

# The Extraterritorial Defense: A Border to RICO Claims Arising from International Transactions

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**W**HILE the Racketeer Influenced and Corrupt Organizations Act (“RICO”)<sup>1</sup> has its roots in the fight against organized crime,<sup>2</sup>

plaintiffs’ attorneys, seeking RICO’s treble damages and award of attorneys’ fees,<sup>3</sup> have long sought to fit the RICO square peg into the round holes of basic fraud and business disputes. International business

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<sup>1</sup> 18 U.S.C. § 1962 et seq.

<sup>2</sup> *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (Congress’s purpose in enacting RICO “was to attack the infiltration of organized crime and racketeering into legitimate organizations ... .”) (internal quotations omitted); Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1155 (11th Cir. 2006) (“Congress

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intended RICO’s civil remedies to help eradicate organized crime from the social fabric by divesting the association of the fruits of ill-gotten gains”) (internal quotations omitted).

<sup>3</sup> 18 U.S.C. § 1964(c).

transactions, in particular, are often vulnerable to RICO claims.

Every RICO claim requires: (1) “racketeering activity” that is (2) conducted through an “enterprise.”<sup>4</sup> A RICO “enterprise” is the “vehicle through which the unlawful pattern of racketeering activity is committed.”<sup>5</sup> “Racketeering activity” consists of any of the criminal offenses, commonly referred to as “predicate acts,” identified in 18 U.S.C. § 1961(1).<sup>6</sup> Mail and wire fraud are the most commonly pled predicate acts.<sup>7</sup>

<sup>4</sup> Kenda Corp., Inc. v. Pot O’Gold Money Leagues, Inc., 329 F.3d 216, 233 (1st Cir. 2003); Terrell v. Eisner, 104 F. App’x 210, 212 (2d Cir. 2004); Liggon-Redding v. Cong. Title, 229 F. App’x 105, 106 (3d Cir. 2007); Dickerson v. TLC The Laser Eye Ctr. Inst., Inc., 493 F. App’x 390, 394 (4th Cir. 2012); Crowe v. Henry, 43 F.3d 198, 204 (5th Cir. 1995); Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882, 886 (6th Cir. 1990); United States v. Murphy, 768 F.2d 1518, 1531 (7th Cir. 1985); McDonough v. Nat’l Home Ins. Co., 108 F.3d 174, 177 (8th Cir. 1997); Sun Sav. & Loan Ass’n v. Dierdorff, 825 F.2d 187, 194–195 (9th Cir. 1987); Dummar v. Lummis, 543 F.3d 614, 621 (10th Cir. 2008); Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1264 (11th Cir. 2004); United States v. Philip Morris Inc., 116 F. Supp.2d 131, 135 (D.D.C. 2000).

<sup>5</sup> Nat’l Org. for Women v. Scheidler, 510 U.S. 249, 259 (1994). An enterprise “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” Boyle v. United States, 556 U.S. 938, 944 (2009) (quoting 18 U.S.C. § 1961(4)).

<sup>6</sup> Ironworkers Local Union 68 v. Astrazeneca Pharms., LP, 634 F.3d 1352, 1358 n.13 (11th Cir. 2011).

<sup>7</sup> See Meier v. Musburger, 588 F. Supp.2d 883, 904 (N.D. Ill. 2008) (“Given the breadth of the mail and wire fraud statutes, [], mailings and wirings have always been favored predicate acts in cases like this where ordinary disputes are sought to be transformed into RICO claims.”); Midwest

Prior to 2010, federal courts applied varying approaches to resolve the issue whether RICO should apply to a case involving racketeering activity occurring outside of the United States, or involving enterprises, plaintiffs and/or defendants located outside the United States. The RICO statute is silent as to its extraterritorial application.

In 2010, the Supreme Court addressed the issue of whether section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) had extraterritorial application.<sup>8</sup> In concluding it did not, the Supreme Court reiterated the “longstanding principle of American law that ... unless there is the affirmative intention of Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.”<sup>9</sup> Because the Exchange Act is silent as to extraterritorial application, the Court concluded unequivocally: “When a statute gives no clear indication of an extraterritorial application, it has none.”<sup>10</sup>

Since *Morrison*, federal courts have overwhelmingly concluded that because RICO is silent as to its extraterritorial application, *it has none*. With federal courts consistently concluding that RICO does not apply extraterritorially, the battle lines are drawn at the outset: whether the complaint in question alleges an extraterritorial RICO claim. Predictably, counsel for RICO

Grinding Co., Inc. v. Spitz, 976 F.2d 1016, 1025 (7th Cir. 1992) (“The widespread abuse of civil RICO stems from the fact that all modern business transactions entail use of the mails or wires”).

<sup>8</sup> *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

<sup>9</sup> *Id.* at 2877 (internal quotations omitted).

<sup>10</sup> *Id.* at 2878.

plaintiffs argue there are no extraterritorial facts, while RICO defendants seek to peel back and expose the extraterritorial elements of the RICO claim. This current battleground is highly relevant to international cross-border business transactions. Courts post-*Morrison* are all over the board in making this fact-based determination.

The extraterritorial defense can be a powerful weapon for defendants in combatting a RICO claim, which, because of its stigma and potency, has itself been described as the “thermonuclear option” for plaintiffs.<sup>11</sup> This article examines: (1) the pre-*Morrison* jurisprudence regarding the extraterritorial application of RICO; (2) the *Morrison* decision; (3) post-*Morrison* decisions regarding the extraterritorial application of RICO; and (4) an ensuing set of questions to consider when making an effective motion to dismiss a RICO claim based on the extraterritorial defense.

## I. Pre-*Morrison* Jurisprudence Regarding the Extraterritorial Application of RICO

Pre-*Morrison*, some courts had held that RICO could not be applied extraterritorially at all, given Congress’s silence on the subject.<sup>12</sup> Most federal courts,

however, applied variations of the “conduct” test (focusing on whether certain conduct occurred in the United States) and/or the “effects” test (focusing on whether the effects of certain conduct were felt in the United States).<sup>13</sup> The “conduct” and “effects” tests generally were borrowed in the RICO context from tests applied in cases involving the Exchange Act.<sup>14</sup>

There was some variation among the federal courts in the way in which the “conduct” and “effects” tests were applied. The Ninth Circuit blended the two tests and concluded more generally that provided plaintiffs alleged that defendants were *engaged* in substantial fraudulent activity in the United States that *affected* United States citizens and commerce, there was no impermissible extraterritorial application of RICO.<sup>15</sup>

The Second Circuit affirmed a district court’s use of the conducts test only,<sup>16</sup>

<sup>11</sup> *Neiman Marcus Grp., Inc. v. Dispatch Transp. Corp.*, No. 09 CV 6861, 2011 WL 1142922, at \*6 (S.D.N.Y. Mar. 17, 2011) (citation omitted) (“Allegations of RICO violations not only have a stigmatizing effect on those named as defendants, but carry also the possibility of treble damages. RICO therefore is an ‘unusually potent weapon,’ sometimes referred to as the ‘litigation equivalent of a thermonuclear device.’”).

<sup>12</sup> *See e.g.*, *Jose v. M/V Fir Grove*, 801 F. Supp. 349 (D. Or. 1991).

<sup>13</sup> *See e.g.*, *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1130–1131 (D.C. Cir. 2009); *Aerovias de Mexico, S.A. de C.V. v. De Prevoisin*, 224 F.3d 766, 2000 WL 992495 (5th Cir. 2000); *Liquidation Comm’n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1351–1352 (11th Cir. 2008) (citing *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663–664 (9th Cir. 2004).

<sup>14</sup> *Poulos*, 379 F. 3d at 663.

<sup>15</sup> *Id.*

<sup>16</sup> Plaintiffs in *North South Fin. Corp v. Al-Turki*, did not challenge on appeal the district court’s use of a “conducts” test only to decide the extraterritorial issue; thus, the Second Circuit did not decide the issue of whether that test alone was appropriate. 100 F.3d at 1052. The Second Circuit did note, however, that other Circuits used a combination of the “conduct” and “effects” tests, typically borrowed from securities law. *Id.*

applying a conducts test more stringent than that applied in other circuits by requiring that the domestic conduct alleged be material to the completion of the fraud and a direct cause of the alleged injury.<sup>17</sup>

The Eleventh Circuit broadened the Second Circuit's standard by requiring "conduct material to the completion of the racketeering" in the United States (as opposed to conduct material to the completion of the *fraud*), or "significant effects of the racketeering" to be felt in the United States, for RICO to apply.<sup>18</sup> Both the Second and the Eleventh Circuits cautioned against the use of the conduct test alone, stating that "preparatory" conduct, or conduct "far removed from the consummation of the fraud," alone would not work, such as use of American mail or wires to prepare for or cover up a fraud scheme perpetrated by foreigners against other foreigners.<sup>19</sup>

The District of Columbia Circuit tweaked its own effects test and required that the conduct have substantial, direct, and foreseeable effect within the United States for RICO to be applicable.<sup>20</sup>

## II. The *Morrison* Decision

The Supreme Court decided *Morrison* on June 24, 2010. *Morrison* did not involve RICO, but rather involved a 10b-5 securities claim made by Australian

investors in an Australian bank whose stock was not traded on any exchange in the United States. The Supreme Court in *Morrison* first had to determine whether Section 10b-5 applied extraterritorially. The Supreme Court stated: "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>21</sup> It then held: "When a statute gives no clear indication of an extraterritorial application, it has none."<sup>22</sup>

In reaching this conclusion, the Supreme Court examined the circuit courts' jurisprudence on the issue, noting that the Second Circuit had developed two tests for determining whether 10b-5 could be applied extraterritorially in a case: (1) the "effects" test – whether the wrongful conduct had a substantial effect in the United States or on United States citizens; or (2) the "conduct" test – whether the wrongful conduct occurred in the United States.<sup>23</sup> The Supreme Court noted the difficulty in administering the two tests, the Second Circuit's ultimate mixing of the two tests, the actions of other circuits in producing a "proliferation of vaguely relating variations on the [Second Circuit's] 'conduct' and 'effects' tests," and criticism by commentators of the tests based on their unpredictable and inconsistent application.<sup>24</sup> For these reasons, it rejected the "conduct" and "effects"

<sup>17</sup> *Id.* at 1053.

<sup>18</sup> *Renta*, 530 F.3d at 1351–1352 (emphasis added).

<sup>19</sup> *Id.* at 1352; see also *North South*, 100 F.3d at 1052–1053.

<sup>20</sup> *Philip Morris*, 566 F.3d at 1130.

<sup>21</sup> *Morrison*, 130 S. Ct. at 2877 (internal quotations omitted) (citations omitted).

<sup>22</sup> *Id.* at 2878.

<sup>23</sup> *Id.* at 2878–2879 (citations omitted).

<sup>24</sup> *Id.* at 2879–2881.

tests.<sup>25</sup> The Supreme Court then simply concluded that because there is no affirmation indication in the Exchange Act that it be applied extraterritorially, the Exchange Act does not.<sup>26</sup>

The investor plaintiffs in *Morrison* then argued that they were not seeking its extraterritorial application because the Australian bank had purchased a bank headquartered in Florida, and it was the fraudulent activity of the Florida bank and its executives that gave rise to the 10b-5 claims.<sup>27</sup> This led to the second question answered by the Supreme Court in *Morrison* and also relevant in the RICO context: when does a complaint seek to apply 10b-5 extraterritorially? The Supreme Court answered this second issue by determining the focus of the Exchange Act: the focus of Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.<sup>28</sup> Thus, the Supreme

Court concluded that 10b-5 claims apply only to transactions in securities listed on domestic exchanges or domestic transactions in other securities.<sup>29</sup>

### III. The Post-*Morrison* Landscape: How is it Determined Whether a Complaint States an Extraterritorial RICO Claim?

Federal courts have unequivocally agreed, post-*Morrison*, that because RICO is silent as to its extraterritorial application, it cannot be applied extraterritorially.<sup>30</sup> A defendant facing a complaint with a foreign plaintiff, some extraterritorial defendants, some extraterritorial conduct, or even arguably, an extraterritorial enterprise, should examine closely whether it has grounds for a motion to dismiss based on the plaintiff seeking an impermissible application of RICO extraterritorially. The post-*Morrison* battleground is whether the actual facts in the complaint allege an extraterritorial RICO claim. Federal courts have significantly diverged in making that very fact-intensive determination, resulting in the very confusion and variation in standards that the Supreme Court in *Morrison* hoped but failed to cure in reaching that decision.

In *Morrison*, the Supreme Court answered the question of whether an extraterritorial claim was being made in that case by

<sup>25</sup> *Id.* at 2878–2881. Several courts have recognized this rejection. See e.g., *Cedeno v. Intech Group, Inc.*, 733 F. Supp.2d 471, 473 (S.D.N.Y. 2012); *United States v. Philip Morris USA, Inc.*, 783 F. Supp.2d 23, 27–29 (D. D.C. 2011) (granting motion for reconsideration of earlier judgment entered against defendant on RICO claim, where judgment against defendant on RICO claim had been based on the racketeering activity having an effect on the United States, on the basis that *Morrison* rejected the “effects” test); *Norex Petroleum Ltd v. Access Ind., Inc.*, 631 F.3d 29, 32–33 (2d Cir. 2010) (recognizing the Supreme Court’s rejection of the conduct and effects tests and referring to the Second Circuit’s versions of those tests as “now-abrogated”); *Mitsui O.S.K. Lines, Ltd. v. Seamasster Logistics, Inc.*, 871 F. Supp.2d 933, 937 (N.D. Cal. 2012); *Sorota v. Sosa*, 842 F. Supp.2d 1345, 1349 (S.D. Fla. 2012).

<sup>26</sup> *Morrison*, 130 S. Ct. at 2883.

<sup>27</sup> *Id.* at 2883–2884.

<sup>28</sup> *Id.* at 2884.

<sup>29</sup> *Id.*

<sup>30</sup> See e.g., *Sorota*, 842 F. Supp.2d at 1349; *Norex*, 631 F.3d at 32–33; *CGC Holding Co. LLC v. Hutchens*, 824 F. Supp.2d 1193, 1207–1210 (D. Col. 2011); *In re Toyota Motor Corp.*, 785 F. Supp.2d 883, 913 (C.D. Cal. 2011); *Philip Morris*, 783 F. Supp.2d at 27–28; *The European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771, 2011 WL 843957, at \*4 (E.D.N.Y. Mar. 8, 2011); *Cedeno*, 733 F. Supp.2d at 473; *In re Libor-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp.2d 666, 731–733 (S.D.N.Y. 2013).

looking at the “focus” of the Exchange Act.<sup>31</sup> This has led federal courts, examining the issue in the RICO context, to look at the “focus” of RICO, with varying results. The examination of the “focus” of RICO has essentially led to two separate analytical pathways. Some federal courts have determined that the “focus” of RICO is on the enterprise alleged and held that any RICO claim alleging an extraterritorial enterprise is extraterritorial. Other federal courts have concluded that the focus of RICO is on the racketeering activity alleged and held that any RICO claim can be based on racketeering activity that occurred in the United States regardless of whether the enterprise is extraterritorial.

### A. Focus on the Decisions or Activity of the Enterprise

Some federal courts examining *Morrison* in the RICO context have concluded that the “focus” of RICO is the “enterprise,”<sup>32</sup> and thus the RICO claim is extraterritorial only if the claim involves a foreign enterprise.<sup>33</sup> The rationale of these deci-

sions is generally that RICO does not criminalize racketeering activity alone; rather, RICO criminalizes the commission of racketeering activity only if done through an enterprise.<sup>34</sup>

Figuring out where an enterprise is located is not always simple. Recognizing that the “enterprise” alleged may have more than one physical location, some courts specifically look at the “nerve center” or the “brains” of the enterprise (where the decisions of the enterprise are made).<sup>35</sup> This “nerve center” case law should be particularly helpful in cases where plaintiffs, attempting to get around the *Morrison* extraterritorial limitations, allege an associated-in-fact enterprise that includes one or more domestic individuals or entities, but the decisions clearly are being made extraterritorially.

<sup>31</sup> *Morrison*, 130 S. Ct. at 2884.

<sup>32</sup> Again, a RICO “enterprise” is the “vehicle through which the unlawful pattern of racketeering activity is committed.” See *supra* note 5.

<sup>33</sup> See e.g., *Sorota*, 842 F. Supp.2d at 1349–1351 (enterprise consisting of foreign corporations was not subject to RICO); *Cedeno*, 733 F. Supp. 2d at 473–474 (“the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity,” and thus Venezuelan enterprise was not subject to RICO claim); *In re Le-Nature’s*, MDL No. 2021, 2011 WL 2112533, at \*3 (W.D. Pa. May 26, 2011) (defendant participated in a domestic enterprise and thus RICO applied); *Mitsui*, 871 F. Supp.2d at 937–939 (N.D. Cal. 2012) (“The relevant question is simply whether the enterprise is extraterritorial or not”); *The European Cmty.*, 2011 WL 843957, at \*5; *In re Libor*, 935 F. Supp.2d at 734; see also *Aluminum Bahrain B.S.C.*

*v. Alcoa, Inc.*, No. 8-299, 2012 WL 2093997, at \*2–4 (W.D. Pa. June 11, 2012) (denying motion to dismiss RICO claim based on extraterritoriality where virtually all significant decisions made by the enterprise were made domestically).

<sup>34</sup> See *in re Libor*, 935 F. Supp.2d at 732 (“[T]he focus of RICO is on the enterprise” and “[t]he additional element that elevates isolated [predicate] acts to a RICO violation is the involvement of the enterprise ... as an active mechanism for perpetrating the racketeering activity”); *The European Cmty.*, 2011 WL 843957, at \*5 (“[T]he statute does not punish the predicate acts of racketeering activity ... but only racketeering activity in connection with an enterprise... . Because the focus of RICO is the enterprise, a RICO enterprise must be a domestic enterprise.”).

<sup>35</sup> See e.g., *The European Cmty.*, 2011 WL 843957; *Mitsui*, 871 F. Supp. 2d at 940–944; see also *Aluminum Bahrain B.S.C.*, 2012 WL 2093997, at \*1–4 (rejecting defendants’ extraterritorial argument as a basis to defeat RICO claims because the Complaint alleged that substantially all of the decisions of the enterprise were being made in Pittsburgh, Pennsylvania).

At least one court elected not to use the nerve center test to determine the location of the enterprise because decision making was made in several different countries, and considered the enterprise's "brawn," or where the *enterprise acted*, to determine the location.<sup>36</sup> That district court concluded that only the activities done collectively by the associated-in-fact enterprise should be considered in determining the enterprise's location, and ultimately concluded the enterprise therein to be extraterritorial.<sup>37</sup>

If faced with a RICO claim in which a primarily non-domestic enterprise is alleged, a defendant should consider the merits of a motion to dismiss based on the reasoning of these "focus on the enterprise" cases.

## B. Focus on the Racketeering Activity

Several federal courts have held that the focus of RICO is on the racketeering activity.<sup>38</sup> It is important to note that many of these cases applying a "focus on the

racketeering activity" seem to be applying the very "conduct" and "effects" tests that the Supreme Court rejected in *Morrison*. Further, these courts seem to be applying them in varying and inconsistent ways.

*CGC Holding Company* is a case where the enterprise alleged was an association-in-fact made up entirely of Canadian companies "managed" by three Canadian individuals.<sup>39</sup> Had the court concluded that the focus of RICO was on the enterprise, it would certainly have concluded that the complaint sought to apply RICO extraterritorially. But in that case, the alleged victims of the RICO scheme were all United States citizens, and the complaint alleged a loan fraud scheme that was "directed at and largely occurred within the United States."<sup>40</sup> Finding that the racketeering activity "of the enterprise within the United States was a key to its success," the district court concluded that the complaint did not seek to apply RICO extraterritorially.<sup>41</sup>

The Ninth Circuit recently rendered a decision in a criminal RICO case rejecting both the "nerve center test" and the "location of the enterprise" approach because the facts of that case involved a situation where "the 'brains' of the operation were located overseas but the enterprise violated United States immigration law."<sup>42</sup> The Ninth Circuit concluded that it must focus on the "pattern of Defendants' racketeering activity as opposed to the geographic location of Defendants' enter-

<sup>36</sup> *In re Libor*, 935 F. Supp.2d at 733.

<sup>37</sup> *Id.* at 734.

<sup>38</sup> See e.g., *CGC Holding Co.*, 824 F. Supp.2d at 1209 ("[t]he focus of the [RICO] statute is the racketeering activity, i.e., to render unlawful a pattern of *domestic* racketeering activity perpetrated by an enterprise"); *Chevron Corp. v. Donziger*, 871 F. Supp.2d 229, 245 (S.D.N.Y. 2012) ("it is very unlikely that Congress had 'no concern' with the conduct of the affairs of foreign enterprises through patterns of racketeering activity ... if the prohibited activities injured Americans in this country and occurred here, either entirely or in significant part"); see also *Tanedo v. East Baton Rouge Parish Sch. Board*, No. 0-01172, 2012 WL 5378742, at \*9 (C.D. Cal. Aug. 27, 2012) (without determining the focus of RICO, simply concluding the RICO claim was not extraterritorial because the predicate acts alleged occurred in the United States).

<sup>39</sup> Complaint at ¶¶ 4–14, 19, 74, 75, *CGC Holding Co., LLC v. Hutchens*, No. 1:11-cv-01012 (D. Colo. April 15, 2011) (D.E.1).

<sup>40</sup> 824 F. Supp.2d at 1209.

<sup>41</sup> *Id.* at 1210.

<sup>42</sup> *U.S. v. Chao Fan Xu*, 706 F.3d 965, 977 (9th Cir. 2013).

prise.”<sup>43</sup> Defendants were Chinese nationals who committed massive bank fraud by stealing funds from the Bank of China, laundered the funds into United States banks, and then committed immigration fraud in an effort to escape prosecution. In examining the nerve center test, the Ninth Circuit concluded that it could “produce absurd results” by letting a foreign enterprise get away with domestic racketeering activity that a domestic enterprise would be liable for.<sup>44</sup> Opting instead to focus on the racketeering activity, the Ninth Circuit recognized that if the only predicate acts alleged were the bank fraud, such activity took place in China and likely would be extraterritorial.<sup>45</sup> But the Ninth Circuit found the defendants’ violation of United States immigration law as part of the predicate acts alleged to be significant, and held:

The geographic location of an enterprise may be relevant under certain factual scenarios, like the criminal schemes at issue in *European Community* and *Mitsui O.S.K. Lines*. But in a case like this one, where the “brains” of the operation were located overseas but the enterprise violated United States immigration law in the United States, [the proper focus was on the pattern of racketeering activity.]<sup>46</sup>

The Ninth Circuit, similar to the court in *CGC Holding Company*, basically applied the “conduct” test rejected by the Supreme Court in *Morrison* in concluding that it was

not an extraterritorial application of RICO where the defendants committed some predicate acts that involved the violation of United States immigration law in the United States, and that were in furtherance of the overall goal of the conspiracy.<sup>47</sup> The Ninth Circuit determined that the bank fraud abroad would have been “a dangerous failure” but for the domestic immigration fraud, and thus the domestic predicate acts were a key to the success of the overall scheme.<sup>48</sup>

In *Chevron v. Donziger*, the court did not completely reject the “focus on the enterprise” approach, stating that it could be relevant to extraterritoriality “depend[ing] on the facts,”<sup>49</sup> but ultimately concluded that the domestic plaintiff in that case asserting a claim from at least some domestic racketeering activity did not state a extraterritorial RICO claim, thus essentially combining the “conduct” and “effects” tests that *Morrison* rejected.

Virtually every complaint making a RICO claim will allege *some* connection to the United States. In *Morrison*, for example, plaintiffs argued they did not seek extraterritorial application of 10b-5 because the alleged fraudulent statements in the case were made in Florida by the executives of a domestic company.<sup>50</sup> The Supreme Court rejected this argument, holding that the focus of the Exchange Act was “not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”<sup>51</sup> It further recognized that it is “a rare case of prohibited extraterritorial application that lacks *all* contact with the United States. But

<sup>43</sup> *Id.*; see also *Borich v. BP, P.L.C.*, 904 F. Supp.2d 855, 862 (N.D. Ill. 2012) (recognizing the split in federal courts and concluding that the proper focus is the pattern of racketeering activity and its consequences, rather than the location of the enterprise).

<sup>44</sup> *Id.* (citation omitted).

<sup>45</sup> *Id.* at 978.

<sup>46</sup> *Id.* at 977.

<sup>47</sup> *Id.* at 978–979.

<sup>48</sup> *Id.*

<sup>49</sup> 871 F. Supp.2d at 243.

<sup>50</sup> *Morrison*, 130 S. Ct. at 2883–2884.

<sup>51</sup> *Id.* at 2884.



the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”<sup>52</sup>

Given the variation in applying the “focus on the racketeering activity,” a defendant seeking dismissal should carefully review relevant case law to find that which is most helpful to the facts in its particular case. The mere allegation of some domestic predicate acts will not alone defeat the extraterritorial defense.

#### IV. Considerations When Seeking to Dismiss Based on the Extraterritorial Application of RICO

This section provides a list of questions defendant’s counsel should consider when evaluating a possible motion to dismiss a RICO claim based on the extraterritoriality defense.

**Is the enterprise alleged primarily domestic or foreign?** If the alleged enterprise is primarily foreign, then a defendant should make a motion to dismiss the RICO claim. Even if the enterprise alleged is domestic, if the complaint alleges injury proximately caused only by extraterritorial racketeering activity, the defendant should move to dismiss the RICO claim.<sup>53</sup>

<sup>52</sup> *Id.*

<sup>53</sup> See e.g., *Hourani v. Mirtchev*, No. 10-1618, 2013 WL 1901013, at \*4–6 (D. D.C. May 8, 2013) (dismissing RICO claim as extraterritorial despite one domestic plaintiff, one domestic defendant, a domestic enterprise, and allegations of domestic money laundering as predicate acts, where the injuries were alleged to be proximately caused only by extraterritorial predicate acts); *Philip Morris*, 783 F. Supp.2d at 29 (post-Morrison reversal of judgment against defendant who had been held liable under RICO for foreign conduct that had an effect on the United States, and rejecting the Government’s argument that the defendant could be liable under RICO for its domestic conduct where the domestic conduct was the not the basis for the RICO liability).

Further, a defendant should carefully scrutinize the enterprise allegations and move to dismiss if it appears that a complaint is only stating a domestic enterprise to get around the extraterritoriality limitation when the facts alleged in the complaint actually reflect a foreign enterprise.<sup>54</sup>

**Where did the alleged racketeering activity take place?** If the alleged racketeering activity took place primarily outside of the United States, a defendant should move to dismiss. Even if the racketeering activity is alleged to have taken place primarily in the United States, a defendant has legitimate arguments for dismissal if the enterprise is foreign, if the alleged victims are foreign, if the only domestic racketeering activity is the movement of funds in and out of United States banks, or if the domestic racketeering activity is not the proximate cause of the injury alleged.

**Is the movement of funds in and out of United States banks the only domestic conduct alleged?** Plaintiffs often try to assert a RICO claim based on the laundering of money in and out of United States bank accounts. Federal courts consistently have held that if such activity is the only connection

<sup>54</sup> See e.g., *in re Libor*, 935 F. Supp.2d at 732–734 (dismissing RICO claims as extraterritorial and noting that the plaintiffs resisted “the most natural” enterprise under the facts alleged because it would be foreign and impermissibly extraterritorial, and that the enterprise actually alleged by plaintiffs was a “strained attempt” to “plead around an obvious defect in their theory”).

with the United States, RICO does not apply.<sup>55</sup>

**If domestic racketeering activity is alleged, did it proximately cause the alleged injuries?** In an effort to avoid an extraterritorial dismissal, plaintiffs may allege some domestic predicate acts. Even if the court chooses to focus on the racketeering activity rather than the enterprise, Defendants should argue that any alleged domestic racketeering activity does not prevent dismissal based on extraterritoriality unless the domestic racketeering activity is the proximate cause of the alleged injury for the RICO claim.<sup>56</sup>

<sup>55</sup> See e.g., *Cedeno*, 733 F. Supp.2d at 473–474 (S.D.N.Y. 2010), *aff'd* 457 Fed. Appx. 35 (2d Cir. 2012); *Tymoshenko v. Firtash*, 11-CV-2794, 2013 WL 1234821, at \*11–13 (S.D.N.Y. March 26, 2013) (dismissing RICO claim as extraterritorial where the only domestic conduct was the laundering of illegally obtained funds by U.S. defendants in U.S. banks); *The Republic of Iraq v. ABB AG*, No. 08 Civ. 5951, 2013 WL 441959, \*22–23 (S.D.N.Y. Feb. 6, 2013) (dismissing RICO claim as extraterritorial despite some the allegations of some domestic predicate acts involving U.S. bank accounts); see also *Chao Fan Xu*, 706 F.3d at 978 (noting that extraterritorial bank fraud “is beyond the reach of RICO even if the bank fraud resulted in some of the money reaching the United States”).

<sup>56</sup> See e.g., *Hourani*, 2013 WL 1901013, at \*4–6 (dismissing RICO claim as extraterritorial where the extraterritorial extortion was the proximate cause of the alleged injuries, and not the post-extortion domestic money laundering); *Borich*, 904 F. Supp.2d at 862 (“This Court concludes that a domestic plaintiff injured by a domestic pattern of racketeering activity is not attempting to apply RICO extraterritorially”) (emphasis added); see also *Philip Morris*, 783 F. Supp.2d at 29–30 (rejecting Government plaintiff’s argument that the case was not solely extraterritorial because of various actions taken in the United States by the defendants, on the basis that such domestic actions were “not the basis for [the defendant’s] RICO liability” in the case); *In re Moutter*, 493 B.R. 640, 657 (Bkrtcy. S.D. Fla. 2013) (RICO claims dismissed where scheme was primarily foreign and the complaint, despite alleging some activity in Florida, did “not allege a significant relationship between Florida or the United States and any of the harm allegedly suffered by either Plaintiff”).

Furthermore, if a Court chooses to focus on the racketeering activity, despite *Morrison’s* rejection of the conduct test, Defendants can also argue that domestic racketeering activities that are merely preparatory or far removed from the consummation of the fraud should not remove the cloak of extraterritoriality.<sup>57</sup>

### **Is the Plaintiff Domestic or Foreign?**

A foreign plaintiff obviously makes the case seem all the more extraterritorial, even if courts are not specifically citing the citizenship of the plaintiff as a basis for dismissal.<sup>58</sup> The fact that a plaintiff is domestic, however, should not alone provide a basis for concluding the RICO claim is not extraterritorial, as there are examples of dismissals based on the extraterritorial defense even where the plaintiff is domestic.<sup>59</sup> Even the

<sup>57</sup> See *Renta*, 530 F.3d at 1352; *North South*, 100 F.3d at 1052–1053.

<sup>58</sup> See e.g., *Cedeno*, 733 F. Supp.2d 411 (S.D.N.Y. 2010) (RICO claim brought by Venezuela citizens dismissed based on extraterritoriality); *Norex*, 631 at 29 (2d Cir. 2010) (affirming dismissal of RICO claim brought by Canadian oil company based on extraterritoriality); *Tymoshenko*, 2013 WL 1234821, at \*13 (holding the scheme alleged “where both the victims and victimizers are foreign” not to be sufficient to state a RICO violation); *Republic of Iraq*, 2013 WL 441959, at \*24 (dismissing a RICO claim as extraterritorial where the complaint alleged a scheme “directed by a foreign government, involving international conduct, and exacting a toll on a foreign plaintiff”).

<sup>59</sup> See e.g., *Hourani*, 2013 WL 1901013, at \*1, n.1 (RICO claim dismissed based on extraterritoriality despite one of the two plaintiffs being a U.S. citizen); *Philip Morris*, 783 F. Supp.2d at 27–30 (reversing earlier judgment against defendant on RICO claim that had been based on foreign racketeering activity having an effect on the United States, in light of *Morrison’s* rejection of the “effects” test); *in re Libor*, 935 F. Supp.2d 666 (RICO claim dismissed based on extraterritoriality despite domestic plaintiffs); *Sorota*, 842 F. Supp.2d 1345 (dismissing RICO claim as extraterritorial despite having a domestic plaintiff and some domestic wire fraud activity, because the enterprise alleged was foreign).

Supreme Court in *Morrison*, in noting that a case need not lack all contact with the United States for the presumption against extraterritorial application to apply, cited to its earlier decision holding that Title VII does not apply extraterritorially to a claim made by a U.S. plaintiff against a U.S. defendant, but concerning employment that took place overseas, where the “focus” of Title VII was domestic employment.<sup>60</sup> Note that a

court may find a domestic plaintiff significant in the inquiry.<sup>61</sup>

### **Are Defendants Domestic or Foreign?**

As with plaintiffs, foreign defendants make the case seem all the more extraterritorial, even if courts are not citing to the citizenship of the defendants in make the extraterritorial decision.<sup>62</sup> A plaintiff, however, should not be able to argue successfully that the presence of domestic defendants in a case alone defeats the extraterritorial defense.<sup>63</sup>

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<sup>61</sup> See e.g., *Borich*, 904 F. Supp.2d at 862 (“This Court concludes that a domestic plaintiff injured by a domestic pattern of racketeering activity is not attempting to apply RICO extraterritorially.”).

<sup>62</sup> See e.g., *Philip Morris*, 783 F. Supp.2d at 25–29 (reversing RICO judgment against one defendant who “[u]nlike the other Defendants,” was foreign); *Sorota*, 842 F. Supp.2d at 1346–1351 (dismissing RICO claim where plaintiff was domestic but defendant was foreign); *but see* *Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir. 1991) (holding, pre-*Morrison*, that “the mere fact that the corporate defendants are foreign entities does not immunize them from the reach of RICO”).

<sup>63</sup> See e.g., *Norex*, 631 F.3d 29 (affirming dismissal of RICO claim based on extraterritoriality even with some domestic defendants); *Philip Morris*, 783 F. Supp.2d at 27–29 (reversing RICO judgment against foreign defendant despite the presence of domestic co-defendants); *Tymoshenko*, 2013 WL 1234821, at \*11–13 (dismissing RICO claim despite several United States defendants, where the enterprise was foreign and all “key aspects of the alleged scheme were focused abroad”); *The European Cmty.*, 2011 WL 843957 (granting motion to dismiss RICO claims despite the presence of several American defendants).

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<sup>60</sup> *Morrison*, 130 S. Ct. at 2884 (citing Equal Emp’t Opportunity Comm’n v. Arabian Am. Oil Co., 499 U.S. 244, 247 (1991)).