

William & Mary Law Review

Volume 28 (1986-1987)
Issue 1

Article 6

October 1986

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Edward Lee Isler

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Edward Lee Isler, *RICO: Limiting Suits by Altering the Pattern*, 28 Wm. & Mary L. Rev. 177 (1986), <https://scholarship.law.wm.edu/wmlr/vol28/iss1/6>

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RICO: LIMITING SUITS BY ALTERING THE PATTERN

When Congress enacted the Racketeer Influenced and Corrupt Organizations Act,¹ it sought "the eradication of organized crime in the United States"² by providing prosecutors with criminal penalties and civil remedies with which to combat those involved in racketeering activity.³ Commentators have ranged in their opinions from those who have heralded the statute as an innovative new tool enabling prosecutors to "even the odds" with organized crime,⁴ to those who have disdainfully compared it to the "notorious Article 58 in the Soviet Criminal Code."⁵ Additionally, the statute allows private litigants injured by racketeering activity to bring suit for recovery of treble damages and attorney's fees.⁶ In the last five years,⁷ this Civil RICO provision has become "everybody's darling."⁸

RICO attacks this connection between organized crime and legitimate enterprise by prohibiting four activities. First, income received from a pattern of racketeering activity or collection of an

1. 18 U.S.C. §§ 1961-1968 (1982). RICO was Title XI of the Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922 (1970).

2. Pub. L. No. 91-452, 84 Stat. 922-23 (1970) (Statement of Findings and Purpose).

3. 18 U.S.C. §§ 1963, 1964(a), (b) (1982).

4. Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1048 (1980). Professor Blakey was Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-70 when the Organized Crime Control Act of 1970 was passed. Mr. Gettings was Counsel and Director of the House Republican Conference Task Force on Crime from 1967-69 as Congress was developing the Act.

5. Berg & Zelikow, *The RICO Statute*, 18 U.S.C. §§ 1961-1968: *The Business Client As Racketeer*, 45 TEX. B.J. 159, 164 (1982) (quoting 1 A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* (1973)).

6. 18 U.S.C. § 1964(c) 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."

7. Only three percent of the approximately 270 trial court decisions addressing Civil RICO reported through April 1985 were decided before 1980. REP. OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SEC. OF CORP., BANK. & BUS. LAW 55 (1985) [hereinafter cited as ABA TASK FORCE].

8. Strafer, Massumi, & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655 (1982).

unlawful debt may not be invested in an enterprise which is involved in interstate commerce.⁹ Second, such a pattern or collection may not be used to acquire or maintain any interest in an interstate enterprise.¹⁰ Third, such a pattern or collection may not be used to conduct the affairs of such an enterprise.¹¹ Finally, conspiracy to engage in any of these activities also violates the statute.¹²

To ensure the statute's effectiveness, Congress construed these provisions and defined their key terms broadly and required that they be liberally interpreted.¹³ Congress also enacted a "private attorney general" provision permitting civil suits by private litigants.¹⁴ Provisions of this kind are "in part designed to fill prosecutorial gaps."¹⁵ This section of the statute is responsible for most of the current concern over RICO. Congress believed that prosecutorial discretion would prevent abuse of the statute's broad enforcement provisions.¹⁶ This expectation has been realized to

9. 18 U.S.C. § 1962(a) states in part:

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 within the meaning of section 2, title 18, United States Code, 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 operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

10. 18 U.S.C. § 1962(b) states, "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."

11. 18 U.S.C. § 1962(c) states:

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.

12. 18 U.S.C. § 1962(d) states, "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

13. Congress stated that "the provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

14. See *supra* note 6.

15. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3284 (1985).

16. See *Measures Relating to Organized Crime: Hearings on S.30, S.974, S.975, et.al., Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 346-47, 424 (1969).

some extent.¹⁷ The same restraint, however, is not apparent among private litigants:

In the context of civil RICO. . .the restraining influence of prosecutors is completely absent. Unlike the Government, private litigants have no reason to avoid displacing state common-law remedies. Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions. . . .¹⁸

Although Civil RICO suits were rare in the first ten years following the statute's enactment, since 1980 courts have witnessed an explosion of Civil RICO proceedings.¹⁹ As the number of Civil RICO suits increased, courts tried to limit private litigants' use of the statute. The earliest judicially imposed restriction on Civil RICO was the requirement that the plaintiff prove a nexus between the defendant and organized crime.²⁰ The courts soon disregarded this requirement as lacking a sufficient grounding in the statute.²¹ In recent years, courts attempted to limit Civil RICO by allowing plaintiffs to bring suits only against defendants with a

17. See, e.g., *United States Attorney's Manual*, § 9-110.200 (1983) ("[I]t is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge.").

18. *Sedima*, 105 S. Ct. at 3294 (Marshall, J., dissenting).

19. See *supra* note 7; see also Blakey & Gettings, *supra* note 4. At least one court has given the Blakey & Gettings article credit for the sudden awareness in recent years of RICO's potential. See *Sedima, S.P.R.L. v. Imrex, Co.*, 714 F.2d 483, 486 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

20. The organized crime limitation was used first in *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975), where the court dismissed the RICO claim, noting that "[t]here is nothing in the proposed complaint even to suggest that defendant is connected in any way with organized crime." *Id.* at 113. Several courts followed this rule. See, e.g., *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 21 (2d Cir. 1983) (expressly rejecting the lower court's organized crime nexus requirement); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 746-48 (N.D. Ill. 1981).

21. According to Moran, *Pleading a Civil RICO Action Under Section 1962(c): Conflict-ing Precedent and the Practitioner's Dilemma*, 57 TEMP. L.Q. 731, 747-48 (1984), courts based their rejection of an organized crime nexus on three grounds. First, the plain language of the statute does not support such an interpretation; second, the government does not include an organized crime nexus as an element of a criminal RICO suit; finally, the burden of proving a link between the defendant and organized crime would be too heavy for the plaintiff or prosecutor and would result in the ineffectiveness of RICO. Moran cited *Schacht v. Brown*, 711 F.2d 1343, 1353 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983), *United States v.*

prior criminal conviction in the same matter²² or by requiring that plaintiffs prove an indirect "racketeering" injury distinct from the injury received from the predicate acts of racketeering.²³ The variety of solutions offered to limit RICO's use by private plaintiffs destined the issue for resolution in the Supreme Court.

In *Sedima, S.P.R.L. v. Imrex Co.*,²⁴ the Supreme Court by a 5-4 vote cast aside any judicially created limitations on Civil RICO.²⁵ Recognizing that Civil RICO was "evolving into something quite different from the original conception of its enactors,"²⁶ the Court nevertheless decided that the job of correcting the statute lay with Congress and not the Court.²⁷ The Court pointed Congress in the direction of reform, however, by asserting that the "extraordinary uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern'."²⁸

Uni Oil, Inc., 646 F.2d 946, 953 (5th Cir. 1981), and *United States v. Roselli*, 432 F.2d 879, 885 (9th Cir. 1970), respectively, as support for these three grounds. *Id.* at 748 nn.77-79.

22. Almost every circuit rejected the prior conviction requirement. *See, e.g., Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1286-87 (7th Cir. 1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982). The Second Circuit's treatment of *Sedima* provided the major support behind a prior conviction requirement. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 496-504 (1984), *rev'd*, 105 S. Ct. 3275 (1985).

23. As with the prior conviction requirement, *see supra* note 22, the racketeering injury requirement received consideration in most federal circuits but garnered little support. *See, e.g., Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1058-59 (8th Cir. 1982).

24. 105 S. Ct. 3275 (1985).

25. The Second Circuit had interpreted the term "violation" in § 1964(c) to mean that the defendant in a Civil RICO suit must first be convicted of the predicate acts. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 498-99 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985). The Supreme Court rejected that interpretation: "As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be." *Sedima*, 105 S. Ct. at 3281.

The Court also perceived "no distinct 'racketeering injury' requirement." *Id.* at 3285. The Court held that the harm caused by the predicate acts alone constitutes compensable injury under RICO, and further found that the enactors of RICO viewed a racketeering injury requirement, which would be similar to the competitive injury requirement in antitrust statutes, as an unnecessary complication in administering the statute. *Id.* at 3285-86.

26. *Id.* at 3282.

27. *Id.*

28. *Id.*

This Note analyzes the purpose and role of the pattern requirement in Civil RICO, examines the problems courts have encountered in defining "pattern," and reviews proposals for reform of the pattern requirement put forth by legal observers. The Note then concludes that Congress should modify the pattern requirement, and suggests modifications which will best provide guidelines by which the courts consistently can determine when a pattern exists.

THE HISTORY AND PURPOSE OF THE PATTERN REQUIREMENT

Congress's concern over the impact of organized crime on legitimate business grew as a result of several congressional investigations in the 1960's.²⁹ RICO was the legislature's response to revelations of the widespread presence of organized crime in legitimate enterprise.³⁰ The constitutional guarantee of prosecution for conduct only, and not for status,³¹ prevented Congress from simply passing a statute outlawing membership in a suspected crime syndicate. Congress had to design a law proscribing the specific conduct in which crime syndicates were engaged. Because the lawmakers believed repeated acts of violence and intimidation characterize professional criminal behavior, they created a "pattern of racketeering activity" requirement as the centerpiece of the statute.³²

This desire to limit the application of RICO to the type of ongoing criminal activity associated with professional criminals, however, conflicted with another congressional goal. Because of past difficulty in successfully prosecuting organized crime figures, the

29. See, e.g., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967); *Hearings Before the Subcomm. of the House Comm. on Appropriations*, 89th Cong., 2d Sess., 271-78 (1966) (statement of J. Edgar Hoover); *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 88th Cong., 1st Sess., 5-35 (1963) (statement of Robert F. Kennedy).

30. For a detailed history of the birth of RICO, see generally *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 488-94 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985); Blakey & Gettings, *supra* note 4, at 1009-21; McClellan, *The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 55-60 (1970).

31. See *Robinson v. California*, 370 U.S. 660 (1962). But see *Scales v. United States*, 367 U.S. 203, 224-25 (1961).

32. See *infra* note 36 and accompanying text.

lawmakers desired to avoid legal loopholes by casting a wide net.³³ The conflict inherent in designing a statute broad enough to catch the true racketeer, but limited enough to prevent application against the small-time criminal, underlies all the judicial disparity in RICO's interpretation. The courts are caught between the broad plain meaning of the statute, especially in light of the command that RICO be "liberally construed," and the restrictive application of the statute prescribed in the legislative history. Nowhere has this conflict been clearer than in the judicial interpretation of the "pattern" requirement.

Congress described "pattern" broadly as requiring "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years—excluding any period of imprisonment—after the commission of a prior act of racketeering activity."³⁴ The breadth of this definition ensured prosecutors ease in proving a pattern. This same breadth, however, conflicts with congressional intent to reach only true racketeers. Congress envisioned that the pattern requirement would prevent RICO from being applied against the "isolated offender."³⁵ An oft-cited passage from the Senate report states that the "target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective."³⁶

33. In the "Statement of Findings and Purpose" accompanying The Organized Crime Control Act, Congress stated:

Organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). *See also* *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) ("Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble damage proceedings—the price of eliminating all possible loopholes.").

34. 18 U.S.C. § 1961(5) (1982).

35. 116 CONG. REC. 35,193 (1970) (statement of Rep. Poff).

36. S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969). The Supreme Court cited this passage in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3285 n.14 (1985), as well as in most cases in which the court dealt with the pattern element. *See, e.g., United States v. Moeller*, 402 F. Supp. 49, 58 (D. Conn. 1975).

Congress has left the courts out on a limb. If the courts interpret "pattern" consistently with the facially broad meaning of section 1961(5), then all manner of individuals and organizations will find themselves subject to RICO prosecution. The man who wins \$1000 on two separate instances in a gambling game may face harsh criminal and civil penalties.³⁷ On the other hand, if courts interpret "pattern" narrowly, in line with the act's legislative history, they may open up the loopholes for true organized crime which Congress sought to close.

The term "pattern" defies concise definition. A standard dictionary defines "pattern" loosely as "a composite of traits or features characteristic of an individual."³⁸ The adaptability of "pattern" makes it attractive for use in a criminal or civil statute; it provides courts with the discretion necessary to adjudicate the many types of alleged racketeering activity brought before the bench.

Because of the possibility for abuse of this discretion, however, a pattern requirement must include guidelines by which courts can render consistent interpretations. These guidelines should prevent the use of the statute in situations outside of the legislative intent, while encouraging an interpretation of the statute by which that intent will be fulfilled. The broad definition of pattern in section 1961(5) of RICO fails to provide this guidance. The result has been confusion and inconsistency in the federal court system.

Until recently, very few Civil RICO litigants contested the validity of the pattern requirement.³⁹ One commentator has suggested that this may be a result of the emphasis in Civil RICO cases on other limitations.⁴⁰ Criminal defendants, however, have challenged the pattern requirement frequently. Their arguments generally have centered around the assertion that "pattern" is unconstitu-

37. This example was asserted by Representatives Conyers, Mikva, and Ryan, who opposed Title XI of the Organized Crime Control Act. 116 CONG. REC. 34,870, 34,872 (1970).

38. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 962 (1981).

39. Prior to *Sedima*, the only reported Civil RICO case to fail because of the pattern requirement was *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6 (W.D. Pa. 1981) (multiple bribes taken by public official all during the course of a one-night fundraiser).

40. Chepiga, Bookin & Khuzami, *The "Pattern of Racketeering Activity" Requirement After Sedima*, 139 PRAC. LAW INST., CIVIL RICO 1985, 65, 77 [hereinafter cited as *Pattern After Sedima*].

tionally vague. Courts have rejected these challenges,⁴¹ but these cases have provided courts with an opportunity to interpret the pattern requirement.

The breadth of the definition of pattern in section 1961(5), and the conflicting congressional desires to prosecute professional criminals, but *only* professionals, have contributed to wide disparity in the judicial interpretation of this statutory element. The Supreme Court refused to clear up these inconsistencies in *Sedima* even as it hinted at the need for an interpretation of "pattern."⁴² This Note offers a resolution of the various issues surrounding the pattern requirement in a RICO proceeding.

THE RELATEDNESS ISSUE

Proponents of a Relatedness Element

A central issue in the interpretation of "pattern" as defined in section 1961(5) is whether the defendant's acts must be interrelated. The earliest leading case that examined the relatedness element as part of the pattern requirement was *United States v. Stofsky*.⁴³ In that case, several garment manufacturing union officials faced charges of extortion, tax evasion, and violation of the Taft-Hartley labor laws. On the basis of these activities, the government also brought a RICO charge.⁴⁴

In an attempt to clarify the relationships between the RICO elements, the government asserted that the statute requires that the racketeering offenses be "connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts."⁴⁵ Although the court found no textual support for this position in the language of the statute, it agreed that a pattern required "more than accidental or unre-

41. Despite the broad and somewhat ambiguous language of RICO, courts have rejected vagueness challenges by relying on the specific nature of the predicate offenses. *See, e.g., United States v. Parness*, 503 F.2d 430, 440-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

42. *See supra* text accompanying notes 24-28.

43. 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

44. *Id.* at 611-12.

45. *Id.* at 613.

lated instances of proscribed behavior.”⁴⁶ To support this reading, the court referred to a definition of pattern in another Title of the Organized Crime Control Act, which states that “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.”⁴⁷ Based on this provision, and on the court’s understanding of what Congress intended in incorporating pattern as an element of RICO, the court adopted the government’s definition of pattern.⁴⁸ The relatedness element thus received its first strong judicial support.

Subsequent decisions followed the *Stofsky* opinion and recognized the need for a relationship between the predicate offenses. In *United States v. White*,⁴⁹ the court stated that “[u]se of the term ‘pattern’ in connection with two racketeering acts committed by the same person suggests that the two must have a greater interrelationship than simply commission by a common perpetrator.”⁵⁰ In the ensuing ten years, many courts adopted a reading of pattern which included a relatedness element.⁵¹

The Supreme Court, which had remained silent on the proper treatment of section 1961(5), finally commented in *Sedima, S.P.R.L. v. Imrex Co.*⁵² Justice White, writing for the Court, did not provide an outright interpretation of pattern because that particular issue was not before the Court.⁵³ In footnote 14, however, Justice White wrote that “[t]he legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern.”⁵⁴ He went on to note the possible use of the defini-

46. *Id.*

47. 18 U.S.C. § 3575(e) (1982).

48. 409 F. Supp. at 614.

49. 386 F. Supp. 882 (E.D. Wis. 1974).

50. *Id.* at 883.

51. See, e.g., *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983); *United States v. Starnes*, 644 F.2d 673, 678 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981); *United States v. Chovanec*, 467 F. Supp. 41, 44 (S.D.N.Y. 1979); *United States v. Field*, 432 F. Supp. 55, 60 (S.D.N.Y. 1977), *aff’d mem.*, 578 F.2d 1371 (2d Cir. 1978).

52. 105 S. Ct. 3275 (1985).

53. *Id.* at 3287.

54. *Id.* at 3285 n.14.

tion of pattern found in section 3575(e), just as the court in *Stofsky* had done.⁵⁵

Although dicta, the language in *Sedima* indicates support for the notion that "pattern" implies a relationship between the acts of racketeering activity. Several federal courts have read *Sedima* in this way.⁵⁶ Further support for the relatedness element appears in the recommendations of the American Bar Association. An ABA Section on Criminal Justice Report stated that "[i]t is difficult to discern any rationale for permitting two farflung and unrelated activities to satisfy the pattern requirement merely because the same business is involved,"⁵⁷ and recommended a requirement that "the acts be related in common scheme or plan."⁵⁸

The report of the ABA Task Force on Civil RICO endorsed that recommendation⁵⁹ and added that the "best guidance" for application of the relatedness element is found in *United States v. Dean*.⁶⁰ In that case, the court relied on previous analysis in criminal conspiracy cases to determine whether several acts constituted two distinct patterns of racketeering activity. Finding that "similar factors [are] relevant in the RICO context," the court adopted a five-point test.⁶¹ The ABA Task Force on Civil RICO approved of this test which requires identifying: "(1) when each of the various activities took place; (2) the identity of the persons involved in the activities; (3) the statutory offenses charged as acts of racketeering; (4) the nature and scope of the activities; and (5) the places where the activities occurred."⁶²

Other legal observers also have argued in favor of a relatedness element,⁶³ and a recent House bill included a "pattern" definition

55. *Id.*

56. See, e.g., *Miller v. Glen Helen Aircraft, Inc.*, 777 F.2d 496 (9th Cir. 1985); *Alexander Grant & Co. v. Tiffany Indus.*, 770 F.2d 717, 718 n.1 (8th Cir. 1985); *Graham v. Slaughter*, 624 F. Supp. 222 (N.D. Ill. 1985); *Allington v. Carpenter*, 619 F. Supp. 474 (C.D. Cal. 1985).

57. 1982 A.B.A. SEC. CRIM. JUST. REP. at 7 [hereinafter cited as ABA REPORT].

58. *Id.* at 6.

59. See ABA TASK FORCE, *supra* note 7, at 201.

60. 647 F.2d 779 (8th Cir. 1981).

61. *Id.* at 788.

62. ABA TASK FORCE, *supra* note 7, at 202 (paraphrasing the test used in *Dean*, 647 F.2d at 788).

63. See, e.g., Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 862-65 (1980) ("[the relatedness element] seems a sensible approach that is consistent with the congressional intent"); Wexler, *Civil RICO Comes of Age: Some Mat-*

which would have required that the two acts be "interrelated by a common scheme, plan or motive," and that they not be "isolated events."⁶⁴

Opponents of a Relatedness Element

Despite this strong support for a "pattern" definition which requires a relationship between the predicate acts of the alleged pattern, considerable opposition exists in the courts and among legal observers.

Judicial resistance to a relatedness element can be traced to *United States v. Elliott*.⁶⁵ *Elliott* featured an unusual fact situation. Six defendants, some of whom had never met one another, participated in a widespread ring of diverse criminal activities ranging from murder to arson.⁶⁶ No apparent relationship existed between the acts other than the general reign of terror. The court, however, explicitly rejected the holdings in *Stofsky* and *White*, and found that "the statute does not require such interrelatedness, and we can perceive no reason for reading it into the statutory definition"⁶⁷

The holding in *Elliott*, although not as widely cited as that in *Stofsky*, achieved a judicial following of its own. In *United States v. Weisman*,⁶⁸ the court conceded that Congress seemingly did not intend RICO to apply to "sporadic and unrelated criminal acts."⁶⁹ Nevertheless, the court found no relatedness element in the lan-

urational Problems and Proposals for Reform, 35 *RUTGERS L. REV.* 285, 338 (1983) (endorsing the relatedness proposals of the ABA REPORT, *supra* note 57); Note, *The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 *VAND. L. REV.* 441, 477 (1980) (endorsing the relatedness element of *Stofsky*, *supra* notes 43-48).

64. H.R. 2517, 99th Cong., 1st Sess. (1985) (reprinted in part in *Pattern After Sedima*, *supra* note 40, at 85-89). This bill encompassed most of the recommendations of the ABA REPORT, *supra* note 57, and was one of several aimed at reforming RICO.

65. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

66. Over a six-year period, various members of this loosely structured association burned down a nursing home; counterfeited car titles; stole cars, construction equipment, and other property; committed murder and physical intimidation; and dealt in miscellaneous illegal narcotics operations. *Id.* at 884-95.

67. *Id.* at 899 n.23.

68. 624 F.2d 1118 (2d Cir. 1978), *cert. denied*, 449 U.S. 871 (1980).

69. 624 F.2d at 1122.

guage of the statute.⁷⁰ The court also added a twist to the reference in *Stofsky* and other cases to section 3575(e) of the Organized Crime Control Act by stating that Congress's failure to give section 1961(5) a similar definition reveals that Congress "intentionally chose to use the term [pattern] differently" in RICO.⁷¹ Other courts continued in this vein to find a pattern where no relationship existed between the predicate acts.⁷²

In *Sedima*, the Supreme Court appeared to signal the end for the *Elliott-Weisman* reading of "pattern."⁷³ The Court's refusal to state a clear rule for interpreting the relatedness issue, however, has led to a continued *Elliott-Weisman* reading in some cases. In *United States v. Qaoud*,⁷⁴ for example, the court maintained that "[t]here is no requirement . . . that the predicate acts be interrelated in any way."⁷⁵ Despite *Sedima*'s footnote 14, therefore, the doctrine dismissing a relatedness element is very much alive in the federal court system.⁷⁶

Analysis

An analysis of the need for a relatedness element must take place against the backdrop of the original purpose of RICO itself. When Congress attempted to insulate legitimate enterprise from the influence of organized crime, it did not concern itself with the mere habitual criminal, but with the insidious influence of ongoing, organized, criminal activity. Although, as some courts have noted,

70. *Id.*

71. *Id.* at 1122-23.

72. *See, e.g., United States v. Phillips*, 664 F.2d 971, 1011-12 (5th Cir. 1981), *cert. denied*, 459 U.S. 906, 457 U.S. 1136 (1982).

73. *See supra* text accompanying notes 24-28.

74. 777 F.2d 1105 (6th Cir. 1985).

75. *Id.* at 1116.

76. *See, e.g., United States v. Schnell*, 775 F.2d 559, 569 (4th Cir. 1985); *Torwest DBC, Inc. v. Dick*, 628 F. Supp. 163, 165-67 (D. Colo. 1986) (finding that the language of § 3575(e) applies to the continuity element of pattern and that the predicate acts need be related only to the enterprise, and not to each other). Some legal observers also continue to oppose a relatedness element. *Cf. Blakey & Gettings, supra* note 4, at 1030 n.96 (asserting that "*Elliott*, not *Stofsky*, was decided correctly"). Some opposition is based on the concern that reading a relatedness element into the pattern requirement, although perhaps desirable in a civil context, will endanger the statute's availability as a mechanism for criminal law enforcement. *Id.*; *see also RICO: Hearings on H.R. 2577 and H.R. 2943 Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 99th Cong., 1st Sess. 44 (1985).

the relatedness element does not appear in the plain language of the statute, the fulfillment of its original purpose requires that courts consider the relationship between the statute's predicate acts in any inquiry into whether a pattern exists.

Finding a relatedness element that courts can interpret consistently, while also maintaining legislative intent, however, is difficult. Each of the suggested alternatives⁷⁷ has various ramifications for RICO litigation; in particular, however, any relatedness element must be considered in terms of its effect on the availability of either Civil or Criminal RICO as a tool for law enforcement.

Legal observers and critics of RICO, for example, generally are more concerned with the current explosion of Civil RICO cases than with the use of Criminal RICO. During the 1970's, when prosecutors were applying RICO almost exclusively to criminal cases, public clamor for reform was understandably limited. No one wanted to be responsible, after all, for limiting a tool which enabled law enforcement officials to attack organized crime effectively. In the last five years, however, the profusion of Civil RICO suits against non-criminal defendants has caused an outcry in legal circles. In this decade, few legal issues have received as much attention. Under these circumstances, the relatedness element must be measured in terms of its comparative impact on both Civil and Criminal RICO.

The impact on Civil RICO will be minute. Civil litigants generally do not have standing to bring claims unless they have suffered an injury. If the injury is the result of two or more acts of racketeering activity under section 1961(1),⁷⁸ the plaintiff can probably show the requisite relationship between the acts simply by proving that the defendant directed both acts at the plaintiff. Two injuries or fraudulent acts aimed at the same person almost certainly

77. The American Bar Association has proposed a requirement that the acts "be related in common scheme or plan." ABA REPORT, *supra* note 57, at 6. A proposed amendment to RICO would have required that the acts must be "interrelated by a common scheme, plan or motive, and are not isolated events." H.R. 2517, 99th Cong., 1st Sess. (1985). Finally, the Organized Crime Control Act defines a pattern thus: "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) (1982).

78. 18 U.S.C. § 1961(1) (1982).

should constitute a common scheme or plan. Similarly, under the section 3575(e) definition, acts with the same "victims" form a pattern.⁷⁹ The majority of Civil RICO cases, therefore, will not be affected by a relatedness element.

With regard to Criminal RICO, however, a relatedness element would create "a whole new ballgame."⁸⁰ Such a requirement would severely cripple law enforcement officials in their assault on organized crime. Under the present reading, the prosecutor, unlike the private Civil RICO litigant, has no standing requirement to satisfy. The prosecutor can allege many widely varied activities with which to build a case against criminal defendants. In *United States v. Elliott*,⁸¹ for example, the defendants engaged in a broad reign of terror involving numerous individual victims. None of those victims could presumably have satisfied the standing requirements to institute a Civil RICO suit individually, but the criminal case was allowed. The court held that "although the target of the RICO statute is not 'sporadic activity', we find nothing in the Act excluding from its ambit an enterprise engaged in diversified activity."⁸² Working within the confines of too-strict a relatedness element, however, future prosecutors would face great difficulty in applying RICO to an *Elliott*-type of fact situation. Surely, however, a group of individuals participating in the kind of activities found in *Elliott* fall within the realm of organized criminal activity at which RICO is aimed.

A too-narrow interpretation of "common scheme or plan" or "same or similar purposes," both suggested relatedness proposals, could render RICO ineffective in the war against organized crime. Prior to passage of the Organized Crime Control Act, the methodical actions of professional criminals often enabled them to escape convictions. Given a narrow reading of "pattern" in RICO cases, professional criminals might avoid RICO's sanctions by contriving

79. 18 U.S.C. § 3575(e) (1982).

80. *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 833 (N.D. Ill. 1985) (referring to the effect of *Sedima* on interpretation of the pattern requirement).

81. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

82. *Id.* at 899. The court went on to state: "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.*

that their acts appear unrelated.⁸³ Courts and prosecutors should not have their hands tied by prior strict readings of the relatedness element.

Another consideration involved in the discussion of a relatedness element is its effect on the defendant's procedural rights. Rather than extending protection to the alleged offender, a too-strict relatedness element may place him in a worse position. In theory at least, courts currently examining the pattern requirement can employ practical experience. Juries can press into service their own ideas of what forms a pattern. Defendants can argue the underlying concepts of "pattern" before the court. While these factors may not seem critical, they at least give the defendant a chance to persuade the court by common sense reasoning that no pattern exists in his case. If Congress or the courts adopt a proposal such as section 3575(e),⁸⁴ this opportunity will be lost. The broad provisions of that proposal will enable the jury to find a pattern without much difficulty, but as is often the case with hard and fast rules, once the section 3575(e) requirements are met, the trier of fact will lose incentive to analyze further the pattern requirement of the crime.

An example illustrates the problem: *A* and *B* are competitors in the drycleaning business. In 1979, *A* defrauds *B* in a contractual setting. In 1985, *A* wins \$1,000 in an illegal poker game which he uses to purchase a new machine for his business. Assuming *B* sues *A* on the basis of these predicate acts, the section 3575(e) analysis would proceed as follows: Similar purposes? Both illegal acts enabled *A* to improve his business. Same victims? *B* is injured by both acts. Similar results? *A*'s business is upgraded each time. According to section 3575(e), a pattern exists in *A*'s action. The jury, hav-

83. *E.g., id. Elliott* presents an excellent example of the advance planning typical in organized crime:

J.C.'s [defendant's] *modus operandi*, as reflected in this arrangement, was based on the mistaken notion that a person could not be convicted on the basis of only one co-conspirator's testimony. J.C. thus assumed—and often advised others—that he would be sheltered from liability if he could deal with only one other person at each phase of a particular transaction.

Id. at 895 (footnote omitted). Even though the defendant misunderstood the law, this situation suggests the extent to which professional criminals plan their activities in order to avoid prosecution.

84. 18 U.S.C. § 3575(e).

ing crossed the section 3575(e) threshold to find a pattern, will move on to consider the other RICO elements. Yet here is a fact situation in which a "pattern" of racketeering activity almost certainly does not exist. Because it only had to meet the cut and dried section 3575(e) rule, however, the jury is given little discretion to apply its common sense to the pattern issue. As a result of the new relatedness element, A would suffer in a way Congress never intended when it enacted RICO.

Defining "pattern" to include a relatedness element is a tricky business. Some considerations argue for a strict definition that will lead to consistent results and effective prosecution of professional racketeers. Others cry for a loose definition that, while emphasizing the relatedness element, will allow courts to use discretion and common sense in determining the existence of a pattern. RICO's ultimate goals will be better served under the second, less-strict reading.

Rather than adopt the current proposals, Congress or the courts should adopt a relatedness element under which the predicate acts must be interrelated in some manner beyond their common relationship to the enterprise. Although this definition may result in judicial inconsistency as courts attempt to interpret the clause "in some manner," it will provide courts with the needed flexibility with which to apply RICO. This definition emphasizes the need for an interrelationship between the predicate acts while allowing courts to consider each fact situation separately. The result will be an interpretation of pattern which combines congressional intent and common sense.

THE CONTINUITY ISSUE

Early Cases

The potential relationship among predicate acts constituting an alleged pattern gives rise to a spectrum of issues. At one end of the spectrum is the relatedness question: to what extent must the acts be connected in some manner so as to show a pattern? At the other end of this spectrum is the continuity question: when are the acts so closely connected that they are not distinct actions but rather one activity, and thus incapable of forming a pattern?

As with the relatedness element, legislative support for a "continuity" element is unclear from the congressional record. Courts most often cite the language of the Senate Report stating that it is a "factor of continuity plus relationship which combines to produce a pattern."⁸⁵ Other language in the legislative history also implies that some kind of continuity element is inherent in the statute.⁸⁶ As in the relatedness discussion, however, the lack of statutory language on the interpretation of "pattern" has resulted in inconsistent adjudication in the courts on the question of continuity.

The first case which produced any substantial discussion of the continuity issue was *United States v. Moeller*.⁸⁷ In *Moeller*, the defendant invested in fire insurance for one of his corporation's plants. He then arranged for other defendants to burn it down so that he could obtain the insurance money. The hired men kidnapped three employees from the plant and set it afire.⁸⁸ Despite the fact that the kidnapping and the arson took place almost simultaneously, the government asserted that the acts constituted two acts of racketeering activity and thus formed a pattern.⁸⁹ The district court, believing that the United States Court of Appeals for the Second Circuit had already disposed of the continuity issue in *United States v. Parness*,⁹⁰ deferred to that case and held that the two acts did constitute a pattern.⁹¹ The judge first asserted a contrary view in dicta, however:

While the statutory definition makes it clear that a pattern can consist of only two acts, I would have thought the common sense interpretation of the word "pattern" implies acts occurring in *different criminal episodes*, episodes that are at least somewhat

85. S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969). The report also states: "The infiltration of legitimate business normally requires more than one 'racketeering activity' and *the threat of continuing activity* to be effective." *Id.* (emphasis added).

86. Racketeering activity is "at least two independent offenses forming a pattern of conduct." 116 CONG. REC. 35,193 (statement of Rep. Poff); "[RICO] is not aimed at the isolated offender." *Id.*

87. 402 F. Supp. 49 (D. Conn. 1975).

88. *Id.* at 56-57.

89. *Id.* at 56-58.

90. 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

91. *Moeller*, 402 F. Supp. at 57-58.

separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity.⁹²

With these words, the court laid the groundwork for the current continuity arguments.

Despite the language in *Moeller*, courts declined to acknowledge any continuity element. In *United States v. Weatherspoon*,⁹³ for example, the defendant claimed a lack of continuity to prove that no pattern existed in her activities. The defendant had perpetrated five counts of mail fraud by sending the Veterans Administration false reports of the enrollment of veterans in her beauty college so that she could obtain VA benefits.⁹⁴ The court noted that "according to Weatherspoon, there was only one 'act' of racketeering activity because all of the mailings which formed the basis for the mail fraud counts were in furtherance of a single scheme to defraud."⁹⁵ Finding her argument "unique," "imaginative," and "novel," the court nevertheless rejected it because neither the legislative history nor the plain language of the statute supported her assertion.⁹⁶ The court concluded that "each mailing in furtherance of a scheme to defraud is a separate offense. . . even if there is but one scheme involved."⁹⁷

The rule in *Weatherspoon* carried the day in RICO proceedings, almost without exception, for several years.⁹⁸ Many of these cases, like *Weatherspoon*, involved schemes to defraud which unfolded over a period of time.⁹⁹ Some, however, more closely resembled the facts in *Moeller* because all of the racketeering acts occurred in a

92. *Id.* at 57.

93. 581 F.2d 595 (7th Cir. 1978).

94. *Id.* at 597-98.

95. *Id.* at 601.

96. *Id.* at 601-02.

97. *Id.* at 602.

98. See, e.g., *United States v. Zang*, 703 F.2d 1186, 1194 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983); *United States v. Phillips*, 664 F.2d 971, 1038-39 (5th Cir. 1981), *cert. denied*, 459 U.S. 906, 457 U.S. 1136 (1982); *United States v. Starnes*, 644 F.2d 673, 678 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981); *United States v. Beatty*, 587 F. Supp. 1325, 1329 (E.D.N.Y. 1984); *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061, 1066 (S.D.N.Y. 1983); *United States v. Chovanec*, 467 F. Supp. 41, 44 (S.D.N.Y. 1979).

99. See, e.g., *United States v. Mazzio*, 501 F. Supp. 340 (E.D. Pa. 1980), *aff'd*, 681 F.2d 810 (3d Cir. 1982); *United States v. Salvitti*, 451 F. Supp. 195 (E.D. Pa. 1978).

short time span, such as one night.¹⁰⁰ Regardless of the facts, courts refused to recognize a continuity element in the RICO pattern inquiry.

The Supreme Court passed up a chance to settle the issue in *Sedima, S.P.R.L. v. Imrex Co.*¹⁰¹ The Court did, however, cite the "continuity plus relationship" language of the Senate Report¹⁰² and indicated further that Congress and the courts had failed "to develop a meaningful concept of 'pattern'."¹⁰³ The Court suggested a need for a relatedness element, but provided no clue as to the proper definition of a continuity element. It simply highlighted the need for judicial reform of "pattern."¹⁰⁴

By emphasizing the pattern requirement while refusing to aid in its interpretation, the Court opened the door for inconsistent adjudication of the continuity issue in post-*Sedima* cases. Recent cases show that the continuity element remains unsettled in the federal courts.

Courts have adopted several approaches to the continuity issue. A few courts have ignored the continuity element by focusing solely on the issue of relatedness. In those courts which have attempted to establish a continuity element, confusion reigns supreme. Much of this judicial confusion derives from varying interpretations of the "different criminal episodes" language in *Moeller*.¹⁰⁵ A narrow view of this phrase has resulted in a requirement that the plaintiff prove two entirely separate criminal schemes. A more moderate reading requires that the plaintiff prove two episodes within the same scheme. Most post-*Sedima* cases fall roughly under one of these two approaches.

100. See, e.g., *United States v. Licavoli*, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984) (murder and conspiracy to commit murder were the two predicate acts).

101. 105 S. Ct. 3275 (1985).

102. *Id.* at 3285 n.14.

103. *Id.* at 3287.

104. *Id.*

105. 402 F. Supp 49, 57 (D. Conn. 1975). "Different criminal episodes" is not the only phrase which has generated confusion. Courts have also set forth varying interpretations of "transaction." Compare *Allington v. Carpenter*, 619 F. Supp 474, 478 (C.D. Cal. 1985) (equating a transaction with a single scheme) with *Graham v. Slaughter*, 624 F. Supp. 222, 225 (N.D. Ill. 1985) (implying that several transactions make up a scheme). The inability to arrive at a consensus on the meanings of these phrases has led to a rampant misreading of precedents by these courts.

Two-schemes approach

The leading case representing the two-schemes approach is *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*¹⁰⁶ In that case, some of the defendant's employees defrauded the plaintiff by participating in a series of kickbacks at the plaintiff's expense. The RICO suit was based on two mailings involved in one of the kickbacks.¹⁰⁷ The court dismissed the suit because the mailings were part of the same scheme.¹⁰⁸ The court added that if the other three kickbacks had involved the use of the mails, the court still would have found that the mailings constituted one fraudulent scheme, which does not "represent the necessary 'pattern of racketeering activity.'"¹⁰⁹ The court thus implied that two separate schemes were required to fulfill the continuity element of the pattern requirement. The court reiterated this interpretation in *Morgan v. Bank of Waukegan*,¹¹⁰ where the defendant allegedly participated in a four-year fraud.¹¹¹ The court held that if all the conspirators engaged in a "single plot," then despite the number of acts which took place during the four-year period, no pattern of racketeering activity existed.¹¹²

The two-schemes approach has generated substantial judicial support. In *Superior Oil Co. v. Fulmer*,¹¹³ the United States Court of Appeals for the Eighth Circuit endorsed the district court's reasoning in *Inryco*. The defendant in *Superior Oil*, an employee of the plaintiff, had been converting gas from the plaintiff's pipeline.¹¹⁴ The court held that "several related acts of mail and wire fraud in pursuit of the underlying conversion" did not represent the requisite continuity needed to form a pattern, and thus dis-

106. 615 F. Supp. 828 (N.D. Ill. 1985).

107. *Id.* at 828-30.

108. *Id.* at 832.

109. *Id.*

110. 615 F. Supp. 836 (N.D. Ill. 1985).

111. *Id.*

112. *Id.* at 838.

113. 785 F.2d 252 (8th Cir. 1986).

114. *Id.* at 253-54.

missed the RICO claim.¹¹⁵ Many courts have followed either *Inryco* or *Superior Oil* in applying the two-schemes approach.¹¹⁶

Two transactions within a single scheme approach

Not all courts have adopted the *Inryco* two-schemes approach. Instead, many have endorsed a concept of continuity that requires two separate transactions, or two separate criminal episodes, within a single scheme.

This approach appeared in *Graham v. Slaughter*.¹¹⁷ The defendant in *Graham* embezzled \$60,000 over a two-year period through twenty payments via the mail and wire services.¹¹⁸ The court agreed with the conclusion stated in *Inryco* that multiple mailings in furtherance of a single criminal episode do not constitute a pattern.¹¹⁹ The court determined, however, that:

[w]here this court differs with *Inryco* is in the implication that a single fraudulent effort or episode should be equated with a single scheme.

. . . .

115. *Id.* at 257.

116. *See, e.g.,* *Madden v. Gluck*, 636 F. Supp. 463, 465 (E.D. Mo. 1986) (fraudulent check kiting scheme involving multiple acts of mail and wire fraud); *Richter v. Sudman*, 634 F. Supp. 234, 237-40 (S.D.N.Y. 1986) (fraudulent misrepresentations made to plaintiffs in order to induce them to attract investors); *Utz v. Correa*, 631 F. Supp. 592, 594-95 (S.D.N.Y. 1986) (scheme to defraud investor by misappropriation of investor's funds); *Allright Missouri, Inc. v. Billeter*, 631 F. Supp. 1328, 1329-30 (E.D. Mo. 1986) (multiple acts of wire fraud in connection with transfer of partnership property); *Soper v. Simmons Int'l, Ltd.*, 632 F. Supp. 244 (S.D.N.Y. 1986); *Dunham v. Independence Bank*, 629 F. Supp. 983, 989-90 (N.D. Ill. 1986) (prospective borrower brought suit against bank for fraudulent misrepresentations regarding loan); *Torwest DBC, Inc. v. Dick*, 628 F. Supp. 163, 165-67 (D. Colo. 1986) (corporate directors secretly purchased property and resold it to corporation at substantial profit); *Medallion TV Enter., Inc. v. SelecTV of California, Inc.*, 627 F. Supp. 1290, 1295-97 (C.D. Cal. 1986) (defendant fraudulently induced plaintiff to enter into joint venture); *SJ Advanced Technology & Mfg. v. Junkunc*, 627 F. Supp. 572, 576-77 (N.D. Ill. 1986) (action by competitor against government contractor for malicious misrepresentations made to government); *Fleet Management Systems, Inc. v. Archer-Daniels-Midland Co.*, 627 F. Supp. 550, 553-60 (C.D. Ill. 1986) (misappropriation of computer software system); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F. Supp. 1418, 1421-23 (D. Okla. 1985) (fraudulent preparation of audit report by accounting firm); *Allington v. Carpenter*, 619 F. Supp. 475, 477-78 (C.D. Cal. 1985) (scheme to defraud investors by promising high rate of return).

117. 624 F. Supp. 222 (N.D. Ill. 1985) (Getzendanner, J.).

118. *Id.* at 223.

119. *Id.* at 224-25. *See supra* text accompanying notes 106-09.

To be "continuous," more than sporadic or isolated activity must be alleged. In this court's view, that requires more than a single transaction but not necessarily more than a single scheme.¹²⁰

The court further illuminated this approach in determining that predicate acts can form a pattern when they appear to be "independently motivated crimes," rather than "ministerial acts performed in the execution of a single fraudulent transaction."¹²¹

The judge who authored the opinion in *Graham* again tried to delineate the two-transactions approach in *Medical Emergency Service Associates v. Foulke*.¹²² In that case, a medical corporation accused the defendant physicians of breach of fiduciary duty and brought a RICO suit based on acts of mail fraud.¹²³ Although maintaining its earlier reasoning in *Graham*, the court found that because each mailing did not result in a "separate injury" or "separate transaction," none of the mailings constituted a separate criminal episode.¹²⁴ The *Graham-Foulke* line of reasoning, therefore, requiring at least two separate criminal episodes within the same scheme, defines a separate episode as being an "independently motivated crime," or an act which results in a "separate injury."

The United States Court of Appeals for the Eleventh Circuit also has followed this approach. In *Bank of America National Trust & Savings Association v. Touche Ross & Co.*,¹²⁵ five banks brought suit against an accounting firm for the preparation of false financial statements and reports. The banks relied on these reports to extend credit to a corporation which later went bankrupt.¹²⁶ The court determined that the nine alleged acts of wire and mail fraud constituted a pattern, stating that "[a]cts that are part of the same scheme or transaction can qualify as distinct predicate acts."¹²⁷ In so holding, the court provided strong support for the two-transac-

120. *Id.* at 225.

121. *Id.*

122. 633 F. Supp. 156 (N.D. Ill. 1986).

123. *Id.* at 157.

124. *Id.*

125. 782 F.2d 966 (11th Cir. 1986).

126. *Id.* at 968.

127. *Id.* at 971.

tions approach. Many other post-*Sedima* cases also have relied on this interpretation.¹²⁸

No continuity element approach

At the opposite extreme from the two-schemes approach are cases in which, despite references to pattern and continuity in *Sedima*, courts have required no continuity element at all. *Conan Properties, Inc. v. Mattel, Inc.*¹²⁹ is one such case. Citing some of the language from footnote 14 of *Sedima*, the court in *Conan Properties* merely concluded that "when two acts which relate to each other and arise out of the same scheme are alleged, the requirement of pleading a 'pattern of racketeering activity' has been met."¹³⁰ Thus, the court interpreted *Sedima* to mean that "pattern" involved a relatedness element, but not a continuity element. Other courts have given the language in *Sedima* a similar reading.¹³¹

128. See, e.g., *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 313 (7th Cir. 1985) (retailer filed fraudulent sales tax returns); *Federal Deposit Ins. Corp. v. Kerr*, 637 F. Supp. 828, 834-35 (W.D.N.C. 1986) (acts of securities, mail, and wire fraud in illegally liquidating assets of bankrupt corporation); *Tryco Trucking Co. v. Belk Stores Serv., Inc.*, 634 F. Supp. 1327, 1334 (W.D.N.C. 1986) (defendant tried to drive plaintiff out of trucking business by means of fraud and extortion); *Bush Devel. Corp. v. Harbour Place Assoc.*, 632 F. Supp. 1359, 1364-66 (E.D. Va. 1986) (multiple acts of mail fraud in scheme by general contractor to defraud construction project owner); *Paul S. Mullin & Assoc., Inc. v. Bassett*, 632 F. Supp. 532, 539-41 (D. Del. 1986) (defendants converted decedent's business to their own use and usurped his clients by fraud); *United Fish Co. v. Barnes*, 627 F. Supp. 732, 734-35 (D. Me. 1986) (defendants embezzled payments by customers and instructed company to write off those accounts as bad debts); *Rush v. Oppenheimer*, 628 F. Supp. 1188, 1198-1200 (S.D.N.Y. 1985) (plaintiff brought suit against defendant for "churning" of plaintiff's stocks); *Trak Microcomputer Corp. v. Wearne Bros.*, 628 F. Supp. 1089, (N.D. Ill. 1985) (several violations of mail and wire fraud as part of scheme to fraudulently obtain microcomputer technology).

129. 619 F. Supp. 1167 (S.D.N.Y. 1985).

130. *Id.* at 1170.

131. See, e.g., *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985) (holding that *Sedima* did not mean that two related acts might not form a pattern, but rather that two isolated acts would not form a pattern); *Alexander Grant & Co. v. Tiffany Indus.*, 770 F.2d 717, 718 n.1 (8th Cir. 1985) (implying that all that "continuity plus relationship" requires is a large number of acts and allegation of similar purposes, results, participants, victims, and methods of commission); *Systems Research, Inc. v. Random, Inc.*, 614 F. Supp. 494, 497 (N.D. Ill. 1985) (holding that the predicate acts merely must be sufficiently related to constitute a pattern).

Analysis

RICO is obviously not intended to reach the defendant who has committed an isolated offense. Courts must therefore define the point at which multiple acts do or do not constitute such an isolated offense. They should, that is, recognize the need for a continuity element in the pattern inquiry.

The two-schemes approach set forth in *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*¹³² provides a practical solution for limiting Criminal RICO suits to professional criminals. Because only professional criminals are likely to engage in two separate criminal schemes, prosecutors and courts will be able to use RICO's harsh penalties only in the situations for which Congress conceived its use—the infiltration of legitimate enterprise by organized crime figures.

The two-schemes approach, however, contains many problems. First, it may be so restrictive that it limits RICO's availability as a weapon in the prosecutor's arsenal. The two-schemes approach coupled with a relatedness element places prosecutors in the impractical situation of having to show two completely separate schemes while showing also that the schemes are related. A professional criminal could only benefit from a strict combination of both relatedness and continuity.

Perhaps the biggest problem with the two-schemes approach is its potentially devastating effect on Civil RICO. Plaintiffs injured by racketeering are usually the victims of one scheme to defraud, intimidate, or extort. Under the two-schemes approach, a court would dismiss the typical Civil RICO suit because the defendant could show easily that all his acts were part of the same overall scheme to injure that victim. Perhaps the only way a plaintiff in this situation could proceed with a Civil RICO suit would be to allege not only a scheme against him or herself, but also a scheme against another victim. This claim, however, may run afoul of the relatedness element. Unless a plaintiff can prove that he was the victim of two separate schemes by the defendant, therefore, which is not usually the case in Civil RICO, RICO's private attorney general provision would be eviscerated.

132. 615 F. Supp. 828 (N.D. Ill. 1985); *see supra* text accompanying notes 106-09.

The two-schemes approach renders RICO useless in some of the situations in which it is most needed. Congress and the courts, therefore, should not implement the two-schemes approach.

The two-transactions interpretation is the most workable of the several approaches. Unlike the no-continuity approach, it reflects Congress's desire that RICO not be aimed at the isolated offender. Unlike the two-schemes approach, it does not raise problems of proof when combined with the relatedness element; both criminal episodes can occur within a "common scheme or plan." The problem with this approach, however, is in the difficulty courts have experienced in defining "separate criminal episodes" or "a single transaction."

The court in *Graham v. Slaughter*¹³³ equated "single transactions" with "independently motivated crimes."¹³⁴ Asking a court to determine when two acts are "independently motivated" strains judicial competence; the court would have to look into the mind of the defendant to see whether there is any link between his motives in executing the two acts. Merely by asserting that his acts arose from the same motive, a defendant can place a heavy burden of proof on the plaintiff in his attempt to establish the continuity element and thus the entire RICO suit. It would be a practically impossible burden for either private plaintiffs or prosecutors.

A more helpful analysis appears in *Medical Emergency Service Associates v. Foulke*.¹³⁵ In denying the existence of continuity in a fraud involving several mailings, the court stated that "each mailing did not result in a *separate injury* or separate transaction. Accordingly, each mailing is not a separate criminal episode."¹³⁶ The court's implication that each "separate criminal episode" requires a "separate injury" merits discussion. A court's view of the plaintiff's "injury" could have a decided effect on the plaintiff's ability to meet the continuity element. In a general sense, all of the alleged episodes in which the plaintiff is a victim could be viewed as contributing to his single, total injury. From this broad perspective, the plaintiff can never prove his case because he only suffers

133. 624 F. Supp. 222 (N.D. Ill. 1985).

134. *Id.* at 225.

135. 633 F. Supp. 156 (N.D. Ill. 1986).

136. *Id.* (emphasis added).

one injury overall, and therefore cannot prove the existence of separate criminal episodes.

A more narrow understanding of injury, however, improves the separate criminal episodes approach and provides the courts with some guidance for adjudicating the continuity element. Courts should begin their analysis by asking, "Would injury to the victim still result if this act stood alone, or did the act require the other predicate offenses in order to complete the injury?" In so asking, the court must consider each predicate act not as a separate abstract action, but rather within the facts of each case. If the act, even in that context, would have itself resulted in an injury, then it likely will constitute a separate criminal episode.

For example, imagine that Victim *V* receives a phone call from Racketeer *R*, in which *R* fraudulently induces *V* to send him money. *V* then wires *R* the money, constituting a separate offense under the wire fraud statute. Two acts have taken place, but is this one episode or two? Under a properly narrow analysis of the injury component, a court should find that this is one episode because if *V* had not responded to *R*'s call, the first act, by sending money, the second act, *V* would have suffered no injury. Because each act must be linked with the other to create the plaintiff's actual injury, only one criminal episode exists.

This analysis breaks down, however, in situations such as that presented in *United States v. Moeller*,¹³⁷ in which the defendant committed arson and kidnapping in the same night.¹³⁸ Under the foregoing analysis, these acts, each of which caused a separate injury, would satisfy the continuity element. But one night's activity should hardly constitute truly "separate criminal episodes." Courts should, therefore, analyze a second factor: a consideration that the episodes be "somewhat separated in time and place."¹³⁹ This language from *Moeller* meshes well with the separate injury requirement. Because the acts must be "somewhat separated," courts maintain some discretion in isolating acts that satisfy the separate injury factor. At the same time, the combination of both factors

137. 402 F. Supp. 49 (D. Conn. 1975).

138. *Id.* at 57.

139. *Id.*

gives courts more guidance than they would have in using just the "time and place" requirement.

This second factor of the continuity test is not without its flaws. One spokesman for the United States Attorney General's office, commenting on the "time and place" language, observed:

[T]he conjunctive 'and' could be read to require that each predicate act be separate from all other acts in both time and place. Under this interpretation, once an initial criminal act is performed at a certain location, such as defendant's regular place of business, subsequent predicate acts performed at the same location pursuant to an ongoing criminal enterprise could not be considered as establishing a pattern of racketeering activity. Or, acts performed simultaneously at separate locations by defendants acting in concert (such as simultaneous acts of murder against several victims) might not possess the requisite separateness in time, exempting all but one of the acts as RICO predicates.¹⁴⁰

In order to avoid such problems, courts or lawmakers could change the conjunctive "and" to "or," thus requiring that the acts be "somewhat separated by time or place." This will alleviate the problem of recovery for acts committed in the same place or of acts occurring simultaneously in different places. By combining the "separate injury" concept and the "somewhat separated by time or place" factor, the courts can determine that separate criminal episodes exist in either case. This analysis will give the courts a workable and flexible continuity element.

CONCLUSION

Congress enacted RICO to combat the influences of professional criminals on ordinary citizens and legitimate business. In constructing this statute, Congress was caught in a conflict between the need for a statute sufficiently broad for effective prosecution, and one sufficiently limited to restrict its application to the intended continuous offenders. This conflict is manifested in the statute's ambiguous "pattern" requirement. Its very inclusion in

140. See *RICO: Hearings on H.R. 2577 and H.R. 2943 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 45 (1985).

the statute was an attempt to ensure a strict application of RICO, but the breadth of its definition was a concession to the obvious need for far-reaching legislation. Although Congress could not have foreseen it, the sixteen years since RICO's enactment have shown that, in reality, the hope for a limited application was sacrificed for the benefits of a broad reach. Courts throughout the country recognize the current need to modify RICO to regain a balance between these two purposes. Reforming "pattern" by requiring elements of relatedness and continuity between the predicate acts is the most effective means of returning RICO to the initial intent of the legislators. The relatedness element should be added simply, without further definition which would only tend to hollow the term. The continuity element, on the other hand, requires greater specificity. Congress and the courts should adopt a two-part analysis, requiring that the predicate acts cause separate injuries and also be somewhat separated by time or place. By adopting these modifications, RICO will enable citizens and officials to thwart the effects of ongoing organized criminal activity on legitimate enterprise, while preserving individual liberties.

Edward Lee Isler