RICO'S EXTRATERRITORIAL APPLICATION: FROM *MORRISON* TO *RJR, NABISCO, INC.*

ABSTRACT

In 2010 the Supreme Court invalidated the "conduct and effects" tests that lower courts had used to assess the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act (RICO). After the Supreme Court's landmark decision in Morrison v. National Australia Bank Ltd.*, lower courts struggled to identify the proper test for determining the extraterritorial application of RICO. Three different tests emerged in the wake of* Morrison *for analyzing RICO's extraterritorial application: (1) the enterprise test, (2) the pattern of racketeering activity test, and (3) the predicate acts test. Ultimately, the Supreme Court adopted the predicate acts test when it addressed the issue in its 2016 decision in* RJR Nabisco, Inc. v. European Community.

This Note argues that the Supreme Court correctly chose the predicate acts test as the best approach for determining RICO's extraterritorial application. Through analyzing the history of the conduct and effects tests in RICO jurisprudence, the Supreme Court's decision in Morrison *that invalidated the conduct and effects tests, and the different tests used by the lower courts to analyze RICO's extraterritorial application after* Morrison*, this Note demonstrates why the predicate acts test is both the clearest to apply and truest to RICO's ambitious text and objectives. Lastly, this Note argues that the Supreme Court should abandon the second prong of* Morrison *in favor of a simpler test.*

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I. INTRODUCTION

This Note argues the Supreme Court correctly adopted the predicate acts test for determining whether a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO),[1] which was designed by Congress to eradicate organized crime,[2] may be applied extraterritorially. A law applies extraterritorially when it extends to activity occurring outside the United States.[3] Generally speaking, there is a presumption that U.S. law applies domestically and will not apply extraterritorially unless there is clear congressional intent to the contrary.[4] However, the distinction between extraterritorial and domestic application of RICO was of little to no importance in early RICO jurisprudence because RICO was held to apply extraterritorially under most circumstances.[5] Prior to 2010, courts addressing RICO's extraterritorial application rarely, if at all, discussed the presumption against extraterritoriality.[6]

Courts initially decided RICO's extraterritorial application by borrowing tests developed from securities and antitrust jurisprudence.[7] The two most prominent tests used to determine extraterritoriality in securities and antitrust law were the "conduct and effects" tests or a combination of the two.[8] Under the conduct test, a law applied extraterritorially if conduct material to the claim occurred in the United States.[9] Under the effects test,

1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 901–904, 84 Stat. 922, 941–48 (codified as amended at 18 U.S.C.A. § 1961 (West 2015 & Supp. 2016); 18 U.S.C. §§ 1962–1968 (2012)).

2. *Id.*, 84 Stat. at 922–23 (Statement of Findings and Purpose).

3. Gideon Mark, *RICO's Extraterritoriality*, 50 AM. BUS. L.J. 543, 543 (2013).

4. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)) ("This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality . . . .").

5. *See, e.g.*, Poulos v. Caesars World, Inc., 379 F.3d 654, 663 (9th Cir. 2004); *see infra* Part III.

6. *See, e.g.*, *Poulos*, 379 F.3d at 663 (collecting cases).

7. *See, e.g.*, *id.* (collecting cases).

8. Mark, *supra* note 3; *see* Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991) (summarizing the conduct and effects tests under antifraud provisions of the Securities Exchange Act, which is similarly silent as to extraterritorial application), *overruled by Morrison*, 561 U.S. 247.

9. *See Alfadda*, 935 F.2d at 478 ("Under the 'conduct' test, a federal court has subject matter jurisdiction if the defendant's conduct in the United States was more than

a law applied extraterritorially if the illegal activity abroad caused a substantial effect in the United States.[10] These tests, or variances thereof, were used by appellate courts to decide the extraterritorial application of securities, antitrust, and RICO claims for decades.[11]

In 2010, securities jurisprudence was thrown into a state of flux when the U.S. Supreme Court explicitly rejected the use of the conduct and effects tests in determining the extraterritorial reach of statutes that were silent as to their extraterritorial application.[12] In *Morrison v. National Australia Bank Ltd.*, the Supreme Court held that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[13] The Court revitalized the longstanding principle of U.S. law that there is a presumption against extraterritorial application of U.S. statutes unless there is a clear manifestation of congressional intent for the statute to apply extraterritorially.[14] The *Morrison* decision impacted far more than just securities jurisprudence. The Court's reinvigoration of the presumption against extraterritoriality and its rejection of the conduct and effects tests rocked established extraterritorial RICO jurisprudence.[15]

After the *Morrison* decision, nearly every federal court to address the

merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad." (citing Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1046 (2d Cir. 1983))).

10. *Id.*

11. *See, e.g.*, *Poulos*, 379 F.3d at 663–64 (RICO); SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003) (securities fraud), *overruled by Morrison*, 561 U.S. 247; Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 666–67 (7th Cir. 1998) (securities fraud), *overruled by Morrison*, 561 U.S. 247; *Alfadda*, 935 F.2d at 478 (securities fraud); SEC v. Kasser, 548 F.2d 109, 115–16 (3d Cir. 1977) (securities fraud), *overruled by Morrison*, 561 U.S. 247; Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) (securities fraud), *overruled by Morrison*, 561 U.S. 247; Schoenbaum v. Firstbrook, 405 F.2d 200, 206, 208 (2d Cir.) (securities fraud), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968), *and overruled by Morrison*, 561 U.S. 247; Occidental Petrol. Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102–03 (C.D. Cal. 1971) (antitrust).

12. *Morrison*, 561 U.S. at 259–61.

13. *Id.* at 255.

14. *Id.* (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)); *see also* European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 135 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016).

15. *See* Liquidation Comm'n of Banco Intercont'l, S.A. v. Renta, 530 F.3d 1339, 1351–52 (11th Cir. 2008); *Poulos*, 379 F.3d at 663; N.S. Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051–52 (2d Cir. 1996), *overruled by Morrison*, 561 U.S. at 253–55, *as recognized in* Norex Petrol. Ltd. v. Access Indus., Inc., 631 F.3d 29, 32 (2d Cir. 2010) (per curiam); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988) (en banc).

issue of RICO's extraterritorial application held that RICO does not, on its own, apply extraterritorially.[16] RICO "is silent as to any extraterritorial application," and some courts held this fact alone as dispositive that RICO fails to rebut the presumption against extraterritoriality under *Morrison*.[17] Even the lone federal court granting RICO extraterritorial reach prior to the Supreme Court's recent decision in *RJR Nabisco, Inc. v. European Community* did so in a limited fashion.[18] Thus, before the Court's decision in *RJR Nabisco, Inc.*, if a RICO claim was determined to seek extraterritorial application, it was almost always held invalid. Accordingly, the distinction between extraterritorial and domestic application of RICO became crucial for a claim to survive.

While courts were nearly unanimous in concluding that RICO does not, on its own, apply extraterritorially, they were sharply split on how to resolve whether a claim sought extraterritorial or domestic application.[19] In *Morrison*, the Supreme Court noted the difficulty of distinguishing between an extraterritorial claim and a domestic claim, stating, "[i]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States."[20] The Court went on to suggest that merely *some* domestic activity in a claim is not enough to overcome the presumption against extraterritoriality.[21] To determine extraterritorial application in *Morrison*, the Court looked at the "'focus' of congressional concern" in the statute after it concluded the presumption against extraterritoriality had not been rebutted.[22] The focus of a statute can be discerned by analyzing "the objects of the statute's solicitude."[23] When a statute's focus is on acts or objects that occur within the United States, application of the statute is

16. *See, e.g.*, United States v. Chao Fan Xu, 706 F.3d 965, 974–75 (9th Cir. 2013) (listing cases), *overruled by RJR Nabisco, Inc.*, 136 S. Ct. 2090. *But see European Cmty.*, 764 F.3d at 133.

17. *Al-Turki*, 100 F.3d at 1051; *see, e.g.*, Cedeño v. Intech Grp., Inc., 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010), *aff'd*, 457 F. App'x 35 (2d Cir. 2012), *and overruled by European Cmty.*, 764 F.3d 129, *rev'd on other grounds*, 136 S. Ct. 2090.

18. *See European Cmty.*, 764 F.3d at 136 (holding "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate"); *see also* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016) (noting the first step of the two-step analysis framework used was not met in *Morrison*).

19. Patricia A. Leonard & Gerardo J. Rodriguez-Albizu, *Do Extraterritorial RICO Claims Still Exist in a Post-*Morrison *World?*, FED. LAW., Oct./Nov. 2012, at 60, 60–61.

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

21. *Id.*

22. *Id.*

23. *Id.* at 267.

domestic.[24] Although *Morrison* provided the lower courts with a framework to determine whether a claim seeks extraterritorial or domestic application, the framework is vague and susceptible to incongruous results.

Federal courts struggled to apply *Morrison*'s framework to RICO jurisprudence. While there was no consensus among the lower courts about what RICO's focus is or whether it could be applied extraterritorially, three plausible interpretations emerged in the wake of *Morrison*: (1) "the focus of RICO is on the enterprise [which is] the recipient of, or cover for, a pattern of criminal activity";[25] (2) the focus of RICO is the pattern of defendants' racketeering activity;[26] or (3) RICO rebuts the presumption of extraterritoriality to the extent the predicate acts required to show a pattern of racketeering activity apply extraterritorially.[27] Each approach offered certain advantages and drawbacks for analyzing a RICO claim's extraterritorial application. The enterprise approach was clear, predictable, and in line with the Supreme Court's reinvigoration of the presumption against extraterritoriality.[28] However, it ignored RICO's multiple foci[29] in favor of administrative ease and produced results inconsistent with RICO's goal of eradicating organized crime.[30] The pattern of racketeering activity approach incorporated RICO's multiple foci but was also the most difficult to apply.[31] Finally, the predicate acts approach provided a clear test that was the most consistent with *Morrison*'s two-step framework; however, it also resembles the conduct test that was explicitly rejected by the Supreme Court

24. *See id.*; *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

25. Cedeño v. Intech Grp., Inc., 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010), *aff'd*, 457 F. App'x 35 (2d Cir. 2012), *and overruled by* European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016).

26. United States v. Chao Fan Xu, 706 F.3d 965, 977 (9th Cir. 2013) (citations omitted), *overruled by RJR Nabisco, Inc.*, 136 S. Ct. 2090.

27. *See European Cmty.*, 764 F.3d at 136.

28. *See* Anneka Huntley, Note, *RICO's Extraterritoriality After* Morrison*: Where Should We Go from Here?*, 65 HASTINGS L.J. 1691, 1694 (2014).

29. Mark, *supra* note 3, at 594–95. *See generally* 18 U.S.C.A. § 1961 (West 2015 & Supp. 2016); 18 U.S.C. §§ 1962(a)–(d) (2012) (listing the prohibited activities under the Act).

30. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922–23 (Statement of Findings and Purpose) ("It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."); *see infra* Part IV.B.

31. *See infra* Part IV.C.

in *Morrison*.[32]

Out of the three approaches outlined above, this Note argues that the Supreme Court correctly adopted the predicate acts approach as the appropriate test for analyzing a RICO claim's extraterritorial application because the predicate acts approach: (1) is consistent with the reinvigoration of the presumption against extraterritoriality under *Morrison*; (2) provides a clear rule for courts to follow; (3) allows for extraterritorial application when the underlying predicate rebuts the presumption against extraterritoriality; and (4) acknowledges RICO's multiple foci. Part II of this Note provides an introduction to RICO by exploring the text, legislative history, and application of the Act. Part III addresses the extraterritorial application of RICO claims before *Morrison*. Part IV analyzes the three different approaches promulgated by lower courts to decide RICO's extraterritoriality following the *Morrison* decision. Part V analyzes the Supreme Court decision in *RJR Nabisco, Inc.* and argues that the Court correctly chose the predicate acts test as the best test for determining a RICO claim's extraterritoriality because it is the most consistent with the two-step framework under *Morrison* and most true to the objectives of the Act. Finally, Part VI provides a brief conclusion.

II. INTRODUCTION TO RICO

When RICO was passed in 1970,[33] organized crime was responsible for draining billions of dollars from the U.S. economy through unlawful and illegal activities.[34] Additionally, organized crime caused illegal and dangerous drugs to be imported and distributed, infiltrated legitimate businesses and labor unions with illegally obtained money, and otherwise harmed the United States and its citizens.[35] RICO was passed with the purpose of expanding and strengthening the legal tools available to the government to combat organized crime effectively.[36] Specifically, Congress sought to fix the defects in the evidence-gathering process of the law, enhance sanctions on members of organized crime, and create new solutions to combat organized crime.[37] The Act aimed to attach criminal liability to leaders of organized crime who had previously escaped prosecution through

32. *See* Leonard & Rodriguez-Albizu, *supra* note 19, at 62–63; *infra* Part IV.D.

33. Organized Crime Control Act §§ 901–904, 84 Stat. at 941–48.

34. Organized Crime Control Act, 84 Stat. at 922–23 (Statement of Findings and Purpose).

35. *Id.*

36. *Id.* at 923.

37. *Id.*

ordering subordinates to commit crimes.[38] RICO "is widely regarded as the single most important piece of organized crime legislation ever enacted."[39] Although RICO's focus is undoubtedly on the type of organized crime that plagued the United States during the '70s, its significance extends beyond that narrow scope. Congress recognized this when it explicitly stated that RICO "shall be liberally construed to effectuate its remedial purposes."[40]

A. *RICO Liability*

RICO "imposes criminal and civil liability upon those who engage in certain 'prohibited activities,'" including specified state law crimes, various specified federal statutes, and certain federal offenses.[41] Engaging in a lone prohibited activity is not enough to trigger RICO's application; there must also be either "a pattern of racketeering activity" or the "collection of unlawful debt."[42] RICO requires at least two acts of racketeering activity (two prohibited acts) to demonstrate a "pattern of racketeering activity."[43] Courts also require that the acts (prohibited activities) are related in some way and constitute a threat of continuing activity.[44] Two sporadic and unrelated criminal acts would not trigger RICO liability.[45]

RICO also requires that the predicate acts be committed as part of an "enterprise," defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity" with the common purpose of engaging in a criminal act as defined in the statute.[46] Enterprise is shown through "evidence of an ongoing organization, formal or informal, and by

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

39. Mark, *supra* note 3, at 547.

40. *See* Organized Crime Control Act § 904(a), 84 Stat. at 947.

41. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 232 (1989); *see* 18 U.S.C. § 1962 (2012) (defining "prohibited activities"). Prohibited activities include crimes such as murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in a controlled substance, money laundering, wire fraud, mail fraud, etc. 18 U.S.C.A. § 1961(1) (2015 & Supp. 2016).

42. *See* 18 U.S.C. § 1962.

43. 18 U.S.C.A. § 1961(5).

44. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985); *see also* S. REP. NO. 91-617, at 158 (1969).

45. *H.J. Inc.*, 492 U.S. at 239 (quoting 116 CONG. REC. 18940 (1970) (statement of Sen. McClellan)).

46. 18 U.S.C.A. § 1961(4); *see also* United States v. Turkette, 452 U.S. 576, 583 (1981).

evidence that the various associates function as a continuing unit."[47] Association-in-fact enterprises exist when individuals share a common "purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[48] Given Congress's mandate that RICO's terms be construed liberally, a wide array of associations qualify as enterprises.[49]

III. RICO EXTRATERRITORIALITY BEFORE *MORRISON*

Before the Supreme Court decided *Morrison* in 2010, only a minority of courts had determined that RICO did not apply extraterritorially, reasoning that because Congress did not explicitly provide for extraterritorial application, there was none.[50] The majority of courts held that RICO could be applied extraterritorially.[51] Most courts applied the conduct or effects tests, or a variance of them, when analyzing whether a RICO claim would have extraterritorial reach.[52] Both the conduct and effects tests were developed by the Second Circuit in response to the question of whether claims under section 10(b) of the Securities Exchange Act (Exchange Act) had extraterritorial application.[53] Because the Exchange Act was silent as to its extraterritorial application, courts had to decide "whether Congress would have wished the precious resources of the

47. *Turkette*, 452 U.S. at 583.

48. Boyle v. United States, 556 U.S. 938, 946 (2009).

49. *See, e.g.*, United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000) (members of the Cosa Nostra Mafia); United States v. Torres, 191 F.3d 799, 807 (7th Cir. 1999) (members of a street gang); United States v. Richardson, 167 F.3d 621, 625–26 (D.C. Cir. 1999) (group of armed robbers who participated in various robberies); United States v. Mazzei, 700 F.2d 85, 88 (2d Cir. 1983) (illegal gamblers).

50. *See, e.g.*, Jose v. M/V Fir Grove, 801 F. Supp. 349, 357 (D. Or. 1991).

51. *See, e.g.*, Liquidation Comm'n of Banco Intercont'l, S.A. v. Renta, 530 F.3d 1339, 1351–52 (11th Cir. 2008); Poulos v. Caesars World, Inc., 379 F.3d 654, 663 (9th Cir. 2004); N.S. Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1052–53 (2d Cir. 1996), *overruled by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 253–55 (2010), *as recognized in* Norex Petrol. Ltd. v. Access Indus., Inc., 631 F.3d 29, 32 (2d Cir. 2010) (per curiam); Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991), *overruled by Morrison*, 561 U.S. 247; Republic of the Philippines v. Marcos, 862 F.2d 1355, 1358–59 (9th Cir. 1988) (en banc); United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974).

52. *See, e.g.*, *Renta*, 530 F.3d at 1351–52; *Poulos*, 379 F.3d at 663; *Al-Turki*, 100 F.3d at 1052–53; *Alfadda*, 935 F.2d at 478; *Marcos*, 862 F.2d at 1358–59.

53. *See Alfadda*, 935 F.2d at 478; Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045–46 (2d Cir. 1983) (citing Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972), *overruled by Morrison*, 561 U.S. 247); *see also* Mark, *supra* note 3, at 554.

United States courts" to encompass transnational frauds.[54] Under the conduct test, section 10(b) of the Exchange Act applied extraterritorially when the defendant's conduct in the United States was material to the fraud and particular acts within the United States directly injured foreign investors.[55] Section 10(b) of the Exchange Act also applied extraterritorially under the effects test when illegal activity abroad caused substantial effects within the United States.[56]

The conduct test first appeared in RICO jurisprudence when the Second Circuit addressed the extraterritorial reach of RICO in *Alfadda v. Fenn*.[57] In *Alfadda*, the court held that RICO applied extraterritorially when a foreign enterprise engaged in conduct that was material to the pattern of racketeering activity within the United States.[58] Thus, so long as conduct material to the racketeering pattern occurred in the United States, the court found RICO could apply extraterritorially.[59] In *North South Finance Corp. v. Al-Turki*, the Second Circuit continued to develop extraterritorial RICO jurisprudence by borrowing from securities and antitrust precedent.[60] In *Al-Turki*, the court noted various similarities between RICO and securities jurisprudence.[61] Just as section 10(b) of the Exchange Act is silent as to extraterritorial application,[62] so too is RICO.[63] Furthermore, a large number of the provisions of RICO were designed based on the Clayton Act (antitrust legislation).[64] However, the *Al-Turki* court noted "the tests for asserting jurisdiction extraterritorially vary depending on the substantive law to be

54. *Alfadda*, 935 F.2d at 478 (quoting *Psimenos*, 722 F.2d at 1045).

55. *Psimenos*, 722 F.2d at 1045–46 ("[O]ur true concern [i]s that we entertain suits by aliens only where conduct material to the completion of the fraud occurred in the United States." (citing Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975), *overruled by Morrison*, 561 U.S. 247)).

56. Schoenbaum v. Firstbrook, 405 F.2d 200, 206, 208 (2d Cir.), *rev'g en banc on other grounds*, 405 F.2d 215 (2d Cir. 1968), *and overruled by Morrison*, 561 U.S. 247; *see also* Mark, *supra* note 3, at 556 (citing Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 30 (D.C. Cir. 1987), *overruled by Morrison*, 561 U.S. 247).

57. *See Alfadda*, 935 F.2d at 478.

58. *Id.* at 479–80.

59. *See id.*

60. N.S. Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051–52 (2d Cir. 1996), *overruled by Morrison*, 561 U.S. at 253–55, *as recognized in* Norex Petrol. Ltd. v. Access Indus., Inc., 631 F.3d 29, 32 (2d Cir. 2010) (per curiam).

61. *See id.* at 1051–52, 1052 n.7 (citing *Alfadda*, 935 F.2d at 478–79, 480).

62. *See Morrison*, 561 U.S. at 262.

63. *Al-Turki*, 100 F.3d at 1051–52.

64. *See id.* at 1052 (quoting Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150 (1987)).

applied abroad" and the congressional intent regarding extraterritorial application of the statutes may not be identical.[65] Despite the similarities among RICO, securities, and antitrust statutes, the Second Circuit ultimately failed to endorse a test for deciding RICO's extraterritorial reach.[66]

A combination of the conduct and effects tests to determine RICO's extraterritorial reach was officially endorsed by the Ninth Circuit in *Poulos v. Caesars World, Inc.*[67] Although the Ninth Circuit reiterated the Second Circuit's concern that securities statutes were not precisely analogous to RICO, it nonetheless determined "the tests used to assess the extraterritorial application of the securities laws" should apply to RICO, as well.[68] A majority of courts followed the Ninth Circuit's lead in adopting a combination of the conduct and effects tests to determine RICO's extraterritoriality.[69] Under this approach, if conduct material to the pattern of racketeering activity occurred within the United States and directly caused a foreign injury, or racketeering activity abroad caused significant effects within the United States, RICO applied extraterritorially.[70] Conduct is considered material to the racketeering activity when it is central to the completion of the racketeering activity.[71] Conduct is not material when the activity occurring inside the United States merely consists of "preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries."[72]

IV. RICO'S EXTRATERRITORIALITY POST-*MORRISON*

In *Morrison*, the Supreme Court decided section 10(b) of the Exchange Act does not apply extraterritorially.[73] The Court expressly rejected the use of the Second Circuit's conduct and effects tests in securities jurisprudence,

65. *Id.*

66. *See id.*

67. *See* Poulos v. Caesars World, Inc., 379 F.3d 654, 663 (9th Cir. 2004).

68. *See id.*

69. *See* Mark, *supra* note 3, at 554–55.

70. *See* Liquidation Comm'n of Banco Intercont'l, S.A. v. Renta, 530 F.3d 1339, 1351–52 (11th Cir. 2008); *see also* Mark, *supra* note 3, at 555.

71. *See Renta*, 530 F.3d at 1352 (citing *Al-Turki*, 100 F.3d at 1052–53).

72. *See* Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991) (quoting IIT v. Vencap. Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975), *overruled by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010)), *overruled by Morrison*, 561 U.S. 247; *see also Renta*, 530 F.3d at 1352.

73. *Morrison*, 561 U.S. at 265.

essentially erasing four decades of extraterritorial securities jurisprudence.[74] In its place, the *Morrison* Court developed a two-pronged approach for assessing whether a statute overcomes the presumption against extraterritoriality.[75] At the first step, courts are required to determine whether the statute gives a clear, affirmative indication that it applies extraterritorially.[76] If at the first step the court concludes the statute is not extraterritorial, then the second step requires the court to assess whether the case involves a domestic application of the statute.[77] This is done through looking at the statute's "focus of congressional concern."[78] While the decision directly impacted securities jurisprudence, it also indirectly affected RICO jurisprudence because of the lower courts' reliance on the conduct and effects tests in determining RICO's extraterritorial application.[79]

A. Morrison

In *Morrison*, the Supreme Court decided section 10(b) of the Exchange Act did not apply extraterritorially to "foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[80] Section 10(b) protects investors from fraud or misrepresentations made in connection with the sale or purchase of any security.[81] The plaintiffs in *Morrison* were foreign shareholders of a foreign company who brought suit when the value of their stock fell drastically after alleged misrepresentations by both their company and a U.S. company.[82] The Supreme Court determined the Exchange Act only applied to stock transactions on domestic exchanges and domestic transactions in securities.[83] The *Morrison* Court rejected the conduct and effects tests and adopted a

74. *See id.* at 255–59, 261; Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663, 665 & n.7 (2012).

75. *See Morrison*, 561 U.S. at 265–67.

76. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016) (discussing the two-step framework established in *Morrison* and *Kiobel*). *See generally* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (refusing to apply Alien Tort Statute extraterritorially).

77. *Id.*

78. *See Morrison*, 561 U.S. at 266.

79. *See, e.g.*, Liquidation Comm'n of Banco Intercont'l, S.A. v. Renta, 530 F.3d 1339, 1352 (11th Cir. 2008); Poulos v. Caesars World, Inc., 379 F.3d 654, 663 (9th Cir. 2004).

80. *Morrison*, 561 U.S. at 250–51, 273.

81. *See* 15 U.S.C. § 78j(b) (2012).

82. *Morrison*, 561 U.S. at 251–53.

83. *Id.* at 273.

two-pronged test for analyzing a claim's extraterritorial application.[84]

Under the *Morrison* framework, courts are first required to look for clear congressional intent of extraterritorial application in the plain language of the statute.[85] If the statute lacks a "clear statement rule" (i.e., "this law applies abroad"), the overall context of the statute should be considered to determine whether Congress intended for the law to apply extraterritorially.[86] If the court, based on its analysis of the plain language and statutory context, finds evidence of clear congressional intent for the law to apply extraterritorially, then the presumption against extraterritoriality is rebutted.[87] In *Morrison*, the Court found no affirmative congressional indication that section 10(b) of the Exchange Act applied extraterritorially based on the statute's plain language and provisions as a whole.[88] In a concurring opinion, Justice John Paul Stevens adamantly disagreed with the Court's finding that the text of the Exchange Act did not indicate at least some extraterritorial application.[89] Stevens sharply criticized the majority for failing to give proper weight to the "strong clues that [section 10(b)] should cover at least some" transnational securities fraud.[90]

If a court concludes a statute is not extraterritorial after the first step in a *Morrison* analysis, a claim brought under the statute may still survive, provided the claim involves a domestic application of the statute.[91] The second step of the *Morrison* framework requires courts to look at the focus of congressional concern in a statute to determine whether a claim involves a domestic application of the statute.[92] "If the conduct relevant to the

84. *Id.* at 259–61, 265–67.

85. *Id.* at 265.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 281–83 (Stevens, J., concurring); *see also* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336 (2d Cir. 1972) ("Congress . . . meant § 10(b) to protect against fraud in the sale or purchase of securities whether or not these were traded on organized United States markets . . . ."), *abrogated by Morrison*, 561 U.S. 247.

90. *Morrison*, 561 U.S. at 283 n.9 (Stevens, J., concurring) ("By its terms, § 10(b) regulates 'interstate commerce,' which the Exchange Act defines to include 'trade, commerce, transportation, or communication . . . between any foreign country and any State, or between any State and any place or ship outside thereof.' Other provisions of the Exchange Act make clear that Congress contemplated some amount of transnational application." (citations omitted)).

91. *Id*. at 266–67 (majority opinion).

92. *See id.* at 261, 266.

statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad."[93] In *Morrison*, the Court determined "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."[94] Thus, the *Morrison* Court adopted a transactional test, determining the focus of section 10(b) is where the transaction occurred.[95] Because the transaction in *Morrison* did not involve securities listed on a domestic exchange, and all aspects of the transactions occurred outside the United States, the Court affirmed the dismissal of the petitioners' claims.[96]

B. *The Enterprise Test*

The Supreme Court's decision in *Morrison* drastically altered how lower courts analyzed a RICO claim's extraterritorial application. Three main approaches for determining whether a RICO claim called for extraterritorial application emerged from the lower courts. The first test to materialize from the lower courts was the enterprise test, which surfaced just a few months after the Supreme Court's decision in *Morrison*.[97] In *Cedeño v. Intech Group, Inc.*, a Venezuelan citizen brought suit under RICO's civil provisions against a group of Venezuelan government officials, claiming that the defendants had used New York-based U.S. banks in a money laundering scheme to hold, move, and conceal the fruits of fraud, extortion, and other various crimes committed by the defendants.[98] The scheme's only connection to the United States was the transferring of funds through U.S. banks.[99]

The *Cedeño* court reaffirmed both the presumption against

93. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016) (citing *Morrison*, 561 U.S. at 262–63).

94. *See Morrison*, 561 U.S. at 266.

95. *Id.* at 266–67, 269–70 (holding that section 10(b) does not provide a cause of action in "foreign-cubed" (f-cubed) cases because it applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities"). *See generally id.* at 283 n.11 (Stevens, J., concurring in the judgment) (explaining "foreign-cubed" actions as those with foreign plaintiffs suing a foreign defendant based on transactions in foreign countries).

96. *Morrison*, 561 U.S. at 273.

97. *See* Cedeño v. Intech Grp., Inc., 733 F. Supp. 2d 471, 473–74 (S.D.N.Y. 2010), *aff'd*, 457 Fed. App'x 35 (2d Cir. 2012), *and overruled by* European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 136 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016).

98. *Id.* at 472.

99. *Id.*

extraterritoriality and the focus test developed from *Morrison*.[100] At the first step of the *Morrison* framework, the court quickly determined that RICO did not apply extraterritorially because RICO is silent as to its extraterritorial application.[101] In other words, because RICO lacks a clear statement rule, the court determined that Congress did not intend for the Act to apply extraterritorially.[102] Without analyzing the text of the Act or its statutory context, the court moved on to the second part of the *Morrison* test.[103] Under the second prong, the important question for the court became what the focus of RICO is.[104] The court determined that the focus of RICO is the "enterprise" rather than the pattern of criminal activity necessary to trigger RICO liability.[105] Since the court found that RICO is primarily concerned with the enterprise and not the pattern of racketeering activity, the court held that because RICO does not explicitly address foreign enterprises, it does not encompass claims against foreign enterprises.[106] Accordingly, the Venezuelan plaintiff did not have a valid RICO claim against Venezuelan defendants because the alleged enterprise was foreign.[107]

The *Cedeño* court's determination that RICO's primary focus under the second prong of *Morrison* is the enterprise finds support in the text of the statute. "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 . . . ."[108]

100. *See id.* at 473–74.

101. *Id.* at 473 (quoting N.S. Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996)).

102. *Id.*; *see also Morrison*, 561 U.S. at 265.

103. *Cedeño*, 733 F. Supp. 2d at 473–74, *aff'd*, 457 Fed. App'x 35 (2d Cir. 2012), *and overruled by* European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 136 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016).

104. *See id.* at 473.

105. *Id.* ("So far as RICO is concerned, it is plain on the face of the statute that the statute is focused on how a pattern of racketeering affects an *enterprise*: it is these that the statute labels the 'Prohibited activities,' 18 U.S.C. § 1962." (emphasis added)).

106. *Id.* at 473–74. "But nowhere does the statute evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality." *Id.* at 473.

107. *Id.* at 474.

108. *Id.* at 473–74 (emphasis added). RICO prohibits the use of a pattern of racketeering activity to impact an enterprise "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." *Id.* (citations omitted) (citing 18 U.S.C. § 1962 (2012)).

Additionally, the court's decision is in line with *Morrison*'s presumption against extraterritoriality because the statute fails to "evidence any concern with foreign enterprises."[109] Other lower courts embraced the Southern District of New York's enterprise test after *Cedeño*.[110] Because of its wide use after the *Morrison* decision, the enterprise test developed by the *Cedeño* court was further refined with the addition of the "nerve center" test borrowed from corporate law.[111] The nerve center test is used in corporate law to identify a corporation's principal place of business for purposes of deciding diversity jurisdiction.[112] The place where a corporation's officers direct, control, and coordinate all activities in furtherance of the corporation's objections is considered the nerve center, and its location in a state will subject the corporation to jurisdiction in that state.[113] Noting the difficulty of determining the location of an enterprise, the Eastern District of New York applied the nerve center test to determine more consistently the location of an enterprise.[114]

While the enterprise approach was supported for its adherence to the presumption against extraterritoriality and clear framework, it had significant flaws as well. In light of the Supreme Court's recent decision in

109. *Id.* at 473.

110. *See, e.g.*, Sorota v. Sosa, 842 F. Supp. 2d 1345, 1350 (S.D. Fla. 2012) (holding that RICO liability did not attach to an enterprise located in Peru); *In re* Toyota Motor Corp., 785 F. Supp. 2d 883, 915 (C.D. Cal. 2011) ("[W]ere foreign Plaintiffs to bring a RICO claim against an alleged enterprise operating in the United States, consisting largely of domestic 'persons,' engaging in a pattern of racketeering activity in the United States, and damaging Plaintiffs abroad, these foreign Plaintiffs might well state a claim consistent with *Morrison*'s holding."); United States v. Phillip Morris USA, Inc., 783 F. Supp. 2d 23, 29 (D.D.C. 2011) (holding that the facts showed the defendants' enterprise was located abroad and therefore no RICO liability attached).

111. *See* European Cmty. v. RJR Nabisco, Inc., No. 02-CV-5771 (NGG)(VVP), 2011 WL 843957, at *6 (E.D.N.Y. Mar. 8, 2011), *vacated*, 764 F.3d 129 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016).

112. Hertz Corp. v. Friend, 559 U.S. 77, 93 (2010).

113. *Id.* at 80–81.

114. *European Cmty. v. RJR Nabisco, Inc.*, 2011 WL 843957, at *6 ("RICO enterprises, however, may not have a single center of corporate policy. Although the 'nerve center test' compels the court to determine a principal, i.e., single place of business for a corporation, though there may be many, the test is still instructive in determining the geographic location of 'enterprise.' The nerve center test's focus on the 'brains,' that is, where the corporation's decision are made, as opposed to the 'brawn,' that is, how the corporation acts, shows the Supreme Court's conception of the corporation's geographic location and where it makes its decisions as twinned. Thus, although an enterprise may very well possess several 'nerve centers,' it is the 'brains' not the 'brawn' that dictate where the enterprise is located.").

RJR Nabisco, Inc., the most glaring flaw from the enterprise approach was its failure to properly consider the first prong of *Morrison*.[115] The *Cedeño* decision provides an illustrative example. The first step in the *Morrison* framework requires courts to look for a clear indication that RICO applies extraterritorially.[116] A clear indication is not limited to an express statement from Congress (i.e., "this law applies to foreign conduct"), but instead includes looking at textual clues and the overall purpose of an act.[117] The *Cedeño* court abruptly—and incorrectly—stopped its analysis under the first prong in *Morrison* when it failed to find an express statement from Congress stating the Act applied extraterritorially.[118] Instead, the court should have continued its analysis by examining the text and purpose of RICO to determine whether Congress gave a clear indication that the Act should apply extraterritorially.[119] A proper application of *Morrison* will be discussed in Part V.

Another notable flaw with the enterprise test was that it required courts to make the difficult determination of deciding the location of an enterprise.[120] Most of the cases that applied the enterprise test involved relatively simple fact patterns.[121] For instance, in *Cedeño* and *United States v. Phillip Morris USA, Inc.*, the defendants were clearly foreign nationals who committed the racketeering acts at issue in foreign countries.[122] Applying the enterprise test to a more complicated fact pattern reveals the difficulty in determining whether an enterprise is truly foreign and also demonstrates the incongruous results possible with this approach.[123] For

115. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016).

116. *Id.*

117. *Id.* 2101–02.

118. Cedeño v. Intech Grp., Inc., 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010), *aff'd*, 457 Fed. App'x 35 (2d Cir. 2012), *and overruled by* European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 136 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016).

119. *RJR Nabisco, Inc.*, 136 S. Ct. at 2101–02.

120. *See, e.g.*, European Cmty. v. RJR Nabisco, Inc., No. 02-CV-5771 (NGG)(VVP), 2011 WL 843957, at *5–7 (E.D.N.Y. Mar. 8, 2011), *vacated*, 764 F.3d 129 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016).

121. *See, e.g.*, *Cedeño*, 733 F. Supp. 2d at 472.

122. United States v. Phillip Morris USA, Inc., 783 F. Supp. 2d 23, 29 (D.D.C. 2011); *Cedeño*, 733 F. Supp. 2d at 472.

123. *See, e.g.*, Chevron Corp. v. Donziger, 871 F. Supp. 2d 229, 242–43 (S.D.N.Y. 2012) ("For example, suppose that officials of two corporations—one incorporated in Delaware and the other in Bermuda, but both doing substantial business in the United States—conducted the respective affairs of those entities, each entity independent of the other, through patterns of mail and wire fraud or other predicate acts in the United

instance, an enterprise organized in a foreign country could commit racketeering acts within the United States and escape liability under RICO because the brains of the operation are located in a foreign country.[124] Furthermore, the nerve center test was crafted for deciding the location of formal corporations, not the informal enterprises that may be present in RICO cases.[125] Informal RICO enterprises rarely have a traditional corporate structure; instead, "decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, or other method[s]."[126] These characteristics make it highly probable that an informal RICO enterprise will have multiple locations without a clear identifiable nerve center serving as a headquarters of sorts.

A third flaw in the enterprise test was that, by solely focusing on the enterprise aspect of RICO, it discounted RICO's other important foci. While it is indisputable that the enterprise is one of RICO's foci, it is equally clear that RICO's other focus is on a pattern of racketeering activity.[127] RICO liability only attaches if there is a pattern of racketeering activity, meaning RICO does not punish isolated or discrete acts.[128] A pattern of racketeering activity requires at least two acts of racketeering activity, and the acts must be related, or otherwise constitute a threat of continuing racketeering activity.[129] Furthermore, the Supreme Court itself recognized that "[t]he

States to the great injury of members of the American public. The idea that the officials of the Delaware corporation could be prosecuted criminally and sued civilly under RICO because their enterprise was a domestic corporation while their counterparts with the Bermudan corporation would be immune solely because the Bermudan corporation was foreign would be risible.").

124. *See* R. Davis Mello, Note, *Life After* Morrison*: Extraterritoriality and RICO*, 44 VAND. J. TRANSNAT'L L. 1385, 1406–07 (2011).

125. *See* Mark, *supra* note 3, at 601.

126. *Id.* (citing Boyle v. United States, 556 U.S. 938, 948 (2009)).

127. *See* 18 U.S.C. § 1962 (2012); *see also* Mark, *supra* note 3, at 594–95 (discussing RICO's three foci of enterprises, patterns of racketeering activity, and organized crime).

128. *See* 18 U.S.C.A. § 1961(5) (West 2015 & Supp. 2016); 18 U.S.C. § 1962; H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 232 (1989); *see also H.J. Inc.*, 492 U.S. at 251 (Scalia, J., concurring in the judgment) (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)).

129. *See* 18 U.S.C.A. § 1961(5) (defining "pattern of racketeering activity" to require "at least two acts of racketeering activity"); *H.J. Inc.*, 492 U.S. at 237 (majority) ("In our view, Congress had a more natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.").

heart of any RICO complaint is the allegation of a *pattern* of racketeering."[130] Although the Supreme Court ultimately decided the issue based on *Morrison*'s first prong, the majority still relied indirectly on the "focus" arguments developed in the other approaches to address the second prong of *Morrison*.[131] Accordingly, the enterprise test is inconsistent with a correct application of *Morrison*, leads to incongruous results, and fails to recognize RICO's multiple foci.

C. *Pattern of Racketeering Activity Test*

Another test developed by the lower courts to analyze a RICO claim's extraterritorial application focused on the alleged pattern of racketeering activity. Under this approach, when significant acts in the pattern of racketeering activity occurred in the United States, RICO liability attached.[132] The pattern of racketeering activity test was developed by the Ninth Circuit in *United States v. Chao Fan Xu*.[133] In *Chao Fan Xu*, four Chinese nationals engaged in fraud against the Bank of China (resulting in around $482 million of lost assets for the Bank of China) and then sought to avoid imprisonment—in the event that their fraud was discovered—by entering into the United States with counterfeit documents for the purpose of obtaining false marriages with U.S. citizens to avoid extradition back to China.[134] Thus, the racketeering activities were conducted both in China and the United States (the fraud against the Chinese bank occurred in China, and the violation of U.S. immigration laws occurred in the United States).[135] The Ninth Circuit noted that this case illustrated the flaws of the enterprise test because, under the enterprise test, the defendants would escape punishment merely because their enterprise was formed, and operated for the most part, in a foreign country.[136] Choosing not to apply the enterprise

130. Rotella v. Wood, 528 U.S. 549, 556 (2000) (quoting Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 154 (1987)).

131. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101–03 (2016).

132. *See* United States v. Chao Fan Xu, 706 F.3d 965, 978 (9th Cir. 2013), *overruled by* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016).

133. *Id.* "[A]n inquiry into the application of RICO to Defendants' conduct is best conducted by focusing on the pattern of Defendants' racketeering activity as opposed to the geographic location of Defendants' enterprise." *Id.* at 977.

134. *Id.* at 972–73.

135. *Id.* at 978.

136. *Id.* at 977 ("[I]n 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, 'there is no necessary or . . . even probable connection between where the RICO enterprise makes its decisions and whether the application of RICO to the racketeering

test, the *Chao Fan Xu* court instead applied the pattern of racketeering activity test, determining that where the racketeering activity occurred would be dispositive in analyzing a RICO claim's extraterritorial application.[137]

Chao Fan Xu presented the Ninth Circuit with its first opportunity to consider whether RICO applied extraterritorially after *Morrison*.[138] Much like the Southern District of New York before it, the Ninth Circuit held, based on precedent and without an analysis of its own, that RICO failed to rebut the presumption against extraterritoriality under *Morrison*'s first prong.[139] The Ninth Circuit was likely wary of *Morrison*'s emphasis on the presumption against extraterritoriality and sought to adhere to the Supreme Court's recent mandate in making its determination.[140] After determining that RICO did not apply extraterritorially, the Ninth Circuit turned its attention to the trickier question of deciding whether the RICO claim sought domestic or extraterritorial application under *Morrison*'s second prong.[141]

Applying the second step of the *Morrison* framework, the Ninth Circuit was required to look for the focus of congressional concern in RICO to determine whether the claim at hand involved a domestic or extraterritorial application of the statute.[142] In its analysis, the Ninth Circuit acknowledged the difficulty in applying *Morrison*'s focus logic to RICO.[143] While noting that other circuits "side-stepped the issue," the Ninth Circuit ultimately decided that *Morrison* mandated a detailed inquiry of RICO's focus.[144] After

activity at issue . . . was the sort of activity with which Congress would have been concerned." (quoting Chevron Corp. v. Donziger, 871 F. Supp. 2d 229, 243 (S.D.N.Y. 2012))).

137. *Id.* at 977–79.

138. *Id.* at 974.

139. *Id.* at 974–75; *see* Cedeño v. Intech Grp., Inc., 733 F. Supp. 2d 471, 473, *aff'd*, 457 Fed. App'x 35 (2d Cir. 2012), *and overruled by* European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 136 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016).

140. *Chao Fan Xu*, 706 F.3d at 974 ("Rather than guess anew in each case, this Court applies the presumption [against extraterritorial application] in all cases, preserving a stable background against which Congress can legislate with predictable effects." (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010))).

141. *Id.* at 975 ("Accordingly, we must determine whether under the circumstances of this case RICO can be lawfully applied to any, or all, of Defendants' conduct—foreign or domestic.").

142. *Id.*; *see Morrison*, 561 U.S. at 266.

143. *Chao Fan Xu*, 706 F.3d at 975.

144. *Id.*

a careful analysis of the relevant statutory language and legislative history, the court concluded that RICO's focus is on the pattern of racketeering activity.[145] Applying that conclusion to the facts at hand, the court decided that because "RICO's focus is on the pattern of racketeering activity, we conclude that Defendants' criminal plan, which included violation of United States immigration laws while the Defendants were in the United States, falls within the ambit of the statute."[146]

The pattern of racketeering activity approach finds support in both RICO's statutory language and its legislative history. Looking first at the statute's language, 18 U.S.C. § 1962(c) prohibits "the conduct of [a criminal] enterprise's affairs through a pattern of racketeering activity."[147] Although there must be both a pattern of racketeering activity and an enterprise for a valid RICO claim, RICO primarily punishes patterns of racketeering activity and not the forming of a criminal enterprise.[148] Furthermore, RICO's legislative history shows that the statute was designed to eradicate organized crime in the United States "by strengthening the legal tools in the evidence-gathering process, . . . establishing new penal prohibitions, and . . . providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[149] The legislative intent shows that Congress was concerned with punishing patterns of organized crime, which makes it highly unlikely that Congress was unconcerned with foreign organized crime enterprises whose actions violated the laws of this county.[150]

Although the pattern of racketeering activity test fixes many of the flaws in the enterprise test, it comes with its own host of problems as well. Most importantly, the pattern of racketeering approach fails to properly apply the first prong of *Morrison*.[151] As previously discussed, the first step in the *Morrison* framework requires courts to look for a clear indication that RICO applies extraterritorially.[152] A clear indication can be discerned from the context of the statute and is not limited to an explicit statement from

145. *Id.* at 977–78.

146. *Id.* at 979.

147. 18 U.S.C. § 1962(c) (2012).

148. *See* Mello, *supra* note 124, at 1407.

149. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose).

150. *Chao Fan Xu*, 706 F.3d at 978 (citing Chevron Corp. v. Donziger, 871 F. Supp. 2d 229, 241–43 (S.D.N.Y. 2012)).

151. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016).

152. *Id.* at 2103; *see supra* notes 85–87, 116–17 and accompanying text.

Congress that the law applies extraterritorially.[153] Similar to the *Cedeño* court's incorrect analysis, the court in *Chao Fan Xu* also prematurely ended its analysis under the first prong in *Morrison* when it relied solely on precedent to conclude that RICO does not apply extraterritorially.[154] *Morrison* requires courts to look at the text and purpose of a statute to determine whether Congress gave a clear indication that the statute should apply extraterritorially.[155] The Ninth Circuit failed to conduct the prescribed contextual analysis compelled by *Morrison*.[156]

Other criticisms against the pattern of racketeering activity test include that it disregards the presumption against extraterritoriality and is difficult for courts to apply. First, the pattern of racketeering activity test allows courts to attach RICO liability to a pattern of racketeering activity that occurs entirely abroad as long as there is some connection to the United States.[157] This is a problem because it allows for results similar to those found under the conduct or effects tests, which were expressly rejected by the Supreme Court in *Morrison* because they failed to take the presumption against extraterritoriality into account.[158] The *Morrison* Court made clear that merely *some* domestic activity in a claim is not enough to overcome the presumption against extraterritoriality,[159] yet the pattern of racketeering activity approach allows for precisely this result. Second, it is unclear how much of a domestic connection there needs to be for liability to attach under the pattern of racketeering activity approach.[160] The Ninth Circuit failed to provide "guidance as to how much of the pattern of activity need take place in the United States for a court to find that the entire pattern and predicate acts occurred domestically."[161] Consequently, the pattern of activity test does not incorporate *Morrison*'s two prongs correctly, fails to provide a clear framework for the application of the test, and the potential for significantly varying results exists.

153. *RJR Nabisco, Inc.*, 136 S. Ct. at 2101–02; *see supra* note 117 and accompanying text.

154. *Chao Fan Xu*, 706 F.3d at 974–75.

155. *RJR Nabisco, Inc.*, 136 S. Ct. at 2101–02.

156. *See Chao Fan Xu*, 706 F.3d at 974–75; *see also RJR Nabisco, Inc.*, 136 S. Ct. at 2101–02.

157. *See Chao Fan Xu*, 706 F.3d at 979.

158. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 259–61 (2010) (majority).

159. *Id.*

160. *See* Chevron Corp. v. Donziger, 871 F. Supp. 2d 229, 243 (S.D.N.Y. 2012).

161. *See* Huntley, *supra* note 28, at 1714.

D. *Predicate Acts Test*

The last test developed to analyze a RICO claim's extraterritorial application was the predicate acts test. The predicate acts approach was created by the Second Circuit in *European Community v. RJR Nabisco, Inc.*[162] In *European Community*, the European Community and 26 of its member states sued RJR Nabisco, Inc. (RJR), alleging that RJR had participated in a scheme in which "drug traffickers smuggled narcotics into Europe and sold the drugs for euros that—through a series of transactions involving black-market money brokers, cigarette importers, and wholesalers—were used to pay for large shipments of RJR cigarettes into Europe."[163] Prior to *European Community*, the Second Circuit had determined that RICO, as a whole, did not apply extraterritorially.[164]

Approaching the problem for the first time in four years, the Second Circuit took great pains to distinguish its 2010 decision in *Norex Petroleum Ltd. v. Access Industries, Inc.*[165] While the court rejected the argument that all RICO claims apply extraterritorially in *Norex*, it noted that its holding was limited to refusing "to equate the extraterritoriality of certain RICO predicates with the extraterritoriality of RICO as a whole."[166] The court went on to state that while RICO does not apply extraterritorially in *all* its applications, it may still apply extraterritorially in *some* of its applications.[167] Accordingly, the Second Circuit undertook the *Morrison* analysis to determine which RICO claims may apply extraterritorially.[168]

Unlike the *Cedeño* and *Chao Fan Xu* courts, the Second Circuit determined that RICO rebutted the presumption of extraterritoriality at the first step of the *Morrison* framework.[169] Through looking at the relevant statutory language and context of the Act, the Second Circuit found that "Congress manifested an unmistakable intent that certain . . . predicates for

162. European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 136 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016).

163. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2098 (2016) (citing European Cmty. v. RJR Nabisco, Inc., No. 02–CV–5771 (NGG)(VVP), 2011 WL 843957, *1–2 (E.D.N.Y. Mar. 8, 2011)).

164. Norex Petrol. Ltd. v. Access Indust., Inc., 631 F.3d 29, 33 (2d Cir. 2010).

165. European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 135–38 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016).

166. *Id.* at 136.

167. *Id.*

168. *Id.*

169. *Id.*

RICO liability apply to extraterritorial conduct."[170] As a reminder, RICO predicates are the specified state and federal crimes that must be violated—at least twice, by a criminal enterprise, and in a manner that demonstrates a pattern of racketeering activity—for RICO liability to attach.[171] The Second Circuit held that because the text of RICO in § 1961(1) incorporates predicates that necessarily involve extraterritorial conduct,[172] Congress unmistakably intended for RICO to apply extraterritorially when RICO liability is based on violation of predicates that criminalize foreign conduct.[173] Under the predicate acts test, "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate."[174] Accordingly, when there is clear congressional intent for a RICO predicate to apply extraterritorially, RICO will apply extraterritorially to the same extent the predicate act does.[175] Applying this to the facts of the case, the court held that European Community's RICO claim applied extraterritorially to the extent the alleged pattern of racketeering activity was based on predicates that applied extraterritorially.[176] The court also determined that even RICO liability based on violations of predicates that did not overcome the presumption against extraterritoriality validly stated a cause of action because, in the context of the complaint, they stated a domestic RICO claim.[177]

170. *Id.*

171. *Supra* text accompanying note 41. RICO predicates include crimes such as murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in a controlled substance, money laundering, wire fraud, mail fraud, etc. 18 U.S.C.A. § 1961(1) (2015 & Supp. 2016).

172. *See, e.g.*, *European Cmty.*, 764 F.3d at 136. RICO lists § 2332 of Title 18 as a predicate act. Section 2332 criminalizes killing, and attempting to kill, "a national of the United States, *while such national is outside the United States*." 18 U.S.C. § 2332(a), (b) (emphasis added). Section 2423(c) also provides an example of a predicate specifically criminalizing extraterritorial conduct. Section 2423(c) criminalizes "[e]ngaging in illicit sexual conduct *in foreign places*." *Id*. § 2423(c) (emphasis added).

173. *European Cmty.*, 764 F.3d at 136.

174. *Id.*

175. *Id.*

176. *Id.* at 139 ("[T]he money laundering and material support of terrorism statutes both apply extraterritorially under specified circumstances, including those circumstances alleged in the Complaint.").

177. *Id.* ("Nevertheless, because Plaintiffs have alleged that all elements of the wire fraud, money fraud, and Travel Act violations were completed in the United States or while crossing U.S. borders, we conclude that the Complaint states domestic RICO claims based on violations of those predicates.").

The predicate acts test is supported by the text of RICO. Racketeering activity under RICO's purview includes various federal criminal statutes, which act as predicates for RICO liability or guilt (a defendant must violate at least two of the listed federal criminal statutes to trigger RICO).[178] Some of the predicate acts (federal criminal statutes) incorporated in RICO involve prohibited conduct outside the United States, while others apply to both domestic and extraterritorial conduct.[179] By incorporating predicate statutes that apply to both domestic and extraterritorial conduct, it is clear Congress intended RICO to have at least some extraterritorial reach.[180] "Indeed, it is hard to imagine why Congress would incorporate these statutes as RICO predicates if RICO could never have extraterritorial application."[181]

The predicate acts approach is also in line with the presumption against extraterritoriality and *Morrison*'s two-part framework for analyzing a claim's extraterritorial application. By making the extraterritorial application of RICO coextensive with the extraterritorial application of the relevant predicate statutes, the predicate acts approach recognizes that RICO has no extraterritorial application independent of its predicate statutes.[182] This approach also avoids the absurd result of having predicate statutes that apply extraterritorially when violated independently but lose their extraterritorial application when brought under a RICO claim.[183] Furthermore, the predicate acts approach ensures that foreign enterprises that engage in illegal domestic activity will not be shielded from liability solely because of their foreign status.[184] Lastly, the predicate acts approach reflects a proper contextual analysis of RICO under *Morrison*'s first prong because it recognizes Congress's clear intent (found in the textual provisions of RICO and its objectives) for certain RICO violations to apply extraterritorially.[185] Instead of solely relying on an explicit statement from Congress addressing extraterritoriality, the predicate acts approach

178. 18 U.S.C.A. § 1961(5) (West 2015 & Supp. 2016); 18 U.S.C. § 1962 (2012).

179. *European Cmty.*, 764 F.3d at 136 ("[Section] 2332 of Title 18 criminalizes killing, and attempting to kill 'a national of the United States, *while such national is outside the United States*.'" (quoting 18 U.S.C. § 2332(a) (emphasis in original))).

180. *Id.*

181. *Id.*

182. *Id.* at 139 (citing Norex Petrol. Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010)).

183. *Id.* at 138–39.

184. *Id.*

185. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261–63 (2010); *see European Cmty.*, 764 F.3d at 136.

correctly discerns Congress's intent for RICO's proper extraterritorial application from text of the statute and its overall context.[186]

E. RJR Nabisco, Inc. v. European Community

As a result of the inconsistent tests and conclusions regarding RICO's extraterritorial application after *Morrison*, the Supreme Court stepped in to resolve the issue.[187] It did so by revisiting the Second Circuit's 2014 decision in *European Community*.[188] In its analysis of the Second Circuit's decision, the Supreme Court reaffirmed the importance of the presumption against extraterritoriality and the two-step framework for analyzing extraterritoriality issues.[189] Specifically, the Court emphasized that if at step one under *Morrison*, a statute clearly has extraterritorial application, then it is unnecessary and incorrect to conduct the focus inquiry under the second prong.[190] Relying on this rationale, the Court concluded that the question of RICO's extraterritorial application was resolved under the first prong of the *Morrison* framework.[191]

> While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. "Assuredly context can be consulted as well." Context is dispositive here. Congress has not expressly said that § 1962(c) applies to patterns of racketeering activity in foreign countries, but it has defined "racketeering activity"—and by extension a "pattern of racketeering activity"—to encompass violations of predicate statutes that do expressly apply extraterritorially. Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect. This unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritorially.
>
> We therefore conclude that RICO applies to some foreign racketeering activity. A violation of § 1962 may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself

186. *See European Cmty.*, 764 F.3d at 136.
187. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2090 (2016).
188. *Id.*
189. *Id.* at 2100–01.
190. *Id.* at 2101.
191. *Id.* at 2102–03.

extraterritorial.[192]

Like the Second Circuit before it, the Supreme Court adopted the predicate acts approach to determine a RICO claim's extraterritorial application.[193] It concluded that the Second Circuit was correct in holding that the plaintiffs' claim in *European Community* was not an impermissible extraterritorial application of RICO because two of the RICO predicates violated applied extraterritorially and the remaining predicates stated valid domestic RICO violations.[194] However, the Court ultimately dismissed the claim, reasoning a claim brought under § 1964(c)—RICO's private right of action—must allege and prove a domestic injury to its business or property, which the European Community could not do.[195]

1. *Decision's Impact*

While the Court's decision established RICO's proper extraterritorial application under the first prong of *Morrison*, it failed to resolve how courts should approach the second prong (deciding a statute's focus) for cases where alleged RICO liability is based on violations of domestic predicates. *RJR Nabiso, Inc.* presented the Court with an excellent vehicle to address the issue, because according to the Court's own analysis, three of the alleged predicates violated did not overcome the presumption against extraterritoriality.[196] However, instead of deciding the issue based on the second prong of *Morrison*, the Supreme Court quickly determined that because the complaint alleged domestic violations of RICO, and the "allege[d] conduct in the United States . . . satisfie[d] every essential element" of the underlying predicates, its domestic application was proper.[197] In other words the Court utilized the conduct test, a test it explicitly rejected in *Morrison*, to determine whether the parts of the RICO claim that did not overcome the presumption of extraterritoriality were valid.[198]

192. *Id.* (emphasis omitted) (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 (2010)).

193. *Id.* at 2103.

194. *Id.* at 2105–06.

195. *Id.* at 2106.

196. *Id.* at 2105.

197. *Id.* (quoting European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 142 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016)).

198. *Id.*; Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010).

The Court's decision is unsurprising given the struggles lower courts experienced in applying *Morrison*'s second prong to RICO. As discussed in Part III, lower courts that addressed the issue fell into two camps, finding that RICO's focus was on either the enterprise or the pattern of racketeering activity. Statutes with multiple possible foci, such as RICO, reveal a glaring flaw under *Morrison*'s second step. Courts are essentially left guessing what aspect of a statute—which requires predicate acts to be violated, by a criminal enterprise, and in a manner that demonstrates a pattern of racketeering activity—Congress considered the true focus.[199] As the inconsistent results reached by lower courts demonstrate, courts come to different conclusions based on their analyses of the statute and the complaints before them.[200] If anything, RICO's broad focus is on combatting organized crime, as evidenced in the statute's statement of findings and purpose.[201] Trying to discern some narrower congressional focus than the statute's overall purpose and objective leads to inconsistent results that neglect RICO's multiple requirements for liability to attach.

Since the second prong of the *Morrison* framework is essentially unworkable in complicated statutes with multiple possible foci, the second step should be scrapped in favor of the conduct test utilized by the Court in *RJR, Nabisco, Inc.*[202] Scrapping the second prong would not hamper courts in applying the presumption against extraterritoriality under *Morrison*'s first prong and presents a clearer test for determining whether a statute has stated a valid domestic claim if it fails to rebut the presumption. If a complaint alleges conduct in the United States satisfies every essential element of a statute, then it states a valid domestic claim.[203]

V. CONCLUSION

After the Supreme Court's decision in *Morrison*, lower courts were forced to reexamine their approach to determining RICO's extraterritorial application. The first test to emerge post-*Morrison* was the enterprise test, which posited that the line between domestic and extraterritorial application of RICO is based on whether the enterprise is foreign or domestic.[204] The

199. *Supra* notes 41–45.

200. *See supra* Part III.

201. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922–23 (Statement of Findings and Purpose).

202. *See RJR Nabisco, Inc.*, 136 S. Ct. at 2105.

203. *Id.*

204. *See supra* Part IV.B.

second test utilized by lower courts focused on the pattern of racketeering activity. Under this approach, when significant acts in the pattern of racketeering activity occur in the United States, RICO liability attaches.[205] Finally, the last test to be applied post-*Morrison*—the test ultimately affirmed by the Supreme Court[206]—was the predicate acts test. RICO applies extraterritorially under the predicate acts test if liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate statute.[207] Out of the three tests to emerge post-*Morrison*, the predicate acts approach adheres most closely to the statutory language and purpose of RICO. The predicate acts approach is the best test for deciding whether a RICO claim seeks extraterritorial or domestic application because it is most consistent with *Morrison*'s framework, provides a clear rule for courts to follow, and allows for extraterritorial application when the underlying predicate rebuts the presumption against extraterritoriality. Additionally, the Court's implicit approval of the conduct test in place of the second step under *Morrison* represents a more sound approach for determining whether a claim states a valid domestic application. This approach provides the best way to incorporate sound RICO jurisprudence while still following the Court's mandate on the presumption against extraterritoriality under the *Morrison* decision.

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205. *See supra* Part IV.C.

206. *RJR Nabisco, Inc.*, 136 S. Ct. at 2105.

207. *See supra* Part IV.D.

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