

Notes & Comments

RACKETEERING AFTER *MORRISON*: EXTRATERRITORIAL APPLICATION OF CIVIL RICO

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ABSTRACT—In *Morrison v. National Australia Bank Ltd.*, the Supreme Court set forth a framework to identify the extraterritorial reach of a federal statute. The Supreme Court required that a statute demonstrate congressional intent to apply to extraterritorial conduct. Under this framework, federal courts have found that civil RICO does not apply to extraterritorial conduct. However, the courts have been inconsistent in their analysis of RICO under *Morrison*. Some courts have found that RICO does not apply to extraterritorial *enterprises* while others have found that RICO does not apply to extraterritorial *conduct*. But the courts have been consistent in saying that *Morrison* precludes some extraterritorial application of civil RICO. This analysis is inconsistent with the *Morrison* framework and ignores the text and legislative history of RICO. The text of the RICO statute provides no limitation on the application of the law to extraterritorial conduct. Further, the extraterritorial limitation is inconsistent with the congressional directive to liberally construe the statute to effectuate its remedial purpose—to limit the impact of organized crime. In the text and history of civil RICO, Congress clearly indicated that the statute should apply extraterritorially.

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INTRODUCTION

In 1951, ABC, NBC, and CBS interrupted their regular programming to carry the United States Senate hearings on the investigation of organized crime in the United States.¹ For over sixty years, Americans had heard stories about organized crime, but these hearings were the first public acknowledgment of the murdering of witnesses and corruption of public officials associated with the Mafia.² At that time, efforts to curtail mob activity failed. Law enforcement suffered from corruption, a lack of resources, and a failed understanding of the American Mafia.³

In 1970, Congress recognized that organized crime drained billions of dollars from the United States' economy every year and that current legal remedies were insufficient to combat the problems.⁴ In response, Congress enacted the Racketeer Influenced and Corrupt Organizations Act of 1970⁵ (RICO) as part of the Organized Crime Control Act of 1970⁶ (OCCA). Congress designed RICO with both criminal⁷ and civil⁸ provisions in an

¹ See THOMAS REPPETTO, *AMERICAN MAFIA: A HISTORY OF ITS RISE TO POWER* ix (2004).

² *Id.* at ix-x.

³ *Id.* at xii-xiii.

⁴ See H.R. REP. NO. 91-1549, at 1-2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 1073, 1073.

⁵ 18 U.S.C. §§ 1961-1968 (2006).

⁶ Pub. L. No. 91-452, 84 Stat. 922.

⁷ Section 1963 provides criminal penalties that include fines, forfeiture of property, and imprisonment.

⁸ Section 1964 provides for civil remedies that include injunctive relief and treble damages.

effort to provide more effective tools to eliminate the influence of organized crime on legitimate businesses.⁹

Over time, law enforcement agencies and plaintiffs began using RICO to reach groups beyond the original aim of the statute, the American Mafia. RICO is now used as a tool against legitimate enterprises,¹⁰ white-collar criminals,¹¹ and organizations with a social or political agenda,¹² in addition to the American Mafia.¹³ Because of the broad range of defendants and strong remedies available, civil RICO claims have become popular among plaintiffs.¹⁴

Unfortunately for those plaintiffs, civil RICO was not popular among lower courts, which regularly applied RICO law restrictively and dismissed a “vast majority” of civil RICO claims prior to trial.¹⁵ Recently, lower courts have attacked RICO by dismissing claims involving “extraterritorial conduct”—conduct occurring outside the United States. Finding that civil RICO lacks extraterritorial application, lower courts have dismissed numerous RICO claims.

The extraterritoriality attack on civil RICO stems from a framework set forth in *Morrison v. National Australia Bank Ltd.* In *Morrison*, the Supreme Court held that a statute cannot be applied to extraterritorial conduct unless there is a “clear indication” in the statute that Congress intended extraterritorial application.¹⁶ Thus, a court must examine the statute’s language to determine whether Congress intended that the statute apply to extraterritorial conduct.¹⁷

⁹ See *Organized Crime Control: Hearings on S.30, and Related Proposals, Relating to the Control of Organized Crime in the United States, Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 91st Cong. 106–07 (1970)* [hereinafter *1970 Hearings*] (statement of Sen. John L. McClellan) (discussing the limitations of existing laws to combat the criminal influences over legitimate businesses).

¹⁰ See *United States v. Turkette*, 452 U.S. 576, 580 (1981) (“On its face, [RICO] appears to include both legitimate and illegitimate enterprises within its scope . . .”).

¹¹ See, e.g., *Papai v. Cremonnik*, 635 F. Supp. 1402, 1411 (N.D. Ill. 1986) (“[T]o the extent RICO is used as a weapon against ‘white collar crime’, this purpose is not contrary to the intent of Congress but is in fact one of the ‘benefits’ Congress saw the Act as providing.”).

¹² In a RICO case against a group alleged to have been using threatened or actual force to shut down abortion clinics, the Supreme Court held that there need not be an economic motive to state a claim under RICO. See *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 253, 256–61 (1994).

¹³ See, e.g., Arnold H. Lubasch, *Gotti Guilty of Murder and Racketeering*, N.Y. TIMES, Apr. 3, 1992, at A1 (late edition) (discussing the RICO conviction of famous mobster John Gotti).

¹⁴ Estimates of the extent of civil RICO filings range from 4% to 17% of all federal filings. See G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: “Mother of God—Is This the End of RICO?”* 43 VAND. L. REV. 851, 870–71 (1990).

¹⁵ Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1, 3 (1993).

¹⁶ 130 S. Ct. 2869, 2878 (2010).

¹⁷ See *id.* at 2881–83 (examining section 10(b) of the Securities Exchange Act of 1934 to determine if Congress gave a clear indication that the statute was to apply to extraterritorial conduct).

Lower courts have begun to apply the *Morrison* framework to civil RICO claims. The Second Circuit addressed the issue in *Norex Petroleum Ltd. v. Access Industries, Inc.* and held that civil RICO did not have extraterritorial application.¹⁸ After *Norex*, a number of district courts followed the Second Circuit's holding that civil RICO does not apply to extraterritorial conduct.¹⁹ The *Norex* reasoning allows district courts to clear their dockets of complex extraterritorial RICO claims. However, a careful analysis of RICO and the legislative history of the OCCA indicates that courts should not limit RICO to domestic conduct because the statute clearly demonstrates Congress's intent that courts apply RICO extraterritorially.

Part I provides an overview of civil RICO and the rationale for passing the law. It demonstrates the effect of racketeering on interstate and foreign commerce and Congress's desire to provide more effective means to combat the problem of racketeering regardless of whether that racketeering occurred in the United States or abroad. Part II examines the *Morrison* framework for the extraterritorial application of federal statutes. This Part shows that the clear indication test does not require a direct statement of extraterritoriality in the statute but can be inferred from the text, purpose, and design of the statute. Part III analyzes the current case law regarding the extraterritorial application of civil RICO and argues that civil RICO should apply to extraterritorial conduct. Given the purpose in passing the Act, the direct statement that RICO applies to racketeering by organizations engaged in "interstate or foreign commerce,"²⁰ and the extraterritorial reach of the predicate acts, Congress intended for RICO to apply extraterritorially. A brief Conclusion follows.

I. THE DEVELOPMENT OF RICO

A. *The Foundation of RICO*

In 1970, Congress considered organized crime to be a tremendous drain on the United States' economy and legal system. Organized crime siphoned billions of dollars from the economy every year.²¹ Representative William McCulloch described the economic size of organized crime as larger than "[i]f U.S. Steel, American Telephone & Telegraph, General Motors, Standard Oil of New Jersey, General Electric, Ford Motor Co., IBM, Chrysler, and RCA all joined together into one conglomerate

¹⁸ 631 F.3d 29, 32–33 (2d Cir. 2010) (per curiam).

¹⁹ See, e.g., *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 913 (C.D. Cal. 2011) ("RICO does not apply extraterritorially."); *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 29 (D.D.C. 2011) ("[T]here is no evidence that Congress intended to criminalize foreign racketeering activities under RICO.")

²⁰ 18 U.S.C. § 1962(a)–(d) (2006).

²¹ H.R. REP. NO. 91-1549, at 1 (1970), reprinted in 1970 U.S.C.C.A.N. 1073, 1073.

merger.”²² In response, Congress passed OCCA to provide stronger legal tools in the evidence-gathering process and more effective penalties for those involved in organized crime.²³ Two specific shortcomings in the current laws emerged: first, criminal procedure provided significant protections for those who illegally influenced enterprises; and second, criminal sanctions were generally limited to fines and imprisonment.²⁴ In answer, Congress included RICO in OCCA, in part to stop criminal influences on legitimate enterprises.²⁵

B. The Structure of RICO

RICO prohibits four activities: (1) investing the proceeds of a pattern of racketeering activity in an enterprise,²⁶ (2) acquiring any interest in or control of an enterprise through a pattern of racketeering activity,²⁷ (3) conducting the affairs of an enterprise through a pattern of racketeering activity,²⁸ and (4) conspiring to violate any of the previous provisions.²⁹ Each one of these prohibited activities is criminalized only to the extent that it affects “interstate or foreign commerce.”³⁰ Much RICO litigation has focused on the construction of a few of these terms—“a pattern of racketeering activity,” “an enterprise,” and “affecting interstate or foreign commerce.”

1. *A Pattern of Racketeering Activity.*—A plaintiff must prove that a defendant engaged in a pattern of racketeering activity to succeed in any RICO claim. RICO defines a “pattern of racketeering activity” as “requir[ing] at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.”³¹ The use of “requires” rather than “means” (as is used in other definitions³²) in the section may imply that two acts of racketeering within ten years of each other are necessary to describe a

²² 1970 Hearings, *supra* note 9, at 78 (statement of Rep. William McCulloch).

²³ See H.R. REP. NO. 91-1549, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 1073.

²⁴ 1970 Hearings, *supra* note 9.

²⁵ See *id.* at 106.

²⁶ 18 U.S.C. § 1962(a) (2006).

²⁷ *Id.* § 1962(b).

²⁸ *Id.* § 1962(c).

²⁹ *Id.* § 1962(d).

³⁰ *Id.* § 1962(a)–(d).

³¹ *Id.* § 1961(5).

³² See, e.g., *id.* § 1961(2) (“‘State’ means any State of the United States”); *id.* § 1961(7) (“‘[R]acketeering investigator’ means any attorney or investigator so designated”).

pattern of racketeering activity but may not be sufficient.³³ This ambiguity has led many lower courts to impose stricter limitations on the pattern element of a plaintiff's RICO claim than two racketeering acts within ten years of each other.³⁴

Congress created an expansive definition of racketeering activity within RICO. Under the statute, only a detailed list of offenses and behaviors qualify as racketeering activity. These activities, often called predicate acts, comprise two major categories. The first category includes certain state felonies including murder, kidnapping, and arson.³⁵ The second category includes a series of offenses outlawed by federal statutes including, *inter alia*, bribery, wire fraud, mail fraud, and money laundering.³⁶ This list of predicate acts is exhaustive, and plaintiffs may not add to (nor may defendants subtract from) the offenses that constitute a pattern of racketeering activity.³⁷ By requiring two or more predicate acts to state a RICO claim, the statute requires plaintiffs to allege not only a criminal enterprise but also the elements of each predicate act they claim constitutes a part of the pattern of racketeering activity.³⁸

2. *The Enterprise.*—A pattern of racketeering activity must somehow connect to “an enterprise.” The pattern can be conducted to the detriment of, through, or for the benefit of an enterprise.³⁹ RICO defines an enterprise as “includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”⁴⁰ Unlike the list of predicate acts, the enterprise definition uses “include” rather than “means,” so it is

³³ See *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) (“The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a ‘pattern.’”).

³⁴ See Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 HARV. J. ON LEGIS. 281, 294 (2004) (“Even under [a] relaxed standard . . . many courts continued to dismiss RICO complaints for failure to allege a proper pattern of racketeering activity. Rather than viewing the complaint in the light most favorable to the pleading party, these courts read artificial temporal or other requirements into the pattern element and assumed that the plaintiff could not adduce evidence at trial to satisfy these requirements.”).

³⁵ See § 1961(1)(A) (“‘[R]acketeering activity’ means any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance . . . which is chargeable under State law and punishable by imprisonment for more than one year . . .”).

³⁶ See *id.* § 1961(1)(B)–(E).

³⁷ The definition of racketeering activity uses the more restrictive “means” instead of “includes” or “requires.” See *id.* § 1961(1).

³⁸ For example, in *Sedima, S. P. R. L. v. Imrex Co.*, the plaintiff alleged that the defendant corporation committed multiple acts of mail and wire fraud. See 473 U.S. at 483–84. The plaintiff was required to allege each element of mail and wire fraud under the applicable federal statute and the RICO elements under § 1962. See *id.* at 496–97, 500.

³⁹ See § 1962(a)–(d).

⁴⁰ *Id.* § 1961(4).

nonexhaustive.⁴¹ A RICO enterprise includes both legitimate and criminal enterprises.⁴² This means that the traditional American Mafia could be an enterprise under RICO, but so could a legitimate business organization. Congress broadly defined the RICO enterprise, giving maximum flexibility to law enforcement agencies and plaintiffs to file suit against any organization or group that can obtain property.⁴³

To distinguish the enterprise element from the pattern-of-racketeering-activity element, courts created certain standard elements to establish proof of a group of individuals associated in fact. These elements include: (1) “a common or shared purpose,” (2) a “continuity of . . . structure and personality,” and (3) “an ‘ascertainable structure’ distinct from that inherent in the conduct of a pattern of racketeering activity.”⁴⁴ These elements distinguish a group of individuals associating for the sole purpose of committing a crime from a group of people committing crimes in the furtherance of an enterprise.

The goal of the RICO enterprise (or the pattern of racketeering activity) need not be economic in nature. In *National Organization for Women, Inc. v. Scheidler*, the Supreme Court held that an enterprise need not have an economic goal to violate RICO.⁴⁵ In that case, the National Organization for Women sued a group of antiabortion protesters for efforts designed to interfere with the operation of clinics and to “persuade women not to have abortions.”⁴⁶ The antiabortion protesters argued that because their motives were not economic in nature, civil RICO did not apply to their conduct.⁴⁷ The Court held that, similar to the legitimate-versus-illicit-enterprise distinction, Congress did not require that an enterprise have an economic motive.⁴⁸ The Supreme Court thus broadly construed RICO terms, which is consistent with the legislative directive contained within OCCA to liberally construe provisions to effectuate the Act’s remedial purposes.⁴⁹

⁴¹ Compare *id.* § 1961(1), with *id.* § 1961(4).

⁴² *United States v. Turkette*, 452 U.S. 576, 580–81 (1981) (“There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, ‘legitimate.’”).

⁴³ See H.R. REP. NO. 91-1549, at 56 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4032.

⁴⁴ *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) (quoting *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980)).

⁴⁵ See 510 U.S. 249, 252 (1994).

⁴⁶ *Id.* at 252–53.

⁴⁷ See *id.* at 258.

⁴⁸ See *id.* at 260–61.

⁴⁹ See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (“The provisions of this title shall be liberally construed to effectuate its remedial purposes.”).

3. *Affecting Interstate or Foreign Commerce.*—The final element of a civil RICO violation is that the prohibited act must affect interstate or foreign commerce.⁵⁰ From the inception of OCCA, Congress was concerned with the effect of racketeering on American business people, investors, and companies.⁵¹ Thus, RICO focuses on the pattern of racketeering activity to the extent that it affects interstate or foreign commerce.⁵²

C. *The Unique Remedies of RICO*

RICO provides a statutory framework that avoids some of the difficulties law enforcement agencies and district attorneys faced in combating organized crime. Prior to RICO, criminal infiltration of an enterprise was subject to higher procedural and evidentiary burdens of criminal law.⁵³ Further, the only remedies available for the criminal infiltration of an enterprise were fines and imprisonment.⁵⁴ Because RICO contains provisions for both criminal and civil sanctions, the expansive remedies available and lower procedural and evidentiary barriers offer courts greater flexibility to disrupt the activities of a criminal enterprise.⁵⁵

The availability of civil sanctions allows a private citizen or the United States to file suit without the defendant gaining the strong protections that apply in a criminal case.⁵⁶ For example, criminal cases require proof beyond a reasonable doubt, and evidence collection requires a warrant or strict adherence to procedural requirements. In contrast, civil suits merely require proof by a preponderance of the evidence and have a more liberal discovery process.⁵⁷ Furthermore, the remedies in a civil suit include treble damages and reasonable attorney's fees, and could subject the violators to divesture of assets in an enterprise, dissolution or reorganization of the enterprise, and other equitable remedies.⁵⁸ Criminal sanctions, conversely, are often limited to fines and imprisonment. The broad range of civil remedies thus allows a judge to determine the most effective way to stop the criminal activity.

⁵⁰ See 18 U.S.C. § 1962(a)–(d) (2006).

⁵¹ See Organized Crime Control Act of 1970, 84 Stat. at 923 (“[O]rganized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . .”).

⁵² This provision is also likely a hook to establish federal jurisdiction over the prohibited conduct.

⁵³ See 1970 Hearings, *supra* note 9, at 106.

⁵⁴ See *id.* at 107.

⁵⁵ See 18 U.S.C. §§ 1961–1968. Section 1963 provides criminal penalties, and § 1964 provides for civil sanctions.

⁵⁶ See *id.* § 1964.

⁵⁷ See 1970 Hearings, *supra* note 9, at 106.

⁵⁸ See § 1964(a), (c).

RICO operates differently than many other criminal or civil statutes. RICO focuses not on the individuals committing criminal activities but rather on the criminal enterprises.⁵⁹ As a result, RICO targets the foundation of the criminal activity—the criminal enterprise—and can more effectively eliminate the problem of organized crime. Without RICO, prosecutors and harmed individuals could only prosecute *individual* members of a criminal organization.⁶⁰ Such members are easily replaced in a sophisticated organization. By focusing on the enterprise, RICO can disrupt the organization itself. Thus, it becomes more effective in eliminating systemic crime than statutes that focus on an individual.

Just as Congress created a system with a broad range of remedies to protect business from corrupt influences, Congress did not limit the territorial scope of the statute. Congress did not limit the definition of enterprise to a domestic one. Nor did Congress limit commerce to interstate commerce. Despite no indication that Congress intended to limit the scope of the enterprise or the definition of commerce domestically, courts have begun to read those limits into the statute under a theory that the statute lacks extraterritorial application.⁶¹

II. EXTRATERRITORIAL APPLICATION OF FEDERAL STATUTES

A. Foreign RICO Applications Before Morrison

The broad wording of the RICO statute coupled with a global economy led to cases against foreign defendants for activity that occurred in a foreign country. Even before the Supreme Court set forth the extraterritoriality framework in *Morrison*, these cases saw several procedural challenges raised by defendants regarding the applicability of RICO to their conduct.

The first hurdle for plaintiffs to overcome was to show that RICO applied to foreign enterprises. Although the statute itself makes no distinction between a foreign or domestic enterprise,⁶² defendants argued that a foreign enterprise fell outside the definition of a RICO enterprise.⁶³ Courts rejected this argument and denied motions to dismiss by foreign

⁵⁹ RICO outlaws a pattern of racketeering behavior only to the extent that such behavior is part of or benefits an enterprise. *See id.* § 1962.

⁶⁰ *See* Goldsmith, *supra* note 15, at 5–8.

⁶¹ *See infra* Part III.A.

⁶² RICO prohibits a pattern of racketeering activity in connection with “any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.” *E.g.*, § 1962(a) (emphasis added). Subsections (b) and (c) contain the same language. *See id.* § 1962(b)–(c). Further, enterprise is defined to include “any . . . corporation.” *Id.* § 1961(4) (emphasis added).

⁶³ *See, e.g.*, *United States v. Parness*, 503 F.2d 430, 438–40 (2d Cir. 1974) (denying the defendant’s motion to dismiss for failure to state a claim because RICO applies to both domestic and foreign enterprises).

defendants,⁶⁴ and such rulings were consistent with the broad construction the Supreme Court had given RICO.⁶⁵ With the broad interpretation of RICO afforded by courts and the wording of the statute, prior to *Morrison*, RICO applied to foreign enterprises. However, other difficulties impeded successful RICO claims brought against foreign defendants.

Among the issues facing a plaintiff's RICO claim against a foreign enterprise are jurisdictional and procedural issues that prevent successfully pleaded claims from going forward. Plaintiffs have difficulties establishing personal jurisdiction over and properly serving foreign defendants.⁶⁶ And even if a plaintiff could win a verdict after clearing all pretrial hurdles, they might not have been able to enforce a judgment against a foreign defendant. Sometimes efforts to enforce a judgment affect a nation's sovereignty.⁶⁷ Additionally, differences in damages calculation allowed by a foreign country could also derail efforts to collect final judgments.⁶⁸ These procedural issues remain difficult for plaintiffs to overcome. However, these issues are now secondary to arguing that RICO should apply extraterritorially under the *Morrison* framework.

B. *Morrison v. National Australia Bank Ltd.*

In 2010, the question of how to apply federal statutes to extraterritorial conduct reached the Supreme Court. In *Morrison v. National Australia Bank Ltd.*, a group of foreign investors sued an Australian banking corporation for violation of section 10(b) of the Securities Exchange Act of 1934.⁶⁹ The defendants moved to dismiss the claim on three grounds: (1) lack of subject matter jurisdiction, (2) failure to state a claim due to insufficient domestic actions alleged, and (3) section 10(b) did not apply to

⁶⁴ See, e.g., *North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc.*, 680 F. Supp. 746, 750–51 (E.D.N.C. 1988) (denying a motion to dismiss by a foreign defendant).

⁶⁵ See, e.g., *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256–61 (1994) (rejecting a narrow view of the purpose of an enterprise in favor of a broad view encompassing more than just economic motives); *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (rejecting a narrow interpretation of the term "enterprise" in favor of including both illicit and licit enterprises within the definition).

⁶⁶ See generally Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET,"* 73 MINN. L. REV. 1023, 1051–67 (1989) (discussing the procedural difficulties faced by plaintiffs in extraterritorial civil RICO suits).

⁶⁷ See *id.* at 1070–71 ("Nations perceiving United States extraterritorial jurisdiction as a threat have taken measures to defeat enforcement of judgment and discovery orders. Such measures usually are accomplished through statutes that block enforcement of foreign laws, regulations, or court orders. At least sixteen nations, including the United Kingdom and Australia, have enacted legislation of this type." (footnotes omitted)).

⁶⁸ See *id.* at 1071–72 (explaining that multiple countries use "claw-back" provisions to allow for a defendant to recover some of a multiple damages award enforced in a foreign nation such as the treble damages provision of RICO).

⁶⁹ 130 S. Ct. 2869, 2875–76 (2010). Section 10(b) of the Securities and Exchange Act of 1934 is codified at 15 U.S.C. § 78j (2006).

extraterritorial conduct.⁷⁰ The Second Circuit found insufficient domestic acts and held that section 10(b) did not apply to extraterritorial conduct.⁷¹ As a result, the lower courts dismissed the case for lack of subject matter jurisdiction.⁷²

1. Extraterritoriality as a Canon of Construction.—In its review of the case, the Court clarified the Second Circuit’s ruling⁷³ and then went on to deal with the extraterritoriality problem. The Court first looked at the theory of a strict domestic application of federal statutes. The Court held that “[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”⁷⁴ The Court clarified that the concept of extraterritorial application (or lack thereof) is “a canon of construction, or a presumption about a statute’s meaning,” and not a limitation on Congress’s power.⁷⁵ Any federal statute is presumed to not have extraterritorial application: “When a statute gives no clear indication of an extraterritorial application, it has none.”⁷⁶ Thus, for a federal statute to overcome the presumption against extraterritorial application, Congress must provide a “clear indication” of extraterritorial application within the statute.

A clear indication of extraterritorial application is different from a “clear statement” of extraterritorial application. A clear statement would be an explicit statement in the text that the statute applies extraterritorially.⁷⁷ However, a clear indication test does not require an explicit reference to extraterritoriality. In *Morrison*, the Court held that the presumption against extraterritoriality does not require a clear statement from Congress to be overcome.⁷⁸ Rather, the context of a federal statute and other sources of statutory meaning can be consulted to “give ‘the most faithful reading’ of

⁷⁰ See *Morrison*, 130 S. Ct. at 2876.

⁷¹ See *id.* at 2877.

⁷² See *id.* at 2876.

⁷³ The Supreme Court first clarified that any dismissal due to a statute lacking extraterritorial application is not a question of subject matter jurisdiction. See *id.* at 2876–77. Rather, asking what conduct a statute reaches is asking what conduct a statute prohibits, and that question is one of the merits. See *id.* at 2877. On the contrary, a subject matter jurisdiction question relates to a court’s “power to hear a case.” *Id.* at 2877 (quoting *Union P. R.R. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009)). Thus, a dismissal for a statute’s lack of extraterritorial application would fall under the auspices of Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. See *id.*

⁷⁴ *Id.* at 2877 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)) (internal quotation marks omitted).

⁷⁵ *Id.*

⁷⁶ *Id.* at 2878.

⁷⁷ See, e.g., 18 U.S.C. § 351(i) (2006) (“There is extraterritorial jurisdiction over the conduct prohibited by this section.”).

⁷⁸ See *Morrison*, 130 S. Ct. at 2883.

the text” and to determine if there is a clear indication of extraterritoriality in the statute.⁷⁹

2. *Application of the Clear Indication Test to Section 10(b).*—When analyzing section 10(b) of the Exchange Act, the Court held that it was not for the courts to decide whether Congress would have wanted the statute to apply to extraterritorial conduct.⁸⁰ Rather, the presumption against extraterritorial application applies to *all* federal statutes.⁸¹ In *Morrison*, the plaintiffs sued under Rule 10b-5,⁸² which is bound by the limits of section 10(b)—thus, the Rule’s extraterritorial application was also limited to the extent of section 10(b)’s application.⁸³

Applying the clear indication framework to the Exchange Act, section 10(b) does not have extraterritorial application.⁸⁴ First, the text of the statute does not, on its face, suggest extraterritorial application.⁸⁵ In fact, it appears that Congress was more concerned with the use of manipulative and deceptive devices within the United States than on exchanges in foreign countries.⁸⁶

The plaintiffs made three arguments that the statute applied to extraterritorial conduct. First, the plaintiffs argued that because “interstate commerce” includes “trade, commerce, transportation, or communication . . . between any foreign country and any State,” the statute evinces an intent to apply to foreign conduct.⁸⁷ But historically the Court has not found that a broad definition of commerce implies that Congress intended the statute to apply to foreign conduct.⁸⁸ “The general reference to

⁷⁹ *Id.* (quoting *id.* at 2892 (Stevens, J., concurring)).

⁸⁰ *See id.* at 2878–81.

⁸¹ *Id.* at 2881.

⁸² 17 C.F.R. § 240.10b-5 (2012). Rule 10b-5 prohibits the use of deceptive or manipulative devices in connection with the purchase or sale of a security. *See id.*

⁸³ *Morrison*, 130 S. Ct. at 2881. This assumption of the referenced statute’s extraterritorial application may leave open a door for plaintiffs to use cross-referencing statutes to assume the extraterritorial application of one for the benefit of another. However, it is unclear whether the regulation received the extraterritorial application of the statute because it was a regulation (and not a statute promulgated by Congress) or because it was limited to the extent of the statute as per prior law. *See id.*; *see also* *United States v. O’Hagan*, 521 U.S. 642, 651 (1997) (noting that rule 10b-5 “does not extend beyond the conduct encompassed by § 10(b)’s prohibition”).

⁸⁴ *Morrison*, 130 S. Ct. at 2883.

⁸⁵ *Id.* at 2881.

⁸⁶ The statute makes multiple references specifically to *national* securities exchanges. *See* 15 U.S.C. § 78j (2006) (“It shall be unlawful for any person . . . by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any *national* securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a *national* securities exchange . . . any manipulative or deceptive device . . .” (emphasis added)).

⁸⁷ *Morrison*, 130 S. Ct. at 2882 (alteration in original) (quoting § 78c(a)(17)).

⁸⁸ *See id.*

foreign commerce in the definition of ‘interstate commerce’ does not defeat the presumption against extraterritoriality.”⁸⁹

The plaintiffs also argued that the description of the purpose of the Exchange Act indicates that “prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries,” and that this language shows that the statute was meant to apply to extraterritorial conduct.⁹⁰ However, the Court pointed out that the language “such transactions” actually specifies transactions that affect the “national public interest.”⁹¹ The Court held that “[t]he fleeting reference to the dissemination and quotation abroad [of securities prices] cannot overcome the presumption against extraterritoriality.”⁹²

Finally, the plaintiffs argued that certain sections of the Exchange Act restrict the use of the Act abroad; thus, the lack of such restrictions on section 10(b) indicates that that portion of the statute should be applied extraterritorially.⁹³ The Court rejected this argument because it represents only one possible interpretation of the statute, and “possible interpretations of statutory language do not override the presumption against extraterritoriality.”⁹⁴

A different provision in the statute provides specific extraterritorial application—section 30(a), which prohibits activities that affect foreign securities exchanges.⁹⁵ However, the extraterritorial application of one section does not overcome the presumption against extraterritoriality of other sections.⁹⁶ As a result, the Court found that there is no clear indication that section 10(b) of the Exchange Act applies to extraterritorial conduct.

3. *The Application of the Morrison Test Outside of the Exchange Act.*—After the Court’s ruling in *Morrison*, lower courts have begun to apply the *Morrison* framework to laws other than the Exchange Act. Some examples of other federal statutes to which courts have applied the framework include the Torture Act,⁹⁷ the Alien Tort Statute (ATS),⁹⁸

⁸⁹ *Id.*

⁹⁰ *Id.* (quoting § 78b(2)).

⁹¹ *Id.* (quoting § 78b).

⁹² *Id.*

⁹³ Specifically, the plaintiffs argued that section 30(b) of the Exchange Act, which outlined provisions under which the Act does not apply extraterritorially, suggests that the rest of the statute must apply extraterritorially. *See id.*

⁹⁴ *Id.* at 2883.

⁹⁵ *See id.*

⁹⁶ *See id.* (“Subsection 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect. Its explicit provision for a specific extraterritorial application would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges . . .”).

⁹⁷ *See United States v. Belfast*, 611 F.3d 783, 810–11 (11th Cir. 2010).

⁹⁸ *See Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, slip op. at 7–14 (U.S. Apr. 17, 2013); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744–47 (9th Cir. 2011).

and civil RICO.⁹⁹ Further, *Morrison* could have substantial impact on other laws that have yet to be challenged for lack of extraterritorial application.¹⁰⁰ Examining the application of *Morrison* to other federal statutes gives important insight into the breadth of the extraterritoriality analysis. Specifically, these cases indicate that the test goes beyond looking at the plain language of the statute to determine if Congress gave a clear indication of extraterritorial application.

Faced with the question of whether the Torture Act applied to extraterritorial conduct in *United States v. Belfast*, the Eleventh Circuit held that the language of the statute clearly indicated that the Torture Act applied to conduct occurring outside of the United States.¹⁰¹ The language punishes “[w]hoever outside of the United States commits . . . torture”—making it very clear that Congress intended to punish the behavior of actions outside of the United States.¹⁰² However, the court also explained that the intention to apply a statute extraterritorially may be inferred from the “nature of the harm” prohibited, the “international focus of the statute,” and the idea that prohibiting only “acts occurring within the United States would undermine the statute’s effectiveness.”¹⁰³ In addition to its clear language, the Torture Act met all three of these inferential criteria for applying a statute extraterritorially.¹⁰⁴

The Ninth Circuit heard a challenge to the application of the ATS to extraterritorial conduct.¹⁰⁵ Because the ATS itself is a jurisdictional statute, the challenge took the form of a dispute over the court’s jurisdiction.¹⁰⁶ In finding that the ATS has extraterritorial application, the court found that there was a clear indication in the text of the statute that it applied to more than just domestic conduct.¹⁰⁷ Further, the typical reasons for avoiding extraterritorial application of a statute—sovereignty infringement and

⁹⁹ See *infra* Part III.

¹⁰⁰ Commentators suggest that the *Morrison* decision could affect a number of different laws, including antitrust laws, employment laws, and environmental laws. See Stephen R. Smerek & Jason C. Hamilton, *Extraterritorial Application of United States Law After Morrison v. National Australia Bank*, 5 DISP. RESOL. INT’L 21, 30–33 (2011).

¹⁰¹ See 611 F.3d at 811 (“The language of the Torture Act itself evinces an unmistakable congressional intent to apply the statute extraterritorially.”).

¹⁰² 18 U.S.C. § 2340A(a) (2006).

¹⁰³ *Belfast*, 611 F.3d at 811 (quoting *United States v. Plummer*, 221 F.3d 1298, 1310 (11th Cir. 2000)).

¹⁰⁴ See *id.*

¹⁰⁵ *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011).

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 746 (“[ATS]’s explicit reference to the law of nations indicates that we must look beyond the law of the United States to international law in order to decide what torts fall under its jurisdictional grant. Piracy was one of the paradigmatic classes of cases recognized under the ATS when it was enacted.”). As this Note was being finalized for publication, the Supreme Court held that the ATS does not reach extraterritorial conduct. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, slip op. at 13–14 (U.S. Apr. 17, 2013).

foreign relations problems—did not exist with the ATS because it was written to reach only international norms rather than norms specific to the United States.¹⁰⁸ These two factors suggested that “[t]here are strong indications that Congress intended the ATS to provide jurisdiction for certain violations of international law occurring outside the United States, and there are no indications to the contrary.”¹⁰⁹

Belfast and *Sarei* illustrate that the *Morrison* test is not a simple “plain language” statutory question. The Supreme Court chose to adopt the clear indication test instead of a more restrictive clear statement test. This *Morrison* test is a broader inquiry of legislative intent. Intent can be gleaned from the language of a statute,¹¹⁰ but it can also be learned from a more careful analysis of the purpose of the statute, the way the statute was constructed, the potential for conflict with a sovereign nation, and the effect of not applying the statute to extraterritorial conduct or enterprises.

III. THE EXTRATERRITORIAL APPLICATION OF CIVIL RICO

Courts have begun applying the *Morrison* framework to civil RICO. After a per curiam decision in the Second Circuit, all courts to consider the issue have (though under varied reasoning) come to the same conclusion: civil RICO should not receive extraterritorial application. However, the first court to come to this conclusion, and its stated rationale for directing other lower courts to dismiss extraterritorial RICO claims, lacked sufficient analysis of civil RICO under the *Morrison* test. A careful analysis of civil RICO under *Morrison* shows that RICO should apply to extraterritorial conduct and to foreign enterprises.

A. *Norex Petroleum Ltd. v. Access Industries, Inc.*

After the *Morrison* decision, the Second Circuit was the first court to address the application of civil RICO to extraterritorial conduct.¹¹¹ In *Norex*, the court examined a plaintiff’s suit against defendants for conspiring to take control of a Russian oil company through a pattern of racketeering activity, some of which occurred in the United States.¹¹² The district court had dismissed the case for lack of subject matter jurisdiction because it found that RICO did not apply to extraterritorial conduct.¹¹³ The

¹⁰⁸ *Sarei*, 671 F.3d at 746.

¹⁰⁹ *Id.* at 747.

¹¹⁰ A statement that “this statute applies extraterritorially” would be the most direct, but a statement that it prohibits certain conduct “outside the United States” is also sufficiently plain language to support extraterritorial application. *See* *United States v. Belfast*, 611 F.3d 783, 811 (11th Cir. 2010).

¹¹¹ *See* *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 30–31 (2d Cir. 2010) (per curiam).

¹¹² *See id.* at 31.

¹¹³ *Id.* at 32. The lack of subject matter jurisdiction was an error in the lower court’s analysis of the extraterritoriality application of federal statutes similar to the lower court’s decision in *Morrison*. The

Second Circuit found that “RICO is silent as to any extraterritorial application”¹¹⁴ and rejected arguments that the presumption against extraterritoriality is overcome by either the extraterritorial reach of the predicate acts or by the reference to enterprises that “engage[] in, or that activities of which affect, interstate or foreign commerce.”¹¹⁵ Thus, the defendants succeeded in their motion to dismiss for failure to state a claim.¹¹⁶

After this decision, a number of district courts outside the Second Circuit responded to motions to dismiss RICO claims for failure to state a claim under the extraterritorial analysis of *Morrison* and *Norex*. Each district court’s decision came to a conclusion similar to *Norex*—finding that civil RICO lacked extraterritorial application.¹¹⁷ The rationale used by district courts to dismiss extraterritorial RICO claims falls into two different categories: either that Congress did not intend for RICO to criminalize extraterritorial activity¹¹⁸ or that the “focus” of the RICO statute is on the enterprise, and the statute gives no indication that RICO applies to foreign enterprises.¹¹⁹

B. Application of the Morrison Framework to Civil RICO

Despite these rulings, under the *Morrison* framework, civil RICO should apply to extraterritorial conduct and to foreign enterprises. No court has found that RICO applies extraterritorially. However, the statute itself indicates that it was not solely concerned with domestic activity or enterprises. The adoption of predicate acts with extraterritorial reach in the RICO framework, such as witness tampering or the assassination of foreign officials, evinces intent to apply RICO to more than just domestic conduct. Failing to apply civil RICO to extraterritorial conduct or enterprises would

Second Circuit correctly framed the extraterritoriality question as one of the merits, not of a court’s power to hear a case. *Id.*

¹¹⁴ *Id.* (quoting *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)).

¹¹⁵ *Id.* at 33 (quoting 18 U.S.C. § 1962(a)–(d) (2006)). Many of the RICO predicate acts contain explicit and implicit extraterritorial reach. For a list of predicate acts with such reach, see *infra* note 140 and accompanying text.

¹¹⁶ *Id.* at 33.

¹¹⁷ See, e.g., *Le-Nature’s, Inc. v. Krones, Inc.* (*In re Le-Nature’s, Inc.*), WDPA No. 9-MC-162, MDL No. 2021, No. 9-1445, 2011 WL 2112533, at *3 (W.D. Pa. May 26, 2011) (holding that the “focus[]” of RICO is a domestic enterprise and that RICO would not apply to foreign enterprises); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 914 (C.D. Cal. 2011) (holding that RICO does not apply to foreign enterprises under *Morrison*); *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 29 (D.D.C. 2011) (holding that RICO does not apply extraterritorially).

¹¹⁸ See, e.g., *Philip Morris*, 783 F. Supp. 2d at 29 (“[T]here is no evidence that Congress intended to criminalize foreign racketeering activities under RICO.”).

¹¹⁹ See, e.g., *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010) (“RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.”).

substantially impact the effectiveness of the statute. Finally, the policy of RICO indicates the law should be applied to extraterritorial conduct.

1. RICO Applies Extraterritorially on Its Face.—The language and the structure of RICO indicate that Congress intended it to apply extraterritorially. Recall that a statute applies extraterritorially if there is a clear indication of congressional intent, which need not rise to the level of a clear statement. A statute should apply outside of the United States only if such a result arises from “the most faithful reading” of the text.¹²⁰ The most faithful reading of RICO demonstrates that it should apply to extraterritorial conduct.

RICO prohibits a pattern of racketeering activity in connection with “any enterprise” engaged in or affecting “interstate or foreign commerce.”¹²¹ The statute does not distinguish between foreign enterprises or domestic enterprises in its text. In fact, it applies to *any* enterprise. Congress neither limited the term “enterprise” in the operative portion of the statute nor in the definitions section of the statute.¹²² Further, Congress’s use of the word “includes” as opposed to “means” leaves the term “enterprise” as the most broadly defined word of all of RICO’s defined terms.¹²³

The Supreme Court recognized Congress’s intention to maintain a broad definition of a RICO enterprise. When faced with a decision to narrowly define a RICO enterprise to a more specific “licit” or “illicit” enterprise, the Court refused to limit the definition of an enterprise.¹²⁴ Similarly, had Congress intended to narrow the definition of “enterprise” to domestic enterprises, it could have inserted a single word: “domestic.” Rather than provide any limiting language on the type of enterprise reached by the statute, Congress kept the broadest phrase “any enterprise” in both the operative portion of the statute and the definitions. Congress intended that RICO apply to extraterritorial enterprises.

Multiple courts, however, have found that the focus of the RICO statute is the enterprise and that RICO does not provide for suits against a

¹²⁰ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) (quoting *id.* at 2892 (Stevens, J., concurring)).

¹²¹ 18 U.S.C. § 1962(a)–(c) (2006) (emphasis added).

¹²² *See id.* § 1961(4) (“[E]nterprise’ includes *any* individual, partnership, corporation, association, or other legal entity, and *any* union or group of individuals associated in fact although not a legal entity[.]” (emphasis added)).

¹²³ *Compare id.* § 1961(4) (“[E]nterprise’ *includes* any individual” (emphasis added)), with *id.* § 1961(6) (“[U]nlawful debt’ *means* a debt” (emphasis added)).

¹²⁴ *See United States v. Turkette*, 452 U.S. 576, 580–81 (1981) (“Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, ‘legitimate.’”).

foreign enterprise.¹²⁵ In *In re Le-Nature's, Inc.*, the court analyzed the RICO statute to determine the focus of the law.¹²⁶ Finding that the focus was the enterprise, the presumption against extraterritoriality applied to any foreign enterprise.¹²⁷ The court in *In re Toyota Motor Corp.* took the same approach.¹²⁸ The problem with these courts' analyses is that they skip the clear indication analysis altogether. They both cite to *Norex* and conclude that RICO does not contain evidence that Congress intended extraterritorial application. *Norex* has created an unfortunate domino effect of district courts (even those not bound by the Second Circuit's decision) forgoing an in-depth analysis of RICO in favor of applying facts to a presumption against extraterritoriality.

The correct analysis does not require an initial determination of the focus of the statute, rather it requires a determination of whether Congress gave a clear indication that the statute applies extraterritorially. The focus of the statute should not be looked at to determine what portion may be applied extraterritorially. But the focus may be useful in determining whether Congress intended the statute to apply extraterritorially at all. Regardless of the need to initially determine the focus of RICO, an analysis of the "any enterprise" language should lead to a conclusion that RICO applies to foreign enterprises. Moreover, other operative text in the statute supports the application of RICO to foreign enterprises. RICO prohibits a pattern of racketeering in connection with "any enterprise which is engaged in, or the activities of which affect, interstate *or foreign commerce*."¹²⁹ By specifically including the phrase "or foreign commerce," Congress was not solely focused on domestic enterprises. The use of the disjunctive "or" means that Congress prohibited a pattern of racketeering activity in connection with an enterprise engaged in or affecting *either* interstate *or* foreign commerce. Consequently, Congress has prohibited activity in connection with enterprises that engage *exclusively* in foreign commerce.¹³⁰ Any domestic corporation that engages in foreign commerce would at a minimum affect, and very likely engage in, interstate commerce. If Congress had only intended that RICO apply to domestic enterprises,

¹²⁵ See, e.g., *In re Le-Nature's, Inc.*, WDPA No. 9-MC-162, MDL No. 2021, No. 9-1445, 2011 WL 2112533, at *3 (W.D. Pa. May 26, 2011); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 914 (C.D. Cal. 2011).

¹²⁶ *In re Le-Nature's, Inc.*, 2011 WL 2112533, at *3.

¹²⁷ See *id.*

¹²⁸ See *In re Toyota Motor Corp.*, 785 F. Supp. 2d at 914.

¹²⁹ 18 U.S.C. § 1962(a)-(c) (2006) (emphasis added).

¹³⁰ Congress may, in addition, have been trying to reach enterprises and conduct related to commerce among foreign countries that affect the United States. Foreign commerce is not defined in RICO, but 18 U.S.C. § 10 defines it as "includ[ing] commerce with a foreign country." The use of "includes" rather than "means" shows that foreign commerce must include more than just commerce with a foreign country. The only other type of commerce that could meet a description of foreign commerce would be commerce among foreign countries.

Congress could have limited the language to “engaged in or affecting interstate commerce.” The use of “or foreign commerce” gives a clear indication that RICO was intended for foreign as well as domestic enterprises.

In fact, earlier versions of OCCA and RICO included a more restricted definition of interstate or foreign commerce. Earlier drafts of RICO defined “foreign commerce” as meaning “commerce between any State and any foreign country.”¹³¹ But Congress removed this definition from RICO in its final version, leaving the statute much broader in its application. Why did Congress leave foreign commerce undefined in the final version? It is not entirely clear, but it might be a result of the focus of the hearings on “La Cosa Nostra” (the Sicilian Mafia).¹³² Whatever the impetus, Congress chose to modify the statute and opted for the broader, undefined term “interstate or foreign commerce,” and courts should adhere to its plain meaning.

Some courts have improperly rejected this analysis of the “interstate or foreign commerce” term in RICO due to a misinterpretation of *Morrison*.¹³³ Multiple courts discounted RICO’s use of “or foreign commerce” by citing the *Morrison* Court’s analysis of the definition of “interstate commerce” in the Exchange Act.¹³⁴ However, the two seemingly similar terms in the statutes must be analyzed differently. First, the Court in *Morrison* specifically noted that “even statutes that contain broad language in their definitions of ‘commerce’ . . . do not apply abroad.”¹³⁵ The *Morrison* Court was discrediting the use of the term “interstate commerce” as an indication of extraterritoriality because it only appeared in the definition section and not the operative portion of the statute. On the other hand, “interstate or foreign commerce” does not appear in the definitions section of RICO. Instead, RICO uses the term in the operative part of the statute.¹³⁶

Further, the Court in *Morrison* reasoned that concluding that section 10(b) did not apply extraterritorially did not render the definition of interstate commerce meaningless because certain conduct between a

¹³¹ H.R. 326, 91st Cong. § 2(3) (1969), reprinted in 1970 Hearings, *supra* note 9, at 719, 720.

¹³² See, e.g., Harry Kelly, *Kelly—Crime (First of a Series)*, in 1970 Hearings, *supra* note 9, at 418, 419 (discussing Carlos Marcello, a Sicily native, and his impact on organized crime in Louisiana).

¹³³ See, e.g., *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (per curiam) (“*Morrison* forecloses that argument, noting that ‘we have repeatedly held that even statutes that contain broad language in their definitions of commerce do not apply abroad.’” (quoting *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2882 (2010))); *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) (“[T]he Court [in *Morrison*] rejected the arguments . . . that section 10(b) applies abroad because its definition of ‘interstate commerce’ includes activities between ‘any foreign country and any State.’” (quoting *Morrison*, 130 S. Ct. at 2882)).

¹³⁴ See *Norex*, 631 F.3d at 31; *Cedeño*, 733 F. Supp. 2d at 473.

¹³⁵ *Morrison*, 130 S. Ct. at 2882 (emphasis added).

¹³⁶ 18 U.S.C. § 1962(a)–(c) (2006) uses the term specifically to describe activities that are prohibited to the extent that they are in connection with an enterprise engaged in or affecting interstate or foreign commerce.

foreign country and a state would nonetheless be prohibited.¹³⁷ However, to read RICO as not applying to foreign enterprises would render the “or foreign commerce” language superfluous because any domestic enterprise engaged in foreign commerce would almost certainly affect interstate commerce.¹³⁸ On the face of the statute, RICO applies extraterritorially.

2. *Pattern of Racketeering Activity and Predicate Acts.*—To construe RICO not to apply to extraterritorial conduct would be to ignore the extraterritorial reach of some of the predicate acts in the statute. RICO prohibits a “pattern of racketeering activity,” which is defined from a list of various state and federal statutes.¹³⁹ Many of those predicate acts outlined in 18 U.S.C. § 1961(1) have explicit extraterritorial applications.¹⁴⁰ By prohibiting a pattern of racketeering activity, RICO prohibits a person from committing two or more of *any* of the list of predicate acts within a ten-year period. Since many of those predicate acts can be committed in foreign countries or have explicit extraterritorial application (i.e., the predicate act’s statute explicitly states that there is extraterritorial jurisdiction over violation of the statute), RICO’s reference to those predicate acts adopts their extraterritorial application.¹⁴¹

¹³⁷ *Morrison*, 130 S. Ct. at 2882 n.7.

¹³⁸ At the very least, a domestic corporation engaging in exclusively foreign commerce would require the use of certain domestic services to operate its business, whether it be electricity, transportation, or other general services that affect interstate commerce.

¹³⁹ See §§ 1961–1962.

¹⁴⁰ See, e.g., *id.* § 175(a) (“There is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States.”); *id.* § 351(i) (“There is extraterritorial jurisdiction over the conduct prohibited by this section.”); *id.* § 832(b) (“There is extraterritorial Federal jurisdiction over an offense under this section.”); *id.* § 1512(h) (same); *id.* § 1513(d) (same); *id.* § 1751(k) (“There is extraterritorial jurisdiction over the conduct prohibited by this section.”); *id.* § 2332b(e) (“There is extraterritorial Federal jurisdiction . . .”). In addition to statutes that expressly provide for extraterritorial jurisdiction, a number of the predicate acts criminalize activities that occur outside the United States. See, e.g., *id.* § 37(b)(2) (criminalizing violence at international airports); *id.* § 229(c)(2)–(4) (criminalizing the development, possession, or use of chemical weapons outside the United States); *id.* § 1116(c) (criminalizing the murder of foreign officials); *id.* § 2281(b)(3) (criminalizing violence against maritime fixed platforms); *id.* § 2332f(b)(2) (criminalizing bombing of a public place, government facility, and public transportation system); *id.* § 2340A (“Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years . . .”).

¹⁴¹ This is not to say that RICO would apply to any conduct that is committed overseas. If a plaintiff based an extraterritorial RICO claim on predicate acts that do not have extraterritorial application, the plaintiff would not be able to state a claim. To meet the pleading requirements for RICO, the plaintiff would have to properly plead the predicate acts as well as the elements of RICO. The plaintiff would not be able to properly plead the predicate acts under *Morrison* because the predicate acts must have a clear indication of extraterritorial application. As a result, the plaintiff would also fail to allege a pattern of racketeering activity, which would be fatal to the RICO claim.

Courts have erroneously attempted to analogize the extraterritorial reach of the predicate acts to section 30 of the Exchange Act.¹⁴² But this analysis runs contrary to the reasoning of *Morrison*. The *Morrison* Court found section 30 to limit the extraterritorial reach of the other sections in the Exchange Act.¹⁴³ Section 30 of the Exchange Act outlines specific instances where the Act has extraterritorial application.¹⁴⁴ The Court reasoned that if the entire act were to be given extraterritorial application, and section 10(b) in particular, there would have been no need to outline a specific provision for extraterritorial application.¹⁴⁵ Since section 30 and section 10(b) are part of one statutory framework, the explicit extraterritorial jurisdiction in one section, by negative implication, eliminates the other sections from extraterritorial application.¹⁴⁶

The analogy of the predicate acts to section 30 of the Exchange Act does not hold. First, RICO and the predicate acts are part of different statutory frameworks. They were enacted separately and those statutes cannot, by negative implication, show that RICO does not have extraterritorial application. Unlike section 30 of the Exchange Act, Congress did not enact the predicate acts with the intent to strip or grant RICO of any jurisdiction. Many of the predicate act statutes were enacted before RICO was even drafted.¹⁴⁷ Section 30, however, is part of the Exchange Act and outlined specific instances where the Act would or would not apply to foreign conduct.

Second, RICO prohibits committing a pattern of predicate acts. This means that RICO is concerned with anyone committing multiple predicate acts in connection with an enterprise. Congress made RICO extraterritorial when it adopted predicate acts with extraterritorial application. RICO has adopted the provisions of those statutes as part of the burden of proving a pattern of racketeering activity, and it has thus adopted their extraterritorial application. RICO does not limit the type of the predicate act in any way.¹⁴⁸ Congress could have limited the scope of the predicate acts in multiple locations in RICO, but Congress left the definition broad. For example, Congress had the opportunity to define racketeering activity as “any

¹⁴² See, e.g., *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (per curiam) (“*Morrison* similarly forecloses Norex’s argument that because a number of RICO’s predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.” (citing *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2882–83 (2010) (“[T]he presumption against extraterritoriality operates to limit [section 30 of the Exchange Act] to its terms.”))).

¹⁴³ See *Morrison*, 130 S. Ct. at 2883.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ For an original list of the predicate acts, see H.R. REP. NO. 91-1549, at 56–57 (1970), reprinted in 1970 U.S.C.A.N. 4007, 4032–33.

¹⁴⁸ See 18 U.S.C. § 1961(1) (2006) (defining “racketeering activity” as “any act” (emphasis added)).

domestic act” but chose not to. Congress could have limited a pattern of racketeering activity to two or more “domestic” predicate acts in its definition but, again, chose not to do so. Finally, in the operative portion of the statute, Congress could have prohibited a “*domestic* pattern of racketeering activity,” but did not.

The decision to maintain a broad definition of the predicate acts works together with the broad definition of an enterprise and the disjunctive phrase “interstate or foreign commerce.” Taken together, RICO prohibits a pattern of racketeering activity—including foreign predicate acts—affecting any enterprise, domestic or foreign, engaged in or affecting interstate or foreign commerce.¹⁴⁹ The “most faithful reading” of RICO evinces the clear intent of Congress to apply RICO to domestic and extraterritorial conduct and domestic and foreign enterprises.¹⁵⁰

3. *Failing to Apply RICO to Extraterritorial Conduct or Enterprises Undermines the Statute.*—Failing to apply RICO extraterritorially would substantially undermine Congress’s intent in passing the statute. A court can infer extraterritoriality in a statute from “the nature of the harm” prohibited, the “international focus of the statute,” and the idea that prohibiting only “acts occurring within the United States would undermine the statute’s effectiveness.”¹⁵¹ Limiting the statute to domestic conduct and enterprises would counter Congress’s intentions by any of these metrics.

The nature of the harm RICO was designed to remedy was the influence of organized crime on corporations and other enterprises.¹⁵² Congress acknowledged that organized crime was growing because of “defects in the evidence-gathering process of the law . . . and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.”¹⁵³ Thus, Congress passed OCCA (including RICO) to strengthen these tools and provide new remedies against organized crime.¹⁵⁴ Even in 1970, business and commerce were becoming international in nature, and Congress created RICO to apply to any enterprise affecting interstate or foreign commerce.¹⁵⁵ RICO prohibits this activity “without exception.”¹⁵⁶

Congress was so concerned with RICO being limited that it actually created a clause within OCCA that RICO was to “be liberally construed to

¹⁴⁹ See *id.* § 1962(a)–(d).

¹⁵⁰ See *Morrison*, 130 S. Ct. at 2883 (quoting *id.* at 2892 (Stevens, J., concurring)).

¹⁵¹ *United States v. Belfast*, 611 F.3d 783, 811 (11th Cir. 2010) (quoting *United States v. Plummer*, 221 F.3d 1298, 1310 (11th Cir. 2000)).

¹⁵² See 1970 Hearings, *supra* note 9.

¹⁵³ S. 30, 91st Cong. at 2 (1970), reprinted in 1970 Hearings, *supra* note 9, at 2, 3.

¹⁵⁴ See *id.*

¹⁵⁵ See 18 U.S.C. § 1962(a)–(c) (2006).

¹⁵⁶ H.R. REP. NO. 91-1549, at 57 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4033.

effectuate its remedial purposes.¹⁵⁷ To limit RICO to only domestic applications would be counter to this liberal construction requirement. RICO was enacted with the focus of alleviating the effects of organized crime on the economy and businesses of the United States, but nowhere does Congress indicate that RICO was only applicable if those effects were caused by organized crime within the country.

In fact, in the Senate Committee Hearings about the Organized Crime Control Act, Congress often referenced the “Cosa Nostra,” the Sicilian Mafia, as an example of the type of activity that Congress wanted to prevent.¹⁵⁸ If RICO were not applicable to extraterritorial conduct, any activities committed in Sicily (or Mexico, Canada, or the Bahamas) would not be prohibited under RICO—substantially limiting the effect RICO could have on the harm caused by organized crime.

Similarly, if RICO were limited to domestic enterprises, the government and citizens could only seek remedies against the domestic “cells” of the Sicilian Mafia or analogous criminal enterprises but could not sue the segments of the organizations outside of the country. Not being able to reach the entire organization in a suit or criminal prosecution is a primary reason Congress passed RICO. Prior to RICO, criminal prosecutions could only eliminate individuals in a criminal enterprise.¹⁵⁹ In an organized criminal enterprise, individuals are replaceable. Likewise, if RICO only focused on domestic enterprises, RICO could eliminate parts of an international organization but could never reach the entire organization. Such an organization would be free to reform the domestic cell of an enterprise in the United States while remaining—in its foreign operations—immune from RICO. This outcome runs counter to the reason Congress passed RICO—to eliminate the ongoing harm caused by criminal infiltration of legitimate businesses.

The RICO statute also inherently recognizes the international nature of some organized crime. When selecting predicate acts to include in the definition of “racketeering activity,” many of the acts have an inherently international aspect to the crime.¹⁶⁰ The international focus of many predicate acts, coupled with the fact that Congress enacted RICO with a focus on any enterprise—including those that only engage in interstate or

¹⁵⁷ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

¹⁵⁸ See *1970 Hearings*, *supra* note 9, at 152, 157 (statement of John N. Mitchell, Att’y Gen. of the United States) (“Today, a greatly expanded Cosa Nostra, consisting of 24 groups or ‘families,’ operates in most of the States, in Mexico, in the Bahamas, in parts of Canada, and other regions of the world. . . . More and more frequently, members of the Cosa Nostra are seeking connections with legitimate business. . . .”).

¹⁵⁹ See *supra* Part I.C.

¹⁶⁰ See *supra* note 140 and accompanying text. This does not give plaintiffs free rein to sue defendants for any extraterritorial activity. A RICO claim must still properly plead the predicate acts. If a predicate act does not have extraterritorial application under *Morrison*, then you cannot prove the predicate acts, which would eliminate any RICO claim.

foreign commerce¹⁶¹—shows that Congress was aware of the international nature of organized crime. As RICO was passed with international concerns clearly in mind, the statute should overcome any presumption against extraterritoriality. However, Congress never explicitly stated that OCCA or RICO were created to apply extraterritorially. In fact, in the Statement of Findings and Purpose on OCCA, Congress specifically mentioned the effects and activities of organized crime *in the United States*.¹⁶² But these statements do not indicate that Congress was only interested in organized crime in the United States. Rather, the effects in the United States brought the problem of organized crime to Congress's attention. Congress wanted to alleviate these effects by passing OCCA and RICO.

Exempting foreign enterprises from RICO creates difficulties with effective enforcement and the elimination of organized crime. First, criminal enterprises are able to exploit a loophole to continue their racketeering activity. Any organized crime syndicate simply has to locate its enterprise outside of the United States to avoid any and all difficulties it would normally encounter under RICO.¹⁶³ Under this structure, an organization located in Mexico, Canada, or the Caribbean could commit wire or mail fraud against individuals in the United States and those victims (and the United States government) would be without one of their most significant tools to combat organized crime.¹⁶⁴ Similarly, a drug cartel in Colombia could perpetually traffic drugs into the United States with impunity, without fear of RICO.¹⁶⁵ This result is contrary to the entire purpose of creating the RICO framework.

4. *Policy Considerations in Extraterritorial Application of RICO*.—Eliminating the extraterritorial application of RICO statutes would severely limit an effective tool against organized crime. Eliminating RICO's application is particularly limiting because the

¹⁶¹ See *supra* Part III.B.1.

¹⁶² See H.R. REP. NO. 91-1549, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 1073, 1073.

¹⁶³ One court has indicated that in determining the location of the enterprise, a court should employ a “nerve center” test. See *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 (NGG) (VVP), slip op. at 10–12 (E.D.N.Y. Mar. 8, 2011). This would make enforcement even more difficult because then an organization would need only to locate its management outside of the United States but could have agents commit crimes in the United States while maintaining the criminal enterprise's immunity from RICO.

¹⁶⁴ Instead, the affected individuals would have to bring suit and state a claim for each individual act of wire or mail fraud. A plaintiff would be without the substantial remedies offered by RICO. See *supra* Part I.C.

¹⁶⁵ Even if the Colombian drug cartel were not targeting the United States directly with its racketeering, to the extent the activity has an effect on foreign commerce, this activity should be within the auspices of civil RICO. The plaintiffs would likely face other hurdles, such as obtaining personal jurisdiction over the defendants, but properly pleading a RICO claim should not be one of the hurdles. See *supra* Part II.A.

international aspect of organized crime today is more apparent and difficult to combat. In 2008, the United States Department of Justice announced a new plan to combat a growing problem affecting the country—international organized crime.¹⁶⁶ The report found that, recently, “international organized crime has expanded considerably in presence, sophistication and significance,” and organized crime is “now threaten[ing] many aspects of how Americans live, work and do business.”¹⁶⁷ The report also noted that “[i]nternational organized criminals do not need to reside in the United States to engage in criminal activities targeting the United States, its interests and its people.”¹⁶⁸ The more sophisticated organizations can remain in countries that provide the criminals safety from arrest while continuing the criminal activities that affect the United States.¹⁶⁹

For exactly this reason, RICO must apply extraterritorially. Congress drafted OCCA as a statute with a broad purpose and language, and as such, RICO should be used against the most sophisticated of criminals. But if RICO were not to apply extraterritorially, even unsophisticated criminals would see an easy way to avoid the harsh punishments and penalties under RICO.

Applying laws extraterritorially is not without controversy. Extraterritorial application of United States laws has led to the “withdrawal of foreign investment, [hurdles to] acquisitions and mergers, and damage to foreign relations.”¹⁷⁰ Further, applying United States laws to individuals or organizations in foreign countries could be seen as a violation of that nation’s sovereignty.¹⁷¹ However, the federal judicial system deals with these issues by other means, including restrictions on personal jurisdiction, venue selection, and enforcing judgments against foreign defendants.¹⁷² These other barriers to RICO claims provide protection to foreign sovereignty and foreign corporations without unnecessarily burdening RICO plaintiffs. The United States needs to be able to protect itself from foreign threats, and one of the only ways to do this is to apply certain laws extraterritorially.

Criminals are already becoming so sophisticated that Congress is struggling to keep pace and ensure that new racketeering activities are included as predicate acts under the statute. Recent proposals to add

¹⁶⁶ See U.S. DEP’T OF JUSTICE, OVERVIEW OF THE LAW ENFORCEMENT STRATEGY TO COMBAT INTERNATIONAL ORGANIZED CRIME (2008), available at <http://www.justice.gov/ag/speeches/2008/ioc-strategy-public-overview.pdf>.

¹⁶⁷ *Id.* at 1.

¹⁶⁸ *Id.* at 10.

¹⁶⁹ See *id.*

¹⁷⁰ Goldsmith & Rinne, *supra* note 66, at 1026–27 (footnotes omitted).

¹⁷¹ See *id.* at 1029.

¹⁷² See *supra* Part II.A.

computer crimes under the Computer Fraud and Abuse Act (CFAA)¹⁷³ have been presented to Congress.¹⁷⁴ Criminal organizations have used computer fraud as a key part of their operations to steal identities and financial information.¹⁷⁵ However, even if violations of the CFAA were added as predicate acts, if RICO has no extraterritorial application, the benefit of this expansion would be diminished.¹⁷⁶

Further, RICO becomes completely ineffective as a tool against terrorism if the statute lacks extraterritorial application. RICO predicate acts include “any act that is indictable under any provision listed in section 2332b(g)(5)(B)” — a section of the Acts of Terrorism Transcending National Boundaries Act.¹⁷⁷ But the current case law would prevent the application of RICO to foreign terrorist organizations.¹⁷⁸ As a policy matter, to not apply RICO to extraterritorial conduct or foreign enterprises completely limits it as a tool that the United States and its citizens can use to combat organized crime.

CONCLUSION

RICO was designed to provide the United States and its citizens with more effective legal tools to protect against the significant impacts of organized crime. The statute was created with a broad purpose and has, despite numerous limiting attempts by lower courts, been consistently interpreted by the Supreme Court to give it broad effect. After *Morrison v. National Australia Bank Ltd.*, lower courts have again been narrowing the scope of RICO by dismissing claims against foreign enterprises or claims resulting from foreign conduct.

But *Morrison* does not give lower courts carte blanche to dismiss any claim involving extraterritorial conduct. Rather, *Morrison* requires that the court analyze the statute and determine whether the “most faithful reading of the text” gives a “clear indication” that the statute should apply extraterritorially.¹⁷⁹ The lower courts that have examined RICO under this framework have not provided the most faithful reading of the RICO statute in their analysis of its extraterritorial application.

¹⁷³ 18 U.S.C. § 1030 (2006).

¹⁷⁴ See *Cyber Crime: Updating the Computer Fraud and Abuse Act to Protect Cyber Space and Combat Emerging Threats: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 5 (2011) (statement of James A. Baker, Associate Deputy Att’y Gen. of the United States).

¹⁷⁵ See *id.*

¹⁷⁶ The CFAA was found to have extraterritorial application. See *United States v. Ivanov*, 175 F. Supp. 2d 367, 375 (D. Conn. 2001).

¹⁷⁷ § 1961(1).

¹⁷⁸ For background on the use of RICO as a tool to combat terrorism, see generally Irvin B. Nathan & Kenneth I. Juster, *Law Enforcement Against International Terrorists: Use of the RICO Statute*, 60 U. COLO. L. REV. 553 (1989).

¹⁷⁹ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) (quoting *id.* at 2892 (Stevens, J., concurring)).

RICO applies to extraterritorial conduct. It applies to *any* enterprise. It applies to an enterprise engaged solely in or affecting only *foreign* commerce. And a large number of the predicate acts that constitute a “pattern of racketeering activity”¹⁸⁰ are explicit in their application to extraterritorial conduct.

RICO was enacted with concern for the harm to the United States economy caused by organized crime. That harm can exist if the criminal activity is committed within or outside of the United States. Through its reference to numerous extraterritorial predicate acts, RICO recognizes that many elements of a claim may occur outside the United States.

This failure to apply RICO extraterritorially is also completely inconsistent with the purpose of the statute—to be a powerful tool against organized crime. Criminal enterprises are getting more complex and more sophisticated; failing to apply RICO to extraterritorial conduct gives them an easy way to avoid liability. The call to expand the predicate acts of RICO and the use of RICO against terrorists (or their financial backers) would be significantly hindered if RICO did not apply to foreign enterprises or extraterritorial conduct. RICO is targeted at stopping sophisticated, organized crime, and limiting its application to domestic conduct will create a dangerous loophole easily exploitable by sophisticated, organized criminals.

¹⁸⁰ § 1961(5).

