

RICO's Post-'Morrison' Reach: Will Other Courts Adopt the 2nd Circuit's Approach?

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Special to Law.com

November 12, 2010

For decades, U.S. courts have applied a multi-factor balancing test to determine whether the Racketeer Influenced and Corrupt Organizations Act applies outside U.S. territory. However, in the wake of the U.S. Supreme Court's recent reaffirmance of the "presumption against extraterritoriality" in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), lower courts have begun to re-examine the question of RICO's extraterritorial application. A pair of 2nd Circuit opinions have cited *Morrison* to curtail the extraterritorial application of RICO, but a number of ambiguities remain, and it remains unclear whether the 2nd Circuit's approach will be adopted widely by other federal courts.

The scope of civil RICO liability is quite broad, and RICO may impose treble-damages liability for overseas conduct that is not actionable (or if actionable, would not trigger treble damages) under the law of the place where it occurs. Accordingly, the scope of RICO's application to overseas conduct is of interest to a wide range of companies operating outside of the United States.

'CONDUCT' AND 'EFFECTS' TESTS AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The Supreme Court has long held that the extraterritorial application of U.S. law is presumptively improper unless Congress has clearly and affirmatively expressed its intent to legislate beyond American borders. See, e.g., *F. Hoffmann-La Roche LTD v. Empagran S.A.*, 542 U.S. 155, 164–75 (2004); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Prior to the Supreme Court's decision in *Morrison*, however, lower courts frequently applied "conduct" and "effects" tests where a statute, such as RICO, is silent as to its extraterritorial application. See *North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996). Under the conduct test, courts applied statutes extraterritorially when "conduct material to the completion of [a crime] occurred in the United States." *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983). Under the effects test, on the other hand, courts applied statutes extraterritorially when a defendant's conduct had direct and substantial effects within the United States, or was intended to and actually did have an effect within the United States. See, e.g., *Al-Turki*, 100 F.3d at 1052; *United States v. Noriega*, 746 F. Supp. 1506, 1513 (S.D. Fla. 1990).

MORRISON'S REAFFIRMATION OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY

In 2010, *Morrison* came before the Supreme Court, involving a so-called "f-cubed" claim under the Securities Exchange Act of 1934 – a claim predicated on alleged foreign harm to foreign plaintiffs perpetrated by a foreign defendant. 130 S. Ct. at 2875.

The case's sole connection to the U.S. was that some of the defendants had implemented parts of their scheme from Florida. *Id.* In the course of rejecting the application of the Exchange Act to such "f-cubed" claims, the *Morrison* Court broadly rejected the conduct and effects tests, holding that they are inconsistent with the presumption against extraterritoriality. According to the Court, the judge-made conduct and effects tests lacked a basis in the text of the Exchange Act, and therefore "violate[d] the traditional principle that silence means no extraterritorial application." *Id.* at 2881. The Exchange Act's silence (or, at most, ambiguity) concerning its application abroad required the conclusion that it only applied domestically. *Id.* at 2883. Examining the text and history of the Exchange Act, the *Morrison* Court found that the act's "focus" was on domestic securities sales and exchanges, and that it was only "parties to those transactions that the statute [sought] to 'protect.'" *Id.* at 2883–86. More specifically, the Court held that the Exchange Act applies only to transactions of securities listed on U.S. exchanges and to securities transactions that occur in the United States. *Id.* at 2884.

RICO AFTER 'MORRISON'

Though the ink on the *Morrison* opinion has only just dried, a pair of cases in the 2nd Circuit – a district court case, *Cedeno v. Intech Group, Inc.*, 09 Civ. 9716 (JSR), 2010 U.S. Dist. LEXIS 88026 (S.D.N.Y. Aug. 24, 2010), and a subsequent decision of the 2nd Circuit, *Norex Petroleum Ltd. v. Access Industries, Inc.*, No. 07-4553-cv, 2010 WL 3749281 (2d Cir. Sept. 28, 2010) – have already extended *Morrison* beyond the Exchange Act and into the RICO context.

Cedeno, like *Morrison*, involved an "f-cubed" claim. In *Cedeno*, a foreign plaintiff sought redress for foreign harms caused by foreign defendants, and the only connection to the United States was the use of U.S. bank accounts to further the scheme. 2010



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U.S. Dist. LEXIS 88026, at *2. The *Cedeno* court noted that, because RICO was silent as to its extraterritorial application, *Morrison* required that it only apply domestically. *Id.* at *4–5. Homing in on the *Morrison* Court's language regarding the "focus" of the Exchange Act, the *Cedeno* court found the focus of RICO to be the domestic RICO enterprise and the impact of predicate acts upon it. *Id.* at *7.

In *Norex*, the 2nd Circuit endorsed *Cedeno*'s logic in interpreting RICO under *Morrison*. *Norex Petroleum Ltd.*, 2010 WL 3749281, at *3. *Norex* involved an international group of defendants, including some Americans, who the plaintiff alleged had caused harms in Russia through a racketeering conspiracy in Russia. *Norex Petroleum Ltd. v. Access Indus.*, 540 F. Supp. 2d 438, 440 (S.D.N.Y. 2007). The lower court in *Norex* had dismissed the plaintiff's claims against an international group for lack of subject matter jurisdiction using the conduct and effects tests. *Id.* at 442–49. The 2nd Circuit affirmed the dismissal, but on different grounds – the court held that *Morrison* applied to render the conduct and effects tests superfluous in the RICO context, and that because Congress gave RICO "no clear indication of extraterritorial application," the plaintiff's allegations of foreign conspiracies failed to state a claim. *Norex Petroleum Ltd.*, 2010 WL 3749281, at *3 (citing *Morrison*, 130 S. Ct. at 2878). Furthermore, the *Norex* court relied upon *Morrison* to hold that simply alleging some domestic conduct – in *Norex*, the routing of funds through U.S. banks – is insufficient to support the application of RICO. *Id.* at *4.

OPEN QUESTIONS REMAIN

Cedeno and *Norex* suggest that, as a result of *Morrison*, RICO will not apply to foreign conspiracies with tangential relationships to the United States. Instead, courts will likely apply RICO only to enterprises that are located within the United States. Determining the location of a RICO enterprise will, however, raise a number of difficult issues, especially in cases involving more significant U.S. activity and contacts than *Cedeno* or *Norex*.

Until *Morrison*, the formal "location" of the RICO enterprise had not been an issue. There is, accordingly, no well-developed test for determining the situs of the RICO enterprise. In the future, courts may develop several approaches to deciding this issue. For example, courts may apply a "predominance" test, analogous to the test for determining the principal place of business of a corporation. Such an approach would look to whether the United States is the center of the enterprise's activities or of its management and decision-making, attempting to distinguish incidental U.S. contacts from activities sufficient to support a finding that the RICO enterprise is located in the United States.

Second, courts may look to the place where the RICO "predicate acts" in furtherance of the RICO enterprise (such as mail fraud,

wire fraud or other specified offenses) occurred, reasoning that RICO applies when one, or all, of the alleged predicate acts take place in the United States. Third, while such an approach would seem inconsistent with the 2nd Circuit's approach, courts may also analogize the RICO enterprise – an "association in fact" – to unincorporated associations, which have traditionally been viewed as having their location wherever a member resides. See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195–96 (1990). Fourth, courts may draw from the agency and conspiracy theories of personal jurisdiction – which allow a person outside the jurisdiction to be charged with the forum contacts of agents and co-conspirators – such that participants in a RICO enterprise are chargeable with the foreseeable U.S. conduct of all members of the enterprise. However, no court has yet embraced any of these approaches in the wake of *Morrison*.

Morrison reinforced the presumption against extraterritorial application of U.S. law, and the 2nd Circuit has applied the case to restrict the reach of RICO. Whether other circuits follow the 2nd Circuit's lead, however, is an open question, and ambiguities in defining the RICO enterprise suggest that RICO's precise reach beyond U.S. borders remains far from clear.

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