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COMMENTS

CIVIL RICO: BEFORE AND AFTER *SEDIMA*

I. INTRODUCTION

A substantial debate has ensued regarding the application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to legitimate business enterprises.¹ Courts disagree as to whether a broad or narrow interpretation of the statute is warranted. RICO was enacted in order to provide an additional enforcement weapon in the war against organized crime. However, a broad interpretation of the statute has resulted in treble damage liability on respectable business and commercial enterprises. As a result, some courts created standing barriers in an attempt to restrict the availability of the RICO treble damage remedy in private civil actions. These standing barriers were, however, rejected by other courts in favor of a broad application of RICO. Courts rejecting standing barriers contended that the sweeping imposition of RICO liability was necessary for RICO to function as an effective weapon in the fight against organized crime.

In *Sedima S.P.R.L. v. Imrex Co.*,² the United States Supreme Court eliminated the two standing barriers applied most frequently so that RICO could be an effective tool in combatting organized crime. In dicta, however, the Court encouraged the development of a previously underutilized standing barrier, the "pattern" requirement.³ Consequently, *Sedima* shifted the RICO controversy to a new front.

This Comment will analyze the change in focus on the private civil right of action stemming from a RICO violation. Part II of this Comment will provide essential background in-

1. See, e.g., Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME LAW. 237, 280-83 (1982); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655 (1982); Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983).

2. 105 S. Ct. 3275 (1985).

3. *Id.* at 3287.

formation. Part III will examine the two previously employed standing barriers to RICO claims. Part IV will analyze the Supreme Court's discussion in *Sedima* and its reasoning. Part V discusses the new standing limitation created by *Sedima*. The Comment concludes with a plea for congressional action in order to resolve the debate concerning the breadth of the civil RICO provisions.

II. BACKGROUND

RICO was enacted as Title IX of the Organized Crime Control Act of 1970.⁴ The RICO statute provides for a private cause of action that enables a successful plaintiff to recover treble damages.⁵ The statutory language in section 1964(c) specifically states: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."⁶ As the quoted language indicates, violation of section 1962 is required in order to invoke the RICO cause of action.⁷ Section 1962 defines the prohibited conduct.⁸

4. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of 18 and 28 U.S.C. (1982)).

5. See 18 U.S.C. § 1964(c) (1982).

6. *Id.* Subsection (a) gives the district courts of the United States "[j]urisdiction to prevent and restrain violations of section 1962. . . ." 18 U.S.C. § 1964(a) (1982). Subsection (b) enables the Attorney General to institute proceedings in actions brought by the United States government. 18 U.S.C. § 1962(b) (1982). For further analyses of these civil remedies, see Note, *Equitable Law Enforcement and the Organized Crime Control Act of 1970 — United States v. Cappetto*, 25 DE PAUL L. REV. 508 (1976); Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192 (1975). Subsection (d) states: "A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States." 18 U.S.C. § 1964(d) (1982).

7. See *Bays v. Hunter Sav. Ass'n*, 539 F. Supp. 1020, 1023 (S.D. Ohio 1982). Section 1962 is commonly known as "criminal RICO." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983).

8. Section 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal. . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or opera-

In section 1961 Congress explained several key terms to assist in the implementation of RICO.⁹ Most significantly, "racketeering activities" were defined as violations of any one of over thirty separate, already existing state and federal statutes.¹⁰ These activities have been referred to as the "predicate acts."¹¹ A "pattern of racketeering" encompasses two violations of any of the predicate acts within the past ten years.¹²

RICO was enacted by Congress to assist in the fight against organized crime.¹³ New weapons were needed because the existing federal and state laws that imposed fines and prison sentences were ineffective in combating organized crime.¹⁴ The new weapon, RICO, aims at the "economic base" of organized crime.¹⁵ The express RICO provisions au-

tion of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962 (1982).

Subsection (c) has been the provision most often used as the basis for RICO actions because the language "conduct" or "participate" is easily applied to a wide variety of fact situations. See Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 DICK. L. REV. 201, 231 (1981).

9. See 18 U.S.C. 1961 (1982) (defining "enterprise" and "persons" among other things).

10. 18 U.S.C. § 1961(1) (1982).

11. *Haroco Inc., v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 388 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985).

12. 18 U.S.C. § 1961(5)(1982).

13. Pub. L. No. 91-452, 84 Stat. 922, tit. IX § 1 (1970).

14. See S. REP. NO. 617, 91st Cong., 1st Sess. 78 (1969). (The Senate Report noted that "[n]ot a single one of the 'families' of La Cosa Nostra has been destroyed through criminal prosecutions."). Furthermore, if a mobster were convicted, the syndicate could easily replace that person. The structure of the criminal organization would remain intact. Therefore, a new approach was needed in order to effectively attack the entirety of organized crime. 115 CONG. REC. 9,567 (1969) (statement of Sen. McClellan).

15. S. REP. NO. 617, 91st Cong., 1st Sess. 79-80 (1969).

thorizing private civil remedies directly attack the mob's economic assets by allowing the recovery of treble damages and attorneys' fees.¹⁶

Recently, there has been an explosion of RICO litigation.¹⁷ The increase in civil RICO litigation can be attributed to a number of factors. First, the statutory language is broad enough for RICO to be applied to a wide variety of factual situations, including virtually any type of fraud or breach of contract action.¹⁸ Furthermore, since the provisions of RICO are not expressly limited to organized crime, a wide variety of defendants without mob ties have been sued under RICO.¹⁹

Moreover, the opportunity for a successful plaintiff to secure treble damages provides an additional incentive to seek a RICO claim.²⁰ In addition, since the "predicate acts include a great many state law violations, federal securities law violations, and federal mail and wire fraud violations, an expansive interpretation of RICO allows plaintiffs to bring into federal courts many claims formerly subject only to state jurisdiction, and to bypass remedial schemes created by Congress."²¹ Furthermore, although civil RICO is based on the violation of predicate acts which are predominately criminal laws, the plaintiff must in most cases satisfy the less rigorous civil "preponderance" evidentiary standard.²²

16. 18 U.S.C. § 1964(c) (1982).

17. By 1978, there were only two reported cases involving RICO claims. See *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278 (D. Del. 1978); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975). Only 13 RICO cases were reported up to early 1981. Long, *supra* note 8, at 206 n.32. As of early 1984, over 100 RICO decisions had been published. Siegel, "RICO" *Running Amok in Board Rooms*, L.A. Times, Feb. 15, 1984, at 1.

18. *Accord Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 487-88 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

19. A former United States District Attorney for the Southern District of Texas, Tony Canales, has stated, "Your last name doesn't have to end in a vowel for [RICO] to apply to you." *Houston Post*, Sept. 29, 1980, at C1, col 3.

20. See *Parnes v. Heinold Commodities*, 548 F. Supp. 20, 23 (N.D. Ill. 1982).

21. *Sedima*, 741 F.2d at 486. "Litigators, never at a loss for ingenuity, naturally found the prospect of treble damages under Section 1964(c) (as well as the possibility of invoking what might otherwise be unavailable federal jurisdiction) very inviting for garden-variety fraud claims." *Parnes*, 548 F. Supp. at 23.

22. *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978) (preponderance standard applicable in RICO actions). *But see* Strafer, *Massumi & Skolnick*, *supra* note 1, at 715-17 (advocating a "clear and convincing" standard).

Finally, there is a congressional mandate within the statute itself that the provisions of RICO be "liberally construed to effectuate its remedial purposes."²³ This liberal construction clause, along with the factors discussed above, supports a broad interpretation of the RICO statute and has encouraged the extensive application of RICO. The resulting explosion of RICO litigation has spawned controversy among courts and commentators.²⁴

III. THE FORMER CONTROVERSY

Prior to *Sedima*, the debate regarding the scope of the RICO statute centered on two issues. First, there was a question concerning the type of injury necessary to permit recovery under the statute. The second issue focused on whether a prior criminal conviction was a prerequisite to a civil RICO action. Because of their detailed analysis of these issues, the "point cases"²⁵ were the Second Circuit's decision in *Sedima S.P.R.L. v. Imrex Co.*²⁶ and the Seventh Circuit's decision in *Haroco, Inc. v. American National Bank & Trust Co.*²⁷ Both of these decisions were ultimately reviewed by the Supreme Court.

A. Racketeering Injury Requirement

In an effort to narrow the scope of civil RICO, the Second Circuit Court of Appeals required the plaintiff to allege, in addition to the RICO elements expressly provided for in the statute, a "distinct RICO injury." In other words, plaintiffs in the Second Circuit were required to allege something more than an injury caused by each of the predicate offenses that comprise the pattern.²⁸ By contrast, bare allegations that the

23. The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified at 18 U.S.C. § 1961) (1982).

24. See, e.g., Pickholz, *The Firestorm over Civil RICO*, A.B.A. J. 78, 79 (Mar. 1985).

25. *Id.* at 80.

26. 741 F.2d 482 (2d Cir. 1984), *rev'd*, 105 S. Ct. 32 (1985).

27. 747 F.2d 384 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985). The Second Circuit's opinion in *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), was also significant "because *Sedima* must be read together with the decision in *Bankers Trust*" for a complete understanding of the Second Circuit's position. *Haroco*, 747 F.2d at 395.

28. *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516 (2d Cir. 1984). See also *Sedima S.P.R.L. v. Imrex, Co.*, 741 F.2d 482, 503 (2d Cir. 1984).

predicate offenses directly or indirectly injured the plaintiff's business or property were sufficient to sustain a RICO claim in the Seventh Circuit.²⁹

The controversy focused on the language in section 1964(c) which predicates RICO recovery on an injury caused "by reason of a violation of section 1962. . . ." ³⁰ The Second Circuit contended that if Congress merely intended to establish a remedy for injuries generated solely from the violations of the predicate acts themselves, then the statutory language would have read "by reason of a violation of section 1961."³¹ Therefore, defining a RICO injury in terms of a section 1962 violation required "something more" than an injury caused by the predicate acts of the defendant. In other words, some type of *racketeering injury* must be alleged.³²

However, other courts,³³ including the Seventh Circuit,³⁴ examined the RICO language and following the plain meaning of section 1964(c), concluded that no distinct racketeering injury was required. One court noted that the language "contains no requirement for a 'racketeering enterprise injury'; nor does it limit the protected injury to one sustained 'by reason of' the racketeering enterprise; it grants civil relief for 'injury' which logically includes any injury, 'by reason of a violation of section 1962'."³⁵ The Seventh Circuit distinguished "a 'racketeering injury' from the elements of a RICO cause of action spelled out explicitly in the statute. . . . [T]he 'racketeering

29. *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984).

30. 18 U.S.C. § 1964(c) (1976).

31. *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516 (2d Cir. 1984).

32. *Id.* Proponents of a racketeering injury requirement encountered problems in defining a racketeering injury. *Alexander Grant & Co. v. Tiffany Indus.*, 742 F.2d 408, 413 (8th Cir. 1984) ("[A] racketeering enterprise injury is a slippery concept whose definition has eluded even the courts professing to recognize it"). The Seventh Circuit noted that the "initial hurdle for proponents of the racketeering injury is to define it." *Haroco*, 747 F.2d at 389.

33. *See, e.g.*, *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308, 1318-20 (N.D. Ill. 1983); *Slattery v. Costello*, 586 F. Supp. 162, 166-67 (D.D.C. 1983); *Yancoski v. E.F. Hutton & Co.*, 581 F. Supp. 88, 96 n.19 (E.D. Pa. 1983); *Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234, 244 (E.D. Pa. 1983).

34. *Haroco*, 747 F.2d at 398.

35. *Furman v. Cirrito*, 741 F.2d 524, 528 (2d Cir. 1984).

teering injury' requirement. . . goes farther than this elementary exposition of RICO."³⁶

The Second Circuit, however, attempted to bolster its conclusion by analyzing legislative history in order to understand the scope of the private civil remedy.³⁷ After considering the available legislative history, the court concluded that Congress was not aware of the possible implications of section 1964(c) since the private civil RICO provisions received little attention from the House and Senate during the enactment of the Organized Crime Control Act.³⁸ The Second Circuit referred to the "clanging silence of legislative history."³⁹ It was the combination of this perceived legislative silence and the application of RICO in areas other than organized crime that prompted the Second Circuit to construct the racketeering injury requirement.⁴⁰

B. *Prior Conviction Requirement*

The Second Circuit Court of Appeals in *Sedima* further restricted the scope of private civil RICO by holding that a

36. *Haroco*, 747 F.2d at 387.

37. *Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 488 (2d Cir. 1984).

38. *Id.* at 488-92.

39. *Id.* at 492. According to the Second Circuit in *Sedima*:

The most important and evident conclusion to be drawn from the legislative history is that Congress was not aware of the possible implications of section 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it. The House Judiciary Committee, which authored the provision, would at least have mentioned the amendment to the full House as a major change in its report had there been any inkling of its possible implications."

Id.

40. *Id.* at 496. Some courts have taken exception to the Second Circuit's injury conclusion. These courts find sufficient evidence in the Senate legislative history to support broad private civil RICO remedy. See *Bennett v. Berg*, 685 F.2d 1053, 1058 (8th Cir. 1982), *aff'd*, 710 F.2d 1361 (1983) (en banc) (The panel stated that "[s]ection 1964(c) provides a private cause of action modelled on the antitrust laws," referring to S. REP. NO. 617, 91st Cong., 1st Sess. 80-82, 125, 160 (1969)). The dissent in *Bankers Trust* noted that since Senator Hruska had included provisions for private equitable relief and treble damages "in earlier versions of RICO, it is apparent that RICO's sponsors in the Senate were fully familiar with the implications of such private remedy." *Bankers Trust v. Rhoades*, 741 F.2d 511, 521 (2d Cir. 1984) (Cardamone, J., dissenting).

prior criminal conviction for one of the predicate acts was a prerequisite to the private RICO claim.⁴¹ Other courts, including the Seventh Circuit, have rejected this requirement.⁴²

Like the racketeering injury requirement debate, arguments centered on the statutory language. The Second Circuit *Sedima* majority maintained that the use of the word "violation" in section 1964(c) means conviction,⁴³ but Judge Cardamone, dissenting in *Sedima*, pointed out that the word has also been used to designate civil wrongs in other situations.⁴⁴ The Sixth Circuit commented that "Congress would have defined the section 1964 violation differently had it desired such a requirement."⁴⁵

The *Sedima* majority also argued that the legitimate businessperson, against whom a civil RICO claim was made would be stigmatized as a racketeer as a result of a civil RICO claim. For this reason at least a prior conviction should be prerequisite to the claim.⁴⁶ Judge Cardamone's dissent, however, suggested that the sensitivity to stigma was overstated because the public would know the difference between a criminal conviction and a civil claim.⁴⁷ Case law also indicates that the mere potential of stigma does not transform a civil action

41. *Sedima S.P.R.L. v. Imrex, Co.*, 741 F.2d 482, 503 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

42. *Banker Ramo Corp. v. United Bus. Farms*, 713 F.2d 1272, 1286-87 (7th Cir. 1983).

43. *Sedima*, 741 F.2d at 498-99.

44. *Sedima*, 741 F.2d at 508 (Cardamone, J., dissenting).

45. *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) ("We find nothing in the plain language of RICO to suggest that civil liability under § 1964(c) is limited only to those already convicted or charged with criminal racketeering activity.") *See also* *Parnes v. Heinold Commodities*, 487 F. Supp. 645, 647 (N.D. Ill. 1980); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978).

The language in section 1961 has also been subject to varying interpretations. The Second Circuit majority in *Sedima* contended that "Congress did not intend to give civil courts power to determine whether an act is 'indictable' in the absence of a properly returned indictment or 'chargable' absent an information. . . that is the purpose of a grand jury," so that in civil RICO suits, "every plaintiff becomes his own one-person grand jury." *Sedima*, 741 F.2d at 500. In response, Judge Cardamone, dissenting in *Sedima*, argued that the statute does not read "for which an indictment or information has been returned or filed." *Id.* at 505 (Cardamone, J., dissenting).

46. *Sedima*, 741 F.2d at 499.

47. *Id.* at 508 (Cardamone, J., dissenting).

into a criminal proceeding or require the invocation of criminal safeguards.⁴⁸

IV. *SEDIMA*

The Second Circuit's questions on the civil RICO prerequisites were ultimately resolved by the United States Supreme Court. In *Sedima, S.P.R.L. v. Imrex Co.*,⁴⁹ the Supreme Court held that there is no prior conviction requirement for a private action under 1964(c). The Court found no support in the statute's language, legislative history, or considerations of policy for the imposition of such a requirement.

Following a strict interpretation of the statutory language, the Court noted that the word "conviction" does not appear anywhere in the statute. According to the Court, the term "violation" in 1964(c) does not imply a criminal conviction, but "refers only to a failure to adhere to legal requirements."⁵⁰ The Court also determined that if there had been any intent by Congress to impose such a "novel requirement, there would have been at least some mention of it in the legislative history, even if not in the statute."⁵¹ Furthermore, the Court addressed concerns that RICO unfairly stigmatizes legitimate businesses as racketeers by noting that "civil RICO leaves no greater stain than do . . . other civil proceedings."⁵²

Finally, the Court noted that a prior conviction requirement conflicted with Congress' underlying policy concerns. Potential plaintiffs serve as private attorney generals under civil RICO, filling the prosecutorial gaps when the Government itself pursues only civil remedies. "This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice."⁵³

48. See *Ullmann v. United States*, 350 U.S. 422 (1956).

49. 105 S. Ct. 3275 (1985). In *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 105 S. Ct. 3291, 3292 (1985), the Court issued a per curiam opinion consistent with its decision rendered the same day in *Sedima* by merely requiring the RICO injury to flow from the predicate acts themselves.

50. *Id.* at 3281.

51. *Id.* at 3282.

52. *Id.* at 3283.

53. *Id.* at 3284.

The Court also rejected any requirement that the successful RICO plaintiff must establish some type of "racketeering injury" instead of merely an injury from the predicate acts themselves. According to the Court, the plain words of the statute do not mention nor make room for a racketeering injury requirement. When a plaintiff alleges each element of a RICO violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.⁵⁴ Therefore, recoverable damages stem from the commission of the predicate acts, not some amorphous racketeering injury concept.⁵⁵

The Court also recognized the vagueness of the racketeering injury concept and the struggle by the lower courts to define such an injury. The Court reviewed the legislative history and rejected the Second Circuit's contention that section 1964(c) went through Congress unnoticed. Furthermore, since the best indication of Congressional intent is the statutory language itself, according to the Court, the plain language of the RICO statute provides strong evidence that Congress was cognizant of the broad implications of section 1964(c). As a result, even if the legislative history was characterized by "clanging silence," the plain wording of the statute would control. The Court then concluded that the plain statutory language is certainly broader than the limits drawn by the Second Circuit.⁵⁶

Underlying the Court's rulings on these issues was its decision not to curtail Congress' "new method for fighting crime," but to read the civil RICO provisions in the spirit of "attacking crime on all fronts."⁵⁷ The Court observed that the application of RICO to a wide variety of situations does not necessarily mean RICO's provisions have been misconstrued or are ambiguous, but merely suggests the breadth of RICO's plain language and the Congressional intent underlying the statute's provisions. The Court admitted that RICO had

54. *Id.* at 3286.

55. *Id.* at 3285.

56. *Id.* at 3285 n.3.

57. *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 105 S. Ct. 3291, 3292 (1985).

evolved into something quite different from the legislature's original conception of the statute, but declared that any defects are "inherent in the statute as written and its correction must lie with Congress."⁵⁸

Nevertheless, the Court then shifted the RICO controversy to a new front. Justice White, writing for the majority, stated that "[t]he 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of . . . the failure of Congress and the courts to develop a meaningful concept of 'pattern.'"⁵⁹ In dicta, the Court stressed that "two isolated racketeering acts don't constitute a pattern"⁶⁰ and supported this view by citing legislative history which states that "continuity plus relationship" combine to produce a pattern.⁶¹

The Court's new emphasis on a heightened pattern requirement is inconsistent with its rejection of the prior conviction and racketeering injury requirements. As noted, the Court's objection to the prior conviction and racketeering injury prerequisites was based on a broad reading of the RICO

58. *Sedima*, 105 S. Ct. at 3287.

59. *Id.*

60. *Id.* at 3285 n.14.

61. The following is the full text of the Court's discussion of the pattern concept.

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "requires at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. REP. NO. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern" 116 CONG. REC. 18940 (1970) (statement of Sen. McClellan). See also *id.* at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 655. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. 18 U.S.C. § 3575(e). . . ."

Id.

language and motivated by a desire to permit the statute to function as an effective tool in fighting organized crime. Nevertheless, the Court's apparent mandate that the statute be read broadly clashes with the Court's suggested heightened pattern requirement; the pattern requirement reduces the breadth of the RICO provisions.

There are other inconsistencies inherent in the Court's new pattern requirement. Rejection of the prior conviction and racketeering injury requirements was based on the absence of explicit statutory language calling for such limitations. Although there is no explicit language in the RICO statute requiring either "continuity" or "relatedness," the Court nevertheless read these elements into the pattern concept. Moreover, the Court relied heavily on the legislative history that supports the installation of the "continuity" and "relatedness" elements into the pattern definition, but nonetheless failed to reconcile the part of legislative history which does not confirm this determination.⁶²

The Court itself declared that the correction of any defects in the RICO statute is best left to Congress, but, incongruously, then encourages the lower courts to develop a pattern requirement. Thus, the Court's dicta accentuating the continuity and relationship characteristics of a pattern has received increased scrutiny following *Sedima*. Most certainly the "pattern" concept represents the next major issue in civil RICO litigation.

62. Broad Pattern Definition in Criminal Cases Plays Havoc with Civil RICO Litigation, Attorney says, 1 Civ. RICO Rep. No. 16, at 2 (Sept. 25, 1985). According to Rep. Poff, "A 'pattern of racketeering activity' means simply two or more acts of racketeering activity, one of which . . . must have occurred subsequent to enactment of the title." 116 CONG. REC. 35295 (1970). Therefore, it can be argued that the legislative history cited by the Court is not so clear as to warrant expanding the perspicuous statutory definition of a "pattern" when the statutes plain language does not contain any references to "continuity" or "relationship." BROAD PATTERN DEFINITION IN CRIMINAL CASES PLAY HAVOC WITH CIVIL RICO LITIGATION, ATTORNEY SAYS, 1 Civil RICO Rep. No. 16, at 2 (Sept. 25, 1985). In addition, the fact that Congress included a broad spectrum of acts in RICO's list of racketeering activities contradicts the requirement that the predicate acts be related to each other. *Id.*

V. THE NEW CONTROVERSY

A. *Relationship*

Prior to the Supreme Court's dicta in *Sedima, S.P.R.L. v. Imrex*,⁶³ the lower courts disagreed on whether any relationship between the predicate acts was necessary in order to establish a "pattern of racketeering." Even among those courts instituting the relationship requirement, there were divergent views on the particular type of relationship required. For instance, some pre-*Sedima* courts simply presumed that two independent acts of racketeering, that is two predicate offenses, occurring within a ten year period of each other constituted a pattern of racketeering.⁶⁴

On the other hand, the Second⁶⁵ and Fifth⁶⁶ Circuits performed more thorough examinations of the pattern concept and determined that it did not call for any type of relationship among the predicate acts, but merely required a nexus between *each* predicate act and the enterprise. These courts point out that the explicit statutory definition of a "pattern" does not contain any reference to a "relatedness" component.⁶⁷ In addition, the incorporation of a relatedness factor into the definition of a pattern would allow those organized criminals engaged in diversified activities to escape RICO's provisions.⁶⁸ Since Congress enacted RICO in order to eradicate organized crime, the inclusion of a relatedness factor into

63. 105 S. Ct. 3275 (1985).

64. See, e.g., *Sutliff, Inc. v. Donovan Co., Inc.*, 727 F.2d 648 (7th Cir. 1984); *Pit Pros, Inc. v. Wolf*, 554 F. Supp. 284, 285 (N.D. Ill. 1983); *Lode v. Leonardo*, 557 F. Supp. 675, 681 (N.D. Ill. 1982).

65. See *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), cert. denied, 449 U.S. 871 (1980).

66. See *United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir. 1981); *United States v. Welch*, 656 F.2d 1039, 1052 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States v. Bright*, 630 F.2d 804, 830 n.47 (5th Cir. 1980).

67. See, e.g., *United States v. Elliott*, 571 F.2d 880, 899 n.23 (5th Cir. 1978) ("[W]e can perceive no reason for reading it into the statutory definition."); *United States v. DePalma*, 461 F. Supp. 778, 782 (S.D.N.Y. 1978) ("The statutory definition of pattern of racketeering activity is unambiguous and contains no reference to any requirement of 'relatedness'. . . .")

68. *Elliott*, 571 F.2d at 899. "We would deny society the protection intended by Congress were we to hold that the Act does not reach those enterprises nefarious enough to diversify their criminal activity." *Id.*

the "pattern" element would unduly restrict the scope of RICO and frustrate the intention of Congress.⁶⁹

The legislative history does not refer to a relationship between the predicate acts through a common scheme, but merely reflects some concern to those commenting on the proposed RICO bill that the two acts be somehow related in time. The limitation requiring the commission of at least two acts of racketeering within a ten year period was the only nexus between the predicate acts contemplated by Congress. In addition, the basic dictionary definition of a pattern implies separate elements which constitute a whole.⁷⁰ A statutory scheme in which a pattern of racketeering activity is composed of independent racketeering acts conforms with this definition.⁷¹ Although some courts apply the extensive definition of a pattern in section 3575 to the meaning of pattern in RICO,⁷² "the fact that the two sections were enacted simultaneously yet embody different definitions of pattern would seem to indicate that Congress intentionally chose to use the term differently in different contexts."⁷³

Despite these statutory indicators, there is pre-*Sedima* authority requiring a relationship between the predicate acts in order to comprise a pattern.⁷⁴ More specifically, the Seventh and the Ninth Circuit's interpretation of a pattern encompasses two or more racketeering acts connected by a "com-

69. *Id.*

[W]e find nothing in the Act excluding from its ambit an enterprise engaged in diversified activity. Indeed, Congress expressly stated that the purpose of the Act was "to seek the eradication of organized crime," which it described as a "highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct. . . ."

Id.

70. "[A] reliable sample of traits, acts, or other observable features characterizing an individual." WEBSTER'S NEW COLLEGIATE DICTIONARY 841 (1977).

71. *DePalma*, 461 F. Supp. at 784. "Indeed the dictionary definition of pattern, whether in terms of a dress pattern or model, or a pattern of shot implies separate, discrete elements which are placed together in a whole, a conception consistent with Congress' intent to deal with organized crime." *Id.*

72. See *supra* notes 65-69.

73. *Weisman*, 624 F.2d at 1123.

74. See, e.g., *United States v. Kaye*, 556 F.2d 855, 860-61 (7th Cir.), cert. denied, 434 U.S. 921 (1977) (quoting *White*, 386 F. Supp. at 883-84).

mon scheme, plan or motive,"⁷⁵ and is hereinafter referred to as the "common scheme approach."⁷⁶ In other courts, similar results, participants,⁷⁷ victims,⁷⁸ or methods of commission⁷⁹ created a sufficient relationship between the predicate acts so as to form a pattern. Absent such a relatedness prerequisite, potential RICO plaintiffs can simply accumulate evidence of sporadic and disconnected predicate offenses in order to allege the two acts necessary to sustain a RICO cause of action. The institution of a relatedness requirement would substantially curtail the overinclusion problems that exist under the statute.⁸⁰

Proponents of incorporating the relatedness factor into the definition of a pattern rely primarily on the legislative history which indicates that "this fact of continuity plus relatedness . . . combines to produce a pattern."⁸¹ Courts have also argued that "[i]n common usage, the term 'pattern' is applied to a combination of qualities or acts forming a consistent or characteristic arrangement, so that use of the term pattern suggests a greater interrelationship than simply commission by a common perpetrator."⁸²

In *Sedima*, the Supreme Court, in dicta, indicated that a relationship factor is inherent in the pattern of racketeering,⁸³ but specifically stated that it was not deciding the pattern issues. Nevertheless, the Court commented:

[In] defining 'pattern' in a later provision of the same bill, Congress was more enlightening: "Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of

75. *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). *See also* *United States v. Starnes*, 644 F.2d 673, 678 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981).

76. *United States v. Nacrelli*, 468 F. Supp. 241 (E.D. Pa. 1979).

77. *United States v. Morris*, 532 F.2d 436 (5th Cir. 1976).

78. *United States v. Chovanec*, 467 F. Supp. 41 (S.D.N.Y. 1979).

79. *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978).

80. *White*, 386 F. Supp. at 884 ("Absent a showing of a 'pattern' or interrelatedness of such activity, § 1962(c) could be used against the isolated acts of an independent criminal; such was not the intended target of the challenged statute.").

81. S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969).

82. *White*, 386 F. Supp. at 883.

83. *Sedima*, 105 S. Ct. at 3285 n.14.

commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."⁸⁴

The Court's reference to this pattern provision in section 3575 seemed to imply that a similar definition of a pattern should be instituted into RICO's pattern definition. This interpretation of relatedness is more broad than the Seventh and Ninth Circuits "common scheme" approach,⁸⁵ since it appears that two acts can be interrelated by certain characteristics, but not necessarily have to emanate from the same scheme. In light of this dicta, the post-*Sedima* decisions will be examined in order to determine if the lower courts have picked up the Court's suggestions or have continued to apply their pre-*Sedima* precedents.

Thus far, reaction by the lower courts to the *Sedima* "relationship" dicta has varied. In *Alexander Grant v. Tiffany Industries*,⁸⁶ the Eighth Circuit, in dicta, utilized the section 3575(e) definition of "pattern" in order to satisfy the *Sedima* Court's concerns that RICO not be extended to reach sporadic activity.⁸⁷ Thus, the *Sedima* dicta regarding both the relationship element of a pattern and the type of relationship required among the predicate acts appears to have been persuasive to the Eighth Circuit.

In *R.A.G.S. Couture, Inc. v. Hyatt*,⁸⁸ the Fifth Circuit recognized that "the Supreme Court in *Sedima* implied that two isolated acts would not constitute a pattern."⁸⁹ Since the predicate acts in the case at bar were related, the court refrained from further discussion of the relatedness issue. Nonetheless, this dictum appears to have been purposely included to forewarn of the court's changed attitude toward the relatedness question.

On the other hand, certain district courts within the jurisdiction of the Second Circuit have been reluctant to follow the *Sedima* dicta and, instead, appear bound by the controlling precedents in their circuit. The Second Circuit, prior to *Sedima*, had not required the predicate acts to be related to

84. *Id.*

85. See *infra* note 108 and accompanying text.

86. 770 F.2d 717 (8th Cir. 1985).

87. *Id.* at 718 n.1.

88. 774 F.2d 1350 (5th Cir. 1985).

89. *Id.* at 1355.

each other in terms of possessing a unitary character.⁹⁰ In *Equitable Life Assurance Society v. Alexander Grant*,⁹¹ the district court completely ignored any reference to the *Sedima* relationship dicta in its discussion of whether a unified scheme among the predicate acts was required; instead, the court referred to existing Second Circuit precedent which does not require such relatedness. In fact, the court incorrectly interpreted the Supreme Court's dicta in *Sedima*. The district court opined that the *Sedima* dicta addressed the question of whether more than two predicate acts must be alleged to sustain a RICO claim, or whether two alleged acts by themselves would be sufficient.⁹² The court concluded that it did not need to reach that issue since the plaintiff alleged three separate acts of mail fraud.

The *Alexander Grant* court grossly misconstrued the Court's language in *Sedima* that pattern requires at least two predicate acts; it does not necessarily mean two predicate acts.⁹³ The distinction between means and requires reflects on the quality of the pattern relationship, not merely the quantity of predicate acts. The Court in *Sedima* was attempting to demonstrate that the proof of two isolated acts is not enough to form a pattern, but that "continuity plus a relationship" between the predicate acts is also essential to a pattern. The *Grant* court, bound by the doctrine of *stare decisis*, has distorted the Court's dicta in *Sedima* in order to follow the prior decisions in the Second Circuit.

In contrast, the district court in *Conan Properties, Inc. v. Mattel, Inc.*,⁹⁴ quoting *Sedima*, held that "two isolated acts of racketeering activity do not constitute a pattern."⁹⁵ The ruling eliminated alleged securities violations incurred between 1970 and 1974 from the pattern of mail and wire fraud acts which occurred from 1980 through 1982 because the securities offenses were unrelated to the mail and wire fraud predicate acts. This case is significant because the court's holding devi-

90. See *supra* note 65 and accompanying text.

91. No. 85 Civ. 3595 (S.D.N.Y. Dec. 23, 1985). See also *United States v. Louie*, No. 84 Cr. 1025 (S.D.N.Y. Dec. 26, 1985).

92. *Alexander Grant*, No. 85 Civ 3595.

93. *Accord Sedima*, 105 S. Ct. at 3285 n.14.

94. No. 84 Civ. 5799 (S.D.N.Y. Sept. 26, 1985).

95. *Id.*

ates from the pre-*Sedima* precedent in the Second Circuit which did not require a unified scheme among the predicate acts.⁹⁶

These post-*Sedima* district court cases in the Second Circuit indicate that *Sedima* has created confusion, uncertainty and lack of uniformity with regard to the relatedness requirement within that one circuit. However, the Second Circuit's apparent desire to narrow the scope of the RICO statute as evidenced by its previous construction of the prior conviction and racketeering injury limitations, would suggest that a relationship requirement will be established by that circuit.

The Supreme Court's emphasis on the relationship between predicate acts has reinforced the position of those courts which already required a unitary character among predicate acts. However, most courts do not appear to have adopted the more expansive interpretation of relationship as defined in section 3575(e) and cited by the Supreme Court, opting instead for the common scheme interpretation.⁹⁷

B. Continuity

Courts are divided in regard to the extent racketeering activities must be separate and independent so that a pattern of *continuing* conduct is formed rather than a single criminal event. The vast majority of pre-*Sedima* courts have held that two acts of racketeering emanating from a single scheme,⁹⁸ a

96. One court in the District of Columbia has, however, embraced the section 3575(e) definition. *Foltz v. U.S. News & World Report*, 108 F.R.D. 57 (D.D.C. 1985). According to this post-*Sedima* decision, a pattern is constituted by predicate acts which are interrelated by results, participants, victims or other distinguishing characteristics.

97. *See, e.g.*, *United States v. Watchmaker*, 761 F.2d 1459, 1474-76 (11th Cir. 1985); *Alcorn County v. U.S. Interstate Supplies*, 731 F.2d 1160, 1168 (5th Cir. 1984); *United States v. Starnes*, 644 F.2d 673, 678 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981) (pursuant to one scheme, interstate travel to commit arson, the actual act of arson, and use of mail after the arson were separate acts of racketeering and combined to produce a pattern); *United States v. Karas*, 624 F.2d 500, (4th Cir. 1980) (payment of a single bribe in three installments); *United States v. Weatherspoon*, 581 F.2d 595, 602 (7th Cir. 1978) (multiple mailings in the furtherance of a single scheme constituted a pattern) (No evidence that RICO "require[s] a showing of separate and unrelated schemes, as a precondition for finding two indictable 'get' . . . that would constitute a 'pattern of racketeering activity' under [RICO]."); *United States v. Parness*, 503 F.2d 430, 441-42 (2d Cir. 1974) (interstate transportation of stolen securities as part of a single scheme to defraud), *cert. denied*, 419 U.S. 1105 (1975).

98. *United States v. Phillips*, 664 F.2d 971, 1038 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982) (separate acts "need not, however, be in the context of independent

single episode,⁹⁹ or even a single criminal act¹⁰⁰ constituted a pattern. According to these courts, each separately indictable predicate offense constituted a racketeering act, and the commission of two or more racketeering acts comprised a pattern,¹⁰¹ even though the predicate offenses might overlap in terms of time, victims, or modus operandi.¹⁰²

In *Sedima*, the Supreme Court suggested in dicta that "continuity plus relationship" combines to produce a pattern. The impact of this continuity factor on lower courts' decisions in the post-*Sedima* era will now be analyzed. More specifically, several sub-issues of the continuity requirement will be examined in light of mail fraud cases.

First, do two mailings pursuant to the same scheme constitute the threat of continuing activity envisioned by Congress? Is the threat of continuing activity evidenced by two separate criminal acts pursuant to a commonscheme? Finally, does the threat of continuing activity require multiple schemes?¹⁰³

Lower courts have differed in their responses to the Supreme Court's dicta concerning the continuity factor. Circuit court activity subsequent to the *Sedima* decision has been

schemes or objectives."); *United States v. Calabrese*, 645 F.2d 1379, 1389 (10th Cir.) (a pattern was formed even though the acts "were between the same parties and [arguably] constituted 'a single customer transaction.'"), *cert. denied*, 451 U.S. 1018 (1981); *Starnes*, 644 F.2d at 678; *United States v. Morelli*, 643 F.2d 402 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981); *United States v. Karas*, 624 F.2d 500, 504 (4th Cir.), *cert. denied*, 449 U.S. 1078 (1980); *Harper v. New Japan Sec. Int'l*, 545 F. Supp. 1002, 1004 (C.D. Cal. 1982) ("Each act of criminal activity is counted . . . even if numerous acts arise out of the same episode.")

99. *United States v. Moeller*, 402 F. Supp. 49, 58 (D. Conn. 1975) ("A 'pattern' can apparently be established in this Circuit by two acts occurring on the same day in the same place and forming part of the same criminal episode.")

100. *Haroco, Inc. v. American Nat'l Bank*, 747 F.2d 384, 387 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985).

101. For example, multiple mailings constituting two separately indictable racketeering acts of mail fraud formed a pattern, even though the mailings originated from the same scheme or same criminal episode. *United States v. Sampson*, 371 U.S. 75 (1962). Likewise, one court has held that charges of mail and wire fraud arising out of a common factual nucleus comprised a pattern. *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061 (S.D.N.Y. 1983). The court relied on the literal language of the statute and what it considered to be the common sense interpretation of a pattern. *Id.* The *Beth Israel* court failed to consider the legislative history that stresses "continuity" among the predicate acts.

102. See *supra* note 61.

103. Kaplan, *Civil RICO After Sedima: An Overview*, ALI-ABA VIDEO LAW REVIEW STUDY MATERIALS, 41, 77 (1985).

limited. In *R.A.G.S. Couture, Inc. v. Hyatt*,¹⁰⁴ the Fifth Circuit, recognizing that *Sedima* implied that two isolated racketeering acts would not constitute a pattern, nevertheless completely ignored the continuity factor in holding that any two related acts of mail fraud comprise a pattern. The Seventh Circuit, in *Illinois Department of Revenue v. Phillips*,¹⁰⁵ without any reference or discussion of the *Sedima* continuity dicta, followed pre-*Sedima* precedents that ignored the continuity element so that nine related acts of mail fraud constituted the requisite pattern. Thus, the *Sedima* dicta with regard to the continuity element does not appear to have been persuasive to the Fifth and Seventh Circuit Courts.

The continuity dicta and supporting reasoning, however, has been more persuasive to the Eighth Circuit. In *Alexander Grant & Co. v. Tiffany*,¹⁰⁶ the Eighth Circuit stated, in dicta, that multiple acts of mail and wire fraud in the furtherance of a single audit scheme to defraud bespeaks a sufficient continuity to satisfy the Supreme Court's concerns in *Sedima* that RICO not encompass sporadic activity.

The most extensive post-*Sedima* activity regarding the continuity factor has occurred within the District Court for Northern Illinois. In this district, a variety of conflicting views of the *Sedima* dicta and the continuity factor has emerged, providing an excellent opportunity to evaluate developing judicial solutions to the problem. On one extreme, in *Aetna v. Levy*,¹⁰⁷ the district court ignored the Supreme Court's continuity discussion and held that two acts of mail fraud within a ten year period pursuant to a single scheme established a pattern of racketeering activity. Similarly, in *Systems Research v. Random, Inc.*,¹⁰⁸ the court also ignored the continuity requirement, merely requiring that the acts be listed in the statute and "sufficiently related" to each other.

104. No. 84-3827 (5th Cir. Oct. 30, 1985) (the mailing of two false invoices regarding the ownership and repair of certain equipment in an attempt to defraud repair of certain equipment in a company constituted a pattern).

105. 771 F.2d 312 (7th Cir. 1985).

106. 770 F.2d 717 (8th Cir. 1985).

107. No. 83 Civ. 3566 (N.D. Ill. Nov. 7, 1985).

108. 614 F. Supp. 494 (N.D. Ill. 1985).

However, in *Northern Trust Bank v. Inryco, Inc.*,¹⁰⁹ a trial judge, interpreting the Supreme Court's "unmistakable signal,"¹¹⁰ determined that more than one fraudulent scheme is necessary in order to comply with the continuity factor of a pattern. Since *Sedima* "creates a whole new ballgame," the court declared that it was "no longer obligated to follow contrary Court of Appeals opinions" in which two related acts pursuant to one scheme were sufficient.¹¹¹ As a result, the court ruled that two specific acts of mail fraud made in connection with one fraudulent scheme involving a phony sub-contract, without any facts to infer continuous activity, did not satisfy *Sedima's* continuity requirement. Other trial judges within the district have followed the multiple scheme approach developed in *Inryco*,¹¹² but *Inryco* was the first court, before or after *Sedima*, to establish such a requirement.

The district court judges in *Trak Microcomputer Corp. v. Wearne Brothers*¹¹³ and *Graham v. Slaughter*¹¹⁴ follow the

109. 615 F. Supp. 828 (N.D. Ill. 1985).

110. *Id.* at 833. "[*Sedima's*] message was both plain and deliberate: Lower courts concerned about RICO's expansive potential would be best advised to focus on the hitherto largely ignored 'pattern' concept." *Id.*

111. *Id.* The Seventh Circuit Court of Appeals had established a relatedness requirement in order to constitute a pattern. In *Starnes*, 644 F.2d at 677-78, the court held that actions taken in furtherance of a single criminal end are sufficiently related to satisfy the "pattern requirement." In *Weatherspoon*, 581 F.2d at 601-02, the court rejected a requirement that the predicate acts must be performed pursuant to separate criminal episodes. The *Inryco* court reanalyzed these decisions in light of *Sedima*:

In logical terms, such cases as *Starnes* and *Weatherspoon* were only partly right in flushing out the concept of "pattern." True enough, "pattern" connotes similarity, hence the cases' proper emphasis on relatedness of the constituent acts. But "pattern" also connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity.

Inryco, 615 F. Supp. at 831 (emphasis in original).

112. See *Fagenholz v. AMF Inc.*, No. 85 Civ. 3456 (N.D. Ill. Dec. 5, 1985). The plaintiff's allegations of a single an fraudulent transaction committed against him and an unsubstantiated belief that similar frauds may have been committed against third parties does not suffice to establish a "pattern." *Murlas Commodities, Inc. v. Borman*, No. 85 Civ. 09640 (N.D. Ill. Nov. 19, 1985); *United States v. Yonan*, 622 F. Supp. 721 (N.D. Ill. 1985).

One district court outside of the Northern District of Illinois appears to have followed *Inryco*. *Kredietbank v. Morris*, No. 84-1903 (D.N.J. Oct. 11, 1985) (court's emphasis on multiple lawsuits seems to imply the *Inryco* multiple scheme approach).

113. No. 84 Civ. 7970 (N.D. Ill. Oct. 25, 1985).

114. No. 84 Civ. 7881 (N.D. Ill. Nov. 27, 1985).

dicta in *Sedima* but disagree with *Inryco's* elucidation of the concept.

In *Graham*, the court agreed with the *Inryco* court that prior pre-*Sedima* Seventh Circuit decisions in which multiple mailings in furtherance of a single criminal episode or transaction constitute a pattern should not be followed. However, the court rejected *Inryco's* conclusion that multiple mailings pursuant to a single scheme can never establish a pattern of racketeering activity. The *Graham* court attributes the difference to the *Inryco* court's "implication that a single fraudulent effort or episode should be equated with a single scheme."¹¹⁵ In contrast, the *Graham* court defined continuity in terms of multiple transactions, somewhat separated in time and place.¹¹⁶ The fact that criminal events or transactions may relate to one scheme or multiple schemes is irrelevant. The court relies on the legislative history¹¹⁷ statutory language and the dicta in *Sedima* for support of its interpretation.

In order to differentiate racketeering acts which constituted repeated criminal transactions from those acts that were repeated to carry out the same criminal transaction, the court evaluated the perpetrators' objective intent by considering whether the act appeared to be "independently motivated crimes," or appeared to be ministerial acts performed in the execution of a single fraudulent transaction. The court then held that twenty predicate acts of embezzlement, stretched over a two year period and performed in the execution of a single scheme to defraud a company of its funds comprised twenty independently motivated crimes. In comparison, the court classified the two acts of mail fraud pursuant to the sin-

115. *Id.* See also *Trak*, No. 84 Civ. 7970 ("This court does not agree with the suggestion that a 'pattern of racketeering activity' cannot be established with respect to a single fraudulent scheme.")

116. *Frye v. First Nat'l Bank of Niles*, No. 85 Civ. 0700 (N.D. Ill. Dec. 3, 1985) ("[T]he pattern requirement requires a series of criminal episodes sufficiently separated in time and place to establish the threat of continuing activity; it does not, however, require a pattern of separate fraudulent schemes.")

117. *Graham*, No. 84 Civ. 7881 (N.D. Ill. Nov. 27, 1985) ("Nothing in the legislative history of RICO . . . compels the conclusion that a 'pattern of racketeering' requires a pattern of fraudulent schemes."). See also *Allington v. Carpenter*, 619 F. Supp. 474, 478 (C.D. Cal. 1985) ("[I]mportantly, it is the only construction which give meaning to Congress' intended rejection of RICO liability predicated upon isolated or sporadic criminal acts. The legislative history contains repeated references to such a limitation.")

gle scheme in *Inryco* as ministerial acts rather than independently motivated crimes.¹¹⁸

Outside of the District Court for Northern Illinois, there has not been much activity regarding the continuity factor. One court in the Eastern District of New York, in *Rojas v. First National Bank Association*,¹¹⁹ established an approach to the continuity factor which required "a showing of at least two predicate acts and the threat of continuing activity."¹²⁰ The court did not define what constitutes a threat of continuing activity, so that it appears under this test that two racketeering acts pursuant to a single transaction and single scheme would comprise a pattern.

The Supreme Court's discussion of continuity was completely ignored by a district court judge in *Northeast Womens Center, Inc. v. Monagle*¹²¹ where multiple racketeering acts committed on the same date at the same time was sufficient to sustain a RICO claim in spite of the fact that the racketeering acts were not executed in a series of episodes, events or schemes which were ongoing.

C. Analysis

Defining a pattern of racketeering activity in a manner requiring a relationship between the racketeering acts prevents potential plaintiffs from merely aggregating two or more isolated and independent predicate offenses in order to initiate a RICO claim.¹²² The relatedness factor is consistent with Con-

118. The *Graham* court's emphasis on transactions rather than schemes was also followed in *Morgan v. Bank of Waukegan*, 615 F. Supp. 836 (N.D. Ill.1985) (single plot spread over several years does not satisfy the pattern requirement articulated by *Inryco*). Courts outside the Northern District of Illinois that followed *Inryco* include *Professional Assets Mgt.*, 616 F. Supp. 1418 (W.D. Ok. 1985) (predicate acts arising from one engagement to perform one audit were part of a single unified transaction and did not constitute a pattern); *Allington v. Carpenter*, 619 F. Supp. 474, 478 (C.D. Cal. 1985) ("[A] 'pattern' of racketeering activity must include racketeering acts sufficiently unconnected in time or substance to warrant consideration as separate criminal episodes. The acts of wire fraud alleged in the complaint do not meet this standard. Each act was a part of the same criminal transaction.").

119. 613 F. Supp. 968 (E.D.N.Y. 1985).

120. *Id.* at 971 n.1.

121. No. 85-4845 (E.D. Pa. Oct. 25, 1985).

122. "For example, a corporate defendant may have been found guilty of violating a federal campaign contribution law ten years before allegedly engaging in a deceptive advertising scheme. Plaintiff may argue that these were both frauds, thereby constituting

gress' intent to eradicate continuing, nonsporadic activity. The RICO statute itself, clearly requires the finding of a pattern. Since all language in a statute should be treated as significant,¹²³ the relatedness requirement would give meaning to the "pattern" element.

The *Sedima* interpretation of pattern will substantially restrict the breadth of the statute's application. However, there is concern that imposition of a relatedness requirement will result in a failure to reach organized criminals who are able to diversify their activities. Thus the precise definition of relatedness still needs to be refined. A relationship defined in terms of a common scheme, or plan is more restrictive than a connection involving an interrelationship of distinguishing characteristics, and therefore, constitutes a greater limitation on the scope of RICO.

Congress, and the *Sedima* Court, also considered continuity to be an important component of a pattern since "[t]he threat of infiltration of legitimate business normally requires . . . the threat of continuing activity to be effective."¹²⁴ The *Inryco* multiple schemes requirement is one interpretation of the continuity factor. Under *Inryco*, since more than one related predicate act performed in the furtherance of one scheme would not constitute a pattern, the multiple schemes approach does eliminate from the purview of RICO the situation in which multiple mailings are made pursuant to a single fraudulent scheme. Application of RICO to the multiple mailings, single scheme scenario has been troublesome because the two mailings are, in reality, merely ministerial acts performed with regard to one independently motivated crime. Multiple ministerial acts performed in executing one criminal event does not implicate the threat of continuing criminal activity envisioned by Congress.

However, the *Inryco* test might allow bona fide racketeers to avoid RICO since a defendant would be allowed "to commit a dozen related fraudulent acts in pursuit of a single grand

a pattern." Nathan & Bograd, *RICO Litigation's New Battleground: "Pattern" and "Enterprise,"* ALI-ABA VIDEO LAW REVIEW STUDY MATERIALS, 143, 155 (1985).

123. M. ROMBAUER, LEGAL PROBLEM SOLVING 78 (4th ed. 1983).

124. *Sedima*, 105 S. Ct. at 3285 n.14.

scheme, such as infiltrating one corporation."¹²⁵ Clearly, *Inryco's* approach frustrates Congress' attempt to shield legitimate business from any infiltration by racketeers.

Compared to the *Inryco* approach, the continuity requirement established by the court in *Graham* is more comprehensive. The *Graham* Court focused on multiple transactions rather than multiple schemes. *Graham* defined a criminal transaction as an independently motivated crime, so that multiple mailings pursuant to a single scheme would not be within the scope of RICO since they would be characterized as ministerial acts pursuant to one criminal transaction. In contrast to *Inryco*, the test would not exclude a bona fide racketeer who has a scheme to infiltrate a business through many transactions. This test, however, lacks a sufficient definition of exactly what constitutes ministerial acts performed in the furtherance of one criminal event as opposed to activity constituting an independent transaction. The consequences of this loophole is that a potential plaintiff can merely allege that the predicate acts occurred in discrete criminal episodes, while the defense will contend that predicate acts, especially those occurring within a short period of time of each other, were part of the same criminal transaction. This distinction would most certainly be subject to intense litigation.

The relatedness and continuity factors have been approached as mutually exclusive requirements of a pattern. However, these elements may in fact overlap; predicate acts related to a common scheme will look more like a single criminal transaction rather than multiple criminal events.¹²⁶ Consequently, it will be harder to establish continuity under the *Graham* test when there is a single criminal scheme. On the other hand, since the *Inryco* continuity test requires multiple schemes, this fusion will not be a problem.

Evaluation of the relatedness and continuity elements together illustrates a major flaw with the *Inryco* court's multiple scheme pattern model. Under *Inryco*, the multiple scheme requirement necessary to demonstrate continuity would be in-

125. Kaplan, *supra* note 103.

126. BROAD PATTERN DEFINITION IN CRIMINAL CASES PLAYS HAVOC WITH CIVIL RICO LITIGATION, ATTORNEY SAYS, 1 Civ. RICO Rep. No. 16, at 2 (Sept. 25, 1985).

consistent with requiring all the predicate acts to be connected through a common scheme in order to satisfy the relationship element of pattern. The *Inryco* test, therefore, ignores Congress' relationship element. However, the *Inryco* court did emphasize that pattern connotes *similarity* as well as multiplicity of events. Therefore, it appears that only the predicate acts performed in the furtherance of each scheme need to be related. Because each scheme must be independent and unrelated to the other, the *Inryco* test would not exclude two isolated acts performed in two independent schemes from the RICO provisions.

For example, one act of bribery committed nine years ago that is independent and unrelated to one act of mail fraud committed today would satisfy the *Inryco* test since each was performed pursuant to an independent scheme. In spite of the lack of relatedness between schemes, under *Inryco* this isolated activity would constitute a RICO violation. Thus, the *Inryco* test should be rejected because its application in certain situations ignores the relatedness factor stressed by the Court and expressed in the legislative history.

VI. CONCLUSION

The statutory language of RICO is unambiguous and in the absence of a clearly expressed legislative intent to the contrary, that language must be regarded as conclusive. There is no express legislative history which clearly supports an organized crime nexus, a competitive injury requirement, or a prior conviction prerequisite. Therefore, the *Sedima* Court properly refused to restrict the reach of the statute with these limitations.

In constructing the statute, Congress balanced the importance of broad language necessary to ensnare organized crime against the risk that legitimate businesses would also be subject to RICO liability. Congress decided in favor of broad construction. The fact that RICO is applied in unanticipated situations reflects the breadth of the statutory terms, not ambiguity. Judicially imposed standing barriers might have foreclosed application of the statute to the target of the statute, organized crime.

Nonetheless, it has been asserted that even Congress may not have recognized all of the possible applications of RICO.

As a result, the *Sedima* Court encouraged the imposition of continuity and relationship elements on the statute's pattern of racketeering concept. This judicial legislation has resulted in disparate treatment of similar RICO cases, such as those involving mail fraud. This disparity is a serious problem because of the severe penalties involved. Therefore, if Congress, in fact, did not intend to permit the resulting applications of RICO, Congress is the proper authority to rectify any problems. Judicially created standing and pattern requirements represent unauthorized attempts to rewrite the statute and disturb the policy. These choices more correctly belong to Congress.¹²⁷

Therefore, Congress should undertake a study and examine whether RICO is working. The question to be resolved is whether the statute has been effective in eradicating the economic base of organized crime and at what cost in terms of subjecting legitimate business to liability.

Congress would be well advised to abolish the entire RICO scheme or restrict the scope of the statutory language in order to achieve a more equitable balancing between the risk of overinclusion and the availability of RICO as a weapon in fighting organized crime. If, in fact, the statute is not meeting its objectives, a more equitable balancing could be accomplished in a number of ways. The statute's application could be restricted by increasing the number of predicate offenses necessary to constitute a pattern. In addition, Congress could eliminate some of the predicate offenses from the list provided in section 1961. Congress could also provide a more thorough definition of a pattern. In any event, Congress must act to resolve the controversy. The decision is theirs.

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127. *Moss v. Morgan Stanley Inc.*, 553 F. Supp. 1347, 1359 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983) (it's not the judiciary's role to reassess Congress' balance of costs and benefits of RICO).