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Reconsidering the Extraterritorial Reach of the Mail and Wire Fraud Statutes

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Assume the following scenario: A group located in England that orders goods from a company, also located in England, plans and executes a "bust-out" scheme. However, at some point during the execution of the scheme, to enhance its credibility or for lulling purposes, the schemers have a confederate in the United States send an email or mailing to the victim company.

Based on that communication, a federal prosecutor in the United States could indict the English participants in the scheme under the mail and wire fraud statutes substantively or, at a minimum, for conspiracy and, on the current state of the law, expect the indictment to survive a motion to dismiss. The reach of those statutes to certain kinds of frauds (i.e., fiduciary and honest services) has been cut back. (*See Skilling v. United States*, 130 S. Ct. 2896 (2010). *See also Cleveland v. United States*, 531 U.S. 12 (2000) (holding that a state-issued license is not property for purposes of the mail fraud statute.)) However, the courts have not set any comparable limitation on their use to prosecute frauds that are, at their essence, extraterritorial. To the contrary, these statutes have been given broad extraterritorial application, and motions to dismiss that have raised the issue have not been successful.

The recent Supreme Court decision in *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010), may, however, suggest an opening for revisiting that issue. In *Morrison*, a securities fraud action, the Court reaffirmed the primacy of the statutory presumption against extraterritoriality. Unless congressional intent to make a statute extraterritorial is clear, it is presumed that the statute does not have extraterritorial reach. As the Securities Exchange Act is silent as to its extraterritorial reach, the Court held that it should be construed to have none. In further reliance on the presumption, the Court struck down the conduct and effects tests, which have been developed chiefly by the Second Circuit for determining when exceptions should be made for arguably extraterritorial cases, a holding that should have consequences for the application of other "silent" statutes. Indeed, the Second Circuit has, in response to *Morrison*, abandoned its conduct and effects tests for Racketeer Influenced and Corrupt Organizations (RICO) Act cases. *See Norex Petroleum Ltd. v. Access Indus.*, 631 F.3d 29 (2d Cir. 2010).

The *Morrison* holding should similarly make a difference in the construction of the mail and wire fraud statutes. Until now, courts have generally approached the issue of a statute's territorial reach as a question relating to its jurisdiction. However, *Morrison* defines the issue of extraterritoriality as a "merits" issue rather than a "jurisdictional" one. Thus, under *Morrison*, with reference to mail fraud, while a use of the domestic mails would confer jurisdiction on a federal court to hear a case involving an otherwise foreign scheme, that doesn't answer whether the statute should be construed to apply to the prosecution of such schemes. Similarly, while the

wire fraud statute's reference to foreign commerce, for jurisdictional purposes, has previously been held to be a sufficiently clear indication of congressional intent to give it extraterritorial reach, that should no longer be the case. Indeed, *Morrison* specifically rejected the argument that a statute's reference to foreign commerce shows such intent. In other words, under *Morrison*, a criminal statute's expansive jurisdictional provisions no longer necessarily provide a basis for its extraterritorial application.

While American criminal jurisdiction is ordinarily territorial, there is no issue as to whether Congress can give its laws extraterritorial application. It can. Rather, the issue is whether, in enacting a particular statute, Congress has intended to do so. The courts have always upheld the reach of the mail and wire fraud statutes to the prosecution of foreign frauds against defense arguments that they should not be applied extraterritorially. However, these rulings have usually avoided determining whether the statutes are extraterritorial by holding that what matters is whether the statutes' domestic jurisdictional requirements have been met. The statutes have been construed to penalize the domestic use of the instrumentalities of commerce in the commission of frauds, wherever they may be executed, not the frauds themselves. The "gist of the offense" is not the devising of the fraudulent scheme, it is the use of the mails to execute it. *Hartzell v. United States*, 72 F.2d 569, 576 (8th Cir. 1934). Similarly, as to wire fraud, see, for example, *United States v. Gilboe*, 684 F.2d 235, 238 (2d Cir. 1982), "jurisdiction under § 1343 is satisfied by defendant's use of the wires to obtain the proceeds of his fraudulent scheme." As the Sixth Circuit stated in *United States v. Wood*, 364 F.3d 704, 711 (6th Cir. 2004), "'the mail and wire fraud statutes do not penalize the victimization of specific persons; rather, they are *directed at the instrumentalities of fraud*.' . . . 'The place where the scheme is conceived or put in motion is immaterial, it is the place of mailing or delivery by mail.'" (emphasis in original).

At least one pre-*Morrison* case, *United States v. Kim*, 246 F.3d 186 (2d Cir. 2001), did give consideration to the presumption. However, it determined that the wire fraud statute is intended to reach frauds primarily carried out abroad. It found a "clear" indication of such congressional intent in a 1956 amendment that "include[d] the words 'foreign commerce' so as to reach fraud schemes furthered by foreign wires as well as by interstate wires." *Id.* at 189.

In *United States v. Christopher West*, Case No. 08 CR 669 (N.D. Ill. June 23, 2010), the court construed the mail fraud statute to be extraterritorial on a different rationale, pursuant to *United States v. Bowman*, 260 U.S. 94 (1922). In *Bowman*, the Court had approved the extraterritorial application of a criminal statute prohibiting a conspiracy to defraud a corporation in which the United States is a shareholder, even though the statute was silent as to its extraterritorial application. (The scheme took place on the high seas on board a ship owned by the corporation.) While the Court affirmed the continuing applicability of the presumption against extraterritoriality, it held that "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction or fraud wherever perpetrated . . ." *Id.* at 98. *West*'s reliance on *Bowman* is not

persuasive because it was premised on the fact that the victim of the fraudulent scheme (committed at Bagram Air Force Base, Afghanistan) was the United States, and "an extraterritorial location would be a probable place for its commission." *West*, No. 08 CR 669 at 8. However, *Bowman* does not hold that a statute's extraterritorial reach is to be construed "as applied." The determination is instead to be made based on whether the purpose of the statute is the protection of the interests of the United States. The mail and wire fraud statutes, of course, are also intended to protect nongovernmental victims.

So, if, as in *Kim*, the wire fraud statute can be construed to have extraterritorial application, even when the presumption against extraterritoriality is considered, how does *Morrison* affect the issue? First, it reframes it procedurally. Until *Morrison*, the issue of extraterritoriality had been viewed as jurisdictional. *Morrison* "corrects" that "threshold" error. It defines the issue of extraterritoriality instead as a "merits" question. As it states, "[T]o ask what conduct [a statute] reaches is to ask what conduct [it] prohibits, which is a merits question. Subject matter jurisdiction, by contrast, 'refers to a tribunal's power to hear a case.'" *Morrison*, 130 S. Ct. at 2877. Thus, the fact that the use of the mails and interstate and foreign wire facilities confers jurisdiction to hear cases under sections 1341 and 1343 doesn't mean that those statutes are to be construed to have extraterritorial reach. Moreover, *Morrison* specifically rejects the argument that a statutory reference to foreign commerce shows that a statute is intended to have extraterritorial application. Section 10(b) of the Securities Exchange Act, under review in *Morrison*, prohibits any manipulative or deceptive conduct under the regulations of the SEC, that is, Rule 10b-5, "by the use of any means or instrumentalities of interstate commerce or the mails . . ." However, *Morrison* states that there is "nothing" in that language "to suggest it applies abroad." *Id.* at 2881. In response to the government's argument that the reference to foreign commerce in the statute's definition of interstate commerce shows such intent, the opinion makes clear that "[t]he general reference to foreign commerce in the definition of 'interstate commerce' does not defeat the presumption against extraterritoriality." *Id.* at 2882.

The implications, then, of *Morrison* for construction of the mail and wire fraud statutes should be clear: They cannot be construed to have extraterritorial reach based on the expansive scope of their jurisdictional provisions. As they are otherwise silent as to their reach, and there is nothing about their scope and purpose that renders locality irrelevant, they should be construed to be domestic statutes.

The argument against the extraterritoriality of the mail and wire fraud statutes, in reliance on *Morrison*, has so far been made unsuccessfully in two cases, *United States v. Coffman*, 2011 U.S. Dist. LEXIS 14600 (E.D. Ky. 2011), and *United States v. Mandell*, 2011 U.S. Dist. LEXIS 27064 (S.D.N.Y. 2011). However, neither provides a fair test of the argument; in both, there was substantial domestic conduct. Indeed, in *Mandell*, the district court noted that the "fact that defendants engaged in some conduct abroad does not mean that conduct here in the United States is not covered by the mail and wire fraud statutes." *Mandell*, 2011 U.S. Dist. LEXIS 27064, at *15. Even so, both courts relied on the Supreme Court's earlier decision in *Pasquantino v.*

United States, 544 U.S. 349 (2005), in rejecting the defendants' arguments that the statutes don't reach foreign frauds.

That reliance, however, may be misplaced. In *Pasquantino*, the defendants were convicted of a wire fraud scheme in which they smuggled liquor into Canada, defrauding the Canadian government of excise tax revenues. While, factually, the case involved a fraud on a foreign victim, the Canadian government, the primary issue was not whether the wire fraud statute should be construed extraterritorially. It was whether the prosecution violated the common law revenue rule, which bars U.S. courts from enforcing the tax laws of foreign countries. The majority opinion determined that it did not. The issue of the statute's extraterritoriality was raised by Justice Ginsburg's dissent, which maintained that this prosecution was an impermissible extension of the statute's reach, in violation of the presumption against extraterritoriality. As the dissent stated, "[c]onstruing §1343 to encompass violations of foreign revenue laws . . . ignores the absence of anything signaling Congress' intent to give the statute such an extraordinary extraterritorial effect." *Pasquantino*, 544 U.S. at 377 (Ginsburg, J., dissenting). However, the majority opinion gave short shrift to the argument, dismissing it as a "novelty" and denying that its decision gave the wire fraud statute extraterritorial reach. The majority stated that the case presented a domestic application of the statute, pointing to the execution of the scheme by the "use of U.S. interstate wires." At the same time, the majority suggested in passing that the statute has extraterritorial application. Because the wire fraud statute can be employed to punish frauds "executed in interstate or foreign commerce," it "surely [is] not a statute in which Congress had only 'domestic concerns in mind.'" *Id.* at 372.

Given that the majority opinion found the execution of the scheme in *Pasquantino* to be domestic, its suggestion that Congress intended extraterritoriality by its statutory reference to foreign commerce is at best dictum. More important, it is inconsistent with *Morrison*'s later statement that "'we have repeatedly held that even statutes that . . . expressly refer to '*foreign* commerce' [in their definitions of commerce] do not apply abroad. . . . The general reference to foreign commerce in the definition of 'interstate commerce' does not defeat the presumption against extraterritoriality." *Id.* at 2882 (emphasis in original). Moreover, the implication that use of interstate facilities would alone be sufficient to render an otherwise extraterritorial scheme domestic also appears to be contradicted by *Morrison*'s separation of a statute's jurisdiction from the issue of its territorial reach and by its discounting of the significance of jurisdictional contacts in determining whether an essentially extraterritorial case should be deemed to be domestic. As *Morrison* states,"[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Id.*at 2884.

If the mail and wire fraud statutes are no longer to be construed to have extraterritorial application, how then should the determination be made as to what constitutes domestic criminal activity that is within their reach? The answer should be relatively easy with regard to schemes at the two ends of the spectrum. Ponzi schemes such as Madoff's or the Rothstein scheme in South Florida, planned and primarily executed in the United States, are clearly domestic. On the other

end of the spectrum, the bust-out described in the opening paragraph and the scheme in *United States v. Kim* appear to be impermissibly extraterritorial. (In *Kim*, the defendant, a New York resident, was indicted for wire fraud for approving payment of inflated travel vouchers submitted to the United Nations as part of its peacekeeping mission in Bosnia-Herzegovina, while he was stationed in Bosnia-Herzegovina. The payments were made by wire from a New York bank.) However, what about the schemes, such as in *Coffman* and *Mandell*, that are transnational? How is the determination to be made at what point a scheme that is both domestic and foreign in participants and execution should be considered to be extraterritorial?

The Court's approach in *Morrison* to such line drawing was to determine the "focus" of congressional concern, separate and apart from the location "where the deception originated." It held that section 10(b)'s focus is on transactions in securities listed on domestic exchanges and domestic transactions in other securities. Similarly, in *Cedeno v. Intech Group, Inc.*, 733 F. Supp. 2d 471 (S.D.N.Y. 2010), a RICO case in which, following *Morrison*, the district court dismissed the complaint as alleging an extraterritorial scheme, RICO's focus was construed to be on domestic enterprises "as the recipient of, or cover for, a pattern of criminal activity." (The author represents one of the defendants in this case, which is now on appeal.) However, defining a "focus" for mail and wire fraud purposes is not as neatly done. While there may be a formal entity that is used in the execution of the fraud, such as a brokerage or law firm, there may not be such an entity, or there may be both foreign and domestic entities.

Another substantial issue is the application of the statutes to fraudulent schemes located outside the United States and directed against victims in the United States, for example, the hypothetical English bust-out ordering its products from a U.S.- based supplier. Victim venue, that is, the filing of charges in the district where the victim is located, has long been a staple of mail and wire fraud prosecutions. More fundamentally, it would be difficult to argue that the anti-fraud statutes were not intended to protect domestic victims against targeting by foreign schemes, even though that position appears contrary to *Morrison*'s categorical rejection of domestic effects exceptions for extraterritorial schemes. *Morrison*, 130 S. Ct. at 2878–81.

A possible approach would be, as has been suggested with regard to RICO, to develop a "predominance test," which would look at whether the United States is the center of the alleged criminal activity, both as to the location of the execution of the scheme, use of the mails and wires aside, and the defendants and victims. (With regard to RICO, see Jonathan C. Cross, "RICO's Post-'Morrison' Reach: Will Other Courts Adopt the 2nd Circuit's Approach?," *Law.com* (Nov. 12, 2010).) This is, effectively, the Second Circuit's approach in *Norex*, which defined the issue as whether a federal court can hear a RICO claim that "primarily involves foreign actors and foreign acts." *Norex*, 622 F.3d at 149.

In sum, the effort to provide guidelines for distinguishing the domestic from the extraterritorial under the mail and wire fraud statutes may prove to be less straightforward than under the securities laws and RICO. However, given the range of prosecutions brought under these

statutes, the issue will continue to arise with some frequency. Defense lawyers are now armed with better arguments, following *Morrison*, for challenging the prosecution of cases that are extraterritorial.

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