZING THE POST-MORRISON RICO JURISPRUDENCE

After *Morrison v. National Australia Bank*, the former foundational principles regarding extraterritoriality in the securities law context—i.e., the conduct and effects tests—have been replaced with a purely transactional analysis.<sup>150</sup> In light of this seismic shift in § 10(b) jurisprudence, courts are now faced with re-examining its copycat body of law, RICO. Two of *Morrison's* holdings appear applicable in the RICO context—namely, (1) that the extraterritoriality inquiry is a merits question rather than a jurisdictional question,<sup>151</sup> and (2) that a statute does not apply extraterritorially in the absence of a clear legislative statement to that effect.<sup>152</sup> The critical issue, however, involves the very definition of extraterritorial application.

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RICO applies to domestic enterprises but that the domestic enterprises sued in this case were not subject to RICO liability. *Id.* at \*7–8.

146. *United States v. Philip Morris USA, Inc.*, No. 99–2496 (GK), 2011 WL 1252662, at \*5 (D.D.C. Mar. 28, 2011).

147. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Products Liab. Litig.*, No. 8:10ML 02151 JVS (FMOx), 2011 WL 1485479, at \*17–18 (C.D. Cal. Apr. 8, 2011).

148. *Farm Credit Leasing Servs. Corp. v. Krones, Inc. (In re Le-Nature's, Inc.)*, No. 9–MC–162, 2011 WL 2112533, at \*3 n.9 (W.D. Pa. May 26, 2011).

149. *Id.*

150. *See Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2888 (2010) (Stevens, J., concurring) (noting that many courts had previously applied the effects test).

151. *Id.* at 2877.

152. *Id.*

There are at least three alternative tests that courts could invoke to define extraterritoriality under RICO in the wake of *Morrison*. First, courts could follow the *Cedeño* approach, which seems to be that RICO applies only to U.S. enterprises.<sup>153</sup> Second, courts could adopt the quasi-jurisdictional “contacts” approach employed by the Second Circuit in *Norex*.<sup>154</sup> A third approach could be to focus on a complete, but possibly subsidiary, pattern of racketeering activity in the United States. No court has yet taken this view, but this Note explores and ultimately endorses this third approach.

### A. *The Domestic Enterprises Approach of Cedeño*

The first alternative for defining extraterritoriality in the RICO context is that endorsed by the court in *Cedeño v. Intech Group, Inc.*<sup>155</sup> In *Cedeño*, the court zeroed in on language from *Morrison* that emphasized the “focus” of the Exchange Act and determined that the statutory focus of RICO was on the “enterprise” rather than on the pattern of racketeering activity.<sup>156</sup> Because the court viewed the statute to be principally concerned with the enterprise, rather than the criminal conduct itself, the court found it dispositive that the RICO statute does not explicitly mention foreign enterprises.<sup>157</sup> In the absence of such statutory language, the court held that RICO did not apply to foreign enterprises.<sup>158</sup> Other courts seem to have taken this approach as well.<sup>159</sup>

The *Cedeño* court’s reasoning is not beyond challenge, however. First, the *Cedeño* opinion assumes that the Second Circuit case of *Alfadda v. Fenn* is no longer good law in light of *Morrison*.<sup>160</sup> In *Alfadda*, the plaintiffs alleged that they were “defrauded when their stake in [defendant Saudi European Investment Corporation N.V. (SEIC)] was diluted by sales in contravention of an offering prospectus.”<sup>161</sup> SEIC was a foreign corporation, but the two individual defendants were U.S. citizens.<sup>162</sup> The allegedly misleading

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153. See *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) (“[N]owhere does the statute evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality.”).

154. See *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (per curiam) (holding that “simply alleging that some domestic conduct occurred cannot support a claim of domestic application” and noting “[t]he slim contacts with the United States” alleged in *Norex*).

155. *Cedeño*, 733 F. Supp. 2d at 471.

156. *Id.* at 473–74.

157. *Id.* at 474.

158. *Id.*

159. See, e.g., *European Cmty. v. RJR Nabisco, Inc.*, No. 02–CV–5771 (NGG) (VVP), 2011 WL 843957, at \*4 (E.D.N.Y. Mar. 8, 2011) (holding that extraterritorial application of RICO is prohibited).

160. *Cedeño*, 733 F. Supp. 2d at 474 n.3.

161. *Alfadda v. Fenn*, 935 F.2d 475, 476 (2d Cir. 1991).

162. *Id.*

prospectus was distributed outside the United States, and the securities offerings were made outside the United States.<sup>163</sup> However, much of the planning and negotiating leading up to the second offering occurred in the United States.<sup>164</sup> In *Alfadda*, the Second Circuit applied RICO and held that “[t]he mere fact that the corporate defendants are foreign entities does not immunize them from the reach of RICO.”<sup>165</sup>

The *Cedeño* court acknowledged the *Alfadda* case in a footnote, but dismissed it as “exactly the kind [of approach] that *Morrison* found to impermissibly ‘disregard . . . the presumption against extraterritoriality.’”<sup>166</sup> While that claim arguably has some merit, it is not altogether clear that *Alfadda* is now bad law. The reason for discounting *Alfadda* as contrary to *Morrison* is that the Second Circuit in *Alfadda* took the lack of an explicit reference to “foreign enterprise[s]” in the RICO statute to mean that “enterprise,” as it is used in the statute, includes *any* enterprise, whether foreign or domestic.<sup>167</sup> The reasoning of the *Alfadda* court does seem arguably counter to the holding in *Morrison*, but the *Cedeño* court unjustifiably assumed, without citing any supporting authority, that the question of extraterritoriality turns simply on whether the defendant enterprise is foreign or domestic.<sup>168</sup>

In reality, it is not at all clear that the general domestic or foreign status of the enterprise is the determinative factor in classifying a particular case as seeking either domestic or extraterritorial application.<sup>169</sup> *Cedeño* and *Le-Nature’s* both involved easy fact patterns: in *Cedeño*, the defendants were indisputably foreign entities,<sup>170</sup> and in *Le-Nature’s*, the defendant entities were apparently legally organized under domestic law.<sup>171</sup> A more complicated fact pattern would strain this view of RICO. For example, it is very plausible that an enterprise organized under foreign law could orchestrate a racketeering scheme that was

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163. *Id.* at 477–78.

164. *Id.*

165. *Id.* at 479.

166. *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 474 n.3 (S.D.N.Y. 2010).

167. *Alfadda*, 935 F.2d at 479.

168. *See Cedeño*, 733 F. Supp. 2d at 474 (“If, as noted above, RICO evidences no concern with foreign enterprises, RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.”).

169. Indeed, prior to *Morrison*, federal courts looked to the locus of the racketeering conduct and its effects, rather than whether an enterprise itself was foreign or domestic in nature. *See, e.g.*, *Sec. Exch. Comm’n v. Berger*, 322 F.3d 187, 192–93 (2d Cir. 2003).

170. *Cedeño*, 733 F. Supp. 2d at 472.

171. *Farm Credit Leasing Servs. Corp. v. Kronos, Inc. (In re Le-Nature’s, Inc.)*, No. 9–MC–162, 2011 WL 2112533, at \*3 (W.D. Pa. May 26, 2011). The court implicitly acknowledged the simplicity of the facts in this case by noting that it was unnecessary to consider what the outcome would be if the defendant entities were not legally organized under domestic law. *Id.*

conducted entirely within the United States. In such a case, if the situs of the enterprise (i.e., foreign or domestic) is not determinative, then while the *reasoning* in *Alfadda* may seem contrary to the *Morrison* approach, the *Alfadda* holding would still be good law.

Even if *Alfadda* is no longer good law, the *Cedeño* court still failed to adequately consider existing RICO jurisprudence. The court based its decision upon a determination that RICO “is focused on how a pattern of racketeering affects an enterprise” and is not “designed to punish someone for committing a pattern of multiple criminal acts.”<sup>172</sup> However, the Supreme Court has stated that “the heart of any RICO complaint is the allegation of a *pattern* of racketeering.”<sup>173</sup> Thus, *Cedeño* seems to be at least partially inconsistent with a statement by the Supreme Court regarding the centrality of the pattern requirement.

Indeed it is silliness to assert that the “enterprise” element is any more important to a RICO claim than the “pattern of racketeering activity” element. In citing the statute’s name (i.e., the Racketeering Influenced and Corrupt Organizations Act) to support such a position, the *Cedeño* and *Le-Nature’s* courts apparently glossed over the first word of the RICO acronym in eager determination to focus on the last.<sup>174</sup> Although both are fundamental elements of a RICO claim, RICO chiefly punishes patterns of racketeering activity, not the conducting of an enterprise. This is a statute that was originally enacted to target organized *crime*, not just any organized activity. The case law, which heavily focuses on defining a “pattern of racketeering activity,”<sup>175</sup> bears out this emphasis, and the Supreme Court itself has held that the “pattern of racketeering activity” element is the “heart” of RICO.<sup>176</sup>

In addition to the doctrinal problems posed by the *Cedeño* approach, there is also a significant practical difficulty—namely, determining whether a particular enterprise is foreign or a domestic. In *Cedeño*, there was nothing difficult about classifying the defendant enterprise as foreign.<sup>177</sup> Similarly, in *Le-Nature’s*, there was no dispute that the defendant enterprises were domestic.<sup>178</sup> However, every case is not so easy. Because “enterprise” is so liberally defined in the RICO statute, it is all but inevitable that some “enterprises”

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172. *Cedeño*, 733 F. Supp. 2d at 473.

173. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987) (per curiam).

174. *Cedeño*, 733 F. Supp. 2d at 473; *In re Le-Nature’s*, 2011 WL 2112533, at \*3.

175. See *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 662 (7th Cir. 1998) (“The court dismissed all of the RICO claims on the grounds that Kauthar failed to allege satisfactorily the requisite predicate acts, failed to allege a pattern of racketeering activity and failed to allege other essential elements of individual RICO claims under 18 U.S.C. § 1962(a)–(d).”).

176. *Agency Holding Corp.*, 483 U.S. at 154.

177. *Cedeño*, 733 F. Supp. 2d at 472.

178. *In re Le-Nature’s*, 2011 WL 2112533, at \*3.



sued under RICO will lack any form of official organization at all. If a court were presented with a multinational group of individuals, operating in several different countries including the United States, the seemingly straightforward rule of *Cedeño* would suddenly be much more complicated because it would be necessary somehow to classify this informal enterprise as either foreign or domestic.<sup>179</sup>

The *RJR Nabisco* court attempted to resolve this difficulty by invoking the “nerve center” test, but identifying an enterprise as either foreign or domestic is still only one step in the *Cedeño* analysis. It strains credulity to argue that Congress intended RICO to target an informal enterprise that does much of its planning in the United States but operates entirely overseas, but did not intend it to apply to an informal enterprise that does its planning overseas but conducts all of its racketeering activities in the United States.

### B. The “Contacts” Approach of *Norex*

Another possible way to address problems of extraterritorial application of RICO is through the quasi-jurisdictional framework adopted by the Second Circuit in *Norex Petroleum Ltd. v. Access Industries, Inc.*<sup>180</sup> The court in *Norex* seemed to engage in an analysis of the contacts between the conduct alleged in the complaint and the United States.<sup>181</sup> This test appears to be a carryover from the conduct and effects tests that the Second Circuit had used prior to *Morrison*. Indeed, the court in *Norex* even reverted to pre-*Morrison* language in stating that “[t]he slim contacts with the United States alleged by *Norex* are insufficient to support extraterritorial application of the RICO statute.”<sup>182</sup> Of course, *Morrison* made clear that no amount of contacts could support extraterritorial application of RICO (or any other statute), but only an express statement by Congress.<sup>183</sup> This statement in *Norex* looks like an attempt by the Second Circuit to reconcile *Morrison* with its pre-existing, jurisdiction-focused conduct test jurisprudence.

The conduct test, as it existed prior to *Morrison*, supported federal jurisdiction over a RICO claim when the defendant's activities in the United States were more than “merely preparatory” to a racketeering scheme conducted elsewhere, and these activities or culpable failures to act within the United States “directly caused” the

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179. Cf. *id.* at \*3 n.9 (“Although I recognize the problems that might arise in different RICO contexts, I do not opine as to how today's findings apply to an associated-in-fact enterprise, which might not have a distinct “location” as does an enterprise that is a legal entity.”).

180. *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32–33 (2d Cir. 2010) (per curiam).

181. *Id.* at 33.

182. *Id.*

183. *Id.*

claimed losses.<sup>184</sup> While perhaps walking back from this precise formulation in light of *Morrison*, the Second Circuit in *Norex* nonetheless sounded less than revolutionary in declaring that “simply alleging that some domestic conduct occurred cannot support a claim of domestic application” and noting the “slim contacts with the United States alleged by *Norex*.”<sup>185</sup>

The Second Circuit may indeed be right if the *Norex* opinion intended to suggest that *Morrison* may not necessarily compel the conclusion that the conduct test cannot be used to determine the applicability of RICO. The primary requirement of *Morrison* seems to be that the inquiry be framed in terms of whether the application of the statute sought by the plaintiff is domestic or extraterritorial in nature, not necessarily that courts refrain from employing the conduct test.<sup>186</sup> Because there can be no extraterritorial application of a statute without an explicit congressional statement to that effect,<sup>187</sup> the only question that needs to be answered in the RICO context is whether the court is dealing with a garden-variety domestic application, or whether the plaintiff is seeking to apply the statute extraterritorially.

One must consider, then, whether the Second Circuit’s new contacts–conduct test from *Norex* is the best way to delineate the boundaries of domestic application. The crux of the Second Circuit’s approach in *Norex* appears to be determining whether the primary racketeering scheme—or at least enough of it—was carried out in U.S. territory.<sup>188</sup> One problem with this formulation is that it answers the original question only to create another question—namely, how is a court to determine what quantum of conduct in the United States is enough? *Norex* tells us that “some” contacts with the United States—in this case, routing (or laundering) money through U.S. banks<sup>189</sup>—are not enough,<sup>190</sup> but this case hardly offers much

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184. See *Itoba Ltd. v. LEP Grp. PLC*, 54 F.3d 118, 122 (2d Cir. 1995) (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir. 1975)); *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991) (reversing the district court’s dismissal for lack subject matter jurisdiction where the defendant company’s misleading securities filings were more than merely preparatory and were the cause of significant equity losses for American shareholders in the defrauded company). For a discussion of the ambiguity and complexity existing in the “conduct test” jurisprudence, see *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2879 (2010) (“The Second Circuit had thus established that application of § 10(b) could be premised upon either some effect on American securities markets or investors (*Schoenbaum*) or significant conduct in the United States (*Leasco*).”).

185. *Norex*, 631 F.3d at 33.

186. *Id.*

187. *Morrison*, 130 S. Ct. at 2877–78.

188. *Id.* at 2878.

189. See *Norex*, 631 F.3d at 33 (holding that some domestic conduct is not enough to justify application of RICO).

190. *Norex Petrol. Ltd. v. Access Indus., Inc.*, 304 F. Supp. 2d 570, 572–75 (S.D.N.Y. 2004).

guidance beyond its own facts. Of course, the *Norex* approach creates neither more nor less uncertainty than the pre-*Morrison* conduct test because it is, after all, essentially the same inquiry rebranded.

Arguably, the *Cedeño* and *Norex* approaches are not inconsistent with one another; at least one commenting practitioner has asserted that the Second Circuit actually endorsed the *Cedeño* decision in *Norex*.<sup>191</sup> But while the decisions may not contradict one another, they nonetheless appear to have been decided on different grounds. The court in *Cedeño* emphasized that the defendant enterprise was a “foreign enterprise,” to which the RICO state statute did not apply.<sup>192</sup> The Second Circuit could have followed that same reasoning in *Norex*—although there was perhaps a better argument that this case involved a domestic enterprise<sup>193</sup>—but the court instead pointed to the tangential relationship between the racketeering scheme and the United States as the basis for its determination that RICO did not apply.<sup>194</sup>

## V. A BETTER ALTERNATIVE

### A. *The Need for a Third Alternative*

In the search for a standard by which to determine whether a particular application of RICO would be domestic or extraterritorial, both the *Cedeño* and *Norex* approaches fall short. The *Cedeño* approach is saddled with doctrinal and practical complications.<sup>195</sup> The *Cedeño* court focused almost exclusively on the enterprise involved in RICO allegations, a narrow focus that is not supported by existing case law.<sup>196</sup> The *Norex* approach fails to adequately answer the question that *Morrison* sparked in the RICO context.<sup>197</sup> Phrased in language that is clearly contrary to the holding in *Morrison*, the *Norex* court’s quasi-jurisdictional formulation fails to offer satisfactory guidance as to when RICO allegations are domestic in nature rather than extraterritorial.<sup>198</sup>

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191. *Norex*, 631 F.3d at 33.

192. See Jonathan C. Cross, *RICO's Post-'Morrison' Reach: Will Other Courts Adopt the 2nd Circuit's Approach?*, LAW.COM (Nov. 12, 2010), <http://www.law.com/jsp/article.jsp?id=1202474772016>.

193. *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 472 (S.D.N.Y. 2010).

194. *Norex*, 631 F.3d at 33.

195. See *supra* Part IV.A.

196. See *supra* Part IV.A.

197. See *supra* Part IV.B.

198. *Id.*

### B. A Complete Pattern of Racketeering Activity in the United States

A third, better alternative to delineating the scope of domestic application of RICO would be to apply RICO in any case where a plaintiff alleges the commission of enough predicate acts in the United States within the statutory time period to establish a “pattern of racketeering activity,” even if the “enterprise” is a foreign enterprise or the scheme involves the commission of predicate acts in a foreign jurisdiction. This approach would require a paradigm shift from viewing any given racketeering scheme as essentially one specific “pattern of racketeering activity,” to viewing every racketeering scheme as a consisting of potentially numerous patterns of racketeering activity in multiple jurisdictions.

In borrowing the extraterritoriality jurisprudence from the securities law context, courts have tended to view the “pattern of racketeering activity” requirement of RICO<sup>199</sup> similarly to the “purchase or sale” requirement of § 10(b).<sup>200</sup> This tendency has resulted in courts trying to fit the square peg of RICO jurisprudence into the round hole of securities law jurisprudence. While a securities fraud claim, no matter how elaborate, is centered around a single purchase or sale of a security, the “heart” of a RICO claim is “the allegation of a *pattern* of racketeering activity.”<sup>201</sup> This fundamental difference manifests itself in the challenge of defining the boundaries of domestic application of each statute.

In the § 10(b) context, the Supreme Court has identified a straightforward method of determining whether a particular plaintiff is seeking domestic or extraterritorial application of the statute.<sup>202</sup> Under *Morrison*’s transactional test, the court need only inquire whether the stock in question was traded on domestic exchanges or otherwise purchased in the United States.<sup>203</sup> But there is no such single transaction to which a court can sensibly anchor an entire “pattern of racketeering activity.” As the Court held in *H.J.*, the pattern requirement is a flexible concept that essentially requires

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199. See 18 U.S.C. § 1961 (2006) (defining a “pattern of racketeering activity” as requiring “at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity”).

200. See 15 U.S.C. § 78j (2006) (prohibiting fraud “in connection with the purchase or sale of any security”).

201. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987).

202. See *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2888 (2010) (“Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”).

203. *Id.*

only that a plaintiff demonstrate either past, continued criminal activity or criminal activity that threatens to become "continuous."<sup>204</sup>

Using this third approach to determine what constitutes extraterritorial application of RICO, courts would move away from the view of racketeering activity as necessarily a single, broad-based scheme and instead focus on the statutory proscription of specific predicate crimes. The result would be an analysis that simply looks to identify continued criminal activity, or ongoing criminal activity with the threat of becoming continuous, undertaken in connection with the conduct of an enterprise and consisting of at least two acts of racketeering activity within a ten-year time period.<sup>205</sup> A court utilizing this approach would not engage in an inquiry into whether a particular enterprise was foreign or domestic, or how significant any acts occurring in the United States were to the overall racketeering scheme. An enterprise based overseas and committing a pattern of racketeering activity that primarily occurred overseas could therefore still have liability under RICO if it or an affiliate engaged in a course of continuous criminal conduct involving at least two violations enumerated in the statute<sup>206</sup> in U.S. territory.

The third approach is faithful to both the RICO statute and to the holding in *Morrison*. In fact, this approach is actually more consistent with a description of *Morrison's* holding in the *Cedeño* opinion than the rest of the *Cedeño* opinion itself is. According to the *Cedeño* court, *Morrison* clarified that the statutory language defining "interstate commerce" as including activities between any foreign country and any state "was only intended to catch situations where, for example, a foreign person perpetrated a fraud in the United States."<sup>207</sup> This third approach is also consistent with the spirit of the Second Circuit's *Norex* decision, but this alternative view offers a more doctrinally sound and practically useful framework for evaluating whether an alleged RICO violation is domestic or extraterritorial. This third approach treats the extraterritoriality issue as more of a merits question, as *Morrison* requires, and less like a preliminary quasi-jurisdictional issue. Instead of framing the inquiry as whether the defendant has "sufficient contacts" with the U.S. to be subject to RICO liability, this approach would simply examine whether the defendant has in fact engaged domestically in a pattern of racketeering in connection with carrying on an enterprise.

One criticism of this third approach may be that it does not offer specific guidance for a borderline case in which a defendant has allegedly engaged in a course of criminal conduct that spans multiple

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204. *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238, 241–42 (1989).

205. For a list of the enumerated predicate crimes, see 18 U.S.C. § 1961 (2006).

206. *See supra* note 199.

207. *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) (citing *Morrison*, 130 S. Ct. at 2882 & n.7).

jurisdictions. However, neither the *Cedeño* approach nor the *Norex* approach can claim any greater clarity. *Cedeño* provides clarity only as long as the enterprise can be easily classified as either domestic or foreign; *Norex* employs a typical case-by-case analysis of the contacts that a particular RICO defendant or scheme has to the United States. It is true that this Note also endorses a “flexible approach,” but in reality, this third approach involves no more flexibility than that inherent in the “pattern” analysis that the Court adopted in *H.J.* In other words, this approach does not add any additional uncertainty to the existing RICO analysis in a case not involving extraterritoriality.

In light of the handful of cases decided since *Morrison*, perhaps the strongest criticism of this approach is that it focuses too heavily on the “pattern of racketeering activity” element, and wrongly deemphasizes the “enterprise” element, in the RICO analysis. While the structure of the statutory language could arguably lend some credence to the argument that the enterprise is the “focus” of RICO,<sup>208</sup> such a position is inconsistent with the Supreme Court’s acknowledgement that the “pattern of racketeering activity” element is central to the prohibitions of RICO.<sup>209</sup> Furthermore, common sense suggests that Congress intended RICO to apply to a generally foreign enterprise that engaged in racketeering activity in the United States.

## VI. CONCLUSION

In the wake of *Morrison*, lower courts will be forced to reexamine the previously settled approach to extraterritoriality and RICO. The RICO jurisprudence, which had so closely tracked the doctrinal development of securities law jurisprudence for so many years, must now diverge from the § 10(b) framework, at least for purposes of drawing the line between domestic and extraterritorial application. Two courts have offered different takes on the implications of *Morrison* in the RICO context. The U.S. District Court for the Southern District of New York has embraced the theory that the line between domestic and extraterritorial application of RICO should be drawn based on whether the enterprise involved is foreign or domestic.<sup>210</sup> The Second Circuit has appeared to advocate a contacts-

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208. The statute chiefly prohibits (1) using any income derived from a pattern of racketeering activity to invest in any enterprise engaged in, or affecting, interstate or foreign commerce; (2) acquiring, through a pattern of racketeering activity, any interest in any enterprise engaged in, or affecting, interstate or foreign commerce; and (3) participating, through a pattern of racketeering activity, in the conduct of the affairs of any enterprise engaged in, or affecting, interstate or foreign commerce. 18 U.S.C. § 1962 (2006).

209. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987).

210. *Cedeño*, 733 F. Supp. 2d at 474.

based, quasi-jurisdictional test to determine whether a particular case involves sufficient contacts with the United States to invoke RICO.<sup>211</sup>

This Note advocates a third approach that would adhere more closely to the statutory language and more faithfully to existing case law. RICO should have domestic application when a plaintiff alleges the commission of enough predicate acts in the United States within the statutory time period to establish a “pattern of racketeering activity,” regardless of the situs of the enterprise or the commission of additional predicate acts in a foreign jurisdiction. This approach represents the best way to reconcile prior RICO jurisprudence with the Court’s renewed emphasis on the presumption against extraterritorial application of U.S. laws in *Morrison*.

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211. *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010) (per curiam).

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