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Federal Crimes & Offenses

Racketeer Influenced & Corrupt Organizations Act (RICO)

The Expanding Territorial Reach of RICO: It's Not Just For U.S.-Based Organized Crime Anymore

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Background

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 ("RICO"), was passed in 1970 for the primary purpose of "seeking the eradication of organized crime in the United States." Pub. L. 91-452, 84 Stat. 922, 923. Although RICO was intended to reach organized crime perpetrated by the Mafia, in the four decades since its inception, RICO has been used to reach conduct as varied as municipal tax evasion, civil fraud, and even terrorism.

Unsurprisingly, as RICO's substantive scope has expanded, so too have courts considered whether RICO may apply extraterritorially. For example, may a plaintiff (or the government) use RICO to seek redress for conduct occurring wholly outside the United States? Conversely, may foreign litigants use RICO to address activities that, while occurring in the United States, have little effect on parties in America? Courts have adopted varied "tests" to determine whether RICO may apply extraterritorially and have reached mixed results.

Now, a case pending on a writ of certiorari to the Supreme Court brings a number of these issues to the fore. *United States v. Philip Morris USA, Inc.* 566 F.3d 1095 (D.C. Cir. 2009) (hereinafter, *BATCo*), *petition for cert. filed*, 78 U.S.L.W. 3501 (U.S. Feb. 19, 2010) (No. 09-980) is part of a $280 billion civil RICO case the government has been pursuing against the tobacco industry for over a decade. Defendant British American Tobacco (Investments) Ltd. ("BATCo") is a British corporation with its principal place of business in England.[1] BATCo is among eleven tobacco industry entities the United States government sued to recover the costs of tobacco-related illnesses allegedly caused by the defendants' conduct. *See United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 31–32 (D.D.C. 2006). BATCo never marketed cigarettes in the United States and did not directly cause fraudulent statements to be made to U.S. consumers regarding the potential health effects of smoking. Yet, both the district court and the D.C. Circuit Court of Appeals held that BATCo's wholly foreign conduct provided a sufficient basis for RICO liability

because that conduct was part of the tobacco industry's scheme to hide the health effects of smoking; a scheme that had consequent effects in the United States.

Indeed, the D.C. Circuit held that any time foreign conduct has adverse effects within the United States, there is actually no "true" question of extraterritoriality for the court to examine at all. *BATCo*, 566 F.3d at 1130. Instead, in a departure from long-standing precedent establishing a presumption against the extraterritorial application of U.S. laws, the D.C. Circuit held that where such adverse effects are felt in the United States, the court need not consider that presumption, nor whether Congress intended the law to apply outside the United States. *Id.* at 1130.

If the D.C. Circuit Court's decision is left intact, it will represent a substantial expansion of the extraterritorial application of RICO which could present palpable risks for U.S. companies with foreign affiliates and foreign companies that conduct operations in the United States.

The Presumption Against Extraterritoriality

The presumption against the extraterritorial application of U.S. laws dates back to 1909 when the Supreme Court expressed concern that extraterritorial application of U.S. law could create conflicts between U.S. interests and the right of foreign governments to regulate conduct occurring within their own territory. *American Banana v. United Fruit Co.*, 213 U.S. 347, 357–58 (1909), overruled in part by *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990). The Supreme Court has reaffirmed the presumption against extraterritoriality, absent some indication that Congress intended legislation to apply outside the United States. *See, e.g.*, *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (superseded in other respects by 42 U.S.C. §§ 2000e(f), 12111(4)) (requiring a "clear statement" that Congress intended the law to apply abroad); *Smith v. United States*, 507 U.S. 197, 204 (1993) (there must at least be "clear evidence" of Congress' intent); *see also F. Hoffman LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 174 (2004).

On its face, RICO is silent as to its extraterritorial application. *See Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir. 1991); *Jose v. M/V Fir Grove*, 801 F. Supp. 349, 355 (D. Or. 1991); *Kauthar SDN BHD v. Steinberg*, 149 F.3d 659, 671 (7th Cir. 1998). At least one court has held that Congress could not have intended for RICO to apply extraterritorially because the stated purpose of the statute is limited to the eradication of organized crime "in the United States," and the statute fails to provide for any mechanism for service of process outside the country. *See Jose*, 801 F. Supp. at 355–57. Other courts, however, have looked to RICO's focus on activities affecting "interstate *or foreign commerce*" (18 U.S.C. § 1962(a)) (emphasis added) as evidence that Congress intended a wider scope. *See Starlight Intern. Inc. v. Herlihy*, 13 F.Supp.2d 1178, 1184 (D. Kan. 1998); *Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1353 (11th Cir. 2008).

Tensions in Existing Case Law

Courts have employed two tests to determine whether RICO may reach beyond U.S. borders.

The first test, known as the "conduct test," asks whether "conduct material to the completion of the fraud occurred in the United States." *Concern Sojuzvneshtrans v. Buyanovski*, 80 F. Supp. 2d 273, 278 (D. N.J. 1999). Merely preparatory acts or conduct remote from the actual consummation of the fraud usually are not sufficient to establish jurisdiction. *See Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996) (no subject matter jurisdiction where use of mails and wires in the United States was part of a series of preparatory acts for fraud consummated abroad).

The second test, the "effects test," considers whether the conduct at issue (even if it takes place entirely abroad) has effects in the United States. There are two iterations of this test. The first (adopted from the test employed in securities law cases), assesses whether the conduct has substantial, direct, and foreseeable effects in the United States. *Wiwa v. Royal Dutch Petrol. Co.*, 2009 BL 97569 at *11–12 (S.D.N.Y. Mar. 18, 2009) (transactions "'with only remote and indirect effects in the United States do not qualify as substantial'") (citation omitted); *see also Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 252 (S.D.N.Y. 2008). The second version of the effects test (adopted from the test employed in antitrust cases) asks whether the conduct was intended to, and actually did, have an effect on the United States. *Wiwa*, 2009 BL 97569 at *14 (second version requires plaintiff to provide some specific evidence of the effects in the United States). Courts differ as to which version of the effects test is appropriate, often applying both to the same set of facts. *Id.* at *17–24.

In practice, the second version of the test may be somewhat less onerous. Courts applying the first version of the test often find that the effects in the United States are too attenuated to ground liability. *See, e.g.*, *Boyd*, 544 F. Supp. 2d at 252 (defendant's RICO enterprise to secure Iraqi wheat market monopoly was not the "direct cause" of the drop in wheat prices, but merely one of many contributing factors). By contrast, the antitrust version of the effects test does not inquire into how direct or foreseeable the results of the racketeering activity were. For example, in *United States v. Noriega*, 746 F. Supp. 1506, 1510 (S.D. Fla. 1990), *aff'd*, 117 F.3d 734 (11th Cir. 1997), the court found that General Manuel Noriega could be liable for providing "refuge and a base" in Panama for the Medellin drug cartel's operations because the cartel intended to import the drugs into the United States, yet did not specifically analyze whether Noriega's conduct directly led to the effects in the United States. Instead, the court concluded that because the "object of the alleged conspiracy was to import cocaine into the United States" the effects were sufficiently palpable to support jurisdiction. *Id.* at 1514.

Although the elements of the conduct and effects tests are well-defined, courts remain divided as to how to apply the presumption against extraterritoriality in conjunction with these tests.

In applying the conduct test, the presumption against extraterritoriality is usually expressed as a concern that American courts not be used to provide windfall judgments to foreign litigants in cases involving only an attenuated connection to the United States. *See, e.g.*, *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003) (citing cases) (RICO's purpose is not "to provide windfall civil judgments to citizens of any country . . . for fraudulent transactions which only

casually touch upon the United States"). Other courts, however, focus on the United States' inherent interest in deterring actors from using America as a base for peddling fraud. *See, e.g.*, *Concern*, 80 F. Supp. 2d at 279 ("where the key fraudulent acts . . . project from the United States . . . exporters of racketeering activity [should not] remain[] insulated from this territory's laws.").

Courts have likewise adopted differing — often inconsistent — approaches to accounting for the presumption against extraterritoriality when applying the effects test. However, three analytical frameworks generally prevail.

First, some courts, including several in the Second Circuit, make a threshold determination of Congressional intent. For example, in *Norex Petroleum Ltd. v. Access Industries, Inc.*, 540 F. Supp. 2d 438 (S.D.N.Y. 2007) the court dismissed the RICO claims of a Canadian shareholder of a Russian oil company and rejected plaintiff's claim that the effects test was met by virtue of Canada's "equal access" treaty with the United States. The court held that Congress did not intend to use the resources of U.S. courts to resolve issues involving purely foreign transactions. *Id.* at 445; *see also North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996) (courts should not assume that RICO's application abroad should echo that of the securities and antitrust laws).

Other courts acknowledge that international comity concerns should inform the effects test. In *Jose* , the court not only analyzed whether RICO was intended to apply to the labor practices of foreign defendants, but it also applied a multifactor test developed by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (superseded in part by statute as stated in *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988)) to assess the international comity impact of applying U.S. law internationally.[2] The court held that comity weighed against extraterritorial application of RICO because, although the defendants' allegedly fraudulent labor practices could have a significant impact on the Philippine shipping industry, it would have only minimal impact on commerce within the United States. *Jose*, 801 F. Supp. at 357–358; *see also North South*, 100 F.3d at 1052 ("RICO ... provides for treble damages, which heightens concerns about international comity and foreign enforcement").

By comparison, even before the appellate court's decision in *BATCo*, the D.C. Circuit historically evinced a more aggressive approach to the extraterritorial application of U.S. laws. For example, in *Laker Airways Ltd. v. Sabena, Belgian World Airways*, 731 F.2d 909, 923 (D.C. Cir. 1984), the court considered whether Laker Airways was the victim of a predatory pricing scheme perpetrated by European competitors. Relying on principles of criminal law, the court reasoned that "when a malefactor in State A shoots a victim across the border in State B, State B can proscribe the harmful conduct," and thus held that extraterritorial application of U.S. anti-competition law was appropriate. In so doing, the court held that where foreign conduct results in domestic effects, the assertion of jurisdiction "is not an extraterritorial assertion of jurisdiction" at all. *Id.* Nearly ten years later, in *Environmental Defense Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) the D.C. Circuit reaffirmed that holding when it considered whether certain provisions of the National Environmental Policy Act extended to the National Science Foundation's operations in Antarctica.

The court held that "the presumption [against extraterritoriality] is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States."[3]

Nevertheless, in both *Laker* and *Massey*, the court gave some consideration to the question of Congressional intent. *See Laker*, 731 F.2d at 923 (Congress likely intended anti-competition legislation to have extraterritorial reach, given the "radiating consequences of anti-competitive activities"); *Massey*, 986 F.2d at 533 ("courts should look to see if there is any indication that Congress intended to extend the statute's coverage 'beyond places over which the United States has sovereignty *or some measure of legislative control*.'") (citation omitted).

The BATCo Decision

The D.C. Circuit's opinion in *BATCo*, however, threatens to expand the extraterritorial scope of U.S. legislation even further than *Laker* and *Massey*. *Laker* and *Massey* included some analysis of Congressional intent. By contrast, in *BATCo* the DC Circuit held that where the effects test is met, the presumption against extraterritoriality has no role, and there is no need to analyze whether Congress intended for the statute to reach foreign conduct.

BATCo argued before the D.C. Circuit that the district court failed to assess properly whether RICO could reach BATCo's wholly foreign conduct. The D.C. Circuit rejected that argument stating that "BATCo's point has nothing to do with the case at hand" and held that any "foreign conduct meeting th[e] 'effects' test is 'not an extraterritorial assertion of jurisdiction.'" *BATCo*, 566 F.3d at 1130 (citation omitted). The court held that there was no need to consider Congress' intent in enacting RICO – it "need only decide whether the district court erred in applying the effects test." *Id.* In essence, the D.C. Circuit held that the effects test can serve as a substitute for (and *prima facie* evidence of) Congressional intent.

Importantly, the D.C. Circuit sidestepped several thorny issues presented by the district court's decision. First, the D.C. Circuit did not address that the district court found that the effects test was satisfied based on narrow factual findings as to BATCo's conduct.[4] The district court found that BATCo engaged in extensive, decades long research (conducted overseas) regarding the health effects of smoking, was aware of the harmful effects of tobacco use, and shared its findings with its U.S. affiliate, B&W. B&W, not BATCo, withheld the findings from the U.S. Surgeon General. The district also court noted that BATCo was a member of a number of industry trade groups, including INFOTAB, an international group that worked with domestic trade groups to further the tobacco industry's goals. Reasoning that RICO should be "broadly construed to reach a wide variety of activity," the district court purportedly applied the first version of the effects test, requiring a "substantial," "direct," and "foreseeable" effect in the United States, but then summarily concluded that BATCo's conduct met the test, because "many of BATCo's statements and policies . . . concerned U.S. subsidiary/affiliate Brown & Williamson . . . ." and "BATCo's activities and statements furthered the Enterprise's overall scheme to defraud, which had tremendous impact in the United States." *Philip Morris*, 449 F. Supp. 2d at 873. Yet, the district court never addressed

which of BATCo's "statements and policies . . . concerned" B&W, much less explained how any of those statements and policies had any direct effect in the United States. Far from directly linking any conduct specifically perpetrated by BATCo to consequences felt in the U.S., the district court grounded BATCo's liability on the substantial domestic effect of the tobacco industry's overall scheme. The D.C. Circuit did not substantively consider this issue. Instead, it reiterated the district court's findings and concluded that "these unchallenged findings, together with the findings of the tremendous domestic effects of the fraud scheme generally, make clear that the district court committed no error." *BATCo*, 566 F.3d at 1131.

The D.C. Circuit also never seriously considered whether BATCo could have foreseen the effects of its co-defendants' acts. Rather, it relied on statements made by other defendants about the global interconnectedness of the tobacco industry, and did not specifically analyze whether BATCo knew or should have known about its co-defendants' activities. *Id.*

BATCo raises substantial questions about the scope and meaning of the effects test. First, by bypassing the question of Congressional intent, the decision places in doubt the relevance of the century-old presumption against extraterritoriality. Second, the court left open the question of how *direct* effects must be to give rise to extraterritorial jurisdiction over foreign acts and failed to address the impact of intervening events on the effects test. Courts have previously held that "an effect cannot be 'direct' where it depends on [ ] uncertain intervening developments," *United States v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004), but *BATCo* suggests that intervening acts will not defeat a finding that the effects were "direct." The D.C. Circuit found that the effects test was satisfied, in part, because BATCo shared sensitive research with B&W, who later decided to withhold it from the Surgeon General. Neither the district court nor the D.C. Circuit analyzed whether B&W's intervening decision to hide the research should insulate BATCo from liability under RICO.

Potential Impact of the BATCo Decision

If the *BATCo* decision is upheld, it could pose significant consequences for foreign corporations doing business in the United States and for U.S. companies with foreign affiliates. If Congressional intent to regulate foreign conduct can be presumed anytime domestic effects are felt, a whole new realm of conduct will fall under RICO's scope. For example, companies with foreign operations could find themselves subject to RICO liability for peripheral activities that are later construed to be part of a "scheme" with effects in the United States. Or, foreign entities could face RICO liability for the unforeseeable conduct of other parties. Indeed, the *BATCo* decision suggests that a party could be held liable for conduct that it never intended to reach U.S. shores.

The import of *BATCo* will likely extend beyond RICO given that the effects test is used in myriad other contexts, including antitrust, copyright, and securities law. In the past, international reaction to the aggressive extraterritorial application of U.S. law has resulted in withdrawals or reductions in foreign investment, retaliatory action against U.S. companies' corporate transactions in foreign countries, and generalized political damage to America's foreign relations.

If the Supreme Court takes up *BATCo*, hopefully it will clarify the role of the presumption against extraterritoriality and reaffirm the importance of determining Congressional intent whenever litigants seek to apply a law to wholly foreign conduct. Given the high court's emphasis on statutory language as evidence of Congressional intent, it may issue some guidance on the type of foreign conduct RICO was meant to encompass. Regardless, the *BATCo* case provides an ideal vehicle for resolving the often confusing and divided jurisprudence regarding the limits of the effects test, and the presumption against extraterritoriality.

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1 BATCo is a foreign affiliate of Brown & Williamson Tobacco Co. ("B&W"), a U.S. company.

2 Among the factors to be considered are the (1) degree of conflict with foreign law; (2) nationality of the parties; (3) extent to which compliance can be expected; (4) relative significance of the effects in the United States; (5) extent to which there was an intent to harm American interests; (6) foreseeability of the effects; and (7) relative importance of the conduct within the United States to charged violations. *Timberlane*, 549 F.2d at 614.

3 Before *BATCo*, courts in the D.C. Circuit usually declined to reach the issue of the extraterritorial application of RICO. *See, e.g.*, *A.G. Intern. Svcs. v. Newmont Mining USA Ltd.*, 346 F. Supp. 2d 64 (D.D.C. 2004). On one occasion, the D.C. district court acknowledged that "the key consideration [in applying RICO extraterritorially] is congressional intent." *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 115 (D.D.C. 2004) However, recent cases hew more closely to the analysis in *Laker* and *Massey*, focusing primarily on whether the conduct or effects tests were met, with less attention to Congressional intent. *See, e.g.*, *Oceanic Exploration Co. v. ConocoPhilips, Inc.*, 2006 BL 100159 at *40, (D.D.C. Sept. 21, 2006).

4 By contrast, the district court's 900-page opinion contained extensive factual findings about BATCo's co-defendants. *Philip Morris*, 449 F. Supp. 2d at 1-867.

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