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# EXTRATERRITORIAL APPLICATION OF RICO: PROTECTING U.S. MARKETS IN A GLOBAL ECONOMY

*Kristen Neller\**

The Racketeer Influenced and Corrupt Organizations Act<sup>1</sup> (RICO) was enacted by Congress in 1970 to combat organized crime in America. Since its enactment, it has been used extensively in both the civil and criminal arenas. With the participation of foreign corporations,<sup>2</sup> foreign subsidiaries, and foreign actors in general in the U.S. economy, it is only a matter of time before foreign defendants will be sued under RICO. This Note will discuss whether RICO should be applied extraterritorially: that is, whether federal courts should assume jurisdiction over foreign entities as defendants in RICO claims.<sup>3</sup> First, RICO's language, legislative history and application by the courts will be examined. Second, other areas of the law in which extraterritorial applications have been considered by the courts will be discussed, including antitrust, securities, employment, and environmental laws.<sup>4</sup> Finally, RICO will be examined in light of the current jurisprudential context as created in these other areas. This analysis will suggest that RICO, based on its underlying intent and its relation to other areas of the law, should apply extraterritorially, but only after thorough consideration has been given to concerns of international comity.<sup>5</sup>

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\* Albion College, B.A., 1990; University of Michigan, J.D., 1992.

1. 18 U.S.C. §§ 1961-68 (1988).

2. The term "foreign corporation" is assumed, for the purposes of this note, to mean "belonging to or relating to another sovereign or dominion, as in the expressions 'foreign law,' 'foreign community,' 'foreign minister' and 'foreign territory.'" *Bigley v. N.Y. & P.R.S.S. Co.*, 105 F. 74, 76 (D. N.Y. 1900). The term includes not only corporations organized in foreign nations, but also associations in foreign countries having the attributes of corporations. *Liverpool Ins. Co. v. Mass.*, 77 U.S. (10 Wall.) 566, 573 (1870).

3. This note will be limited in discussion to the narrow theoretical question of whether RICO should be extraterritorially applied and will not address the general jurisdictional issues. For a choice of law analysis of the extraterritorial application issue, see Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 223 (arguing for a federal choice of law system for multinational cases).

4. These four areas of law were chosen for comparison with RICO based on the specific consideration of the extraterritorial application issue by U.S. courts in these areas.

5. International comity, or the comity of nations, is defined as: "The recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." BLACK'S LAW DICTIONARY 267

## I. RICO

### A. Purpose, Language and Application

The purpose, language, and application of RICO suggest that it should be applied extraterritorially. Congress originally enacted the statute to combat organized crime in the United States. While considering whether to enact legislation like RICO, Congress conducted extensive studies on the effects and activities of organized crime. Among its findings were: 1) that organized crime was a highly sophisticated industry that drained the U.S. economy of billions of dollars annually, 2) that the activities of organized crime organizations, because of their significant economic impact, weakened the stability of the U.S. economic system, interfering with free competition and seriously burdening interstate and foreign commerce, and 3) that organized crime would continue to grow under the then-current legal system because a) defects in the evidence-gathering process inhibited the production of legally admissible evidence, and b) existing sanctions were too limited in scope and impact to deter organized criminal activity.<sup>6</sup>

The Senate discussions prior to the enactment of RICO indicate that Congress viewed organized crime's significant economic power as the major threat to the United States. The threat of organized crime, then, was not a threat to the well-being of individuals or to some vague notion of public safety, but to the health and welfare of the U.S. economy. Consequently, legislative proposals in response to the threat focused principally on the economic power base of organized crime.

What is needed here, the committee believes, are new approaches that will deal . . . with the economic base through which . . . individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.<sup>7</sup>

RICO was formulated, accordingly, to attack the economic power base of organized crime through the creation of new penal prohibitions and remedies as well as stiffer sanctions.<sup>8</sup>

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(6th ed. 1990). The consideration of international comity concerns has become increasingly important in the modern global society. See generally Wolfgang Friedmann, *The Role of International Law in the Conduct of International Affairs*, 20 INT'L J. 158 (1965) (asserting that the development of highly destructive weapons, the emergence of new sovereign nations, and the rapid increase in population require countries to respect international laws).

6. *United States v. Turkette*, 452 U.S. 576, 588-89 (1981).

7. *Id.* at 591-92 (citing S. REP. NO. 91-617 at 79 (1969)).

8. To further fulfill RICO's aggressive role in the fight against organized crime, Congress made its violation punishable by extensive criminal and civil penalties. The maximum criminal penalty allowed under RICO is a \$25,000 fine and a twenty-year prison sentence. Violators can also be subject to broadly described property forfeiture provisions. 18 U.S.C. § 1963 (1988). Under RICO's civil remedies, successful plaintiffs are awarded treble damages, court costs, and

The RICO statute is worded broadly, and the scope of its applicability is very loosely defined. The statute prohibits "any person who has received any income, directly or indirectly, from a pattern of racketeering activity" from using or investing such income, or part thereof, in "the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."<sup>9</sup> Further, it prohibits "any person, through a pattern of racketeering activity" from acquiring or maintaining "any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."<sup>10</sup> Finally, RICO prohibits the direct or indirect participation in "such enterprise's affairs through a pattern of racketeering activity" by "any person employed by or associated with any enterprise" so engaged.<sup>11</sup>

Specific key terms within the statute are also broadly stated and defined. "Person" is defined in RICO to include "any individual or entity capable of holding a legal or beneficial interest in property."<sup>12</sup> Similarly, the term "enterprise" includes "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>13</sup> "Racketeering activity" covers several activities. Traditional 'mob' activities are named, including murder, kidnaping, gambling, arson, robbery, bribery, extortion, and dealing in obscene matter.<sup>14</sup> Other offenses within this category include mail fraud, wire fraud, obstruction of justice, any offense involving fraud under Title 11, securities fraud, and "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs."<sup>15</sup> Finally, the "pattern" of racketeering activity required for action under RICO consists simply of at least two acts of racketeering activity recurring within any ten year period after the enactment of the

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attorney fees. This civil remedy is available to "[a]ny person injured in his business or property" by a RICO violation of another. *Id.* § 1964. Finally, courts are also allowed to provide remedies under civil claims similar to the newly-enacted corporate sentencing guidelines, such as orders of divestment, prohibitions of business activity, and orders of dissolution or reorganization. *Id.*

9. *Id.* § 1962.

10. *Id.*

11. *Id.*

12. *Id.* § 1961.

13. *Id.*; According to RICO's legislative history, this broad definition is given to insure that "infiltration of any associative group by any individual or group capable of holding a property interest can be reached." H.R. REP. No. 1549, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4032.

14. 18 U.S.C. § 1961 (1988); Liability is based not just on the "act" of these offenses, but "any threat involving" them as well. *Id.*

15. *Id.*

statute.<sup>16</sup>

The Supreme Court has interpreted and clarified the language and scope of the statute. In general, the Supreme Court has consistently interpreted RICO to effectuate the broad purposes of the statute. The Court handed down its first major interpretation of RICO in 1981, in *United States v. Turkette*.<sup>17</sup>

In *Turkette*, the Court decided that the term "enterprise" encompassed legitimate as well as illegitimate enterprises. The Court discussed the broad purpose and language of RICO at length, and concluded, "[i]n view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime."<sup>18</sup> Most importantly, the court stated that if Congress had intended a more limited interpretation, it would have included "some positive sign that the law was . . . to reach" only certain activities.<sup>19</sup>

Later cases followed *Turkette*'s broad interpretation and expanded RICO accordingly. In 1985, the Supreme Court explicitly reinforced the expansive reading of *Turkette* as appropriate for enforcing Congress's broad purposes in *Sedima v. Imrex*.<sup>20</sup> The Court stated, "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime . . . it is in this spirit that all of the Act's provisions should be read."<sup>21</sup> Also, the court noted the "extraordinary, if not outrageous," uses to which civil RICO has been put, in that "it has become a tool for everyday fraud cases brought against 'respected and legitimate' enterprises."<sup>22</sup> Nevertheless, the Court found this broad application consistent with the intent of Congress, and reversed a lower court decision which permitted private actions under RICO only against defendants who had been convicted on criminal charges, and only where a 'racketeering injury' had occurred.<sup>23</sup>

Most recently, in 1989, the Supreme Court interpreted RICO's "pattern" requirement in *H.J. Inc. v. Northwestern Bell Telephone Co.*<sup>24</sup> In the decision, the Court focused on the broadness of RICO's

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16. *Id.*

17. 452 U.S. 576.

18. *Id.* at 590.

19. *Id.* at 593.

20. 473 U.S. 479 (1985).

21. *Id.* at 498.

22. *Id.* at 499.

23. *Id.*

24. 492 U.S. 229 (1989).

language, stating that it “places an outer limit on the concept of a pattern of racketeering activity that is broad indeed.”<sup>25</sup> Looking to the statute’s purpose and legislative history once again, the Court found that flexibility was the main intent of Congress in the application of RICO: “It is reasonable to infer . . . that Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the *expansive* bounds set.”<sup>26</sup> Nonetheless, the Supreme Court limited the “pattern” requirement of RICO somewhat by including only those racketeering acts that relate to each other in some way and that amount to or pose a threat of continued criminal activity.<sup>27</sup>

The judiciary’s flexible interpretation of RICO has spurred the application of RICO to several ‘enterprises’ perhaps unanticipated by Congress. For example, a federal judge in Philadelphia ruled in 1986 that an abortion clinic could invoke RICO against forty-one anti-abortion activists who allegedly stole or destroyed thousands of dollars worth of medical equipment.<sup>28</sup> The activists apparently had threatened to use force and eventually broke into the clinic to steal equipment. Civil RICO has also been used in divorce cases, landlord-tenant suits and other ‘garden-variety’ claims.<sup>29</sup>

These cases and other similar “stretches” of civil RICO have encouraged a movement to modify RICO to prevent such expansive application. A consensus among the legal and business communities has advocated that the civil provisions of RICO be revised to narrow its application.<sup>30</sup> Representative Richard Boucher of Virginia voiced the thoughts of many when he stated, “Civil RICO has been one of the most badly abused of Federal statutes. It is so broadly drafted that it could apply to virtually any commercial dispute.”<sup>31</sup> As a response to the movement for revision, the last three Congressional sessions have examined the possibility of reform. However, none of the proposed bills of revision succeeded; they were merely “subject[ed] to a fury of

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25. *Id.* at 237.

26. *Id.* at 238 (emphasis added).

27. *See id.* at 239-43 for a general discussion of this issue.

28. Nancy Blodgett, *New RICO Twist: Damaged Abortion Clinic Sues*, 72 A.B.A. J. 26 (1986).

29. Joan Biskupic, *RICO: Perennial Legislation, Perennial Roadblocks*, CONG. Q., May 4, 1991, at 1135.

30. *Id.*

31. Stephen A. Holmes, *Congress to Take New Look at Racketeering Law*, N.Y. TIMES, Sept. 14, 1990, at 4.

debate, then quietly left behind.”<sup>32</sup> Passage of a revised civil RICO does not seem likely in the near future. Several key House Committee Chairmen have opposed any revised RICO legislation brought before the House, and there has yet to be any such proposed legislation in the Senate.<sup>33</sup>

Thus RICO stands, with ambiguous language, broadly defined and interpreted. The statute, originally conceived as a governmental weapon against organized crime, has become a widely used part of private plaintiffs’ arsenals against corporate criminal activity. Furthermore, RICO allows private parties to enforce a number of ‘garden-variety’ claims. The judicial decisions demonstrate that RICO encompasses the enforcement of the statutory prohibitions in virtually all situations. This expansive enforcement scheme should include extraterritorial as well as domestic application.

### B. *Extraterritorial Application*

Taken together, the congressionally mandated purpose, broad language, and flexible applications of RICO suggest that the statute, on its face, should be applied extraterritorially. First, the extraterritorial application is completely consistent with the purpose of RICO. In brief, RICO was enacted to combat the activities of certain entities, organized crime organizations or otherwise, because their activities were having a significant negative effect on the U.S. economy. Thus, the activities of foreign entities which likewise negatively impact the U.S. economy seem a logical target for the application of the statute. In fact, the purpose of the statute necessitates extraterritorial application. In order to achieve the statute’s goal of eliminating the negative effects of organized crime, RICO must apply to all entities engaging in the proscribed activities in ways which affect the United States. This includes both domestic and foreign entities.

Second, the broad language of RICO is similarly consistent with its extraterritorial application. The statute itself requires that it be “liber-

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32. Biskupic, *supra* note 29, at 1135. The most recent proposal, H.R. 1717, sponsored by Rep. William J. Hughes (D-N.J.), placed responsibility for limiting civil RICO application in the hands of the trial judge. *Id.* at 1136. First, the bill narrowed the definition of “pattern” to that espoused recently by the Supreme Court in *H.J.Inc.*, requiring relation and continuity. Second, the criminal RICO provisions were to lie untouched, as would civil claims brought based on conduct already found to be criminal. However, cases not brought on this basis were not to be brought under civil RICO unless three conditions were met as determined by the trial judge: 1) that the defendant was a major participant in the conduct producing injury, 2) that a triple damage remedy is found appropriate considering the magnitude of the plaintiff’s injury, and 3) that a need to deter conduct like that alleged exists. If the trial judge determines that any of these three conditions are not met, he or she is expected to dismiss the case altogether. *Id.*

33. *Id.*

ally construed so as to effectuate its purposes."<sup>34</sup> Also, the statute, as discussed above, is worded quite broadly; it avoids clearly defining such key terms as "person," "enterprise," and "pattern," and neglects to clearly articulate the intended scope. This vagueness has allowed expansive interpretation of the statute by the Supreme Court, thereby promoting its extraterritorial application. For example, the Court in *Turkette* declared an unlimited definition of "enterprise" by recognizing that if Congress had meant its definition to be limited, it would have so stated.<sup>35</sup> Therefore, "enterprise" should not be limited to the inclusion of domestic entities, but should also include foreign entities. Moreover, the Supreme Court emphasized in *Sedima* the "aggressive" nature of RICO, and that its language and scope was to be interpreted "in this spirit,"<sup>36</sup> as well as the need for "flexibility" in determining the scope of the statute's applicability in *H.J. Inc.*<sup>37</sup> Such an aggressive and flexible application of RICO would logically encompass application of the statute to foreign entities. Therefore, the broad language of RICO is consistent with its extraterritorial application.

Finally, the expanded applications of RICO, and of civil RICO in particular, are consistent with its extraterritorial application as well. It only seems natural that courts would be willing to sanction the application of RICO for use against foreign entities who have participated in or performed traditional "racketeering" enterprises<sup>38</sup> when they have sanctioned its application to so many non-traditional domestic enterprises. Also, the failure of reformers to revise civil RICO suggests that the statute's applications will not be limited at any time in the near future so as to foreclose extraterritorial application.

## II. OTHER U.S. LAWS

In contrast to RICO, there are areas of law for which the issue of extraterritorial application has been explicitly raised. They include antitrust, securities, employment, and environmental laws. The following is a brief overview of these areas of law with respect to the judicial treatment given the issue of extraterritorial application.

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34. 19 U.S.C. § 904 (1988)(provision ancillary to RICO).

35. *Turkette*, 452 U.S. at 590.

36. *Sedima*, 473 U.S. at 498.

37. *Id.*

38. "Traditional enterprises" refers to those originally contemplated by Congress, such as organized crime organizations and corrupt corporate entities. See *supra* note 14 and accompanying text.



### A. Antitrust

It is well-settled today that American antitrust laws can be applied extraterritorially.<sup>39</sup> The first case to address the question of extraterritorial application was *American Banana v. United Fruit*<sup>40</sup> in 1909. The Court refused to apply U.S. antitrust laws extraterritorially. Justice Holmes dismissed the plaintiff's claims briefly because the actual act in violation of U.S. law had been performed by a foreign government and not by the domestic party. Relying on principle echoing the Act of State doctrine,<sup>41</sup> Holmes upheld in his decision "the general and almost universal rule that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."<sup>42</sup> Although the *American Banana* decision has not been officially overturned, several subsequent decisions have limited its ruling to Act of State grounds only.<sup>43</sup>

The next case to consider extraterritorial application of U.S. antitrust laws followed just two years later. In *United States v. American Tobacco*,<sup>44</sup> the U.S. government charged that defendants, including twenty-nine individuals, sixty-five American corporations, and two English corporations, were engaged in a conspiracy to restrain interstate and foreign trade in tobacco and tobacco products, and were attempting and had actually achieved a monopoly. In its prayer for relief, the government requested "that the British-American Tobacco Co. be adjudged an unlawful instrumentality created solely for carrying into effect the obligations and purposes of said contract, combination and conspiracy . . . and that it be enjoined from engaging in interstate or foreign trade and commerce within the jurisdiction of the United States."<sup>45</sup> The Court granted the government's request, as-

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39. The antitrust laws with regard to which the question of extraterritorial application has been most often discussed are the Sherman Act (15 U.S.C. §§ 1-2 (1988)) and the Clayton Act (15 U.S.C. §§ 12-14, 19-27 (1988)). The Sherman Act declares "every contract, combination . . . or conspiracy" which restrains trade to be illegal. 15 U.S.C. § 1 (1988). The Clayton Act prohibits price discrimination activities and noncompetitive agreements among competitors. 15 U.S.C. §§ 12-14, 19-27 (1988).

40. 213 U.S. 347 (1909).

41. The Act of State doctrine was first established by the Supreme Court in *Underhill v. Hernandez*, 168 U.S. 250 (1897): "The courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Id.* at 252. This doctrine was most recently upheld in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

42. *American Banana*, 213 U.S. at 356.

43. In fact, in the next case involving foreign defendants and their alleged violation of U.S. antitrust laws, the court did not even cite *American Banana*, presumably because the conduct in question was not performed by a sovereign government, but by private parties. *United States v. American Tobacco*, 221 U.S. 106 (1911).

44. *Id.*

45. *Id.* at 149.

suming jurisdiction over all defendants, including the two British corporations, without questioning at all the Court's jurisdiction over the parties.<sup>46</sup>

The Supreme Court explicitly examined the extraterritorial application of U.S. antitrust laws a few years later in a dispute over transportation routes in and out of the United States. In *United States v. Pacific & Arctic Railway & Navigation Co.*<sup>47</sup>, the U.S. government alleged that the defendants, both U.S. and Canadian corporations, monopolized transportation routes between ports in the continental United States, Canada and Alaska. Because the disputed transportation route lay partially outside U.S. boundaries, the Court had to assume extraterritorial jurisdiction over the foreign route portions and the foreign defendants to hear the claim. The Court recognized some jurisdictional limits, stating "we may not control foreign citizens or corporations operating in foreign territory."<sup>48</sup> Nevertheless, the Court explicitly rejected the claim that the law could have no extraterritorial application at all. If that were the case, it reasoned, no country would have jurisdiction over the transportation routes. The Court held that the antitrust laws were enforceable against foreign entities participating in illegal combinations within the United States.<sup>49</sup> However, the holding only covered the operations actually occurring in U.S. territory. Thus, the U.S. antitrust laws were applied against the foreign defendants for their operations inside the U.S. border.

Extraterritorial application of U.S. antitrust laws reached its peak when Judge Learned Hand heard the case *United States v. Aluminum Co. of America*<sup>50</sup> (*ALCOA*) in 1945. This case was monumental in that, in addition to explicitly abandoning *American Banana* and its strict territorial doctrine, the court delineated a clear test for determining under exactly what circumstances a U.S. court could assert jurisdiction over foreign defendants or conduct occurring abroad as part of an antitrust claim.

In *ALCOA*, the government claimed that the Aluminum Company of America (*ALCOA*) and Aluminum Limited, a Canadian company, had conspired with European producers of aluminum to impose quotas on imports of aluminum into the United States and to restrain interstate and foreign commerce in aluminum. Further, Aluminum Limited and five European aluminum producers comprised a Swiss

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46. *Id.* at 184-88.

47. 228 U.S. 87 (1913).

48. *Id.* at 106.

49. *Id.*

50. 148 F.2d 416 (2d Cir. 1945).

corporation which, according to quotas previously set, were alleged to have allocated the amount of aluminum to be produced.<sup>51</sup>

Judge Hand easily found the court to have jurisdiction over the Canadian and Swiss companies, stating it to be "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for [anti-competitive] conduct outside its borders that has consequences within its borders if the conduct is intended to and actually does have an effect on United States imports or exports which the state reprehends."<sup>52</sup> Thus, a two-prong test was delineated. A U.S. court may apply U.S. antitrust laws extraterritorially for violations occurring outside U.S. borders, so long as the violative conduct: 1) is intended to have harmful effects and 2) actually has had such effects.<sup>53</sup> Once the intent of the defendants is shown, the burden shifts to the defendants to show that actual effects did not occur.<sup>54</sup>

Judge Hand found the two-prong test to be satisfied in the ALCOA case<sup>55</sup> and held the Canadian and Swiss companies liable. U.S. courts have widely accepted the so-called "effects" test pronounced in the *ALCOA* decision as the authoritative standard for determining whether jurisdiction lies for extraterritorial antitrust claims.<sup>56</sup>

In addition to the "effects" test, further definition has been given to the jurisprudence with regard to the extraterritorial application of U.S. antitrust laws. Courts since *ALCOA* have realized that the effect on American commerce should not, by itself, suffice to allow the extraterritorial application of U.S. laws, but that foreign interests should also be taken into consideration. As former Attorney General Katzenbach stated, "[a]nything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States."<sup>57</sup>

Evidence for this proposition may be found in certain foreign legis-

51. *Id.* at 442.

52. *Id.* at 443.

53. *Id.* at 444.

54. *Id.*

55. Judge Hand implied that general intent was sufficient to satisfy the first prong of the test, pointing out that it was sufficient for the defendants in the case at hand to have merely "expected" or "supposed" harmful effects to result from their behavior. *Id.*

56. The *Alcoa* opinion was declared a final, unappealable judgment due to the fact that a quorum of the Supreme Court was unavailable. The appeal to the Second Circuit was certified, authorizing it to hear cases "in lieu of a decision by the Supreme Court." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1161 n.46 (E.D. Pa. 1980) (quoting 15 U.S.C. § 29, the statute granting the Second Circuit special jurisdiction).

57. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 611 (9th Cir. 1976) (quoting Nicholas Katzenbach, *Conflicts on an Unruly Horse*, 65 YALE L.J. 1087, 1150 (1956)).

lation, specifically termed "blocking legislation." Several foreign nations have enacted blocking legislation in response to the U.S. extraterritorial application of its laws, antitrust laws in particular.<sup>58</sup> Blocking statutes hinder the ability of American litigants to acquire evidence necessary for their suits and render the enforcement of any judgments obtained abroad ineffective.<sup>59</sup> For example, the blocking legislation passed in the United Kingdom prohibits granting requests for evidence made by foreign authorities and prevents British courts from enforcing certain damage awards.<sup>60</sup> Some of the statutes which have proven quite extensive and powerful include "clawback" provisions, which allow defendants to recover damages paid by them pursuant to a foreign judgment through the attachment of assets the foreign plaintiff may have in that country,<sup>61</sup> rendering the suit and judgment completely ineffective.

Specifically with regard to the antitrust area, courts have acknowledged and attempted to consider such international concerns and avoid retaliatory actions. For example, the Ninth Circuit explicitly pronounced the "effects" test of *ALCOA* to be inadequate in *Timberlane Lumber Co. v. Bank of America*<sup>62</sup> because it does not address the relevant international interests of each case. The court stated that "[t]he effects test by itself is incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and the country."<sup>63</sup> The Third Circuit also declared the inadequacy of a sole "effects" consideration in *Mannington Mills Inc. v. Congoleum Corp.*<sup>64</sup>

In each decision, the "effects" test of *ALCOA* was recognized to be the authoritative standard for deciding the validity of extraterritorial application. However, these courts suggested further considerations be made after the two-prong *ALCOA* test was satisfied. The additional considerations, to be evaluated and balanced in each individual case,

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58. Blocking legislation has been enacted by the following countries in response to the U.S. application of antitrust laws extraterritorially: Great Britain, Australia, Canada, the Netherlands, France, Sweden, the Philippines, Belgium, Italy, New Zealand, Norway, Denmark, Germany, and Finland. Warren Pengilly, *Extraterritorial Effects of United States Commerce and Antitrust Legislation: A View from "Down Under,"* 16 VAND. J. OF TRANSNAT'L L. 853, 872 (1983). For a more specific discussion of such legislation, see John J. Cannon III, *Foreign Statutory Response to Extraterritorial Application of United States Antitrust Law*, 1 DICK. INT'L L. ANN. 125, 155 (1982).

59. Pengilly, *supra* note 58, at 872-73.

60. Cannon, *supra* note 58, at 144.

61. *Id.* at 145.

62. *Timberlane*, 549 F.2d at 611-12.

63. *Id.*

64. *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

include: (a) the degree of conflict with foreign law or policy; (b) the nationality of the parties; (c) the relative importance of the alleged violation of conduct as compared to that abroad; (d) the availability of a remedy abroad and the pendency of litigation there; (e) the existence of an intent to harm or affect U.S. commerce and the foreseeability of the harm or effect; (f) the possible effect upon foreign relations if the court were to exercise jurisdiction and grant relief; (g) whether the court can make its order effective; (h) whether an order for relief would be acceptable in the United States if made by the foreign nations under similar circumstances; and (i) whether a treaty existing between the affected nations has addressed the issue.<sup>65</sup> These suggested considerations have been accepted and applied in later decisions.<sup>66</sup> This expansion of the *ALCOA* test reflects a move by the courts to address comity concerns in the extraterritorial application of U.S. laws.

The jurisprudence with regard to the extraterritorial application of U.S. antitrust laws has been well delineated by the courts. Courts have accepted extraterritorial application as appropriate when the two-prong *ALCOA* "effects" test has been satisfied. Recent cases further suggest that relevant international interests be considered as well through a balancing of several specific factors. In general, courts examining the issue of extraterritorial application in the antitrust area have readily accepted such application and have willingly applied U.S. antitrust laws against foreign entities.

### B. Securities

As in the antitrust area, the extraterritorial application of federal securities laws has been widely accepted by courts.<sup>67</sup> The first significant case to address the question of extraterritorial application came before the Second Circuit in *Schoenbaum v. Firstbrook*.<sup>68</sup> In this shareholder derivative suit, the plaintiff alleged that the directors of the defendant corporation had authorized the sale of the corporation's treasury stock to a Canadian corporation for inadequate compensation after having been informed that the corporation had valuable oil property. The court affirmed the summary judgment entered below in the

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65. *Id.* at 1297-98; *Timberlane*, 549 F.2d at 614.

66. *Zenith*, 494 F. Supp. at 1183 n.46; *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

67. Most cases arising under federal securities law having extraterritorial implications concern the fraud provisions of Section 10b and Rule 10b-5 of the 1934 Securities and Exchange Act, 15 U.S.C. § 78j(b)(1988); 17 C.F.R. § 240.10b-5 (1991).

68. 405 F.2d 200 (2d Cir. 1968).

District Court because the plaintiff had failed to meet the burden of proof for a Rule 10b-5 violation.<sup>69</sup> Nonetheless, because the sales transaction had occurred entirely in Canada, the court discussed at length the extraterritorial application of Rule 10b-5.

In addressing the issue of extraterritorial application, the court discussed Section 30 of the Securities and Exchange Act<sup>70</sup> (Exchange Act) covering Foreign Securities Exchanges. Section 30 establishes the extent to which the Exchange Act applies to persons affecting securities transactions through foreign exchanges.<sup>71</sup> The purpose of the section is to allow persons in the securities business to sell and purchase securities outside the U.S. without having to follow Securities and Exchange Commission (SEC) disclosure and registration requirements.<sup>72</sup> Most importantly, the SEC is given authority to take action under Section 30 to regulate those transactions for which it is necessary so as to prevent evasion of the Exchange Act as a whole.<sup>73</sup> In reliance on this, the court found extraterritorial application of the Exchange Act to be appropriate when necessary to protect American investors. The court stated,

We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities. In our view . . . the specific language of Section 30 [does not] show Congressional intent to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are affected outside the United States, when extraterritorial application of the Act is necessary to protect American investors.<sup>74</sup>

Accordingly, the court held that extraterritorial application of the Exchange Act was appropriate "at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors."<sup>75</sup>

The Second Circuit revisited the issue in 1972 in *Leasco Data Processing Equip. v. Maxwell*.<sup>76</sup> Under this Rule 10b-5 claim, the defendants were alleged to have conspired to cause Leasco, an American company, to buy shares of stock from a British company controlled by

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69. *Id.* at 209.

70. *Id.* at 207.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 206.

75. *Id.* at 208.

76. 468 F.2d 1326 (2d Cir. 1972).

the defendant, a British citizen, at prices in excess of their true value.<sup>77</sup> All of the alleged fraudulent conduct occurred abroad, as well as the purchase or sale of the securities in question. Acknowledging *Schoenbaum*, Judge Friendly, writing for the majority, found the language of the Exchange Act “too inconclusive to lead us to believe that Congress meant to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security.”<sup>78</sup> Judge Friendly declared that the court “would be hard pressed to find justification for going beyond *Schoenbaum*” in such a case.<sup>79</sup>

Nonetheless, the court found extraterritorial application necessary in the case to effectuate the Exchange Act’s overall purpose and held the defendants liable. Judge Friendly emphasized that the overall purpose of the Exchange Act was to protect against fraud in the sale or purchase of securities, whether or not they were traded on established United States markets.<sup>80</sup> Accordingly, the court concluded, “we cannot perceive any reason why [Congress] should have wished to limit the protection to securities of American issuers.”<sup>81</sup> In the case at hand, some of the alleged fraudulent conduct was found to have occurred in the United States; enough, in fact, that Judge Friendly considered the foreign conduct to be “an essential link” in the overall fraud.<sup>82</sup> Although the parties executed the allegedly fraudulent contract in England, the defendants made initial misrepresentations in the United States. According to the court, these initial misrepresentations caused the plaintiffs to fall prey to the fraudulent scheme.<sup>83</sup> Thus, extraterritorial application was necessary to effectuate the Exchange Act’s purposes and protect American investors. Judge Friendly wrote,

While, as earlier stated, we doubt that impact on an American company and its shareholders would suffice to make the statute applicable if the misconduct had occurred solely in England. We think it tips the scales in favor of applicability when substantial misrepresentations were made in the United States.<sup>84</sup>

The “essential link” language served the same purpose as the “effects” test in the antitrust cases: it justified the court’s assertion of extraterri-

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77. *Id.* at 1330.

78. *Id.* at 1334.

79. *Id.*

80. *Id.* at 1335-36.

81. *Id.* at 1336.

82. *Id.* at 1335.

83. *Id.*

84. *Id.* at 1337.

torial jurisdiction. The court simply substituted a finding of U.S. contacts for evidence of actual effects.

In 1975, the Second Circuit again addressed the issue of extraterritorial applicability in *Bersch v. Drexel Firestone Inc.*<sup>85</sup> In this derivative suit, American purchasers of securities in a Canadian corporation sued the corporate officers and shareholders for their failure to reveal material facts in the corporation's prospectus and for common law fraud. The relevant jurisdictional facts went beyond both the *Schoenbaum* and *Leasco* fact situations:<sup>86</sup> The corporations involved were not U.S. corporations, and the alleged fraudulent conduct which occurred in the United States was of minimal importance, being merely preparatory in nature.<sup>87</sup> Initially, Judge Friendly, again writing for the majority, appeared sympathetic to the investors, declaring that "Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners."<sup>88</sup> In the end, however, he held that the unique fact situation of the case was not alone sufficient to make extraterritorial application appropriate.<sup>89</sup>

Judge Friendly, in his analysis of the case, focused on the effects of the sales transactions on U.S. commerce, adopting a stance consciously parallel to the *Alcoa* two-prong "effects" test:<sup>90</sup> "Acts done outside the jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."<sup>91</sup> He found no such intentions existing merely when "in the long run there was an adverse effect on this country's general economic interests or on American securities prices . . . or American investors generally."<sup>92</sup> Rather, for effects to be found, fraudulent conduct abroad must result in injury to purchasers or sellers of securities in whom the United States has an interest. Judge Friendly also emphasized the importance of direct causation, holding that the federal securities laws did not apply to losses from sales of securities to foreigners outside the United States where acts in the United States did not directly cause such losses.<sup>93</sup> Essentially, the

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85. 519 F.2d 974 (2d Cir. 1975).

86. *Id.* at 985-86.

87. *Id.* at 986.

88. *Id.* at 987.

89. *Id.*

90. *Id.* at 989.

91. *Id.* at 988 (quoting *Strassheim v. Daily*, 221 U.S. 280, 284-85 (1911)).

92. *Id.* at 989.

93. *Id.* at 993.



direct causation argument allowed the court to deny the protection of U.S. securities laws to foreigners unless the culpable acts actually occur within the United States.

A few years later, the Third Circuit continued the analysis of the proper extraterritorial application of U.S. securities laws by expanding upon the *Bersch* holding. In *Securities and Exchange Commission v. Kasser*,<sup>94</sup> the SEC tried to invoke jurisdiction over defendants allegedly engaged in a fraudulent scheme involving misrepresentations about the purchase and sale of securities within the United States.<sup>95</sup> The unique facts in this case stretched the issue beyond *Bersch*: the sole victim in this case was a foreign corporation; the fraud had little if any impact within the United States; no securities in question were traded on a U.S. market; there was no sale to any U.S. citizen; and the sales made did not have any impact on the domestic market. Despite the tenuous ties of the case to traditional U.S. jurisdictions, the court allowed the action by the SEC by finding that a significant amount of the alleged fraudulent conduct had occurred in the United States.<sup>96</sup>

In its decision, the court relied almost exclusively on traditional 'territorial' doctrine, and specifically on *Straub v. Vaisman & Co.*, which most recently reaffirmed the traditional territorial doctrine as extended to the securities laws.<sup>97</sup> In addition to the territorial doctrine, the court also relied on the Second Circuit's line of cases, including its broad interpretation of the securities laws and congressional intent.<sup>98</sup>

More significant to the issue of extraterritorial application than its holding, however, the *Kasser* court implicitly recognized the importance of considering relevant foreign interests and international concerns when determining if extraterritorial application is appropriate in a given situation. This recognition is evidenced by the policy reasons given in support for its decision.<sup>99</sup> First, the court emphasized one of the main goals of the securities fraud provisions, deterrence of fraudulent behavior. The *Kasser* court noted that, without extraterritorial

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94. 548 F.2d 109 (3d Cir. 1977).

95. *Id.* at 110-11.

96. *Id.* at 111-12, 115.

97. *Id.* at 112-13 ("[c]onduct within the United States is alone sufficient from a jurisdictional standpoint to apply the federal [securities] statutes." (quoting *Straub v. Vaisman & Co.*, 540 F.2d 591 (3d Cir. 1976))).

98. Specifically, the court refers to the *Bersch* and the *Leasco* cases. Also, the court gave great deference to the Second Circuit in the securities area in general: "The prior pronouncements of this Court and those of the Second Circuit, a Court with special expertise in matters pertaining to securities, lend great support for a holding of jurisdiction here." *Id.* at 115.

99. *Id.* at 116.

application, it would be creating "a haven for . . . defrauders and manipulators . . . to deny such jurisdiction may embolden those who wish to defraud foreign securities purchasers or sellers to use the United States as a base of operations."<sup>100</sup> Further, by allowing the SEC to proceed in this case, "this Court will enhance the ability of the SEC to police vigorously the conduct of securities dealings within the United States."<sup>101</sup>

Second, the court looked to its decision's effect on the foreign legal communities. The court hoped that its tough policing of securities fraud would encourage other nations to do the same. In addition, the court feared that if it did not extend jurisdiction under this claim, "[s]ome countries might decline to act against individuals and corporations seeking to transport securities fraud to the United States."<sup>102</sup> The decision to assert jurisdiction was a way to avoid making the United States a safe place for foreigners to conduct criminal activity.<sup>103</sup>

These cases demonstrate that the courts have extended extraterritorial jurisdiction to enable the enforcement of U.S. securities laws. The reasoning is similar to that used in the extraterritorial application of U.S. antitrust laws. Although the securities cases utilize an "essential link" test rather than the antitrust "effects" test, both tests serve the purpose of establishing sufficient U.S. concern to justify extraterritorial jurisdiction. In addition, the securities cases have followed the antitrust cases in addressing international comity issues before enforcing U.S. laws against foreign entities.

### C. *Employment*

In marked contrast with the antitrust and securities areas, courts have established a clear presumption against the extraterritorial application of American employment regulations. The Supreme Court first examined the question of extraterritorial application in this area in the landmark case, *Foley Bros. v. Filard*.<sup>104</sup> In *Foley*, the Court considered the question of whether the Federal Eight-Hour Law<sup>105</sup> applied to work performed under a contract between the United States and a private contractor on construction projects to be completed in Iraq and Iran. The Court refused to extend the federal regulation to such a

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. 336 U.S. 281 (1949).

105. 40 U.S.C. § 324 (1988).

case. First, the Court emphasized the purely domestic focus of the legislation. It recognized Congress's concerns as solely the domestic labor market and its conditions for employees.<sup>106</sup>

Second, based on this domestic focus, the Court relied on the territorial limitations pronounced in *Blackmer v. United States*<sup>107</sup> to deny extraterritorial application of the Eight-Hour Law. *Blackmer* held that, absent a contrary intent by Congress, legislation is presumed to be applicable only within the territorial jurisdiction of the United States. As the Court could find no evidence in the language of the Eight-Hour Law or in its legislative history to overcome the presumption,<sup>108</sup> it concluded:

The absence of any distinction between citizen and alien labor indicates to us that the statute was intended to apply *only* to those places where the labor conditions of both citizens and alien employees are a probable concern of Congress. Such places do not include foreign countries such as Iraq and Iran.<sup>109</sup>

Therefore, extraterritorial application of the Eight-Hour Law was denied.

Ten years later the Supreme Court examined the possible extraterritorial application of the Labor Management Relations Act (LMRA) in *Benz v. Compania Naviera Hidalgo*.<sup>110</sup> The controversy in this case arose over the picketing of a foreign ship, operated entirely by foreign seamen under foreign articles, while the vessel was temporarily docked in an American port. American unions, to which the foreign seamen did not belong, participated in the picketing.<sup>111</sup> The Court, as in *Foley*, looked for some evidence of congressional intent within the statute itself or its legislative history, to overcome the presumption pronounced in *Blackmer*. Despite its emphasis on the statute's language, the Court found the primarily domestic focus of the LMRA to be controlling, stating, "the whole background of the Act is concerned with industrial strife between American employers and employees."<sup>112</sup> Thus, the presumption against extraterritorial application was again upheld.

Most recently, in 1991, the Supreme Court heard a case concerning Title VII of the 1964 Civil Rights Act<sup>113</sup> in which it conclusively

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106. *Foley Bros.*, 336 U.S. at 285-86.

107. 284 U.S. 421 (1932).

108. *Foley Bros.*, 336 U.S. at 285.

109. *Id.* at 286 (emphasis added).

110. 353 U.S. 138 (1957).

111. *Id.* at 142.

112. *Id.* at 143-44.

113. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

adopted the presumption against extraterritorial application of employment regulations. In *Equal Employment Opportunity Commission v. Arabian American Oil*, the plaintiff was fired while working in Saudi Arabia for a Delaware corporation and brought suit claiming the termination was based on discrimination of his race, religion and national origin.<sup>114</sup> Applying analysis similar to that found in the *Foley* and *Benz* decisions, the Court explicitly rejected the plaintiff's claim because of the lack of evidence showing congressional intent for extraterritorial application of the Civil Rights Act, stating "had congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures" directly.<sup>115</sup>

Thus, the presumption against extraterritorial application of employment regulations has been consistently reinforced. In fact, courts have rejected every claim of such jurisdiction concerning employment statutes since the decision in *Foley Bros.*,<sup>116</sup> including the Federal Employers' Liability Act,<sup>117</sup> the Railway Labor Act,<sup>118</sup> the National Labor Relations Act,<sup>119</sup> and the Equal Pay Act of 1963.<sup>120</sup> Moreover, even where Congress has explicitly extended legislation to extraterritorial application, courts have avoided following this mandate. For example, Congress specifically amended the Age Discrimination in Employment Act (ADEA) of 1967<sup>121</sup> in 1984 to include "trade . . . among the several States; or between a State and *any place outside thereof . . .*"<sup>122</sup> Yet the Seventh Circuit, for example, in *Pfeiffer v. Wm. Wrigley Jr. Co.*,<sup>123</sup> refused to apply the ADEA against a foreign defendant.

In *Pfeiffer*, an American plaintiff brought suit against a German subsidiary with which he had been employed because his employment had been immediately terminated upon his sixty-fifth birthday. The case was brought in 1985, after the adoption of the amendment to the Age Discrimination Act, yet the court refused to allow jurisdiction due to the amendment's non-retroactive status.<sup>124</sup> Judge Posner, curi-

114. 111 S.Ct. 1227 (1991).

115. *Id.* at 1234.

116. Jonathan Turley, "When in Rome:" *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. REV. 598, 618 (1990).

117. 45 U.S.C. §§ 51-60 (1988).

118. *Id.* §§ 151-64 (1988).

119. 29 U.S.C. §§ 151-64 (1988).

120. *Id.* § 206.

121. *Id.* §§ 621-34.

122. Turley, *supra* note 116, at 625 (citing 29 U.S.C. § 630(g) (1982))(emphasis added).

123. 755 F.2d 554 (7th Cir. 1985).

124. *Id.* at 559.

ously enough, however, in writing for the majority stressed the significance of the domestic focus of ADEA, despite the recently adopted amendment clearly evidencing Congress's intent to apply the ADEA extraterritorially.<sup>125</sup> Thus, the presumption against the extraterritorial application of U.S. employment laws has held steadfast, despite recent efforts of Congress to abolish the presumption.

#### D. *Environment*

The same practically irrebuttable presumption against extraterritorial application of employment regulations applies to environmental laws as well.<sup>126</sup> Consideration of this issue has focused primarily on the National Environmental Policy Act<sup>127</sup> (NEPA) of 1969.<sup>128</sup> The NEPA was drafted as an "Environmental Bill of Rights," assigning federal government agencies the responsibility of overseeing government projects under their control that might have harmful environmental effects.<sup>129</sup> In the statute, Congress used very broad language, not mentioning any jurisdictional limits, and stating a broad purpose: "recognizing the . . . critical importance of restoring and maintaining environmental quality to the overall welfare and development of man . . . it is the continuing policy . . . to create and maintain conditions under which man and nature can exist in productive harmony."<sup>130</sup> The statute specifically recognizes the international concerns of environmental protection, requiring agencies operating under the statute to "recognize the *worldwide* and long-range character of environmental problems."<sup>131</sup>

Despite this seemingly permissive language, most courts have dismissed extraterritorial application of NEPA very briefly.<sup>132</sup> One case in particular, however, discussed the issue extensively. The District of Columbia Circuit, in *Natural Resources Defense Council v. Nuclear Regulatory Commission*,<sup>133</sup> (NRDC), considered the application of the statute to a request for a nuclear reactor permit in the Philippines. Not only did the court find the evidence of congressional intent in the

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125. *Id.* at 556.

126. The following discussion on the extraterritorial application of U.S. environmental laws is limited to the issue's treatment in U.S. courts. This note will not address the issue with respect to U.S. foreign policy or international trade negotiations.

127. 42 U.S.C. § 4321 (1982).

128. Turley, *supra* note 116, at 628.

129. *Id.*

130. *Id.* (citing 42 U.S.C. § 4331(A) (1982)).

131. *Id.* (citing 42 U.S.C. § 4332(2)(F) (1982)) (emphasis added).

132. *Id.* at 629.

133. 647 F.2d 1345 (D.C. Cir. 1981).

statute and legislative history insufficient to override the generally established presumption<sup>134</sup> against extraterritorial application, but it adopted an even tougher standard to rebut the presumption in the future.<sup>135</sup> A clear expression of intent by Congress is not enough to override the presumption. Rather, future plaintiffs will have to show "an unequivocal mandate from Congress" for the courts to have jurisdiction.<sup>136</sup> Further, the decision declared exceptions that will apply to any such 'unequivocal mandate' which, in effect, foreclose the possibility of extraterritorial application of any environmental legislation in the future. They include: 1) where conduct occurs outside the United States, 2) where the conduct does not affect, or is not intended to affect, interests within the United States, or 3) where the conduct was not of nationals of the United States.<sup>137</sup> Thus, the presumption against extraterritorial application of U.S. environmental laws appears to have been firmly cemented into the present jurisprudence.

### III. COMPARISON TO RICO

The extraterritorial application of RICO seems a logical inevitability due to its likeness to several aspects of the antitrust and securities laws applied extraterritorially by courts. First, RICO is more similar with regard to the purpose behind its enactment and its intended focus to laws in the antitrust and securities areas which have been applied extraterritorially than those in the environmental and employment areas which have not. The purpose behind the enactment of RICO as well as its broad application by the courts is analogous to that of the Sherman and Clayton Acts in antitrust law. Each were enacted by Congress to combat harmful influences on the U.S. economy: with RICO, racketeering influences and antitrust, anticompetitive influences. Courts have applied each of the statutes broadly, sometimes to situations not originally contemplated by Congress. Similarly, the purpose behind the enactment of RICO is comparable to that of Rule 10b-5 of the Securities and Exchange Act. Congress adopted Rule 10b-5 to combat securities fraud and protect American investors and the market as a whole, while RICO was enacted to combat racketeering activity and protect American businesses and industry. For each statute, the prohibited activity's impact on the U.S. economy as a whole was the primary concern of Congress. Courts have applied both RICO and Rule 10b-5 broadly and to circumstances seemingly outside

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134. See *Foley Bros.*, 336 U.S. at 285-88.

135. Turley, *supra* note 116, at 630-31.

136. *NRDC*, 647 F.2d at 1357.

137. *Id.*; Turley, *supra* note 116, at 631.

the realm of original contemplation by Congress. The broad judicial interpretations of these statutes may reflect expansions in the market and court attempts to address economic realities.

By contrast, the purpose behind employment and environmental laws are quite different, and their focus is more narrow than that of RICO. Employment laws have been enacted by Congress to prevent actions by employers harmful to individual employees. While environmental laws appear to have been enacted to prevent activities which harm the environment so to protect mankind as a whole from environmental hazards, the statutes have traditionally focused on the impact of environmental legal violations only on particular individuals or small geographical areas in a domestic context. Also, the concern of courts in enforcement of the employment and environmental laws has been primarily with the actual act of violation and its impact on individuals, and not so much on the effects of the violation on society as a whole. Thus, employment and environmental laws have a different and a much narrower scope than RICO, aimed at the protection of individuals rather than U.S. businesses and industry.

RICO may be further viewed as analogous to antitrust and securities laws and distinct from employment and environmental laws because of its significant economic focus. Jonathan Turley has distinguished between antitrust and securities laws, on the one hand, as "market" statutes, and employment and environmental laws on the other as "non-market" statutes.<sup>138</sup> This distinction, it is argued, is "effects" based, and corresponds to the different treatment received by each. Courts are traditionally very concerned with "market" statutes and compliance enforcement because of the potentially significant effect violations may have on the U.S. economy, and, consequently apply them broadly, often without hesitation against foreign entities. In contrast, "non-market" statutes have a purely domestic focus. Violations of these statutes do not affect the economy to the same extent. Thus, courts traditionally have applied them in a very limited manner and only domestically.<sup>139</sup> RICO seems to fit clearly into Turley's definition of a "market" statute, since it was enacted to deter racketeering activities primarily because of the significant effect on the U.S. economy.

One court has explicitly recognized the similarities between laws enacted based on economically harmful activity and the need for

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138. Turley, *supra* note 116, at 601. By "market" statutes, Turley refers to those economically based in terms of congressional intent, and similarly, by "non-market", he refers to those non-economically based.

139. *Id.* at 639.

broad, if not extraterritorial application, of such legislation. In 1980, the court in the *Zenith* case,<sup>140</sup> while examining a specific claim under the Sherman Act, declared that its decision would encompass similar claims under the Clayton Act, the Robinson-Patman Act,<sup>141</sup> the Anti-Dumping Act,<sup>142</sup> and the Wilson Tariff Act<sup>143</sup> because all were American economic regulations. The court stated, "Because we believe that the issue with respect to the extraterritorial application of *American economic regulation* are the same *regardless* of the particular statute being applied, we will likewise refrain from extended discussion of those additional bases for jurisdiction at this time."<sup>144</sup> Thus, at least one court has recognized the distinction between market and non-market law and applied economic laws extraterritorially.

In addition, RICO is more akin to law in the securities and anti-trust areas than to those in the employment and environmental areas with regard to the type of conduct regulated. The type of conduct sought to be regulated by RICO may take several forms, from murder to bribery to mail fraud, but all forms are "criminal" in nature. That is, the activities bringing penalties under RICO center around fraudulent intent, and would be viewed by most as wrongful conduct. Similarly, securities fraud and anti-competitive practices, done with the intent (assumed or explicit) of harming another's business, are likewise reprehensible activities. By contrast, paying an employee less than minimum wage or requiring over forty hours of work in one week from an employee may appear cruel and inhumane, but these activities are not generally thought of as "crimes." Instead, violations of most employment laws are civil wrongs which can be enforced without requiring criminal intent. Likewise, in the environmental arena, most violations are not "criminal" and enforcement does not require the element of intent. Often violations of employment and environmental laws are merely management decisions based on the economic considerations demanded of a free-market system. These violations lack the fraudulent intent typically present in RICO violations.

Finally, the analysis employed by the courts in applying RICO is more akin to that in the antitrust and securities areas in that the courts feel broad application of the law is necessary in order to give any effect to them. For example, in the *Pacific & Arctic Railway* case, discussed *supra*, the court found jurisdiction over the defendants as necessary,

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140. *Zenith*, 494 F. Supp. at 1183.

141. 15 U.S.C. §§ 13(a), 13(b), 21(a) (1988).

142. 19 U.S.C. §§ 160-71 (1976).

143. 15 U.S.C. §§ 8-11 (1988).

144. *Zenith*, 494 F. Supp. at 1187 (emphasis added).



because without it no one would be able to regulate the activities in question and the antitrust laws would be rendered totally ineffective.<sup>145</sup> Similarly, throughout the entire line of securities cases discussed above, the courts emphasized the necessity of allowing jurisdiction so as to fulfill the congressional purposes behind the statutes, or else, again, they would be rendered totally ineffective against the activities in question. By contrast, the attitude of the courts in the employment and environmental areas seems to be that the laws and the purposes behind them will still be satisfied and effective with only purely domestic applications. Economic laws, through international transactions, are easily circumvented by departing the country and controlling activities from a foreign haven. Environmental and employment laws, on the other hand, can be fully served by domestic enforcement. Once a violator takes its business elsewhere, the violation no longer directly harms the United States, as the violators are linked to the individual worker or land concerned.

The extraterritorial application of RICO is suggested by its congressionally mandated purpose, its broad language, and its broad applications by the courts. Further, extraterritorial application of RICO is logical because of the statute's similarity in purpose and interpretation of the courts to antitrust and securities laws. Effective application may be achieved by borrowing from the jurisprudence in these areas. First, since under RICO, "racketeering activity" is the conduct being regulated, it seems logical that to have extraterritorial application, at least *some* activity must be required to occur inside the boundaries of the United States. The line of securities cases discussed earlier indicates such a concern by the courts. Whether it be the requirement of enough conduct such to provide "an essential link" between the violation and the United States as in *Leasco*, or simply conduct of "minimal importance" as found in *Bersch*, it seems at least some of the allegedly illegal conduct must occur inside U.S. borders in order for the federal courts to appropriately assume jurisdiction.

As the primary focus of Congress in enacting RICO was on the effects of racketeering activity on the U.S. economy, the "effects" test from *ALCOA* would likely be the most desirable standard to adopt for RICO. To recall, the "effects" test requires only that the actor have intended detrimental effects to occur within the U.S. and to have actually produced these effects. This is appealing when considering the extraterritorial application of RICO because Congress was concerned

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145. 228 U.S. at 106.

not just with the racketeering activity itself, but most of all with its effect on the U.S. economy.

Second, the emphasis in the antitrust area on the consideration of issues of international comity is appropriate for the extraterritorial application of RICO.<sup>146</sup> Successful extraterritorial application of RICO will only be effected if considerations of relevant international interests are addressed. Otherwise, retaliatory actions (such as blocking statutes) and diplomacy conflicts, *inter alia*, will inevitably result, rendering RICO enforcement impossible and causing international strife between the United States and other nations. More generally speaking, any time the United States acts, either through its courts' decisions or the Executive Branch's foreign policy, foreign interests are affected. In fact, in today's global society, many actions taken by U.S. courts and Congress, while appearing to be of little concern to interests abroad, have a strong impact on these interests. As courts have recognized, it is essential that international concerns be considered when deciding jurisdictional issues.

Moreover, due to the recent enactment of blocking statutes by several foreign nations, the scope of RICO as extended to foreign defendants must be viewed in concert with international interests in order to be effective, especially in light of the treble damage remedy available to civil plaintiffs. The emphasis on international considerations in the *Kasser* decision provides a helpful starting point in the necessary jurisprudence. The expansive list of factors suggested for use in the *Mannington* and *Timberline* cases further assists in providing an excellent example of the numerous important considerations to be made in determining whether the extraterritorial application of RICO in a given case is appropriate.<sup>147</sup> Not only is such a thorough consideration of international comity issues appropriate, but it is also necessary if RICO is to be effective against foreign entities. It is in these ways that the jurisprudence established in the antitrust and securities areas with regard to extraterritorial application provides helpful guidance for such an application of RICO.

In conclusion, the extraterritorial application of RICO should be accepted, if not heralded, by the courts and Congress. RICO on its face, with its ambiguous language, broad purposes, and the expansive interpretation given by the Supreme Court, clearly allows such an extension. The main purpose of RICO is to eliminate the harmful effects

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146. As discussed *supra* notes 59-90 and in accompanying text, the jurisprudence in the securities area seems to be moving toward this type of emphasis as well.

147. For the same reasons, the *Mannington* and *Timberline* factors should also be followed in the securities area when considering extraterritorial application.

of organized crime on the U.S. economy. In order to accomplish this goal, RICO must be applied to all violations which impact the United States. This requires application of RICO to the activities of both domestic and foreign entities. The mandate of RICO will continue unfulfilled if foreign entities are immune to RICO sanctions. Foreign entities may flock to the United States to engage in organized crime and escape punishment. Domestic entities may be able to circumvent RICO by establishing foreign counterparts to undertake activities violative of the statute. Thus, the purpose of RICO necessitates extraterritorial application. Also, in comparison with other areas of U.S. regulation in which the issue of extraterritorial application has been considered, RICO seems most similar in several aspects to the anti-trust and securities areas, both of which have sanctioned extraterritorial application. Moreover, the established jurisprudence of the securities and antitrust areas, specifically the effects test and the emphasized consideration of international interests, seems most appropriate for use in RICO's application, so as to fulfill Congress's intended purposes and render RICO most effective in the international arena.