

RICO’S EXTRATERRITORIAL REACH:
THE IMPACT OF *EUROPEAN
COMMUNITY V. RJR NABISCO*

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INTRODUCTION

As the facts of complex litigation become increasingly international in scope, an alleged scheme under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) may span continents, with citizens of various nations playing central roles, transactions being orchestrated in one corner of the world and carried out in another, and funds moving from one country to the next. Thus, the question of RICO’s extraterritorial reach takes on great significance, both in the criminal and civil spheres.

Under RICO, it is unlawful for any person associated with an enterprise to conduct or participate in the conduct of the enterprise’s affairs through a pattern of racketeering activity.¹ An “enterprise” is broadly defined to encompass any individual or legal entity, or group of individuals associated in fact.² “Racketeering activity” is defined to include certain state-law offenses as well as offenses under specific federal criminal statutes that are listed as predicate RICO offenses.³

In *European Community v. RJR Nabisco, Inc.*,⁴ the Second Circuit forged a new path in holding that RICO does have extraterritorial reach, and that RICO applies extraterritorially when liability is based on a predicate statute that itself applies extraterritorially.⁵ The Second Circuit *RJR* decision departs from all those before it by finding a clear manifestation of congressional intent to apply RICO extraterritorially. In April 2015, the Second Circuit issued a ruling declining to hear the case en banc.⁶ On October 1, 2015, the United States Supreme Court granted the petition for certiorari filed by RJR Nabisco, Inc.⁷

To date, the Ninth Circuit is the only circuit other than the Second Circuit that has rendered an opinion regarding RICO’s extraterritorial reach. The Second Circuit *RJR* opinion directly conflicts with that of the Ninth Circuit, as well as with all district court opinions that have addressed the issue. In contrast to *RJR*, these cases all have found that Congress did not clearly express an intention for RICO to have extraterritorial reach, and, thus, that courts, in compliance with the Supreme Court opinion of *Morrison v. National Australia*

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1. 18 U.S.C. § 1962(d) (2008).

2. 18 U.S.C. § 1961(4) (2013).

3. *Id.* § 1961(1).

4. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014), *reh’g denied*, 764 F.3d 149 (2d Cir. 2014), *reh’g en banc denied*, 783 F.3d 123 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 28 (Oct. 1, 2015).

5. *Id.* at 136-37.

6. *European Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123 (2d Cir. 2015).

7. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 28 (2015).

Bank, Ltd.,⁸ must apply a presumption against extraterritoriality, and ascertain RICO's "focus" for purposes of determining whether a particular application of RICO is domestic or extraterritorial. These cases have split into two camps—those finding that RICO's focus is on the enterprise, and those finding, as did the Ninth Circuit, that the focus is on the pattern of racketeering activity.

Supreme Court review of the issue of RICO's extraterritoriality will arrive at a critical time. The analyses of the courts applying the *Morrison* focus test to RICO have created a judicial landscape marked by incoherence and inconsistency. *RJR* is set to be the defining case in the Second Circuit, and without Supreme Court clarification, will only add to the confusion among the courts trying to determine the issue of RICO's extraterritoriality. *RJR* presents an opportunity for the Supreme Court to offer an approach that will bring reasonableness and clarity to RICO jurisprudence.

This Article examines the development of the case law regarding RICO's extraterritorial reach, with emphasis on the recent Second Circuit *RJR* decision and its potential impact, along with an examination of issues left unresolved by the courts. Part I of the Article focuses on the Supreme Court's landmark decision in *Morrison* that provided the current framework for determining RICO's extraterritorial reach. It follows chronologically the development of the post-*Morrison* case law that led up to the *RJR* decision. Part I also examines the district court opinion in *RJR*, and ends with a look at the Ninth Circuit case of *Chao Fan Xu*, which found RICO's focus to be on the pattern.

The Article then turns in Part II to the Second Circuit *RJR* proceedings that applied a new analysis in determining that RICO does, in fact, have extraterritorial reach, coextensive with that of the particular predicate offenses alleged. Part II describes the Second Circuit panel decision, and dissects the Second Circuit decision declining to rehear the case en banc. It examines the court's strained efforts to restrict the interpretation of Second Circuit precedent so as to minimize its significance. It looks at the dissenting opinions rejecting the *RJR* court's predicate-based extraterritorial analysis, and examines the policy concerns they raise. Part II also discusses the dissent's efforts to distinguish the territorial reach of RICO in criminal and civil cases, and a possible basis for such a distinction in judicial precedent.

Part III of the Article considers the potential impact of the *RJR* opinion. It examines the possibility for an expansion of RICO's extraterritorial reach based on *RJR*, and analyzes a question that *RJR* left unresolved—namely, the parameters for stating a domestic RICO claim. Part III also discusses how the *RJR* extraterritorial analysis avoids the difficulties courts have faced in trying to apply the "focus" test of *Morrison* to RICO, and offers a means to simplify and clarify the law.

8. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

I. THE SUPREME COURT'S *MORRISON* DECISION SETS THE STAGE

In the time period after the United States Supreme Court decision of *Morrison* in 2010,⁹ which provided the current framework for determining RICO's extraterritorial reach, and prior to the *RJR* case, no court had held that RICO has extraterritorial reach, and no court had adopted an analysis for determining RICO's extraterritorial reach that was based on the extraterritorial reach of the predicate acts alleged.

Only two published court of appeals decisions had addressed the issue, the Second Circuit in *Norex Petroleum Ltd. v. Access Industries, Inc.*,¹⁰ and the Ninth Circuit in *United States v. Chao Fan Xu*.¹¹

Following the Supreme Court's decision in *Morrison*, courts examining the issue of RICO's extraterritorial reach uniformly have recognized *Morrison* as the starting point for the analysis.

In *Morrison*, the Supreme Court, on an appeal from the Second Circuit, considered the extraterritorial reach of section 10(b) of the Securities Exchange Act of 1934. The Court held that the question of the reach of section 10(b) was a merits question, and not a question of subject-matter jurisdiction, as the Second Circuit had treated it.¹² It began with the recognition of a longstanding principle of American law that, unless a contrary intent appears, congressional legislation is meant to apply only within the United States' territorial jurisdiction.¹³ "[T]hus, unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions."¹⁴ The Supreme Court held that in the case before it, the Second Circuit panel had wrongfully disregarded this presumption against extraterritoriality in reasoning that "because the Exchange Act is silent as to the extraterritorial application of § 10(b), it was left to the court to 'discern' whether Congress would have wanted the statute to apply."¹⁵

The Second Circuit had developed two tests for determining whether section 10(b) should be applied to foreign transactions that could be met separately, or in some combination: (1) an "effects test" that questioned whether the wrongful conduct had a substantial effect in the United States or upon its citizens; and (2) a "conduct test" focusing on whether the wrongful conduct occurred in the United States.¹⁶ Other circuits employed similar

9. *Id.*

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

11. *United States v. Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013) (as amended on denial of reh'g Mar. 14, 2013).

12. 561 U.S. at 254.

13. *Id.* at 255.

14. *Id.* (internal quotation marks omitted).

15. *Id.*

16. *Id.* at 257-58.

analyses.¹⁷ The Supreme Court opined that the application of these tests had resulted in inconsistent and unpredictable results, and that instead of trying to divine what Congress would have wanted in a given situation, the courts should uniformly apply the presumption against extraterritoriality.¹⁸

The Supreme Court turned to the language of section 10(b), which the Court concluded contained nothing to suggest it applied abroad.¹⁹ The Court rejected the argument that the statute's reference to foreign commerce in its definition of "interstate commerce" overcame the presumption against extraterritoriality,²⁰ or that the presumption was overcome by Congress' reference, in describing the purpose of the Act, to the fact that prices of securities traded in domestic exchanges are disseminated and quoted abroad.²¹ The Court likewise was not persuaded that the language of other sections of the Act was sufficient to overcome the presumption against extraterritoriality.²² The Court concluded: "In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not."²³ Addressing the argument in the concurring opinion of Justices Stevens and Ginsburg that the majority had "impermissibly narrowed the inquiry" in determining whether a statute has extraterritorial application, the Court stated that the presumption is not a "clear statement rule" and so does not require express language stating that the law applies abroad, but rather context can be considered as well.²⁴

The Supreme Court then addressed how to determine whether a particular application of the Act is domestic or extraterritorial. The Court held that it was necessary to analyze the "focus" of congressional concern in enacting the statute.²⁵ The court determined that the focus of the Securities and Exchange Act was the purchase and sale of securities in the United States, and, thus, to state a claim, a transaction must involve a domestic purchase or sale, or a security listed on a domestic exchange.²⁶

17. *Id.* at 259-60.

18. *Id.* at 260-61.

19. *Id.* at 262.

20. *Id.* at 262-63.

21. *Id.* at 263.

22. *Id.* at 263-64.

23. *Id.* at 265.

24. *Id.*

25. *Id.* at 266.

26. *Id.* at 267-70.

A. *The Second Circuit Decisions in Cedeño and Norex*

1. Cedeño

Prior to *Morrison*, courts examining the issue of RICO's extraterritoriality initially applied general analyses aimed at determining congressional intent,²⁷ courts then largely settled on the more specific application of the "conducts" and/or "effects" tests²⁸ that were used in securities fraud and antitrust cases,

27. *United States v. Noriega* was one of the early cases to examine whether RICO has extraterritorial reach. *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990). In that case, Manuel Noriega, former Panamanian dictator, and a co-defendant were charged under RICO with participating in a scheme to import cocaine into the United States. The court treated the issue of RICO's extraterritoriality as a case of first impression. While the court ended with an "effects" test, it reached that result from a more general analysis that looked at: 1) whether the United States has the power to reach the conduct at issue under international law principles; and 2) whether the statutes in question were intended to have extraterritorial effect. *Id.* at 1512. The court looked to case law and the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES to conclude that the United States has the power to exercise jurisdiction over conduct that occurs outside its territorial boundaries but produces effects, or is intended to produce effects, within the United States. *Id.* The court relied on the often-cited example of the authority of one country to prosecute a person standing in a second country who fires a bullet across the border and strikes a person standing in the first country. "All the nations of the world recognize the principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done." *Id.* at 1513 (quoting *Rivard v. United States*, 375 F.2d 882, 887 (5th Cir.) (internal quotations omitted)). The court noted that these international law principles had recently been expanded to conduct intended to produce effects within the United States, without proof of an overt act or effect within the United States. *Id.* Turning to the RICO statute, the court concluded that it evinced an intention to be expansive in scope, and to broadly eradicate the effects of organized crime. *Id.* at 1516-17. The court concluded that to construe RICO narrowly to apply only to conduct within the United States "would frustrate RICO's purpose by allowing persons engaged in racketeering activities directed at the United States to escape RICO's bite simply by moving their operations abroad. . . . As long as the racketeering activities produce effects or are intended to produce effects in this country, RICO applies." *Id.* at 1517. *See also* *Jose v. M/V Fir Grove*, 801 F. Supp. 349, 354-58 (D. Or. 1991) (looking for guidance to both antitrust and securities cases, but applying a more general inquiry to determine congressional intent). *Cf.* *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991) (*see infra* note 32).

28. *See, e.g.*, *N. S. Fin. Grp. v. Al-Turki*, 100 F.3d 1046, 1050-53 (2d Cir. 1996) (affirming district court's dismissal for lack of subject-matter jurisdiction based on failure to satisfy conduct test but noting that it was not deciding whether conduct test (whose use plaintiff did not challenge) should govern in RICO case); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004) (affirming district court's application of conduct and effects tests to RICO claim); *United States v. Philip Morris USA, Inc.*, 477 F. Supp. 2d 191, 196-98 (D.D.C. 2007) (finding conduct test irrelevant to facts at issue and applying effects test); *Aerovias De Mex, S.A. De C.V. v. De Prevoisin*, No. 99-41162, 2000 U.S. App. LEXIS 40243 (5th Cir. June 29, 2000) (adopting conduct and effects tests in an unpublished per curiam opinion); *Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1351-52 (11th Cir. 2008) (adopting conduct and effects tests); *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 251-53 (S.D.N.Y. 2008) (applying conduct and effects tests). *See also*

and subsequently rejected in *Morrison*.

One of the first cases to examine the issue of RICO's extraterritorial application after *Morrison* was *Cedeño v. Intech Group, Inc.*²⁹ The RICO claim in that case was based on a money-laundering scheme that used U.S. banks located in New York to hold and move funds. The defendants were various individuals and entities, many associated with the Venezuelan government, who were alleged to have wrongfully imprisoned the plaintiff Cedeño and to have damaged his business, a company incorporated in the British Virgin Islands and named as a co-plaintiff.

The court relied on *Morrison* as the focal point of its analysis. Plaintiffs alleged that *Morrison* was inapplicable because the complaint was premised on domestic predicate acts of money laundering involving transfers of funds into and out of New York banks, and not on extraterritorial activity. Rejecting the plaintiff's position, the court quoted *Morrison*: "[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States,' and the presumption against extraterritoriality 'would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.'"³⁰

In determining the "focus" of the RICO statute, the district court brusquely rejected the plaintiff's "superficial argument" that "since the federal statutes prohibiting money laundering are (they say) extraterritorial in nature, a RICO action predicated on violations of those statutes should be given extraterritorial application."³¹ Instead, the court held that the focus of RICO was on the enterprise, and the impact of the pattern of racketeering activity upon it,³² and that RICO has no application when the enterprise and the impact of the predicate act upon it are entirely foreign.³³ The plaintiff's "superficial argument" was the position adopted by the Second Circuit four years later in

Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 688-690 (S.D. Tex. 2009).

29. Cedeño v. Intech Grp., Inc., 733 F. Supp. 2d 471 (S.D.N.Y. 2010), *aff'd sub nom.*, Cedeño v. Castillo, 457 F. App'x 35 (2d Cir. 2012).

30. *Id.* at 473 (quoting *Morrison*, 561 U.S. at 266).

31. *Id.* at 473.

32. *Id.* at 473-74. The district court recognized that its opinion was "arguably contrary" to the 1991 case, *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991), when the Second Circuit addressed the extraterritorial reach of RICO for the first time, but held that *Alfadda* had ignored the presumption against extraterritoriality and so was no longer good law under *Morrison*. 733 F. Supp. 2d at 474, n.3. Nonetheless, *Alfadda* offers early support for the "pattern" test that had not yet been articulated by the courts. The *Alfadda* court squarely rejected the proposition that enterprises should be immune from liability under RICO by virtue of their foreign character alone, and stated that the allegation of a pattern was at the heart of a RICO complaint. 935 F.2d at 479.

33. While the *Cedeño* district court opinion arguably could be read so as not to foreclose the application of RICO to a case involving a foreign enterprise and predicate acts with a domestic impact, the *Cedeño* court of appeals interpreted the decision as stating simply that the focus of RICO is on domestic enterprises. 457 F. App'x at 37.

RJR.

2. Norex

One month after the district court's decision in *Cedeño*, the Second Circuit decided *Norex*. The complaint alleged that defendants had participated in a racketeering and laundering scheme that aimed to seize control of the Russian oil industry through the use of Russian oil companies, and that defendants had illegally obtained plaintiffs' controlling majority shareholder interest in one of the companies.³⁴ The complaint alleged that defendants committed various predicate acts in the United States, including mail and wire fraud, money laundering, Hobbs Act violations and bribery.³⁵ The Court stated:

Morrison wholeheartedly embraces application of the presumption against extraterritoriality, finding that 'unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.' . . . The Morrison Court rejected various tests devised over the years to divine a statute's extraterritorial application in favor of a bright line rule: '[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'³⁶

The *Norex* court then observed: "Our Court's precedent holds that RICO is silent as to any extraterritorial application."³⁷ The Court also stated that *Morrison* "forecloses Norex's argument that because a number of RICO's predicate act possess an extraterritorial reach, RICO itself possesses an extraterritorial reach."³⁸ Finally, without addressing the "focus" of the RICO statute, the court simply concluded: "The slim contacts with the United States alleged by Norex are insufficient to support extraterritorial application of the RICO statute."³⁹ Thus, while it was firm in its opinion that RICO does not have extraterritorial reach, the *Norex* court provided little enlightenment as to the proper analysis for determining whether a claim is in fact extraterritorial. Indeed, as the court in *Chevron Corp. v. Donziger* noted, *Norex* failed to articulate any approach to determining the application of RICO "beyond

34. *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 31 (2d Cir. 2010).

35. *Id.* The *Norex* district court opinion was decided prior to *Morrison*. The district court held that the issue of extraterritoriality was a matter of subject-matter jurisdiction. *Norex Petrol. Ltd. v. Access Indus., Inc.*, 540 F. Supp. 2d 438, 441 (S.D.N.Y. 2007). Applying *Morrison*, the Second Circuit held that instead it was a matter of whether the complaint stated a claim for relief under Fed. R. Civ. P. 12(b)(6). 631 F.3d at 32. The district court also applied the conduct and effects tests, 540 F. Supp. 2d at 442-49, that were later rejected by *Morrison*, 561 U.S. at 257-61.

36. 631 F.3d at 32 (citations omitted).

37. *Id.*

38. *Id.* at 33.

39. *Id.*

drawing a conclusion with respect to the particular complaint before it.”⁴⁰

After *Norex*, the Second Circuit issued a summary order affirming the *Cedeño* district court decision.⁴¹ In an unpublished opinion, the Second Circuit rejected plaintiff’s argument that the complaint alleged activity within the domestic application of RICO.⁴² The Court sidestepped the question of whether the focus of RICO was on the enterprise or the pattern, but, citing *Norex*, said that either way, the complaint alleged inadequate conduct in the United States to state a domestic RICO claim.⁴³ The court further rejected the plaintiff’s argument that even if the activity was not domestic, RICO should be given extraterritorial application because the predicate acts alleged in the Complaint had extraterritorial application.⁴⁴ The Second Circuit concluded: “This argument is foreclosed by *Norex*, 631 F.3d 29, where this Court declined to link the extraterritorial application of RICO to the scope of its predicate offenses. *Id.* at 33(holding that RICO is inapplicable extraterritorially even though statutes defining some of its predicate offenses specifically apply abroad).”⁴⁵

B. District Courts Look to RICO’s Focus

Following *Norex*, the district courts adopted similar approaches to determining RICO’s application. Applying *Morrison*, the courts uniformly concluded that RICO was silent as to its extraterritorial application, and so looked to the “focus” of the RICO statute.⁴⁶ The decisions split into two groups – those that found the focus of RICO to be on the enterprise⁴⁷ and those that

40. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 573 (S.D.N.Y. 2014).

41. *Cedeño v. Castillo*, 457 F. App’x 35 (2d Cir. 2012).

42. *Id.* at 37.

43. *Id.* at 37-38.

44. *Id.* at 38. The complaint alleged violations of 18 U.S.C. § 1951(interference with commerce by threats or violence) and 18 U.S.C. § 1956(f) (money laundering).

45. *Id.*

46. In *Chevron Corp. v. Donziger*, 974 F. Supp. 2d at 571, n.1337, the court adhered to *Norex* but questioned whether RICO’s silence as to its extraterritorial application “correctly resolves the question” of congressional intent, in light of the Supreme Court’s statement in *Morrison* that the presumption against extraterritoriality is not a “clear statement” rule but allows for consideration of context as well.

47. See, e.g., *Farm Credit Leasing Servs. Corp. v. Krones, Inc.* (In re Le-Nature’s, Inc.), No. 9-1445, 2011 U.S. Dist. LEXIS 56682, at *15-18 (W.D. Pa. May 26, 2011) (where the alleged enterprise is domestic, the claim is within RICO’s ambit, and the court need not analyze whether the alleged conduct or its effects occurred within or outside United States); *Sorota v. Sosa*, 842 F. Supp. 2d 1345 (S.D. Fla. 2012) (looking to the enterprise as RICO’s focus and dismissing claim where foreign enterprise’s only connection to United States was that it possessed funds that originated from and possibly were returned to a Florida bank); *Mitsui O.S.K Lines, Ltd. v. Seamasster Logistics, Inc.*, 871 F. Supp. 2d 933, 938-44 (N.D. Cal. 2012) (The district court decided that the enterprise was the focus and adopted the nerve-center test used by the *RJR* district court for purposes of determining an enterprise’s location, see, *infra*, pp. 16-17, but following further proceedings, the Ninth Circuit held that

held that RICO's focus was on the pattern of racketeering activity.⁴⁸

The logic for deciding that the enterprise was the focus was based on the observation that RICO does not punish predicate acts of racketeering alone, but only racketeering activity as related to an enterprise.⁴⁹ Other courts disagreed and concluded that the "focus" of RICO was on the pattern, based on factors such as legislative history demonstrating intent to punish patterns of organized criminal activity, the Supreme Court's statement that "the heart of any RICO complaint is the allegation of a *pattern* of racketeering,"⁵⁰ and the desirability of allowing a remedy for plaintiffs injured by a pattern of racketeering activity in the United States, without regard to the domestic or foreign character of the enterprise or defendants.⁵¹

C. *The District Court RJR Opinion*

The *RJR* case began in the Eastern District of New York.⁵² The plaintiffs

application of the nerve-center test was erroneous, and remanded with directions to apply *Chao Fan Xu*. 618 F. App'x 304 (9th Cir. July 6, 2015)).

48. *See, e.g.*, *CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d 1193, 1209-10 (D. Colo. 2011) (holding that RICO's focus was on the pattern, and that RICO applied when most of the defendants resided in Canada but phony loan scheme was directed at U.S. borrowers and racketeering activity occurred in U.S.); *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 243-45 (S.D.N.Y. 2012).

49. *See, e.g.*, *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771, 2011 U.S. Dist. LEXIS 23538, at *15-16 (E.D.N.Y. March 8, 2011); *In re Le-Nature's, Inc.*, 2011 U.S. Dist. LEXIS 56682, at *15.

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

51. *See, e.g.*, *Chevron Corp. v. Donziger*, 871 F. Supp. 2d at 241-45, United States v. *Chao Fan Xu*, 706 F.3d 965, 976-77 (9th Cir. 2013) (as amended on denial of reh'g Mar. 14, 2013).

52. The European Community filed its first RICO complaint against RJR in 2000. It was dismissed for lack of subject-matter jurisdiction. *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456 (E.D.N.Y. 2001). A second complaint filed by the European Community, and an additional ten European countries as plaintiffs, was again dismissed. *European Cmty. v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231 (E.D.N.Y. 2002). Plaintiffs then filed a third complaint, the original complaint in the action that was before the Second Circuit in the decision denying rehearing en banc. *Complaint, European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 (E.D.N.Y. Oct. 30, 2002). Plaintiffs also appealed the decision dismissing the second complaint. The Second Circuit affirmed the district court's decision dismissing the second complaint with respect to all the defendants, except for Japan Tobacco, Inc., and its related entities. *European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004). The parties then stipulated to the filing of an amended complaint. Proceedings were stayed so that plaintiffs could file a petition for writ of certiorari. The United States Supreme Court granted the petition, summarily vacated the Second Circuit decision dismissing the second complaint, and remanded in light of *Pasquantino v. United States*, 544 U.S. 349 (2005). *European Cmty. v. RJR Nabisco, Inc.*, 544 U.S. 1012 (2005). On remand, the Second Circuit reinstated its decision. *European Cmty. v. RJR Nabisco, Inc.*, 424 F.3d 175 (2d Cir. 2005). Plaintiffs again petitioned for writ of certiorari but the petition was denied. *European Cmty. v. RJR Nabisco, Inc.*, 546 U.S. 1092 (2006). In 2009, plaintiffs

alleged that RJR Nabisco orchestrated a global money-laundering scheme and laundered money through New York-based financial institutions. According to the complaint, the scheme began with Colombian and Russian criminal organizations smuggling illegal narcotics into Europe, where the narcotics were sold for euros. The foreign criminal organizations used money brokers in Europe to launder the euros and exchange them for the domestic currency of the criminals' home countries. The money brokers then sold the euros to cigarette importers at a discount rate. The cigarette importers used the euros to purchase RJR's cigarettes from wholesalers, who, in turn, purchased the cigarettes from RJR and shipped them to the importers. The money brokers used the funds from the cigarette importers to continue the laundering cycle.⁵³ The complaint alleged that RJR directed the money-laundering scheme by concealing the identity of the cigarette purchasers, surreptitiously shipping cigarettes through Panama, and bribing Colombian border guards so that RJR employees could illegally enter the country to receive payments for cigarettes and then travel to Venezuela to wire the funds to RJR Nabisco accounts in the United States.⁵⁴

In a decision by Judge Nicholas Garaufis, the district court found that the complaint failed to "even remotely suggest[]" that defendants had any hand in directing the drug smuggling, currency swap, or currency purchase aspects of the criminal systems, or to explain how they directed or even participated in the remaining criminal activity.⁵⁵ The district court interpreted *Norex* as barring any extraterritorial application of RICO.⁵⁶ Relying on *Morrison*, the district court looked to the "focus" of the RICO statute in order to determine whether the RICO claim was domestic or extraterritorial.⁵⁷ The district court determined that the enterprise was the "focus" of the RICO statute, and

successfully moved to file a second amended complaint, adding new plaintiffs and new defendants. Defendants moved to dismiss. The court dismissed the RICO claims and reserved decision on the remaining state-law claims. *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771, 2011 U.S. Dist. LEXIS 23538 (E.D.N.Y. Mar. 8, 2011). The remaining state-law claims were subsequently dismissed, and leave to file an amended complaint denied. *European Cmty. v. RJR Nabisco, Inc.*, 814 F. Supp. 2d 189 (E.D.N.Y. 2011). The appeal to the Second Circuit, the denial of rehearing, and the denial of rehearing en banc followed. 764 F.3d 129, *reh'g denied*, 764 F.3d 149 (2d Cir. 2014), *reh'g en banc denied*, 783 F.3d 123 (2d Cir. 2015). The Second Circuit remanded the case for further proceedings, 764 F.3d at 149, which were stayed in light of RJR's intention to file its petition for a writ of certiorari. Minute Entry for Status Conference, No. 02-CV-5771 (E.D.N.Y. June 4, 2015). RJR then filed, and the Supreme Court granted, the petition for certiorari. 136 S. Ct. 28 (2015) (mem.).

53. *See RJR*, 764 F.3d at 133.

54. *Id.* at 134. The district court's recitation of the facts was much more cursory and dismissive of RJR's role, and aligned with the court's easy dismissal of the case.

55. *RJR*, 2011 U.S. Dist. LEXIS 23538, at *22.

56. *Id.* at *12-13.

57. *Id.* at *13-14.

therefore that a RICO enterprise must be a domestic enterprise.⁵⁸ For purposes of establishing the geographical location of the enterprise, the court adopted the nerve center test used for determining a corporation's principal place of business for diversity jurisdiction.⁵⁹ The district court viewed the enterprise as a "loose association of foreign criminal organizations whose policies and activities were directed from outside the United States,"⁶⁰ and dismissed the complaint on the ground that RICO cannot apply to activity outside the United States and cannot apply to a foreign enterprise.⁶¹

D. The Ninth Circuit Weighs in with Chao Fan Xu

Before the Second Circuit heard the case, the Ninth Circuit weighed in on the issue of RICO's extraterritorial application in a criminal case, *United States v. Chao Fan Xu*.⁶² In *Chao Fan Xu*, four Chinese nationals appealed after being convicted of partaking in a RICO conspiracy to steal funds from the Bank of China, to transfer the funds out of China, and then by committing immigration fraud, to enter the United States in order to enjoy the proceeds of their crime.⁶³ Beginning its analysis with *Morrison*, the court relied on Ninth Circuit precedent that RICO was silent as to its extraterritorial application, applied the presumption against extraterritorial application, and then sought to ascertain the focus of RICO.⁶⁴

Observing that the determination of RICO's focus was "far from clear-cut,"⁶⁵ the Ninth Circuit noted that courts were divided in concluding whether the focus was on the enterprise or on the pattern of racketeering activity.⁶⁶

The Ninth Circuit examined the nerve center test used by the *RJR* district court and determined that it was inadequate for purposes of the case before it.⁶⁷ The court found persuasive the reasoning of the court in *Chevron Corp. v. Donziger* that application of the test could produce anomalous results to the extent that a domestic enterprise could be held culpable, but a foreign enterprise immune from prosecution, even though both were engaged in

58. *Id.* at *17.

59. *Id.* at *18-21.

60. *See* *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 137 (2d Cir. 2014), *reh'g denied*, 764 F.3d 149 (2d Cir. 2014), *reh'g en banc denied*, 783 F.3d 123 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 28 (Oct. 1, 2015).

61. *European Cmty. v. RJR Nabisco*, 2011 U.S. Dist. LEXIS 23538, at *12-13, 17-18; *see RJR*, 764 F.3d at 134.

62. *United States v. Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013) (as amended on denial of *reh'g* Mar. 14, 2013).

63. *Id.* at 974.

64. *Id.* at 974-75.

65. *Id.* at 975.

66. *Id.* at 975-76.

67. *Id.* at 976-77.

identical conduct within the United States.⁶⁸

Thus, the Ninth Circuit determined that the focus should be on the pattern of racketeering activity;⁶⁹ however, somewhat confusingly, it then went on to analyze the situation before it by describing the enterprise. The court observed that the indictment described two parts of the enterprise. One part involved extraterritorial fraud on the Bank of China, even if the bank fraud resulted in some of the money reaching the United States. The second part, however, involved activity in the United States, including immigration law violations that “bound the Defendants’ enterprise to the territorial United States.”⁷⁰ The court stated that the two parts of the enterprise were conjoined because the success of the bank fraud depended on defendants’ ability to commit immigration fraud and safely enjoy the proceeds in the United States.⁷¹ The Ninth Circuit then turned back to the pattern of racketeering activity and concluded that defendants’ immigration law violations fell “squarely within RICO’s definition of racketeering activity.”⁷² “Defendants’ pattern of racketeering activity may have been conceived and planned overseas, but it was executed and perpetrated in the United States.”⁷³

II. THE *RJR* SECOND CIRCUIT PROCEEDINGS

A. *The Second Circuit Panel Reverses the RJR District Court Decision*

Against this legal backdrop, the Second Circuit heard the *RJR* appeal and reversed the decision of the district court.⁷⁴ The Second Circuit agreed with the Ninth Circuit that the extraterritorial reach of RICO should not depend on the domestic or foreign nature of the enterprise.

The Second Circuit reasoned that RICO should not be construed so as to allow a defendant associated with a foreign enterprise to escape liability for conduct that violates a RICO predicate.⁷⁵ “Surely the presumption against extraterritorial application of United States law does not command giving foreigners carte blanche to violate the laws of the United States”⁷⁶

68. *Id.* at 977.

69. *Id.* at 977-78.

70. *Id.* at 978.

71. *Id.* at 978-79.

72. *Id.* at 979.

73. *Id.*

74. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014), *reh’g denied*, 764 F.3d 149 (2d Cir. 2014), *reh’g en banc denied*, 783 F.3d 123 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 28 (Oct. 1, 2015). The Second Circuit panel included Judges Pierre Leval, Robert Sack and Peter Hall.

75. *Id.* at 138.

76. *Id.*

However, the Second Circuit then parted ways with the Ninth Circuit, as well as all prior courts that had examined RICO's extraterritorial reach. The court determined that there was no need to analyze RICO's focus. By incorporating into RICO predicate acts that have extraterritorial reach, Congress unmistakably communicated its intention to apply RICO extraterritorially.⁷⁷ Thus, the extraterritorial reach of RICO is coextensive with the extraterritorial reach of the particular predicate act alleged.⁷⁸ "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate."⁷⁹

In an effort to reconcile its decision with *Norex*, the court asserted that *Norex* did not say that RICO could never apply extraterritorially, but only that it did not apply extraterritorially "*in all of its applications.*"⁸⁰

The Second Circuit decision came as a surprise, not only because the court reached a conclusion that no prior court had, but also because it was not a conclusion advocated by either party. The only mention of this predicate-based approach to extraterritorial reach came in a footnote by the United States in its amicus brief in which it stated that it believed RICO was clearly intended to apply extraterritorially "in part because some of RICO's predicate crimes can only be violated by extraterritorial conduct," but that it recognized the panel was bound by *Norex's* holding that RICO has no extraterritorial application.⁸¹

In a subsequent decision denying the petition for a panel rehearing,⁸² the Second Circuit rejected *RJR's* argument that even when the conduct giving rise to a RICO injury may be extraterritorial, the plaintiff must still allege a domestic injury. The Second Circuit held that RICO does not require a domestic injury.⁸³

77. *Id.* at 137.

78. *Id.* at 136.

79. *Id.*

80. *Id.*

81. Brief for the United States as Amicus Curiae in Support of Neither Party at 9 n.3, *RJR*, 764 F.3d 129 (No. 11-2475-CV). The United States had crafted a similar argument in its *Norex* amicus brief, but had restricted it to criminal cases, and had taken no position with respect to the extraterritorial reach of RICO in civil cases. Brief of the United States as Amicus Curiae in Support of Limited Rehearing En Banc, *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010) (No. 07-4553-CV). *See infra* note 164.

82. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 149 (2d Cir. 2014), *reh'g denied*, 764 F.3d 149 (2d Cir. 2014), *reh'g en banc denied*, 783 F.3d 123 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 28 (Oct. 1, 2015).

83. *Id.* at 150-52. The Second Circuit also amended its initial panel opinion to reflect the fact that the plaintiffs had pled a domestic investment with respect to their § 1962(a) claim. *Id.* at 151 n.1. In the petition for rehearing en banc, defendants argued as their primary point that the panel decision conflicted with *Norex* as to whether or not RICO requires a domestic injury. They devoted only about two pages to a discussion of whether the panel decision conflicted with *Norex* on the issue of RICO's extraterritorial reach. *See* Petition of Defendants-Appellees for Rehearing En Banc of Petition Decision and Amended Decision,

B. *The Second Circuit Declines to Rehear RJR En Banc: The Concurring Opinion of Judge Hall*

By an 8-5 vote, the Second Circuit judges declined to rehear the case en banc. Judge Hall, who was one of the three judges who issued the Second Circuit *RJR* panel opinion, wrote the only concurring opinion. Four judges wrote dissenting opinions.⁸⁴

In his opinion concurring with the denial of the rehearing en banc, Judge Hall focused his analysis on reexamining the *RJR* panel's decision and its compatibility with both the Supreme Court's decision in *Morrison* and the Second Circuit's decision in *Norex*.

Judge Hall began with the language of RICO that defines racketeering activity as "any act . . . indictable under" specified predicate criminal statutes.⁸⁵ He noted that certain RICO predicate statutes specifically apply to extraterritorial conduct. Many of these relate to international terrorism and were added to RICO as predicate offenses in 2001 when Congress passed the Patriot Act. Since that time, additional expressly extraterritorial crimes have been added as RICO predicates so that there are now about 30 predicate offenses with explicit extraterritorial reach, nearly all of which relate to international terrorism. Some of these offenses apply exclusively to foreign conduct, such as killing or attempting to kill a U.S. national on foreign soil.⁸⁶ Judge Hall agreed with the conclusion of the *RJR* panel that "[b]y incorporating these statutes into RICO as predicate racketeering acts, Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability."⁸⁷

Second, Judge Hall looked to *Morrison* and concluded that the panel's decision was "wholly consistent with *Morrison*"⁸⁸ because Congress clearly manifested an intention that RICO apply extraterritorially by "incorporating statutes that apply extraterritorially into RICO as predicates."⁸⁹

RJR, 764 F.3d 149 (No. 11-2475-CV).

84. *European Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123 (2d Cir. 2015). Two of the three judges who issued the panel decision, Judges Leval and Sack, are senior judges and thus had no vote on whether to grant the rehearing en banc. Judge Gerard E. Lynch dissented, solely on the ground that he believed the case warranted rehearing en banc. Judges Dennis Jacobs, José Cabranes, Renna Raggi and Debra Ann Livingston also dissented on the merits. (The dissenting opinions were authored by Jacobs, Cabranes, Raggi, and Lynch.)

85. *Id.* at 124 (Hall, J., concurring in denial of rehearing en banc) (alteration in original).

86. *Id.* at 124-25.

87. *Id.* at 125 (quoting *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 137 (2d Cir. 2014), *reh'g denied*, 764 F.3d 149 (2d Cir. 2014), *reh'g en banc denied*, 783 F.3d 123 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 28 (Oct. 1, 2015)).

88. *Id.* at 125.

89. *Id.*

C. *The RJR En Banc Court Attempts to Sideline Norex*

Finally, Judge Hall examined *Norex*. He went to great pains to parse the language of the *Norex* opinion to show why, in his view, the *Norex* court intended to say only that RICO did not have general extraterritorial application, and not to say that RICO can never have extraterritorial application. Judge Hall argued that *Norex* could have meant one of two things: (1) that RICO did not have general extraterritorial reach in all its applications; or (2) that RICO had no extraterritorial reach under any circumstances.⁹⁰ In large part, he argued that *Norex* had to have meant the former and not the latter, because the former is right and the latter is wrong.⁹¹ Judge Hall was further convinced that the brevity of the court's discussion on the subject meant that it intended "to convey the simple, noncontroversial proposition expressed in version (1) above, and not the puzzling proposition expressed in version (2)."⁹²

If this indeed were the case, however, one must ask why the *Norex* court did not expressly state that its holding was so restricted, or include any qualifying language whatsoever. Further, one of the predicate offenses alleged in *Norex* was money laundering, an offense that has express extraterritorial reach.⁹³ Yet, the *Norex* court never addressed the predicate offenses at issue, except to state that *Morrison* "forecloses *Norex*'s argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach."⁹⁴

If *Norex* did intend to state only that RICO did not have extraterritorial reach in all its applications, and not to state that RICO could never have extraterritorial application, the distinction was lost on almost everyone. Courts interpreting *Norex* seemed to think, just as the *RJR* district court had thought, that it precluded extraterritorial application of RICO in any circumstances. This was true as to district courts within the Second Circuit. Citing *Norex*, the court in *Republic of Iraq v. ABB AG* stated: "The RICO statutes do not apply extraterritorially."⁹⁵ In *Tymoshenko v. Firtash*, the court unequivocally stated:

90. *Id.* at 126.

91. *European Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123, 126-27 (2d Cir. 2015).

92. *Id.* at 127.

93. *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 31 (2d Cir. 2010). 18 U.S.C. § 1956(f) provides for extraterritorial jurisdiction if the offense is committed by a United States citizen abroad. 18 U.S.C. § 1956(f) (2012). In the case of a non-citizen, the conduct must occur in part in the United States. *Id.* In both cases, the money laundering must involve funds in excess of \$10,000. *Id.* The complaint's allegations of money laundering as a predicate offense was noted by Judge Raggi in her dissent as a reason why *Norex* could not be so easily restricted. *RJR*, 783 F.3d at 135 (Raggi, J., dissenting).

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

95. *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 543 (S.D.N.Y. 2013), *aff'd*, 768 F.3d 145 (2d Cir. 2014).

“The Second Circuit has held that RICO does not apply extraterritorially.”⁹⁶ Likewise, in *Chevron Corp. v. Dozinger*, the court declared: “Our court of appeals has ruled that RICO does not apply extraterritorially.”⁹⁷

After stating that RICO could not apply extraterritorially in light of *Norex*, all these courts then went on to struggle with the question of how to ascertain the focus of the RICO statute, and how to determine if the particular application before it was extraterritorial or domestic. None seriously entertained the argument that RICO’s extraterritorial application was dependent upon the extraterritorial reach of its predicate offenses, and, in its unpublished *Cedeño* opinion, the Second Circuit expressly rejected this argument on the ground that it was “foreclosed by *Norex*, 631 F.3d 29, where this Court declined to link the extraterritorial application of RICO to the scope of its predicate offenses.”⁹⁸ Courts outside the Second Circuit likewise read *Norex* to bar extraterritorial application of RICO.⁹⁹

Thus, while Judge Hall strained to reconcile *RJR* and *Norex*, all the dissenting judges saw a conflict between *RJR* and *Norex*. The perceived need to resolve the tension between the decisions was the sole basis of Judge Lynch’s dissent.¹⁰⁰ Judge Lynch expressly stated that he did not join the other dissenters in their criticisms of the panel’s decision in *RJR*.¹⁰¹ While stating that he was not coming to any definitive conclusions as to the extraterritorial reach of RICO, he revealed that he was “inclined to think that the better outcome would be to adopt the view of the panel in this case.”¹⁰²

However, like the other dissenting judges, he believed the Second Circuit should address the conflict between the *Norex* and *RJR* decisions in a rehearing en banc,¹⁰³ and on this point, the dissent has the upper hand. The concurring opinion’s restriction of *Norex* feels forced. Regardless of one’s personal view as to whether the *RJR* panel got it right in its formulation of RICO’s extraterritorial reach, the dissenting judges in the decision denying the

96. *Tymoshenko v. Firtash*, No. 11-CV-2794, 2013 U.S. Dist. LEXIS 42754, at *33 (S.D.N.Y. Mar. 26, 2013).

97. *Chevron Corp. v. Dozinger*, 974 F. Supp. 2d 362, 571 (S.D.N.Y. 2014).

98. *Cedeño v. Castillo*, 457 F. App’x 35, 38 (2d Cir. 2012) (citation omitted).

99. *See, e.g., United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 28 (D.D.C. 2011); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 913 (C.D. Cal. 2011); *CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d 1193, 1208 (D. Colo. 2011); *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1348 (S.D. Fla. 2012); *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 937-38 (N.D. Cal. 2012); *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 164-65 (D.D.C. 2013), *aff’d*, 796 F.3d 1 (D.C. Cir. 2015); *United States v. Chao Fan Xu*, 706 F.3d 965, 974-75 (9th Cir. 2013) (as amended on denial of reh’g Mar. 14, 2013).

100. *European Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123, 141 (2d Cir. 2015) (Lynch, J., dissenting).

101. *Id.*

102. *Id.*

103. *Id.* at 141, 144.

rehearing en banc make compelling arguments regarding the conflict between the *RJR* and *Norex* decisions. There is no denying, as Judge Lynch argues, that deep tensions exist between the reasoning and result in *Norex* and the reasoning and result in *RJR*, “whether or not these two holdings are ultimately irreconcilable.”¹⁰⁴ Indeed, one can go further, and conclude that a plain reading of *Norex* shows that the two opinions are, in fact, irreconcilable.

Even if the Second Circuit is wrong in concluding that the *Norex* court intended to restrict its decision to state only that RICO does not always have extraterritorial effect, from a practical standpoint, *Norex* will now be marginalized, and the standard set forth by the *RJR* court for determining the extraterritorial application of RICO will govern, in the Second Circuit at least, unless *RJR* is overruled.¹⁰⁵ (In fact, even prior to the decision denying rehearing en banc, the district courts amended their interpretation of *Norex* to limit it in accordance with the *RJR* panel opinion.)¹⁰⁶

104. *Id.* at 144. Judge Jacobs (joined by Cabranes, Raggi, Livingston and Lynch) made the same point in noting that the “taut tension” between the two decisions and “resulting instability” would likely necessitate en banc review. *Id.* at 127-28.

105. Judge Cabranes, in a footnote in his dissenting opinion from the *RJR* denial of the petition for rehearing en banc, quotes from his own dissenting opinion in an earlier case that “the decision not to convene the en banc court does not necessarily mean that a case either lacks significance or was correctly decided. Indeed, the contrary may be true.” 783 F.3d at 128 n.2 (Cabranes, J., dissenting) (citation omitted). Be this as it may, Judge Hall’s concurring opinion demonstrates full agreement with the *RJR* panel decision, *id.* at 124-27 (Hall, J., concurring), and, at the current time, has led to the marginalization of *Norex*. See, e.g., *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-MDL-2262, 2015 U.S. Dist. LEXIS 107225, at *342 (S.D.N.Y. Aug. 4, 2015) (The court stated with respect to its prior decision in the case: “Our analysis, which focused on the foreign location of the alleged RICO enterprise, is no longer good law now that the Second Circuit has held that RICO ‘applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate’”).

106. See, e.g., *Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419, 2015 U.S. Dist. LEXIS 44126, at *28-29 (S.D.N.Y. Mar. 31, 2015) (“Following *Norex*, some district courts misinterpreted the Circuit’s rejection of the argument that ‘RICO applies extraterritorially *in all of its applications* as a ruling that RICO can never have extraterritorial reach in any of its applications.” (citation omitted)); *Tymonshenko v. Firtash*, 57 F. Supp. 3d 311, 324 (S.D.N.Y. 2014) (announcing that the *RJR* panel opinion “established a new framework for evaluating RICO’s permissible territorial scope” and “clarified that *Norex* had not, in fact, barred *any* extraterritorial application of RICO; it had merely held that RICO does not apply extraterritorially ‘in all of its applications’” (quoting *RJR*, 764 F.3d at 136)); *Reich v. Lopez*, 38 F. Supp. 3d 436, 447 (S.D.N.Y. 2014) (“Following *Norex*, some district courts misinterpreted the Circuit’s rejection of the argument that ‘RICO applies extraterritorially *in all of its applications* as a ruling that RICO can never have extraterritorial reach in *any* of its applications.” (citation omitted)). See also *Ixotic AG v. Kammer*, No. 09-CV-4345, 2014 U.S. Dist. LEXIS 180782, at *30, n.10 (Sept. 30, 2014) (magistrate’s recommendation), *adopted by*, 2015 U.S. Dist. LEXIS 6814 (E.D.N.Y. Jan. 21, 2015). *Accord* *Petroleos Mexicanos v. SK Eng’g & Constr. Co.*, 572 F. App’x 60, 61 (2d Cir. 2014) (citing *RJR* for the proposition that a RICO claim premised on wire fraud cannot apply extraterritorially, and *Norex* for the proposition that sufficient domestic conduct must be alleged to state a domestic RICO claim).

D. *The RJR En Banc Dissent Rejects a Predicate-Based Extraterritorial Analysis*

With the exception of Judge Lynch, the dissenting judges all voiced disagreement with the *RJR* panel court's decision to base the extraterritorial reach of RICO on the predicate offenses.

Judge Raggi (joined by Judges Jacobs, Cabranes and Livingston) wrote the lengthiest dissent. Raggi argued that *RJR* conflicts with both *Morrison* and *Norex*,¹⁰⁷ and that rehearing en banc was needed to consider: "(1) whether RICO applies extraterritorially, and (2) the criteria for determining whether a RICO claim is domestic or extraterritorial."¹⁰⁸

Raggi disagreed with the panel's conclusion that Congress had clearly and affirmatively showed its intent for RICO to apply extraterritorially by adopting predicate offenses that applied extraterritorially.¹⁰⁹ She argued that this was merely a possible construction, and thus insufficient under *Morrison*.¹¹⁰

However, her attempts to reconcile Congress' decision to include extraterritorial crimes as predicate acts under RICO, with the conclusion that Congress did not intend RICO to apply extraterritorially, are problematic.

Interestingly, while expressing strong support for *Norex* and arguing that it must be read so as to exclude the extraterritorial application of RICO in any circumstance, Raggi appears to leave open the possibility that extraterritorial predicates can be used under RICO as part of a pattern of racketeering activity in certain circumstances.¹¹¹

Raggi argued that Congress could have included the extraterritorial predicates so as to allow a prosecutor to prove an extraterritorial crime: (1) as a predicate in "an essentially domestic pattern of racketeering to demonstrate the intended continuity of the pattern,"¹¹² or (2) to show the relatedness of a domestic pattern to a foreign enterprise.¹¹³ However, Raggi argued, what is not clear is that Congress intended to extend RICO's reach to a foreign enterprise conducting a foreign pattern of racketeering.¹¹⁴

107. *European Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123, 132-37 (2d Cir. 2015) (Raggi, J., dissenting).

108. *Id.* at 132.

109. *Id.* at 130-34.

110. *Id.*

111. *Id.* at 135-36.

112. *Id.* at 135.

113. *Id.* at 135-36.

114. *Id.* at 136. The basis for Raggi's argument is unclear. Her limitation of the proposed intended uses of the RICO extraterritorial offenses to criminal cases, and for the purpose of proving continuity or relatedness suggests that she may be relying on *United States v. Basciano*, 599 F.3d 184 (2d Cir. 2010) to which she later cites. That case concerned multiple defendants charged with a single pattern of racketeering activity. *Id.* at 191-92. In such criminal cases, the jury can consider all charged predicates in identifying a common

Raggi's examples of Congress' possible intended uses of the predicates presuppose some extraterritorial reach. Raggi presumably would argue that it is the predicates in the above examples that are given extraterritorial reach, and not the RICO statute. Thus, she argued that it was necessary to limit the extraterritorial reach of RICO's predicate acts "to [their] terms."¹¹⁵ This is a statement with which the *RJR* panel would agree, although the panel would differ with Raggi as to what exactly it means. In the two hypotheticals Raggi poses, an extraterritorial offense is proven in order to demonstrate a pattern of racketeering, and, in turn, liability under RICO. Thus, RICO liability in the two examples is dependent on the ability to apply the predicate statute extraterritorially.

In these two examples, the result under Raggi's approach and the panel's approach is the same. The difference is that the panel concludes that Congress has unequivocally expressed its intention that the extraterritorial reach of RICO is coextensive with its predicates, and the inquiry ends there.¹¹⁶ One need not address whether the pattern or the enterprise is essentially domestic or foreign for purposes of determining the extraterritorial reach. Raggi disagrees, and argues that more analysis is required. Perhaps, for example, Congress intended to restrict the use of extraterritorial predicates to situations when a domestic pattern is alleged, in which case, under Raggi's approach, the court has to examine whether the pattern is domestic or not.

To this end, Raggi argued that a rehearing en banc was necessary to clarify the criteria for determining whether a RICO claim is domestic or extraterritorial, by examining the "focus" of the statute as instructed by *Morrison*, and resolving the debate among the courts as to whether the focus under RICO is the pattern, the enterprise, or some combination of the pattern and the enterprise together.¹¹⁷

Thus, Raggi's approach would restrict the situations in which an

pattern of racketeering, and not just the predicates with respect to which an individual defendant is charged. *Id.* at 189. However, the prosecution is by no means relieved of the burden of proving sufficient predicates to establish a pattern. *Id.* Furthermore, while the *Basciano* court also stated that the predicate acts of which the other defendants were charged could be used to establish relatedness and continuity to show that defendants' own acts constitute a pattern, *id.* at 206-07, again there is no distinction under the RICO statute for the use of predicates to establish a pattern, and the lesser use of predicates merely to show continuity or relatedness. If Raggi is suggesting, without any supporting evidence at all, that Congress may have intended to include the extraterritorial offenses only to show relatedness or continuity in a criminal case, not only does she ignore the statutory framework of RICO, she ascribes to Congress an intent so nuanced and fine as to defy any reality of Congress as we know it.

115. *Id.* at 134.

116. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 137 (2d Cir. 2014), *reh'g denied*, 764 F.3d 149 (2d Cir. 2014), *reh'g en banc denied*, 783 F.3d 123 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 28 (Oct. 1, 2015).

117. 783 F.3d at 139-41 (Raggi, J., dissenting).

extraterritorial offense could be proven, possibly to cases concerning a domestic enterprise and an essentially domestic pattern, and perhaps a foreign enterprise and a domestic pattern, but not a foreign enterprise and a foreign pattern.¹¹⁸

In his dissenting opinion, Judge Lynch addressed Raggi's arguments to some extent. He argued that there is nothing in the language of RICO that demonstrates that Congress intended to exclude foreign "enterprises" from the operation of RICO,¹¹⁹ and posed various hypotheticals, including one where a revolutionary group abroad carries out multiple beheadings of Americans under 18 U.S.C. § 2332 (a)(1), a RICO predicate.¹²⁰

So long as Congress expressly extended its criminal prohibitions to the foreign conduct in question and incorporated those prohibitions into RICO, Congress has determined that such predicate crimes can constitute a pattern within the definition of RICO. Presumably it has done so because a pattern of such crimes strikes at American interests just as much as a pattern of terrorist acts committed in the United States by the same foreign-based enterprise.¹²¹

Further, Lynch noted that no one is suggesting that RICO applies to a foreign enterprise committing foreign crimes; only conduct that is chargeable under a state law or indictable under specific federal statutes can be a predicate, and form part of the required pattern of racketeering activity under RICO.¹²²

Raggi further argued that under the panel's formulation, a plaintiff could allege a pattern comprised of various RICO predicates, some that apply domestically and some that apply extraterritorially.¹²³ However, a plaintiff need not prove all the alleged predicates, but only a sufficient number to demonstrate the required pattern.¹²⁴ Thus, Raggi argued, a plaintiff could potentially establish a pattern without proving any of the alleged extraterritorial predicates.¹²⁵ She concluded: "It would be curious for Congress to locate a statute's extraterritorial reach in an allegation that need not be proved."¹²⁶ She added that "[i]f, on the other hand, the panel intended to condition RICO's extraterritorial reach on *proof* of the alleged extraterritorial-crime predicates," then the opinion "departs even further from our RICO jurisprudence in requiring not simply proof of a pattern of racketeering, but proof of particular predicates."¹²⁷

118. *Id.* at 136.

119. *Id.* at 142-43 (Lynch, J., dissenting).

120. *Id.*

121. *Id.* at 143.

122. *Id.*

123. *Id.* at 138 (Raggi, J., dissenting).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

Raggi's point would be more persuasive if the alleged extraterritorial predicate conferred upon the plaintiff some benefit—for example, that the plaintiff, by alleging an extraterritorial predicate, was freed from the requirement of proving that an offense without extraterritorial reach, such as wire fraud, was sufficiently domestic. But it does not. Under the panel opinion, the extraterritoriality of RICO is coextensive with the predicate alleged.¹²⁸ Thus, if a plaintiff alleges a pattern comprised of extraterritorial money laundering and acts of mail and wire fraud, and cannot prove the extraterritorial money laundering, then the plaintiff is left in a position of being required to prove a domestic pattern of racketeering, the same position the plaintiff would have been in had it not alleged money laundering at the outset.¹²⁹

E. Policy Concerns of the RJR En Banc Dissent

Judge Cabranes (joined by Jacobs, Raggi and Livingston) stressed policy concerns. He agreed with Raggi that there is no clear indication that Congress ever intended “to give global reach to a whole host of non-terrorism related civil claims.”¹³⁰ Cabranes noted Justice Powell's dissent in *Sedima* “lamenting the expansion of RICO to include civil racketeering charges . . . ‘against legitimate businesses seeking treble damages in ordinary fraud and contract cases.’”¹³¹ He warned that *RJR* “will encourage a new litigation industry exposing business activities abroad to civil claims of ‘racketeering’” and “will invite our courts to adjudicate civil RICO claims grounded on extraterritorial activities anywhere in the world.”¹³²

Judge Hall retorted: “Some colleagues are troubled by the prospect of applying RICO to extraterritorial conduct, which they deem unwise. Whether this is wise or unwise is not the court's business when Congress has legislated clearly on the issue.”¹³³

Since the start of RICO litigation, it has become standard to issue dire warnings that private litigants will twist RICO to make it apply to every garden-variety business dispute. These warnings have become so commonplace

128. *European Cmty. v. RJR Nabisco, Inc.* 764 F.3d 129,137 (2d Cir. 2014), *reh'g denied*, 764 F.3d 149 (2d Cir. 2014), *reh'g en banc denied*, 783 F.3d 123 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 28 (Oct. 1, 2015).

129. Judge Cabranes echoed Raggi's argument in his dissent. 783 F.3d at 130 (Cabranes, J., dissenting). He argued that “a plaintiff need not actually prove any of the extraterritorial predicates in order to sustain a *civil claim* for RICO activities alleged to have occurred entirely outside the United States.” *Id.* But he does not explain how this is true, and, it would seem that it is not.

130. *Id.* at 129.

131. *Id.* at 130 n.10 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 529-30 (1985) (Powell, J., dissenting)).

132. *Id.* at 130.

133. *Id.* at 127.

that they take on an air of legitimacy just from the fact of their repetition alone.¹³⁴ But this has not happened and will not happen because of *RJR*. While it is true that plaintiffs *might* try, the fact is that it is very difficult to state a valid RICO claim, and few make it past a motion to dismiss.¹³⁵ As creative as plaintiffs may be in their attempts to expand RICO, the courts have been just as creative in finding ways to block RICO claims that they believe sound in contract or “ordinary” fraud. There are numerous grounds for attacking a RICO claim under § 1962(c), including failure to adequately allege an enterprise, failure to comply with Rule 9(b), failure to allege proximate cause, and failure to allege a pattern,¹³⁶ and the defendant need succeed on only one ground.

The courts have added a host of requirements that are not in the statute’s express terms. They have even suggested that RICO claims will be subjected to

134. See generally Michael Goldsmith & Penrod W. Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 *BYU L. REV.* 55.

135. See *Gross v. Waywell*, 628 F. Supp. 2d 475, 480 (S.D.N.Y. 2009) (From 2004 to 2007, 83% of the RICO cases filed in the Southern District of New York that were resolved on the merits at the time of the court’s opinion were dismissed under Rule 12(b)(6), while 17% were dismissed for lack of merit or on summary judgment motions. Further, a survey of appellate decisions nationwide from 1999-2001 showed that plaintiffs were ultimately successful in only three of 145 cases. *Id.* at 479 (citing Pamela H. Bucy, *Private Justice*, 76 *S. CAL. L. REV.* 1, 22 (2002)). See also *Sky Med. Supply Inc. v. SCS Support Claims Servs.*, 17 F. Supp. 3d 207, 220 (E.D.N.Y. 2014) (“Indeed, although civil RICO may be a ‘potent weapon,’ plaintiffs wielding RICO almost always miss the mark.”).

136. See, e.g., *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-61 (2006) (dismissing RICO claim under § 1962(c) for failure to allege proximate causation through facts indicating that the alleged RICO violation directly caused plaintiff’s injuries, as well as failure to allege transactional causation, meaning that but for the violation, plaintiff would not have been injured); *Babb v. CapitalSource, Inc.*, 588 F. App’x 66, 68-69 (2d Cir. 2015) (upholding dismissal of RICO claim for failure to plead fraud with particularity under Rule 9(b), and denial of motion for leave to amend); *Franzone v. City of New York*, No. 13-CV-5282, 2015 U.S. Dist. LEXIS 58199, at *31 (E.D.N.Y. May 1, 2015) (dismissing RICO complaint for failure to specify two predicate acts per defendant and to show continuity); *Wood v. Gen. Motors Corp.*, No. 08-CV-5224, 2015 U.S. Dist. LEXIS 37782, at *12-22, 26-29 (E.D.N.Y. Mar. 25, 2015) (failure to adequately plead predicate acts, including failure to allege mail and wire fraud with particularity under Rule 9(b), failure to allege an enterprise, and failure to adequately allege an agreement to establish a RICO conspiracy claim); *iXotic AG v. Kammer*, No. 09-CV-4345, 2015 U.S. Dist. LEXIS 6814, at *3 (E.D.N.Y. Jan. 21, 2015) (dismissing RICO complaint and denying motion for leave to amend where plaintiff alleged two distinct enterprises instead of a single combined enterprise and failed to show requisite continuity to prove a pattern); *Mackin v. Auberger*, 59 F. Supp. 3d 528, 535, 542-46 (W.D.N.Y. 2014) (dismissing RICO claims for failure to allege an enterprise, among other reasons, and stating that plaintiff’s tactics in trying to “transform an employment and political dispute into a federal racketeering case . . . offend RICO’s intended purpose and do not withstand scrutiny”), *appeal withdrawn*, No. 14-4610 (2d Cir. Feb. 2, 2015); *O’Callaghan v. N.Y. Stock Exch.*, No. 12-CV-07247, 2013 U.S. Dist. LEXIS 110655, at *32-36 (S.D.N.Y. Mar. 28, 2013) (failure to plead proximate causation); *World Wrestling Entm’t, Inc. v. Jakks Pac., Inc.*, 530 F. Supp. 2d 486, 518-24 (S.D.N.Y. 2007) (failure to allege an injury), *aff’d*, 328 F. App’x 695 (2d Cir. 2009). See also *infra* notes 137-42.

a higher burden than other claims on a motion to dismiss.¹³⁷ The judicial enhancements of the RICO statute are most pronounced in the pattern requirement. Although RICO's literal terms require only that a plaintiff allege at least two predicate acts in ten years,¹³⁸ the courts have required much more as they have interpreted and added to the definition of a "pattern." The ordinary contract and fraud claims that Judge Cabranes frets over are regularly dismissed for failure to allege continuity—either open-ended continuity (which necessitates a showing that there is a continued threat of RICO activity), or closed-ended continuity. Courts in the Second Circuit routinely dismiss cases for failure to allege closed-ended continuity under the judicially imposed and increasingly rigid "guideline" that the duration of the alleged activity surpass two years.¹³⁹ Likewise, RICO claims are dismissed for failure to allege closed-ended continuity when the number of participants or victims is limited, the purpose of the scheme is adjudged to be too narrow, or the predicate acts lack variety.¹⁴⁰ Open-ended continuity can be even more difficult to demonstrate

137. Courts frequently state that not only must a RICO complaint contain sufficient factual matter to show the claims are plausible on their face, and meet Rule 9(b)'s heightened pleading requirements when fraud is alleged, but also a civil RICO complaint will be subjected to "particular scrutiny," and thus, that "plaintiff's burden is high when pleading RICO allegations." *Wood*, 2015 U.S. Dist. LEXIS 37782, at *11 (quoting *Spiteri v. Russo*, No. 12-CV-2780, 2013 WL 4806960, at *45 (E.D.N.Y. Sept. 7, 2013)). *See also* *Kalimantano GmbH v. Motion in Time, Inc.*, 939 F. Supp. 2d 392, 407 (S.D.N.Y. 2013) ("The Court has a duty to critically assess RICO claims at the threshold, to assure that a plaintiff's claim of a RICO violation is not used improperly to bludgeon settlement or surrender . . ."); *Patrizzi v. Bourne in Time, Inc.*, No. 11 Civ. 2386, 2012 U.S. Dist. LEXIS 146861, at *9 (S.D.N.Y. Oct. 11, 2012) ("[C]ourts should strive to flush out frivolous RICO allegations at an early stage of the litigation." (quoting *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998))).

138. 18 U.S.C. § 1961(5). Prior to *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), that is all the courts generally required. *See, e.g.*, *United States v. Weisman*, 624 F.2d 1118, 1121-23 (2d Cir. 1980), *abrogated by* *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989), *as recognized in* *Ianniello v. United States*, 10 F.3d 59 (1993).

139. The Second Circuit religiously notes that it has never found closed-ended continuity where the predicate acts spanned a period of less than two years. *See, e.g.*, *Fresh Meadow Food Servs. v. RB 175 Corp.*, 282 F. App'x 94, 98 (2d Cir. 2008) (quoting *First Capital Asset Mgmt. v. Satinwood Inc.*, 385 F.3d 159, 181 (2d Cir. 2004)). *See also* *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008) (stating that two years is not a "bright-line" test but that it will be "rare" that a shorter time period will suffice, and upholding district court's dismissal where predicate acts spanned a 16-month period); *Ho Myung Moolsan Co. v. Manitou Mineral Water, Inc.*, 665 F. Supp. 2d 239, 261 (S.D.N.Y. 2009) (dismissing complaint for failure to allege closed-ended continuity, and noting that "[c]ourts have repeatedly held that a simple fraud scheme is insufficient to state a RICO violation"). It is indeed a very rare case that has upheld a pattern with a duration of less than two years. *See, e.g.*, *Allstate Ins. v. Valley Physical Med. & Rehab., P.C.*, No. 05-5934, 2009 U.S. Dist. LEXIS 91291, at *22-25 (E.D.N.Y. Sept. 30, 2009) (less than two years); *First Interregional Advisors Corp. v. Wolff*, 956 F. Supp. 480, 486 (S.D.N.Y. 1997) (less than fourteen months); *Polycast Tech. Corp. v. Uniroyal, Inc.*, 728 F. Supp. 926, 947-48 (S.D.N.Y. 1989) (eight and one-half months).

140. *See, e.g.*, *iXotic AG*, 2014 U.S. Dist. LEXIS 180782, at *33-35 (no closed-ended

than closed-ended continuity when the defendant is deemed to be a legitimate business entity.¹⁴¹ The courts have also looked with particular disfavor on cases where the only predicate acts alleged were mail or wire fraud in furtherance of a scheme.¹⁴²

Further, Judge Cabranes' admonition that the federal courts will now be deciding RICO claims "grounded on extraterritorial activities anywhere in the world" is untrue. Under *RJR*, in order to survive a motion to dismiss, the RICO claim must be based on specified predicate acts that by their express terms have extraterritorial effect, or must have sufficient domestic contacts in the United States.

F. The Basis for a Distinction Between RICO's Extraterritorial Reach in Civil and Criminal Cases

In her dissent, Judge Raggi argued that Congress' inclusion of the criminal statutes in RICO does not evidence an intent that the statutes be given extraterritorial effect in a civil case.¹⁴³ Judge Cabranes likewise expressed concerns that the *RJR* court was overreaching in its conclusion that Congress intended RICO to have extraterritorial reach in civil cases.¹⁴⁴ Even Judge Lynch, who did not take issue with the merits of the *RJR* court's decision, expressed concern that if the Supreme Court were to grant further review of the case:

I hope and trust that it will not allow the context of this case—a civil action, that like many RICO civil suits, might lead some to doubt the wisdom of allowing a somewhat amorphous statute to be wielded by private interests in endlessly creative ways—to blind it to the clear intention of Congress to apply RICO to foreign terrorist groups who commit patterns of criminal acts that may occur abroad, but that violate American laws with express extraterritorial

continuity even though activity spanned a period of almost 34 months, because the complaint alleged a single type of predicate act (wire fraud) targeting a single group of three victims with a single goal of defrauding them of money in connection with a single matter).

141. If a defendant is regarded as a legitimate business, the courts impose the additional requirement that in order to state a claim based on open-ended continuity, a plaintiff must allege facts showing that the predicate acts were the regular way of doing business or that the predicate acts, by their very nature, imply a threat of continued criminal activity. *See, e.g., Kalimantano GmbH*, 939 F. Supp. 2d at 406 (citing *DeFalco v. Bernas*, 244 F.3d 286, 323 (2d Cir. 2001)).

142. *See, e.g., W. Assocs. Ltd. P'ship v. Mkt. Square Assocs.*, 235 F.3d 629, 636-37 (D.C. Cir. 2001); *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 20-21 (1st Cir. 2000); *Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000); *Hartz v. Friedman*, 919 F.2d 469, 473 (7th Cir. 1990); *Gotham Print, Inc. v. Am. Speedy Printing Ctrs., Inc.*, 863 F. Supp. 447, 458 (E.D. Mich. 1994).

143. *European Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123, 137 (2d Cir. 2015) (Raggi, J., dissenting).

144. *Id.* at 129-30 (Cabranes, J., dissenting).

reach.¹⁴⁵

However, none of the dissenting judges offered a viable argument for distinguishing between civil and criminal cases. Raggi argued only that Congress' inclusion of the criminal statutes in RICO does not evidence an intent that the statutes be given extraterritorial effect in civil cases, because the extraterritorial predicates by themselves provide no private right of action.¹⁴⁶ However, this argument is not persuasive as it disregards the statutory framework of RICO, the very nature of which is to create a private cause of action for racketeering activity based on predicate acts that are criminal offenses and do not otherwise provide for private causes of action.¹⁴⁷ Raggi's argument, thus, does not offer any basis for distinguishing the extraterritorial offenses from any other predicate acts.

Yet if one accepts the premise of the dissenting judges that congressional intent is unclear with respect to the extraterritorial reach of RICO, legal precedent does provide a potential basis for constructing an argument that different standards should be applied in determining that intent in the context of civil and criminal RICO cases.

The presumption against extraterritoriality applied in the *Morrison* action is one that has developed in the context of civil cases.¹⁴⁸ In the 1922 case of *United States v. Bowman*,¹⁴⁹ the Supreme Court held that the presumption should not be applied to a certain class of criminal statutes. The Court stated that the presumption should not be employed when criminal statutes do not depend on their locality for jurisdiction but instead are enacted to enforce the government's right to defend itself against "obstruction, or fraud wherever perpetrated."¹⁵⁰ The Court further explained that criminal statutes should not be restricted to domestic application when to do so "would be greatly to curtail the scope and usefulness of the statute."¹⁵¹

While the *Bowman* court stated that it was particularly concerned with

145. *Id.* at 144 (Lynch, J., dissenting).

146. *Id.* at 137 (Raggi, J., dissenting).

147. 18 U.S.C. § 1964(c) creates a private cause of action for "pattern of racketeering activity" violations under 18 U.S.C. § 1962, with "racketeering activity" defined under 18 U.S.C. § 1961(1) to include the specified criminal offenses.

148. See generally S. Nathan Williams, *The Sometimes "Craven Watchdog": The Disparate Criminal-Civil Application of the Presumption Against Extraterritoriality*, 63 DUKE L. J. 1381, 1390-93 (2014). The presumption against extraterritoriality was first employed in the context of a civil antitrust action in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

149. 260 U.S. 94 (1922).

150. *Id.* at 98.

151. *Id.* In contrast, the *Bowman* court explained, the presumption does not apply to crimes against private individuals or their property, such as assault, murder, larceny or fraud. *Id.*

crimes committed abroad by United States citizens or agents,¹⁵² its holding has not been so limited by subsequent cases. For example, it has been stated that the presumption against extraterritoriality may be inappropriate in cases concerning crimes committed by foreigners outside the United States that “may impinge on the territorial integrity, security, or political independence of the United States.”¹⁵³ Thus, in *United States v. Vasquez-Velasco*, the Ninth Circuit gave extraterritorial effect to 18 U.S.C. § 1959 (violent crimes in aid of racketeering activity) in connection with murders of United States citizens by Mexican drug cartel members in retaliation for DEA activities in Mexico, and in furtherance of racketeering activities.¹⁵⁴

Credible arguments could be made for extending the reasoning of *Bowman* to criminal RICO cases involving, for example, terrorism-related predicates.¹⁵⁵ The *Bowman* criminal exception to the presumption against extraterritoriality, like the presumption itself, comes into play only when congressional intent as to the extraterritorial reach of a statute is unclear.¹⁵⁶ When analyzing whether to apply *Bowman* to criminal RICO cases, it can be argued, as the *RJR* dissenting judges asserted, that even when it may be clear that Congress intended that a predicate offense standing alone have extraterritorial application, such as 18 U.S.C. § 2332f, which applies to bombings of public places and governmental facilities,¹⁵⁷ the relevant inquiry is whether, and under what circumstances, Congress intended that RICO be given extraterritorial effect. Accepting *arguendo* the position that congressional intent as to the application of RICO is unclear, then different conclusions could logically be reached in ascertaining congressional intent if the presumption against extraterritoriality is applied in civil, but not criminal, cases.

152. *Id.* at 98-100, 102-03.

153. *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994).

154. *See also* *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1203-06 (9th Cir. 1991) (applying *Bowman* in case charging foreign defendant as an accessory after the fact to murder of DEA agent in aid of racketeering enterprise, where all criminal conduct occurred outside the United States); *United States v. Benitez*, 741 F.2d 1312, 1316-17 (11th Cir. 1984) (applying *Bowman* to conspiracy by non-American citizens to murder U.S. government agents, where criminal acts occurred in Colombia). While the *Vasquez-Velasco* case concerned murders of private citizens, to which the *Bowman* exception typically does not apply (*see supra* note 151), it was applied in *Vasquez-Velasco* because the murder victims were mistaken by the drug cartel as DEA agents, and the murders were viewed as impinging upon United States security interests. 15 F.3d at 841.

155. On the other hand, the contrary argument has been made that it is wrongheaded to apply a more lenient test for concluding that a statute has extraterritorial effect in criminal cases as opposed to civil cases, and that actually, a stricter test should be applied to protect the rights of defendants who risk harsh punishment and loss of liberty. *See* Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 2, 29-31 (2014); Williams, *supra* note 148, at 1417-18.

156. *See Bowman*, 260 U.S. at 97-102.

157. 18 U.S.C. § 2332f (2013). The express extraterritoriality provision for § 2332f is found in 18 U.S.C. § 2332f(b)(2).

Thus, for example, if the focus is found to be on the predicate acts or racketeering activity,¹⁵⁸ it could be argued that RICO should be given extraterritorial effect in a criminal case when based on terrorism-related offenses intended to apply abroad because to hold otherwise “would be greatly to curtail the scope and usefulness of [RICO].”¹⁵⁹ However, the same conclusion may not necessarily follow in a civil case where the presumption against extraterritoriality is applied.¹⁶⁰

The advantage of such an approach is that it would meet the concerns of many, including the dissenting judges, that the expansion of RICO’s extraterritorial reach in civil cases based on predicates such as the terrorism-related offenses is misplaced, because in including such offenses as predicates, Congress was clearly focused on criminal cases. At the same time, by not applying the presumption against extraterritoriality in criminal cases, the approach would still give effect to congressional intent to allow RICO criminal prosecutions based on such offenses to proceed.¹⁶¹

The difficulty with this binary approach is that it would further muddy the waters with respect to RICO’s extraterritorial application.¹⁶² In addition, when addressing the application of other statutes providing for dual civil and criminal liability, the courts have held that the presumption against extraterritoriality should be applied to both civil and criminal cases,¹⁶³ although it can be argued that criminal RICO is a far better fit for application of the *Bowman* exception, at least with respect to terrorism-related racketeering activity conducted abroad that impinges upon security and political interests of the United States.¹⁶⁴

158. Such a result would be possible under an analysis that found the focus of RICO to be on the predicate acts or the pattern of racketeering. (It is more difficult to see how such an analysis could be applied if the focus is found to be on the enterprise alone.)

159. *Bowman*, 260 U.S. at 98.

160. Of course, because of RICO’s unique reliance on predicate offenses, issues would arise as to whether the presumption should be applied in some criminal cases and not others, depending on the particular predicate offenses involved.

161. *Cf.* Clopton, *supra* note 155 (arguing that the presumption against extraterritoriality should be abandoned altogether and replaced with separate rules to govern in civil, criminal and administrative cases).

162. See Williams, *supra* note 148, at 1403-07, for a discussion of issues mitigating against the application of different standards for determining congressional intent in criminal versus civil cases.

163. *Id.* at 1405-07.

164. Interestingly, in *Norex*, the United States submitted an amicus curiae brief supporting a limited rehearing en banc following the Second Circuit’s affirmance of the district court’s dismissal of the RICO claim. The United States argued, based on *Bowman* and the RICO statute, that the *Norex* opinion should not be read so broadly as to preclude application of RICO extraterritorially in criminal prosecutions. Brief of United States as Amicus Curiae Supporting Limited Rehearing En Banc, *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010) (No. 07-4553-CV).

III. *RJR's* POTENTIAL IMPACTA. *Possible Expansion of RICO's Extraterritorial Reach*

If the Supreme Court upholds *RJR*, it will provide a defined basis for criminal RICO prosecutions based on predicates with extraterritorial reach, either by their express terms or as determined by the judiciary. The impact of the *RJR* extraterritorial test as it relates to civil RICO cases remains to be seen. The predicate acts with extraterritorial reach under RICO are limited. The money-laundering statute has some extraterritorial reach, and it is the extraterritorial predicate offense that has been most frequently invoked in RICO cases.

Thus, if the *RJR* holding stands, it could provide an expanded basis for RICO claims to the extent they are predicated on money laundering. As the Second Circuit notes in the *RJR* decision denying rehearing en banc, however, many of the predicate offenses that apply to foreign conduct relate to international terrorism.¹⁶⁵ These offenses are unlikely to find their way into many RICO civil cases, although they cannot be ruled out entirely. In this regard, it cannot be overlooked that in *RJR*, it was alleged, as a predicate offense, that *RJR* had provided material support for terrorism in that cigarettes acquired in the scheme were sold to Iraq to or for the benefit of terrorist organizations, in violation of 18 U.S.C. § 2339B.¹⁶⁶ Even if civil cases attempt to allege such terrorism-related predicates, however, unless they are well supported with detailed factual allegations, few will make it beyond the hurdles of a motion to dismiss. Conversely, if they do have merit, perhaps they belong in the RICO sphere.

B. *The Murky Parameters of a Domestic RICO Claim Under RJR*

The *RJR* case leaves unanswered the question of the proper parameters for determining whether an alleged claim is domestic or extraterritorial.

In *Morrison*, the Supreme Court was troubled by the unpredictability and inconsistency of securities law decisions that applied the conduct and effects tests.¹⁶⁷ Its formulation of the new test set forth in *Morrison* was intended to remedy those difficulties. In the RICO arena, the *Morrison* test has been an unsuccessful tool.¹⁶⁸ To the extent the *RJR* holding prevails, it could provide a clearer basis for determining whether or not a RICO claim applies

165. *European Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123, 124-25 (2d Cir. 2015).

166. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 139-40 (2d Cir. 2014), *reh'g denied*, 764 F.3d 149 (2d Cir. 2014), *reh'g en banc denied*, 783 F.3d 123 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 28 (Oct. 1, 2015).

167. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 260 (2010).

168. *See infra* Section III.D.

extraterritorially. It offers little guidance, however, with respect to the more difficult test of determining whether a claim is, in fact, extraterritorial or domestic.

The *RJR* panel held that a RICO claim based on a predicate that does not have extraterritorial reach will be sustained when a complaint alleges sufficient domestic conduct, regardless of whether the case involves a foreign enterprise, or foreign activities.¹⁶⁹ However, the *RJR* court sidestepped the question of what constitutes sufficient domestic activity, stating that it found it unnecessary to “decide precisely how to draw the line between domestic and extraterritorial applications” of the predicate acts before it.¹⁷⁰ The *RJR* parties have not asked the Supreme Court to address this question, and there is no telling whether the Supreme Court will reach it. Thus, it is quite possible that post-*RJR* litigation to come will focus on this issue of the dividing line between a domestic and extraterritorial claim.

For example, the two most commonly-alleged predicate offenses are mail and wire fraud.¹⁷¹ The Second Circuit has held that both of these offenses are domestic.¹⁷²

The elements of mail or wire fraud under 18 U.S.C. §§ 1341 and 1343 are: (1) a scheme to defraud victims of (2) money or property through the (3) use of the mail or wires.¹⁷³ When the mail or wires are used in furtherance of a fraud, the communications themselves need not contain false or misleading information. It suffices if the use of the mail or wires is incidental to “an essential part of the scheme or a step in the plot.”¹⁷⁴ Further, there is no requirement to allege that defendants mailed or wired anything themselves. Defendants need only cause the mail or wires to be used, or initiate a series of events that would foreseeably result in their use.¹⁷⁵

Because mail and wire fraud do not have extraterritorial reach, the government must show that the claims are sufficiently domestic. There is still a level of uncertainty as what this requires in a RICO action. In *RJR*, the court

169. *RJR*, 764 F.3d at 140-41.

170. *Id.* at 142.

171. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985); *id.* at 502 (Marshall, J., dissenting); *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1025 (7th Cir. 1992).

172. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 140-41 (2d Cir. 2014), *reh'g denied*, 764 F.3d 149 (2d Cir. 2014), *reh'g en banc denied*, 783 F.3d 123 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 28 (Oct. 1, 2015).

173. *United States v. Shellef*, 507 F.3d 82, 107 (2d Cir. 2007); *United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000); *Angermeir v. Cohen*, 14 F. Supp. 3d 134, 145 (S.D.N.Y. 2014) (quoting *Shellef*, 507 F.3d at 107).

174. *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 307 (S.D.N.Y. 2013) (quoting *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989)); see also *Schmuck*, 489 U.S. at 712, 714-15; *United States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013).

175. *Pereira v. United States*, 347 U.S. 1, 8 (1954); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 589 (S.D.N.Y. 2014); *DeSole*, 974 F. Supp. 2d at 307.

found it unnecessary to draw the line between the domestic and extraterritorial application of the mail and wire fraud statutes.¹⁷⁶ And there is a bit of tension between various statements the *RJR* court made on the subject. On one hand, it stated:

The complaint alleges that defendants hatched schemes to defraud in the United States, and that they used the U.S. mails and wires in furtherance of those schemes and with the intent to do so In other words, plaintiffs have alleged conduct in the United States that satisfies every essential element of the mail fraud [and] wire fraud . . . claims. If domestic conduct satisfies every essential element to prove a violation of a United States statute that does not apply extraterritorially, that statute is violated even if some further conduct contributing to the violation occurred outside the United States.¹⁷⁷

In a footnote, the court stated that it was not deciding whether domestic conduct satisfying fewer than all of a statute's required elements could constitute a violation of the statute.¹⁷⁸ If every essential element of an offense must occur in the United States, then it can be argued that a plaintiff must establish that both the scheme to defraud and the use of the wires occurred in the United States.

However, if the extraterritorial reach of a RICO claim is coextensive with the extraterritorial reach of its predicate offenses, as the *RJR* case so states, would it not logically follow that the territorial reach of a RICO claim in general should be coextensive with the territorial reach of its predicates? If the domestic reach of RICO is the same as the domestic reach of the predicate offenses, then domestic application of RICO premised on mail or wire fraud may not require proof that all required elements were committed within the United States.

In criminal cases based only on mail or wire fraud, and not RICO, the courts have only required that the use of mail or wires occur in the United States, and not the scheme to defraud.¹⁷⁹ For example, in *United States v.*

176. *RJR*, 764 F.3d at 142.

177. *Id.*

178. *Id.* at 142 n.14.

179. *See, e.g.*, *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997), *cert. denied*, 525 U.S. 812 (1998) (Wire fraud statute proscribes the use of the telecommunication systems in the United States. "Nothing more is required."); *United States v. Gilboe*, 684 F.2d 235, 237-38 (2d Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983) (A Norway citizen and Hong Kong resident's wire fraud convictions were upheld on one offense, based upon wire communications between Hong Kong, where the defendant resided, and New York, and on the second offense, based on wire transfers from China, through New York, and onto the Bahamas.); *United States v. Kazzaz*, 592 F. App'x 553, 554-55 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2388 (2015) (Focus of mail and wire fraud statutes is the misuse of mail and wires. Mailing of checks to Alabama and use of wires to send bank payment to Alabama provide sufficient domestic nexus for claims.). *Cf.* *United States v. Kim*, 246 F.3d 186 (2d Cir. 2001) (Court upholds convictions where defendant and co-conspirators did not personally use U.S. wires, but defendant approved inflated travel invoices with knowledge that the use of U.S. wires would follow by a New York bank's payment of the invoices;

Singhai,¹⁸⁰ the court held that mailings originating in China or Japan and sent to the S.E.C. through United States mails constituted a domestic application of the mail fraud statute. The court explained:

Defendants attack this reasoning by pointing out that because the mail fraud statute requires proof of a U.S. mailing, every alleged mail fraud is automatically a domestic application. But that is precisely the point of the mail fraud statute: once a person uses the U.S. mails, they are subject to the mail fraud statute pursuant to their domestic activity—making an analysis of the statute’s extraterritorial application unnecessary in a case such as this one.¹⁸¹

However, while logic might impel the courts in this direction, the courts certainly have shown little willingness to expand RICO so broadly,¹⁸² and the *RJR* court leaves open the distinct possibility that courts might require proof that all essential elements of an offense occurred in the United States. If the scheme to defraud must also occur in the United States, the task of proving a domestic violation of mail or wire fraud becomes more difficult. Furthermore, the determination of the locus of a “scheme” to defraud can be indeterminate, and present difficulties similar to those presented in determining the location of a pattern.

In *Petroleos Mexicanos v. SK Engineering & Construction Co.*, decided after the *RJR* panel decision but before the denial of the rehearing en banc, the Second Circuit, in a summary order, held that a RICO claim predicated on wire fraud could not apply extraterritorially, and that sufficient contacts were required in order to state a domestic claim.¹⁸³ While the court did not expressly state that all elements of a wire fraud claim must occur in the United States, it does suggest that simply alleging wire transfers to or from the United States is not enough.¹⁸⁴ The court concluded that plaintiff’s wire fraud claims were extraterritorial because the pleading lacked any allegation “that the

court suggests that § 1343 has extraterritorial reach.). *But see* *United States v. Prevezon Holdings Ltd.*, No. 13 Civ. 6326, 2015 U.S. Dist. LEXIS 104204 (S.D.N.Y. Aug. 7, 2015) (stating that *RJR* changed the “legal landscape” by clarifying that wire fraud cannot apply extraterritorially, and rejecting wire fraud as the specified unlawful activity under 18 U.S.C. § 1956 (money laundering), because the scheme was not “sufficiently domestic”).

180. 876 F. Supp. 2d 82 (D.D.C. 2012).

181. *Id.* at 97.

182. *See, e.g.*, *Cedeño v. Intech Group, Inc.*, 733 F. Supp. 2d 471, 472 (S.D.N.Y. 2010), *aff’d sub nom.*, *Cedeño v. Castillo*, 457 F. App’x 35 (2d Cir. 2012); *Sorota v. Sosa*, 842 F. Supp. 2d, 1345, 1350-51 (S.D. Fla. 2012). Under the “conducts” test, courts distinguished between wire transfers into or out of the United States that were integral to the fraud, and so conferred jurisdiction, and wire transfers that were merely preparatory or incidental to the fraud. *See, e.g.*, *Norex Petrol. Ltd. v. Access Indus., Inc.*, 540 F. Supp. 2d 438, 444 (S.D.N.Y. 2007), *aff’d*, 631 F.3d 29 (2d Cir. 2010); *Madanes v. Madanes*, 981 F. Supp. 241, 250-52 (S.D.N.Y. 1997).

183. 572 F. App’x 60, 61 (2d Cir. 2014).

184. *Id.*

scheme were directed from (or to) the United States.”¹⁸⁵ In so stating, it is unclear whether the *Petroleos* court is referring to the RICO scheme or the “scheme to defraud” that is an element of the wire fraud statute itself.¹⁸⁶

In another RICO case, *Laydon v. Mizhuo Bank, Ltd.*,¹⁸⁷ the court comes even closer to requiring that all elements of wire fraud occur in the United States, but it too leaves enough ambiguity in its analysis to preclude a definite conclusion. The court first states that the complaint before it “describes actions that are too attenuated to sufficiently plead that the scheme to defraud came about in the U.S.”¹⁸⁸ The court then falls back on the imprecise requirement that the complaint allege sufficient contacts with the United States, and concludes that the complaint’s minimal contacts are not enough.¹⁸⁹

Although neither case is an exercise in precision, both indicate that the courts are disinclined to allow RICO claims based upon wire transfers into or out of the United States alone and will require at least some nexus between the United States and the scheme to defraud.

In contrast, however, in *United States v. Hayes*,¹⁹⁰ a very recent criminal case charging wire fraud under § 1343 alone, and not under RICO, the Southern District of New York affirmed that the use of wires alone was sufficient to state a domestic application of the wire fraud statute. The court concluded that the defendant’s “argument that the location of the wires is ‘ancillary’ to the location of the scheme to defraud must, therefore, be rejected, because the location of the wires is the court’s primary concern.”¹⁹¹

Thus, the proper parameters for stating a domestic claim under RICO remain open to question.

185. *Id.*

186. The language from the *RJR* decision on which it relies appears to refer to the entire RICO scheme, and not the scheme to defraud that is a required element of wire fraud. The problem arises from the indefinite nature of the *RJR* analysis, which, on the one hand, states that a domestic claim is stated if all the elements of a predicate act occurred in the United States, but on the other hand, also engages in this nebulous inquiry as to whether the complaint alleges sufficient domestic contacts. The *Petroleos* district court opinion refers specifically to the lack of evidence that “the pattern of racketeering activity was directed at the United States.” No. 12 Civ. 9070, 2013 U.S. Dist. LEXIS 1072222, at *9 (S.D.N.Y. July 29, 2013) (internal quotations omitted).

187. No. 12 Civ. 3419, 2015 U.S. Dist. LEXIS 44126 (S.D.N.Y. Mar. 31, 2015).

188. *Id.* at *31.

189. The court expresses a misunderstanding of *RJR* in that it states that *RJR* allows for an extraterritorial application of RICO when all the elements of wire fraud occur in the United States. This, of course, is an example of a domestic application, and not an extraterritorial application at all. *Id.* at *30, 33.

190. No. 12 mj 3229, 2015 U.S. Dist. LEXIS 101212 (S.D.N.Y. Aug. 3, 2015).

191. *Id.* at *15.

C. *RJR Steers Clear of the Difficulties in Determining RICO's Focus*

Is the Second Circuit correct in concluding that congressional intent is clear that the extraterritorial reach of RICO is coextensive with the extraterritorial reach of the predicate offenses? There is appeal to this simple, straightforward conclusion. As the *RJR* panel asserted in defense of its approach, it offers a means of “simplifying the question of what conduct is actionable in the United States,” and provides a method for the courts to consistently analyze the extraterritorial issue.¹⁹² It prevents the “incongruous results” that can occur when the enterprise is seen as RICO’s focus, such as insulating domestic activity from liability in the case of a foreign enterprise.¹⁹³

As the United States argued in its *Norex* amicus brief, *RJR*’s predicate-based extraterritorial approach is consistent with the approach taken by courts in analyzing “piggyback statutes” in other contexts. Thus, for example, the government pointed out that the general conspiracy statute has been held to apply extraterritorially when the underlying offense applies extraterritorially.¹⁹⁴ Other “piggyback” statutes including harboring offenses, accessory after the fact offenses, aiding and abetting and 18 USC § 924(c), which criminalizes the use of a firearm during commission of a violent crime, have all been held to apply extraterritorially when the underlying offense applies extraterritorially.¹⁹⁵

While it is true that RICO is distinguishable in that it is not an offense based on derivative criminal liability, or a statute simply providing for additional punishment in the presence of aggravating circumstances, nonetheless, the cases do offer some persuasive support for the *RJR* approach.

Still, all the dissenting judges, excepting Lynch, argued that the *RJR* predicate-based extraterritorial approach is not supported by a clear manifestation of congressional intent, but is only one possible interpretation of that intent. All the judges looking at the issue before *RJR* was decided, likewise, had concluded that RICO lacks a clear statement of congressional intention to give it extraterritorial application. Thus, the issue is open to

192. *RJR*, 764 F.3d at 139.

193. *Id.*

194. See Brief of the United States as Amicus Curiae in Support of Limited Rehearing En Banc at 4-5, *Norex*, 631 F.3d 29 (2d Cir. 2010) (No. 07-4553-CV) (citing *United States v. Yousef*, 327 F.3d 56, 87-88 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003)). The government raised the same argument in its brief in *Chao Fan Xu*. Brief of the United States at 47-53, 706 F.3d 965 (9th Cir. 2013), (No. 09-10189).

195. See Brief in Opposition On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 22-23, *RJR*, 546 U.S. 1092 (2006) (No. 05-549); see, e.g., *United States v. Lawrence*, 727 F.3d 386, 395 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1340 (2014) (conspiracy); *United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013) (conspiracy); *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) (harboring, accessory after the fact, aiding and abetting, conspiracy); *United States v. Shibin*, 722 F.3d 233, 247 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1935 (2014) (18 U.S.C. § 924(c)); *United States v. Siddiqui*, 699 F.3d 690, 701 (2d Cir. 2012) (18 U.S.C. § 924(c)).

question.

If the Second Circuit is wrong in concluding that congressional intent is clear, then *Morrison* seemingly requires that the court apply the presumption against extraterritoriality and ascertain the focus of RICO, as the Ninth Circuit did in *Chao Fan Xu*. A look at the analyses of the courts that have engaged in this exercise, however, reveals a labyrinth of confusion and inconsistency. If the Supreme Court disagrees with *RJR*, one can only hope that it will provide an alternative that will offer reasonableness and clarity.

D. The Courts' Misadventures in Applying the Focus Test of Morrison

1. The Curving Path of the Ninth Circuit in Chao Fan Xu

If the Supreme Court rejects the Second Circuit's solution, one possibility is that it might embrace the Ninth Circuit decision in *Chao Fan Xu*. The Ninth Circuit's decision, however, is particularly confounding. After declaring that the focus was on the pattern, the Ninth Circuit stated that the first part of the enterprise at issue in the case before it involving bank fraud on the Bank of China was extraterritorial even though some of the funds may have entered the United States. In reaching this conclusion, the Ninth Circuit did not examine the specific predicate acts before it, or explain why, if the focus was on the pattern, it stated that this part of the "enterprise" was extraterritorial. Further, the opinion provides little guidance as to the factors on which the court relied in concluding that the bank fraud activity was extraterritorial, and where or how to draw the line between extraterritorial and domestic patterns.

The Ninth Circuit's decision to bifurcate the enterprise into parts, one foreign and one domestic, and then to conclude that they were co-dependent so as to bring the entire RICO claim under domestic application raises a host of questions. Is the court stating that the activities as a whole, including the extraterritorial activity and the United States activity, are in effect transformed into one big domestic pattern because of their dependent relationship? Or is the court stating only that the predicate acts that were committed in connection with the immigration fraud were sufficient in and by themselves to constitute a pattern? If it is the former, then the Ninth Circuit's approach would lead to a different result than the Second Circuit *RJR* approach. Under the *RJR* approach, the extraterritorial predicate acts cannot be considered as part of the pattern if they do not have extraterritorial reach. Thus, for example, any predicate acts that alleged money laundering committed by non-citizens completely abroad could not be considered part of the pattern, and the determination would then need to be made as to whether plaintiffs were able to satisfy the pattern element with the remaining predicate acts alleged. In contrast, under the Ninth Circuit approach, the extraterritorial predicate offenses could be considered provided that the pattern was sufficiently

domestic as a whole, although the Ninth Circuit opinion provides little guidance as to what this means.

2. *The Vexing Enterprise and Pattern Approaches*

Both the “enterprise” and the “pattern” approaches have proved unsatisfactory on multiple grounds. One major difficulty with both approaches is that they are likely to lead to unpredictable and inconsistent results—exactly what the court in *Morrison* found so troubling. This inconsistency appears not only with respect to the selection by some courts of the “pattern” focus, and some of the “enterprise” focus, but also with respect to the divergent analyses applied by courts following the same “enterprise” or the same “pattern” approach.

An initial problem is that the classification of cases into either “enterprise” or “pattern” categories is not precise, and it is not only *Chao Fan Xu*, but other cases as well, that use language blurring the distinction.

For example, *Cedeño* is almost always classified as an “enterprise” case, and certainly language by the court supports that conclusion. However, the court also uses language to suggest that not only the location of the enterprise, but also the location of the pattern, or the effects of the pattern, might be important. Thus, *Cedeño* begins by stating: “[I]t is plain on the face of [RICO] that the statute is focused on how a pattern of racketeering affects an enterprise. . . .”¹⁹⁶ This statement could be interpreted to suggest that RICO’s focus is on the interplay between the pattern and the enterprise, and both are relevant. Yet this statement is immediately followed by the enterprise-focused observation that “nowhere does the statute evidence any concern with foreign enterprises.”¹⁹⁷ The *Cedeño* court then concludes with the statement: “RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.”¹⁹⁸ Thus, *Cedeño* appears not to foreclose the possibility that RICO could apply when the racketeering activities of a foreign enterprise occur within the United States, or impact upon domestic interests.¹⁹⁹

In contrast, *United States v. Philip Morris USA*²⁰⁰ is characterized as a pattern case. That decision was rendered in the course of the historic lawsuit brought by the United States against tobacco-related companies for engaging in a conspiracy for over four decades to mislead the American public about risks

196. 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010), *aff’d sub nom.*, *Cedeño v. Castillo*, 457 F. App’x 35 (2d Cir. 2012).

197. *Id.*

198. *Id.* at 474. In *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1350 (S.D. Fla. 2012), the court relied on this same language.

199. *See* 733 F. Supp. 2d at 473-74.

200. 783 F. Supp. 2d 23 (D.D.C. 2011).

and health effects of smoking.²⁰¹ Prior to the *Morrison* decision, defendants, including BATCo, a British corporation, were found liable under RICO. BATCo's liability was premised on activities primarily conducted abroad but which the court determined had tremendous impact in the United States.²⁰² In a motion for reconsideration decided after the *Morrison* decision, the district court held that RICO did not apply to BATCo, a foreign defendant engaged primarily in foreign activity, even though that activity had impact on the United States, because *Morrison* had invalidated the "effects" test.²⁰³

In reaching its decision, the court, on the one hand, suggested that RICO's focus is on the pattern, by stating that there is no evidence Congress intended to criminalize foreign racketeering activities under RICO.²⁰⁴ On the other hand, however, it approvingly quoted *Cedeño* at length, including its language that the focus is on the enterprise.²⁰⁵

Furthermore, as many have noted, it is not easy to ascertain the location of the enterprise or the pattern. While, in the securities law context, finding the focus requires only that the court pinpoint the location of a single event—the purchase or sale of the security—the test does not translate so easily in the context of RICO.

For example, when an enterprise is engaged in a pattern of racketeering in the United States, it would seem pointless to look at the enterprise's citizenship or its legal auspices for purposes of locating the enterprise, because both a United States citizen and a foreign citizen should be equally culpable for activity conducted within the United States. Further, an association-in-fact enterprise can be comprised of citizens of, or entities organized under the laws of, diverse nations, so this type of analysis can be confounding.²⁰⁶

On the other hand, it can be difficult to determine the enterprise's location by focusing on other factors such as the location from which the enterprise conducted operations or directed the racketeering activity, as an enterprise may have multiple such locations.²⁰⁷

201. *See* United States v. Phillip Morris USA, 566 F.3d 1095, 1105-08 (D.C. Cir. 2009), *cert. denied*, 561 U.S. 1025 (2010).

202. *See id.* at 1130-31.

203. 783 F. Supp. 2d at 27-29.

204. *Id.* at 29.

205. *Id.* at 28-29. It is questionable whether the case should be classified as either a "pattern" or an "enterprise" case, however. It is a bit of an anomaly because it does not focus on the location of the enterprise or the pattern, but only on the role of one foreign defendant in the enterprise. Thus, the question before the Court might have been more appropriately framed as a question of whether there was sufficient evidence linking this foreign defendant to the (domestic) enterprise or to its pattern of racketeering activity (and whether that pattern could encompass the extraterritorial acts).

206. *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 242-43 (S.D.N.Y. 2012).

207. *See* Mitsui O.S.K. Lines v. Seamount Logistics, Inc., 871 F. Supp. 2d, 933, 939 (N.D. Cal. 2012) (RICO enterprises are "groups of people." "As such, they do not 'occur' in

Furthermore, the “enterprise” focus actually results in focusing on different distinct elements depending upon the facts of the case. Thus, an enterprise can be a criminal enterprise responsible for committing the pattern of racketeering, or it can be a passive instrument or the victim of the racketeering activity.²⁰⁸ It is one thing to say that Congress’ focus was on the criminal enterprise, and quite another when the enterprise is the victim or a passive instrument.²⁰⁹

As *Chao Fan Xu* illustrates, deciding where a pattern comprised of multiple acts occurred can be equally difficult. It is often not easy to ascertain exactly what criteria a court is using to determine whether a pattern is domestic or foreign. For example, in *Chevron Corp. v. Donziger*, the court decided that the pattern was domestic based on its determination, among other things, that the scheme was conceived in and orchestrated in the United States, the scheme was directed against a United States bank and acts in furtherance of the scheme took place in the United States.²¹⁰ The court never specifically discussed, however, where each individual predicate act that formed the pattern had occurred. After deciding the “pattern” was domestic, the court went on to engage in a second analysis of whether plaintiff had generally satisfied the “pattern” requirement by analyzing each specific predicate act.²¹¹ This analysis likewise made no mention of where the predicate acts occurred and never connected back to the first analysis.

In other cases, courts’ analyses of whether a pattern is domestic look to be little more than an exercise in counting the number of instances of domestic conduct and making a judgment as to whether the number looks “substantial.”²¹²

To add more confusion, after applying either the “enterprise” or “pattern” language, the courts often follow *Norex*’s lead in stating that the alleged contacts with the United States are insufficient. In doing so, it is often unclear whether the court, in applying the enterprise focus, is stating that the enterprise has insufficient contacts with the United States to render it domestic, or when applying the pattern test, is stating that the pattern has insufficient activity within the United States to render the pattern domestic, or whether the court is tacking on a new “contacts” analysis to supplement its prior “enterprise” or “pattern” analysis. As one example, in *Hourani v. Mirtchev*,²¹³ the court

a place in the way that transactions do.” They have an “amorphous structure.”).

208. *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994).

209. *Accord Chevron Corp.*, 871 F. Supp. 2d at 243.

210. *Id.* at 245.

211. *Id.* at 247-52.

212. *See, e.g., Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 574 (S.D.N.Y. 2014) (looking at whether pattern included “substantial conduct in the United States”).

213. 943 F. Supp. 2d 159 (D.D.C. 2013), *aff’d*, 796 F.3d 1 (D.C. Cir. 2015).

concluded that RICO's focus was on the pattern.²¹⁴ It then went on, however, to examine the case's United States contacts, looking at not only activity conducted in the United States, but the United States citizenship of the parties and the United States location of the defendant corporation. The court concluded that these contacts were too "peripheral" under *Norex* to establish a domestic RICO claim.²¹⁵ It is not clear, however, why the court is considering the parties' citizenship or corporate location, if RICO's focus is on the pattern.

Furthermore, the entire debate as to whether RICO's focus is on the pattern or the enterprise seems contrived. The assumption made by so many courts that they must declare themselves to be either a member of the enterprise or the pattern caucus seems unnecessarily restrictive. Assuming *arguendo* that RICO lacks a clear indication of extraterritoriality so as to necessitate an analysis of RICO's focus, would it not make more sense to argue that Congress was focused on both the pattern and the enterprise, and the relationship between the two?²¹⁶ After all, the literal terms of RICO make it unlawful to participate in the conduct of the *enterprise's* affair through a *pattern* of racketeering activity.²¹⁷ Both are essential to liability. Perhaps also courts should devote more discussion to the policy objectives of RICO in the search to find the "focus" rather than immediately jumping to the choice between the "enterprise" or the "pattern."

The courts' strained analyses often look to be little more than an attempt to determine the conduct and effects associated with the RICO activity. Thus, in *Cedeño*, the court found the enterprise to be the focus, but then weighed the impact of the predicate acts in the United States (effects). In *In re Toyota Motors Corp.*, the court agreed "in principle" that RICO's focus is on the enterprise, but felt less confident as to whether RICO applies to a domestic enterprise whose "effects" occur outside the United States.²¹⁸ In *Chevron v. Donziger*, the court held that RICO applies to "a domestic pattern of racketeering aimed at or causing injury to a domestic plaintiff" (conduct and effects).²¹⁹ The court in *Borich v. BP, P.L.C.* likewise defined the "focus" as

214. *Id.* at 165.

215. *Id.* at 167.

216. This was the position taken by the United States in its amicus curiae brief in *RJR* submitted in connection with the appeal from the district court decision. Based on its assumption that the court was bound by *Norex's* holding that RICO has no extraterritorial application, the United States argued that RICO's focus was on both the enterprise and the pattern, and that a RICO claim should be considered domestic if either the enterprise is located or operating within the United States, or the pattern occurs within the United States. Brief for the United States as Amicus Curiae in Support of Neither Party at 9-20, *RJR*, 764 F.3d 129 (2d Cir. 2014) (No. 11-2475-CV).

217. 18 U.S.C. § 1962(d).

218. 785 F. Supp. 2d 883, 914 (C.D. Cal. 2011).

219. 871 F. Supp. 2d 229, 245 (S.D.N.Y. 2012). Yet one of the Supreme Court's criticisms of the conduct test in *Morrison* was that it "was held to apply differently

the “pattern of racketeering and its consequences.”²²⁰

The inadequacies that are seen with the “enterprise” focus are that it insulates from liability a foreign enterprise engaging in unlawful conduct in the United States, and a foreign enterprise that engages in activities abroad that are directed at and impact the United States—in other words, it does not adequately consider conduct and effects.²²¹ Likewise, the “pattern” focus, given the lack of criteria for its application, often looks to be simply a re-labeled “conduct” test. Then, to complete the mess, the courts slap on the vague “sufficient contacts” test to their analysis, which often is little more than a recitation of various domestic conduct and effects.

Perhaps this is at the heart of the problem. Even though the *Morrison* conducts and effects test have been repudiated, judges’ decisions often seem to be led by their gut opinion that they should not be entertaining RICO claims that lack sufficient United States conduct or effects. And the “enterprise” and “pattern” focuses that have emerged are not up to the task of meeting their concerns. This is why, for example, the mere misuse of United States wires, even a pattern of such misuse, in a case involving foreign actors and largely foreign activity strikes many judges as too tenuous a thread to sustain a RICO claim. The conduct seems too incidental, and the effects too weak. There is visceral appeal to the conclusion that Congress intended RICO to apply to conduct that takes place in the United States or has substantial effects in the United States. And, certainly, one could see that defined “conduct” or “effects” might well play an important role when integrated into a properly-delineated statutory “focus.” The problem is, under the present judicial landscape, the courts choose either an enterprise or pattern approach, but lack any true focus.

CONCLUSION

The beauty of *RJR* is that it provides a bright escape from the chaos created by the courts’ efforts to apply *Morrison*’s focus test to RICO cases. In *Morrison*, the Supreme Court said, with respect to the conduct and effects tests: “As they developed, these tests were not easy to administer.”²²² The same is equally true with respect to the “enterprise” and “pattern” approaches. *RJR* announced a new framework for determining the extraterritorial reach of RICO. It offers an approach that is logical and understandable. By finding a clear congressional intention to apply RICO extraterritorially, *RJR* avoids the

depending on whether the harmed investors were Americans or foreigners.” 561 U.S. 247,258 (2010). Thus, it is questionable whether the results of application of the pattern “focus” should depend upon the nationality of the victim.

220. 904 F. Supp. 2d 855, 861 (N.D. Ill. 2012).

221. See, e.g., *Chao Fan Xu*, 706 F.3d 965, 977 (9th Cir. 2013) (as amended on denial of reh’g Mar. 14, 2013); *Chevron Corp.*, 871 F. Supp. 2d at 242.

222. 561 U.S. at 258.

difficulties inherent in determining RICO's focus, and then analyzing the location of that focus in a particular case.

The Supreme Court's decision will arrive at a critical time, with *RJR* now set to be the defining case in the Second Circuit, the *Chao Fan Xu* pattern focus approach governing in the Ninth Circuit, and the other circuits having not yet weighed in.

The *RJR* decision reflects the realities of a world where both criminal and business transactions are increasingly international in scope. When RICO claims involve a pattern of racketeering activity that violates United States laws that are either specifically dominated in RICO as predicate acts with extraterritorial effects, or have sufficient domestic contacts to the United States, under *RJR*, the courts can—and it is submitted, should—adjudicate those offenses. *RJR* will lead to greater predictability and consistency in determining the extent of RICO's extraterritorial application, even if it still does leave unresolved the criteria for determining whether a claim is sufficiently domestic when it is premised on a predicate act lacking extraterritorial reach. This latter issue is one that the Supreme Court may not address, and, if it does not, future litigation on this point can be expected.

Ultimately though, regardless of any advantages to the *RJR* approach, the Supreme Court can only affirm *RJR* if it agrees with the conclusion that the predicate-based analysis is consistent with the clear intent of Congress. In the event the Supreme Court disagrees with *RJR*, it needs to do more than simply sanction the enterprise or the pattern as RICO's focus. Instead, it needs to exercise true leadership and offer an analysis that will bring reasonableness and clarity to RICO jurisprudence. It is submitted that the best choice, however, is to affirm *RJR*'s conclusion that congressional intent is clear. At the end of the day, it is very difficult to provide a satisfactory answer as to why Congress would have included predicate statutes in RICO that can be violated only by extraterritorial conduct, unless it intended RICO to apply extraterritorially.