Under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), it is “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” On its face, the RICO statute is silent as to whether it can be applied extraterritorially—that is, to actors or conduct outside of the United States. For years, many federal courts engaged in a subjectively fact-intensive “effects” test, in which they weighed various factors both inside and outside of the United States to determine whether, under the particular facts presented, RICO could be applied extraterritorially. This subjective analysis resulted in the lack of a clear standard and seemingly inconsistent results in RICO matters that involved extraterritorial conduct or actors. Although several recent federal court decisions have now clarified that RICO may not be applied extraterritorially, an identifiable split in the courts is forming as to what constitutes an extraterritorial application of the RICO statute.

The case that served as the springboard for clarifying whether or not RICO can be applied extraterritorially is the U.S. Supreme Court’s decision in Morrison v. Nat’l Australia Bank Ltd., 130 S. Ct. 2869 (2010), a case arising under the Securities and Exchange Act of 1934 and having absolutely nothing to do with RICO. Since Morrison was decided, two lines of cases have formed in the federal courts regarding how to properly determine whether a plaintiff is seeking to impermissibly apply RICO extraterritorially.

This article will explain the Morrison decision, highlight the federal court opinions across the United States that have utilized Morrison’s holding to address whether RICO can be applied extraterritorially, and discuss what courts are considering to be extraterritorial applications of the statute.

**Morrison v. Nat’l Australia Bank Ltd.**

In Morrison, the Supreme Court examined whether § 10(b) of the Securities and Exchange Act applied extraterritorially. In that case, foreign plaintiffs brought a cause of action under § 10(b) against both foreign and U.S.-based defendants for misconduct in connection with securities traded on foreign exchanges. In concluding that the plaintiffs’ claim was an impermissible extraterritorial application of U.S. securities laws, the Supreme Court re-emphasized the long-standing principle that, unless a contrary intent appears, congressional legislation presumptively applies only to regulate domestic conduct and therefore does not apply extraterritorially. According to the Supreme Court, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”

The Supreme Court confirmed that the presumption against extraterritorial application applies to all statutes, not just to the Securities and Exchange Act. The Supreme Court also rejected the argument that a general reference to interstate commerce or foreign commerce is sufficient to overcome the presumption against extraterritorial application.

In so holding, the Supreme Court in Morrison flatly rejected the so-called “conducts” and “effects” test that had previously been created to determine whether a plaintiff’s claim could apply to regulate extraterritorial conduct. This subjective, fact-intensive test permitted extraterritorial application of the Securities and Exchange Act if conduct material to the claim occurred in the United States or had a substantial effect in the United States or upon U.S. citizens. (This same test was borrowed by numerous federal courts to apply RICO extraterritorially.) In rejecting the “conducts” and “effects” test, the Supreme Court noted that “[t]he results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality.” Rather than guess anew in each case, the Court held, “we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.”

The Court’s ruling in Morrison teaches that the proper territorial analysis requires a court to compare the statute’s “focus”—that is, what conduct the statute specifically aimed to remedy or to protect with the allegations of a plaintiff’s claim. The Morrison Court concluded that the focus of § 10(b) was not to punish all deceptive conduct in the trade of securities but, instead, to try to punish deceptive conduct only with respect to securities traded on a domestic, national exchange. Because the securities at issue in Morrison were traded on an Australian exchange system, the court held that the plaintiffs’ claim sought an impermissible extraterritorial application of § 10(b) of the Securities and Exchange Act.

**RICO Cases After Morrison**

Since Morrison, several federal courts have adopted the language used in the case in the context of RICO claims. Morrison’s impact on RICO has been substantial and has resulted in a sweeping change in the treatment of extraterritorial RICO claims. All the reported decisions following Morrison have uniformly held that RICO does not apply extraterritorially. However, two camps have emerged in analyzing how to determine if a plaintiff’s RICO claim is seeking to apply the statute extraterritorially—one camp using the “enterprise” approach and the other using the “predicate acts” approach.

**The “Enterprise” Approach**

The Southern District of New York was the first federal court to apply Morrison in the RICO context. In Cendeno v. Intech Group Inc., 733 F. Supp. 2d 471 (S.D.N.Y. 2010), a Venezuelan citizen brought a RICO claim that alleged a wide-ranging money laundering scheme that used New York-based U.S. banks to hold, move, and conceal the fruits of fraud and extortion by Venezuelan government officials and their Venezuelan confederates. Because the Cendeno plaintiff alleged the existence of a RICO enterprise whose actors were based in Venezuela, some of the defendants in Cendeno moved to dismiss the complaint, arguing that it exceeded RICO’s territorial limits.

The Cendeno court noted that any analysis of RICO’s extraterritorial reach began with the Supreme Court’s decision in Morrison. After summarizing Morrison’s main points on the presumption against extraterritorial application of U.S. laws, the district court turned its attention to analyzing the “focus” of RICO, as the Morrison court instructed. The decision...
reached in Cedeno noted that, as far as RICO is concerned, it was “plain on the face of the statute” that its focus is on “how a pattern of racketeering activity affects an enterprise.” According to the district court, “RICO is not a recidivist statute designed to punish someone for committing a pattern of multiple criminal acts,” but, instead, “the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity.” Because RICO on its face evidenced no concern that the conduct of foreign enterprises was sufficient to overcome the presumption against extraterritoriality, the Cedeno court concluded that RICO does not apply when “the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.” The Cedeno court thus formulated the “enterprise” approach: RICO applies only to regulate the conduct of domestic-based enterprises.

After the Cedeno decision, the Second Circuit Court of Appeals in Norex Petroleum Ltd. v. Access Indus. Inc., 631 F.3d 29 (2d Cir. 2010), similarly concluded that, under Morrison, a RICO claim failed because the plaintiff had alleged the existence of a foreign-based enterprise. Key to the Norex holding was the Second Circuit’s conclusion in its prior, pre-Morrison decisions that RICO was silent as to its extraterritorial application. The Second Circuit rejected the plaintiff’s argument “that because a number of RICO’s predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.” Instead, the court concluded that, under Morrison, even if a statute may appear to include language suggesting an extraterritorial reach, the presumption against extraterritoriality limits such a provision to only domestic conduct.

Although the Norex court did not per se adopt the “enterprise” approach, the court’s analysis seemingly hinged on the location of the alleged RICO enterprise. Because the plaintiff in Norex alleged the existence of a foreign-based RICO enterprise, the Second Circuit concluded that the plaintiff’s attempt to apply RICO failed as a matter of law.

The District of Columbia court has also held that RICO does not apply extraterritorially when the plaintiff’s alleged enterprise is based on foreign soil. In United States v. Philip Morris USA Inc., 783 F. Supp. 2d 23 (D.D.C. 2011), the court, citing Morrison, granted a defendant’s motion for reconsideration of a prior order finding the defendant criminally liable under RICO. Despite the existence of some domestic activity that supported the government’s case, the district court concluded that “isolated domestic conduct does not permit RICO to apply to what is essentially foreign activity.” Because the Supreme Court, in crystal clear language, rejected the ‘effects’ test for extraterritorial application,” the Philip Morris court concluded that Morrison “invalidated the sole basis for the defendant’s liability” under RICO. In reaching its conclusion, the District of Columbia court cited favorably to Cedeno’s “enterprise” approach for analyzing what conduct constitutes an extraterritorial application of RICO.

In In re Toyota Motor Corp., 785 F. Supp. 2d 883 (C.D. Cal. 2011), the court also applied Morrison in holding that RICO cannot be applied to claims involving conduct or events that occur outside the United States. In that case, a putative class of foreign plaintiffs brought a RICO claim for the alleged diminution in market value of their vehicles in light of defects in those vehicles based on sales made throughout the United States and worldwide. In dismissing the plaintiffs’ RICO claim, the district court agreed with the Cedeno court that the focus of RICO is on the enterprise as the recipient of, and cover for, a pattern of criminal activity. Notably, however, the district court stated that foreign plaintiffs may state a claim under RICO, following Morrison, if they alleged an enterprise operating in the United States and consisting largely of domestic RICO “persons” engaging in a pattern of racketeering activity in the United States but nonetheless damaging plaintiffs located abroad. Stated differently, the Toyota Motor Corp. court became the first court to conclude that, under Morrison, the territorial location of the plaintiff is not dispositive of the validity of a RICO claim. Rather, from a territorial analysis, the location of the RICO enterprise is dispositive.

In Sorota v. Sosa, No. 11-80897-Civ, 842 F. Supp. 2d 1345, 2012 WL 335530 (S.D. Fla. Jan. 31, 2012), the U.S. District Court for the Southern District of Florida, also relying upon Morrison, similarly held that the RICO statute does not apply to a foreign-based RICO enterprise and refused to follow Liquidation Comm’n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339 (11th Cir. 2008). In Renta, the Eleventh Circuit had applied the “conducts” and “effects” test to hold that RICO could be applied extraterritorially to address the conduct of a foreign-based enterprise. In Sorota, the District Court for the Southern District of Florida held that Morrison had “undermined” Renta “to the point of abrogation.”

In Sorota, the plaintiff alleged that the defendant had violated RICO by inducing the plaintiff to wire money from Florida to Peru for the ostensible purpose of operating a Peruvian start-up telephone company. Instead of using the money to operate the Peruvian company, the defendant allegedly misappropriated most of the money through other Peruvian entities for his own personal use in Florida and Peru. As alleged by the plaintiff, all the RICO actors were located in Peru. The defendant moved to dismiss the case on the ground that, because RICO was silent as to extraterritorial application, the presumption precluded any such application. The court agreed and noted that every court that had considered this same argument after Morrison in circuits outside the Eleventh Circuit had embraced it and that contrary Eleventh Circuit law was no longer valid. Accordingly, the court dismissed Sorota’s RICO claim with prejudice.

The Sorota court also expressly adopted Cedeno’s “enterprise” approach, noting that the “focus” of RICO is on the enterprise itself. In rejecting the “predicate acts” approach, the district court concluded that RICO’s “focus” could not be on the predicate acts themselves, because each predicate act is independently criminalized by statute. The “Predicate Acts” Approach

Two recent district court decisions after Morrison have held that the “focus” of RICO is not on the enterprise itself but, instead, on the predicate acts that form the pattern of racketeering activity.

In CGC Holding Co. LLC v. Hutchens, 824 F. Supp. 2d 1193 (D. Col. 2011), the plaintiffs alleged that the RICO actors, the majority of whom resided in Canada, engaged in
a pattern of domestic racketeering activity through an enterprise whose goal was to extract money from U.S. plaintiffs through a phony loan scheme. Although the District Court of Colorado agreed that the RICO statute itself does not apply extraterritorially, given the statute’s silence as to any such intent, the court nonetheless concluded that the plaintiffs had stated a viable RICO claim, because the predicate acts occurred in the United States.\(^39\) The *Hutchens* court thus established the “predicate acts” approach, which looks to where the predicate acts of racketeering activity occur, and not to the location of the enterprise, in determining what conduct constitutes an extraterritorial application of RICO. \(^40\) Although the alleged RICO enterprise in *Chevron* consisted primarily of actors based in the United States\(^41\) (which would have satisfied the “enterprise” approach), the District Court for the Southern District of New York nonetheless analyzed the post- *Morrison* RICO cases and concluded that the *Hutchens* analysis more accurately reflected congressional intent in enacting the RICO statute.\(^42\) In rejecting the “enterprise” approach, the *Chevron* court determined that the “focus” of RICO was not on the enterprise itself, as *Cadeno* and its progeny concluded, but rather on “protecting American victims at least against injury caused by the conduct of the affairs of enterprises through patterns of racketeering activity that occur in this country.”\(^43\)

**The Future of Extraterritorial RICO Litigation**

A decisive split among federal courts is emerging for construing RICO’s “focus” and in applying a standard for determining a RICO claim’s extraterritorial application. All courts agree that RICO does not apply extraterritorially, but the courts differ in applying *Morrison’s* teachings in the RICO context. Future RICO litigation will certainly center on whether the “predicate acts” or the “enterprise” approach should be used as the governing standard in RICO cases.

The authors respectfully believe that the *Hutchens* and *Chevron* courts failed to properly apply the *Morrison* analysis. For example, the *Chevron* court adopted the “predicate acts” approach not by examining the RICO statute as a whole but, instead, by divining what Congress intended in enacting RICO.\(^44\) Of course, such “judicial-speculation-made law”—divining what Congress would have wanted if it had thought of the situation before the court”—is precisely the approach the U.S. Supreme Court counseled against in *Morrison*.\(^45\) Moreover, the “predicate acts” approach requires that a court undertake a fact-intensive analysis for determining where the central predicate acts of racketeering activity occurred. Such an analysis is merely a reincarnation of the “conducts” and “effects” test, which the Supreme Court expressly rejected in *Morrison*.\(^46\) As the majority of cases have recognized, the “focus” of RICO is not, and cannot be, on the predicate acts themselves, because each predicate act is independently criminalized by separate statutes.\(^47\) The analysis used in the *Hutchens* and *Chevron* rulings is inconsistent with the prevailing standard adopted by all the other courts that have addressed this issue.

In those courts that adopt the “enterprise” approach, from a territorial perspective, future RICO litigation will center on where the RICO enterprise is geographically located. Finding this locus may be difficult: RICO enterprises tend to be amorphous and may involve multiple actors in multiple countries, including the United States. When an alleged RICO enterprise includes both foreign and domestic actors and effects, the enterprise’s launching pad from a territorial perspective may be difficult to determine with precision.

But recent cases have suggested an analysis for determining the territorial center of gravity for a territorially diverse RICO enterprise. At least one court faced with such a scenario adopted the “nerve center” test recently used by the Supreme Court in *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), to determine a corporation’s principal place of business for diversity jurisdiction purposes. In *European Community v. RJR Nabisco Inc.*, No. 02-CV-5771, 2011 WL 843957 (E.D.N.Y. 2011), the district court found that the “nerve center” test was particularly well suited for determining the geographic location of an alleged RICO enterprise.\(^48\) The *European Community* court determined that applying the “nerve center” test to determine the location of an enterprise similarly avoids the fact-intensive weighing of corporate assets, functions, or revenues, which the Supreme Court concluded was unworkable in prior tests used by the courts for determining the location of a corporation’s principal place of business.\(^49\) According to the court, the place where the “brains” of the enterprise are located dictates its geographic location, and not the “brawns,” from a territorial perspective.\(^50\) Such a test may prove useful in the years of extraterritorial RICO litigation, which is sure to come.
Conclusion

The Supreme Court’s decision in Morrison clarified the analysis for extraterritorial application for all laws, not just for the Securities and Exchange Act. The Court’s ruling has had a substantial effect on cases concerning the application of the RICO statute in attempts to regulate foreign conduct, and all reported RICO decisions post-Morrison have uniformly concluded that RICO does not apply extraterritorially. However, as set forth above, a split is developing in the federal courts on the issue of RICO’s “focus,” and therefore the issue of how to determine whether or not a plaintiff is improperly seeking extraterritorial application of the statute. Even though the Morrison court certainly intended to remedy a lack of clarity regarding the extraterritorial application of U.S. laws, recent decisions have unfortunately created some confusion as to RICO’s role in regulating the conduct of foreign-based actors. TFL

Endnotes

See, e.g., Liquidation Comm’n of Banco Intercontinental S.A. v. Renta, 530 F.3d 1339, 1351–1352 (11th Cir. 2008) (adopting “conducts” and “effects” test for determining whether RICO could be applied to regulate conduct occurring abroad); Poulos v. Caesars World Inc., 379 F.3d 654, 663–664 (9th Cir. 2006) (same); Aerovias de Mexico v. de Prevoisin, 224 F.3d 766, 766 (5th Cir. 2000) (same); North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996) (same).
16 See, e.g., Liquidation Comm’n of Banco Intercontinental S.A. v. Renta, 530 F.3d 1339, 1351–1352 (11th Cir. 2008) (adopting “conducts” and “effects” test for determining whether RICO could be applied to regulate conduct occurring abroad); Poulos v. Caesars World Inc., 379 F.3d 654, 663–664 (9th Cir. 2006) (same); Aerovias de Mexico v. de Prevoisin, 224 F.3d 766, 766 (5th Cir. 2000) (same); North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996) (same).
10 Id. at 2877.
11 Id. at 2881.
12 Id. at 2882.
13 Id. at 2879–2881. The “conducts” and “effects” test had been widely utilized prior to Morrison. See, e.g., Kauther SDN BHD v. Stemberg, 149 F.3d 659, 667 (7th Cir. 1998); Robinson v. TCI/US West Communications Inc., 117 F.3d 900, 906 (5th Cir. 1997); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31–32 (D.C. Cir. 1987); Grunenthal GmbH v. Holtz, 712 F.2d 421, 424 (9th Cir. 1983); Continental Grain (Australia) Pty. Ltd. v. Pacific Oil Seeds Inc., 592, F.2d 409, 415 (8th Cir. 1979); S.E.C. v. Kasper, 548 F.2d 109, 113–115 (3d Cir. 1977).
14 See Morrison, 130 S. Ct. at 2879.
15 See, e.g., Renta, 530 F.3d at 1352.
16 See Morrison, 130 S. Ct. at 2881.
17 Id. at 2873.
18 Id. at 2884.
19 Id.
20 Id. at 2888.
21 Cedeno, 733 F. Supp. 2d at 472–73.
22 Id. at 473–474.
23 Id. at 473.
24 Id. at 474.
25 Id.
26 Norex, 631 F.3d at 32–33.
27 Id. at 32.
28 Id. at 33.
29 See, e.g., 18 U.S.C. § 1962(c) (providing that it “shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity”) (emphasis added).
30 The Supreme Court in Morrison noted that a general reference to foreign commerce, such as that contained in 18 U.S.C. § 1962(c), was insufficient to overcome the presumption against extraterritoriality. See Morrison, 130 S. Ct. at 2882.
31 Norex, 631 F.3d at 33.
32 Philip Morris, 783 F. Supp. 2d at 29.
33 Id.
34 Id. at 28–29.
36 Id. at 900.
37 Id. at 914.
38 Id. at 915.
39 Patricia A. Leonard and Gerardo J. Rodriguez-Albizu served as counsel of record for the defendant, Steven Sosa, in this matter.
40 See Renta, 530 F.3d at 1351–52.
42 Id. at *3.
43 Id. at *4.
44 Id.
45 Id.
46 See id. at *6 (rejecting the “enterprise” approach because “[t]o say that Congress did not intend RICO to apply unless the enterprise in question was purely domestic would be unsupportable,” and that, as a result, “courts should be cautious before construing the statute in civil cases in ways that would be most undesirable, not to mention inconsistent with Congressional intent, if applied in criminal cases”).
47 Morrison, 130 S. Ct. at 2881.
48 Id. at 2880–81.
51 Id. at *6.
52 Id.