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Interpreting RICO's "Pattern of Racketeering Activity" Requirement After *Sedima*: Separate Schemes, Episodes or Related Acts?

HAROLD SELAN*

INTRODUCTION

Until 1985, the term "pattern of racketeering activity" as used in the Racketeering Influenced and Corrupt Organizations Act (RICO) was usually applied by simple reference to the RICO statute where the term is defined as the commission of two or more specified criminal acts within a ten year period of one another.[1] As civil RICO grew in use and popularity during the 1980s, some courts began to view the task of judicially construing the RICO statute as being similar to a "treasure hunt."[2] Still, the requirement of pleading and proving a pattern of racketeering activity remained relatively free from judicial scrutiny. That changed in 1985 when the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*,[3] admonished both Congress and the lower courts for their failure "to develop a meaningful concept of pattern."[4] Although *Sedima* involved several important issues unrelated to the interpretation of "pattern of racketeering activity," the present significance of the decision is the continuing debate over the meaning of Justice White's dicta that a "pattern of racketeering activity" involves elements of "continuity plus relationship."[5]

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1. 18 U.S.C. § 1961(5) (1982).
2. Sutcliff, Inc. v. Donovan Cos., 727 F.2d 648, 652 (7th Cir. 1984).
3. 473 U.S. 479 (1985).
4. *Id.* at 500.
5. *Id.* at 496 n.14.

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For some courts, *Sedima's* dicta "create[d] a whole new ball game"[6] which justified wholesale re-examination of the pattern requirement. Other courts have analyzed Justice White's language as dicta and have resisted the urge to engage in judicial activism by rewriting RICO's statutory requirements. Consequently, a broad spectrum of divergent interpretations reading the pattern requirement has emerged since *Sedima*. Naturally, the impact of such diverse, and often antagonistic, decisions has created confusion both among those pleading civil RICO and courts ruling on the perimeters of the racketeering statute.

Within this wide spectrum, three major theories have emerged. At one end of this spectrum is a series of decisions first articulated in the Northern District of Illinois, which restrict the interpretation of pattern as requiring a showing of *separate fraudulent criminal schemes* as a prerequisite to RICO liability.[7] At the other end of the spectrum are courts which hold that a pattern is adequately alleged when a plaintiff claims two or more connected or related criminal acts listed in the RICO statute.[8] These courts have narrowly read *Sedima* and have tended to follow closely the plain language of the RICO statute.[9] Courts at this end of the spectrum which have confronted the separate schemes analysis have squarely rejected it as an attempt to eviscerate the RICO statute by judicially grafting requirements on the statute unforeseen by Congress.[10]

A middle approach has also evolved which, like the separate scheme theory, goes beyond RICO's stated statutory definition of pattern. However, unlike the proponents of the more restrictive separate scheme theory, the adherents to this middle approach recognize that a pattern of *separate fraudulent episodes or transactions* occurring within a single fraudulent scheme can fulfill the requirement of the RICO statute.[11] Under this view, a number of flexible, relevant factors are used to assist the court in making the pattern determination.[12] The Seventh Circuit, summing up the middle approach, admitted that interpreting the pattern of racke-

6. Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 833 (N.D. Ill. 1985).

7. *See infra* notes 46-66 and accompanying text.

8. *See infra* notes 67-95 and accompanying text.

9. RICO's statutory requirements are discussed at length *infra* notes 17-31 and accompanying text.

10. *See, e.g.*, Volckmann v. Edwards, 642 F. Supp. 109 (N.D. Cal. 1986); Brainerd & Bridges v. Weingeroff Enters., Inc., No. 85-C-493, slip op. (N.D. Ill. Sept. 18, 1986). *But see* Medallion Television Enter. v. Selec-TV, 627 F. Supp. 1290 (C.D. Cal. 1986), *aff'd*, No. 86-5595, slip op. (9th Cir. Dec. 9, 1987).

11. *See, e.g.*, Graham v. Slaughter, 624 F. Supp. 222 (N.D. Ill. 1986).

12. *See infra* note 94 and accompanying text.

teering activity requirement is no longer a matter of merely applying statutory language but rather involves the application of a legal "standard":

> The doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative.[13]

Courts using this middle analysis consider it a "flexible approach" towards interpreting the statutory language. These courts envision the definition and scope of what constitutes a "pattern of racketeering activity" developing as an evolving fact-oriented, case by case standard.[14]

The plethora of interpretations of RICO's "pattern of racketeering activity" language and the impact of *Sedima's* dicta has developed into what one court has termed a "cottage industry."[15] Rather than contributing to that thriving industry, the purpose here is to examine the spectrum of interpretations which have proliferated since *Sedima*, and to provide some insight into the benefits and deficiencies of each interpretation.

I. "Pattern of Racketeering Activity": The Statutory Requirements

The RICO statute[16] authorizes a private civil action for treble damages for "[a]ny person injured in his business or property" by a pattern of racketeering activity.[17] Five elements of proof are necessary to establish a violation: it must be shown that a "person,"[18] through a "*pattern of racketeering activity*"[19] or collection of an unlawful debt, directly or indirectly: (a) invested, or (b) maintained an interest, or (c) participated in the conduct of, or (d) conspired to do (a), (b), or (c); in an "*enterprise*,"[20] the activi-

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13. Morgan v. Bank of Waukegan, 804 F.2d 970, 975-76 (7th Cir. 1986).

14. *See, e.g.*, Lawaetz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1287 (D.V.I. 1987); Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118, 123 (D. Md. 1986).

15. Morris v. Gilbert, 649 F. Supp. 1491, 1502 (E.D.N.Y. 1986).

16. 18 U.S.C. §§ 1961-68 (1982).

17. 18 U.S.C. § 1964(c) (1982).

18. 18 U.S.C. § 1961(3) (1982) defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property."

19. A "pattern of racketeering activity" as defined by 18 U.S.C. § 1961(5) (1982) "requires at least two acts of racketeering activity, one of which occurred after [Oct. 15, 1970] and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." (emphasis added).

20. An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1970). Any group, whether formal or informal, legal or illegal, may be alleged as an enterprise so as long as the members are "associated in fact." United States v. Turkette, 452 U.S. 576, 581, 583 (1981) (emphasis added).

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ties of which affect interstate or foreign commerce, causing injury to the plaintiff's "business or property by reason of" the RICO violation.[21]

The term "pattern" appears only once in the statute in the phrase "pattern of racketeering activity," and is defined as requiring *at least two predicate acts of "racketeering activity" within ten years of one another.*[22] "Racketeering activity" is defined as certain "predicate acts" including any act or threat involving any of eight specified state felonies or twenty-five specified federal offenses including any act which is indictable under the federal mail, wire and securities fraud statutes.[23]

The increasing use of civil RICO in recent years has been due, in part, to the relative ease of including several of RICO's predicate acts as part of a civil RICO count, particularly mail fraud,[24] wire fraud,[25] and/or fraud in the sale of securities.[26] The attrac-

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21. 18 U.S.C. § 1964(c) (1982).

22. 18 U.S.C. § 1961(5) (1982) (emphasis added).

23. 18 U.S.C. § 1961(1) (1982). That section states in full that:

"Racketeering Activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery 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), section 471, 472 and 473 (relating to counterfeiting), Section 659 (relating to theft from interstate shipment) if the act indictable under 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transactions), section 1089 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of state or local criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling business), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-2424 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any state law of the United States;

24. 18 U.S.C. § 1341 (1982).

25. 18 U.S.C. § 1343 (1982).

26. Mail and wire fraud must be alleged with enough particularity to satisfy the requirement of FED. R. CIV. P. Rule 9 and include the time, place and content of the fraud as well as the person making the fraud and what was obtained or given as a result of the fraud. *See, e.g.*, Van Dorn Co. v. Howington, 623 F. Supp. 1548, 1555 (N.D. Ohio 1985); *Cf.* Banco de DeSarrollo Agropecuario v. Gibbs, 640 F. Supp. 1168, 1175 (S.D. Fla. 1986) (requiring allegations of two acts of racketeering activity with enough specificity to show

tion of including these federal criminal acts as part of a civil RICO action is appreciated when examining the apparent simplicity of their criminal elements. For example, a mail or wire fraud violation—and hence any derivative violation of the rights of a RICO victim—requires two well-defined elements: (1) that the defendant must have first devised a scheme or artifice to defraud, and (2) they then used the mails or interstate wires to further the scheme.[27] A "scheme to defraud" has been interpreted as including any deceptive scheme "contrary to public policy [which] conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing."[28] Use of the mails or interstate wires, the second element, need only be incidental to support a violation of the federal wire or mail statutes.[29] The invariable presence of these enumerated acts in virtually any commercial fraud scheme, along with the potential of treble damages, has catapulted many "garden-variety" fraud actions into RICO lawsuits. With such broad possible applications, federal courts have become increasing hostile to civil RICO lawsuits, especially those employing the fraud predicate acts as the basis of the racketeering violation. One court put it simply that "if civil RICO is a cancer, the inclusion of mail fraud as a predicate offense is the carcinogen."[30]

Up until the Supreme Court's *Sedima* decision in 1985, the lower courts were focusing on several disparate elements of the RICO statute in an effort to halt the judicial perception of an over-expansion in the civil use of the statute. Some courts held that a civil RICO plaintiff must allege a special "racketeering type" injury separate and distinct from the injury naturally flowing from the predicate acts themselves.[31] More aggressive courts held that civil use of RICO demanded some sort of connection to organized criminal or convicted criminal activity and required a prior criminal conviction on the alleged predicate act as a prerequisite for civil RICO actions.[32] Still, no court had focused on re-

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that there is probable cause the crimes were committed). *But see* Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

27. Pereria v. United States, 347 U.S. 1, 8 (1954); *Cf.* Virden v. Graphics One, 623 F. Supp. 1417, 1434 (E.D. Cal. 1985). Under the first element of these federal crimes it must be established that the defendant had the specific intent to engage in the scheme or artifice to defraud.

28. *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir. 1979).

29. *See, e.g.*, United States v. Bright, 588 F.2d 504, 510 (5th Cir. 1979), *cert. denied*, 440 U.S. 972 (1980).

30. Ghouth v. Conticommodity Servs., Inc., 642 F. Supp. 1325, 1334 n.10 (N.D. Ill. 1986).

31. *See, e.g.*, Alexander Grant & Co. v. Tiffany Indus. Inc., 742 F.2d 408 (8th Cir. 1984) and Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984).

32. *See Sedima*, 741 F.2d 482, *rev'd*, 473 U.S. 479 (1985).

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stricting the interpretation of the pattern requirement as a means of curtailing the statute's growing use.

Prior to *Sedima*, the only significant controversy regarding the interpretation of "pattern of racketeering activity" revolved around the type of relationship necessary to be alleged between the requisite predicate acts themselves in order to establish a pattern. Some courts read the statutory definition of "pattern"--which requires at least two predicate acts within ten years of one another—literally and held that the predicate acts "need not be related to each other but must be related to the affairs of the enterprise."[33] Other courts required that the alleged racketeering acts "must have been connected with each other by some common scheme, plan, or motive so as to constitute a pattern and not simply a series of disconnected acts."[34] Despite this minor interpretive split, there was general unanimity *rejecting any requirement that separate or distinct criminal schemes or episodes* be present to allege pattern.[35] This unanimity was shattered soon after the lower courts began their new quest to interpret the meaning of *Sedima's* dicta on the pattern issue.[36]

II. The *Sedima* Decision

The Supreme Court in *Sedima*, suggested that "[t]he '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'."[37] Despite this admonition by the court, the construction of the phrase "pattern of racketeering activity" was not an issue in *Sedima.*

Sedima involved a Belgian corporation, Sedima, entering into a joint venture with Imrex Co., to provide component electronic parts. The buyer was to order the component parts through Sedima. Imrex was to obtain the parts in the United States and ship them to Europe. The agreement called for the two corpora-

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33. *See, e.g.*, United States v. Weisman, 624 F.2d 1118, 1122-23 (2d Cir. 1980), *cert. denied*, 449 U.S. 871 (1980); United States v. Elliot, 571 F.2d 880, 902-03 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978); Beth Israel Medical Center v. Smith, 576 F. Supp. 1061, 1066 n.5 (S.D.N.Y. 1983).

34. United States v. Field, 432 F. Supp. 55, 60 (S.D.N.Y. 1977); United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975); United States v. White, 386 F. Supp. 882 (E.D. Wis. 1974).

35. United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978); United States v. Starnes, 644 F. Supp. 55, 60 (S.D.N.Y. 1977), *cert. denied*, 454 U.S. 826 (1981).

36. *See* Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 830 (N.D. Ill. 1985) discussed in detail *infra* notes 46-61 and accompanying text.

37. 473 U.S. 479, 496 n.14 (1979).

tions to split the proceeds. Imrex filed approximately $8,000,000 in orders placed with it through Sedima. Sedima became convinced that Imrex was presenting inflated bills, cheating Sedima out of a portion of its proceeds by collecting for nonexistent expenses. Sedima sued, alleging along with its common law claims, RICO violations predicated on acts involving both mail and wire fraud. The Second Circuit in a decision which admittedly was designed to drastically narrow the availability of civil RICO actions, upheld a district court dismissal on the basis that *Sedima* failed to allege either that Imrex suffered a prior criminal conviction of the predicate acts, or that Sedima suffered any "racketeering injury" distinct from the injury flowing from the alleged mail or wire fraud violations.[38]

The Supreme Court reversed in a five to four decision, holding that the successful pleading of a civil RICO action required only allegations of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[39] The Court rejected any requirement from within the statute or its legislative history of the necessity of alleging either prior criminal convictions, special "RICO-type" injury, or any connection with organized crime.[40] According to the majority, with RICO:

> [C]ongress wanted to reach both "legitimate" and "illegitimate" enterprises. [citations omitted]. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that 1964(c) is used against respected businessmen allegedly engaged in a pattern of specifically identifiable criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. . . . [T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.[41]

Although the *Sedima* Court was not presented with the issue of whether Sedima had adequately alleged a "pattern of racketeering activity" against Imrex and the other member of the enterprise, the Court admonished both Congress and lower courts for their failure "to develop a meaningful concept of 'pattern' [of racketeering activity]."[42] The Court noted that this failure, along with the relative ease that the predicate could be alleged, were primarily responsible for the "extraordinary" uses of the civil RICO statute.[43] In what has become the critically discussed footnote 14 in

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38. *Sedima*, 741 F.2d 482 (2d Cir. 1984).
39. *Sedima*, 473 U.S. at 496.
40. *Id.* at 488-500.
41. *Id.* at 499.
42. *Id.* at 500.
43. *Id.*

Sedima, Justice White, writing for the majority, noted:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from other provisions in section 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," section 1961(5) (emphasis added) not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern'. The legislative history supports the view that two isolated acts of racketeering 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 a threat of continuing activity to be effective. *It is this factor of continuity plus relationship which combines to produce a pattern.* S.Rep. No. 91-617, p. 158 (1969). . . . Significantly, in defining "pattern" in a later provision of the same bill Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. 3575(e). This language may be useful in interpreting the other sections of the Act.[44]

As yet, there is no consensus as to what Justice White meant regarding "continuity plus relationship." On the contrary, both the district and circuit courts have radically split as to its meaning. Courts do agree, however, that RICO's racketeering activity language now requires "something more than merely two prior acts . . . to establish a pattern of racketeering activity. The questions remains how much more."[45]

III. RESTRICTING PATTERN TO SEPARATE CRIMINAL SCHEMES: THE *Inryco* DECISION

Following the *Sedima* decision in the summer of 1985, statutory interpretation of "pattern of racketeering activity" emerged as the preeminent RICO issue. *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*,[46] was the first in a line of cases focusing on the meaning of the concept of continuity noted by Justice White in

44. *Id.* at 496 n.14. (emphasis added to the sentence, "It is this factor of continuity plus relationship which combines to produce a pattern." Emphasis in original on "continuity plus relationship").

45. United States v. Friedman, 635 F. Supp. 782, 784 (S.D.N.Y. 1986), *modified on other grounds*, 636 F. Supp. 462 (S.D.N.Y. 1986). *But see Bankers Trust infra* notes 99-109 and accompanying text.

46. 615 F. Supp. 828 (N.D. Ill. 1985). *Inryco* has been called "the most thorough post-*Sedima* decision on the 'pattern' issue." Graham v. Slaughter, 624 F. Supp. 222, 224 (N.D. Ill. 1985).

Sedima's footnote 14. *Inryco* held this element of continuity of a "pattern" is fulfilled by requiring that the predicate acts alleged must have occurred in separate criminal schemes.[47]

In *Inryco*, Northern Trust alleged that a kickback scheme existed between a general and a sub-contractor on a construction job. In the RICO count, the complaint alleged the particulars of the scheme and asserted as the requisite pattern of racketeering activity including "two or more acts of mail fraud as hereinafter described."[48] The two acts described included several mailings involved in connection with the subcontract including the mailing of the subcontract and the mailing of the kickback check. On a motion to dismiss, the district court held that these two specified acts were not enough to establish a "pattern of racketeering activity"; rather, they were simply part of the same fraudulent scheme.[49]

In dismissing the RICO count, Judge Shadur found that: "Both logic and *Sedima* compel the conclusion that the two specified acts [the mailing of the subcontract and the mailing of the kickback check] fail to establish a 'pattern of racketeering activity'."[50] He further observed that even though he need not decide the issue, even if the three additional kickbacks involved the mail, they implemented the same fraudulent scheme.[51] The "logic" referred to by the *Inryco* court was a semantical construction of the term "pattern":

> True enough "pattern" connotes similarity, hence the cases' proper emphasis on relatedness of the constituent acts. . . . [P]attern [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. 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."[52]

Nonetheless, Judge Shadur's reasoning ran contrary to existing authority. Two Seventh Circuit cases, and a Second Circuit case were directly inapposite on the pattern issue. Each of the pre-*Sedima* cases; *United States v. Starnes*,[53] *United States v. Weatherspoon*,[54] and *United States v. Parness*[55] rejected the contention

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47. *Inryco*, 615 F. Supp. at 833.
48. *Id.*
49. *Id.*
50. *Id.* at 834.
51. *Id.* at 833.
52. *Id.* at 831. (emphasis in original).
53. 644 F.2d 673, 677-78 (7th Cir. 1984), *cert. denied*, 454 U.S. 826 (1981) (single arson with mail fraud sufficient).
54. 581 F.2d 595, 601-02 (7th Cir. 1978) (multiple mailings used in fraudulent operation of a Veteran's Administration supported school held sufficient).
55. 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

that separate criminal events were a prerequisite to establishing a pattern of racketeering activity and embraced the concept that a pattern could be shown by criminal acts constituting a single criminal transaction. Even though Judge Shadur recognized that Justice White's language in *Sedima's* footnote 14 was dicta, he took the remarkable step of holding that this same dicta "vitiated" the three prior appellate decisions which had broadly interpreted "pattern."[56]

Inryco's interpretation that a single scheme does not provide the necessary continuity to constitute a pattern began to "cast doubt on the continued validity of cases which carve one criminal episode into multiple predicate act 'pieces' and allege a 'pattern'."[57] As a result, the restrictive interpretation has become popular with those courts which want to halt the growing use of RICO in commercial cases.[58] Recently though, both the Seventh[59] and Second[60]

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56. *Northern Trust*, 615 F. Supp. at 834.

57. Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1195 (S.D.N.Y. 1985).

58. *See, e.g.*, Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1985) (several acts of mail and wire fraud proved at trial in systematic fraud by defendants to steal natural gas from pipeline, held to be only "isolated" fraudulent scheme insufficient to show "pattern of racketeering activity"); Behunin v. Dow Chem. Co., 650 F. Supp. 1387, 1390 (D. Colo. 1986) (alleged criminal activity in intentionally misrepresenting and marketing defective brick and mortar compound constituted single scheme); Simon v. Fribourg, 650 F. Supp. 319 (D. Minn. 1986) (continuity element of pattern not shown in action by former employee against employer for promised participation in profit sharing plan); Maryland Nat'l Bank v. Dauphin Dep. Bank and Trust Co., 647 F. Supp. 908 (M.D. Pa. 1986) (actions of one bank to induce another bank to become primary lender to insolvent customer is not a pattern even though multiple predicate acts were present); McIntyre's Mini Computer Sales Group v. Creative Synergy Corp., 644 F. Supp. 580 (E.D. Mich. 1986) (scheme to steal trade secrets is not a pattern); Eisenberg v. Spectex Indus., 644 F. Supp. 48 (E.D.N.Y. 1986) (multiple mailings of false and misleading proxy and financial statements did not constitute pattern in single scheme to seize control of corporation); Bosteve, Ltd. v. Maraszkwi, 642 F. Supp. 197 (E.D.N.Y 1986) (no evidence that defendants engaged in second scheme to defraud mandated JNOV on RICO verdict); Kronfield v. First New Jersey Nat'l Bank, 638 F. Supp. 1454 (D.N.J. 1986) (fraudulent misrepresentations regarding marketing of bonds taking place all over the country and involving 1400 investors constituted a pattern); Wright v. Everett Cash Mut. Ins. Co., 637 F. Supp. 155 (W.D. Pa. 1986) (multiple mailings involved in alleged bad faith denial of insurance benefits were only ministerial acts in execution of single scheme); Allright Missouri, Inc. v. Billeter, 631 F. Supp. 1328, 1330 (E.D. Mo. 1986) (multiple interrelated acts of wire and mail fraud underlying securities law violations effecting transfer of limited partnership interest in single piece of real estate did not show continuity); SJ Advanced Technology & Mfg. Co. v. Junkunc, 627 F. Supp. 572 (N.D. Ill. 1986) (RICO allegations against a defense contractor upheld where it was alleged that the contractor had made several malicious misrepresentations regarding a competitor (plaintiff) to major customers, the Air Force and other component suppliers—separate acts of fraud on various parties constituted a pattern); Fleet Management Sys. v. Archer-Daniels-Midland Co., 627 F. Supp. 550 (C.D. Ill. 1986) (allegations of numerous acts of wire and mail fraud in scheme to obtain and market under a different name, a software program did not state a pattern); Allington v. Carpenter, 619 F. Supp. 474, 478 (C.D. Cal. 1985) ("a 'pattern of racketeering activity' must include racketeering acts sufficiently unconnected in time or substance to warrant consideration of separate criminal episodes."—each act of wire fraud—phone calls to Switzerland and the Grand Cayman Islands and wiring of money to the islands—held part of the same criminal

Circuits have expressly disapproved *Inryco's* rationale. Still, such disapproval of the restrictive theory has not deterred other courts in applying that interpretation, especially in the Eighth Circuit.[61]

The significance of the restrictive interpretation is that it represents a move by some federal courts to halt the spread of what they see as a deluge of civil RICO actions. In the process, by requiring different criminal schemes as a prerequisite for civil liability, these courts have effectively over-criminalized civil RICO. The central issue in the application of the restrictive interpretation minimizes the actions directly relevant to the plaintiff's injury or the continuity of a single activity occurring over a particular length of time. The restrictive interpretation concentrates on the ability of a plaintiff to allege, as part of a "pattern," other criminal behavior undertaken by the defendant.

For example, in *Richter v. Sudman*,[62] it was alleged that the

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transaction and not a "pattern").

This restrictive interpretation has ben adopted in courts across the country, especially in the southern district of New York. *See, e.g.*, Baum v. Phillips, Appel & Walden, Inc., 648 F. Supp. 1518 (S.D.N.Y. 1986); Savastano v. Thompson Medical Co., 640 F. Supp. 1081 (S.D.N.Y. 1986); Ross v. Bolton, 639 F. Supp. 323, 328 (S.D.N.Y 1986) (RICO pattern established when transaction sued upon was part of continuing series of illegal stock manipulations aimed at different individuals); Richter v. Sudman, 634 F. Supp. 234, 238-39 (S.D.N.Y. 1986) (discussed in text); Frankfurt Distrib. v. RMR Advertisers Inc., 632 F. Supp. 1198 (S.D.N.Y 1986); Soper v. Simmons Int'l Ltd., 632 F. Supp. 244 (S.D.N.Y 1986) (twenty predicate acts committed over a two year period involving at least three different third parties did not constitute a pattern in single alleged scheme to deprive plaintiff of commission for bringing two defendant corporations together for commercial endeavor); Rush v. Oppenheimer & Co., Inc., 628 F. Supp. 1188, 1195 (S.D.N.Y. 1985) (multiple fraudulent acts occurring over eighteen months in churning scheme constituted pattern); Crummere v. Brown, No. 85-1376, slip op. at 8-9 (S.D.N.Y. April 3, 1986) (allegations by individual investor that defendant's illegal wire transfers of her money, fraudulent sale of her securities and conspiracy to commit the same held not to be a pattern—these "multiple predicate acts" were simply a series of events necessary to complete the single fraudulent scheme of diverting funds); *But see* Bankers Trust Co. v. Feldesman, 648 F. Supp. 17 (S.D.N.Y 1986); First Fed. Sav. & Loan Ass'n v. Oppenheimer, Appel, Dixon & Co., 629 F. Supp. 427, 455 (S.D.N.Y. 1986).

59. *See, e.g.*, Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986); United States v. Yoman, 800 F.2d 164 (7th Cir. 1986); Illinois Dep't of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985).

60. United States v. Weisman, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980) and United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

61. The Eighth Circuit has firmly held to the rationale of *Inryco* and continues to require multiple criminal schemes—either similar wrongful activity in the past or other criminal activity elsewhere. *See* Deviries v. Prudental-Bache Securities, Inc., 805 F.2d 326, 329 (8th Cir. 1986); Holmberg v. Morrisette 800 F.2d 205, 210 (8th Cir. 1986); Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986). Cases which recognize the Seventh Circuit's disapproval of *Inryco* yet continue to apply the restrictive rationale include H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 914-16 (D. Minn. 1987); Behunin v. Dow Chem. Co., 650 F. Supp. 1387, 1390 (D. Colo. 1986), and Beck v. Mfrs. Hanover Trust, 650 F. Supp. 48, 50 (S.D.N.Y. 1986).

62. 634 F. Supp. 234 (S.D.N.Y. 1986).

defendants had engaged in four separate but related schemes—inducing thirteen investors to invest money in a commercial venture; inducing the investor to place their investment in an escrow account; concealing defendants' premature withdrawal from that account and further expending money from the account. The court dismissed the RICO count because continuing criminal activity had not been adequately pled:

> [P]laintiffs have not alleged that the defendants have engaged in similar schemes to defraud other investors, nor is there any evidence that this particular scheme is on-going or continuous. Once the defendants dispose of the investors' funds, the fraudulent scheme comes to an end. There is no continuing threat of criminal activity. In contrast, should the defendants again attempt to raise money . . . through fraudulent means, there would be evidence of a "pattern" along with evidence of a continuing threat of such untoward activity.[63]

In searching for multiple *schemes*, courts, as in *Richter*, have insisted on repeated organized criminal activity as part of "pattern of racketeering activity."[64] These courts are now demanding allegations focusing on the defendant's history and demanding either that the defendants "had engaged in like [criminal] activities in the past or that they were engaged in other criminal activities."[65]

Thus in *Richter*, the court emphasized: "The fact that a single activity may continue over a particular length of time does not necessarily establish a pattern. The issue is not the continuity of a single activity, but whether the defendants had a *practice* of engaging in the same or similar types of activity."[66] Taken literally, this insistence on continuing, separate criminal behavior implies that no matter how sophisticated or lengthy a fraudulent scheme may be, the remedial effect provided by Congress under RICO will be denied an injured plaintiff because a single scheme is involved.

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63. *Id.* at 240.

64. *Cf.* Soper v. Simmons Int'l Ltd., 632 F. Supp. 244, 254 (S.D.N.Y. 1986) ("[A]n isolated criminal episode, even if it is accomplished through a number of fraudulent acts, neither evidences a threat of continuing criminal involvement nor the involvement of an organized criminal enterprise.").

65. Holmberg v. Morrisette, 800 F.2d 205, 210 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987). *See also* Deviries v. Prudential Bache Sec., Inc., 805 F.2d 326, 329 (8th Cir. 1986); Rich Maid Kitchens, Inc. v. Pennsylvania Lumberman's Mut. Ins. Co., 641 F. Supp. 297, 312 (E.D. Pa. 1986); Madden v. Gluck, 636 F. Supp. 463 (E.D. Mo. 1986); Allright Mo. Inc. v. Billeter, 631 F. Supp. 1328, 1330 (E.D. Mo. 1986).

66. *Richter*, 634 F. Supp. at 238-39 (emphasis in original).

IV. Multiple Criminal Episodes Within a Single Scheme May Constitute Pattern

A. *The Episodic and Open-Ended Single Scheme Interpretation*

The issue of whether a single prolonged scheme could constitute a pattern quickly followed *Inryco* in *Graham v. Slaughter*.[67] *Graham* involved a two year scheme by a shareholder in a closed corporation of embezzling corporate funds. If the court had analyzed the factual situation using *Inryco's* analysis, the facts would not have constituted a pattern since the two year scheme involved but a single victim and a single goal—the embezzlement of funds of a single corporation over a period of time. The *Graham* court did, however, find a pattern. Disagreeing with *Inryco, Graham* questioned whether the only way of establishing a patten of racketeering activity is through a showing of separate and distinct criminal schemes.[68] Instead, the court imposed a variation on *Inryco's* insistence on separateness and viewed the two year practice of embezzling as "an open-ended scheme,"[69] concluding that this single scheme included "a sufficient number of independent *episodes* to satisfy the continuity factor of *Sedima*."[70]

What emerged from *Graham* was a new formulation for deciphering when a pattern may be present—a pattern is more than a single transaction, but not necessarily more than a single scheme. Though this formula was certainly less rigid than *Inryco's* restrictive view, the *Graham* standard of episodic or transactional criminal events made up in vagueness what it lacked in rigidity. Specifically, what characterized an "episode"? In *Graham*, for example, great emphasis was placed on the fact that the scheme was "open-ended", but what determines if a scheme is "open-ended"—is there a set time frame in which an episodic fraud becomes a pattern?

Two characteristics distinguishing an episode soon evolved—length of time between the alleged transactions and the existence of separate independent harm. Initially, Judge Getzendenner in *Graham* defined an episode as a "transaction somewhat separated in time and place" reflecting ongoing criminal activity.[71] Then, in *Heritage Insurance Co. v. First National*

67. 624 F. Supp. 222 (N.D. Ill. 1986).
68. *Id.* at 224.
69. *Id.* at 225.
70. *Id.*
71. *Id.* at 224 (quoting United States v. Moeller, 402 F. Supp. 49, 57-58 (D. Conn. 1975)).

Bank of Cicero,[72] Judge Getzendenner added a second characteristic which looked to the injury suffered. In *Heritage*, the alleged scheme—a bank's fraudulent use of the mails and wires to convert performance bond escrow accounts to retire a construction contractor's debts owed to the bank—was perpetrated over a significantly shorter period of time than in *Graham*, six months rather than two years. In attempting to balance the relative brevity of the scheme with the number of "episodes" involved, Judge Getzendenner admitted that defining transactions as merely being somewhat separated in time was not sufficient:

> If one were to view the fraud as a single decision to misappropriate escrow funds, the fact that the mailed escrow payments were received over a six month period would probably not suffice to transmute the unitary nature of the fraud into a "pattern of racketeering. [However, in light of the fact that five separate escrow agreements and four mailings took place] *each alleged mailing instigated a new diversion of funds and hence separate injury*."[73]

Other courts have adopted similar characterizations, analyzing an episode as having the identifying feature of "one basic injury" of "independent harmful significance."[74]

The issue has been how to characterize the defendant's criminal behavior in such a way as to satisfy *Sedima's* elusive insistence on "continuity." *Inryco*, and those courts adopting the restrictive interpretation of pattern, stress the continuity of the enterprise itself by requiring allegations that the defendant (as part of the enterprise) had a practice of engaging in criminal activity elsewhere. In contrast, *Graham's* less restrictive moderate interpretation stresses continuity, not of the enterprise, but of the enterprise's actions within the scheme. Thus, under *Graham* and its progeny, "a separate criminal episode is identified by a separate injury and at least two episodes are needed for a pattern."[75]

The moderate reading of pattern initiated in *Graham* has been adopted by a number of courts[76] and may be evolving as a major-

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72. 629 F. Supp. 1412 (N.D. Ill. 1986).

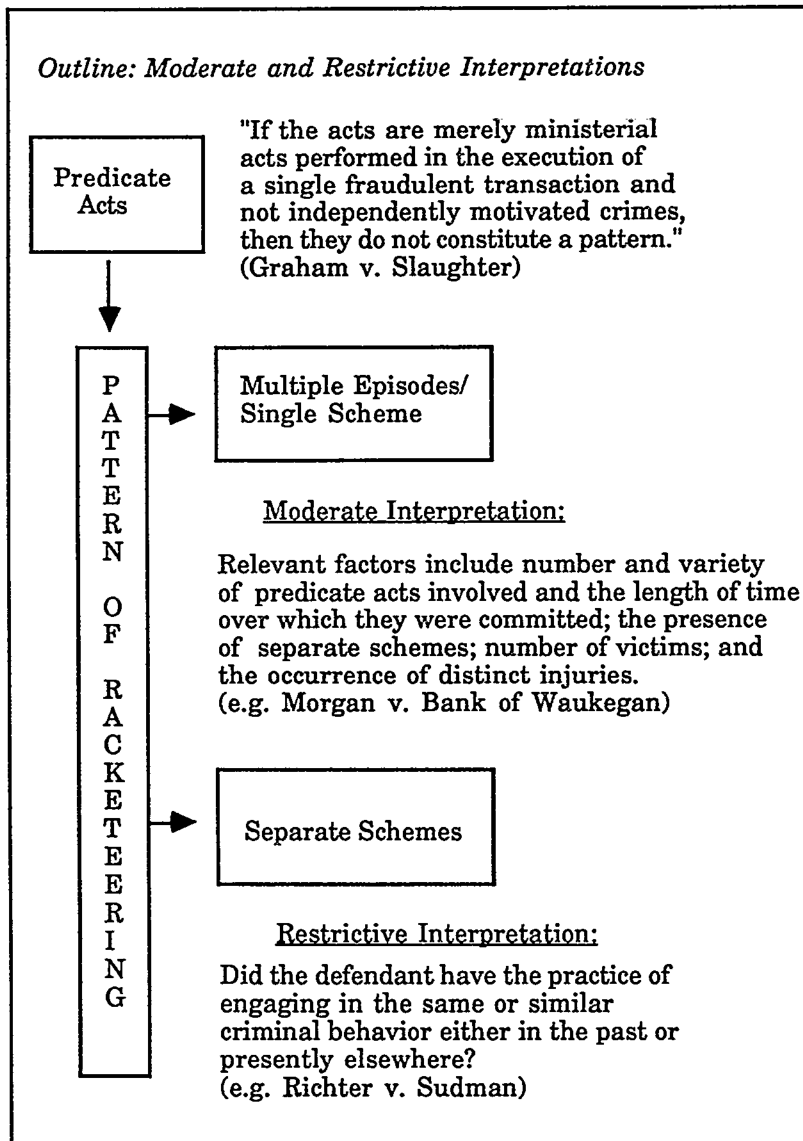
73. *Id.* at 1417. (emphasis added).

74. Ghouth v. Contincommodity Servs., Inc., 642 F. Supp. 1325, 1336 (N.D. Ill. 1986).

75. Techreations, Inc. v. National Safety Council, 650 F. Supp. 337 (N.D. Ill. 1986) (fraudulent inducement by mail and wire to enter into contract and subsequent modification of contract were not even two separate episodes, let alone two schemes).

76. *See, e.g.*, NL Indus., Inc. v. Gulf & W. Indus., 650 F. Supp. 1115 (D. Kan. 1986) (commercial bribery, mail, wire and travel fraud insufficient to constitute a pattern in action against competitor in alleged attempt to obtain one contract); Morris v. Gilbert, 649 F. Supp. 1491 (E.D.N.Y. 1986); Lewis, On Behalf of Nat'l Semiconductor v. Sprock, 646 F. Supp. 574, 582 (N.D. Cal. 1986) (individual mailings of fraudulent test data over a three year period constitutes pattern); Gaudette v. Panos, 644 F. Supp. 826 (D. Mass.

ity view. What emerges from that interpretation, and is discussed in detail below, is a trilateral view of the pattern involving predicate acts, episodes and schemes:



1986) (sufficient number of related episodes including calls, letters and personal assurances continuing over time satisfied "continuity plus relationships" test in action brought against stockbroker for fraudulent administration of investment accounts); Verges v. Babovich, 644 F. Supp. 150 (E.D. La. 1986) (series of parallel and independent frauds on number of individuals by bank in collecting and demanding payment on promissory notes which were procured by fraud constituted a pattern).

1. Predicate Acts—Under the more moderate interpretation applied by *Graham* and other courts, allegations of predicate acts, no matter how numerous, are usually viewed as being mere ministerial acts if used in the execution of a single fraudulent transaction. These courts recognize that while each separate predicate act does indeed constitute a separate indictable criminal offense,[77] that still is not enough to create a RICO violation.[78]

2. Multiple Episodes/Single Scheme—Unlike the restrictive separate schemes test, the middle approach recognizes that a single scheme can, in certain circumstances, provide the requisite continuity to establish a pattern. Two related issues emerge: how to distinguish between predicate acts which are merely ministerial to carrying out a single fraudulent scheme, and predicate act violations which are instrumental and thus constitute different fraudulent episodes or transactions within the single scheme; and secondly, how to distinguish "isolated" and "sporadic" activity from "continuous" activity?

Defining which circumstances will suffice to fulfill the pattern requirement in an ongoing or single scheme situation has resulted in the courts adopting a factually-oriented, case by case approach. While some courts have stressed the presence of distinct injuries,[79] others have emphasized that the predicate acts involved different victims.[80] Several courts have come out with approaches just as

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Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118, 123 n.1A (D. Md. 1986) also adopted a middle approach and set up a two tier analysis of pattern somewhat similar to that ultimately put forward by the Seventh Circuit in Morgan v. Bank of Waukegan, 615 F. Supp. 836 (N. Ill. 1985). Under *Temporaries'* formula, the initial question is whether more than one scheme is involved; if not, the question to be asked is whether an open ended continuous scheme containing a multiplicity of predicate acts was involved. If a single scheme is involved, then a number of factors need to be evaluated to determine the continuous—rather than sporadic nature of the activity including. The factors indicating continuity are: duration of the scheme; number of predicate acts involved; number of victims of such acts; likelihood that the scheme would continue indefinitely. In *Temporaries*, a two month scheme involving numerous telephone calls was deemed as an isolated event and not continuous in nature. *Accord* Anton Motors, Inc. v. Power, 644 F. Supp. (D. Md. 1986) (one scheme to defraud auto body shop by manager involving eight mailings and one victim over a period of less than four months did not constitute a pattern).

77. *See generally* United States v. Benmuhar, 658 F.2d 14 (1st Cir. 1981), *cert. denied*, 458 U.S. 1132 (1982); Saunders v. United States, 415 F.2d 621, 625 (5th Cir. 1969), *cert. denied*, 397 U.S. 976 (1970).

78. *See, e.g.*, Medical Emergency Servs. v. Foulke, 633 F. Supp. 156 (N.D. Ill. 1986) (each mailing does not necessarily create a separate criminal episode and is not enough to qualify as a pattern.); *In re* Evening News Assoc. Tender Office Litigation, 642 F. Supp. 860, 861 (E.D. Mich. 1986) (pattern "requires more than a single episode of racketeering activity even if episode consists of more than one indictable act.").

79. *See supra* notes 71-72 and accompanying text.

80. *See, e.g.*, Verges v Babovich, 644 F. Supp. 150 (E.D. La. 1986). *Cf.* Pentcurelli v. Spector Cohen Gadon & Rosen, 640 F. Supp. 868, 874 (E.D. Pa. 1986) (accepting the broad reading of pattern but also noting as important that other individuals were also the

strict as *Graham's* but have explicitly refused to adopt a definition of pattern which turns on an assessment of whether one or more multiple criminal schemes are involved, finding that: "Such a definition would be highly susceptible to manipulative semantics."[81] These courts have steadfastly refused to adopt a "bright line test in the abstract"[82] and have relied simply on an *ad hoc* approach considering "the nature of the conduct under all the circumstances."[83] At least one court has tried to resolve these questions by insisting on not only multiple episodes but also requiring "from the pleadings, a reasonable inference . . . that these episodes were not an aberration in the way a defendant conducted his business. Rather, the pattern made up of a multiple episodes must be a regular part of the way a defendant does business and in that sense, ongoing."[84]

In *Morgan v. Bank of Waukegan*,[85] the Seventh Circuit thoroughly reviewed the history of cases interpreting pattern. *Morgan* involved an alleged scheme of a lender bank and promoters of a commercial venture to divest plaintiffs of their initial cash investment and their home, which was put up as security for loans to the venture. The alleged scheme continued over a four year period and involved distinct acts of mail fraud—some which related to the initial loan transaction and others of which related to two separate foreclosure sales regarding the collateral. At the district court level, Judge Shadur, the author of *Inryco*, granted summary judgment to the defendants because only a single fraudulent scheme was involved.[86] The Court of Appeals, however, reversed.

The court described the conflict between the two views as a natural one: it requires reconciling the tension between two inherently opposite ideas within any definition of pattern—"continuity" and "relationship."[87] The court stated that requiring both elements as

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victims of defendants' fraudulent inducements).

81. Paul S. Mullin & Assoc. v. Bassett, 632 F. Supp. 532, 541 (D. Del. 1986).

82. Torwest DBC, Inc. v. Dick, 810 F.2d 925, 929 (10th Cir. 1987).

83. Torwest DBC, Inc. v. Dick, 628 F. Supp. 163, 165 (D.C. Colo. 1986), *aff'd*, 810 F.2d 925 (10th Cir 1987). *Accord* Meadow Ltd. Partnership v. Heritage Sav. & Loan, 639 F. Supp. 643, 650 (E.D. Va. 1986) (allegations that savings and loan foreclosed on property, purchased property at auction and resold property in seven day period did not allege a pattern).

84. Papai v. Cremosnik, 635 F. Supp. 1402, 1413 (N.D. Ill. 1986) (multiple episodes found when defendants made false promises to induce plaintiff to invest in defendant's partnership); Halstead Video, Inc. v. Gutillo 115 F.R.D. 177 (N.D. Ill. 1987) (multiple episodes found where defendants skimmed monies from company by falsifying documents, failing to report income and preparing false statement).

85. 804 F.2d 970 (7th Cir. 1986).

86. Morgan v. Bank of Waukegan, 615 F. Supp. 836 (N.D. Ill. 1986), *rev'd*, 804 F.2d 970 (7th Cir. 1986).

87. *Morgan*, 804 F.2d at 975.

part of a pattern of racketeering activity "is a sound theoretical concept that is not easily accomplished in practice."[88] The court added:

> This is because the terms "continuity and "relationship" are somewhat at odds with one another. Relationship implies that the predicate acts were committed somewhat in time to one another, involve the same victim or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points in time or involving different victims. To focus excessively on either continuity or relationship alone effectively negates the remaining prong.[89]

The Court of Appeals concluded (as had Judge Shadur in *Inryco*) that its own broad pre-*Sedima* interpretation in *United States v. Weatherspoon*,[90] holding that two predicate acts invariable constituted a pattern of racketeering activity, had lost its validity in light of *Sedima*.[91] Nevertheless, the court rejected *Inryco's* restrictive separate schemes test because that test focused too excessively on the continuity aspect of the pattern requirement.[92] The court reasoned that the pitfall of such an excessive focus leads to the "untenable result" of allowing defendants who commit a large and ongoing single fraudulent scheme to automatically escape RICO liability for their acts.[93]

The Seventh Circuit in *Morgan* adopted a flexible middle approach similar to what was initiated in *Graham*. Predicate acts, ongoing over a identified period of time were fairly viewed as separate transactions. In determining what adequately constitutes a pattern of racketeering activity, the court laid down the following guidelines:

> Relevant factors [in making the pattern determination] include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. However, the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to meet the pattern requirement. . . . [The determination of pattern] depends on the facts and circumstances of the particular case, with no one factor being determinative.[94]

Under the *Morgan* analysis then, whether specific acts constitute a pattern is to be decided on a case-by-case basis.

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88. *Id.*
89. *Id.*
90. 581 F.2d 595 (7th Cir. 1978).
91. *Morgan*, 804 F.2d at 975.
92. *Id.*
93. *Id.*
94. *Id.*

3. *Multiple Schemes*—Courts adopting either the more moderate interpretation under *Graham* or *Inryco's* restrictive view have generally agreed that a "pattern" exists if there is more than one scheme. However, in *Morgan* the court did note that the number of schemes alleged as just "one factor" to be measured when evaluating whether there is sufficient continuity to constitute a pattern. Nonetheless, it is doubtful that courts would fail to find a pattern if faced with multiple schemes. The idea is that a scheme "is more elaborate and complex than a criminal episode and since multiple occurrences of the latter constitute a pattern, the *a fortiori* multiple occurrences of the former also do."[95]

V. Cases Rejecting Separate Schemes or Multiple Episodes

Unlike *Inryco*, *Graham*, and *Morgan*, a third line of post-*Sedima* cases has emerged broadly reading RICO's pattern requirement. These decisions have generally been critical of judicially imposing categories of "schemes" and "episodes" as necessary prerequisites for finding a pattern of racketeering activity. The criticism has usually been on one or more of four grounds: 1) courts have misread the meaning (and requirements) of footnote 14 in *Sedima*; 2) problems of vagueness and unpredictability are inherent in the definition and application of the restrictive interpretation; 3) that many of the pre-*Sedima* rulings broadly interpreting pattern have been left intact; and perhaps most importantly, 4) that by embellishing (and thereby narrowing the application of RICO) courts have engaged in judicial legislation.

A. *Interpreting the Meaning (and Requirements) of Footnote 14 in Sedima*

Many cases rejecting the restrictive tests using multiple schemes or episodes as characterizing a "pattern" have generally allowed a RICO claim to proceed if two or more related predicate acts are alleged.[96] This liberal interpretation is consistent with many pre-*Sedima* cases interpreting the pattern requirement. A small number of courts, while not as liberal in applying the pat-

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95. Techreations, Inc. v. National Safety Council, 650 F. Supp. 337, 339 (N.D. Ill. 1986). *See also* Ghouth v. Conticommodity Serv., Inc., 642 F. Supp. at 1337 (N.D. Ill 1986) ("if there is more than one scheme, a pattern would probably exist in most cases."); *But see* Paul S. Mullin & Assoc., Inc. v. Bassett, 632 F. Supp. 532, 541 (D. Del. 1986) (taking a moderate approach to the pattern issue, but refusing to look at the pattern issue in terms of "schemes" because the concept is "highly susceptible of semantical manipulation").

96. *See supra* notes 67-95 and accompanying text.

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tern of racketeering activity requirement, have also rejected the interpretative rules which delineate either "schemes" or "episodes" as proper tests for pattern.[97] This second group of cases attempts to satisfy *Sedima* by requiring indicia that the alleged criminal activity exhibits some element of continuity or threat of continuity.

1. The Related Acts Approach—Courts adopting a liberal or more literal view of the pattern language maintain that those cases which have applied an overly restrictive interpretation of RICO's requirement of a pattern of racketeering activity have misread both the RICO statute and *Sedima.* One judge has gone even further, declaring that the restrictive cases which have extrapolated an interpretation from footnote 14 in *Sedima* requiring separate schemes or episodes "turn[s] the Supreme Court's reasoning on its head."[98]

Bankers Trust Co. v. Feldesman[99] best illustrates the related acts approach.[100] The case arose out of actions by the defendants to conceal assets from creditors through a series of three alleged acts of bankruptcy fraud and one act of bribery. The case was dismissed in 1983 when the district court found that the plaintiff had failed to allege any distinct RICO injury, as opposed to merely a direct injury from the predicate acts.[101] The decision was upheld by the Second Circuit[102] but then vacated by the Supreme Court along with *Sedima* in 1985.[103]

On remand, defendants argued that the predicate acts alleged did not constitute a pattern of racketeering activity under the post-*Sedima* decisions narrowing the application of RICO's pattern requirement. The district court disagreed. In discussing the development of the pattern requirement since the *Sedima* decision, the *Bankers Trust* Court criticized both the excessive reliance which courts have placed on footnote 14's reference to continuity in *Sedima*, and the misinterpretation by the courts of RICO's legislative history. As to *Sedima's* footnote 14, the court stated:

> [F]ootnote 14 simply is not a basis for the doctrine that has arisen from it. The footnote makes no mention of multiple "epi-

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97. *See supra* notes 85-94 and accompanying text.
98. Bush Dev. Corp. v. Harbour Place Assoc., 632 F. Supp. 1359, 1366 (E.D. Va. 1986).
99. 648 F. Supp. 17 (S.D.N.Y. 1986).
100. *See also* United States v. Ianniello, 808 F.2d 184, 189-92 (2d Cir. 1986).
101. *Bankers Trust*, 648 F. Supp. at 22.
102. Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984).
103. 473 U.S. 479 (1985).

sodes," "transactions," or "schemes." The primary if not sole focus of footnote 14 is on the need for a relationship between the predicate acts which constitute a pattern. Thus, the Court quotes 18 U.S.C. section 3575(e) (1982), which requires only a connection between criminal acts.[104]

Regarding *Sedima's* reference to continuity, the court in *Bankers Trust*, like Justice White in footnote 14, examined the statute's legislative history and concluded that two *isolated* acts of racketeering by themselves do not constitute a pattern.[105] In *Sedima*, Justice White refers to Senate Report No. 91-617, but only partially quotes one of the significant passages in that portion of the legislative history: "The target of [RICO] is not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern"[106] Nevertheless, in that report, quoted at greater length in *Bankers Trust*, the concept of pattern was discussed in a slightly broader context:

> 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 result would be too large and the remedies disproportionate to the gravity of the offense. The target of [RICO] is not sporadic activity. The infiltration of legitimate business normally requires *more than one "racketeering activity" and the treat [sic] of continuing activity* to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.[107]

Bankers Trust concluded that the continuity alluded to in the Senate Report went to continuity among the predicate acts themselves: "It seems clear from this language that the continuity aspect is satisfied by the existence of a second predicate act, and that the relationship aspect is satisfied by some connection between the acts."[108] Other courts accepting this broad interpretation have reached similar conclusions, specifically that the Court's concern was directed not towards those situations "where the racketeering acts are so closely related that they can be a part of a single criminal episode" but towards those instances where two isolated, sporadic or unrelated predicate acts are alleged to be a pattern."[109]

104. *Bankers Trust*, 648 F. Supp. at 25.
105. *Id.* at 32.
106. *Sedima*, 473 U.S. at 496 n.14.
107. *Bankers Trust*, 648 F. Supp. at 26. (emphasis added).
108. *Id.*
109. Bush Develop. Corp. v. Harbour Place Assoc., 632 F. Supp. at 1366. *See also*

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In finding support for a broad interpretation of RICO's pattern requirement, the courts have looked for support in both the language of footnote 14, as well as the tenor of the entire *Sedima* opinion. In *Sedima*, the Court cautioned against narrowly interpreting the RICO statute stating:

> RICO is to be read broadly. This is not only the lesson of Congress' self-consciously expansive language and overall approach, [citation omitted], but also of its express admonition that RICO is to "be liberally construed to effectuate its purposes," Pub. L. 91-452 section 904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.[110]

Consistent with this language, some courts have taken a more literal approach to interpreting the pattern of racketeering activity language in the RICO statute claiming that two or more *related* predicate acts can constitute a pattern of racketeering.[111]

Brainerd & Bridges v. Weingeroff Enters., Inc., No. 85-C-493, slip op. (N.D. Ill. Sept. 18, 1986).

110. *Sedima*, 743 U.S. at 501.

111. *See, e.g.*, United States v. Ianniello, 808 F.2d 184, 192 (2d Cir. 1986) (holding that when a person commits at least two acts that have a common purpose of furthering a continuing criminal enterprise with which the person is associated, *Sedima's* elements of relatedness and continuity are satisfied); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir 1985) (district court had not dealt with "pattern" issue, however Fifth Circuit noted that *Sedima* merely indicated that the two predicate acts need to be related; in this case where defendants allegedly attempted to defraud the company by twice mailing it false invoices regarding ownership and repair of certain equipment, the alleged acts of mail fraud were related); Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985) (each mailing in a scheme to defraud is a separate offense so that several separate acts of mail fraud constitute a "pattern"); Bergen v. Rothschild, 648 F. Supp. 582, 590-91 (D.D.C. 1986) (stock churning case; mere predicate acts of securities fraud, mail fraud and wire fraud may be sufficient to constitute pattern); Bankers Trust Co. v. Feldesman, 648 F. Supp. 17 (S.D.N.Y. 1986); Winer v. Patterson, 644 F. Supp. 898, 902 (D.N.H. 1986) (stock churning case; literal application of § 1961(1,5)—two acts of racketeering activity alleged a pattern); Tryco Trucking Co. v. Belk Store Servs., 634 F. Supp. 1327, 1334 (W.D.N.C. 1986) ("[a]s long as more than one racketeering activity is sufficiently alleged, a "pattern" . . . may exist even if the racketeering activities contemplate a single scheme."); Bush Dev. Corp. v. Harbour Place Assoc., 632 F. Supp. 1359, 1366 (E.D. Va. 1986) (six separate but related acts of wire fraud involving only one victim and one scheme or episode sufficient for a pattern); Cocan Properties, Inc. v. Mattel, Inc., 619 F. Supp. 1167, 1170 (S.D.N.Y 1985) (plaintiff had alleged copyright infringement of its fictitious character, Conan the Barbarian, adequately met pattern requirement pleading two related and sufficiently particularized predicate acts arising out of the same scheme); First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 629 F. Supp. 427, 445 (S.D.N.Y 1985) (mailings of the same fraudulent information to two or more investors over several days satisfies the pattern requirement); Trak Microcomputer Corp. v. Wearne Brothers, 628 F. Supp. 1089 (N.D. Ill. 1985) (allegations of at least two acts of mail and wire fraud in furtherance of scheme to defraud plaintiffs and illegally obtain microcomputer technology from them held to adequately alleged pattern); Systems Research, Inc. v. Random, Inc, 614 F. Supp. 494 (N.D. Ill. 1986) (kickback scheme where an employee of an employment agency was receiving a kickback for channeling applicants to an outsider—two alleged uses of mails and wires satisfies the pattern element).

2. The "Threat of Continuing Activity" Cases (Continuity of Predicate Acts)—Without fully embracing the requirement of separate schemes or multiple episodes, some courts have adopted variations encompassing some element of continuity.[112] For example, in *Bank of America National Trust and Savings Association v. Touche Ross & Co.*,[113] decided by the Eleventh Circuit Court of Appeals early in 1986, a bank lent money on a project after reviewing documents prepared by defendant, a major accounting firm.[114] The commercial venture went bankrupt and the lender bank sought to recover under RICO. The court found that nine separate acts of wire and mail fraud used for the purpose of inducing the bank to extend credit and involving the same parties over a three year period were sufficient allegations to constitute a pattern.[115]

Touche Ross focused on continuity by Justice White's reference to 18 U.S.C. section 3575(e) in footnote 14, which states that "criminal conduct forms a pattern if it embraces acts having the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[116] Three factors were considered important by the *Touche Ross* Court—the relationship between the parties, the time frame of the predicate acts, and the number of the predicate acts.[117] Rather than analyzing the defendants conduct in terms of episodes or schemes, the Eleventh Circuit stressed "a threat of continuing activity" was the necessary element under *Sedima* to determine a pattern.[118]

Courts interpreting *Touche Ross* have analyzed it as impliedly rejecting using schemes or episodes as determining factors for finding a pattern and implying the less stringent requirement or some factual indication of a threat of continuing activity.[119] The

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112. *See, e.g.*, Bank of America Nat'l Trust and Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986); Lipin v. Enterprises, Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986) (acts to defraud one victim one time insufficient in absence of showing of other victims or other frauds). *Cf.* Torwest DBC, Inc. v. Dick, 810 F.2d 925 (10th Cir. 1987) (continuity can not be scheme to accomplish merely one discrete goal or to continue after that goal; court declines to "provide precise guidelines on this troublesome issue").

113. 782 F.2d 966 (11th Cir. 1986).

114. Civil RICO actions against accounting firms are becoming more frequent. *See, e.g.*, Professional Assets Management, Inc. v. Penn Square Bank, N.A., 616 F. Supp. 1418, 1420-21 (W.D. Okla. 1985); Eastern Credit Corp. Fed. Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1532 (D. Mass. 1986); Pentcurelli v. Spector, Cohen, Gadon & Rosen, 640 F. Supp. 868 (E.D. Pa. 1986).

115. *Touche Ross*, 782 F.2d at 971.

116. *Sedima*, 473 U.S. 496 n.14.

117. *Touche Ross*, 782 F.2d at 969.

118. *Id.* at 971.

119. *See, e.g.*, Sheftelman v. Jones, 636 F. Supp. 263, 268 (N.D. Ga. 1986).

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Ninth Circuit, in *Sun Savings and Loan Association v. Dierdorff*,[120] adopted an approach similar to that used by the Eleventh Circuit in *Touche Ross*, and held that it is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern. Rather, using *Touche Ross* as a guide, the court in *Sun Savings* held that a series of predicate acts can constitute a pattern if the acts posed a threat of continuing activity.[121]

In *Sun Savings*, plaintiff, a savings institution, alleged that its former president solicited and received kickbacks from Sun's customers who received large loans that he had approved. The RICO allegations were premised on alleged violations of four predicate acts of mail fraud based on four letters Dierdorff allegedly sent government authorities in an attempt to coverup and deny his wrongdoing. The district court in San Diego dismissed, holding *inter alia* that the allegations failed to adequately allege a pattern of racketeering activity. The Ninth Circuit reversed, criticizing the restrictive interpretation typified by *Inryco*:

> We are hard put to understand the significance of the semantical distinction embodied in the *Inryco* district court's pronouncement that RICO requires repeated criminal activity rather than repeated criminal acts. The statement overlooks the clear language of section 1961 stating that a pattern "requires at least two acts of racketeering activity." RICO requires repeated *acts*, not repeated *activity*.[122]

The Ninth Circuit's criticism of the restrictive interpretation was that while demanding a showing of predicate acts "sufficiently unconnected" in time and substance might "make sense," that interpretation places the continuity requirement in direct tension with requiring a relationship between the predicate acts. The court stressed that such an interpretation was neither supported by either RICO's language nor *Sedima*.[123] The court concluded that the continuity requirement is aimed only at eliminating RICO actions against perpetrators of isolated and sporadic acts and "is not an attempt to limit RICO to complicated systems of multiple schemes of criminal activity."[124] *Sun Savings* thus held that the four predicate acts alleged against the former president posed a threat of continuing activity because they covered up a whole series of alleged kickbacks and receipts of favors, occurred over several months and in no way completed the criminal

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120. 825 F.2d 187 (9th Cir. 1987).
121. *Id.* at 194.
122. *Id.* at 193 (emphasis in original).
123. *Id.* at 193-94.
124. *Id.*

scheme.[125]

In *Sun Savings*, the Ninth Circuit stressed that the fact that the last of a series of predicate acts may have completed the criminal scheme does not necessarily preclude a finding of continuity.[126] As long as a threat of continuing activity exists at some point during the racketeering activity, regardless of whether the scheme is completed, the continuity requirement is satisfied.[127] *Sun Savings* reaffirms the trend emerging in several decisions which have applied the threat of continuing activity approach—these courts consistently have found that the critical factor is a showing of "temporal separateness and relatedness" demonstrating repetition of the predicate acts over a protracted period of time.[128] How much time, and how many acts are necessary to adequately allege a pattern will be decided on a case-by-case basis.[129]

B. Vagueness and Unpredictability of the Restrictive Interpretations

Some courts, including *Bankers Trust*, have criticized the restrictive interpretations of pattern because the tests—using judicially imposed concepts of schemes and episodes—are inherently vague and unpredictably applied.[130] At least one court has likened

125. *Id.* at 194.

126. *Id.* at 194 n.5.

127. *Id.*

128. *See, e.g., Id.*; Medallion Television Enter. Inc. v. Select-T.V. of California, Inc., No. 86-5595, slip. op. (9th Cir. Dec. 9, 1987) ("[r]ather than attempting to distinguish between single 'episodes' or 'schemes' that may be a pattern, and single 'events' or 'transactions' that may not, we prefer to frame the inquiry as whether the acts are isolated or sporadic, on the one hand, or whether they indicate a threat of continuing activity."); United States v. Freshie, 639 F. Supp. 442, 445 (E.D. Pa. 1986) (the continuity requirement means "there must be racketeering activity over a substantial period of time which when combined with the relatedness requirement form a group distinguishable in composition."). *Cf.* Lipin Enters. Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986) (numerous predicate acts committed over a fairly short period of time, relating to the same victim and the same scheme does not satisfy continuity).

129. No case has yet decided if, under the Eleventh Circuit's approach, two related predicate acts committed in a single scheme over a period can by themselves be enough to fulfill the threat of continuity requirement. Courts within that circuit have implied that such allegations, if properly pled, could constitute a pattern of racketeering activity. *See, e.g.*, Banco de DeSarrollo Agropecuario v. Gibbs, 640 F. Supp. 1168, 1175 (S.D. Fla. 1986) (requiring allegations of two acts of racketeering activity with enough specificity to show that there is probable cause the crimes were committed). On the other hand, in Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1399 (9th Cir. 1986), two predicate acts involved in a scheme to divert goods were held not to pose a threat of continuing activity because they furthered the diversion of only a single shipment of goods and were alleged to have occurred at nearly the same time; "once those acts were completed, defendant had no further need to commit predicate acts."

130. *See, e.g.*, Brainerd & Bridges v. Weingeroff Enters., Inc., No. 85-C-493, slip. op. (N.D. Ill. Sept. 18, 1986); Bankers Trust Co. v. Feldesman, 648 F. Supp. 17, 26

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the restrictive interpretation to the famous definition of obscenity—"I know it when I see it"—that Justice Stewart set forth in his concurrence in *Jacobellis v. Ohio*.[131]

Judge Grady of the Northern District of Illinois best articulated these criticisms in *Brainerd & Bridges v. Weingeroff Enterprises Inc.*,[132] where he compared a dozen cases which applied either the *Inryco* or *Graham* approach. He concluded that there was no discernible line of reasoning leading to any consistency in some, but not others, finding a pattern.[133] Equally important, as pointed out in *Brainerd*, is that in applying these concepts, courts are tying to sketch a variety of ambiguous and vague characteristics of a pattern in an effort to read into *Sedima* a judicial limitation on the statutory definition of pattern of racketeering activity. As stated in *Brainerd*, the result is chaos:

> How does one go about determining whether a fraud is "systematic" or "sporadic"? If a distributor falsified delivery receipts in January and again in March, is that systematic or sporadic? If it falsifies receipts from January through February, is it systematic because it is continuous? But then if it is continuous, then is it just one episode?[134]

Since *Brainerd*, some of the chaos (at least in the Seventh Circuit) has been resolved. The inconsistencies involved in the decision making process employing any of the restrictive forms of interpretation—whether to look at the number of victims, the presence of distinct injury, or the number of schemes—have been thrown together into a judicial hodgepodge by *Morgan v. Bank of Waukegan*. The lower courts are now allowed to consider all of these factors, with no one factor being determinative. To some extent then, the chaos has been organized. For those courts outside the Seventh Circuit still using *Inryco's* or *Grahams's* restrictive approaches, categorizing which behavior falls into a criminal "scheme" or "episode" continues to be decided on an *ad hoc* basis.

A second criticism of the restrictive interpretation questions whether judicially construing the statute as requiring a showing of separate "schemes" raises constitutional defects. The pre-*Sedima* concept of "pattern of racketeering activity" held that the language was clearly defined as involving two or more related acts of racketeering activity; this literal reading of the statute has been

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(S.D.N.Y. 1986). *Accord* United States v. Ianniello, 808 F.2d 184, 192 n.15 (2d Cir. 1986).

131. 378 U.S. 184, 197 (1964)(cited in Brainerd & Bridges v. Weingeroff Enters., Inc., No. 85-C-493, slip op. (N.D. Ill. Sept. 18, 1986)).

132. *Brainerd & Bridges* No. 85-C-493, slip op. (N.D. Ill. Sept. 18, 1986).

133. *Id.*

134. *Id.* at 16-17.

repeatedly upheld as not being unconstitutionally vague.[135] In sharp contrast to the present trend, the pre-*Sedima* courts balked at the idea of requiring separate schemes. For example, in *United States v. Weatherspoon*,[136] the court was confronted with the then "novel" suggestion, later adopted in *Inryco*, that proof of a pattern of racketeering activity required a showing that the criminal defendant had engaged in multiple separate schemes. In dicta, the Seventh Circuit noted that if such a definition were adopted, serious questions would arise as to the constitutionality of the statute.[137] *Weatherspoon* went on to point out that in order to save the RICO statute from "void for vagueness" attacks, courts have required that the predicate acts be related with the affairs of the enterprise.[138] Since re-emergence after *Sedima* of the separate schemes test, at least one court has again raised, in dicta, *Weatherspoon's* concern for the constitutionality of using that interpretation.[139] The issue remains undecided.

C. *The pre-Sedima Cases Broadly Interpreting Pattern May Still be Good Law*

Some post-*Sedima* cases confronting the pattern issue have expressly relied on pre-*Sedima* decisions to support a broad interpretation of the RICO statute. Two lines of cases in particular have been discussed as having continued validity: *United States v. Weatherspoon* and its progeny,[140] holding that so long as at least two or more related acts are proven, a pattern can exist, and *United States v. Starnes*,[141] where the Seventh Circuit reaffirmed its holding in *Weatherspoon* and added: "[T]he fact that there is but one objective under the separate acts does not diminish the

135. *See, e.g.*, United States v. Zemek, 634 F.2d 1159, 1170 (9th Cir. 1980) (clearly defined as at least two acts of racketeering activity); United States v. Parness, 503 F.2d 30, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (pattern is expressly defined as two or more predicate acts); United States v. Stofsky, 409 F. Supp. 609, 612 (S.D.N.Y 1973) (not vague since predicate offenses clearly defined), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

136. 581 F.2d 595 (7th Cir. 1978).

137. *Id.* at 601.

138. *Id.* at 601 n.2.

139. *Brainerd & Bridges*, No. 85-C-493, slip op. at 18.

140. United States v. Weatherspoon, 581 F.2d 595, 601-02 n.2 (7th Cir. 1978). *See also* Harper v. New Japan Sec. Int'l Inc., 545 F. Supp. 1002, 1004 (C.D. Cal. 1982) ("[e]ach act of criminal activity is counted as an act of racketeering activity, even if numerous acts arise out of the same episode.").

141. 644 F.2d 673 (7th Cir. 1981), *cert. denied*, 454 U.S. 826 (1981). *See also* United States v. Choveanec, 467 F. Supp. 41 (S.D.N.Y. 1979) (single objective to defraud single victim constituted RICO offense when carried out through multiple incidents of wire fraud).

applicability of RICO to those acts."[142]

Volckmann v. Edwards, [143] best illustrates the rationale for the continued validity of these pre-*Sedima* decisions. In *Volckmann*, approximately two dozen plaintiffs sued under RICO alleging that they were induced to purchase partnership interests by misrepresentations in the partnership offerings and the promoter's oral misrepresentations. On motion to dismiss, defendants argued that the allegations failed to establish a "patten of racketeering" under RICO because the predicate acts of various mail and wire frauds involving the misrepresentations were so intimately related among themselves as to constitute a single course of conduct.[144]

However, the court refused to follow *Inryco's* insistence that a pattern of racketeering activity required a showing of separate schemes.[145] Instead, the court pointed out that the concept of continuity noted in footnote 14 in *Sedima* and *Inryco's* requirement of separate and distinct schemes as a prerequisite for a pattern represent "opposite ends of a continuum."[146] Rather than accepting the *Inryco* line of authority, *Volckmann* embraced *Weatherspoon's* liberal approach towards finding a pattern and found the requisite continuity demanded by *Sedima* present in the allegations of multiple predicate offenses:

> [I]f *Sedima* only deals with the "continuity" requirement, is it fair to say that the decision by implication vitiates all prior holdings dealing with the separateness requirement?
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> . . . .
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> It is true that *Sedima* admonishes "Congress and the courts to develop a meaningful concept of 'pattern'." [citations omitted]. That admonition, however, *alludes to the suggestion in footnote 14 concerning the continuity requirement, which itself establishes a meaningful concept of pattern.* It does not say anything with regard to the other end of the continuum—the "separateness" requirement. In the absence of any such reference, it must be presumed that the Court did not mean to overturn the *Weatherspoon* line of authority.[147]

The test applied by the *Volckmann* court, consistent with *Weatherspoon* was simply that if the defendants could theoretically have been indicted on multiple counts of mail or securities fraud in connection with the allegedly fraudulent sales, the requisite continuity for pattern was sufficiently alleged.[148]

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142. *Starnes*, 644 F.2d at 678.
143. 642 F. Supp. 109 (N.D. Cal. 1986).
144. *Id.* at 111.
145. *Id.*
146. *Id.* at 113.
147. *Id.* at 114 (emphasis added).
148. *Id.* at 115.

Even if the Supreme Court "did not mean to overturn the *Weatherspoon* line of authority," as *Volckmann* maintained,[149] the Seventh Circuit ultimately disapproved of *Weatherspoon* in *Morgan v. Bank of Waukegan*.[150] However, *Morgan's* disapproval is a limited one, going only to the extent that *Weatherspoon* proclaimed that two predicate acts "invariably constitute a pattern of racketeering activity."[151] Despite *Morgan's* disapproval, courts outside the Seventh Circuit still follow the basic premise of *Weatherspoon* and *Starnes*[152] that a pattern can exist where there is one criminal objective which employs two or more related predicate criminal acts.[153] Arguably, footnote 14's admonition against isolated and sporadic racketeering activity in *Sedima* requires nothing more.[154]

D. *Judicial Legislation*

In *Sedima*, both the majority and minority opinions noted the broad application of civil RICO lawsuits against legitimate enterprises in commercial fraud actions. Justice White, writing for the majority, recognized that civil "RICO is evolving into something quite different from the original conception of its enactors."[155] Still, as the Court noted, civil RICO's expansive use is inherent in the way the statute is written and that if broadness is a defect in the statute, "its correction must lie with Congress."[156] The majority opinion in *Sedima* went on to stress that for the lower courts to impose "amphormous standing requirements [i.e., a prior criminal conviction of the defendants, or specific RICO-type injury] as did the Second Circuit in the *Sedima* case, neither effectively responds to these problems nor is it an appropriate form of statutory

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149. *Id.* at 114.

150. *See supra* notes 85-95 and accompanying text for discussion of *Morgan.*

151. *Weatherspoon*, 581 F.2d at 975.

152. *Morgan* was decided after *Volckmann*. *Morgan's* disapproval of *Weatherspoon* was carefully limited; no mention was made in the opinion to *Starnes'* which allows a single criminal objective to constitute a pattern, and *Starnes* apparently remains good law.

153. *See, e.g.*, Moravian Dev. Corp. v. Dow Chem. Co., 651 F. Supp. 144, 147 (E.D. Pa. 1986) (following *Starnes*); Pentcurelli v. Spector, Cohen, Gadon & Rosen, 640 F. Supp. 868 (E.D. Pa. 1986). *Compare* with district courts within the Seventh Circuit relying on *Weatherspoon* prior to its disapproval in *Morgan*. *See generally* Haroco, Inc. v. American Nat'l Bank and Trust Co., 647 F. Supp. 1026 (N.D. Ill. 1986).

154. *Cf.* Haroco, Inc. v. American Nat'l Bank and Trust Co., 647 F. Supp. 1026., 1031 (N.D. Ill. 1986) ("a number of mailings, fraudulent within the meaning of 18 U.S.C. § 1341, in furtherance of a fraudulent scheme, constitute a pattern of racketeering activity."); *Bankers Trust*, 648 F. Supp. at 25 ("[t]he primary if not sole focus of footnote 14 is on the need for some relationship between the predicate acts constituting a pattern.").

155. *Sedima*, 473 U.S. at 500.

156. *Id.*

amendment undertaken by the courts."[157]

Nevertheless, the judicial hostility towards the growing use of civil RICO has been dramatic. Fearing erosion of the distinct statutory requirements conferring federal jurisdiction, an overburdening of the federal courts, and an usurpation of state court authority over routine contract and fraud matters, the Judicial Conference of the United States has suggested to Congress that it "should seriously consider narrowing" the reach of the civil RICO statute.[158] By embellishing the statute far beyond the statutory requirement, the restrictive decisions have effectively narrowed the use of civil RICO.[159] On the other end of the spectrum are the post-*Sedima* decisions which have continued to interpret the pattern requirement broadly. These decisions have accused those courts imposing restrictive requirements on to the statute as engaging in a blatant form of judicial legislation.

The basis of this criticism again focuses on the statute itself and RICO's legislative history. The interpretations engrafting requirements of demonstrating other criminal schemes or multiple criminal episodes have "[l]ike previous efforts to limit RICO's scope ignore[d] the statute's plain language."[160] While the statute refers to "acts" two or more which must be "related" and in "continuity" to constitute a pattern,[161] neither RICO nor its legislative history in discussing the pattern language mentions schemes or episodes. As pointed out in *Volckmann*, those courts and other authorities which urge such a construction have offered "not a speck of legislative history to support the separateness requirement."[162]

The argument against imposing requirements beyond the stat-

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157. *Id.*

158. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 11-12 (March 11-12, 1986).

159. This is most dramatically illustrated by cases involving virtually the same factual allegations yet resulting in opposite holdings depending on which interpretation of pattern was followed. For example, Behunin v. Dow. Chem. Co., 650 F. Supp. 1387, 1390 (D. Colo. 1986) and Moravian Dev. Corp. v. Dow Chem. Co., 651 F. Supp. 144, 147 (E.D. Pa. 1986) both involved RICO claims against the manufacturer of an alleged defective brick and mortar compound ("Sarabond") which was marketed using allegedly intentional misrepresentations involving mail and wire fraud. In *Behunin*, the court used the restrictive approach under *Inryco* and held that the allegation of multiple mail constituted single scheme. In *Moravian*, the broader test was used and a pattern or racketeering activity was held to have been adequately alleged.

160. Brainerd & Bridges v. Weingeroff Enters., Inc., No. 85-C-493, slip. op. (N.D. Ill. Sept. 18, 1986).

161. Tryco Trucking Co. v. Belk Store Servs., 634 F. Supp. 1327, 1334 (W.D.N.C. 1986); Federal Dep. Ins. Corp. v. Kerr, 637 F. Supp. 828, 835 (W.D.N.C. 1986).

162. *Volckmann*, 642 F. Supp. at 114. The other authorities referred to include the American Bar Association's Ad Hoc Civil RICO Task Force which has recommended that Congress include a requirement of separate schemes. *See Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporations, Banking and Business Law* 208 (1985).

ute and its legislative history is simple—by restricting the interpretation of pattern of racketeering activity, the courts have, in principle, returned to the criminal conviction and racketeering injury requirements rejected by the court in *Sedima*.[163] While these additional requirements might well effectively curtail the use of civil RICO, their creation, "absent explicit support in the legislative history, constitutes a form of statutory amendment reserved for Congress."[164]

CONCLUSION

The Supreme Court in *Sedima* left it to the lower courts to fashion a workable definition of the pattern requirement, but gave little guidance as to the form such a definition should take. Not surprisingly, the diverse and often antagonistic results discussed in this article have arisen. Each approach, of course, has its problems.

The multiple schemes approach, notwithstanding its possible constitutional infirmities, presents certain practical problems. Requiring evidence of multiple criminal schemes imposes almost insurmountable obstacles of both pleading and proof of the plaintiff's case. In many cases, evidence of other schemes would usually be in the possession of the defendant and would come out, if at all, during discovery. To expect a plaintiff to be in a well founded position to plead specific allegations of frauds involving third parties may be unreasonable in many cases.[165]

The more moderate approach of *Morgan*, while attempting to balance all competing factors is too factually oriented and unpredictable. It further exposes the application of the pattern of racketeering activity requirement to possible constitutional vagueness defects. Also, the *Morgan* approach engrafts on to the RICO statute prerequisites that are neither statutorily required nor mandated by *Sedima*. The Supreme Court in *Sedima* rejected both an organized crime nexus or a prior criminal conviction as prerequisites for civil RICO actions. It makes little sense for the lower

163. Bush Dev. Corp. v. Harbour Place Assoc., 632 F. Supp. 1359, 1366 (E.D. Va. 1986).

164. *Volckmann*, 642 F. Supp. at 115.

165. This is best illustrated in B.J. Skin & Nail Care v. International Cosmetic Exch., 641 F. Supp. 563, 567 n.7 (D. Conn. 1986) (acts of mail fraud occurring over a three month period did not constitute pattern under either the separate scheme analysis or the flexible approach. The court reminded counsel of the threat of Rule 11 sanctions in the event an amended complaint was not well grounded in law and fact, after it had dismissed plaintiff's complaint because plaintiff was unable to allege multiple criminal episodes. The dismissal was granted despite plaintiff's protestations regarding defendant's opposition to the plaintiff's requested discovery concerning *that very issue*).

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courts to resurrect these theories in the guise of interpreting pattern of racketeering activity.

The liberal interpretation of pattern requiring at least two related predicate acts seems to be most in line with congressional intent and a reasonable reading of *Sedima*. The RICO statute made it a separate crime for engaging in a pattern for racketeering activity and the civil component of that statute allows those injured by such a pattern to recover for injuries to their business or property. By requiring that racketeering acts have a connection with one another by some common scheme, plan or motive so as to constitute a pattern, the broad interpretation fulfills the "continuity plus relationship" elements suggested by Justice White in footnote 14. A broad definition of pattern allows civil RICO a potentially wide application for combatting fraudulent behavior in the commercial setting. Still, as the Supreme Court in *Sedima* recognized, those engaged in legitimate commercial enterprises have no inherent incapacity for criminal activity nor immunity from its consequences.[166] RICO was designed as "an aggressive initiative to supplement old remedies and develop new methods of fighting crime.[167] The statute should be interpreted in a manner consistent with that legislative intent.

166. *Sedima*, 473 U.S. at 499.
167. Russello v. United States, 464 U.S. 16 (1983).