The Pattern Requirement of Civil RICO: "Enterprise" as a Means to End the Confusion

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CURRENT ISSUES

THE PATTERN REQUIREMENT OF CIVIL RICO: "ENTERPRISE" AS A MEANS TO END THE CONFUSION

The Racketeer Influenced and Corrupt Organizations Act¹ (RICO), enacted as part of the Organized Crime Control Act of 1970,² "was designed in a multifaceted campaign against the pervasive presence of organized crime infiltrated in American business and trade."³ Section 1962 makes it unlawful for "any per-

³ The title and acronym of the Act has been the subject of some comment. Parnes v. Heinhold Commodities, Inc., 548 F. Supp. 20, 21 n.1 (N.D. Ill. 1982). The person who christened the statute may have been a "movie buff with a sense of humor" because in the first Hollywood gangster movie of the 1930's "Little Caesar", Edward G. Robinson played an Al Capone-type character named Rico. Id.
son” to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. Section 1964(c) provides that “[a]ny person injured in his business or property by reason of a violation of section 1962” may bring a federal action and if successful, “shall recover threefold the damages he sustains” and his attorney’s fees.

The availability of treble damages and attorneys’ fees has proved very attractive to plaintiffs and has led to a significant increase in the number of civil RICO suits being brought today. In


* 18 U.S.C. § 1964(c) (1982). Section 1965 of RICO provides that venue of any civil action may be laid in “any district in which . . . [the defendant] resides, is found, has an agent, or transacts his affairs.” 18 U.S.C. § 1965(a) (1982).

Although RICO confers jurisdiction on the federal district courts to entertain civil RICO actions, it does not state whether such jurisdiction is exclusive or concurrent with state courts. See, e.g., Gianc v. Samoco, 40 Cal. 3d 903, 916, 710 P.2d 975, 982, 221 Cal. Rptr. 575, 581-82 (1985) (“‘concurrent jurisdiction is consistent with . . . Congress’s expressed mandate that RICO be liberally construed to effectuate its remedial purposes’”).


* See Black, supra note 5, at 366. The generous remedy provisions enunciated by RICO have recently become appreciated for their value and thereby more frequently utilized. Id. Consequently, suits which previously would have disregarded the RICO statute now are adding RICO violations to their claims. See, e.g., Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984) (RICO violation claimed in case of bankruptcy fraud); Moss v. Morgan Stanley, Inc., 719 F.2d 5 (2d Cir. 1983) (stock traders who obtained non-public information had duty to disclose), cert. denied, 465 U.S. 1025 (1984).

Many have traced the increase in civil RICO actions to an article co-authored by Robert Blakey, the Chief Counsel of the Senate Subcommittee which proposed RICO. Blakey & Gettings, supra note 3, at 1012. See Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 486-87 (2d Cir. 1984) (advocated liberal interpretation of RICO), rev’d, 473 U.S. 479 (1985). It was contended by Senator Hruska that the value of Title IX “may well be found to exist in its civil provisions.” 116 CONG. REC. 602 (1970).
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order to avoid federalization of state common law fraud claims and to curtail the labeling of legitimate businesses as “racke-

Furthermore, another attraction of a RICO claim is that it affords plaintiff a federal forum. See Black, supra note 3, at 966 n.6. It allows a new private cause of action for a number of federal crimes which heretofore did not exist, and it may broaden the “scope of discovery.” Id.

It was reported in Sedima that: “Of 270 district court RICO decisions prior to this year, only 3% (nine cases) were decided throughout the 1970’s, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984.” Sedima, 473 U.S. at 481 n.1 (citing Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 55 (1985)).


Most of the civil RICO suits have been aimed at large legitimate corporations in the financial services industry. Goldsmith, Civil RICO Reform: The Basis for Compromise, 71 Minn. L. Rev. 827, 828 n.5 (1987) (sample listing of major corporations that have used RICO civil provisions, with emphasis on a civil RICO suit brought by IBM that resulted in a multi-million dollar settlement) (citing Oversight on Civil RICO Suits: Hearings Before the Comm. on the Judiciary, 99th Cong., 1st Sess. 411 (1986)).

Not all commentators have welcomed the increase in civil RICO litigation. See Lacovara & Aronow, The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO, 21 New Eng. L. Rev. 1, 1-2 (1985) (civil RICO suits distort congressional intent and cause needless prosecutions); Note, Civil RICO is a Misnomer, supra note 6, at 1290 (RICO’s civil provisions are punitive in effect and criminal in nature and as such require criminal procedural protections). However, such concerns for misuse of the Act may be unfounded. Cf. Goldsmith & Keith, Civil RICO Abuse: The Allegations in Context, 1986 B.Y.U. L. Rev. 55 (1986). The study noted:

It is apparent . . . that the abuse issue has been exaggerated and that, to the extent abuse has occurred, the system has handled the problem effectively and expeditiously. For example, congressional witnesses have often broadly referred to “RICO horror stories” without providing supporting documentation. And, to the extent specific examples of abuse have been provided, most, in fact, were dismissed at the pleading stage. The remainder were for the most part proper RICO claims raising serious allegations of enterprise criminality and commercial fraud.

Id. at 69-70. See also Note, Congress Responds, supra note 3, at 859 (authors noted that of nearly three-hundred civil RICO suits surveyed by ABA Task Force as of March 1985, only nine resulted in treble damage awards).

These criticisms of the broad treble damages provision have spurred some congressional response. See S. 2907, 99th Cong., 2d Sess. (1986). Senator Howard Metzenbaum (D. Ohio) introduced a bill wherein treble damages would have been awarded only as a punitive measure but it failed passage by only three votes in the 99th Congress. Nat’l L.J., Nov. 2, 1987, at 36, col. 3. The proposal also gave consumers broader power to sue. Id. Proponents of the removal of the treble damage provisions contend this would eliminate the incentive for abusive litigation. Id. It is likely that the issue will resurface itself in the very near future, especially in view of the close vote on this bill. Id.

* See Note, Civil RICO and “Garden Variety” Fraud - A Suggested Analysis, 58 St. John’s L. Rev. 93, 95 (1983) (suggests limiting RICO securities fraud actions).
teers," many lower federal courts created artificial hurdles for plaintiffs. For example, courts required plaintiffs to prove an organized crime connection, a racketeering injury, a prior criminal conviction or a competitive injury. Two of these court-imposed hurdles, the racketeering injury and prior conviction requirements, were struck down by the Supreme Court in Sedima, S.P.R.L. v. Imrex Co. as contrary to the language and intent of

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9 See Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (to permit plaintiff to file RICO claim "would add credence to an inference that defendant is somehow involved in organized crime"); Lewin, Racketeering Law's Fallout, N.Y. Times, June 27, 1983, at D1, col. 1 ("RICO charges carry an "emotional . . . wallop").

10 See Hokama v. E.F. Hutton & Co., 566 F. Supp. 656, 643 (C.D. Cal. 1983) (civil actions based on federal securities law must entail some relation to organized crime); Waterman S.S. Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256, 260 (E.D. La. 1981) ("[T]he history of the statute reveals a clearly expressed legislative intent that RICO should apply only to actions involving organized crime activities, and not to everyday civil actions ... "); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 756, 746-48 (N.D. Ill. 1981) (no justification for resort to civil RICO action where no link to organized crime can be proven). For a thorough examination of judicial attempts to limit civil RICO actions, see Abrams, supra note 3, at 154-59. Judicial attempts to require the connection of organized crime with civil RICO actions have been unsuccessful. Id. Since the language of RICO does not entail such a requirement, the courts are unwilling to impose it. Id. Furthermore, the status or association questions this analysis would entail are unconstitutional. Id. See generally Moran, Pleading a Civil RICO Action Under Section 1962(c): Conflicting Precedent and the Practitioner's Dilemma, 57 Temp. L.Q. 731, 746-67 (1984) (discussion of the requirement of proving a competitive or organized crime connection).

11 See Moran, supra note 10, at 756. The requirement of a racketeering injury is the "most popular and frequently invoked limitation." Id. This limitation requires the plaintiff to "suffer an injury that is different from the harm arising from the underlying predicate offenses." Id. See King v. Lasher, 572 F. Supp. 1377, 1382 (S.D.N.Y. 1983) ("state law claims are not properly converted into federal treble damage actions by simply alleging that wrongful acts are a pattern of racketeering related to an enterprise ... [without additional allegations that there was] injury resulting from the purported RICO violations."); Guerrero v. Katzen, 571 F. Supp. 714, 718-19 (D.D.C. 1983) (plaintiffs must prove a RICO injury and furthermore, it must be an injury that RICO was intended to prevent).

12 Sedima, 741 F.2d at 496. The Second Circuit opinion in Sedima held that a criminal conviction was required before a civil RICO action could be maintained. Id. at 496-97.

13 See United States v. Forsythe, 429 F. Supp. 715 (W.D. Pa. 1977), rev'd on other grounds, 560 F.2d 1127 (3d Cir. 1977). The purpose of section 1964(c) was to prevent interference with free competition. Id. at 720. Because both RICO and section 4 of the Clayton Act provided for recovery of treble damages and attorney fees, several of the lower courts had limited standing in civil RICO suits to those plaintiffs who could demonstrate a competitive injury. See, e.g., Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983) (court held it was "appropriate to limit the extraordinary private remedy ... to [those] who have suffered a competitive injury ... "); North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980) (plaintiff was required to allege how he was injured competitively by the RICO violation).

14 473 U.S. 479 (1985). Sedima marked the first time the Supreme Court examined a civil RICO action. Id. The two earlier RICO cases examined by the Court were criminal cases. See Russello v. United States, 464 U.S. 16, 27-28 (1983) (purpose of RICO statute
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the RICO statute. Nevertheless, the Sedima Court did suggest in a now famous footnote that courts had overlooked the “pattern” requirement of the RICO statute as a means of limiting the num-

was to provide innovative measures to stop organized crime); United States v. Turkette, 452 U.S. 576, 580-81 (1981) (scope of RICO suits was to encompass both legitimate and illegitimate enterprises).

18 Sedima, 475 U.S. at 495. The Court stated that the judicially set out requirements were inconsistent with “Congress’ underlying policy concerns.” Id.

Congress’ response to Sedima was in the form of a bill introduced by Congressman Frederick Boucher (D. Va.) nine days after the decision. See H.R. 2943, 99th Cong., 1st Sess. (1985); cf. Note, Congress Responds, supra note 3, at 888. The proposed amendment would codify the pre-Sedima Second Circuit’s prior conviction requirement. Id. It has been suggested that this bill ignores the Sedima Court’s concerns that such requirements arbitrarily limit civil RICO suits. Id. The effect is to provide relief to some and deny it to others simply because the defendant who caused their injury did not have the requisite racketeering injury. Sedima, 475 U.S. at 490 n.9. The proposed bill further ignores the difficulty of obtaining convictions on all counts and the potential dangers of criminal defendants plea bargaining to non-predicate offenses to avoid civil liability. Id.

Similarly, a bill was introduced in the Senate by Senator Orrin Hatch (R. Utah) which would amend section 1964(c) to require that one of the predicate acts be an act other than mail, wire or securities fraud. See S. 1521, 99th Cong., 1st Sess. (1985). It also would limit recovery “to competitive, investment or other business injuries” and award cost and attorney fees to defendants who were victims of frivolous suits. Id. Senator Hatch’s bill would allow a business to sue, but would only allow a private person to sue if he had suffered an injury to an investment. Id. One commentator noted that “[t]his would create the anomalous result . . . of denying a RICO remedy to a private person while providing for a business suffering identical injuries.” Note, Congress Responds, supra note 3, at 885.

18 Sedima, 475 U.S. at 496 n.14. The text of the often quoted footnote is set forth below.

As many commentators have pointed out, the definition of a “pattern of racketeering activity” differs from 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 this portion of 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 35198 (statement of Rep. Poff) (RICO “not aimed at the isolated offender”); House Hearings, at 665. 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. § 5575(e). This language may be useful in interpreting other sections of the Act. Cf. Iannelli v. United States, 420 U.S. 770, 789 (1975).

Id.
ber of suits being brought. In the three years since Sedima, the circuit courts have struggled to define the element of "pattern of racketeering activity" with inconsistent results.

Justice White, writing for the majority in Sedima, set forth the four requirements necessary to establish a violation of section 1962(c): "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." The two key components of a RICO action which will be analyzed are: "enterprise" and "pattern of racketeering activity."

This Article will examine the position of several of the circuits on the pattern requirement after the Sedima decision and conclude that the enterprise component of RICO supplies the unifying link in determining whether the alleged predicate acts constitute a pattern of racketeering activity.

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17 Id.
18 Id. at 496. "The plaintiff must, of course, allege each of these elements to state a claim." Id. Further, the plaintiff only has standing if he can prove injury due to the violation. Id.

The presence of both an "enterprise" and a "pattern of racketeering activity" constitutes a violation of RICO. See United States v. Russotti, 717 F.2d 27, 33 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); United States v. Phillips, 664 F.2d 971, 1011 (5th Cir. 1981) (essence of RICO violation is "conduct[ing] of an enterprise through a pattern of racketeering activity"); United States v. Elliott, 571 F.2d 880, 898 (5th Cir. 1978) (Congress intended enterprise to include "any . . . group of individuals' whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes.").

21 See generally Note, RICO: Limiting Suits by Altering the Pattern, 28 Wm. & Mary L. Rev. 177 (1986). "The term 'pattern' defies concise definition." Id. at 183. In enacting the RICO statute, Congress should have foreseen the immense potential for abuse when no guidelines regarding the "pattern" requirement were provided. Id. This oversight has resulted in a lack of uniformity among the courts. Id. Due to the confusion after Sedima a number of courts still did not follow the pattern guidelines set forth therein. See, e.g., United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985). The Qaoud court found that there was no necessity that acts used to form the pattern be "interrelated in any way." Id. at 1116. See also Torwest D.B.C., Inc. v. Dick, 628 F. Supp. 163, 165-67 (D. Colo. 1986) (held predicate acts only have to be related to the enterprise and not necessarily to each other). This is in clear contradiction to the suggestion made by the Sedima Court that it is necessary to show continuity and relationship to find a pattern. Sedima, 473 U.S. at 496 n.14.
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I. ESTABLISHING A VIOLATION UNDER SECTION 1962

The enterprise element has been the easier of the two components for the courts to interpret since Congress provided for its definition. It includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Labor unions, governmental bodies, individuals and corporations have been held to be covered by this definition. A liberal interpretation of the statute is indicated by the use of the term "enterprise" instead of "business" and by the absence of qualifiers thereto.


See, e.g., United States v. Scotto, 641 F.2d 47, 58 (2d Cir. 1980) (union president and vice president conducted the affairs of Local 1814 of International Longshoremen's Association through a pattern of racketeering activity; "enterprise" included "any union"), cert. denied, 452 U.S. 961 (1981). See also United States v. LeRoy, 687 F.2d 610, 616 (2d Cir. 1982) (embezzlement by union official is considered "racketeering" under RICO), cert. denied, 459 U.S. 1174 (1983); United States v. Kaye, 556 F.2d 855, 861 (7th Cir.) (receiving of money by an employee of a labor union from an employer is a violation of RICO), cert. denied, 459 U.S. 972 (1982).


United States v. Benny, 559 F. Supp. 264, 268 (N.D. Cal. 1983) ("[T]here need be only one individual, but he must act through an identifiable entity—in this case, through his sole proprietorship.").

See, e.g., United States v. Aimone, 715 F.2d 822 (3d Cir. 1983). Congress did not intend to limit the definition of entity to the same category of entities. Id. at 828. Corporations were meant to be included within the term "enterprise" because in drafting RICO, Congress used the word "includes" in the enterprise definition to indicate that a non-exhaustive list of associations was intended. United States v. Thevis, 665 F.2d 616, 625-26 (5th Cir.), cert. denied, 456 U.S. 1008 (1982). See also United States v. Hartley, 678 F.2d 961, 988-89 (11th Cir.) (corporations satisfy "enterprise" requirement), cert. denied, 459 U.S. 1170, 1183 (1982); United States v. Huber, 603 F.2d 387, 393-94 (2d Cir. 1979) (more than one corporation is still considered to be an enterprise), cert. denied, 445 U.S. 927 (1980).

"In fashioning the statute, Congress promulgated a broad legislative scheme to encompass a variety of criminal activities, regardless of their direct effect on legitimate business.")., cert. denied, 445 U.S. 946 (1980); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) ("[A]ll enterprises that are conducted through . . . racketeering . . . fall within the interdiction of the Act.").
The second component, a "pattern of racketeering activity," has provided much more controversy among the courts interpreting it. It is submitted, that this can be traced to Congress' failure to adequately define what constitutes a "pattern" within the meaning of RICO. The statute requires "at least two acts of racketeering activity" within a ten year period. The term "racketeering activity" is defined in section 1961(1) as meaning the violation of any one of a group of criminal statutes detailed in that section, but those acts most often included in a civil RICO action involve acts of mail fraud, wire fraud, and the fraudulent sale denied, 429 U.S. 1039 (1977). See also United States v. Elliott, 571 F.2d 880, 897-98 (5th Cir. 1978) (section 1962(c) reaches both legal and illegal organizations by the term "enterprise").

Civil and criminal sanctions are now available when income derived from a pattern of racketeering activity is invested in any enterprise affecting interstate or foreign commerce. Note, Civil RICO is a Misnomer, supra note 6, at 1290; Note, The Second Circuit Sedima Trilogy: Judicial Impatience With Private Civil RICO, 51 BROOKLYN L. REV. 1037, 1045 (1985) (discussion of section 1962(a)-(c)).

18 U.S.C. § 1961(5) (1984). The statute provides that a pattern of racketeering activity "requires 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." Id.

Racketeering activity is defined in 18 U.S.C. § 1961(1) (1984) to mean:

(A) any act or threat involving murder, kidnaping [sic], gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: [bribery, sports bribery, counterfeiting, theft from interstate shipment, embezzlement from pension or welfare funds, extortionate credit transactions, transmission of gambling information, mail fraud, wire fraud, obscene matter, obstruction of justice, obstruction of criminal investigations, obstruction of State or local law enforcement, interference with commerce, robbery or extortion, racketeering, interstate transportation of wagering paraphernalia, unlawful welfare fund payments, prohibition of illegal gambling businesses, interstate transportation of stolen motor vehicles, interstate transportation of stolen property, trafficking in certain motor vehicles or motor vehicle parts, trafficking in contraband cigarettes, white slave trafficking]; (C) any act which is indictable under title 29 United States Code section 186 [dealing with restrictions on payments and loans to labor organizations or relating to embezzlement from union funds]; (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act. (citations omitted).


See infra note 31.

See, e.g., Sun Savings & Loan v. Dierdorff, 825 F.2d 187 (9th Cir. 1987); Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 (2d Cir. 1987); Bank of America v. Touche
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II. Sedima: ABOLISHING COURT IMPOSED HURDLES?

In Sedima,33 the Second Circuit upheld the requirements of a


The elements of mail and wire fraud are (1) a scheme to defraud and (2) the use of the mails or wires in furtherance of the scheme. See Freschi, 583 F. Supp. at 787 (such a RICO claim should allege that defendants gave false information by mail and wire to defraud plaintiff).

With respect to the first element, case law in the area indicates that any departure from "fundamental honesty" or "fair play and candid dealings" is sufficient to constitute fraud. United States v. Kriemer, 609 F.2d 126, 128 (5th Cir. 1980) (scheme to be measured by non-technical standard of fair play); United States v. Bruce, 488 F.2d 1224, 1229 (5th Cir. 1973) (fraud is scheme to "deceive persons of ordinary prudence and comprehension"), cert. denied, 419 U.S. 825 (1974). The use of the mails or wires is not difficult to establish. See, e.g., Pereira v. United States, 347 U.S. 1, 8-9 (1954) (if mailing or wiring is foreseeable defendant need not have actually mailed anything). Accord United States v. Young Bros., 728 F.2d 682, 688 (5th Cir.) (court saw mailing as not only foreseeable, but did not see necessity of determining a rigid time-frame for mailing; it was sufficient that mailing was in the furtherance of the scheme), cert. denied, 469 U.S. 881, (1984); United States v. Shepherd, 511 F.2d 119, 121-22 (5th Cir. 1975) (if defendant uses the mails or wires, that use need only be "incidental to an essential part" of the scheme). The facility with which these predicate acts may be proved and the common use of such means of communication in everyday business life would seem to explain the popularity of RICO suits involving mail and wire fraud. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 501 (1985) (Marshall, J., dissenting). "The single most significant reason for the expansive use of Civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations." Id. (Marshall, J., dissenting)

Despite the integral part the mails play in business life, honest business persons need not have concern as good-faith has always been a complete defense. See Durland v. United States, 161 U.S. 306, 314 (1896) (if evidence had shown that the defendant acted in good faith, "no conviction could be sustained"); United States v. Martin-Trigona, 684 F.2d 485, 492 (7th Cir. 1982) (same).


A recent ruling by the Supreme Court, however, may make RICO securities-fraud cases less attractive to plaintiffs. See Shearson/American Express v. McMahon, 107 S. Ct. 2352 (1987). In McMahon, the Court ruled that RICO securities claims were arbitrageable under the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982). Id. at 2353. Arbitration awards are less generous as they do not include treble damages and attorneys' fees. Id.

33 741 F.2d 482 (2d Cir. 1984), rev'd, 473 U.S. 479 (1985). Sedima was a Belgian manu-
prior conviction and a racketeering injury. On appeal, however, the Supreme Court, in a five-four decision, struck down those restrictions, holding that "RICO is to be read broadly," perhaps even in "situations that were not contemplated by Congress."

The Court stated that the imposition of additional requirements would emasculate the civil provisions and as a result, the remedial purposes of RICO. Nevertheless, the Court, in a footnote, did
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appear to suggest the potential use of the pattern requirement as a means of limiting RICO suits. The Court provided some guidance by quoting from a relevant Senate Report: "[T]he factor of continuity plus relationship combines to produce a pattern." However, the Court did not provide for what should be the requisite number of racketeering acts necessary to satisfy the "continuity" factor. Furthermore, it failed to set forth what "relationship" the acts must have with each other to constitute a pattern of racketeering activity.

In the same footnote, the Court hinted that the lower courts may refer to the definition of pattern in the Dangerous Special Offenders Act section 3575(e), a part of the same Bill as RICO. Although a number of circuit courts have entertained this invitation, it is submitted that the Sedima Court did not suggest that the definition was a panacea in determining whether a pattern exists under RICO. The fact that both RICO and section 3575(e) were enacted simultaneously yet embodied different definitions would seem to indicate that Congress intentionally chose to use the term "pattern" differently in different contexts.

businessmen . . . ." H.R. 1549, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4083 (views of Reps. Conyers, Mikva and Ryan). Furthermore, it was stated that "what a protracted and expensive trial may not succeed in doing, the adverse publicity may well accomplish . . . ." Id. Representative Mikva went so far as to introduce an unsuccessful amendment that would have allowed victims of frivolous private law suits to recover treble damages. 116 CONG. REC. 35,342-43 (1970) (statement of Rep. Mikva). The fact that the House defeated the amendment without discussion would tend to demonstrate that it was well aware of the scope of RICO and that it moved quickly to prevent any attempts to limit it.

40 Sedima, 473 U.S. at 496 n.14. For full text of footnote 14, see supra note 16. Several commentators agree that the Sedima Court's observations suggest to other courts that they "develop a restrictive view of what a 'pattern' is . . . ." Abrams, supra note 3, at 182. See also Black, supra note 3, at 375.

41 Sedima, 473 U.S. at 496 n.14.

42 Id.


44 See supra notes 82-84 and accompanying text.

45 See United States v. Weisman, 624 F.2d 1118, 1122 (2d Cir. 1980) (Congress intentionally chose to use term pattern in different contexts).
III. LIMITING CIVIL RICO AFTER Sedima: THE EIGHTH AND TENTH CIRCUITS

It is submitted that the most restrictive interpretation of the Sedima footnote is the one shared by the Eighth and Tenth Circuits. Both require plaintiffs to show not only two acts of racketeering activity, but also two or more separate schemes to prove the requisite pattern.\footnote{46 See Madden v. Gluck, 815 F.2d 1163, 1164 (8th Cir.) (appellants only alleged scheme of keeping company afloat in order to "loot" it which did not amount to "pattern of racketeering" under RICO), cert. denied, 108 S. Ct. 86 (1987); Condict v. Condict, 815 F.2d 579, 583 (10th Cir. 1987) (fraud, deceit and use of mails and wires more than twice did not establish "pattern of racketeering activity"); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 929 (10th Cir. 1987) (one scheme, one result, one set of participants, one victim, one method of commission, thus no continuity and no "pattern of racketeering"); Devieries v. Prudential-Bache Securities, Inc., 805 F.2d 326, 329 (8th Cir. 1986) (activities comprising supposed "pattern" pertained soley to alleged misrepresentations in connection with plaintiff's account, and as there was no evidence that defendant had engaged in similar endeavors in the past, the plaintiff failed to prove continuity); Superior Oil v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986) (although alleged acts were sufficiently related to form a pattern, they constituted mere subdivisions of only one fraudulent scheme and therefore lacked sufficient continuity to form a "pattern of racketeering activity"). See also Ornest v. Delaware North Cos., 818 F.2d 651, 652 (8th Cir. 1987) (single eight-year fraudulent scheme was not a pattern); Holmberg v. Morrisette, 800 F.2d 205, 209-10 (8th Cir. 1986) (the fraudulent letters of credit were one scheme and therefore not a pattern), cert. denied, 107 S. Ct. 1953 (1987).}

Illustrative of this position is Superior Oil v. Fulmer,\footnote{47 Id. at 257.} in which the Eighth Circuit held that since the predicate acts were committed in furtherance of a single scheme, the pattern requirement was not met.\footnote{48 Id. at 253-54.} The defendant in Superior Oil was charged with using the mails and wires to convert the plaintiff's natural gas pipeline for his own use.\footnote{49 Id. at 257. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985). The Court noted that the legislative history of RICO seems to require continuity plus relationship between the predicate acts. Id.} Although the plaintiff proved related acts of mail and wire fraud, the court ruled he failed to meet the continuity requirement\footnote{50 Id. at 257.} because "[t]here was no proof that [de-}
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fendants] ha[d] ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere."\(^61\)

The Tenth Circuit adopted the multiple schemes requirement in *Torwest D.B.C., Inc. v. Dick*,\(^62\) wherein they reiterated the rule that to make an adequate showing of continuity the plaintiff must demonstrate facts from which at least the threat of ongoing illegal conduct can be inferred.\(^63\) The court held that a single scheme

Relationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points in time or involving different victims. To focus excessively on either continuity or relationship alone effectively negates the remaining prong.

Morgan *v.* Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986) (citing Heritage Ins. Co. of Am. *v.* First Nat'l Bank of Cicero, 629 F. Supp. 1412, 1416 (N.D. Ill. 1986)). Compar[e Illinois Dept of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985) (defendant who for nine consecutive months filed fraudulent state tax returns satisfied continuity and relationship standards; each return represented separate fraud, and activity would have continued indefinitely until detected) with Elliott v. Chicago Motor Club Ins., 809 F.2d 347, 350 (7th Cir. 1986) (alleged acts of mail fraud were not distinct, although committed over period of several years, because they all related to plaintiffs' attempts to settle one claim under their insurance policy, and acts therefore did not constitute pattern).

\(^61\) *Superior Oil*, 785 F.2d at 257. The Eighth Circuit has since reaffirmed the multiple schemes requirement. See, e.g., Holmberg v. Morrisette, 800 F.2d 205 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 155 (1987). *Morrisette* involved the submission of false documents in order to draw on plaintiff's letter of credit. *Id.* at 207-08. The court reaffirmed its position in *Superior Oil* and held that several related acts of mail and wire fraud as part of a single scheme do not constitute a pattern. *Id.* at 209-10. See also Ornest v. Delaware North Cos., Inc., 818 F.2d 651 (8th Cir. 1987), where the defendant fraudulently falsified daily and monthly gross receipts and reports in order to "skim" commissions from vending machines. *Id.* at 652. The court did not find a pattern although each falsified report could be viewed as a separate predicate act. *Id.* Similarly, in *Madden v. Gluck*, 815 F.2d 1163 (8th Cir.), *cert. denied*, 108 S. Ct. 86 (1987), the defendants kited checks, diverted corporate assets, including employees' vacation pay and United Way contributions, and defrauded creditors through false financial statements. *Id.* at 1164. Despite the existence of multiple predicate acts, the court declined to find "a pattern of racketeering activity" as it deemed the acts to be mere subdivisions of a single fraudulent scheme. *Id.* Finally, in *Devries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326 (8th Cir. 1986), the plaintiff contended that during a six year period the defendant had "churned" his account by recommending unsuitable investments. *Id.* at 327. The court ruled this constituted only a single scheme to generate excessive sales commissions and, as such, failed to allege the continuity necessary to establish a pattern. *Id.* at 329. Other circuits, such as the Seventh Circuit, would have viewed each report as a separate predicate act, and thus would have found a pattern of racketeering activity. See, e.g., *Morgan*, 804 F.2d at, 976.

\(^62\) *810 F.2d 925* (10th Cir. 1987). In *Torwest*, the corporation brought suit against its former directors for secretly purchasing real estate and reselling it to the corporation at an immediate secret profit of $1,250,000 and a potential additional profit of $6,000,000. *Id.* at 926-27.

\(^63\) *Id.* at 928. "This element is derived from RICO's legislative history, which indicates
did not create the requisite threat of ongoing activity.\textsuperscript{84}

The position of the Eighth and Tenth Circuits may be subject to criticism in several ways. It is suggested that to require two separate schemes violates the textual and legislative intent of RICO and also ignores the broad holding in \textit{Sedima}.\textsuperscript{86}

RICO defines “racketeering activity” as an “act,” specifically as any of the state or federal offenses enumerated in section 1961(1).\textsuperscript{86} “The phrase ‘pattern of racketeering activity’ is thus properly read as a pattern of ‘acts,’ not a pattern of ‘schemes’ or ‘activities’” as the Eighth and Tenth Circuits would hold.\textsuperscript{87} Arguably, the Eighth and Tenth Circuits have placed too much emphasis on the “continuity” requirement by requiring that the racketeering acts occur in multiple schemes. Therefore, it is submitted, that the Eighth and Tenth Circuits, in their attempt to limit civil RICO suits have stretched the statutory language beyond its reasonable limits.

Congress passed RICO to combat activities which “harm[ed] innocent investors and competing organizations, interfer[ed] with free competition . . . [and] threaten[ed] the domestic security.”\textsuperscript{88} Such activities can be as easily conducted through a single scheme that RICO does not apply to ‘sporadic activity’ or to the ‘isolated offender.’” \textit{Id.} at 928 (citing \textit{Sedima}, 473 U.S. at 496 n.14). \textit{See also} Skycom Corp. v. Telstar Corp., 813 F.2d 810, 818 (7th Cir. 1987) (allegedly fraudulent representations leading to single contract and transfer of single business opportunity were not a pattern).

\textsuperscript{84} \textit{Torwest}, 810 F.2d at 929. \textit{See} Lipin Enters., Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986) (act to defraud one victim one time insufficient in absence of showing of other victims or other frauds); Torwest DBC, Inc. v. Dick, 628 F. Supp. 163, 165-66 (D. Colo. 1986) (one scheme, one result, one set of participants, one victim, one method of commission, thus no continuity and no pattern of racketeering), \textit{aff’d}, 810 F.2d 925 (10th Cir. 1987).

The Tenth Circuit reaffirmed its position in \textit{Condict} v. \textit{Condict}, 815 F.2d 579 (10th Cir. 1987). There, the plaintiffs contended that the defendants used the mails and wires to acquire the plaintiff’s interest in the family ranch. \textit{Id.} at 580-82. The court relied on \textit{Superior Oil} and \textit{Torwest} and ruled that the plaintiff must show more than a single scheme. \textit{Id.} at 583-85.

\textsuperscript{86} \textit{See infra} note 62 and accompanying text.

\textsuperscript{86} \textit{See supra} note 28 (for list of predicate acts under RICO).


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as a multiple one. To require two or more schemes allows defendants who commit large single schemes to circumvent RICO liability. For instance, where a single scheme involves several of the predicate acts enumerated in RICO the multiple scheme approach would nevertheless find no RICO violation. Such a position undermines the remedial purpose of RICO and ignores the plight of that broad class of victims Congress sought to protect.

See supra note 51 and accompanying text.

See Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986). The Morgan court stated:

The proposition that the predicate acts must always occur as part of separate schemes in order to satisfy the continuity aspect of the pattern requirement focuses excessively on continuity, and therefore cannot be accepted as a general rule. Otherwise defendants who commit a large and ongoing scheme, albeit a single scheme, would automatically escape RICO liability for their acts, an untenable result. Id.

See Moran, supra note 57, at 156 n.111.


See Aetna Casualty & Sur. Co. v. Liebowitz, 570 F. Supp. 908 (E.D.N.Y. 1983), aff'd, 780 F.2d 905 (2d Cir. 1984). Liebowitz demonstrates how a non-multiple scheme application of RICO can remedy illegal activities Congress sought to prevent. Id. The defendant, Stuart Liebowitz, conducted a widespread mail fraud scheme in which he diverted for his own use premium money properly owed to the insurers. Id. at 906. Despite the efforts of the New York State Insurance Department and Aetna, Liebowitz continued the diversion of funds and caused an estimated loss of between four and six million dollars. Id. In his discussion of Liebowitz, one commentator stated that only when Aetna filed a civil RICO suit and the district judge granted a preliminary injunction was the defendant estopped from further diversion of funds. Wexler, Civil RICO Comes of Age: Some Maturational Problems and Proposals for Reform, 55 RUTGERS L. REV. 285, 287-88 (1983). The same commentator suggested that had it not been for the civil RICO action, the defendant would have successfully continued to avoid sanctions. Id. at 310-11.

Civil RICO is valuable to such plaintiffs because it reaches both legitimate and illegitimate enterprises. See United States v. Turkette, 452 U.S. 576, 589-93 (1981). See also United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) (exempting illegal enterprises from RICO would leave a loophole), cert. denied, 429 U.S. 1039 (1977); Blakey & Gettings, supra note 9, at 1023-25 (discussion of the nature of "enterprise" under RICO). In Sedima, the Court reminded us that legitimate enterprises "enjoy neither an inherent incapacity for criminal activity nor an immunity from its consequences." Sedima, 473 U.S. at 496. The inclusion of the words "Organized Crime" in the title of the act has caused many to wrongly associate organized crime with traditional criminal groups such as La Cosa Nostra. Blakey, supra note 2, at 250 n.40. This position was criticized by the sponsor of the Organized Crime Control Act, Senator John L. McClellan: "[I]n none of the hearings or in the processing of legislation in which I have been involved has [organized crime] been used in . . . [such a] circumscribed fashion." Id. (citing GAMBLING IN AMERICA: A REPORT OF THE COMMISSION ON THE REVIEW OF NATIONAL POLICY TOWARD GAMBLING 181-82 (1976)).
It is further submitted that the Eighth and Tenth Circuits have substantially transcended the possible limits of the interpretation of “pattern” suggested by the Court in Sedima. It is noteworthy in this regard, that two judges of the Eighth Circuit have suggested that the “multiple schemes” requirement be re-examined en banc when a proper case presents itself.  

IV. TWO RELATED ACTS ARE SUFFICIENT

Although a majority of the circuit courts are in agreement with the proposition that a “multiple schemes” approach is not the most appropriate analysis, they have nevertheless diverged in their analyses of what approach to take in determining a pattern. It is

The fact that the alleged perpetrators are presumably respectable and entrusted with responsibility . . . by stockholders does not suggest . . . that they are incapable of engaging in organized criminal activity. We all stand equal before the bar of criminal justice, and the wearing of a white collar, even though it is starched, does not preclude the organized pursuit of unlawful profit.

United States v. Carter, 493 F.2d 704, 708 (2d Cir. 1974). The purpose of the civil remedies is "to divest the association of the fruits of its ill-gotten gains." Turkette, 452 U.S. at 585.

The Morgan court further asserted that in determining whether a pattern was established, the "[r]elevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." Morgan, 804 F.2d at 975. However, the court stressed that even if the predicate acts related to the same overall scheme, this did not automatically mean failure of the pattern requirement. Id. at 975-76. Accord Elliott v. Chicago Motor Club Ins., 809 F.2d 347, 350 (7th Cir. 1986). The application of these relevant factors are to be analyzed on a case-by-case basis since the "doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative." Morgan, 804 F.2d at 976. Applying this analysis,
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suggested that the two related acts analysis adopted by the Ninth, Eleventh and Second Circuits most approximates Congress' and the Sedima Court's intent. It is further suggested that the best approach is that enunciated by the Second Circuit in United States v. Ianniello, which looks more specifically to the enterprise component in relation to the predicate acts in determining whether a pattern of racketeering activity exists.

A. The Ninth and Eleventh Circuits

On the opposite end of the spectrum of the pattern interpretative scale are the Ninth and Eleventh Circuits. Rather than requiring multiple schemes, each circuit requires only two related acts to constitute a pattern of racketeering activity. the Morgan court found that a pattern of racketeering did exist under its facts since the alleged acts of mail fraud, which extended over several years, resulted in two separate and distinct foreclosure sales held within two years of each other. Id.

Conversely, the same court was unwilling to find a pattern in Marks, where “[t]he multiple predicate acts covered a short period of time (several months) and [did] not take on the character of being separate and distinct schemes in time and place.” Marks, 811 F.2d at 1112.

Therefore, it is reasonable to conclude, that under the Seventh Circuit’s transactional analysis, the presence of more victims, more predicate acts and distinct injuries inflicted over a longer period of time, will more likely result in a finding of pattern. Nevertheless, at least two separate transactions are required. See Sedima, 473 U.S. at 496 n.14.

It is further submitted that such requirements provide a vague and unpredictable rule of decision. The court in Morgan recognized that such a legal test is “less than precise.” Morgan, 804 F.2d at 977. Moreover, the court accepted that the test that would be developed on a case-by-case basis. Id.

For a case where the Seventh Circuit was unwilling to to find the continuity requirement satisfied, see Skycom, 813 F.2d 810, 818 (7th Cir. 1987), wherein allegedly fraudulent representations leading to single contract and transfer of single business opportunity did not meet the continuity requirement. Id. See also Marks, 811 F.2d at 1112 (multiple predicate acts covered shorter period of time and did not take the character of separate and distinct transactions); Elliott, 809 F.2d at 350 (several acts of mail fraud over a period of several years not distinct since related to one settlement claim).

"See infra notes 100-102 and accompanying text.

"See, e.g., Sun Sav. and Loan Ass’n v. Dierdorff, 825 F.2d 187 (9th Cir. 1987); California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1469 (9th Cir. 1987) (plaintiffs’ allegations of “at least twenty-four separate acts of mail and wire fraud” amounted to pattern), cert. denied, 108 S. Ct. 698 (1988); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986) (district court erred in requiring plaintiffs to allege a connection to organized crime and a separate racketeering activity)."


"See infra notes 81 & 91 and accompanying text.
1. Threat of Continuing Activity

Representative of this position is Bank of America v. Touche Ross & Co., in which the Eleventh Circuit was confronted with a civil RICO claim concerning a suit brought by five banks against a public accounting firm. After reviewing the financial documents prepared by the defendant, the banks agreed to extend credit to International Horizons. Subsequently, International Horizons filed for bankruptcy and the banks sought to recover from the defendant alleging nine separate acts of wire and mail fraud involving the same parties over a three year period.

The Touche Ross court denounced any requirement that the predicate acts must occur within different criminal episodes or multiple schemes and concluded that it was necessary to show

71 782 F.2d at 966.
72 Id. at 968. The banks alleged that the defendants violated section 1962(c) and (d) which provide:
(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(c)-(d) (1982). Therefore, under RICO's definitional framework, the defendants were "persons" employed by or associated with International Horizons, an "enterprise" engaged in interstate and foreign commerce. The banks suffered injury as a result of defendants' "direct or indirect participation in the conduct" of International Horizons' affairs through a "pattern of racketeering activity" (specifically, two or more acts of mail fraud and wire fraud). Touche Ross, 782 F.2d at 969.
73 Id., 782 F.2d at 968.
74 Id. These financial documents were prepared as a prerequisite to execution of the credit agreement to International Horizons. Id. The documents took the form of audited financial statements and unqualified reports. Id.
75 Id. The agreement executed extended $60 million in credit to International Horizons. Id.
76 Id.
77 Id. International Horizons filed for bankruptcy two years after the financial agreement was signed. Id.
78 Id. "During the course of the bankruptcy litigation, the banks entered into a settlement with International Horizons that resulted in a loss to the banks of approximately $16.7 million in unpaid loans and legal expenses." Id. Therefore, the banks brought suit against defendant accountants for the outstanding damages. Id.
The court stated that the bank's complaint which alleged only one instance of mail fraud was not deficient because on seven other occasions it was alleged that the defendants prepared false financial statements and reports that they knew would ultimately be mailed to the banks. Id. at 971.
79 Id.
80 Id. In interpreting Sedima, the court stated that "[a]cts that are part of the same
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more than one predicate act plus the threat of continuing activity to satisfy the continuity component of *Sedima.*

The court found that the complaint before them was sufficient on the basis of the following factors: the relationship between the parties, the time frame of the predicate acts, and the number of predicate acts. The court held that each act which is a separate violation of a statute will be considered distinct from other acts violating the same statute regardless of the underlying circumstances. It is submitted, however, that the Eleventh Circuit’s exclusive reliance on the definition of pattern set forth in section 3575(e) in determining whether a RICO pattern is established places too much emphasis on the relationship of the acts without providing a method for determining continuity.

A Georgia district court applying this standard held that a showing of two predicate acts as part of a single scheme was sufficient to meet the threshold burden under *Touche Ross.* Nevertheless, a single bond offering to thousands of investors did not demonstrate the continuing and ongoing design necessary to establish a ‘threat of continuing activity.’

Although it is conceded that such Eleventh Circuit analysis is consistent with both the language in RICO and in *Sedima,* there

scheme or transaction can qualify as distinct predicate acts” and as such each act will be a separate violation of RICO. *Id.*

*Id.*

*Id.*

*Id.*

*Id.* Rather, the court looked to section 3575(e) as an aid in determining the pattern requirement. See *supra* notes 43-45 and accompanying text. This definition looks to the similarity or interrelatedness of the acts rather than considering whether there is a threat of the acts continuing in the future. *Touche Ross,* 782 F.2d at 971.

*Sheftelman v. Jones,* 636 F. Supp. 263, 268 (N.D. Ga. 1986). The court followed *Touche Ross* and determined that the predicate acts did not constitute a threat of continuity, since they did not occur over a protracted period of time, nor were there frequent solicitations made to a small group. *Id.* at 268. The threshold burden of alleging two predicate acts was met even though only one scheme was involved. *Id.* But see *Bros v. Culver,* 650 F. Supp. 874 (D.C. Cir. 1987). That court interpreted the Eleventh Circuit as stating that a RICO case could not be dismissed as long as separate violations are alleged. *Id.* at 876. In *Bros,* the acts were part of a single transaction, all designed to execute one scheme. *Id.* at 877. *Touche Ross* did not go so far as to say facts like these definitely state a cause of action under RICO. *Id.* The court concluded that an adoption of the *Touche Ross* approach would be unduly broad in light of the facts of this case and the purpose of RICO. *Id.* at 876.

*Sheftelman,* 636 F. Supp. at 268. The court distinguished this conduct from that in *Touche Ross* as not occurring over a protracted time period. *Id.*
remains the circuit's failure to enunciate a clear test for determining when a "threat of continuing activity" exists. As the Georgia case demonstrates, the lack of a clear test will result in defendants escaping RICO liability in situations which Congress clearly intended to remedy.

2. Acts Which Are Not Isolated or Sporadic

The Ninth Circuit has also interpreted RICO as only requiring a single criminal scheme. In Sun Savings and Loan Association v. Dierdorff the court rejected the requirement of multiple schemes as unreasonably limiting the scope of RICO and overlooking the admonition of the Supreme Court to read RICO broadly. A showing of "two or more predicate acts that are not isolated events, are separate in time, and in furtherance of a single criminal scheme" was held sufficient to satisfy the pattern requirement.

The "threat of continuing activity" requirement is met quite simply if the acts are not isolated or sporadic. There is no need to show that the activity will continue to exist in the future, but only that the "threat of continuing activity" existed at some time

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\[87\] See supra notes 85-86 and accompanying text.
\[88\] Sun Savings and Loan Ass'n v. Dierdorff, 825 F.2d 187, 193 (9th Cir. 1987). The court was clear in its rejection of the multiple schemes approach: "We see no sound basis for the view taken by some courts that a pattern requires more than one 'fraudulent scheme' or 'criminal episode'." Id. The alleged racketeering activity consisted of four letters written by Dierdorff (Sun Savings' former president) to various entities. Id. at 189. Dierdorff allegedly wrote the letters to cover up a scheme in which he received kickbacks from Sun's loan customers. Id. at 189-90.
\[89\] Id. at 187.
\[90\] Id. at 193, n.4. See Sedima, 473 U.S. at 497. But see Medallion TV Enter. v. SelectTV, Inc., 627 F. Supp. 1290, 1297 (C.D. Cal. 1986) (separate criminal episodes unconnected in time and substance are necessary to show pattern of racketeering), aff'd, 823 F.2d 1390 (9th Cir. 1987).
\[91\] Dierdorff, 825 F.2d at 193.
\[92\] Id. at 194. Cf. Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1393 (9th Cir. 1986). The Dierdorff court distinguished Schreiber on its facts by noting that in that case, the four predicate acts were part of a "series" of on-going criminal activities. Dierdorff, 825 F.2d at 194. Two predicate acts, occurring at nearly the same time and relating to the single goal of diverting a single shipment, were held not to constitute a threat of continuing activity because there was no further need to commit predicate acts once the goal was completed. Id. The Dierdorff court failed to distinguish the difference between "goal" and "scheme", or indicate how much time must pass between predicate acts before the pattern requirement is met. Id.
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during the activity. Applying this analysis to the facts in Dierdorff, the court held that four separate acts over a five-month period (which acts did not complete the criminal scheme) did meet the pattern requirement.

The Ninth Circuit's approach does extinguish the potential gap between congressional intent to redress civil RICO victims and the Eleventh Circuit's misapplication of the "threat of continuing activity" prong by explicitly eliminating the need to show that the activity will continue to exist in the future. Even this approach, however, does not fully implement Congress' intent in that it fails to give proper respect to the enterprise component of RICO. RICO was designed to ensure that the predicate acts it covers are not isolated or sporadic since it provided that they be done in the conduct of the affairs of an enterprise. It is submitted that the enterprise component, by its very ongoing nature, satisfies the Ninth Circuit's requirement that the acts are not isolated or sporadic, while supplying the unifying link in determining whether the alleged predicate acts constitute a pattern of racketeering activity.

B. The Second Circuit: Pre-Sedima Civil RICO Analysis Survives

1. "Enterprise" as a Means of Finding Pattern

The Second Circuit, prior to Sedima, held that two or more predicate acts constituted a pattern of racketeering activity. In United States v. Parness, the court of appeals held that a pattern of racketeering activity could be established by any two predicate acts, even if the acts occurred on the same day, in the same place, and as part of the same criminal episode. In United States v. Weisman, the Second Circuit left the pattern requirement of Parness

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**Dierdorff**, 825 F.2d at 194 n.5.

**Id.** at 190, 194.


**Id.** at 438. *See also* United States v. Chovanec, 467 F. Supp. 41, 44 (S.D.N.Y. 1979) (court ruled defrauding single victim through six acts of wire fraud was pattern); United States v. Moeller, 402 F. Supp. 49, 58 (D. Conn. 1975) (two acts of interstate transportation of stolen property on the same day formed pattern of racketeering activity).

624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). The Weisman case chroni-

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unaltered, but it chose to focus on the enterprise requirement as a means of establishing continuity between the predicate acts and the "pattern of racketeering activity." In its first case after Sedima, the Second Circuit in United States v. Ianniello, held that the carefully reasoned analysis of Weisman was not overruled by the Sedima footnote. The court continued to examine the "enterprise" to determine whether the relatedness requirement was fulfilled. Pursuant to the Second Circuit's analysis, an enterprise must be a continuing operation and the predicate acts must be related to the common purpose of the enterprise. An enterprise with only a single purpose can qualify as the basis for a RICO violation when two or more predicate acts construct the theater. Id. at 1120. To assure that the minimum number of shares were purchased at the public offering, they arranged to make cash payoffs from the theater's profits to those who purchased stock. Id. Once the theater was operating, Weisman and his associates began to skim and divert to their own use the earnings from ticket sales and concessions. Id. Even when the skimming forced the theater into Chapter XI bankruptcy proceedings, they continued their skimming. Id. at 1121. Weisman was eventually convicted of nine counts of securities fraud and nine counts of bankruptcy fraud. Brodsky, "Pattern Requirement Under RICO", N.Y.L.J. Sept. 9, 1987, at 2, col. 1.


Weisman, 624 F.2d at 1122. The court noted that the language of the Act did not expressly require the predicate acts to be related and that the legislative history was found to be inconclusive. Id. at 1122 n.3. See United States v. Dozier, 672 F.2d 551, 544 (5th Cir.) (government must prove relation between predicate offenses and affairs of enterprise to meet "pattern of racketeering" requirement), cert. denied, 459 U.S. 943 (1982); United States v. Phillips, 664 F.2d 971 (5th Cir. Unit B Dec. 1981) (two predicate acts need not be related to each other, but they must be related to the enterprise), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982).

Ianniello involved a scheme in which money was skimmed from several well known Manhattan restaurants. Id. at 187.

The footnote language regarding pattern was distinguished as mere dicta and, therefore, not controlling. Id.


Ianniello, 808 F.2d at 191.

Id. The court noted that some cases have drawn the line where the crimes were "aimed at a discrete goal, singular in time and in instance." Id. See Professional Assets Management, Inc. v. Penn Square Bank, N.A., 616 F. Supp. 1418, 1420-22 (W.D. Okla. 1985) (crimes to further goal of fraudulently preparing a single audit report did not form a pattern). Apparently, the court is saying that the single purpose necessary for an enterprise to be in violation of 18 U.S.C. § 1962(c) must be engaged in a course of conduct. Ianniello, 808 F.2d at 191. This "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associations function as a continuing unit." Id. (quoting Turkette, 452 U.S. at 583).
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have been committed in order to further the enterprise. Therefore, "when a person commits at least two acts that have the common purpose of furthering a criminal enterprise . . . the elements of relatedness and continuity which the Sedima footnote construes section 1962(c) to include are satisfied."\(^{105}\) It is submitted that the analytical approach taken by the Second Circuit in Weisman and Ianniello strikes the ideal balance between the competing interests of plaintiffs and defendants while avoiding many of the disadvantages of the other circuits' analyses, as discussed above.

The Second Circuit's requirement of continuity as an element of "enterprise" is fully consistent with the Supreme Court's decision in United States v. Turkette,\(^{106}\) where the Court ruled that enterprise is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."\(^{107}\) It is submitted that there is no inconsistency between the requirement of continuity for an enterprise, recognized in Turkette and in the decisions of the Second Circuit, and the requirement of continuity in pattern, recognized in the Sedima footnote. In addition, focusing on the enterprise in determining a pattern and allowing claims of repeated criminal activity in the course of a single scheme to be punished reflects the plain language of RICO while it also tends to discourage claims based solely upon isolated or sporadic activity.\(^{108}\)

2. Aberration in the Second Circuit's Pattern Approach

Although the Second Circuit reaffirmed its position that two related predicate acts are sufficient to establish a pattern under RICO in Beck v. Manufacturers Hanover Trust Co.,\(^{109}\) the court noted that the requisite continuity and relatedness could be found

\(^{105}\) Ianniello, 808 F.2d at 192.
\(^{106}\) 452 U.S. at 583 (1981).
\(^{107}\) Id.
\(^{108}\) Id.
\(^{109}\) Moran, supra note 57, at 150:
The required relationship is reflected instead, in the connection of the Acts to the goal or purpose of the scheme. This relationship not only comports well with the practical realities involved in the perpetuation of a criminal scheme, but also takes into account the congressional intent that RICO not be directed to isolated or unrelated instances of prohibited behavior.
Id.
by examining either the pattern or the enterprise,\textsuperscript{110} and the difference between the two was only "a matter of form."\textsuperscript{111} This is a significant departure from \textit{Ianniello}.	extsuperscript{112} The \textit{Beck} court defined enterprise as the \textit{racketeering activity} engaged in by the defendants,\textsuperscript{113} rather than what RICO describes as the \textit{organizational vehicle} by or through which the racketeering activity is undertaken.\textsuperscript{114} It is submitted that the \textit{Beck} court's definition is contrary to the plain language of RICO which makes it clear that enterprise is a separate entity from racketeering activity.\textsuperscript{115} By equating enterprise with pattern of racketeering activity and then demanding that the plaintiffs prove multiple episodes in order to make the enterprise a continuing enterprise, \textit{Beck} has attempted to reintroduce the multiple episode approach that \textit{Ianniello} effectively eliminated.\textsuperscript{116} It is further submitted that both the \textit{Turkette} Court and the \textit{Ianniello} court recognized that continuity and relatedness are to be found not in the pattern of acts but in the enterprise.\textsuperscript{117}

The court further deviated from its earlier position in \textit{Ianniello} in \textit{Furman v. Cirrito}.\textsuperscript{118} The plaintiff there stated two state law causes of action based on partnership fraud and breach of fiduciary duty, and a cause of action under RICO.\textsuperscript{119} Since the actions of the defendant partners in attempting to dispose of the partnership were undertaken while the partnership was "not functioning as a continuing unit in an ongoing organization,"\textsuperscript{120} the court

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Id.} (citation omitted). The court found that the defendants' enterprise had only one goal, and that an association of this type was "not sufficiently continuing" so as to constitute a RICO enterprise. \textit{Id.}

\textsuperscript{112} \textit{Compare Ianniello, 808 F.2d} at 191 ("inquiry as to relatedness and continuity is best addressed in the context of the concept of 'enterprise'") \textit{with Beck, 820 F.2d} at 51 (\textit{Ianniello} recognized that to examine the enterprise or the pattern is a matter of form).

\textsuperscript{113} \textit{Beck, 820 F.2d} at 51.

\textsuperscript{114} \textit{Furman v. Cirrito, 828 F.2d} 898, 908 (2d Cir. 1987) (Pratt, J., dissenting).

\textsuperscript{115} \textit{See United States v. Turkette, 452 U.S.} 576, 583 (1981) ("The 'enterprise' is not the 'pattern of racketeering activity', it is an entity separate and apart from the pattern of activity in which it engages."); \textit{Ianniello, 808 F.2d} at 190. ("[R]elatedness is supplied by the concept of 'enterprise' . . . . This also supplies the necessary element of continuity since the enterprise is a continuing operation.").

\textsuperscript{116} \textit{Furman, 828 F.2d} at 908 (Pratt, J., dissenting).

\textsuperscript{117} \textit{See supra note} 111.

\textsuperscript{118} \textit{828 F.2d} 898 (2d Cir. 1987).

\textsuperscript{119} \textit{Id.} at 899.

\textsuperscript{120} \textit{Id.} at 903.
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held that the continuity requirement was not satisfied.\(^{131}\)

It is contended that the *Furman* court's analysis in determining whether an enterprise existed was misplaced. In effect, the court proposed that if the acts of the defendant put an end to the enterprise, no RICO liability should exist. It is very unlikely that Congress and the Supreme Court had any intention of leaving such an injury unremedied.

The Second Circuit's recent decisions in *Beck* and *Furman* have shifted the focus away from the enterprise and back to the multiple episode element.\(^{132}\) For example, if a plaintiff claims that he has been defrauded through mail and wire fraud, both predicate acts under RICO, the *Weisman* and *Ianniello* court would examine the scheme to determine whether an enterprise existed.\(^{133}\) If so, the continuity plus relationship requirement of *Sedima* would be deemed satisfied.\(^{134}\) The *Beck* and *Furman* court, however, might look to see if the enterprise had a multiple scheme or a limited life expectancy.\(^{135}\) This approach would appear to be closer to that taken by the Ninth and Eleventh Circuits and, therefore, it fails for the very same reasons discussed above.

**CONCLUSION**

Congress has eagerly seized on the *Sedima* Court's suggestion that they act to limit RICO suits,\(^{136}\) however, no RICO amend-

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\(^{131}\) *Id.* Is the court really stating that an association whose purpose is to put an enterprise out of business cannot be guilty of a RICO charge regardless of how many predicate acts are done or over what period of time they are done? *Id.* at 908. (Pratt, J., dissenting). The court indicated its discontent with plaintiffs' claims. *Id.* It expressed "difficulty in discovering a sufficient allegation of racketeering activity at all" and "look[ed] with a jaundiced eye upon allegations of fraud based on information and belief...." *Id.* A contention of coercion was held "too conclusory to support a charge of criminal wrongdoing ...." *Id.* at 902. But see *Furman*, 828 F.2d at 903-04 (Pratt, J., dissenting). The majority's opinion narrowly defined RICO despite the mandate of Congress and the Supreme Court. *Id.* This decision, along with that of *Beck*, has made the "pattern" requirement into a maze with two opposite exits. *Id.* at 908-09 (citing string of cases either limiting or applying *Ianniello*).

\(^{132}\) *Furman*, 828 F.2d at 908 (Pratt, J., dissenting).

\(^{133}\) *Beck*, 828 F.2d at 908 (Pratt, J., dissenting).

\(^{134}\) See supra notes 91-104 and accompanying text.

\(^{135}\) *Id.*

\(^{136}\) *Id.*

\(^{131}\) See *H.R. 2517*, 99th Cong., 1st Sess. (1985). This bill directly addresses the pattern issue. *Id.* The bill introduced by Representative Conyers (D. Mich.) would amend § 1961(5) to read: "(5) pattern of criminal activity means two or more acts of predicate criminal activity, separate in time and place .... (c) that are interrelated by a common scheme, plan,
ment to this end has yet been passed. Therefore, it is urged that in any future RICO case before the Supreme Court, the Weisman and Janniello approach of focusing on the enterprise element be adopted to determine whether a pattern of racketeering activity exists. This approach best fulfills Congress’ promise of powerful new remedies under RICO while protecting the rights of potential defendants.

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