A Proposed RICO Pattern Requirement for the Habitual Commercial Offender

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I. INTRODUCTION

Think of the Racketeer Influenced and Corrupt Organizations Act and you might conjure up visions of fresh-faced prosecutors bringing down organized-crime kingpins. Think again. Thanks to the Gang That Can't Shoot Straight—Congress—the 1970 RICO statute has instead be-

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come the scourge of corporate directors, accountants and others whose only link to a racket is the tennis court.\(^1\)

With the inclusion of mail,\(^2\) wire,\(^3\) and securities fraud\(^4\) as predicate offenses, the Racketeer Influenced and Corrupt Organizations Act\(^5\) (RICO) has developed into a most devastating weapon in the hands of attorneys who handle plaintiffs' business fraud litigation. RICO's treble damage and attorney's fee provision\(^6\) mandates that garden variety fraud cases be analyzed for inclusion of RICO counts. It is the purpose of this article to suggest a meaningful interpretation of RICO's pattern requirement that will limit RICO's application to the habitual offender, the intended target of the legislation.

Because, by its terms, RICO must be construed liberally to effectuate its remedial purpose,\(^7\) the breadth of RICO has spread in recent years.\(^8\) In 1988 alone, RICO has been ex-

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3. Id. § 1343.
4. Id. § 1961(1)(D). This section provides that "racketeering activity" includes any offense involving fraud in the sale of securities.
5. Id. §§ 1961–68.
6. 18 U.S.C. § 1964(c) provides that:
   Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 U.S.C. § 1982] may sue therefor in any appropriate United States district court and shall recover threefold the damage he sustains and the cost of the suit, including a reasonable attorney's fee.
8. See AMERICAN BAR ASSOCIATION, REPORT OF THE AD HOC CIVIL RICO TASK FORCE, Section of Corporation, Banking and Business Law (1985) [hereinafter ABA TASK FORCE REPORT]. This report references a computerized data base of RICO decisions relating to approximately 300 federal civil RICO cases from the statute's in-
tended to apply to a wide variety of cases including wrongful discharge litigation. Eastern Airlines and its parent company, Texas Air, have filed a $1.5 billion lawsuit under RICO against the Airline Pilot's Association and the International Association of Machinists charging the Unions with an illegal smear campaign intended to ruin Eastern's business reputation. The Department of Justice has obtained an indictment against a Rhode Island businessman under RICO for alleged violations of federal laws relating to the handling of hazardous wastes. Laventhol & Horwath, the ninth largest public accounting firm in the United States, recently paid $15 million in an out of court settlement of a RICO class action suit involving alleged fraud by Laventhol & Horwath in the auditing of certain tax shelter limited partnerships.

The judiciary has not been unaware of the explosion in RICO litigation. In its 1985 decision, Sedima S.P.R.L. v. Imrex Co., Inc., the United States Supreme Court recognized that "in its private civil version, RICO is evolving into something quite different from the original concept of its enactors." The Court suggested that this divergence appeared 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.' "

At footnote fourteen of that opinion, the Court attempted to provide some guidance as to how the pattern element might be interpreted. The Court commented that while only two acts...
of racketeering activity are necessary under the statute for a pattern to exist, two acts "may not be sufficient"17 to actually constitute a pattern. The Court also noted that the congressional history suggests that the elements of continuity and relationship as well as the threat of ongoing activity are the focus of the pattern element.18 Finally, the Court referenced a section of the same omnibus legislation dealing with sentencing guidelines for repeat offenders as a possible source for interpreting the pattern element.19

Since Sedima, the pattern requirement has been in a total state of flux.20 Virtually every circuit has been heard on the subject. Interpretations of what constitutes a pattern range from the "multiple schemes" approach of the Eighth Circuit,21 to the Fifth Circuit's liberal interpretation, which requires only two related predicate acts.22 Definitions of pattern vary not 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." 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. . . ." Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "[Cr]iminal 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."

This language may be useful in interpreting other sections of the Act.

Id. at 496 n.14 (citations omitted) (emphasis added).

17. Id.
18. Id.
19. Id.
20. See Blakey, RICO Litigation Update, RICO: LITIGATION UPDATE 129 (A. Matthews, ed. 1988) [hereinafter RICO UPDATE].

Unfortunately, the district courts since Sedima have largely remained "unreconstructed." . . . Ignoring the general teachings of Sedima, and narrowly focusing on footnote 14, they have continued to dismiss most civil RICO cases, not seeking, as the Supreme Court suggested, to develop a "meaningful" definition of the concept of pattern, but to find an easy device to clear their dockets.

Id. at 199 (citations omitted).

21. See, e.g., Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986) (one isolated fraudulent scheme insufficient to state RICO claim).

22. See, e.g., R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985). But cf. Montesano v. Seafirst Commercial Corp., 818 F.2d 423 (5th Cir. 1987) (following R.A.G.S. but urging that liberal interpretation be overruled because acts in prepara-
only from circuit to circuit but also within certain circuits.\footnote{Compare Furman v. Cirrito, 828 F.2d 898 (2d Cir. 1987) with Reiter's Beer Dist., Inc. v. Christian Schmidt Brewing Co., 657 F. Supp. 136 (E.D.N.Y. 1987). In Furman, the Second Circuit affirmed the dismissal of a claim based on the failure of some partners to disclose to other partners information about the sale of the partnership. The court dismissed on the theory that because the claim was based on a partnership dissolution, the element of continuity was missing from the enterprise element. In Reiter's, however, the district court found a pattern in a three year course of conduct based on a claim to force the plaintiff out of business. In both cases, the claims involved conduct relating to the potential termination of an entity. This sort of conduct was sufficient in Furman, to warrant dismissal under an enterprise theory, but in Reiter's such conduct does not seem to have played a role.

The Eighth Circuit's multiple scheme analysis has been questioned at least three times by panels within that circuit. See infra note 115 and accompanying text. There are many other examples of disagreements between circuits, and even within circuits, as to the appropriate test for pattern. Compare Medical Emergency Serv. Ass'n, S.C. v. Foulke, 844 F.2d 391 (7th Cir. 1988) with Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987). In Medical Emergency, the Seventh Circuit refused to find a pattern in a case in which a group of doctors, through various schemes of alleged fraud, caused the termination of a contract to provide medical services. The court found that the various fraudulent transactions only amounted to one criminal episode, rather than the "separate and distinct episodes of fraud" necessary to constitute a pattern. Id. at 397. However, in Liquid Air a panel in that same circuit upheld the finding of a pattern in a case which involved defrauding the plaintiff through a single scheme, implemented by the mailing of several fraudulent invoices over a seven month period. 834 F.2d at 1304-05. In Medical Emergency, the Seventh Circuit panel denied pattern because the cumulative effect of all the fraudulent acts had only one ultimate objective. The defendants in Liquid Air also had only objective—theft from the plaintiff through fraud—yet that particular panel found such conduct to be sufficient, distinguishing Liquid Air from Medical Emergency on the basis that each fraudulent invoice caused a distinct injury.}

It now appears that the Supreme Court is prepared to confront the issue of what constitutes a "pattern of racketeering activity." In granting review of \textit{H.J. Inc. v. Northwestern Bell Telephone Co.},\footnote{829 F.2d 648 (8th Cir. 1987), cert. granted, 108 S. Ct. 1219 (1988).} the Court has agreed to review, inter alia, whether the petitioners properly alleged a pattern of racketeering activity. \textit{Northwestern Bell} involves allegations of bribery of public officials to influence utility rate-making decisions. The Eighth Circuit previously affirmed the dismissal of the RICO claims on pattern grounds, finding that the plaintiff had failed to allege multiple schemes.

The purpose of this article is to suggest a meaningful interpretation of RICO's pattern requirement. It is the Authors' contention that RICO was intended to reach the habitual offender, the offender who portrays by his or her conduct a pro-
pensity to adopt a criminal approach in order to conduct his or her business affairs. We believe RICO was intended to reach this habitual offender regardless of whether that offender is the stereotyped “racketeer” or wears the cloak of a “legitimate” business entity.\textsuperscript{25} Congress has defined the predicate acts which constitute violations of RICO. Individuals and entities who habitually elect to violate these predicate acts in the conduct of their businesses are indeed the targets of this legislation, and thus should be considered racketeers under the statute.

Conversely, those individuals and entities who do not commit predicate acts as a way of doing business, but rather commit predicate acts only on a sporadic, isolated basis, should \textit{not} be subjected to RICO liability. The Authors believe that the current statute provides a sufficient basis from which an appropriate pattern requirement can be formed.

This article will first place the pattern requirement of RICO into context with other provisions of the statute. The evolution of the pattern requirement will then be discussed. Next, a

\textsuperscript{25} The United States Supreme Court specifically made this point in \textit{Sedima}:
Underlying the Court of Appeals’ holding was its distress at the “extraordinary, if not outrageous,” uses to which civil RICO has been put. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against “respected and legitimate ‘enterprises’.” \textit{Ibid.} Yet Congress wanted to reach both “legitimate” and “illegitimate” enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the “ambiguity” discovered by the court below. “[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”

\textit{Sedima, S.P.R.L. v. Imrex Co., Inc.}, 473 U.S. 479, 499 (1985) (citations omitted). \textit{See also ABA Task Force Report, supra note 8, at 71–2.} The Task Force notes that the concept of pattern was enacted because of the constitutional difficulties of simply outlawing membership in typical organized crime groups such as the Mafia or La Cosa Nostra. This would be accomplished by spelling out as predicate acts those offenses “deemed to be the type of criminal activities frequently engaged in by mobsters, racketeers and other traditional members of organized crime.” \textit{Id.} at 72.

Accordingly, the pattern concept was devised so that a defendant’s repeated use of racketeering acts would serve to identify him or her as falling within the group of persons targeted by RICO. “[T]he wearing of a white collar, even though it is starched, does not preclude the organized pursuit of unlawful profit.” \textit{United States v. Carter}, 493 F.2d 704, 708 (2d Cir. 1974). Thus, in the case of the hypothetical securities fraud defendant, the appropriate analysis is a review of that defendant’s propensity to utilize acts of racketeering conduct on an ongoing, repeated basis as a way of doing business.
brief overview of pattern tests used by the various circuits will be given. The multiple scheme approach of the Eighth Circuit will be analyzed first, followed by a discussion of the liberal treatment of pattern applied by the Fifth and Eleventh Circuits. We will then analyze the criminal episode approach, which we suggest best implements the congressional intent behind RICO.

Following our overview of the current pattern tests, we will provide an in-depth discussion of the congressional history and intent as it pertains to the pattern requirement. The article will conclude with a proposal for an appropriate pattern standard.

II. RICO’S PATTERN ELEMENT

In order to meaningfully discuss an appropriate pattern standard, it is first necessary to understand the relevance of pattern as an element of a RICO prima facie case. Pursuant to section 1962 of the statute, there are four categories of prohibited activities. First, section 1962(a) prohibits any person who has received income from a pattern of racketeering activity or through collection of an unlawful debt from using or investing that income to acquire or operate an interest in any enterprise engaged in or affecting interstate commerce.

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26. The Supreme Court in Sedima made reference to Senate Report No. 91-617, a statement by Senator McClellan, which appeared in the Congressional Record, and a statement by Representative Poff. 473 U.S. at 496 n.14. Unfortunately, rather than serving as food for thought and a catalyst for further analysis, this footnote reference to such a small portion of the readily available history has become the almost exclusive focal point of judicial interpretation of pattern since Sedima. See, e.g., Bartichek v. Fidelity Union Bank/First Nat’l State, 832 F.2d 36, 38-40 (3d Cir. 1987); Sun Sav. and Loan Ass’n v. Dierdorff, 825 F.2d 187, 191-94 (9th Cir. 1987); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 30-31 (1st Cir. 1987); Morgan v. Bank of Waukegan, 804 F.2d 970, 973-77 (7th Cir. 1986); Superior Oil Co. v. Fulmer, 785 F.2d 252, 254-57 (8th Cir. 1986).

27. See RICO UPDATE, supra note 20, at 200. “A meaningful definition of ‘pattern’ must begin with the language of the Statute.” Id.


29. 18 U.S.C. § 1962(a) provides 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.
"Racketeering activity" is defined to include any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, or other specified acts, such as any acts indictable under statutes relating to mail, wire or securities fraud. 30  "Person" is defined in Section 1961(3) to include "any individual or entity capable of holding a legal or beneficial interest in property."

Second, section 1962(b) provides that it

[S]hall be unlawful for any person through a pattern of racketeering activity or through a 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

30. The definitions pertinent to section 1962 are as follows:
(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotics 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: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-94 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-65 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of state or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or informant), section 1515 (relating to interference with commerce, robbery, or extortion), section 1522 (relating to racketeering), section 1531 (relating to interstate transportation of wagering paraphernalia), section 1533 (relating to unlawful welfare fund payments), section 1555 (relating to the prohibition of illegal gambling businesses), section 1556 (relating to the laundering of monetary instruments), section 1557 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 U.S.C.S. § 186] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 U.S.C.S. § 591(c)] (relating to embezzlement from union funds), (D) any offense involving fraud connected with a cure under Title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealing, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

commerce.\textsuperscript{31} Third, section 1962(c) provides that it

[S]hall 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.\textsuperscript{32}

Finally, section 1962(d) provides that it "shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."\textsuperscript{33}

In summary it is a violation of RICO for a person: (1) To use income received from a pattern of racketeering activity to acquire or operate an enterprise; (2) to acquire or maintain an interest in an enterprise through a pattern of racketeering activity; (3) to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity; or (4) to conspire to engage in such prohibited conduct. A pattern of racketeering activity is thus the conduct which triggers violation of this statute.\textsuperscript{34}

A pattern is established, according to section 1961(5), by "at least two acts of racketeering activity . . . the last of which occurred within ten years (excluding any period of imprisonment) after the commission of the prior act of racketeering activity."\textsuperscript{35} Other than the congressional history and some analogies with similar statutes, the federal courts have been free to create their own definitions. This lack of a detailed, uniform definition has created difficulty, particularly since \textit{Sedima}, for courts attempting to interpret the pattern requirement.\textsuperscript{36}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{31} Id. § 1962(b).
\item\textsuperscript{32} Id. § 1962(c).
\item\textsuperscript{33} Id. § 1962(d).
\item Footnote 14 of \textit{Sedima} has encouraged courts and defendants anxious to dismiss RICO claims to focus on the pattern element. \textit{See} Denenberg and Ramsay, \textit{RICO's Pattern Requirement After Sedima: The Second Episode}, 54 DEF. COUNS. J., 361 (1987). "Consequently, the pattern requirement is now being viewed as the key to limiting the broad scope of civil-RICO actions." \textit{Id.} at 363. \textit{See also} Blakey, supra note 7, at 300-07. "Patterns of racketeering activity" may also be grouped into four broad, but not mutually exclusive categories: (1) violence; (2) provision of illegal goods and services; (3) corruption in the labor movement or among public officials; and (4) commercial and other forms of fraud. \textit{Id.}
\item\textsuperscript{35} 18 U.S.C. § 1961(5).
\item The difficulty certainly arises in part, but only in part, from judicial attempts
\end{enumerate}
\end{footnotesize}
III. PRE-SEDIMA DECISIONS

Prior to Sedima the element of pattern was infrequently addressed in the civil case law.\(^{37}\) Generally, the presence of a pattern was assumed when at least two acts of racketeering activity were asserted in the complaint.\(^{38}\) However, pattern was addressed in a criminal context. These cases focused on two terms which do not appear in the statute but are derived from congressional history: "relationship" and "continuity."\(^{39}\)

to use the pattern element as a vehicle for the dismissal of RICO claims from the docket. Sedima can certainly be read as an invitation for courts to focus on the pattern element as a way to limiting the application of RICO in civil fraud cases. See, e.g., Smoky Greenhaw Cotton v. Merrill Lynch, Pierce Fenner & Smith, 785 F.2d 1274, 1280–81 (5th Cir. 1986), cert. denied, 107 S. Ct. 3211 (1987); Graham v. Slaughter, 624 F. Supp. 222, 224 (N.D. Ill. 1985) (federal courts should not accept "run-of-the-mill business fraud cases" under RICO). However, such attempts to limit the application of the statute must be consistent with the language of the statute, including the definition of pattern set forth by Congress in § 1961(5), as well as the congressional intent.

Gratuitous language in some judicial opinions is not conducive to such an effort. See, e.g., Furman v. Cirrito, 828 F.2d 898, 903 (2d Cir. 1987) ("a paradigmatic example of the unfairness that results when RICO, a statute intended to be an [assault on organized crime] . . . is used in an attempt to make a 'federal' case of a simple falling out between partners."); Condict v. Condict, 815 F.2d 579, 585 (10th Cir. 1987) ("this is but an unsuccessful effort to dress a garden-variety fraud and deceit case in RICO clothing"); In re Dow Co. Sarabond Prod. Liab. Litig., 666 F. Supp. 1466, 1470 (D. Colo. 1987) ("RICO is a recurring nightmare for judicial courts across the country. Like the Flying Dutchman, the statute refuses to be put to rest."); Mastercraft Indus., Inc. v Breining, 664 F. Supp. 859, 860 (S.D.N.Y. 1987) ("the facts of this case provide graphic support for the frequently made assertions by the [RICO's] detractors that the statute is being woefully abused by the civil bar."). See generally RICO UPDATE, supra note 20, at 16–58 for a thorough jurisdiction by jurisdiction review of recent pattern decisions.

For a contrary view, see United States v. Turkette, 452 U.S. 576 (1981). "[W]e are unpersuaded that Congress nevertheless confined the reach of the law to only the narrow aspects of organized crime." Id. See also Sedima, 473 U.S. at 479. "[Legitimate business] enjoy[s] neither an inherent incapacity for criminal activity nor immunity from its consequences." Id. at 499.

37. See ABA TASK FORCE REPORT, supra note 8, at 195.
39. See, e.g., Alexander Grant & Co. v. Tiffany Indus., Inc., 770 F.2d 717 (8th Cir. 1985) (acts of racketeering activity should be related by some common scheme or plan); United States v. Weisman, 624 F.2d 1118 (2d Cir. 1980) (no need for relationship other than a connection to the enterprise); 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) (adopting Dept. of Justice position: Acts should be "connected with each other by some common scheme, plan or motive"). For examples of different ways of dealing with the "continuity" prong, see Stofsky, 409 F. Supp at 614 (major concern of Congress was special danger of continuing criminal conduct). See also United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd 578 F.2d 1371 (2d Cir.
A. Relationship

The term "relationship" was used by Senator McClellan, a sponsor of the original bill, when he wrote that a pattern requires the "showing of a relationship." This term, and the term "continuity" also appear in the report of the Senate Judiciary Committee in a discussion of "pattern":

The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided ... largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

Some cases have interpreted the term "relationship" to mean that the racketeering acts themselves must be related or connected to each other by "some common scheme, plan or motive" as opposed to simply being a series of disconnected acts. For example, in United States v. Starnes, the Seventh Circuit held that a pattern of racketeering activity existed when two or more acts were "connected to each other in some logical manner so as to effect an unlawful end." Similarly, in United States v. Brooklier, the Ninth Circuit stated that "a pattern may be established by showing two or more acts ... as long as the defendant committed two of the acts and both of them were connected by a common scheme, plan or motive."


41. See SENATE REP., supra note 39, at 158.
42. Stofsky, 409 F. Supp. at 614.
43. Id.
44. 644 F.2d 673 (7th Cir.), cert. denied, 454 U.S. 826 (1981).
45. 644 F.2d at 678.
46. 685 F.2d 1208 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983).
47. 685 F.2d at 1222. According to the ABA Task Force Report, these cases reached this result in part due to the pattern requirement found under Title X of the...
Other courts have held that the concept of relationship did not require a relationship between predicate acts but, rather, required only that any two racketeering acts were committed in the conduct of an enterprise.\footnote{48} For example, in United States v. DePalma,\footnote{49} the District Court for the Southern District of New York found that since the statutory definition of pattern contained no reference to a requirement of relatedness, none should be required beyond a relationship of the racketeering acts to the enterprise.\footnote{50} In United States v. Elliot,\footnote{51} the defendants participated in a series of unrelated criminal acts which included arson, murder, theft and extortion. The Fifth Circuit held that this was indeed the type of conduct targeted by Congress when it enacted RICO.\footnote{52}

\footnote{48} See, e.g., Weisman, 624 F.2d at 1122. "[T]he statutory language does not expressly require that the predicate acts of racketeering be specifically 'related' to each other and we find no affirmative evidence in the legislative history from which we should infer such a requirement. \textit{Id. But see McClellan, supra note 40, contra.}"


\footnote{50} \textit{Id. at 782. See also United States v. Welch, 656 F.2d 1039 (5th Cir. 1981), cert. denied 456 U.S. 915 (1982) (commission of two predicate crimes sufficient to show participation in affairs of enterprise).}

\footnote{51} 571 F.2d 880 (5th Cir. 1977), cert. denied, 439 U.S. 953 (1978).

\footnote{52} 571 F.2d at 902-03. \textit{See also Note, Reconsideration of Pattern in Civil RICO Offenses, 62 Notre Dame L. Rev. 88, 87-88 (1986). But cf. ABA Task Force Report, supra note 8, at 199-201:}

The approach taken in these other decisions [rejecting a relationship between racketeering acts and a scheme] has obvious problems, however, because it effectively renders the "pattern" requirement superfluous. While Congress never specified in Title IX what it meant by using the term "pattern," it clearly did not state that it meant merely the commission of two acts of racketeering activity within ten years. . . . Moreover, the failure to give meaning to the "pattern" concept by requiring a common scheme would appear to lead to undesirable and unanticipated results. It is difficult to conceive of a reason why the draconian penalties provided in RICO should apply to a situation where corporate executives commit two distant and unrelated predicate offenses in pursuit of corporate affairs. . . . While RICO surely is not intended to reach such activities, without a common scheme
B. Continuity

The second of the two concepts referenced in footnote fourteen is that of "continuity." This concept is derived from several sources in the congressional history. The original Senate Report stated that "[t]he target of [RICO] is thus not sporadic activity . . . [but] the threat of continuing activity. . . ."53 Representative Poff, one of the original sponsors of the bill, reported that RICO was "not aimed at the isolated offender."54

Most pre-Sedima decisions ignored this factor of continuity. For example, in United States v. Weatherspoon,55 the Seventh Circuit held that five mailings as part of a single scheme to defraud the Veterans Administration was sufficient to constitute a pattern of racketeering activity.56 Likewise, in United States v. Chovanec57 the court for the Southern District of New York held that six acts of wire fraud in furtherance of one scheme satisfied the pattern requirements of the statute.58 The same court later noted in that "the major concern of Congress when it enacted [RICO] was the special danger to legitimate business of a continuity of racketeering activity",59 and that a pattern contemplates a prolonged course of conduct.60

requirement or the like "[t]hose who operate substantial and stable enterprises for long periods of time would become targets for RICO offenses merely because the Government can compile all disparate offenses committed during the many years in which the enterprise is operated."  

Id. (footnotes omitted) (quoting Tarlow, RICO Revisited, 17 GA. L. REV. 291, 351 (1983)).

53. SENATE REP., supra note 39, at 158.
55. 581 F.2d 595 (7th Cir. 1978).
56. Id. at 602.


This issue [of continuity] arises in its most extreme form where the predicate offenses consist of no more than multiple mailings in furtherance of a
At least one pre-Sedima decision dismissed a claim for failure to satisfy the continuity concept. In 1981, the court for the Western District of Pennsylvania held in *Teleprompter of Erie, Inc. v. City of Erie*\(^6\) that payment to a councilman of several bribes at one fundraiser was not ongoing in nature and, thus, not a pattern.\(^6\)

Probably the most significant pre-Sedima pattern decision was a 1975 Connecticut District Court case, *United States v. Moeller*.\(^6\) In that case, the defendant was indicted for various violations of federal law arising out of the destruction of a factory.\(^6\) Moeller was accused of committing arson by causing the fire which destroyed one of the plants at his business,\(^6\) and also of kidnapping three employees from the plant on the same day as the alleged arson.\(^6\) Additionally, the bill of particulars alleged that Moeller and the other defendants violated RICO by forming an enterprise to burn the plant, and that they conducted the affairs of that enterprise by burning the plant and kidnapping the three employees.\(^6\)

Judge Newman first turned to the question of whether a pattern of racketeering activity had been properly alleged. He reluctantly held that a pattern had been sufficiently alleged and that according to existing Second Circuit case law\(^6\) "the issue has been authoritatively resolved in this Circuit. . . . A 'pattern' can apparently be established in this Circuit by two acts occurring on the same day in the same place and forming part of the same criminal episode."\(^6\) It is the judge's dicta, how-

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\(^6\)single fraudulent scheme. Even though each of these mailings technically constitutes a separate act of mail fraud, it appears that multiple acts of racketeering activity of this nature fall far short of the type of continuing activity RICO was intended to address.

ABA TASK FORCE REPORT, supra note 8, at 204 (footnote omitted).

62. Id. at 12-13.
64. Id. at 53.
65. Id. at 57.
66. Id.
67. Id.
68. Id. at 58 (citing United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert denied, 419 U.S. 1105 (1975)).
69. Moeller, 402 F. Supp. at 58 (citations and footnotes omitted). However, the court also noted that:

It is arguable that *Parness* is distinguishable from the present case. In *Parness* the acts held to constitute the pattern of racketeering activity and the context in which they occurred supported an inference that they were part of a pattern of continuing activity even though the acts were closely related in
ever, which is significant to a discussion of pattern. While finding that the arson and kidnapping constituted a pattern, the judge stated:

Were the question open, I would have seriously doubted whether the word “pattern” as used in Sec. 1962(c) should be construed to mean two acts occurring in the same place on the same day in the course of the same criminal episode. While the statutory definition makes 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 separated in time and place and yet still sufficiently related by purpose to demonstrate a continuity of activity. 70

In 1985, prior to the Supreme Court’s decision in *Sedima*, the American Bar Association and the Department of Justice ex-
pressed the view that single criminal episodes should not be encompassed by RICO.\textsuperscript{71} The ABA Criminal Justice Section specifically recommended adoption of the analysis of Judge Newman in \textit{Moeller}.\textsuperscript{72} The ABA Task Force stated in its report that the pattern requirement:

> [W]as intended as a means of limiting RICO to those cases where the required predicate offenses were committed in a manner which characterizes the perpetrator as a person who commonly commits such crimes. Only by requiring multiple predicate offenses occurring in two or more separate criminal episodes, can this goal be achieved in the RICO statute.\textsuperscript{73}

The ABA Task Force recommended that the statute be amended to require “(i) that the underlying predicate offenses be connected to each other by a common scheme; and (ii) that the underlying predicate offenses arise in two or more separate criminal episodes.”\textsuperscript{74}

\textsuperscript{71} ABA \textit{TASK FORCE REPORT}, \textit{supra} note 8, at 206-07.

\textsuperscript{72} See ABA Report to the House of Delegates Section of Criminal Justice, Aug., 1982 at 5-6.

\textsuperscript{73} ABA \textit{TASK FORCE REPORT}, \textit{supra} note 8, at 207-08.

\textsuperscript{74} \textit{Id.} at 208. There are several problems with this approach. First, requiring a relationship of predicate offenses to a common scheme can lead to the exclusion of certain Section 1962(b) conduct. Consider the hotel takeover in \textit{United States v. Parness}, 503 F.2d 430 (2d Cir. 1974), \textit{cert. denied}, 419 U.S. 1105 (1975). That takeover clearly involved the acquisition of an enterprise by means of predicate offenses. This is the type of infiltration of legitimate business about which Congress was concerned when it enacted RICO. If the defendants had been more innovative, taking over the hotel by committing only one predicate act, for instance by interstate transportation of only one stolen cashier’s check or perhaps extortion, then there could be no pattern because there would only be one racketeering act. If the same defendants had earlier taken over other businesses through the use of racketeering acts, such conduct could not be considered as part of a pattern under the ABA Task Force proposal since the earlier takeovers would not be part of a “common scheme.” Thus, under the Task Force proposal, RICO would be unavailable as a tool against defendants who had demonstrated repeated, ongoing use of predicate acts to take over legitimate businesses—an untenable result. So long as those defendants were able to avoid the use of multiple predicate acts to accomplish any one takeover, they would be immune from attack under RICO.

Such a scenario is not far-fetched. Consider a group of hypothetical criminals with a reputation for violence in a small ethnic section of a large city. Perhaps the first target for the hypothetical criminals was a small, neighborhood store and the conduct was not a takeover but simply the extortion of protection money. The next target for the hypothetical criminals is a local bakery in the same neighborhood. By repeating this process a number of times, these criminals could avoid RICO so long as each criminal activity employed the commission of only one predicate act. The fruits of each activity contribute to an increasing accumulation of ill-gotten funds for these criminals which enables them to move on to bigger and better targets. Our
IV. The Sedima Decision

On July 1, 1985, the United States Supreme Court decided Sedima, S.P.R.L. v. Imrex Co. The plaintiff, a Belgian corporation, had entered into a joint business venture with the defendant, a New York corporation. The purpose of the joint venture was to provide electronic components to a Belgian firm. The buyer would order the parts through Sedima; Imrex would obtain the parts in the United States and ship them to Europe. The two parties, Sedima and Imrex, would then split the net proceeds. After about three years, Sedima believed that Imrex was inflating the bills, thus overcharging Sedima and cheating it out of a portion of the proceeds by collecting for nonexistent expenses.

Sedima filed a claim in federal court in the Eastern District of New York. In addition to common law claims which included unjust enrichment, conversion, and breach of contract, the complaint also alleged two counts under section 1962(c) based on predicate acts of mail and wire fraud, and one count alleging a conspiracy to violate section 1962(c). The district court dismissed the RICO counts, holding that a RICO injury must be some sort of injury distinct from the direct injury resulting from the predicate acts. According to the district court, the injury must be a distinct racketeering injury or competitive injury. The Second Circuit affirmed on this issue, holding that the plaintiff in a RICO case must allege an injury different in kind from the injury which occurred as a result of the predicate acts. The injury must arise, according to the Second Circuit, by some activity which RICO was intended to deter. The Second Circuit also held that the complaint was defective for failing to allege that the defendants

hypothetical criminals have now become the type of "person[s] who commonly [commit] such crimes." ABA Task Force Report, supra note 8, at 208. Because none of the separate and independent activities are related or connected by a common scheme, there is no RICO violation if the Task Force's recommendation of a common scheme relationship requirement is followed. See, e.g., Note, supra note 52, at 94-95.

75. 473 U.S. 479 (1985).
76. Id. at 483.
77. Id. at 483–84.
78. Id. at 484.
79. Id.
80. Id.
81. Id.
82. Id.
had already been criminally convicted of the predicate acts alleged or of some other RICO violations.\[^{83}\]

On appeal, the Supreme Court reversed the Second Circuit, and remanded the case for trial.\[^{84}\] First, the Court held that no prior criminal conviction was required by the statute and, in fact, every indication from the language of the statute itself, its history, and considerations of policy were to the contrary.\[^{85}\]

Next, the Court found that RICO did not require a separate racketeering injury.\[^{86}\] The Court stated that a RICO violation exists whenever (1) a defendant engages in a pattern of racketeering activity in a manner forbidden by sections 1962(a–c) and (2) these activities injure the plaintiff.\[^{87}\] "Racketeering activity," the Court pointed out, "consists of no more and no less than commission of the predicate acts."\[^{88}\]

It was during this discussion of "racketeering injury" that Justice White, writing for the majority in the five to four decision, commented on the question of how pattern might be interpreted. In footnote fourteen of the opinion,\[^{89}\] Justice White first mentioned that the definition of a "pattern of racketeering activity" differed from certain other of the definitions in section 1961 in that it states that a pattern "requires" at least two acts, whereas most of the other definitions use the term "means" to define the subject.\[^{90}\] The implication, according to Justice White, was that "while two acts are necessary, they may

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83. Id. at 485.
84. Id. at 500. The Supreme Court granted certiorari on the issue of separate racketeering injury "[i]n light of the variety of approaches taken by the lower courts. . . ." Id. at 486.
85. Id. at 493. For example, the Court pointed out that such a requirement (of a prior criminal conviction) would apply "nonsensically" to a criminal prosecution. Id. at 488. Thus, the Court recognized that there can't be one interpretation of the statute's provisions for criminal purposes and a different, more restrictive interpretation for Civil defendants.
86. Id. at 495.
87. Id.
88. Id.
89. Id. at 496 n.14.
90. Id. Actually, of the ten definitions contained in section 1961, only five of them use the term "means" ("racketeering activity" at § 1961(1); "State" at § 1961(2); "unlawful debt" at § 1961(6); "racketeering investigator" at § 1961(7); and "racketeering investigation" at § 1961(8)). Four of the remaining five use the term "includes" to define the subject of the definition ("person" at § 1961(3); "enterprise" at § 1961(4); "documentary material" at § 1961(9); and "Attorney General" at § 1916(10)). Thus, only "pattern of racketeering activity" at § 1961(5) uses the word "requires." 18 U.S.C. § 1961.
not be sufficient.\footnote{473 U.S. at 496 n.14.} The same point was made by Justice Powell in his dissent: "The definition of 'pattern' may thus logically be interpreted as meaning that the presence of the predicate act is only the beginning: something more is required for a 'pattern' to be proved."\footnote{Id. at 527.}

Both Justice White for the majority and Justice Powell in his dissent quoted language from the Senate Report which stated that "sporadic activity" was not a target of RICO.\footnote{Id. at 496 n.14, 527.} Both referred to legislative history to support the proposition that a threat of ongoing activity, rather than isolated acts, was necessary for a pattern to exist: "It is this factor of \textit{continuity plus relationship} which combines to produce a pattern."\footnote{Id. at 496 n.14 (quoting \textit{SENATE REP.}, supra note 39, at 158).}

Both the majority and the dissent mentioned the concept of relationship. In footnote fourteen, Justice White quoted one of the sponsor of the bill, Senator McClellan, who stated on the Senate floor that "the term 'pattern' itself requires the showing of a relationship. \ldots So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. \ldots"\footnote{Id. (quoting 116 CONG. REC. 18940 (1970) (statement of Sen. McClellan)).} Justice Powell, in his dissenting opinion, discussed the ABA Task Force recommendation that a pattern should require that the racketeering acts be related to each other by some common scheme.\footnote{473 U.S. at 528.} He suggested that by so construing pattern, "courts could go a long way toward limiting the reach of the statute to its intended target—organized crime."\footnote{Id.}

However, Justice White stated in the majority opinion that "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, \textit{for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise}."\footnote{Id. at 497 (emphasis added).}

Finally, the majority, in footnote fourteen, commented that the definition of "pattern" enacted by Congress in Title X of the same bill, a provision relating to sentencing guidelines for repeat offenders, might "be useful" in interpreting the phrase

\footnotesize{91. 473 U.S. at 496 n.14.} \footnotesize{92. Id. at 527.} \footnotesize{93. Id. at 496 n.14, 527.} \footnotesize{94. Id. at 496 n.14 (quoting \textit{SENATE REP.}, supra note 39, at 158).} \footnotesize{95. Id. (quoting 116 CONG. REC. 18940 (1970) (statement of Sen. McClellan)).} \footnotesize{96. 473 U.S. at 528.} \footnotesize{97. Id.} \footnotesize{98. Id. at 497 (emphasis added).}
pattern of racketeering activity:99 "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.'" 100

In addition to footnote fourteen and Justice Powell's comment in his dissenting opinion, the majority opinion provided further invitation to courts to focus on the pattern requirement as a vehicle for limiting the application of RICO to everyday civil fraud cases:

We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. . . . 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." 101

Thus, the Sedima decision, a decision which did not involve a pattern question, created a new focus for the limitation of civil RICO and launched a new era of heightened confusion with respect to the question of what constitutes a pattern of racketeering activity.

V. POST-SEDIMA DECISIONS

Since Sedima, most courts have accepted the Supreme Court's invitation to more closely examine the pattern requirement. For the most part, however, this effort has been limited to an application of the phrase "continuity plus relationship," which was coined in footnote fourteen.102 The cases have

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99. Id. at 496 n.14 (citing 18 U.S.C. § 3575(e)).
100. 473 U.S. at 496 n.14 (quoting 18 U.S.C. § 3575 (e)).
102. See supra note 16 and accompanying text.
tended to fall into four categories, with the outcome of the individual cases turning on which test the court applies.

A. The Multiple Schemes Analysis

Most courts have had little trouble finding a “relationship” in the alleged patterns presented to them. Because of this,

103. For example, in Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986), the Eighth Circuit Court of Appeals considered an alleged pattern which consisted of the theft of gas from an interstate pipeline, accomplished by means of several acts of mail and wire fraud. The court found that the relationship half of the two-pronged “relationship plus continuity” test had been satisfied because the several acts of mail and wire fraud were related to each other by virtue of being part of a scheme to convert gas. Id. at 257. In doing so the court cited the Supreme Court’s reference in footnote 14 of Sedima to the pattern requirement of the repeat offender statute to support the proposition that Congress intended, in the repeat offender statute, “to isolate the professional, long-term criminal elements in society.” Id. at 257 n.7. The Eighth Circuit noted that:

The Sedima Court also suggested that the courts look to the definition of “pattern” in 18 U.S.C. § 3575(e), in giving meaning to RICO’s “pattern of racketeering activity” requirement. This definition construes pattern as a series of related acts which “are not isolated events.” Although our research reveals no judicial interpretations of § 3575(e)’s pattern requirement, the legislative history behind this element indicates that it was intended to isolate the professional, long-term criminal elements in society. Id.

[Title IX] has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce. . . . There is rising awareness, in official circles and among all of our people, of the depth of penetration of the forces of organized crime into the fabric of our society and our commercial life.

Id. (emphasis added).

The definition of “pattern” in section 3575(e) is a tool for defining, for sentencing purposes, the repeat offender. To the degree that the congressional history relating to that section focuses on continuous criminal conduct, there is value in looking at that history for the purpose of analyzing what constitutes a RICO pattern. With RICO, as with the repeat offender sections, Congress was attempting to differentiate between the isolated sporadic offender and the member of organized crime, the latter being the true target of RICO. See, e.g., Senate Rep., supra note 39. “Subsection (1) defines ‘racketeering activity’ to include those crimes most often associated with organized crime.” Id. at 158 (emphasis added). See also Wilson, The Threat of Organized Crime: Highlighting the Challenging New Frontiers in Criminal Law, 46 Notre Dame Law. 41, 51 (1970). “Racketeering activity is defined in terms of repeated violations of specific state and federal criminal statues now commonly violated by members of organized crime.” Id. “The Senate report [includes] listed offenses . . . characteristic of organized crime. The listed offenses lend themselves to organized commercial exploitation, unlike some other offenses such as rape, and experience has shown they are commonly committed by participants in organized crime.” McClellan, supra note 40, at 142–43.

Repeated and continuous engagement in the type of conduct described by Congress as “racketeering activity” is the identifying characteristic, then, of the person or
continuity has been the primary focus subsequent to *Sedima* for courts deciding the question of whether a pattern has been properly alleged. The most restrictive construction has been the Eighth Circuit's multiple scheme approach, which was first enunciated in *Superior Oil v. Fulmer.* While finding a proper relationship between the alleged predicate acts of mail and wire fraud, the Eighth Circuit found that the alleged pattern lacked continuity because the conduct constituted only one "continuing scheme" and that "[t]here was no proof that the [defendants] had ever done these activities in the past and there was no proof that they had engaged in other criminal activities elsewhere." The Eighth Circuit has followed *Superior Oil.*

Entity against whom RICO is targeted. It is this manner of conduct that spawns the concept of continuity which is so regularly cited by courts following the *Sedima* decision. It is unfortunate, however, that the Supreme Court seized upon the catchy phrase "continuity plus relationship" in footnote 14 of *Sedima.* 473 U.S. at 496 n.14. This phrase appears at 158 of the Senate Report and has not been adequately analyzed in context by courts when citing that phrase. Although the court found a relationship between the predicate acts, it held that the acts "failed to prove the 'continuity' sufficient to form a 'pattern of racketeering activity.'" 785 F.2d at 287.

The Seventh Circuit, in *Morgan v. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986), also discussed "relationship," finding that "[r]elationship 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." The court suggested that the terms "continuity" and "relationship" are at odds with one another in that continuity "embrace[s] predicate acts occurring at different points in time or involving different victims." The court also stated that "to focus excessively on either continuity or relationship effectively negates the remaining prong."

At least one court since *Sedima* has found a lack of relationship in an alleged pattern. In *Zerman v. E.F. Hutton & Co.,* 628 F. Supp. 1509 (S.D.N.Y. 1986), the defendant, E.F. Hutton, was alleged to have made a single misrepresentation to the plaintiff with respect to the plaintiff's purchase of securities. In order to fit within the RICO pattern requirement of "at least two acts of racketeering activity," the plaintiff "seize[d] upon Hutton's recent well-publicized guilty plea in connection with its overdrafting of its bank accounts." The court found that there was no relationship between the alleged securities fraud act directed toward the plaintiff and the check overdrafting.

104. 782 F.2d 252 (8th Cir. 1986).
105. *Id.* at 257.
106. *Id.* The court quoted *Northern Trust Bank/O'Hara, N.A. v. Inryco, Inc.,* 615 F. Supp. 828, 892 (N.D. Ill. 1985), which stated that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate report could be established by a single criminal episode. . . . It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'" 785 F.2d at 257. In *Northern Trust* Judge Shadur recognized that authority in the Seventh Circuit prior to *Sedima* had rejected a multiple scheme approach. *Northern Trust,* 615 F. Supp. at 831–32, citing United States v. Starnes, 644 F.2d 673 (7th Cir.), cert. denied 454 U.S. 826 (1981). The judge stated, however, that *Sedima* created a "whole new ballgame." 615 F. Supp. at 833. Accordingly, he noted
rior Oil in at least five additional cases.\textsuperscript{107}

The United States Supreme Court has granted \textit{certiorari} for a 1987 case which includes the question of what constitutes a pattern of racketeering activity. That case, \textit{H.J. Inc. v. Northwestern Bell Telephone Co.},\textsuperscript{108} involves a claim that illegal gratuities were paid to members of the Minnesota Public Utilities Commission to influence their rate-making decisions.\textsuperscript{109} The plaintiffs alleged that Northwestern Bell Telephone Company, beginning in 1980, had provided to members of the Commission various gifts, parties, airlines tickets and employment offers,\textsuperscript{110} and that such practices continued through the time of the suit.

In \textit{Northwestern Bell}, the Eighth Circuit first addressed the relationship prong of the "continuity plus relationship" test from footnote fourteen of \textit{Sedima}, by finding that the "relationship prong is met when two or more racketeering acts are shown to be in pursuit of the same overarching \textit{sic} scheme."\textsuperscript{111} As to continuity, however, the court held that "a single fraudulent effort or scheme is insufficient,"\textsuperscript{112} and that in order for there to be sufficient continuity it must be alleged that "Northwest Bell 'had engaged in similar endeavors in the

\begin{itemize}
\item [107.] \textit{H.J. Inc. v. Northwestern Bell Tele. Co.}, 829 F.2d 648, 650 (8th Cir. 1987), \textit{cert. granted}, 108 S. Ct. 1219 (1988) (illegal gratuities to influence rate-making decisions not a pattern); \textit{Allright Missouri, Inc. v. Billeter}, 829 F.2d 631, 641 (8th Cir. 1987) (four year effort to deprive a number of limited partners of their real property only one scheme and thus not a pattern); \textit{Madden v. Gluck}, 815 F.2d 1163, 1164 (8th Cir.), \textit{cert. denied}, 108 S. Ct. 86 (1987) (five thousand bad checks written over five months, diverted corporate assets and false financial statements held to all be subdivisions of only one scheme to loot a business); \textit{Deviries v. Prudential-Bache Sec., Inc.}, 805 F.2d 326, 329 (8th Cir. 1986) (churning of one account over six years only a single scheme); \textit{Holmberg v. Morrisette}, 800 F.2d 205, 209 (8th Cir.), \textit{cert. denied}, 107 S. Ct. 1953 (1986) (fraud in drawing upon three letters of credit only one scheme).
\item [108.] 829 F.2d at 648.
\item [109.] \textit{Id.} at 649.
\item [110.] \textit{Id.}
\item [111.] \textit{Id.} at 650 (quoting \textit{Holmberg}, 800 F.2d at 205).
\item [112.] 829 F.2d at 650.
\end{itemize}
past or that [it was] engaged in other criminal activities.' ”

The Eighth Circuit's "multiple scheme" approach has been questioned by judges on that circuit bench and criticized by other courts and commentators. In *Northwestern Bell*, for example, both Judge Gibson and Judge McMillan wrote separate concurring opinions wherein they urged the Eighth Circuit to reconsider the multiple scheme approach. Even the author

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113. Id. (quoting Devries v. Prudential-Bache Sec., Inc., 805 F.2d 326, 329 (8th Cir. 1986)). These tests set forth by the Eighth Circuit require first that the defendant had either engaged in similar activities in the past or is engaged in other criminal activities, and, second, that the predicate acts also relate to the particular scheme alleged in the complaint. *Northwestern Bell*, 829 F.2d at 650. Seemingly, then, in order to properly plead a pattern of racketeering activity in the Eighth Circuit, one must allege both an ongoing scheme against the plaintiff with repeated predicate acts as well as other schemes against the plaintiff or other victims involving any kind of predicate acts. *Id.*

114. See, e.g., *RICO UPDATE*, supra note 20, at 206–07. "The . . . limitation is objectionable from other perspectives; it would read Section 1962(b) out of the statute and it might well conflict with Section 1962(d)." *Id.*

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. . . . 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:

Denenberg, *supra* note 34, at 375. See also Note, *supra* note 52, at 200.

The problems set forth in the Denenberg article would be alleviated if "relationship" was analyzed only in terms of relevancy to the alleged conduct forming the basis of the claim at issue. For example, evidence of past extortion of others would be relevant to a claim based on an extortion "scheme." Similarly, evidence that a public utility engages in predicate acts such as extortion, mail fraud or bribery in order to gain a business advantage could be relevant in a separate claim based upon a bribery "scheme." In both examples, the defendant has shown a propensity to utilize related predicate acts as a way of doing business in a fashion similar to the claim presented. See also Note, *supra* note 52, at 96. "Nowhere did the Supreme Court contend that one comprehensive scheme involving several related unlawful actions would not constitute a pattern." *Id.*

115. See Northwestern Bell, 829 F.2d at 650–51. Judge McMillan wrote, in part: "I write separately only to state that I agree with Judge John R. Gibson that we should reconsider our pattern of racketeering activity test, in light of the contrary positions recently taken by several other Circuits." *Id.* (McMillan, J., concurring). Judge Gibson wrote in dissent: "[T]he multiple scheme requirement that we have
of the opinion, Senior Judge Henley, commented in a footnote to the opinion "we are aware that our continuity plus relationship approach to the pattern is not without criticism."116 Opponents of the multiple scheme approach contend that this method will allow defendants who have committed multiple acts constituting a single scheme to escape RICO liability.117

Although the Tenth Circuit has refused to define a specific pattern test,118 it is apparent from its post-Sedima decisions that

grafted on to the pattern element strays from the statutory language of RICO. . . . I believe . . . that when a proper case arises, the multiple scheme requirement should be examined by the court en banc. . . ." Id. at 651 (Gibson, J., dissenting).

116. Id. at 650 n.3 (citations omitted).

117. Several Circuit Courts have explicitly rejected the Eighth Circuit's multiple scheme approach. See Bartichek v. Fidelity Union Bank/First Nat. State, 832 F.2d 36 (3d Cir. 1987) (requiring multiple schemes "plainly inconsistent with the purposes of the statute"); Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187 (9th Cir. 1987) (multiple schemes unreasonably limits the reach of RICO); Roeder v. Alpha Ind., Inc., 814 F.2d 22 (1st Cir. 1987) (relieving from liability perpetrators of single, ongoing schemes "untenable"); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987) (multiple scheme requirement will lead to undesirable results); United States v. Ianniello, 808 F.2d 184 (2d Cir. 1987), cert. denied, 107 S. Ct. 3230 (1987) (requiring two schemes effectively eliminates § 1962(b)); Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986) (multiple schemes "focuses excessively on continuity").

Probably the best summary of the criticism of the multiple scheme approach was set forth in Paul S. Mullin & Associates, Inc. v. Bassett, 632 F. Supp. 532 (D. Del. 1986), where the Delaware District Court stated:

This Court is loath to adopt a definition of pattern which turns on an assessment of whether one or multiple criminal schemes is involved. Such a definition would be highly susceptible to manipulative semantics. For example, an attempt by a racketeering enterprise to infiltrate General Motors could involve countless acts of mail fraud, extortion, securities fraud, and bribery. One could argue, however, that only one criminal scheme is involved because only one company was subverted. Under this view, a "pattern" would come into existence only after the same enterprise began to infiltrate Chrysler or Ford. On the other hand, the enterprise, in infiltrating General Motors, undoubtedly had committed criminal acts of a sufficient number and variety, over a sufficient period of time, to suggest the existence of an elaborate design. This should be enough to create a "pattern."

Id. at 541. The court's reference is to 18 U.S.C. § 1962(b), which prohibits the acquisition through a pattern of racketeering activity any enterprise which engages in interstate commerce.

118. See Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212 (10th Cir. 1987).

Torwest decided what was not a pattern of racketeering activity, as did Condict v. Condict, . . . We will do the same and again not attempt to construct an affirmative definition of what would constitute such a pattern. Thus as was said in Torwest: "In reaching this conclusion, we decline to go beyond the facts before us to formulate a brightline test in the abstract."

Id. at 214 (quoting Torwest DBC, Inc. v. Dick, 810 F.2d 925, 929 (10th Cir. 1987) (citations omitted, emphasis in original)).
it finds the rationale of the Eighth Circuit persuasive.\textsuperscript{119} For example, the Tenth Circuit has noted that a "difficult question is presented when the RICO claim is based on one scheme but contemplates open-ended activity . . . and does not have a single goal that, when achieved, will bring the activity to an end."\textsuperscript{120}

The District Court of Colorado, within the Tenth Circuit, has produced what is probably the most intriguing multiple scheme case of all. \textit{In re The Dow Co. "Sarabond" Products Liability Litigation}\textsuperscript{121} involved defendant Dow Chemical's Rule 12 motion to dismiss RICO claims against it in sixteen different cases from district courts of the Third, Sixth, Eighth and Tenth Circuits.\textsuperscript{122} The claims included products liability, negligence and fraud claims against Dow arising out of its manufacture

\textsuperscript{119} See, e.g., \textit{Torwest}, 810 F.2d at 929. In that case the Tenth Circuit affirmed the dismissal of a RICO claim for failure to establish a pattern. The case involved a "scheme" in which the defendants received secret profits from the sale of real estate lots over a six year period. The court found that since there was only a single purpose to the scheme, no pattern could exist.

\textsuperscript{120} Id. Following \textit{Torwest} the Tenth Circuit drew closer to the \textit{Superior Oil} approach in \textit{Condict v. Condict}, 815 F.2d 579 (10th Cir. 1987). This case involved a claim that the defendants had engaged in a scheme to take over a Wyoming ranch covering thousands of acres through a pattern of racketeering activity, including acts of mail and wire fraud. \textit{Id.} at 580. In finding a lack of a pattern, the court quoted extensively from its \textit{Torwest} decision, commenting that the plaintiff in that case had failed because it had only alleged "one scheme, one result, and one set of participants; one victim, one method of commission, and thus, no continuity and no pattern of racketeering activity." \textit{Id.} at 583. The court further stated that the claim was "but an unsuccessful effort to dress a garden-variety fraud and deceit case in RICO clothing." \textit{Id.} at 585. Finally, the court noted that its interpretation of pattern was becoming increasingly similar to that of the Eighth Circuit: "Other courts have interpreted the Supreme Court's \textit{Sedima} discussion on pattern in a similar fashion." \textit{Id.} at 584 n.3 (citing \textit{Holmberg v. Morrisette}, 800 F.2d 205, 210 (8th Cir. 1986), \textit{cert. denied}, 107 S. Ct. 1953 (1987)); \textit{Superior Oil v. Fulmer}, 785 F.2d 252, 257 (8th Cir. 1986).

\textit{See also Garbade}, 831 F.2d at 212. In \textit{Garbade} the defendant, the majority stockholder and an officer of Great Divide Mining and Milling Corporation, secretly withdrew corporate income over a period of time in order to recover for certain loans he had made to the company. The court found that his alleged conduct fit well into the rule from \textit{Torwest}: "[T]o achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished." \textit{Id.} at 214. The court therefore found an absence of the continuity element. \textit{Id.}

\textsuperscript{121} 666 F. Supp. 1466 (D. Colo. 1987). Both Mr. Dorigan and Mr. Edwall, authors of this article, represent plaintiffs in litigation against The Dow Chemical Company involving the product Sarabond. Those plaintiffs include the plaintiffs in \textit{Behunin v. Dow Chemical Co.}, 650 F. Supp. 1387 (D. Colo. 1986). As of the date of publication of this article, the litigation discussed in those opinions is still pending, along with other litigation against Dow involving Sarabond.

\textsuperscript{122} \textit{Sarabond}, 666 F. Supp. at 1470. The claims were before Colorado District
and sale of a mortar additive known as Sarabond, a saran latex. The lawsuits also included claims that Dow, through a pattern of racketeering activity, had marketed, sold and later concealed defects involving Sarabond.

Prior to the motions in *Dow Chemical*, Judge Kane had dismissed all RICO claims in the Colorado-venued cases for failure to state a pattern. Following that decision and the order sending the federal Sarabond cases to Denver pursuant to the Rules on Multidistrict Litigation, Judge Kane allowed the Colorado plaintiffs to amend their complaint to assert a separate scheme involving a Dow roofing product that was also allegedly marketed and sold through a pattern of racketeering activity based upon mail and wire fraud. Dow again moved

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Court Judge John L. Kane pursuant to an assignment by the Judicial Panel on Multidistrict Litigation. *Id.* at 1467–68.

123. *Id.* See also Behunin, 650 F. Supp. at 1467–68.

124. *See First Amended Complaint, In re The Dow Company “Sarabond” Prod. Liab. Litig., C.A. Assoc., et al. v. The Dow Chemical Co., MDL Docket No. 711, Civil Action No. 86-M-1178* (D. Colo. 1986). Each alleged scheme set forth a series of acts of alleged mail and wire fraud. In addition, within each RICO count, three separate schemes are alleged as to each product: 1) “Schemes to conceal defects and misrepresent nature of products for marketing and sales purposes”; 2) “Schemes to conceal defects to continue sales and discourage litigation”; and 3) “Schemes to conceal defects to limit liability on distressed structures.” *Id.* at Para. 205.

125. *See Behunin, 650 F. Supp. at 1387.* In *Behunin*, one of the Sarabond cases, the Colorado plaintiffs had alleged that Dow had engaged in at least three separate schemes for each of four different saran latex products. The alleged schemes involved acts of mail and wire fraud to (1) market and sell the products; (2) later conceal product defects so that sales could continue; and (3) later yet, bring about unfair settlements of claims. The alleged pattern of racketeering activity occurred over a fifteen year period, involving dozens of victims. *Id.* at 1390. Judge Kane held that the alleged conduct was only one fraudulent scheme, accompanied by a “multiplicity of underlying predicate acts.” *Id.* at 1389–90 (citing Garbade v. Great Divide Mining and Milling Corp., 645 F. Supp. 808 (D. Colo. 1986), aff’d 831 F.2d 212 (10th Cir. 1987)).

In *Behunin* the judge also cited as support a case from the Southern District of New York, *Savastano v. Thompson Medical Co.*, 640 F. Supp. 1081 (S.D.N.Y. 1986), wherein a RICO claim involving an over-the-counter appetite suppressant had been dismissed because the alleged fraudulent packaging and marketing was only a “single fraudulent effort, implemented by several fraudulent acts.” 650 F. Supp. at 1390. The language quoted by the court also included a citation to *Northern Trust Bank/O’Hare, N.A. v. Inyco Co.*, 615 F. Supp. 828, 831 (N.D. Ill. 1985), an opinion relied on by the Eighth Circuit in *Superior Oil*. “On the facts of this case, we agree with the court’s conclusion [in *Northern Trust*] that ‘[i]t is difficult to see how the threat of continuing activity . . . could be established by a single criminal episode.’” 640 F. Supp. at 1473.


to dismiss the RICO claims but this time Judge Kane recognized "at least two fraudulent schemes—Dow's efforts to market two distinct lines of products."\textsuperscript{128}

In reaching his conclusion, Judge Kane stated his view of the Tenth Circuit's position concerning pattern. In reviewing the Tenth Circuit's opinions on pattern, the judge commented that even an allegation of more than one scheme does not end the inquiry:\textsuperscript{129}

\begin{quote}
Pattern is not meaningfully defined unless the term "scheme" is itself cloaked in some fairly determinable concept. This last task is a difficult one. The thrust of my own RICO pattern decisions has been that a "scheme" corresponds to a substantially discrete aim or goal. At base, though, a determination of whether a pattern exists "depends on the nature of the conduct under all of the circumstances."\textsuperscript{130}
\end{quote}

He then briefly discussed some of the pattern requirements in the Tenth Circuit, including the criterion that conduct might be a pattern if the circumstances suggest that the activity is not an isolated incident.\textsuperscript{131} The judge considered each alleged scheme: marketing fraud; subsequent concealment; and fraudulent handling of claims, as only one isolated incident. The judge also rejected the assertion that the separate products frauds constituted distinct schemes.\textsuperscript{132}

\begin{footnotes}
\textsuperscript{128} Id. Judge Kane stated that he was "presented with claims arising from Dow's marketing of the product Sarabond, of the saran latex family line of products." \textit{Id.} He goes on to state that "[i]n this vein, I have relied on \textit{Savastano}... in determining that the marketing of a single product constitutes only a single fraudulent scheme." \textit{Id.} This was the only suggestion in the two opinions as to why the judge, in \textit{Behunin}, rejected the alleged fraud relating to Dow's other saran products as additional schemes.

Clearly, the judge considered all the acts of fraud with respect to the marketing, sales and claims involving the separate products to be part of only one scheme. This was his apparent conclusion even though all four of the products were sold to different groups of purchasers, at different periods of time and by different departments within a certain Dow division. 666 F. Supp. at 1473.

\textsuperscript{129} \textit{Id.} at 1472.

\textsuperscript{130} \textit{Id.} (citations omitted).

\textsuperscript{131} \textit{Id.} at 1471 (citing \textit{Torwest}, 666 F. Supp. at 929).

\textsuperscript{132} In \textit{Savastano v. Thompson Medical Co., Inc.}, 640 F. Supp. 1081 (S.D.N.Y. 1986), the issue was whether the alleged fraudulent marketing and packaging of a single product constituted a pattern of racketeering activity. Assuming, for the sake of argument, the correctness of Judge Kane's view, the facts in \textit{Savastano} represented only "a single fraudulent effort [or scheme], implemented by several fraudulent acts." \textit{Id.} at 1085.

Contrast this analysis with that in the \textit{Sarabond} litigation. First, Dow was accused
\end{footnotes}
B. The Liberal Approach

At the opposite end of the spectrum of pattern in a criminal setting is the position adopted by the Fifth Circuit in *R.A.G.S. Couture, Inc. v. Hyatt*. The *R.A.G.S. Couture* case involved a claim that the defendant had attempted to defraud the plaintiff company by twice mailing fraudulent invoices to the plaintiff. The district court had dismissed the RICO count on the grounds that there was evidence of only one act of mail fraud. The Fifth Circuit reversed, finding that the question of whether defendant had committed one act of mail fraud or two was a jury question. In response to an argument that two acts might not be sufficient to constitute a pattern, the Fifth Circuit held that two such acts of mail fraud, by virtue of being related to each other, could constitute a pattern.

Subsequent Fifth Circuit cases have criticized the *R.A.G.S.* decision. For example, in *Montesano v. Seafirst Commercial Corp.*, the citation is not provided. That accusation is the equivalent of the conduct found lacking by the court in *Savastano*. However, the alleged "schemes" in the Dow cases go further. The allegations as to other saran latex products are certainly distinct schemes. These sales were at somewhat different times, to different people and for different purposes. Again, these alleged facts represent a conscious decisional process by the defendant to use racketeering acts in order to gain a business advantage.

It appears, however, that the Tenth Circuit follows a different test for pattern in a criminal setting. In *United States v. Killip*, 819 F.2d 1542 (10th Cir.), cert. denied, 108 S. Ct. 505 (1987), the court affirmed the sufficiency of the evidence to sustain a defendant's conviction of a RICO conspiracy charge. The case involved drug conspiracy charges against members of the Outlaw Motorcycle Club. The defendant was indicted for conspiring to engage in three racketeering acts: (1) Ten Florida drug transactions; (2) a kidnapping; and (3) interstate transportation of drug money. The court sustained the conviction, finding that the Florida drug transactions and the one act of interstate transportation of drug money were sufficient to satisfy a conspiracy to engage in a pattern of racketeering activity. The Tenth Circuit, in the same opinion, reversed the conviction of defendant Teague because the evidence did not support his involvement in two predicate acts. The court found that the evidence supported a finding that he had participated in a Belleville, Illinois drug sale to undercover officers but did not support a finding that he had conspired to engage in another drug distribution in Oklahoma. Because he had only committed one predicate act, he could not be found guilty of conspiracy to participate on a pattern of racketeering activity. Id. at 1548-49.
the Fifth Circuit was asked to redefine pattern of racketeering activity but declined to do so, instead "bow[ing] to R.A.G.S. but urg[ing] that it be overturned en banc." The panel in Montesano was "persuaded that the court should change course in order to faithfully serve congressional purpose." However, it noted that such a change in the pattern requirement would have to be made by the entire Fifth Circuit sitting en banc. Accordingly, the court, in dicta, stated that the test for pattern ought to exclude racketeering acts "preparatory to the accomplishment of a discrete offense."

The Eleventh Circuit has also adopted a liberal approach to the pattern issue. In Bank of America National Trust & Savings Association v. Touche Ross & Co., five banks which had provided financing to a now bankrupt corporation sued the accounting firm and the accountants who had prepared that corporation's financial statements. The banks alleged that the defendants had committed nine separate acts of wire and mail fraud over three years for the purpose of inducing the banks to extend credit to the corporation. The court held that the separate acts of mail fraud involving the same parties for the purpose of inducing credit satisfied the standards promulgated by the Supreme Court in footnote fourteen of Sedima. The court also held that "[a]cts that are part of the same scheme or transaction can qualify as distinct predicate acts" for the pur-

139. 818 F.2d at 423.
140. Id. at 426.
141. Id.
142. Id. at 425-26. The Montesano court affirmed the dismissal of the plaintiffs' RICO claim, nonetheless, because the complaint failed to allege an enterprise separate and distinct from the pattern. The court held that an association-in-fact enterprise must have an ongoing organization or be a continuing unit, such that the enterprise has an existence that can be defined apart from the commission of the predicate acts. Id. at 427.
143. Id. The Montesano court agreed with the view enunciated in Torwest DBC, Inc. v. Dick, 810 F.2d 925 (10th Cir. 1987), which held that "[a] scheme to achieve a single discrete objective does not in and of itself create a threat of on going activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished." Id. at 928-29.
144. See Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross Co., 782 F.2d 966 (11th Cir. 1986).
145. Id. at 971.
146. Id.
pose of finding a pattern.147

Thus, at one end of the spectrum is the multiple scheme approach spawned by the Eighth Circuit's 1986 decision in Superior Oil, while at the other end are both the Fifth Circuit's position that two racketeering acts are sufficient if they are related148 and the liberal interpretation of the Eleventh Circuit.

C. The Criminal Episode Test

A third approach, the criminal episodes analysis, has developed out of the Seventh Circuit. One of the earliest decisions after Sedima interpreting pattern to require more than a number of predicate acts was Northern Trust Bank/O'Hare N.A. v. Inryco, Inc.149 In Inryco a construction contract kickback scheme was alleged to violate RICO because the scheme was implemented through a number of payments using the mail.150 Five kickbacks were made from December, 1979 through October, 1980 in furtherance of this scheme to defraud.151 In finding that a pattern did not exist, Judge Shadur stated that "true enough, 'pattern' connotes similarity, hence the cases' proper emphasis on the relatedness of the constituent acts. But 'pattern' also connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity."152 Inryco has become a leading case cited by those courts attempting to define pattern in terms of repeated criminal activity as opposed to repeated criminal acts to carry out a single

147. 782 F.2d at 971. See also Durham v. Business Mgmt. Assoc., 847 F.2d 1505 (11th Cir. 1988); United States v. Watchmaker, 761 F.2d 1459, 1460 (11th Cir. 1985). In Durham, the Eleventh Circuit affirmed the denial of the defendants' motion for summary judgment relating to the question of whether a pattern had been properly alleged. The defendants argued that a second scheme of fraudulent conduct involving a set of investors other than plaintiffs was too dissimilar from the scheme which had damaged the plaintiffs to be considered as part of a pattern. 847 F.2d at 1512. The court rejected that argument, finding that the degree of similarity of the two schemes was a fact question in light of 18 U.S.C. § 3575(e). Id.
148. See R.A.G.S. Couture Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985).
149. 615 F. Supp. 828 (N.D. Ill. 1985) (two acts of kickback scheme did not establish a pattern).
150. Id. at 830.
151. Id. at 828–30.
152. Id. at 831 (emphasis in original).
criminal transaction. 158

An example of the application of the criminal episodes approach to a civil fraud case is provided by Techreations, Inc. v. National Safety Council. 154 The plaintiff alleged that it had been damaged by the defendant through a pattern of racketeering activity consisting of two separate schemes. 155 The first scheme allegedly involved the fraudulent use of the mails and wire to induce plaintiff to enter into the contract. 156 The second scheme also involved mail and wire fraud to induce the contract’s modification. 157 The RICO defendant then induced the National Safety Council to breach the contract, causing damages to the plaintiff. 158

In dismissing the RICO claim, Judge Getzendanner stated that a pattern ‘‘requires more than a single transaction’’ but

153. See, e.g., Condict v. Condict, 826 F.2d 923, 929 n.3 (10th Cir. 1987); Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1985).

Analysis following Inryco has been altered to a degree by the Eighth Circuit’s adoption of the multiple scheme approach. This approach, represented by Superior Oil, requires proof of different “schemes” of illegal conduct in order to impose RICO liability. This test takes the continuity element one step further than Inryco. Under Inryco the analysis centered on whether there was repeated activity, while in the Superior Oil analysis, the focus is on whether there is more than one distinct “scheme.” Superior Oil, 785 F.2d at 257. The Eighth Circuit has indicated that a separate “scheme” can be found by asking whether the defendant “had ever done these activities in the past... [or was] engaged in other criminal activities elsewhere.” Id.

The Tenth Circuit’s position is not yet clear enough unequivocally to label it a “multiple scheme” or “multiple episode” test. All three opinions, Torwest, Condict, and Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212 (10th Cir. 1987), fall short of articulating a test and instead point to both the Eighth and Seventh Circuit tests. “Any threat of continuing activity... was eliminated when [defendants] were removed from the boards of Torwest and Torwest DBC.” Torwest, 810 F.2d at 929. However, in the same opinion the court mentioned that the “[plaintiff] did not allege... anything to suggest that these defendants actually undertook or planned to undertake any other fraudulent activity.” Id. The first comment indicates that one open-ended scheme might be enough but the second comment is actually a paraphrase of the Eighth Circuit’s multiple scheme test as stated in Superior Oil. 785 F.2d at 257.

154. 650 F. Supp. 337 (N.D. Ill. 1986). The plaintiff, a developer of computer software, alleged that the defendant had fraudulently induced plaintiff to enter into a contract with the National Safety Council to provide a software system for a defensive driving course. Id. Initially, the contract’s terms covered only California. Later, it was amended to add the rest of the nation. Id.

155. Id.

156. Id. at 338–39.

157. Id. at 339–40.

158. Id. at 338.
'not necessarily more than a single scheme.'"\(^{159}\) In addition, according to Judge Getzendanner, an episode is determined by looking for an injury of "independent harmful significance" arising from the particular episode.\(^{160}\)

The two schemes alleged by the plaintiff in Techreations lacked several critical features of a criminal episode.\(^{161}\) First, the modification of the contract was not sufficiently separated in time and place from the original contract so as to constitute a separate criminal episode or transaction.\(^{162}\) Second, the economic damages suffered by the plaintiff as a result of the contract modification, are distinct from those damages caused by breach of the original contract terms, and therefore did not create a separate injury.\(^{163}\) Rather than being truly distinct injuries, they were, relatively speaking, simultaneous and not separated in time and place.\(^{164}\) They both arose out of the same overall breach of contract.

Third, all of the alleged predicate acts of mail and wire fraud arose out of an effort to achieve a single contract breach. The modification of the contract, which plaintiff sought to bootstrap into a separate scheme or episode, was not sufficiently separated in time and place to be considered an independent criminal episode.\(^{165}\)

Finally the alleged predicate acts contemplated a limited, finite and close-ended objective: profiting from the contract's breach. The acts therefore lacked the open-ended nature of a pattern.\(^{166}\)

\(^{159}\) 650 F. Supp. at 339 (quoting Graham v. Slaughter, 624 F. Supp. 222, 235 (N.D. Ill. 1985)). The opinion stated that:

For criminal acts to constitute separate "transactions" or "episodes," they must be "somewhat separated in time and place." Mere "ministerial acts performed in the execution of a single fraudulent transaction" and not themselves "independently motivated crimes" do not create a pattern within the meaning of RICO, even though technically each may be a mail fraud violation. Moreover, "an open-ended scheme may include a sufficient number of independent criminal episodes" to form a pattern.

650 F. Supp. at 339.

\(^{160}\) Id. (quoting Ghouth v. Conticommodity Serv., Inc., 642 F. Supp. 1325, 1336 (N.D. Ill. 1986)).

\(^{161}\) Id. at 340.

\(^{162}\) Id.

\(^{163}\) Id.

\(^{164}\) Id.

\(^{165}\) Id. at 341.

\(^{166}\) Id. The Techreations analysis has been adopted by the courts of the Southern District of New York. See, e.g., Franklin & Joseph, Inc. v. Continental Health Ind.,
The Seventh Circuit Court of Appeals has adopted a form of the criminal episodes analysis. In Medical Emergency Service Associates S.C. v. Foulke, the court considered the propriety of a RICO claim involving a breach of contract to provide emergency services to a hospital. The plaintiff had entered into a contract with a hospital to provide medical staff to that hospital's emergency room. As required by that contract, the plaintiff also entered into individual contracts with various doctors, including defendants, to supervise the employees of the plaintiff staffing the emergency room.

The defendants eventually decided to form a corporation to compete with the plaintiff and, thus, to replace the plaintiff with their own corporation. This decision was implemented, allegedly, through mail and wire fraud constituting a pattern of racketeering activity. The district court judge dismissed the RICO claim, finding that, although the numerous alleged predicate acts of mail and wire fraud would constitute separate offenses, together, "there [was] a single wrongful transaction and a single injury."

On appeal, the Seventh Circuit emphasized the necessity that a pattern requires "separate and distinct episodes of fraud" with a "coordinated scheme to defraud the plaintiff." The plaintiff in this case had only alleged one criminal episode—the defendants' attempt to replace the plaintiff as the provider of emergency room services. Labeling the conduct into various "subschemes," with numerous predicate acts as a part thereof, did not convert the defendants' conduct into a pattern of racketeering activity.

The Foulke Court held that in order for predicate acts to be sufficiently continuous to amount to a pattern of racketeering activity, the acts "must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e. 'transactions somewhat separated in time and place.' . . . And at the same time, there must be a 'relationship among activities—i.e., activities leading up to coordinated action.' " 844 F.2d at 395 (citations omitted, emphasis added).

In the earlier decision, Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806, 809-10 (7th Cir. 1987), the Seventh Circuit held that not all of the alleged separate episodes need be directed toward, or injure, the plaintiff.
pattern of racketeering activity. Instead, the defendants’ activities constituted a “one-shot” effort to defraud a single victim and to inflict a single injury. The Seventh Circuit has also held that acts in furtherance of a single scheme can qualify as a pattern if the acts occur as part of separate criminal episodes.

A number of district courts in the Sixth Circuit have also adopted a criminal episodes approach. A lack of civil opinions at the circuit court level in the Sixth Circuit makes it difficult to determine what test that circuit will employ. However, the district court decisions have taken a clear crimi-

172. 844 F.2d at 397-98.
173. Id. at 397 (quoting Marks v. Pannell Kerr Forster, 811 F.2d 1108, 1112 (7th Cir. 1987)).
174. For example, in Appley v. West, 832 F.2d 1021 (7th Cir. 1987), the beneficiary of a trust alleged that the trustee defrauded her of substantial assets by embezzling trust funds. The predicate acts consisted of fraudulent mailing of monthly bank statements and cancelled checks in order to conceal the trustee’s conversion of the plaintiff’s funds. The court found that a pattern existed because the trustee had sought to defraud the plaintiff twice through two predicate acts of mail fraud, causing a separate and distinct injury both times, those injuries being the embezzlement of two distinct sums of money. Id. at 1028. The court stated that “[w]hether a RICO ‘pattern’ exists is clearly a ‘fact-specific question encompassing many relevant factors,’ including: (1) the number and variety of predicate acts and the length of time over which they were committed; (2) the number of victims; (3) the presence of separate schemes; and (4) the occurrence of distinct injuries.” Id. at 1027 (quoting Marshall, 819 F.2d at 809-10). See also Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1305 (7th Cir. 1987) (“repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern”).

The distinction drawn by the Seventh Circuit in Liquid Air and Appley is the ongoing, repeated “systematic illegal conduct continuing over time” coupled with the occurrence of more than one distinct injury. Such conduct caused separate and distinct injuries to the plaintiffs in Appley and Liquid Air, yet the conduct in both cases was in furtherance of only one criminal objective. There was no decision to engage in criminal activity separate in time and place from another, independent decision. There was no evidence of such separate and distinct conduct with respect to any other victims. Accordingly, these two cases don’t truly follow the criminal episode test.

176. See, e.g., State of Michigan v. Fawaz d/b/a West Seven Mile Serv. and Froggy’s Fill-up, Inc., 848 F.2d 194, RICO Bus. Disp. Guide 6936 (6th Cir. 1988) (unpublished decision). This appears to be the only case thus far decided by the Sixth Circuit outside a criminal setting in which the question arises as to what constitutes a pattern of racketeering activity.
nal episodes stance.\textsuperscript{177}

The Sixth Circuit Court of Appeals, in a May 1988 unpublished decision, \textit{State of Michigan v. Fawaz},\textsuperscript{178} affirmed the dismissal of a RICO claim based upon the mailing of fraudulent tax returns by defendant's gas stations over the course of one year.\textsuperscript{179}

The Circuit Court affirmed the dismissal, stating:

By enacting \([\text{RICO}]\), Congress took aim at racketeering activity, providing criminal sanctions against those engaged in racketeering and affording those injured by that activity in a private civil action to recover treble damages. . . . The legislative history . . . clearly demonstrates that . . . Congress intended to provide new weapons for an assault upon organized crime and its economic roots; to seek eradication of organized crime in the United States; to deal with criminals whose access to an economic base constitutes a serious threat to the economic well-being of the nation; to remove the corrupting influence of organized crime from the channels of commerce; and to deprive organized crime of its economic power by depriving it of its huge, illegal profits.\textsuperscript{180}

The court concluded that Fawaz had simply repeatedly cheated on his income tax and, although the conduct could be "dissected and shoe-horned" into a pattern, the court would not allow such "hypertechnical parsing of a statute."\textsuperscript{181}

\textsuperscript{177} For example, in \textit{Zahra}, 639 F. Supp. at 1405, the court determined that the defendants' repeated borrowing and investing of money over a seven year period constituted only one scheme, i.e., "to borrow money from them without intending to pay it back." \textit{Id.} at 1409. \textit{See also Omega Constr.}, 667 F. Supp. at 463 (no pattern because only a single "scheme or artifice" to defraud plaintiff); \textit{Cincinnati Gas}, 656 F. Supp. at 79–80 (pattern properly found since both fraudulent contract and fraudulent concealment present); \textit{Evening News Ass'n}, 642 F. Supp. at 861 (securities fraud did not subject defendants to RICO liability because only one transaction).

\textsuperscript{178} 848 F.2d at 194, RICO Bus. Disp. Guide at 6936.

\textsuperscript{179} The state of Michigan had already obtained a state court conviction for the taxes due and was receiving payment from the defendant pursuant to a state court order. 848 F.2d at 194, RICO Bus. Disp. Guide at 6936.


\textsuperscript{181} \textit{Id.} The Sixth Circuit applies a different standard in a criminal setting. In \textit{United States v. Jennings}, 842 F.2d 159 (6th Cir. 1988), the court held that the failure of the government to prove that the defendant had actually participated in a second phone call, so as to have committed two acts of wire fraud as opposed to one act, resulted in a lack of a demonstrable pattern. \textit{Id.} at 164. The government alleged that two phone calls made during one evening, two hours apart, constituted a pattern. \textit{Id.} at 162. The Sixth Circuit analyzed the transcript of the second phone call and deter-
Both the Second and Fourth Circuits seem to follow a criminal episodes test although both circuits would not so classify their respective tests.\textsuperscript{182} The Second Circuit, in an \textit{en banc} rehearing of its decision in \textit{Beauford v. Helmsley},\textsuperscript{183} reviewed the evolution of the pattern requirement in that circuit, calling the decisions in the circuit “confused”\textsuperscript{184} on the issue. The court noted that, prior to \textit{Sedima}, the case of \textit{United States v. Weisman}\textsuperscript{185} stood for the proposition that two predicate acts could suffice to constitute a pattern.\textsuperscript{186} After \textit{Sedima}, in \textit{United States v. Ianniello},\textsuperscript{187} the Second Circuit still followed \textit{Weisman} but held that the inquiry as to relationship and continuity could best be addressed through the concept of enterprise.\textsuperscript{188} Because the enterprise in \textit{Ianniello} had the single purpose of a fraud of indefinite duration, a RICO allegation was proper.\textsuperscript{189}

Following \textit{Ianniello} the Second Circuit decided four additional pattern cases, rejecting RICO allegations in each because the enterprise had an obviously terminating goal which

\textit{mined} that the defendant had not participated therein. \textit{Id.} at 163. Because the government could not prove two acts of racketeering activity, the defendant’s conviction under that count was reversed. \textit{Id.}

It seems clear that the Sixth Circuit would have affirmed the RICO conviction had the transcript of the second telephone call indicated participation by the defendant. This view of pattern cannot be reconciled with any of the criminal episode cases decided by the district courts within the Sixth Circuit, nor can it be reconciled with the Sixth Circuit’s view in \textit{Fawaz}. It is obvious that the Sixth Circuit is applying two separate standards, one for civil RICO and one for criminal RICO. However, conviction of a person for distributing drugs because of two telephone calls is not consistent with the intent of Congress as expressed by the Sixth Circuit in \textit{Fawaz}. There was no discussion in \textit{Jennings} of that defendant’s racketeering background so as to render his conviction a logical application of RICO. For example, there was no evidence of a link between the defendant and organized crime or its economic power. \textit{See Fawaz}, 848 F.2d at 194, RICO Bus. Disp. Guide at 6936. While the court in \textit{Jennings} did refer to the defendant’s association with an outlaw motorcycle club involved in criminal activity and noted that the association was an enterprise for RICO purposes, the Sixth Circuit did not focus on the defendant’s criminal activity with respect to the club for the purpose of finding of a pattern. \textit{Jennings}, 842 F.2d at 161.


183. 843 F.2d 103 (2d Cir. 1988), \textit{reh’g granted}, Apr. 1, 1988.

184. \textit{Id.} at 104.


186. \textit{Beauford}, 843 F.2d at 107.


188. 808 F.2d at 191.

was short term.\textsuperscript{190} In \textit{Beauford},\textsuperscript{191} RICO claims were alleged with respect to the conversion of an apartment complex into a condominium. The plaintiffs were five tenants who claimed fraud involving the offering of the units through the conversion.\textsuperscript{192} The fraud related to structural defects, plumbing and electrical defects, financing and maintenance costs.\textsuperscript{193}

The court affirmed the dismissal of these RICO claims because "a discrete, even if widespread, and a continuing, even if finite, scheme" will not permit a plaintiff to take advantage of RICO.\textsuperscript{194} The court noted that regardless of whether the analysis is performed with respect to a pattern or an enterprise:

[W]e nonetheless require continuity in any event, and find insufficient evidence of continuity in a single criminal episode regardless of how many fraudulent acts it entails. In other words, a single criminal episode or scheme does not charge a claim under RICO because it lacks sufficient continuity to constitute an enterprise, even if its fraudulent acts constitute a pattern.\textsuperscript{195}

The Fourth Circuit has likewise adopted a criminal episodes analysis. In \textit{Walk v. Baltimore and Ohio R.R.},\textsuperscript{196} a group of minority shareholders brought an action challenging the proposed merger of a railroad. The railroad allegedly transferred its nonrail assets to an affiliate of the railroad’s parent company. The plaintiffs were not in the class of shareholders with ownership interest in the affiliate.\textsuperscript{197} The transfer of the assets allegedly occurred over six years.\textsuperscript{198}

Next, the defendant’s parent sold the defendant’s interest in
another railroad to the parent at a price allegedly below fair market value. The parent then engineered a merger of that railroad into the defendant and allegedly issued a fraudulent proxy statement with respect to that transaction. The parent also allegedly endeavored to depress the defendant's earnings by shifting costs incurred by other subsidiaries to the defendant. Finally, the parent sought to rid itself of its minority shareholders, the plaintiffs, by merging defendant into the parent. This final merger was the subject of the action in *Walk*.

After reviewing its earlier pattern decisions, the court turned to the facts in *Walk*. The plaintiffs alleged that the conduct at issue constituted at least four separate episodes or schemes, each self-contained, and taking place over ten years. The court found that this activity did not constitute a pattern because each episode "was merely another step toward the accomplishment of a single, limited goal: getting rid of the outside minority interests in [the company]."

The court went on to note that its holding did not preclude the finding of a pattern in a single scheme:

Indeed, one of the most obvious examples of a RICO pattern—a scheme that involves setting up a series of shell cor-

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199. *Id.*

200. The court reviewed its pattern decisions, starting with *International Data Bank v. Zepkin*, 812 F.2d 149, 154 (4th Cir. 1987). In that case the court had noted that while a single scheme should not automatically preclude a finding of pattern:

[A] "single, limited scheme" designed to perpetrate a single fraud should not be transformed into a RICO violation simply because the fraud's commission required several acts of mail or wire fraud; such an interpretation would, we thought, virtually read the pattern requirement out of the statute, for it is "the unusual fraud that does not enlist the mails and wires in its service at least twice."

847 F.2d at 1104 (citing *Zepkin*, 812 F.2d at 154–55). Thus, in *Zepkin* the court found that multiple acts of securities fraud committed by issuing a misleading prospectus to ten investors as part of a single stock offering did not constitute a pattern because all the acts were designed to perpetrate a single fraud.

The Fourth Circuit then compared its *Zepkin* decision with a later decision, *HMK Corp. v. Walsey*, 828 F.2d 1071 (4th Cir. 1987). In that case a developer had made a series of misrepresentations to government officials in order to influence zoning decisions regarding a certain tract of land. Unlike the securities fraud in *Zepkin*, the conduct in *HMK Corp.* spanned four years and could be grouped into several distinct episodes. *Walk*, 847 F.2d at 1104. However, the court found that the conduct was really only a protracted zoning dispute and that the number of predicate acts and length of time was simply a reflection of the peculiar context in which the dispute had occurred. *Id.* (citing *HMK Corp.*, 828 F.2d at 1074–76). Thus, the court found an absence of a pattern.

201. 847 F.2d at 1105.

202. *Id.*
porations, selling stock in them by means of various false representations, and then disappearing with the proceeds—occurs in the corporate context. Such an open-ended scheme contemplating the repeated infliction of independent economic injuries on an indiscriminate number of victims may well pose a special threat to social well-being.203

The court said that its holding was limited to schemes "limited in scope to the accomplishment of a single discrete objective."204 However, even a scheme with a single objective would constitute a pattern if the scheme contemplated ongoing criminal activity of sufficient scope and persistence, such as a series of bank robberies or embezzlements.205

D. Other Approaches

The First, Third and Ninth Circuits do not follow a multiple scheme or a criminal episodes approach. Instead, these circuits look at each allegation on a case-by-case basis. In Roeder v. Alpha Industries, Inc.,206 the First Circuit declined to adopt a definition of pattern that relied "solely on whether activity can be classified as a single scheme or episode."207 The case involved allegations that a corporation, its officers and board of directors had obtained subcontracts through a bribe and had failed to disclose that fact to the public.208 The plaintiff subsequently purchased stock in the corporation, unaware of the bribery. Later, after indictments and guilty pleas with respect to the bribery, the value of plaintiff’s stock diminished.209 Plaintiff then brought suit, claiming that the activity constituted a securities fraud and mail fraud pattern under RICO.

The First Circuit commented that two racketeering acts do not necessarily make a pattern and that the acts must be related and threaten to be more than an isolated occurrence.210 The court found that all the acts, taken together, related only to one instance of bribery.211 The court then concluded that

203. Id. (emphasis added).
204. Id.
205. Id. at 1106.
206. 814 F.2d 22 (1st Cir. 1987).
207. Id. at 31.
208. Id. at 23–24.
209. Id. at 24.
210. Id. at 30.
211. Id. at 31. The acts consisted of eleven phone calls, eight letters and the payment of the bribe in three installments.
the alleged conduct did not constitute a pattern: "There is no suggestion that defendants used similar means to obtain other subcontracts, or that they bribed anyone else. RICO is 'not aimed at the isolated offender.'"\(^{212}\) While the First Circuit claims not to have adopted a multiple scheme or criminal episodes test,\(^{213}\) this language is a paraphrase of the Eighth Circuit's multiple scheme test first set forth in *Superior Oil*.

The Third Circuit, in *Bartichek v. Fidelity Union Bank/First National State*,\(^{214}\) held that an analysis of pattern rests on the review of "a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity."\(^{215}\)

In so ruling, the court rejected the multiple scheme analysis of the Eighth Circuit\(^{216}\) and also rejected the view that a single scheme constitutes a pattern only if it is potentially ongoing or open-ended.\(^{217}\) The Third Circuit noted:

> We do not believe, however, that the notion of continuity compels a requirement of "open-endedness." At the very least, such a requirement would produce anomalous results. This approach would allow a party to maintain a RICO claim if he brought suit before the unlawful scheme had attained its objective; in such cases the scheme would presumably be considered open-ended. This same interpretation,

\(^{212}\) *Id.* (quoting Sedima S.P.R.L. v. Imrex, 473 U.S. 476, 496 n.14 (1985)).

\(^{213}\) 814 F.2d at 31.

\(^{214}\) 832 F.2d 36 (3d Cir. 1987).

\(^{215}\) *Id.* at 39. In *Bartichek*, investors in an oil and gas drilling limited partnership sued the two organizers of the venture and the bank which had loaned plaintiffs funds for the failed investment. The plaintiffs alleged that the defendants had induced the investment through several fraudulent misrepresentations constituting mail fraud. The Third Circuit found a pattern in the *Bartichek* case based on the fact that the alleged scheme was carried out by several individuals and two separate entities, involving the repetition of similar misrepresentations to the twenty-three investors. *Id.*


\(^{217}\) 832 F.2d at 39. This open-ended view has been the focus of the Tenth Circuit's repeated rejection of pattern claims. *See, e.g.,* Torwest DBC, Inc., v. Dick, 810 F.2d 925, 929 (10th Cir. 1987).
though, would deny a RICO cause of action in a case where the scheme had fully accomplished its goal. Yet it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO.\textsuperscript{218}

A determination of continuity and, thus, pattern, according to the court, depends on the circumstances of the particular case.\textsuperscript{219} In two later cases, \textit{Saporito v. Combustion Engineering, Inc.},\textsuperscript{220} and \textit{Environmental Tectonics v. W.S. Kirkpatrick, Inc.},\textsuperscript{221} the Third Circuit found that patterns had been appropriately alleged.\textsuperscript{222}

The leading case in the Ninth Circuit is \textit{Sun Savings and Loan Association v. Dierdorff}.\textsuperscript{223} In that case the Ninth Circuit found a pattern based upon conduct consisting of four acts of mail fraud by a bank president to the bank in order to conceal his receipt of kickbacks from the bank's customers. The court found that the commission of two or more predicate acts that are not isolated events, are separate in time, and are in furtherance of a single criminal scheme is enough to satisfy the pattern requirement.\textsuperscript{224}

The court held that the defendant's concealment of his kickback scheme constituted a pattern because it was not isolated and continued over time, thus providing a threat of continuing

\textsuperscript{218} 832 F.2d at 39.
\textsuperscript{219} Id. at 40.
\textsuperscript{221} 847 F.2d 1052 (3d Cir. 1988), \textit{petition for cert. filed}, June 17, 1988.
\textsuperscript{222} In \textit{Saporito} thirty-two former employees of the defendant alleged that the defendant had fraudulently induced them to retire under a retirement plan while concealing the availability of a more favorable plan. 843 F.2d at 667. The court again followed the factors set forth in \textit{Barticheck}, finding that the number of acts of fraud, the number of victims and the similarity of the acts all indicated a pattern. \textit{Id.}
\textsuperscript{223} 825 F.2d 187 (9th Cir. 1987).
\textsuperscript{224} Id. at 193.

In \textit{Environmental Tectonics}, the plaintiff claimed that the defendants, companies engaged in selling aircraft equipment, had bribed Nigerian government officials to obtain the award of a Nigerian defense contract. The district court had dismissed the RICO claims, holding that neither a multiple scheme nor a single, but open-ended scheme had been alleged. 659 F. Supp. 1381 (D.N.J. 1987). The Third Circuit reversed, first noting that it had earlier rejected both the multiple scheme analysis and the requirement that a scheme must be open-ended in order to constitute a pattern. 847 F.2d at 1063. The court found that the bribery was a "criminal activity that, because of its organization, duration, and objectives pose[d] . . . a threat of a series of injuries over a significant period of time." \textit{Id.} The court also considered as significant the breadth of the conduct, noting that the pattern created an even larger class of victims, the citizens of Nigeria. \textit{Id.}
activity. The court contrasted this conduct with the facts of an earlier case, *Schreiber Distribution Co. v. Serv-Well Furniture Co.*, in which the alleged pattern consisted of the diversion of a single shipment of goods which, when complete, finished the scheme. The Ninth Circuit also commented that the fact that the scheme reaches fruition does not preclude the finding of a pattern so long as a threat of continuing activity exists at some point during the racketeering activity. Subsequent Ninth Circuit cases have refined this interpretation of the pattern requirement.

In sum, there are three different approaches to pattern, each with several variations. The most conservative approach is the Eighth Circuit's multiple scheme approach. The most liberal approaches are those of the Fifth and Eleventh Circuits which allows two predicate acts to constitute a pattern. Finally, a middle approach is the criminal episodes analysis. A review of the congressional history will reveal that the criminal episodes analysis is the test most closely in keeping with the intent of the original legislation.

VI. CONGRESSIONAL HISTORY

The Report of the Senate Committee on the Judiciary on the Organized Crime Control Act of 1969 sets forth the purpose of Title IX (RICO) to be "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." The stat-
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The Senate Report discusses at length the "rising awareness ... of the depth of penetration of the forces of organized crime into the fabric of our society and our commercial life." This penetration was viewed by the Report as "a major threat to the proper functioning of the American economic system, which is grounded in freedom of decision." As of 1969, according to the Report, organized crime already dominated the fields of jukebox and vending machine distribution. The Report stated that businesses such as laundry services, liquor and beer distribution, nightclubs, food wholesaling, record manufacturing, the garment industry and other legitimate businesses had been taken over by organized crime.

The Senate Report discussed other intrusions into legitimate business by organized crime. In 1951 the Special Committee to Investigate Organized Crime in Interstate Commerce, headed by Senator Estes Kefauver, found that organized crime had also invaded a number of industries, including advertising, appliances, baking, banking, basketball, boxing, construction, football, hotels, radio, steel surplus and transportation. In addition, in 1959 and 1960, the Senate Select Committee on Improper Activities in the Labor or Management Field reported that organized crime had moved into legitimate labor

infiltration of legitimate organizations affecting interstate commerce. ... The Attorney General in his testimony on [RICO] ... aptly observed that 'too few Americans appreciate the dimensions of the problem of organized crime; its impact on all America, and what must be done to reduce—and ultimately to eradicate—its sinister and erosive effects.' Id. at 57–58.

233. Id. at 57. See United States v. Turkette, 452 U.S. 576 (1981). "[T]he major purpose of Title IX is to address the infiltration of legitimate business by organized crime." Id. at 591.

234. Senate Rep., supra note 39, at 76.

235. Id. (quoting Report of Antitrust section of the American Bar Association on S.2043 and S.2049 (1968)).

236. Senate Rep., supra note 39, at 76.

237. Id. at 76–77.

unions as well.239

The focus of the legislation on organized crime is obvious throughout the Senate Report. For example, in a discussion of the definition of “racketeering activity,” the report states that the definition “include[s] those crimes most often associated with organized crime, especially those associated with the infiltration of legitimate organizations.”240 As to the definition of “pattern of racketeering activity,” the report states:

The concept of “pattern” is essential to the operation of the statute. One isolated “racketeering activity” was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. 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.241

In the report’s discussion of the language of Section 1962,242 the report states that the section “establishes a threefold prohibition aimed at the infiltration of legitimate organiza-


241. Id. The comment that “the infiltration of legitimate business normally requires more than one ‘racketeering activity,’ ” when read in the context of the entire Senate Report seems to refer to the infiltration of the business world, generically, as opposed to the infiltration of a single business. See id., wherein the discussion focused on the infiltration of types of businesses, i.e., boxing, construction, banks, labor unions, etc. Clearly, the infiltration of one business, such as one hotel or one bowling alley does not make somebody a racketeer or indicate probable affiliation with organized crime. Likewise, the fact that the person needs to commit numerous predicate acts, such as fraud, extortion, or bribery, in order to accomplish the same infiltration of one hotel or bowling alley, does not indicate such affiliation. Indeed, the contrary is probably true. The necessity of repeated acts in order to infiltrate or takeover one store shows either an inefficient or inexperienced criminal or a criminal with no reputation to be taken seriously. Thus, it is most probable that the comment about infiltration requiring more than one act refers to infiltration of an industry, line of business, or a segment thereof. Again, the focus should be on the character of the alleged racketeer and an analysis of whether he or she has demonstrated the type of repeated conduct which was the target of RICO.

With respect to the civil remedies section, the report provides that the broad remedial provisions exist to "reform [the] corrupted organizations . . . and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence. . . ."245

It is therefore clear from the Senate Report that the target of RICO was organized crime and racketeers and the goal of the legislation was removal of those influences from legitimate businesses and organizations. The report also sets forth the rationale of focusing on the activities of organized crime. The report refers to the infiltration of organized crime into legitimate businesses as a "threat of the proper functioning on the American economic system." The report stated that "[w]hen organized crime moves into a business, it customarily brings all the techniques of violence and intimidation which it used in its illegal businesses. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies because its position does not rest on economic superiority."246

The report illustrates some examples of the "techniques of violence and intimidation"247 to which it refers. Following

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246. Id. at 76 (quoting Report of Antitrust Section of the American Bar Association on S. 2043 and S. 2049 (1968)). See Wilson, supra note 106, at 42. "[O]rganized crime is dedicated to illegality as a continuing enterprise, as opposed to the accomplishment of a specific illegal venture." Id. (emphasis added). See also S. Rep. No. 307, supra note 238, at 170.

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247. Id. See also Blakey, supra note 7, at 271–72 (quoting 116 Cong. Rec. 6708 (1970)).
A mafia boss accepts all the shares in a juke box corporation in payment for an illegal gambling debt. Then he expands the number of cafes in which his machines are placed by having the cafe owners threatened and beaten. Soon, he dominates the music machine business in his city, has ruined his competitors, and raises the share of the machine income which he demands that the cafes pay him.

Id. at 6709–10. See also McClellan, supra note 40, at 142: "In an eastern state the mob
takeover of a business, the racketeer will use force and fear to secure a monopoly in the service or product of that business. When the campaign is successful, the organization begins to extract a premium price from customers. At the same time, purchases for that business are always made from specified allied firms "[w]ith its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system. The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgement. Force or fear limits choice, ultimately reduces quality, and increases prices." 248

In addition to violence and intimidation, business fraud is another tool discussed in the report. Reference is made to the takeover of a business by a racketeer who will then borrow money for the business with no intention of repaying the funds. Following the takeover the loans go into default, with the racketeer enriching himself through bankruptcy fraud or insurance fraud, possibly including arson. 249 These techniques of organized crime, according to the Senate Report, effectively eliminate competition, 250 and are often aimed at the small or marginal businessperson who is most vulnerable. 251

Similarly, the report noted that the takeover of labor unions can provide organized crime with the opportunity for theft from union funds, extortion, and profit through manipulation of welfare and pensions funds and insurance contracts. 252 The Senate Report states that trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to "countenance gambling, loan sharking and pilferage." 253

While the focus of RICO was to "thwart the infiltration of organized crime into legitimate business," 254 the question re-

burned several stores and killed employees of a large grocery chain—the venerable A & P." Id. Senator Robert Byrd noted that arson had been used to put pressure on the A & P to purchase mob-manufactured detergent. See 116 Cong. Rec. 602-07 (1970); Blakey, supra note 7, at 271.

249. Id.
250. Id.
251. Id.
252. Id at 78.
253. Id.
254. See, e.g., ABA Task Force Report, supra note 8, at 123-25. The Task Force concluded:

Congress' overwhelming dominant purpose in enacting RICO was to thwart the infiltration of organized crime into legitimate business. In an attempt to
mained as to how to define who was a racketeer or a member of organized crime. 255 Will Wilson, the Assistant Attorney General of the United States in charge of the Criminal Division during RICO's deliberations, wrote that a difficulty with drafting a statute for segregated application to "largely organized, syndicated criminal activities" is the fact that organized crime "has no precise legal configuration." 256 Similarly, Senator John L. McClellan, the senator from Arkansas who sponsored RICO, wrote, in response to criticism that RICO's provisions were too broad in application, that "organized crime [is not] a precise and operative legal concept, like murder, rape, or robbery." 257

During floor discussions of RICO prior to its enactment, criticism was directed at the failure of the statute to define "organized crime." 258 Three congressmen, Mikva (Ill.), Conyers (Mich.) and Ryan (N.Y.) wrote a dissenting view to the House Judiciary Report, opposing adoption of Senate Bill 30, including RICO. 259 One criticism was the fear that the treble damages provision would be used to harass innocent businessmen, due to the need for a showing of only two acts of racketeering activity: "A competitor need only raise the claim that his rival has derived gains from two games of poker." 260 They also criticized the lack of a definition of "organized crime." 261

Similar criticisms were made by groups such as the Committee on Federal Legislation of the Association of the Bar of the

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255. *Id.* See also Wilson, *supra* note 103, at 47–52.
256. *Id.* at 47.
260. *Id.*
261. *Id.* at 196.
City of New York (City Bar)\textsuperscript{262} and the American Civil Liberties Union (ACLU).\textsuperscript{263} In addition, the City Bar complained that the list of offenses was too inclusive, containing offenses often committed by persons not engaged in organized crime.\textsuperscript{264} The ACLU expressed concern that a person could be subjected to the sanctions of RICO by committing two widely separated and isolated predicate acts.\textsuperscript{265} Attempts were even made to define "organized crime." Representative Biaggi of New York offered a floor amendment that would have defined organized crime to include membership in the "Mafia," "La Cosa Nostra," and similar criminal syndicates.\textsuperscript{266}

It is in recognition of these concerns that the concept of "pattern" was developed. First, Assistant Attorney General Wilson noted that:

Organized crime, by any of its names, is not, however, the test for segregation, for, as noted above, those terms are not sufficiently precise to serve as judicially manageable standards. The differentiation is made on the basis of specific conduct, clearly spelled out in advance, and for which special treatment is rationally justified.

Title IX [RICO] makes a similar determination of special con-


\textsuperscript{264} See McClellan, supra note 39, at 142. The Senator's point-by-point analysis is a worthwhile study for the purpose of understanding what this sponsor of RICO envisioned by the term "relationship." The New York City bar criticized the bill by claiming that the list of predicate offenses in Section 1961 is too inclusive and would, therefore, unreasonably broaden the scope of potential RICO defendants. In response to that criticism, Senator McClellan commented that the statute provided a safeguard by requiring a pattern of such violations "[u]nless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business he is not made subject to proceedings under Title IX." Id. at 144.

\textsuperscript{265} Id.

\textsuperscript{266} See 116 Cong. Rec. 35343 (1970):

"Mafia and La Cosa Nostra Organizations" mean nationally organized criminal groups composed of persons of Italian ancestry forming an underworld government ruled by a form of board of directors, who direct or conduct a pattern of racketeering activity and control the operation of a criminal enterprise in furtherance of a monopolistic trade restraining criminal conspiracy. . . . It shall be unlawful for any person to be a member of a Mafia or a La Cosa Nostra organization.

\textit{Id.}
duct deserving special federal prohibition. The prohibition here is directed against the investment in legitimate business of capital accumulated by a pattern of racketeering activity.\textsuperscript{267}

Senator McClellan responded to the complaints that the need to prove only two acts would subject innocent businessmen to the sanctions of RICO. He noted that "commission of two or more acts of racketeering activity is made a necessary, but not a sufficient, element of a pattern."\textsuperscript{268} He stated that the term pattern "itself requires the showing of a relationship ... therefore, proof of two acts of racketeering activity, without more, does not establish a pattern."\textsuperscript{269} The Senator pointed out that the target of RICO was not "sporadic activity."\textsuperscript{270}

As to the concept of "relationship" the Senator, in a discussion about the pattern requirement of Title X, dealing with sentencing guidelines for repeat offenders, compared the two pattern requirements of Titles IX and X. Both the City Bar and the ACLU had criticized the pattern requirement of Title X, expressing concern that the severe sentencing provisions of the title might be applied to a defendant who barely satisfies the recidivist criteria of Title X.\textsuperscript{271} In response to this concern, Senator McClellan stated that the pattern requirement of Title X:

[C]overs continuing, repetitive, intermittent, sporadic, or other conduct in which two or more similar or different criminal acts bear relationships to one another which are relevant to the purposes of sentencing, regardless of the nature of the relationships. The variety of such relationships precludes more detailed specification of them in the bill.\textsuperscript{272}

The Senator then noted that "[c]learly, just as in Title IX, where the concept of "pattern" is employed, the intent of S.30 is clear, on its face and in the Senate Committee report, that the term ‘pattern’ itself conveys the requirement of a relationship between

\textsuperscript{267} Wilson, supra note 103, at 50–51 (emphasis added). The concept of pattern was also developed to insure the constitutionality of the statute. See ABA Task Force Report, supra note 8. ‘Congress made the central proscription of the statute the use of a ‘pattern of racketeering activities’ in connection with an ‘enterprise,’ rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates.’ Id. at 71.

\textsuperscript{268} McClellan, supra note 40, at 144 (emphasis added).

\textsuperscript{269} Id.

\textsuperscript{270} Id. (quoting Senate Rep., supra note 39, at 158).

\textsuperscript{271} McClellan, supra note 40, at 150.

\textsuperscript{272} Id. at 154 (quoting Senate Rep., supra note 39, at 165).
various criminal acts." Thus it is clear that Senator McClellan believed that the pattern requirement in both RICO and Title X contemplated a relationship between predicate acts.

In response to criticism that RICO should not be extended to mail, wire and securities fraud, Senator McClellan commented that the listed offenses "lend themselves to organized criminal exploitation, unlike some other offenses such as rape, and experience has shown that they are commonly committed by participants in organized crime." He noted that "[i]t is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside of organized crime as well." The Senator cited as an example a conviction of Salvatore "Bill" Bonanno, son of former Mafia boss Joseph "Joe Bananas" Bonanno and a Cosa Nostra member, for mail fraud and conspiracy for using a Diners Club credit card extorted from a New York travel agent.

The inclusion in RICO of securities fraud likewise arose out of a recognition by Congress that organized crime utilized such conduct in its business affairs. The Senate Report noted that:

It is most disturbing . . . to learn that organized crime has begun to penetrate securities firms and the Stock Exchange itself. J. Edgar Hoover has testified: "We have over 30 pending cases [March 1, 1969] involving thefts of securities from brokerage houses. Close associates and relatives of La Cosa Nostra figures are known to be involved in at least 11 of these cases." Apparently, no area is immune.

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273. McClellan, supra note 40, at 154 (emphasis added).
274. Id. at 143.
275. Id.
276. Id. at 143-44.
277. See generally ABA TASK FORCE REPORT, supra note 8, at 100-95. See also Glanz, RICO and Securities Fraud: A Workable Limitation, 83 COLUM. L. REV. 1513 (1983).
278. Id. at 1537-39 (footnotes omitted).

The legislative record indicates that during 1969 Congress became aware of a growing problem of theft and fraudulent resale of securities. Attorney General Mitchell described another problem in the securities area—stock market manipulations resulting from huge purchases and sales of securities by organized crime syndicates. By the time S.30 emerged from the subcommittee in December, the subcommittee had become convinced that organized crime was heavily involved in securities thefts, and Title IX had been amended to include securities fraud.

Id. at 1537-39 (footnotes omitted).
278. SENATE REP., supra note 39, at 22 (footnotes omitted).
Senator Hruska, a co-sponsor of RICO, testified in 1967 concerning the manner in which organized crime had infiltrated an established brokerage house. A new man would be placed in the brokerage house and would "almost overnight . . . become a top producer and attract 'customers' with substantial funds available for investment." Target companies would then be selected and carefully controlled stock acquisition in that company would drive up the price of the affected stock. False rumors would be circulated as to the potential earnings of the company until the stock price soared. Profits would then be realized by the racketeers responsible, with the company's management, stockholders and creditors "left holding the bag."

In summary, the congressional history of RICO consists of far more than the few quotations found in footnote fourteen of the Sedima decision. Unfortunately, few courts have followed the Supreme Court's lead, as expressed in that footnote, and examined this history. This history reveals that the statute was intended to eliminate organized crime and racketeers from infiltrating legitimate business. This same history reveals that, due to the impossible task of identifying the racketeers and the members of organized crime, the pattern requirement

279. See McClellan, supra note 40, at 57.
280. See ABA Task Force Report, supra note 8, at 102 (quoting 113 Cong. Rec. 17,998 (1967)).
281. ABA Task Force Report, supra note 8, at 102.
282. Id.
283. Id. See also Glanz, supra note 277. "[W]e have every reason to believe that the illicit traffic of negotiable securities is the latest and one of the most lucrative areas of concentration for most organized mobs in this country." Id. at 1540 (citations omitted). See generally ABA Task Force Report, supra note 8, at 99 n.130. The Task Force cites SEC concerns in 1969 that organized criminal syndicates were becoming involved in manipulation of listed securities in major national securities exchanges.
285. See Blakey, supra note 7, at 276-77 n.119 (quoting 116 Cong. Rec. 35, 204 (1970) (statement of Congressman Poff)).

Whether the technique of infiltration is intimidation and violence or simply public purchase, the consequences of mob ownership of business concerns are always evil. Business competitors suffer unfair competition. Workers are victims of sweetheart labor contracts. And consumers are victims of inferior products and services, price fixing and most of the predatory practices of monopolies. Title IX mobilizes both the criminal and civil mechanisms of the Sherman Act and other antitrust statutes against the barons of organized crime.

Id. "Title IX is designed to inhibit the infiltration of legitimate business by organized crime." 116 Cong. Rec. at 196.
was developed. Assistant Attorney General Wilson wrote that "the differentiation [between organized crime and the mass of defendants] is made on the basis of specific conduct, clearly spelled out in advance, and for which special treatment is justified." As Senator McClellan pointed out, it is the repetition of racketeering acts, in a related pattern and over a period of time which serves to distinguish the defendant as one to whom RICO should apply.

It is also clear from the congressional history that the inclusion of mail, wire and securities fraud was not an idle, ill-conceived act, but rather a recognition that these acts too are the types of conduct employed by organized crime. When such...
acts constitute or are part of a pattern of racketeering activity in connection with furthering or acquiring an interest in a criminal or legitimate enterprise, then such acts can properly serve as a basis for RICO liability.²⁹¹

VII. A PROPOSED PATTERN REQUIREMENT

Courts accepting Sedima’s invitation to focus on RICO’s pattern requirement have attempted to reconcile the statutory definition of pattern with the congressional history set forth in footnote fourteen of the Sedima decision. The statutory definition simply requires “at least two acts of racketeering activity,”²⁹² while the history referenced in footnote fourteen discusses concepts such as “continuity plus relationship.”²⁹³ The inconsistency between the broad statutory definition of pattern and the congressional focus on organized crime has lead to inconsistent court interpretations throughout the country as to what constitutes a pattern of racketeering activity. Accordingly, a uniform approach to pattern is needed that is

head on during open debate on the bill. For example, treble damages were added to Title IX after testimony that securities fraud did not belong in a racketeering statute. Id. at 273 n.112. Also, securities brokerage firms and accounting firms were also subjects of the discussions. Id. at 254 n.48.

²⁹¹. See ABA TASK FORCE REPORT, supra note 8, at 125. Conclusion four provides in part that:

Congress did extend RICO’s provisions to commercial and other fraud to the extent such fraud is proscribed by federal mail, wire and securities fraud concepts; but such commercial and other fraud triggers the RICO provisions only when it constitutes or is part of a “pattern of racketeering activity” in connection with furthering or acquiring an interest in a legitimate or criminal “enterprise.” Nothing in the legislative history indicates that Congress intended to provide an express civil treble damage cause of action for any two instances of mail fraud or wire fraud, or to change the otherwise established federal court precedent that there does not exist an implied private damage cause of action for mail or wire fraud violations. Similarly, nothing in the legislative history suggests that Congress intended to replace existing express and implied private damage causes of action under the federal securities laws with the express RICO treble damage cause of action whenever two instances of mail, wire or securities fraud occurred in connection with a securities transaction.

Id.

²⁹². 18 U.S.C. § 1961(d). This section provides that:

“[P]attern of racketeering activity” requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted October 15, 1970] 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.

²⁹³. 473 U.S. at 496 n.14.
consistent with both the language of the statute and the congressional history.

The application of RICO to "garden variety" fraud cases exceeds the congressional intent of the legislation. RICO was intended to eliminate "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." Clearly, then, some limitation on the application of pattern is required. The broad language of the statute must be limited functionally by the congressional history so that RICO's remedies will be imposed only on those whom Congress intended to be the targets of the legislation. A meaningful definition of pattern will apply to the repeat offender while leaving the isolated offender to the operation of other more traditional laws imposing civil or criminal liability. Indeed, the Supreme Court's citation in footnote fourteen to Title X's repeat offender pattern definition reflects the view that more than a finding of criminality should be made before a defendant can be said to be engaged in a "pattern" of racketeering activity.

Since RICO is part of Title 18 of the Federal Criminal Code, the term "act" of racketeering should be considered in the traditional sense of mens rea. A repeat offender should have made more than one criminal decision involving intent to engage in independent criminal conduct before RICO is invoked. Hence, there should be at least two separate acts of criminal activity, as opposed to mere ministerial mailings or telephone calls in order for a "pattern of racketeering activity" to be found. While each mailing or use of the wires in furtherance of

294. Senate Rep., supra note 39, at 76.

295. Those courts which refuse to narrow the definition of pattern in light of the legislative history and the direction of Sedima have relied upon the broad language of the statute itself. As the Supreme Court noted in footnote fourteen of Sedima, however, the term "pattern" means more than merely two acts of racketeering activity. 473 U.S. at 496 n.14. "Indeed, in common parlance two of anything do not generally form a pattern." Id. A pattern in common usage means "a combination of qualities, acts, tendencies, etc., forming a consistent or characteristic arrangement." Random House Dictionary of the English Language, 1058 (unabr. ed. 1971).

296. See United States v. Bailey, 444 U.S. 394, 415 n.11 (1980) (Congress enacted criminal statutes against a background of Anglo-Saxon common law). "As such, no reason exists, in focusing on the 'acts' that make up 'pattern,' to focus on a purely jurisdictional 'act,' that is, a mailing, a use of a wire communication, or an interstate or foreign transportation." RICO Update, supra note 20, at 201. See also Lipin Enter., Inc. v. Lee, 803 F.2d 322, 325 (7th Cir. 1986) (several mailings do not automatically translate into a pattern).
a criminal objective is a separate act, it is an act without independent significance unless accompanied by independent criminal intent or independent harmful impact. Congress' intent was clearly to focus upon true racketeers, those who repeatedly engaged in criminal conduct, as opposed to those who engage only in an isolated case of civil fraud which can be compensated by other provisions of federal or state law.  

The multiple scheme approach first enunciated by the Eighth Circuit in Superior Oil and later in Northwestern Bell is an attempt to limit RICO to persons who have demonstrated a propensity to use criminal acts as a way of conducting their business. That test requires an analysis of whether the defendant has "ever done these activities in the past [or] . . . proof that [the defendant was] engaged in other criminal activities elsewhere."  

The multiple scheme test correctly looks for evidence of continuity of activity by looking at past activities. The test correctly looks for evidence of relationship by looking at whether the past activities were similar. However, the test is unsatisfactory for several reasons. First, the test is simply too vague. The Eighth Circuit has yet to expand upon this test by defining what it means by a "scheme." As a result, certain courts, including the Tenth Circuit, in attempting to follow the Eighth Circuit's approach, have viewed any conduct which is not entirely open-ended to fall short of constituting a scheme. This interpretation is an unreasonably restrictive view of the concept of continuity. An application of this restrictive view would protect racketeers who, through their activities, have caused the termination of legitimate business enterprises, through bankruptcy fraud, arson, mail fraud or other similar conduct. Thus, racketeers who engage in the systematic liquidation of legitimate businesses as a pattern of conduct would be immune from RICO by their very success in fraudulently milking the assets of the target businesses. This requirement

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297. See, e.g., Northern Trust Bank/O'Hara v. Inryco, Inc., 615 F. Supp. 828, 835 n.12 (N.D. Ill. 1985) (issue characterized as whether the fraud was a "sport" or a regular way for the defendant to do business).

298. Superior Oil, 785 F.2d at 257.

299. For Eighth Circuit cases applying a multiple scheme approach, see supra note 107 and accompanying text.

300. See supra notes 119-32 for an analysis of the Tenth Circuit's pattern decisions.
thus produces an "anomalous result" since "it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO."\textsuperscript{301}

Second, because the word "scheme" has not been defined, there are questions as to what type of criminal activity constitutes a "scheme." The word "scheme" does not appear in the statute. "Scheme" is commonly defined to mean "a plan, design, or program of action to be followed; project . . . an underhand plot; intrigue."\textsuperscript{302} Thus, a criminal plan or design which contemplates income from an ongoing, repeated course of conduct, i.e. through extortion, kidnapping, securities manipulation or bankruptcy fraud is, technically, only one scheme. This is true even if the plan or design injures numerous victims over a long period of time. Such a plan or design certainly seems to constitute a pattern of racketeering activity because the conduct involves repeated use of predicate acts continuing over a period of time, and indicates that the perpetrator is the type of person who conducts his affairs as a racketeer.\textsuperscript{303} However, because such a plan or design constitutes only one broad scheme, no pattern would exist under a multiple scheme approach.

A third problem with the Eighth Circuit's multiple scheme test is the question of relationship. The test, as articulated in \textit{Superior Oil}, requires that the defendant has either committed the same activities in the past or is engaged in "other criminal activities elsewhere."\textsuperscript{304} The congressional history indicates that there must be some relationship between the acts alleged

\textsuperscript{301} Barticheck v. Fidelity Union Bank/First Nat. State, 832 F.2d 36, 39 (3d Cir. 1987).

\textsuperscript{302} \textit{Random House Dictionary of the English Language}, 1276 (unabr. ed. 1971).

\textsuperscript{303} Walk v. Baltimore and Ohio R.R., 847 F.2d 1100 (4th Cir. 1988). In \textit{Walk} the appellate court stated:

Nor do we mean to suggest that related predicate acts may always avoid RICO liability by the "semantical game of generalizing the\[ir\] illegal objective." Quite plainly, a scheme that contemplates the repeated infliction of independent economic injuries—e.g., a series of bank robberies or embezzlements—should not escape characterization as a pattern simply because each criminal act shares the same general objective—the robbing of banks or the embezzlement of funds. \textit{Schemes such as these, which involve the repeated infliction of independent economic injuries—and thus the reaping of independent illegal benefits—are precisely the sort of ongoing criminal activity to which \textit{Sedima}'s continuity requirement is addressed.}

\textit{Id.} at 1106 (emphasis added).

\textsuperscript{304} 785 F.2d 252, 257 (8th Cir. 1986).
to be part of the pattern and the RICO claim being presented. The first part of the Eighth Circuit's test, that the defendant has committed the same activities elsewhere, seems to respond to that congressional intent.

The second part of the test, however, is a departure from the concept of relationship. The commission of "other criminal activities elsewhere" will only occasionally be relevant to the RICO claims presented in a proposed pattern. To allow evidence of past or concurrent criminal activity bearing no relevancy to the claims presented would be contrary to the intent of Congress and the element of pattern. As discussed in this article's section on congressional history, Senator McClellan specifically addressed this point in response to extensive criticism of the pattern element. That criticism stemmed from a concern that hostile competitors of a legitimate business might take advantage of the fact that the pattern definition required only two racketeering acts. Thus, according to the critics, two sporadic or isolated acts could be cited as a RICO pattern. Senator McClellan responded by stating that a pattern requires "a relationship between the various criminal acts." To allow, as suggested by the Eighth Circuit, evidence of "other criminal activity elsewhere" in determining whether multiple schemes exist, would ignore the concept of relationship within the pattern element.

Thus, while the Eighth Circuit's multiple scheme approach has the virtue of singling out only the repeat offender, its primary defect is that it is too vague to be of much assistance in conducting an analysis for pattern. The criminal episodes

305. See supra notes 229-91 and accompanying text.
306. McClellan, supra note 40, at 154.
307. See supra notes 103-32 and accompanying text. Under Section 1962(b) it is a violation of RICO to acquire an interest in an enterprise through a pattern of racketeering activity. If a pattern is intended to distinguish the racketeers from the common citizen, and if RICO is intended to prevent the racketeer from gaining an interest in legitimate business, neither purpose is served by finding that the single takeover of one business is a RICO violation. The point of a multiple scheme analysis is to focus on the perpetrator's history to determine if he has committed similar acts. If the commission of those acts can play some role in the acquisition of the interest in the legitimate enterprise, then there is a Section 1962(b) violation. An example would be repeated episodes of securities manipulation and fraud involving different victims and distinct objectives but all of which contribute to the ability to gain an interest in the target enterprise. This can occur through the accumulation of capital derived from the criminal episodes or through manipulation of the market.
approach, first introduced in *United States v. Moeller*, also focuses on the repeat offender, the true racketeer, while at the same time offering a more specific guideline as to what constitutes a pattern. The criminal episodes analysis looks to the question of whether repeated criminal conduct has occurred in terms of repeated acts of crime, separate in time, having independent significance, and causing distinct injuries.

The criminal episodes approach eliminates from the purview of RICO situations in which numerous predicate acts are purely ministerial in nature in furtherance of a distinct criminal purpose. Thus, one episode of fraud which is implemented by numerous mailings or uses of the wire will not constitute a pattern. Conversely, separate criminal decisions made at different points of time causing distinct injuries are indicative of a pattern. The criminal episodes approach focuses on whether distinct criminal decisions have been made within a stream of predicate acts. For criminal acts to constitute separate episodes, they must be committed in furtherance of a separate purpose, a purpose distinct from the goal of any similar criminal conduct of the perpetrator. Mere ministerial acts, such as repeated mailings or use of the telephone, performed in the furtherance of a distinct criminal purpose do not create a pattern, even though such acts each may technically be a violation of the mail or wire fraud statutes.

A distinct criminal episode has the distinguishing feature of an independent harmful impact. This means that separate criminal acts of independent intent and harmful significance must exist in order for a court to find a pattern of racketeering activity under this analysis.

The criminal episodes approach to the definition of pattern is appropriate in view of the congressional history and intent of RICO. A single fraudulent transaction, such as the fraudulent certification of financial statements as part of an offering, a single fraudulent sale of a security or some other investment, or a single plan to churn a customer’s account, are all only sporadic, isolated fraudulent acts which, by their nature, require

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repeated predicate acts for their implementation. This conduct does not establish that the perpetrator is the type of person who regularly engages in criminal activity as a way of doing business. Thus, this conduct falls short of being the pattern of racketeering activity envisioned by the legislation. The fact that this conduct may harm numerous victims or require numerous predicate acts in order to implement the conduct is really only a function of the plan or scheme undertaken.\textsuperscript{310}

The criminal episodes approach functionally eliminates these types of activities from the purview of RICO because of the lack of independent criminal decisions. The approach is, however, appropriate for ensnaring the repeat offender who regularly engages in such conduct and regularly causes independent injury to the victims of that conduct. By focusing on the question of whether independent decisions to engage in criminal conduct were made, and whether those decisions caused independent harm, the criminal episodes approach provides a functional analysis to identify appropriate RICO defendants.\textsuperscript{311}

One way of determining whether independent criminal episodes exist within a series of predicate acts is to ascertain whether independent and distinct injuries have occurred as a result of the predicate acts.\textsuperscript{312}

If an independent and distinct

\textsuperscript{310}. See, e.g., Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187 (9th Cir. 1987):

This case [four acts of mail fraud in order to conceal a kickback scheme] illustrates that extension through the continued federalization of states [sic] common law remedies. Dierdorff's alleged kickback scheme simply amounted to fraud until it began to be exposed, as it unraveled. Dierdorff (in whose head, presumably, there were dancing visions of profits from his alleged shabby scheme, rather than visions of the arcane nuances of RICO) provided Sun with colorable grounds for RICO's civil treble damages by sending four letters in which he sought to deny his wrongdoing to entities other than Sun. Thus Dierdorff's predicate acts, arguably committed after the fact and certainly not essential to the scheme, provide the bridge between common law fraud and RICO.

\textit{Id.} at 197.


\textsuperscript{312}. See, e.g., \textit{Gouth}, 642 F. Supp. at 1337 (distinct injuries are those separated in time and place).
injury has occurred as a result of certain predicate acts, then a criminal act of independent harmful significance has occurred. The injury must be distinguishable from those injuries caused by other of the predicate acts. Thus, in the case in which numerous investors are harmed by a fraudulent certification of a financial statement, the injuries suffered by those investors are not independent and distinct. All such injuries flow from the one criminal episode reflected in the fraudulent certification. If, however, the same perpetrator, in furtherance of some different objective, engages in some different criminal conduct such as fraud with respect to the financial status of a different client, those injured by that conduct would clearly have injuries independent and distinct from those injured by the first fraudulent certification. If such other conduct bears some relationship to the claims of the investors, then a finding of pattern might be appropriate.313

Another aspect of the criminal episodes test is the distinction between ministerial acts in furtherance of a specific criminal objective and acts in furtherance of separate and distinct criminal objectives. Ministerial acts, such as numerous mailings or use of the wire, occur in furtherance of an episode that has already been undertaken. The acts are necessary to the implementation of the criminal objective. The acts do not cause any independent and distinct injury from those injuries contemplated by that particular criminal objective. Such acts have no independent harmful significance. Thus, if the criminal objective is to defraud certain investors through a prospectus containing misrepresentations, all subsequent predicate acts in furtherance of that objective are ministerial in nature.314

313. Compare H.J., Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), cert. granted, 108 S. Ct. 1219 (1988). Northwestern Bell Telephone’s illegally influencing members of the Minnesota Public Utilities Commission by various methods including cash gifts, employment offers, tickets to sporting and cultural events, airlines tickets, rather than constituting several incidents, were held to be a series of related acts in furtherance of one overall objective: to influence rate consideration.

314. An example would be the churning of a customer securities account. The decision to churn the account has only one objective—the receipt of ill-gotten income through fraud. While an injury occurs each time the account is churned, the injuries are exactly those contemplated by the original criminal objective. The injuries, even though numerous, are the result of ministerial acts in furtherance of the original objective. The acts thus have no independent harmful significance. Compare Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1304–05 (7th Cir. 1987), petition for cert. filed Jan. 28, 1988 (pattern found because each injury from the same churning scheme held to be separate), with Devries v. Prudential-Bache Sec., Inc., 805 F.2d 326, 329
The question arises in the case in which one victim is repeatedly injured by an ongoing scheme, such as a securities churning scheme or a scheme such as that which occurred in Appley v. West. In Appley the beneficiary of a trust alleged that the trustee had defrauded her of substantial assets by embezzling trust funds. The Seventh Circuit found that a pattern existed because each act of mail fraud caused a separate and distinct injury to the plaintiff. In reality, however, the injuries to that plaintiff were not separate and distinct when analyzed in terms of the perpetrator’s objective. The objective was to obtain funds from the beneficiary through an abuse of the trustee’s fiduciary obligations. The fact that the relationship allowed for repeated opportunities to carry out this objective does not convert each opportunity into a separate and distinct criminal decision by the perpetrator to engage in criminal conduct. That decision was made when the trustee elected to embezzle from the plaintiff beneficiary. Each act of embezzlement was only a ministerial effort to further the trustee’s initial objective.

The pattern requirement was intended to identify, by conduct, those to whom RICO ought to be applied. The criminal episodes approach complies with that intent by focusing on the repeated acts of the perpetrator rather than the repeated injury to the victim, as in Appley or in Liquid Air Corp. v. Rogers, another Seventh Circuit case. The defendants in those two cases did not demonstrate a true continuity of criminality such as to identify them as the type of offenders that RICO was intended to target. In both cases the defendants engaged in the furtherance of only one criminal objective and caused only one injury. The fact that the injury occurred segmentally does not change the character of the injuries. The injuries were not separate, independent and distinct from each other.

This potential pitfall can be avoided by requiring that, in addition to independent, distinct injuries, there also be distinct victims. It is consistent with the congressional history and the common meaning of pattern to require that more than one vic-

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315. 892 F.2d 1021 (7th Cir. 1987).
316. Id. at 1028.
318. 834 F.2d 1297 (7th Cir. 1987).
tim be harmed before a pattern can be found. The treble damages provision of the statute exists to resolve a public wrong: the infiltration of legitimate business by organized crime. The existence of this special remedy supports the notion that conduct which comes within the purview of this statute should be of the type which is harmful to more than an isolated victim or a class of similarly harmed victims. Private remedies already exist for resolution of “garden variety” injuries to individual victims.

Further, the congressional intent to focus on organized crime supports the proposition that a pattern of behavior is that which is harmful to a variety of victims as distinguished from that behavior which is isolated, sporadic and harmful to only one or a group of victims. Just as it is difficult to see a pattern of criminal activity resulting from one isolated act of criminal behavior, it is likewise difficult to conceive of a pattern of criminal activity directed at only one victim. In order to bring the treble damages provision of RICO into play, a plaintiff should be required to show that not only he, but others, have been independently injured by distinct criminal conduct. RICO is intended to ensnare repeat offenders, those who are engaged in organized crime and racketeering as a way of doing business. The statute is not intended to reward those who have been repeatedly injured. The focus must be on the perpetrator and his conduct, not the severity or number of injuries to his victim. The term “pattern” is a term chosen by Congress to define the activity of those defendants who have engaged in repeated activity which causes public injury, justifying the imposition of treble damages and attorney’s fees.

In addition to the existence of independent, distinct injuries

319. The criminal episode analysis as applied in the Northern District of Illinois does not require, as a prerequisite, that the injuries occur to distinct victims. See Ghouth v. Conticommodity Serv., Inc., 642 F. Supp. 1325, 1336 (N.D. Ill. 1986). Nonetheless, the presence of more than one victim has strongly influenced the courts in determining whether independent harmful significance exists and, hence, whether criminal episodes exist. See, e.g., Papagiannis v. Pontikis, 108 F.R.D. 177, 179 (N.D. Ill. 1985).

320. In other areas of the law, where a pattern is necessary in order to impose liability, proof of a pattern is often showed by injury to others as a result of the conduct of the defendant. See, e.g., Oklahoma City v. Tuttle, 471 U.S. 808 (1985). In Tuttle a single incident was sufficient to show a pattern of unconstitutional police behavior when the behavior was so grossly negligent that it “spoke out positively on the issue of lack of training.” Id. at 814. Cf. Forstman v. Culp, 648 F. Supp. 1379 (M.D.N.C. 1986) (applying civil rights analogy).
to distinct victims, conduct must also demonstrate continuity or the threat thereof in order to constitute a pattern. The element of continuity is necessary in order to establish that the perpetrator conducts his affairs as a racketeer. Thus, an analysis must be made of the perpetrator's conduct to determine if he has demonstrated a propensity to use racketeering acts in order to achieve his objectives. Absent this analysis, it is impossible to determine if the behavior in question is only sporadic or isolated. The congressional history, particularly the Senate Report and written material authored by one of RICO's sponsors, Senator McClellan, clearly establishes that sporadic or isolated conduct is not the target of the legislation.

The Northern District of Illinois has required that criminal episodes must be "somewhat separated in time and place" in order for the episodes to be considered as being part of a pattern. Requiring that the episodes be separated, at least in time, comports with RICO's intent that only members of organized crime or racketeers be subject to RICO's provisions. A criminal episodes approach which requires distinct injuries to distinct victims by conduct separated in time and place satisfies the continuity requirement intended by Congress. A person or entity that conducts its affairs in this manner poses a threat of continuing racketeering activity to the public. It becomes irrelevant whether a particular "scheme" is "open-ended" or "close-ended."

The concept of "relationship" which has been referenced in footnote fourteen of Sedima is not at odds with the concept of continuity. The term, which does not appear in the statute, was used by Senator McClellan in response to concerns that the pattern definition was too vague. The primary concern expressed was that a legitimate business, by committing two predicate acts at different points in its operation, could be sub-

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321. See supra notes 53-74 and accompanying text.
322. See Senate Rep., supra note 39, at 158. See also McClellan, supra note 40, at 144.
324. This article has focused on a definition of "racketeer" which stressed an ongoing nature of the racketeering acts. Since it is impossible to determine with precision who is a member of organized crime, one must look at the manner in which the perpetrator conducts himself to ascertain if application of RICO is appropriate. A racketeer is the label which appears in the congressional history.
jected to RICO. Senator McClellan responded by referring to the requirement of a pattern as a protection against such application. The Senator compared the RICO pattern requirement to the pattern requirement of Title X, noting that conduct would constitute a pattern under Title X if "two or more similar or different criminal acts bear relationships to one another which is relevant to the purposes of sentencing." He stated that the Senate intended that both pattern requirements convey "the requirement of a relationship between predicate acts."

It is therefore appropriate to look to Title X's pattern requirement for guidance as to when other criminal acts are sufficiently related to be considered as part of a pattern. The predicate acts which are alleged to be part of the pattern must be somehow consistent with or relevant to the particular claim presented. This comports with the standard definition of a pattern: "A combustion of acts forming a consistent arrangement." This also comports with Title X's definition of pattern: "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." Thus, a separate criminal episode, before it can be considered to be part of a pattern, must be analyzed to determine if it is related to the episode which is the subject of the RICO claim at issue. That analysis can be performed by utilizing Title X's pattern definition.

In summary, a review of the congressional history and the case law interpreting pattern indicates that the multiple scheme approach of the Eighth Circuit must be rejected.

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325. For the congressional history, see supra notes 229–91 and accompanying text.
326. Id.
327. McClellan, supra note 40, at 154.
329. 18 U.S.C. § 3575(e).
331. As noted, the primary problem with the multiple scheme test is that it is vague and, thus, difficult to apply. While the Eighth Circuit's pattern test is labeled a "multiple scheme" test, an analysis of several decisions from that circuit indicates, in reality, that the circuit may be employing a criminal episode approach. The Eighth Circuit's analysis closely parallels the criminal episode analysis in that the court looked for related episodes of activity, committed at a different time, having separate objectives and causing distinct injuries to distinct victims. Thus, the Eighth Circuit's
Similarly, none of the other circuits have developed a test for pattern which successfully eliminates application of RICO to garden variety fraud cases. The criminal episodes analysis undertaken by certain district courts comes closest to reaching the objective of limiting RICO to the types of perpetrators who regularly commit predicate acts as a way of doing business. The criminal episodes test can be improved by requiring that distinct victims suffer distinct injuries as a result of different episodes before a pattern can be found. This refinement will aid the court in determining whether a particular defendant is in fact a repeat offender properly subject to the enhanced penalties of the RICO statute.

Accordingly, we propose that the following pattern requirement be employed:

A pattern of racketeering activity consists of:

1. at least two racketeering acts,
2. committed in at least two related episodes,
3. with each episode being committed at a different time,
4. with each episode having a separate objective, and
5. with each episode causing a distinct injury to at least one victim who is not the victim of a separate episode.

Episodes are related if they involve either similar or different racketeering 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.

RICO was intended to eliminate the infiltration of legitimate business by organized crime. Because of the impossibility of identifying with certainty the members of organized crime, Congress created the pattern requirement. Congress determined that appropriate targets for the use of RICO would be identified on the basis of a pattern of specific conduct, represented by the repeated use of racketeering acts.\(^{332}\)

The criminal episodes approach represents a functional method for achieving these objectives while at the same time avoiding the application of RICO to garden variety fraud. This approach protects legitimate business from unreasonable application of the statute while at the same time recognizing that it is impossible to know whether a particular "legitimate" busi-

\(^{332}\) See supra notes 229–91 and accompanying text.

multiple scheme approach, as actually applied, may well be simply a criminal episode approach. See supra notes 103–33 and accompanying text.
ness is covertly influenced or controlled by organized crime or racketeers. The criminal episodes approach focuses on the conduct of the business, requiring separate but related episodes of criminal conduct, committed over time, with distinct injuries to distinct victims. As a result, a legitimate business that engages only sporadically in the commission of racketeering acts will not be the subject of a RICO claim. The application of the statute will be reserved for the habitual commercial offender.