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The Civil RICO Pattern Requirement: Continuity and Relationship, a Fatal Attraction?

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THE CIVIL RICO PATTERN REQUIREMENT: CONTINUITY AND RELATIONSHIP, A FATAL ATTRACTION?

INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act ("RICO")[1] creates a private cause of action[2] against any person who, while involved in one or more enumerated relationships[3] with an enterprise,[4] engages in a pattern[5] of racketeering activity[6] or collects an unlawful debt. In recent years, this cause of action has enjoyed increasing popularity among the plaintiffs' bar,[7] and its popularity seems destined to grow, not only because it offers the attractive prizes of treble damages[8] and attorneys' fees,[9] but also because of the settlement leverage that accompanies a civil RICO charge.[10] The limits of civil RICO, however, are in question.[11]

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1. 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

2. 18 U.S.C. § 1964(c) (1982).

3. The most commonly used civil RICO cause of action is § 1962(c), which imposes liability on any person who conducts or participates in the affairs of an enterprise through a pattern of racketeering activity or collection of an unlawful debt. 18 U.S.C. § 1962(c) (1982). For a discussion of the other sections of 1962, see *infra* note 34.

4. RICO defines an enterprise to include "any individual, partnership, corporation, 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) (1982).

5. A pattern of racketeering activity, as defined in the statute, "requires at least two acts of racketeering activity, one of which occurred after the effective date [October 15, 1970] of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1982).

6. "Racketeering activity" is defined as the commission of one of a number of specified state and federal criminal acts, commonly referred to as predicate acts. 18 U.S.C. § 1961(1) (1982); *see* Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782, 788-89 (D.C. Cir. 1988). The statute enumerates 34 predicate acts, all of which are separate offenses under either state or federal law. *See* 18 U.S.C. § 1961(1). These acts include murder, kidnapping, gambling, arson, bribery, extortion, dealing in obscene materials, sports bribery, counterfeiting, embezzlement from welfare and pension funds, mail and wire fraud, obstruction of justice and criminal investigations, dealing in stolen property, various securities fraud violations, drug and currency offenses. *See id.*

Although these are the acts that the racketeer is most likely to engage in, not every person who commits these acts is deemed a racketeer. *See* McClellan, *The Organized Crime Act (S.30) Or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law. 55, 142 (1970). To incur civil RICO liability, a person must engage in a pattern of racketeering activity, which arises from commission of these acts. *See* 18 U.S.C. § 1961(5) (1982).

7. *See* Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law 55-56 (cited in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 n.16 (1985)). This report found that of the 270 trial court level civil RICO cases, only nine percent involved allegations of criminal activity associated with professional criminals. *See id.*

8. 18 U.S.C. § 1964(c) (1982). *See* Grogan v. Platt, 835 F.2d 844, 845 (11th Cir. 1988); Fleet Mgmt. Sys. v. Archer-Daniels-Midland Co., 627 F. Supp. 550, 555 (C.D. Ill. 1986).

9. 18 U.S.C. § 1964(c) (1982).

10. *See* Shopping Mall Investors v. E.G. Frances & Co., No. 84 C 1469 (S.D.N.Y. June 3, 1987) (WESTLAW, DCT database) (RICO charge can be used for "extortive

In *Sedima, S.P.R.L. v. Imrex Co.*,[12] the Supreme Court recognized that RICO's pattern of racketeering requirement provided the best vehicle for limiting and refining civil RICO.[13] The definition of the pattern requirement, however, has been the subject of debate among the lower courts.[14] This judicial debate has produced four views on the correct reading of the civil RICO pattern requirement. The Court of Appeals for the Eighth Circuit calls for proof of at least two criminal schemes in any given case.[15] Other circuits merely insist on the commission of at least two acts of racketeering activity.[16] Still others decide the pattern issue using a case-by-case approach.[17] In addition some district courts require two criminal episodes to support the finding of a pattern of racketeering activity.[18]

Before the correct reading can be chosen from among these approaches, the target of RICO must be defined clearly. Courts and commentators generally recognize that RICO's language casts a much wider net[19] than Congress ostensibly intended: The Act's legislative history in-

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purposes" because of its stigmatizing effect); *see also* Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1353-54 (3d Cir. 1987) (noting the possible use of a RICO charge to force a settlement in a civil action) (citing brief for defendant at 30). *But see* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 508 (2d Cir. 1984) (Cardamone J., dissenting) (rejecting the stigma argument), *rev'd*, 473 U.S. 479 (1985).

11. In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), the Supreme Court in dictum intimated that the pattern concept should be used to guide the development of RICO. *See id.* at 496 n.14, 500. This statement has been viewed widely as a signal to the courts to develop a more meaningful definition of the pattern requirement. *See* Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 38 (3d Cir. 1987).

12. 473 U.S. 479 (1985).

13. *See Sedima*, 473 U.S. at 500; Fleet Mgmt. Sys. v. Archer-Daniels-Midland Co., 627 F. Supp. 550, 559 (C.D. Ill. 1986); *see also* S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) ("The concept of 'pattern' is essential to the operation of the statute."); McClellan, *supra* note 6, at 144 (the pattern requirement is the key element of the RICO cause of action).

14. The Supreme Court has recently granted certoriari to resolve this issue. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 910 (D. Minn.), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

15. *See, e.g.*, Phoenix Fed. Sav. & Loan Ass'n v. Shearson Loeb Rhoades, Inc., No. 86-1408, slip op. at 6 (8th Cir. Mar. 10, 1988); United States v. Kragness, 830 F.2d 842, 858 (8th Cir. 1987); Allright Missouri, Inc. v. Billeter, 829 F.2d 631, 641 (8th Cir. 1987); Ornest v. Delaware N. Cos., 818 F.2d 651, 652 (8th Cir. 1987).

16. *See, e.g.*, Medallion Television Enters. v. SelecTV, Inc., 833 F.2d 1360, 1362-63 (9th Cir. 1987); Albany Ins. Co. v. Esses, 831 F.2d 41, 44 (2d Cir. 1987); Bank of Am. Nat'l Trust and Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 970-71 (11th Cir. 1986).

17. *See, e.g.*, Appley v. West, 832 F.2d 1021, 1027 (7th Cir. 1987); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987); Elliot v. Chicago Motor Club Ins., 809 F.2d 347, 349-50 (7th Cir. 1987).

18. *See, e.g.*, Gidwitz v. Stirco, Inc., 646 F. Supp. 825, 829 (N.D. Ill. 1986); Ghouth v. Conticommodity Servs., 642 F. Supp. 1325, 1335-37 (N.D. Ill. 1986); Louisiana Power and Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 809 (E.D. La. 1986); Papai v. Cremosnik, 635 F. Supp. 1402, 1413 (N.D. Ill. 1986).

19. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 490-91 (1985) (the statute, as written, is broad and is applied accordingly, regardless of whether Congress expressly intended this); Petro-Tech, Inc., v. Western Co. of N. Am., 824 F.2d 1349, 1352-54 (3d Cir. 1987) (rejecting the application of RICO solely to organized crime) (citing *Sedima*,

dicates that RICO was targeted at organized crime figures.[20] This Note proposes that civil RICO be interpreted to operate against "enterprise criminality"[21]—activity that, "because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time."[22]

This Note argues that of the above approaches to the pattern requirement, the "multiple schemes" approach is most consistent with congressional intent because it best ensures that those subjected to civil RICO liability have manifested the type of ongoing behavior that would allow them to be classified as enterprise criminals.[23] Part I of this Note examines RICO's legislative background and defines the Act's proper target as enterprise criminality. Part II outlines the present jurisprudence on the civil RICO pattern requirement and demonstrates the need for a uniform approach. Part III analyzes all four approaches to the pattern requirement and concludes that the adoption of the multiple schemes approach works most effectively against those persons who conduct themselves in a structured, organized, criminal environment—enterprise criminals.

I. DEFINING CIVIL RICO'S TARGET

A. *Legislative Background*

RICO constitutes title IX of the larger Organized Crime Control Act of 1970 ("OCCA"),[24] which resulted from congressional concern that organized crime had gained strength by tapping into legitimate businesses and was draining the economy's resources.[25] The OCCA's state-

473 U.S. at 491); Abrams, *Civil RICO's Cause of Action: The Landscape After* Sedima, 12 Maritime L.J. 19, 21 (1988) (same); Abrams, *The Place of Procedural Control in Determining Who May Sue or Be Sued: Lessons in Statutory Interpretation from Civil RICO and* Sedima, 38 Vand. L. Rev. 1477, 1522-23 (1985) (same); McClellan, *supra* note 6, at 61-62 (same).

20. *See* Russello v. United States, 464 U.S. 16, 26 (1983); United States v. Turkette, 452 U.S. 576, 589 (1981); Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23 [hereinafter OCCA] (Statement of Findings and Purpose) (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986); *infra* notes 24-27 and accompanying text.

For a complete discussion of the legislative history of RICO, see Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law 70-126; Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 Notre Dame L. Rev. 237, 249-80 (1982); Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 664-85 (1987) [hereinafter *Lynch I*].

21. *See* Criminal Justice Section, Am. Bar. Ass'n, A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Comm. 7 (1985); *infra* notes 56-61 and accompanying text.

22. Marshall-Silver Constr. Co. v. Mendel, 835 F.2d 63, 66-67 (3d Cir. 1987); *see infra* notes 56-61 and accompanying text.

23. *See infra* notes 56-61 and accompanying text.

24. Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 901-04, 84 Stat. 922 (codified as amended in various sections of 18, 28 U.S.C. (1982 & Supp. IV 1986)).

25. *See* S. Rep. No. 617, 91st Cong., 1st Sess. 76-77 (1969); Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 Colum. L. Rev. 920, 978 (1987) [hereinafter *Lynch II*].

ment of purpose clearly indicates that its original target was the influence and power of the traditional racketeering class.[26] The OCCA increases the arsenal of weapons available to prosecutors in the hope of breaking the power of organized crime.[27]

RICO employs a three pronged attack: a criminal cause of action,[28] a government civil cause of action,[29] and a private cause of action.[30] This Note focuses on RICO's private cause of action. The OCCA, under title IX, provides for civil remedies in the form of actions for treble damages[31] and injunctive relief.[32] While many of the elements of this civil cause of

26. *See* OCCA, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970) (Statement of Findings and Purpose); *see also* H.R. Doc. No. 105, 91st Cong., 1st Sess. at 1-2 (1969) (speech of President Nixon indicating that action was required in the fight against organized crime).

In the view of Congress, the traditional racketeering class consisted of the well-known crime families such as the Genovese, Luchese and Gambino families in New York. *See* S. Rep. No. 617, 91st Cong., 1st Sess. 38-39 (1969).

27. The OCCA sought to achieve its purposes "by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (Statement of Findings and Purpose). The congressional debates clearly support this view. *See* 116 Cong. Rec. 35,227 (1970) (statement of Rep. Steiger, sponsor of an amendment to give private citizens standing to sue under RICO) (the new remedies are very important to the effectiveness of the Act); *id.* at 25,190 (statement of Sen. McClellan, co-sponsor of S. 1861, which later became RICO) (discussing RICO's new approach to the problem of organized crime); 115 Cong. Rec. 6993-94 (1969) (statement of Rep. Hruska, co-sponsor of S. 1861, which later became RICO) (describing RICO as an innovative new way of fighting organized crime); *see also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498 (1985) (RICO was an "aggressive initiative . . . for fighting [organized] crime"); Grogan v. Platt, 835 F.2d 844, 845 (11th Cir. 1988) (RICO was meant to be a flexible new way to fight organized crime).

For example, the OCCA relaxes procedural and evidentiary rules to facilitate criminal prosecutions, *see, e.g.*, 18 U.S.C. § 1968(a) (1982) (granting the Attorney General additional powers to obtain documents from other parties); *see also* United States v. Turkette, 452 U.S. 576, 589 (1981) (RICO provides procedural and remedial devices to aid prosecutions), and adds enhanced sanctions, *see id.*; 18 U.S.C. § 1963(a) (1982) (fine of up to $25,000 and/or imprisonment for up to twenty years). The Act also incorporates criminal forfeiture provisions that are used to sever the link between the criminal and his enterprise. *See id.*; United States v. Perholtz, 842 F.2d 343, 369 (D.C. Cir. 1988); McClellan, *supra* note 6, at 141. For a complete discussion of RICO's forfeiture provisions and their use see Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. Rev. 57 (1983); Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. Ill. U. L. Rev. 225 (1981).

28. *See* 18 U.S.C. § 1962(c) (1982).

29. *See* 18 U.S.C. § 1964(b) (1982 & Supp. IV 1986).

30. *See* 18 U.S.C. § 1964(c) (1982).

31. *See* 18 U.S.C. § 1964(c) (1982) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . . . shall recover threefold the damages he sustains . . . .").

32. 18 U.S.C. § 1964(a) (1982). Section 1964(a) provides:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or

action mirror those of the criminal cause of action,[33] civil RICO imposes a lower burden of proof: A civil RICO plaintiff must prove all elements[34] of the claim by only a preponderance of the evidence.[35]

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ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Id.

Congress based its inclusion of civil remedies on the prior success of similar civil remedies in combating antitrust violations and on two major limitations on traditional criminal law remedies, which, in the opinion of the drafters, had led to ineffective law enforcement against organized crime: strict procedural handicaps, such as proof beyond a reasonable doubt, and the limited scope of traditional criminal remedies such as fines and imprisonment. *See Organized Crime Control: Hearings on S. 30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 106-07 (1970).

33. *See* 18 U.S.C. § 1962(c) (1982). The elements set forth on § 1962(c) are applicable to both the civil and criminal causes of action. *See* Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc., 831 F.2d 488, 491-92 (4th Cir. 1987); Eaby v. Richmond, 561 F. Supp. 131, 134 (E.D. Pa. 1983); Moss v. Morgan Stanley Inc., 553 F. Supp. 1347, 1362 (S.D.N.Y.), *aff'd*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

Congress also intended that the civil RICO provisions were to be used to combat the power of organized crime. For example, the treble damage remedy curbs organized criminal activity by attacking the financial base of those who engage in a pattern of racketeering activity. *See* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009, 1042 (1980).

A private party has standing to bring a RICO cause of action for treble damages, *see* 18 U.S.C. § 1964(b), (c) (1982 & Supp. IV 1986), but the Attorney General does not, *see* United States v. Bonnano, 683 F. Supp. 1411, 1454 (E.D.N.Y. 1988). There is a disagreement among courts as to whether a private party may bring a cause of action for injunctive relief under 18 U.S.C. § 1964(a). *Compare* Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1088 (9th Cir. 1986) (injunctive relief not available to a private party), *cert. denied*, 107 S. Ct. 1336 (1987) *with* Chambers Dev. Co. v. Browning-Ferris Indus., 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984) (private party may sue for injunctive relief under RICO); *see also* Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982) (dicta suggesting that a private party may bring an action for injunctive relief), *aff'd in part, rev'd in part*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983). Professor Blakey, one of the drafters of RICO, argues that Congress intended a private cause of action for injunctive relief. *See* Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim: *Will Civil RICO Be Effective Only Against White-Coller Crime?*, 62 Notre Dame L. Rev. 526, 528 (1987). For a general discussion of this issue, see Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 Notre Dame L. Rev. 945 (1984) (advocating availability of equitable relief for private plaintiffs).

34. *See* 18 U.S.C. § 1962(c) (1982). A private plaintiff also can recover if he is able to prove a violation of the other subsections of § 1962. For example, a violation of § 1962(a) occurs when income, derived from the pattern of racketeering, is used to operate an enterprise. *See* 18 U.S.C. § 1962(a) (1982); *see also* Masi v. Ford City Bank and Trust Co., 779 F.2d 397, 401 (7th Cir. 1985). A violation of § 1962(b) involves the use of income, again derived from the pattern of racketeering activity, to acquire or maintain an interest in an enterprise doing business in interstate commerce. *See* 18 U.S.C. § 1962(b) (1982). Finally, a violation of § 1962(d) involves any conspiracy to violate section 1962. *See* 18 U.S.C. § 1962(d) (1982).

35. The Supreme Court, in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985), suggested that the standard of proof in civil RICO actions should be a preponderance of the evidence. Since that decision, courts have held that the preponderance standard ap-

B. *The RICO Net*

The scope of civil RICO today differs considerably from that envisioned by Congress at the time it passed the OCCA.[36] Not all modern civil RICO defendants are part of the traditional racketeering class.[37] Instead, they include banks,[38] brokerage houses,[39] insurance companies,[40] telephone companies,[41] big eight accounting firms,[42] law firms,[43] and colleges.[44]

The well-documented and much-discussed rise in the number of civil RICO filings in recent years[45] has led to the emergence of two views as to

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plies to civil RICO actions. *See* Wilcox v. First Interstate Bank, 815 F.2d 522, 531-32 (9th Cir. 1987); City of New York v. Liberman, No. 85 C 4958 (S.D.N.Y. Jan. 25, 1988) (citing *Sedima*, 473 U.S. at 491) (LEXIS, Genfed Library, Dist. file).

36. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985); *id.* at 500-01 (Marshall, J., dissenting).

37. *See* Abrams, *supra* note 19, at 23 (discussing the identity of modern civil RICO defendants). Moreover, private plaintiffs are finding more creative uses for the statute all the time. *See* sources cited *supra* note 8; *Lynch I*, *supra* note 20, at 663 (creative uses in criminal context).

Civil RICO's effect on the way business is conducted is apparent. It is now becoming advised practice among lawyers and parties to business deals to request letters on various aspects of commercial transactions so that, if anything goes wrong with the deal, the lawyer or business person will have two letters (evincing possible mail fraud), necessary to initiate possible civil RICO proceedings for treble damages. *See* B.J. Skin & Nail Care, Inc. v. International Cosmetic Exchange, 641 F. Supp. 563, 565-66 (D. Conn. 1986) (party need only point to several phone calls to bring an action for treble damages under civil RICO); Zahra v. Charles, 639 F. Supp. 1405, 1408 (E.D. Mich. 1986) (" '[m]ost substantial business transactions involve two or more uses of the [phone or] mail during negotiations' ") (quoting Medallion Television Enters. v. SelecTV, Inc., 627 F. Supp. 1290 (D.C. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1987)).

Courts and commentators have noted that, as a practical matter, the few civil plaintiffs who would institute suits against the mob, or reputed organized crime leaders, probably would be intimidated into dropping them. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1411 (N.D. Ill. 1986); Blakey, *supra* note 20, at 308-09 n.175; Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1119 (1982).

38. *See, e.g.*, American Nat'l Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606 (1985); Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988); Wilcox v. First Interstate Bank, 815 F.2d 522 (9th Cir. 1987); Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986).

39. *See, e.g.*, Deviries v. Prudential-Bache Sec., Inc., 805 F.2d 326 (8th Cir. 1986); Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 3211 (1987); Moss v. Morgan Stanley Inc., 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

40. *See, e.g.*, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 107 S. Ct. 2759 (1987); Elliott v. Chicago Motor Club Ins., 809 F.2d 347 (7th Cir. 1986).

41. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

42. *See* Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986).

43. *See* Nordberg v. Lord, Day & Lord, 107 F.R.D. 692 (S.D.N.Y. 1985).

44. *See* Robinson v. City Colleges of Chicago, 656 F. Supp. 555 (N.D. Ill. 1987).

45. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 n.16 (1985) (citing Report of the Ad Hoc Committee on Civil RICO, 1985 A.B.A. Sec. of Corp., Banking and Business Law 71-2); *supra* note 7.

the proper scope of the civil RICO cause of action.[46]

1. The Restrictive View

Some look unfavorably on the rapid growth of civil RICO[47] and advocate that civil RICO, in accordance with RICO's ostensible target, should be restricted to organized crime.[48] These courts and commentators trace civil RICO's current interpretational difficulties to the fact that civil RICO is overbroad, both as written[49] and as interpreted by the courts.[50] They assert that the broad literal formation of the statute reflects congressional intent to root out organized crime and contend that it can and should be construed today to apply only to organized crime leaders.[51]

It is unlikely, however, that the liberal interpretation trend will be reversed,[52] because the Supreme Court has found the plain meaning of the statute to dictate a broader approach than advocated by those favoring a restrictive view.[53] Within the spectrum of liberal construction, however,

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46. *Compare* Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398-99 (7th Cir. 1984) (RICO is a broad statute and should be applied accordingly), *aff'd per curiam*, 473 U.S. 606 (1985) *with* Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 838 (1980) (Congress enacted an overly broad statute which can be cured only by narrow judicial construction).

47. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 501 (1985) (Marshall, J., dissenting); *id.* at 525-26 (Powell, J., dissenting); Waterman S.S. Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256, 260 (E.D. La. 1981); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 746-48 (N.D. Ill. 1981).

48. *See infra* notes 49-50 and accompanying text.

49. *See* Atkinson, *Racketeer Influenced and Corrupt Organizations, 18 U.S.C. 1961-68, Broadest of the Federal Criminal Statutes*, 69 J. Crim. L. and Criminology 1, 18 (1978) (describing RICO as a sweeping act that intrudes on state sovereignty "and has great potential for abuse"); Bradley, *supra* note 46, at 838 (Congress enacted an overly broad statute that can only be cured by narrow judicial construction); *Lynch II*, *supra* note 25, at 977-84 (RICO should be replaced with a narrower statute); Tybor, *Racketeering Law Facing Key Test*, Nat'l L.J., Dec. 29, 1980, at 1, col. 3 (RICO is like using a cannon to go hunting for squirrels.)

50. *See* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 490 (2d Cir. 1984) (noting that because the addition of subsection (c) to § 1962 "was not considered an important one, . . . Congress did not intend the section to have the extraordinary impact claimed for it"), *rev'd*, 473 U.S. 479 (1985); Fleet Mgmt. Sys. v. Archer-Daniels-Midland Co., 627 F. Supp. 550, 555 (C.D. Ill. 1986) (RICO goes beyond the intent of those who enacted it); Brainerd & Bridges v. Weingorff Enters., No. 85 C 0493 (N.D. Ill. Sept. 18, 1986) (LEXIS, Genfed Library, Dist. file) (same); *Lynch II*, *supra* note 25, at 979 (RICO should be replaced with a narrower statute).

51. *See* Fleet Mgmt. Sys. v. Archer-Daniels Midland Co., 627 F. Supp. 550, 556 (C.D. Ill. 1986) ("[T]his Court believes that the 'pattern' requirement—though arguably unambiguous on its face—should be defined consistent with Congressional intent."); *Lynch I*, *supra* note 20 at 664 (the liberal interpretation of RICO is wrong).

52. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985) (it is up to the legislature to revise RICO if they do not like what is happening to it); *Lynch II*, *supra* note 25, at 982-83 (noting that "no federal anti-racketeering law has ever been repealed" and that the present social and political climate would be hostile to such a move).

53. The statute states that "[i]t shall be unlawful for *any person* employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

courts are neither concise nor uniform concerning what type of criminal activity the civil RICO net should catch.

2. The Best Target: Enterprise Criminality

Civil RICO is a broad remedy in its application beyond organized crime,[54] but it is also limited because it does not reach isolated instances of racketeering activity.[55] Most courts recognize this but few have attempted to define explicitly civil RICO's expanded target.[56] This Note argues that the statute should be enforced only against what is best termed "enterprise criminality."[57]

Defining civil RICO's target as "enterprise criminality" most closely complies with congressional goals. It forms the middle ground between applying RICO only to organized crime and applying it to a broad range of persons, including those responsible for only sporadic illegal acts.[58] As its distinguishing feature, enterprise criminality exposes a systematic approach to crime, characterized by defined purposes and business-like structure and management.[59] This organized criminal activity poses a greater threat of repetition.[60]

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enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (1982) (emphasis added). The Court interpreted this language to extend coverage beyond organized crime. *See Sedima*, 473 U.S. at 499-500.

54. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1410 (N.D. Ill. 1986) ("The basic policy objective behind all of the RICO opinions is to create a net wide enough to catch organized crime yet narrow enough to avoid federalizing 'garden variety' frauds.").

55. *See* S. Rep. No. 617, 91st Cong., 1st Sess. 122 (1969) (Statement of Sen. McClellan). The statute, thus, was not meant to be a safety net to insure prosecution of all racketeering acts.

56. *See, e.g.*, Marshall-Silver Constr. Co. v. Mendel, 835 F.2d 63, 66-7 (3rd Cir. 1987); *infra* note 57. Other courts have held that RICO applies beyond organized crime, without stating it as a direct proposition. *See, e.g.*, Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1301-04 (7th Cir. 1987) (upholding claim against non-organized crime defendant), *cert. filed*, 56 U.S.L.W. 3531 (U.S. Jan. 28, 1988) (No. 87-1262); Morgan v. Bank of Waukegan, 804 F.2d 970, 977-78 (7th Cir. 1986); *supra* note 53.

57. This Note borrows the term "enterprise criminality" from the American Bar Association report on civil and criminal RICO. *See* Am. Bar Ass'n, A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: Report of the RICO Cases Comm. 7 (1985).

Courts and commentators that have attempted to enunciate the proper target of RICO have identified certain characteristics indicative of true racketeering activity. *See, e.g.*, Marshall-Silver Constr. Co. v. Mendel, 835 F.2d 63, 66-67 (3rd Cir. 1987) ("The target of the RICO statute, as its name suggests, is criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." That is enterprise criminality); International Data Bank v. Zepfin, 812 F.2d 149, 155 (4th Cir. 1987) (target of RICO is "ongoing unlawful activities whose *scope* and *persistence* pose a special threat to social well being.") (emphasis added); *see also* Am. Bar Ass'n, A Comprehensive Perspective of Civil and Criminal Legislation and Litigation: A Report of the RICO Cases Comm. 7 (1985) (discussing RICO's application to "enterprise criminality").

58. *See* Medallion Television Enters., Inc. v. SelecTV, Inc., 833 F.2d 1360, 1365 (9th Cir. 1987).

59. *See* cases cited *supra* note 57 and accompanying text.

60. *See* Eastern Publishing & Advertising, Inc., v. Chesapeake Publishing & Adver-

Within the framework of the civil RICO cause of action, "the required enterprise, when coupled with the required 'pattern of racketeering activity,' is intended to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing criminal activities carried out in a *structured organized environment.*"[61] Thus, although Congress saw organized crime as a serious threat to American society,[62] the mechanism of the cause of action is such that it does not act solely to destroy the power of organized crime families.[63] Moreover, any requirement of a showing of affiliation with organized crime would have the practical effect of crippling civil RICO[64] and could raise severe constitutional problems, based on the "void for vagueness" doctrine.[65]

Having argued that RICO's target should be enterprise criminality, the next task is to evaluate which reading of the pattern requirement will best restrict civil RICO's scope to this target.[66] The pattern requirement provides the key to understanding just how and to what extent Congress sought to achieve the OCCA's purposes through civil RICO and to prevent the misapplication of civil RICO to non-enterprise criminals.[67]

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tising, Inc., 831 F.2d 488, 492 (4th Cir. 1987); Manax v. McNamara, No. 87-CA-014 (W.D. Tex. May 1, 1987) (LEXIS, Genfed Library, Dist file) (same); Fleet Mgmt. Sys. v. Archer-Daniels-Midland Co., 627 F. Supp. 550, 557 (C.D. Ill. 1986); *see also infra* text accompanying notes 143-158 (analysis of when this type of activity can be identified and the threat thus exposed).

61. Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law 124.

62. *See supra* note 20 and accompanying text.

63. *See supra* note 20 and accompanying text.

64. *See* McClellan, *supra* note 6, at 62; *see also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 n.16 (1985) (citing Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law 71-2).

65. *See* Fleet Mgmt. Sys. v. Archer-Daniels-Midland Co., 627 F. Supp. 550, 554 (C.D. Ill. 1986).

66. It is useful at this juncture to note that some have suggested ways of limiting RICO other than through a revision of the pattern requirement. One commentator has focused on the enterprise element as a means of narrowing RICO. *See Lynch II*, *supra* note 25, at 973. Some courts have focused on other ways of limiting the expansive reach of RICO. *See, e.g.*, Alexander Grant & Co. v. Tiffany Indus., 742 F.2d 408, 413-14 (8th Cir. 1984) (holding that a civil RICO plaintiff must allege a special racketeering injury distinct from the injury that is the natural result of the predicate acts), *vacated*, 473 U.S. 922 (1985), *cert. denied*, 474 U.S. 1058 (1986); Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 496-504 (2d Cir. 1984) (holding that a prior conviction on the predicate acts is required), *rev'd*, 473 U.S. 479 (1985). The Supreme Court rejected these views in *Sedima*. *See Sedima*, 473 U.S. at 488-89; Fleet Mgmt. Sys. v. Archer-Daniels-Midland Co., 627 F. Supp. 550, 556 (C.D. Ill. 1986) (noting Supreme Court rejection of these views).

67. *See Fleet Mgmt. Sys.*, 627 F. Supp. at 559 ("The obvious purpose of the continuity plus relationship formulation is to narrow the 'pattern' concept to reach RICO's intended goal . . . ."); S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) ("The concept of 'pattern' is essential to the operation of the statute."); McClellan, *supra* note 6, at 144 (same).

II. THE PATTERN REQUIREMENT

A. *Continuity plus Relationship*

Prior to 1985, it was generally accepted that the commission of any two predicate acts of racketeering activity in a ten-year period satisfied civil RICO's pattern requirement.[68] In that year, *Sedima, S.P.R.L. v. Imrex Co.*[69] created a "whole new ballgame."[70] In a now famous footnote, the Supreme Court expressed dissatisfaction with the broad construction that the various courts had given to the civil RICO pattern requirement, indicating that it traced the extraordinary use, and perhaps overuse, of civil RICO to this broad construction.[71] Interpreting section 1962(c) of the statute, the Court held that a "pattern of racketeering activity" requires at least two acts.[72] More significantly, the "predicate acts" must show continuity and be related to each other.[73] The Court also stated that the acts must be coupled with the *threat* that this activity will continue over time.[74] After *Sedima*, proof of two acts of racketeer-

68. *See* United States v. Weisman, 624 F.2d 1118, 1122-23 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); United States v. Aleman, 609 F.2d 298, 304 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *see also* United States v. Parness, 503 F.2d 430, 441-42 (2d Cir. 1974) (pattern found even where the two acts occurred on the same day, in the same place and as part of the same criminal episode), *cert. denied*, 419 U.S. 1105 (1975); Beth Israel Medical Center v. Smith, 576 F. Supp. 1061, 1066 (S.D.N.Y. 1983) (two acts of mail and wire fraud, arising out of same criminal scheme, satisfies the pattern requirement). Some courts went further by requiring a showing that the acts were connected by some common scheme, plan or motive. *See, e.g.*, United States v. Starnes, 644 F.2d 673, 678 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981); United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974). For a good discussion of pre-*Sedima* case law, see Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law 193-208.

69. 473 U.S. 479 (1985).

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

71. *Sedima*, 473 U.S. at 496 n.14; *see* Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 38 (3d Cir. 1987) ("The *Sedima* dictum has been widely viewed as a signal to the federal courts to fashion a limiting construction of RICO around the pattern requirement and the concepts of 'continuity' and 'relationship.' ").

72. *See Sedima*, 473 U.S. at 496 & n.14.

73. *See id.* The Supreme Court based its comments on a reading of the legislative history of RICO. *See id.*

74. *See id.* The continuity element examines future propensities as well as past acts. *See id.*

The Court also indicated that the definition of pattern in title X of the Organized Crime Control Act (OCCA), the Dangerous Special Offender Sentencing Act, *see* 18 U.S.C. § 3575(e) (1982) (repealed 1987), might be useful in developing a meaningful definition of RICO's pattern requirement. *See Sedima*, 473 U.S. at 496 n.14. That section states that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e) (1982) (repealed 1987).

The definition is more specific only as to the relationship requirement, with the last clause requiring continuity without giving any specific guidance as to what it requires.

ing activity, without more, no longer suffices to establish a pattern.[75]

Although the Court attempted to provide guidelines for the pattern inquiry, the *Sedima* footnote did little to resolve the issue of what constitutes a pattern within the meaning of section 1962(c). Instead, *Sedima* has spawned confusion, evidenced by the differing views[76] concerning the nature of the pattern requirement and the hesitation by some circuits to formulate the specific requirements for a pattern of racketeering activity.[77] This confusion demonstrates the need for further guidance in this area.

B. *The Emergence of Four Patterns*

The post-*Sedima* environment has yielded four views on the pattern requirement, including two that directly conflict—the "multiple schemes"[78] and "multiple acts"[79] approaches. This disagreement centers

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See Brainerd & Bridges v. Weingeroff Enters. Inc., No. 85 C 493 (N.D. Ill. Sept. 19, 1986) (LEXIS, Genfed Library, Dist file). Moreover, Congress intended this definition of pattern to isolate the long-term criminal elements in society. *See* 116 Cong. Rec. 847 (Jan. 22, 1970) (Statement of Sen. Hruska) (section aimed at "the *special criminal.* That is the kind who will never be rehabilitated . . . because he has participated in a life of illegal conduct.") (emphasis added); *Organized Crime Control, Hearings on S.30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d. Sess. 245 (1970) ("[P]attern of conduct", according to this definition, would not be "just another bribery count or something of that nature. It would be continuous conduct like that of a major bookie operation over a long period of time.").

At the time of the *Sedima* decision, several courts already had looked to title X for guidance, while another had rejected this approach. *Compare* United States v. Gibson, 486 F. Supp. 1230, 1242 (S.D. Ohio 1980) (title X's pattern requirement can be used to cast light on title IX's pattern requirement) *and* United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (same), *aff'd*, 529 F.2d 327 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) *with* United States v. Weisman, 624 F.2d 1118, 1122-23 (2d Cir.) ("Congress intentionally chose to use the term [pattern] differently" in the context of title IX than it did in title X, when it defined a "pattern of criminal conduct"), *cert. denied*, 449 U.S. 871 (1980). Since *Sedima*, a handful of courts have noted, but have not heavily relied on, the suggestion that the "pattern" definition of title X might be useful in developing a meaningful definition of "pattern" for RICO. *See, e.g.*, Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782, 789 (D.C. Cir. 1988); Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 192 (9th Cir. 1987); Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 969 (11th Cir. 1986).

75. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985) (quoting 116 Cong. Rec. 18940 (1969) (statement of Sen. McClellan)).

76. *See infra* notes 78-142 and accompanying text.

77. *See, e.g.*, Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987) (court adhered to its previous policy of not attempting "to construct an affirmative definition of what would constitute such a pattern" in future actions); California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1469 (9th Cir. 1987) ("[t]he dictum in *Sedima* is suggestive, but without additional explication by the Supreme Court *we decline to follow its lead*") (emphasis added), *cert. denied*, 108 S. Ct. 698 (1988); Smoky Greenshaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274, 1280-81 n.7 (5th Cir. 1986) (noting that the nature of the pattern requirement remains an open question).

78. *See* Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986).

79. *See* United States v. Ianniello, 808 F.2d 184, 190 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987).

upon the *Sedima* footnote's continuity-plus-relationship test.[80] Emphasis on continuity has led the Court of Appeals for the Eighth Circuit to adopt a "multiple schemes" requirement,[81] while the Second Circuit, adhering to a "multiple acts" view, has found a per se relationship among the acts committed by a continuous enterprise to satisfy the pattern requirement.[82] A third view, the "case-by-case" approach, has attempted to mediate between the two extremes[83] by relaxing the continuity requirement in favor of a fact-based test.[84] Still a fourth view that blends the first and third approaches and is referred to as the "multiple episodes" approach has emerged.[85]

1. The Multiple Schemes Approach

In *Superior Oil Co. v. Fulmer*,[86] the Court of Appeals for the Eighth Circuit held that when all the predicate acts are committed in furtherance of only one criminal scheme, the continuity element of the pattern requirement is not met.[87] It found that the acts must occur at separate times, in separate places as part of two distinct criminal schemes.[88]

The facts in *Superior Oil* presented the court with an employee's scheme to convert gas from his employer's pipeline,[89] which was supplying oil directly to another company. The enterprise involved fraudulently altering the position of the meter measuring the flow of oil to hide the conversion.[90] Although the defendant launched a highly technical

80. *See supra* text accompanying notes 72-75; *infra* notes 86-142 and accompanying text.

81. *See* United States v. Kragness, 830 F.2d 842, 858 (8th Cir. 1987); Allright Missouri, Inc. v. Billeter, 829 F.2d 631, 641 (8th Cir. 1987); Superior Oil Co. v. Fulmer, 785 F.2d 252, 257-58 (8th Cir. 1986).

82. *See* Albany Ins. Co. v. Esses, 831 F.2d 41, 44 (2d Cir. 1987); Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988); United States v. Ianniello, 808 F.2d 184, 189-90 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987).

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

84. *See Morgan*, 804 F.2d at 975.

85. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1413 (N.D. Ill. 1986).

86. 785 F.2d 252 (8th Cir. 1986).

87. *See id.* at 257 (relying on reasoning from Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)); *see also* Madden v. Gluck, 815 F.2d 1163, 1164 (8th Cir. 1987) (reaffirming its position in light of the Second Circuit's criticism of its holding in *Superior Oil*); Holmberg v. Morrisette, 800 F.2d 205, 209-10 (8th Cir. 1986) (adopting *Superior Oil*'s analysis), *cert. denied*, 107 S. Ct. 1953 (1987); *supra* note 15.

88. *See* Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986). The multiple schemes requirement has been accepted, on the district court level, in four other circuits. *See* Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermen's Mut. Ins. Co., 641 F. Supp. 297, 312 (E.D. Pa. 1986) (advocating that the Third Circuit adopt the multiple schemes requirement), *aff'd*, 833 F.2d 307 (1987); McIntyre's Mini Computer Sales Group v. Creative Synergy Corp., 644 F. Supp. 580, 584 (E.D. Mich. 1986) (adopting multiple schemes analysis, although using episode phraseology); B.J. Skin & Nail Care, Inc. v. International Cosmetic Exchange, Inc., 641 F. Supp. 563, 566 (D. Conn. 1986) (same); Agristor Leasing v. Meuli, 634 F. Supp. 1208, 1225-26 (D. Kan. 1986) (same).

89. *See* Superior Oil Co. v. Fulmer, 785 F.2d 252, 253-54 (8th Cir. 1986).

90. *See id.* at 254.

scheme requiring many acts for completion, the court found that these acts were characterized by a single motive and thus never assumed the character of separate schemes.[91] The court, therefore, concluded that continuity was lacking[92] because when the evidence reveals only one criminal scheme, the defendant cannot be held to have posed a threat of continuing this activity in the future,[93] regardless of the number of racketeering acts he committed in the process.

Under this "multiple schemes" approach, the relationship element of the pattern requirement is fulfilled when "common perpetrators, common methods of commission, common victims, and a common motive or purpose" ("common scheme or purpose rule") unite the predicate acts.[94] This relationship among the predicate acts can exist in two ways: Interscheme[95] or intrascheme.[96] An interscheme relationship emerges through the series of acts, rather than among the acts themselves[97]—typically when the same perpetrator commits the predicate acts[98] or the acts involve common methods of commission.[99] It displays, on the part of the person committing the acts, a continuous engagement in violative

91. *See id.* at 257.

92. *See id.*

93. *See id.*

94. H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 910 (D. Minn.), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988). Many of the current approaches to the pattern requirement call for a showing of a common scheme to satisfy the relationship element, a requirement that appeared originally in pre-*Sedima* case law. *See* Allington v. Carpenter, 619 F. Supp. 474, 477-78 (C.D. Cal. 1985); United States v. Stofsky, 409 F. Supp. 609, 613-14 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974).

95. *See* United States v. Kragness, 830 F.2d 842, 858 (8th Cir. 1987). In *Kragness*, a criminal RICO case, the defendant was a central figure in an organization that was found to have violated RICO because it operated three separate schemes; two involved importing marijuana into two different locations, and the third involved importing cocaine and quaaludes. *See id.* The related acts constituting the pattern appeared in two separate schemes—that is, interscheme. *See id.*

96. In these cases, the courts have held that the plaintiff had failed to allege a pattern because the continuity element was lacking. They have, however, acknowledge that the relationship requirement had been satisfied based upon the evidence of only one scheme. *See, e.g.*, H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648, 650 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988); Allright Missouri, Inc. v. Billeter, 829 F.2d 631, 641 (8th Cir. 1987); Ornest v. Delaware North Cos., 818 F.2d 651, 652 (8th Cir. 1987).

97. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1408 (N.D. Ill. 1986).

98. *See* United States v. Kragness, 830 F.2d 842, 858-59 (8th Cir. 1987) (holding predicate acts, as part of three separate schemes, obviously related by the fact that they were committed by the same perpetrator).

99. *See Kragness*, 830 F.2d at 858. In *Kragness*, the court found a pattern because the conspiracy used different bases for their operation and different modes of commission. *Id.* Although the court never specifically addressed the issue, the facts of the case satisfied the relationship prong by exhibiting an interscheme relationship among the acts, based upon common perpetrators. *See id.* at 858-59. The court also intimated that, to satisfy the continuity requirement, separate schemes could be proved by the presence of different participants in the different schemes. *See id.* at 858.

conduct over time.[100] An intrascheme relationship, on the other hand, usually arises when the acts involve a commom victim or motive[101] but do not indicate sufficiently a conscious design to engage in this activity over time.

According to the multiple schemes view, a pattern exists when two acts, each a part of a distinct scheme, supply both the relationship and continuity elements.[102] Thus, when the relationship between two predicate acts is intrascheme, it is impossible, under the multiple schemes view, for the acts to satisfy the continuity requirement because the approach requires the existence of a second criminal scheme.[103]

For example, suppose an enterprise contacts bank A and fraudulently induces the bank to give the enterprise a loan for use in a real estate transaction. The enterprise then mails worthless promissory notes to bank A and opens an account at bank *B* to receive the funds. Later, the enterprise contacts potential investors and uses the funds in bank *B* to induce them to invest in the real estate deal. The enterprise next approaches a third bank, bank *C*, to defraud money in the same way as before.[104]

Under the multiple schemes approach, once the enterprise successfully attracted the investors into the real estate deal, it had completed one scheme. The contact with bank *C* marked the beginning of a second, similar scheme.[105] Thus, under the multiple schemes approach, the pat-

100. *See* Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc., 831 F.2d 488, 492 (4th Cir. 1987).

101. The court, in *Superior Oil*, found the defendant's acts to be related by a common scheme. *See* Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986). An intrascheme relationship also can arise in a manner similar to an interscheme relationship—that is, a common perpertrator can obviously commit acts as part of one or two schemes. *See id.*

An example illustrates that both interscheme and intrascheme relationships satisfy the *relatedness* requirement of *Sedima*. Suppose a person commits fraud as part of one scheme and extortion as part of another. This person has displayed a tendency to violate RICO because the acts are related. This relationship is as probative of the relationship between the acts as if the person had done those same two acts as part of the same scheme or the same act as part of different schemes. *See* Brainerd & Bridges v. Weingeroff Enters., Inc., No. 85 C 493 (N.D. Ill. Sept. 18, 1986) (LEXIS, Genfed Library, Dist. file) (discussing the probativity of similar acts in terms of the relationship requirement). Thus, the common scheme requirement, relevant to relationship, does not conflict with the multiple schemes requirement, relevant to continuity.

102. *See* United States v. Kragness, 830 F.2d 842, 858 (8th Cir. 1987).

103. *See supra* note 96 and accompanying text.

104. This hypothetical is based upon the facts of Allington v. Carpenter, 619 F. Supp. 474 (D.C. Cal. 1985).

105. *See, e.g.*, Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986). The contact with the third bank represents the initiation of a second scheme, with the phone call being the required act to uphold the finding of a pattern.

In the hypothetical, both an intrascheme relationship (between the phone call and the mailing in the first scheme, which showed a common purpose) and an interscheme relationship (between any act of the first scheme and the phone call in the second scheme, which shared common perpetrators) exist. Thus, under the multiple schemes approach, the pattern requirement is met.

tern requirement is satisfied either by engaging in the same scheme in two different locations, or by engaging in different schemes in the same or different locations.[106]

2. The Multiple Acts Approach

In *United States v. Ianniello*,[107] the Court of Appeals for the Second Circuit held that the key to the pattern requirement lies in the concept of enterprise expressed in section 1962(c)[108] and in the ten year requirement of section 1961(5),[109] a position that has not changed from that jurisdiction's pre-*Sedima* case law.[110] The *Ianniello* panel held that the acts of the enterprise must be related to the common purpose of the enterprise;[111] therefore, the requirement of a relationship among the predicate acts is fulfilled when they are committed in furtherance of the affairs of an enterprise.[112] Subsequent construction of this "common purpose" requirement has revealed that any two acts committed by an enterprise are united by a "common purpose," so that the relationship requirement is always fulfilled upon proof of the existence of an enterprise.[113] The requisite continuity[114] exists when the enterprise has more than a limited

106. *See* United States v. Kragness, 830 F.2d 842, 858 (8th Cir. 1987).

107. 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987).

108. *See* 18 U.S.C. § 1962(c) (1982); *supra* note 4.

109. *See* 18 U.S.C. § 1961(5) (1982).

110. *Compare* United States v. Weisman, 624 F.2d 1118, 1122-23 (2d Cir.) (pre-*Sedima* holding), *cert. denied*, 449 U.S. 871 (1980) *with* United States v. Ianniello, 808 F.2d 184, 190 (2d Cir. 1986) (post-*Sedima* holding), *cert. denied*, 107 S. Ct. 3229 (1987) *and* Albany Ins. Co. v. Esses, 831 F.2d 41, 44 (2d Cir. 1987) (reaffirming the holding in *Ianniello*) *and* Furman v. Cirrito, 828 F.2d 898, 902-03 (2d Cir. 1987) (same).

111. *See Ianniello*, 808 F.2d at 190.

112. *See id.* at 191.

113. *See* United Sates v. Coonan, 839 F.2d 886, 889 (2d Cir. 1988); *see also* United States v. Benevento, 836 F.2d 60, 72 (2d Cir. 1987) (conducting a continuity inquiry only and not even mentioning the common scheme requirement), *cert. denied*, 108 S. Ct. 2035 (1988). Thus, the "common purpose" requirement, cited in many of the Second Circuit's cases, *see, e.g.*, Albany Ins. Co. v. Esses, 831 F.2d 41, 44 (2d Cir. 1987); Furman v. Cirrito, 828 F.2d 898, 903 (2d Cir. 1987); United States v. Ianniello, 808 F.2d 184, 191 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987), is a per se requirement. Under this approach, no RICO case has ever been dismissed for failure to allege or prove the relationship requirement. *See, e.g.*, *Albany Ins.*, 831 F.2d at 44 (dismissing RICO claim because the enterprise lacked continuity); *Furman*, 828 F.2d at 903 (same); Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51 (2d Cir. 1987) (same), *cert. denied*, 108 S. Ct. 698 (1988). For a good discussion of the apparent conflict and discord among post-*Sedima* Second Circuit opinions, see Beauford v. Helmsley, 843 F.2d 103 (2d Cir. 1988).

114. The enterprise also must satisfy the continuity element of the pattern requirement. *See* Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51 (2d Cir. 1987) (holding that because plaintiff failed to allege a continuing enterprise, no pattern existed), *cert. denied*, 108 S. Ct. 698 (1988). In *Beck*, defendant bank had acted as indenture trustee in the management of bonds for the Mexican government, had fraudulently sold the collateral backing the bonds and had distributed the proceeds of the sale to the bondholders. *See id.* at 48. Plaintiffs alleged that MHT had defrauded them of various amounts of money in connection with its role as indenture trustee. *See id.* at 49. The court held that "[t]he enterprise alleged by plaintiffs had but one straightforward, short-

existence or "discrete" purpose.[115]

In the bank hypothetical introduced in the previous section,[116] under the multiple acts test one phone call to the bank and one mailing of worthless promissory notes would constitute two acts of racketeering activity, namely mail and wire fraud, and thus would satisfy the pattern requirement under the multiple acts approach.[117] This approach, therefore, is the most expansive of the approaches, because it permits the least amount of criminal activity to trigger the statute.[118]

3. The Case-by-Case Approach

Between the extremes of the multiple schemes and multiple acts approaches lies the Seventh Circuit's case-by-case approach. In dealing with the controversy surrounding the pattern requirement, the court pointed out what it perceives as a flaw in the Supreme Court's reasoning in *Sedima*: that to insist on both continuity and relationship among the predicate acts works in theory, but that in reality, these two requirements appear to conflict.[119] According to the Seventh Circuit, continuity under

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lived goal—the sale of the U.S. collateral at a reduced price. At the conclusion of the sale, the alleged enterprise ceased functioning" and thus the enterprise was not continuous. *Id.* at 51; *see also* Albany Ins. Co. v. Esses, 831 F.2d 41, 44-45 (2d Cir. 1987) (affirming district court dismissal of RICO claim because the alleged enterprise was not of a continuous nature).

115. *See* United States v. Ianniello, 808 F.2d 184, 191 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987).

116. *See supra* text accompanying note 104.

117. *See, e.g.*, United States v. Ianniello, 808 F.2d 184, 190-91 (2d Cir. 1986) (the two acts consisting of mail and wire fraud would constitute a pattern if committed by a continuous enterprise—that is, if the real estate deal represented a continuous fraud over a number of years), *cert. denied*, 107 S. Ct. 3229 (1987).

118. Two other circuits have adopted the multiple acts approach, but they do not employ the enterprise rationale to satisfy the continuity-plus-relationship test of *Sedima*. *See* California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1469 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988); Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986).

The Ninth Circuit has held that "it is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern." Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 193 (9th Cir. 1987). "Rather plaintiffs need only allege predicate acts which are not 'isolated or sporadic.' " United Energy Owners Comm., Inc., v. United States Energy Mgmt. Sys., 837 F.2d 356, 360 (9th Cir. 1988) (quoting *Sun Sav.*, 825 F.2d at 193-94).

The Fifth Circuit adopted a similar approach, *see* R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1354-55 (5th Cir. 1985), but later backed away from this position, remarking that the definition of a pattern remained an open question. *See* Smoky Greenshaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274, 1280 n.7 (5th Cir. 1986).

In contrast to these circuits, which were content to remain unchanged after *Sedima*, the Second Circuit has specifically employed the enterprise rationale to satisfy the continuity-plus-relationship test. *See* United States v. Ianniello, 808 F.2d 184, 190-91 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987). The court's approach, however, has not changed substantively. *See* Furman v. Cirrito, 828 F.2d 898, 907-08 (2d Cir. 1987) (Pratt, J., dissenting); *supra* notes 107-115 and accompanying text.

119. *See* Morgan v. Bank of Waukegan, 804 F.2d 970, 975-76 (7th Cir. 1986); Petro-

Sedima, on the one hand, seems to require that the predicate acts be different in time, space, and objective, such that different schemes are required.[120] Relationship, on the other hand, seems to call for acts that are closer in time and mirror each other to some extent.[121]

In an attempt to resolve this perceived conflict, the case-by-case approach relaxes the continuity requirement.[122] Factors relevant to continuity under this approach "include the number and variety of [the] 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."[123] The relationship between activities requires "activities adding up to coordinated action."[124] To a large extent, however, the case-by-case approach remains undefined.[125] In sum, this approach mediates between two conflicting views by expounding a fact-oriented test.[126]

In the bank hypothetical,[127] the presence of different schemes, as a practical matter, would ensure a finding of a pattern under the case-by-case approach.[128] A pattern may have been present earlier, though, based upon the presence of different victims and the separate injuries that they sustained, the length of time and the number of acts required for the completion of the first scheme.[129]

Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1355 (3rd Cir. 1987); *see also* Roeder v. Alpha Indus., 814 F.2d 22, 30-31 (1st Cir. 1987) (adopting *Morgan* analysis); Torwest DBC, Inc., v. Dick, 810 F.2d 925, 928-29 (10th Cir. 1987) (same).

120. *See* Morgan, 804 F.2d at 975.

121. *See id.*

122. *See id.* ("In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be *ongoing* over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, 'transactions "*somewhat* separated in time and place".' ") (quoting Graham v. Slaughter, 624 F. Supp. 222, 225 (N.D. Ill. 1985)) (emphasis added).

123. *Id.*; *see also* Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806, 809-10 (7th Cir. 1987) (continuity requires "activities continuing over time or in different places").

124. *Marshall & Ilsley*, 819 F.2d at 809-10.

125. The First, Third, Fourth and Tenth Circuits have adopted similar, fact-oriented approaches. *See, e.g.*, Saporito v. Combustion Eng'g Inc., 843 F.2d 666, 676-77 (3d Cir. 1988) (factors include "(1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity."); Epstein v. Epstein, No. 87-2083, slip. op. at 9-10 (4th Cir. Jan. 8, 1988) ("the existence of a 'pattern' depends on context, and we must consider the 'criminal dimension and degree' of that conduct complained of in determining whether the conduct constitutes a 'pattern of racketeering activity.' ") (citation omitted); Condict v. Condict, 826 F.2d 923, 927-29 (10th Cir. 1987) (adopting fact-based approach); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 30-31 (1st Cir. 1987) (same).

126. *See* Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1987).

127. *See supra* text accompanying note 104.

128. *See supra* note 123 and accompanying text.

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

4. The Multiple Episodes Approach

Another view is espoused by several district courts.[130] In contrast to the multiple schemes requirement,[131] a single, open-ended scheme would satisfy the continuity element of the pattern requirement under this approach, so long as the scheme includes a sufficient number of criminal episodes (as opposed to acts).[132] Thus, this view has been dubbed the "multiple episodes plus ongoing course of conduct" standard.[133]

Under this view, the episodes, which are greater than acts but less than criminal schemes,[134] are related to each other by the ongoing nature of the activity.[135] Specifically, the fact that the acts are connected by a common perpetrator, victim, method or motive satisfies the pattern inquiry's relationship prong.[136]

To satisfy the continuity requirement, however, the acts, as part of different episodes, must have an "independent harmful significance,"[137] demonstrated by separate victims, separate schemes or separate injuries

130. *See* Ghouth v. Conticommodity Servs., 642 F. Supp. 1325, 1335 (N.D. Ill. 1986); Papai v. Cremosnik, 635 F. Supp. 1402, 1409-10 (N.D. Ill. 1986); *supra* note 18. Because this view has arisen primarily in district courts within the Seventh Circuit, the view has been equated with the case-by-case approach. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 913-14 (D. Minn.), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988). The approaches fundamentally differ, however, in that the case-by-case view purports to favor a less rigidly defined test. *See* Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806, 809-10 (7th Cir. 1987).

131. *See supra* notes 86-106 and accompanying text. Because of the confusion generated by the lack of precision in the use of terms, the distinction between episodes and schemes has been muddied by the frequent use of the word "episode" as a substitute for the word "scheme". *See* McIntyre's Mini Computer Sales Group v. Creative Synergy Corp., 644 F. Supp. 580, 584 (E.D. Mich. 1986) (adopting multiple schemes analysis, although using episode and scheme phraseology interchangeably); B.J. Skin & Nail Care, Inc. v. International Cosmetic Exchange, Inc., 641 F. Supp. 563, 566-67 (D. Conn. 1986) (adopting the multiple schemes requirement although it uses the term "episode").

The distinction between a scheme and an episode can be illustrated best in the open-ended scheme scenario. According to the multiple episode approach, an open-ended scheme is a single scheme that typically involves several episodes. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1409 (N.D. Ill. 1986). Courts following the multiple schemes approach, on the other hand, would exclude large, open-ended schemes because they constitute only single schemes. *See* Holmberg v. Morrisette, 800 F.2d 205, 209-10 (8th Cir. 1986).

132. *See Papai*, 635 F. Supp. at 1409.

133. *See* Gidwitz v. Stirco, Inc., 646 F. Supp. 825, 829 (N.D. Ill. 1986) (quoting Papai v. Cremosnik, 635 F. Supp. 1402, 1413 (N.D. Ill. 1986)).

134. Although the line between a "scheme" and an "episode" is somewhat blurred, *see supra* note 131, the cases indicate that an episode is more than an act. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1412 (N.D. Ill. 1986) (episodes defined as "illegal transactions separated in time").

135. *See Papai*, 635 F. Supp. at 1409.

136. *See id.*; Graham v. Slaughter, 624 F. Supp. 222, 225 (N.D. Ill. 1985).

137. Ghouth v. Conticommodity Servs., 642 F. Supp. 1325, 1336 (N.D. Ill. 1986). Although some indicate a preference for retaining a case-by-case approach, the opinions have enunciated the factors essential in guiding the pattern inquiry, making such an approach infrequent. *See id.* (requiring more than one basic injury); Papai v. Cremosnik, 635 F. Supp. 1402, 1409 n.5 (N.D. Ill. 1986) (same); *see also* Frankart Distrib., Inc. v. RMR Advertising, Inc., 632 F. Supp. 1198, 1201 (S.D.N.Y. 1986).

to one victim in one scheme.[138] The acts also must display "ongoing criminal activity,"[139] best proved by evidence of an open-ended scheme or a scheme of a very long duration.[140]

In the hypothetical introduced earlier,[141] courts following the multiple episodes approach would view the phone call, the mailing of the promissory note and the setting up of the account at bank *B* as comprising only one episode and, thus, would not find a pattern.[142] The three actions would constitute one episode because they involve one sub-goal: to get money to bank *B* in order to attract investors into the real estate deal. The process of convincing those investors actually to invest, including any representations to that end, might be considered the next episode on the road to completing the first scheme.

III. THE BEST APPROACH

A. *The Multiple Schemes Requirement*

This Note proposes that civil RICO should be targeted at conduct described as "enterprise criminality."[143] The enterprise criminal is one who has committed acts proscribed by RICO and can be expected to engage in similar acts in the future if left unchecked.[144] The multiple schemes approach assures that only enterprise criminals are found liable[145] under civil RICO by effectively avoiding the prosecution of iso-

138. *See Ghouth*, 642 F. Supp. at 1336-37.

139. *Id.* at 1337.

140. The district court jurisprudence is not as cohesive as this discussion makes it seem. Most of the cases do agree, however, with the underlying reasoning in the court's analysis in *Papai* and *Ghouth*. *See, e.g.*, Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118, 123-24 (D. Md. 1986) (adopting multiple episodes requirement); Graham v. Slaughter, 624 F. Supp. 222, 225 (N.D. Ill. 1985) (the continuity requirement requires different criminal episodes as part of an open-ended scheme).

141. *See supra* text accompanying note 104.

142. *See, e.g.*, Papai v. Cremosnik, 635 F. Supp. 1402, 1409 (N.D. Ill. 1986). These three acts would constitute one episode of which many are required to complete a scheme.

143. *See supra* notes 56-61 and accompanying text.

144. *See supra* notes 56-61 and accompanying text.

145. *See* Frankart Distrib., Inc. v. RMR Advertising Inc., 632 F. Supp. 1198, 1200-01 (S.D.N.Y. 1986).

In addition to restricting the enforcement of RICO to "enterprise criminality," the multiple schemes approach solves another RICO problem. Much concern has been voiced about the need to restrict the scope of civil RICO to avoid the federalization of traditional state law remedies. Justice Marshall voiced the concern of many courts when he stated that RICO, if allowed, will erase years of state remedies and alter the federal-state balance. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 506, 523 (Marshall, J., dissenting); *id.* at 524 (Powell, J., dissenting) (Civil RICO is being used to replace ordinary fraud and breach of contract cases); Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law, 126 (same); *see also* Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc., 831 F.2d 488, 492 (4th Cir. 1987) (same). *But see* United States v. Turkette, 452 U.S. 576, 587 (1981) (noting Congressional awareness that RICO might subsume many state law actions, but

lated or sporadic acts of violative activity.[146] This view preserves the integrity of congressional action[147] by enforcing the Act as it was passed.

Congress intended the pattern requirement as a means of limiting RICO to those cases where the required predicate offenses were committed in a manner that characterizes the defendant as a person who commonly commits such acts.[148] This RICO goal will be achieved only if courts require that multiple predicate offenses occur in two or more separate schemes.[149]

The relationship element, fulfilled by the common scheme or purpose

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that Congress sanctioned the enlargement of federal powers anyway); *Blakey*, *supra* note 20, at 249-80 (same).

Judicial concern that RICO has been broadened too far is not unfounded. *See* Holmberg v. Morrisette, 800 F.2d 205, 210-12 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 1953 (1987). No need for this broadening exists, as state remedies are capable of providing adequate relief to deserving plaintiffs. In *Holmberg* the defendant's actions comprised one scheme to draw down three letters of credit. *Id.* at 207-09. Plaintiff recovered on state fraud and conversion claims and additionally was awarded punitive damages, demonstrating that state remedies often are adequate. *Id.* at 211-12. If civil RICO's expansion is left unchecked, such effective state remedies could become obsolete. *See Sedima*, 473 U.S. at 523 (Marshall, J., dissenting); *id.* at 525 (Powell, J., dissenting); Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 314 (7th Cir. 1985). The multiple schemes approach, in limiting the scope of civil RICO, would limit the extent to which RICO is federalizing state tort law claims, without necessarily allowing the wrongdoer to go unpunished. *See* Holmberg v. Morrisette, 800 F.2d 205, 206-08 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 1953 (1987).

It should be noted that federal prosecutors have been instructed to avoid overbroad use of criminal RICO actions and to show deference to state law. *See* United States Dep't of Justice, United States Attorney's Manual §§ 9-43.120 (Feb. 16, 1984) (cited in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 502-03 (1985)), and 9-110.200 (June 21, 1984), *reprinted in* Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law, Appendix D. Adoption of the multiple schemes requirement would adequately fill the need for such a limit in civil RICO actions.

146. After surveying the state of the law, the Ad Hoc Civil Rico Task Force recommended that the RICO statute be amended to define "pattern of racketeering activity" as requiring "(i) that the underlying predicate offenses be connected to each other by a common scheme and (ii) that the underlying predicate offenses arise in two or more separate and distinct episodes." Report of the Ad Hoc Civil Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law 250.

The Section of Criminal Justice of the American Bar Association has recommended the adoption of both different criminal schemes and a common scheme or plan linking those schemes to satisfy the pattern requirement. *See* Report to the House of Delegates, 1982 A.B.A. Sec. Crim. Just. Rep. 12, *reprinted in* Criminal Justice Section, Am. Bar Ass'n, A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee, Appendix A (1985). It also has suggested that there always be a requirement of more than one act of mail or wire fraud to meet the pattern requirement. *Id. But see* Report of the Committee on Criminal Law, 1982 Assoc. of the Bar of the City of New York 12 (the only amendment needed is the repeal of the liberal construction clause), *reprinted in* Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law, Appendix C.

147. Frankart Distribs., Inc. v. RMR Advertising, Inc., 632 F. Supp. 1198, 1201 (S.D.N.Y. 1986) (footnote omitted).

148. *See* Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law 203-08.

149. *See id.* at 207-08.

rule,[150] in part reveals a conscious design by the person who commits the acts to engage in this conduct over time, either as part of one or two schemes.[151] The common scheme or purpose requirement assures that the predicate acts show a sufficient causal connection to justify the conclusion that the activities under scrutiny are not a sequence of coincidental, individually motivated acts.[152] A relationship among the acts specifically reveals a propensity to act a certain way over time.[153] Evidence of such a propensity, however, goes only part of the way toward evincing a threat that this activity will continue in the future. The approach requires a second scheme, demonstrating fully the threat of continuation.[154]

Under the multiple schemes approach, the continuity element works in tandem with the relationship requirement to assure that RICO is not applied to sporadic acts. When only one scheme exists, there can be only an intrascheme relationship among the acts.[155] Such a relationship reveals the defendant's commitment or perseverance to complete the one scheme undertaken,[156] but marks no measure of a future threat to act in a similar manner.[157] The initiation of a second, similar scheme, however, does exactly that; the propensity to act a certain way over time materializes, and the defendant shows that he is a "racketeer" within the meaning of civil RICO.[158]

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150. *See supra* note 94 and accompanying text.

151. *See* Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc., 831 F.2d 488, 492 (4th Cir. 1987) (RICO pattern requirement requires a "continuous engagement in criminal conduct"); Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law 72, 124 (best measure of the relationship amongst the acts is a "common scheme" requirement); Report to the House of Delegates, 1982 A.B.A. Sec. Crim. Just. Rep. 6-7, *reprinted in* Criminal Justice Section, Am. Bar Ass'n, A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee, Appendix A (1985) (same).

152. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985) (pattern of racketeering activity requires "*continuity plus relationship*" among the acts) (emphasis in original); S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (same).

153. *See* B.J. Skin and Nail Care, Inc. v. International Cosmetic Exch., Inc., 641 F. Supp. 563, 565 (D. Conn. 1986).

154. *See* Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986).

155. *See* United States v. Kragness, 830 F.2d 842, 858 (8th Cir. 1987); *supra* note 96.

156. *See, e.g.*, Ornest v. Delaware N. Cos., 818 F.2d 651, 652 (8th Cir. 1987) (case involving eight-year-long scheme to defraud); Madden v. Gluck, 815 F.2d 1163, 1164 (8th Cir. 1987) (per curiam) (case, among other things, involving a charge that defendants fraudulently cashed 5,643 checks); Deviries v. Prudential-Bache Sec., Inc., 805 F.2d 326, 329 (8th Cir. 1986) (efforts over six years were solely to generate excessive sales and thus benefit the one criminal scheme undertaken); *supra* notes 95-103 and accompanying text.

157. *See* Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928 (10th Cir. 1987) (for "an adequate showing of continuity under *Sedima*, a plaintiff must demonstrate some facts from which at least a threat of ongoing illegal conduct may be inferred"); *Deviries*, 805 F.2d at 329 (continuity requires a threat of the activity continuing over time).

158. In Northern Trust Bank/O'Hare, v. Inryco, Inc., 615 F. Supp. 828 (N.D. Ill. 1985), the district court held that the word pattern "connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal *activity*. . . . It

Critics fault the multiple schemes view as failing to confront the inevitable definitional problems involved in the pattern inquiry, and instead introducing the new and perhaps more amorphous, concept of "scheme" into the analysis.[159] Despite this criticism, however, courts following this view have little problem identifying different criminal schemes.[160] Moreover, it appears that these courts might be moving toward a more clearly defined test for pinpointing a "scheme," and away from any possible ambiguities.[161]

Critics of this approach also assert that, even assuming one could distinguish adequately among multiple schemes, a rule requiring two or more schemes would exempt from RICO liability defendants who engage in only a single, unlawful scheme, "however extensive and injurious."[162] This criticism that the approach would exclude large, open-ended schemes is unfounded, however, because perpetrators of single schemes were not targeted for RICO coverage.[163]

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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.' " *Id.* at 831. As Judge Newman noted in United States v. Moeller, 402 F. Supp. 49, 57-58 (D. Conn. 1975):

> While the statutory definition makes clear that a pattern can consist of only two acts, I would have thought the common sense interpretation of the word 'pattern' implies acts occurring in *different criminal episodes*, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity. I would further have thought that the normal canon of narrowly construing penal statutes points towards such an interpretation.

Id.

159. *See* Barticheck v. Fidelity Union Bank, 832 F.2d 36, 39 (3rd Cir. 1987).

160. *See, e.g.*, United States v. Kragness, 830 F.2d 842, 858 (8th Cir. 1987) (finding three schemes committed by a single enterprise).

161. *See, e.g.*, *Kragness*, 830 F.2d at 858 (holding that the same criminal scheme in two different locations satisfies the multiple scheme requirement); *see also supra* note 99.

162. *See* Barticheck v. Fidelity Union Bank, 832 F.2d 36, 39 (3rd Cir. 1987). The possibility always exists that a large, open-ended scheme in fact may be severable into separate schemes based on the analysis in *Kragness*. *See supra* note 99.

163. Under the multiple schemes approach, courts view congressional intent as clearly indicating that single schemes do not satisfy the pattern requirement. *See* Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986) (the pattern requirement requires proof of more than one scheme); Deviries v. Prudential Bache Sec., 805 F.2d 326, 329 (8th Cir. 1986) (six-year scheme was held to be insufficient to satisfy the pattern requirement).

A further criticism of the multiple schemes approach is that it is a "restrictive" approach that goes against the policy of liberally construing RICO. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 912 (D. Minn.), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988). *But see* Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law 410 (recommending the repeal of the liberal construction clause); Report to the House of Delegates, 1982 A.B.A. Sec. Crim. Just. Rep. 12, *reprinted in* Criminal Justice Section, Am. Bar Ass'n, A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee, Appendix A (1985) (same). The application of the liberal construction clause, *see* OCCA Act of 1970, Pub. L. 91-452 § 904(a), 84 Stat. 947, however, to civil RICO cases is a matter of some speculation and ultimately appears to depend on whether the civil provisions of the statute are severable from the criminal provisions. *See* Hunt v. American Bank & Trust Co., 606 F. Supp. 1348, 1362-63 (N.D.

B. *Weaknesses of the Other Views*

1. The Multiple Acts Approach

The multiple acts approach is flawed analytically since the fact that a single enterprise committed two acts does not automatically mean that the acts were related or represent continuous activity sufficient to constitute a pattern.[164] The Second Circuit in formulating the multiple acts approach drew the core of its reasoning from the Fifth Circuit's language in *United States v. Elliott*,[165] which stated that "the two or more predicate crimes must be *related* to the affairs of an enterprise but need not otherwise be related to each other."[166] Although the pattern of activity invariably relates to the enterprise,[167] proof of an enterprise does not show a relationship among all the acts committed by, or in furtherance of, that enterprise.[168] The predicate acts must relate to one another substantively, not just procedurally.[169] A procedural relation only reveals the acts the enterprise has committed, without delving into motive,[170] whereas a substantive relation reveals something greater about the type

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Ala. 1985) (implying that due process violation would arise if the severability argument were adopted), *aff'd*, 783 F.2d 1011 (1986).

The possibility exists that the clause might support an expansive view of the pattern requirement. The Supreme Court has not held, however, that the liberal construction clause could be used to affirmatively expand RICO in all circumstances. *See* Russello v. United States, 464 U.S. 16, 24 (1983) (clause cannot be used to expand RICO when the statutory language is ambiguous); United States v. Turkette, 452 U.S. 576, 587 (1981) (same). The clause's reach may be greater in civil RICO than in criminal RICO cases, however, because the rule of lenity requires penal statutes to be interpreted in favor of defendants when an ambiguity exists. *See* United States v. Bass, 404 U.S. 336, 348-50 (1971); *see generally* Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 761 (1935).

The Supreme Court in *Sedima* noted that it would be possible to construe §§ 1961 and 1962 strictly while liberally construing § 1964(c). *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491-93 n.10 (1985); *see also* United States v. Computer Sciences Corp., 689 F.2d 1181, 1190-91 (4th Cir. 1982) (rule of lenity applies to RICO), *cert. denied*, 459 U.S. 1105 (1983). *But see* Tarrant v. Ponte, 751 F.2d 459, 465-66 (1st Cir. 1985) (the rule of lenity is not of constitutional status). Accordingly, a pattern of racketeering activity, defined in § 1961(5), perhaps should be strictly construed.

164. *See* Report to the House of Delegates, 1982 A.B.A. Sec. Crim. Just. Rep. 6-7, *reprinted in* Criminal Justice Section, Am. Bar Ass'n, A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee, Appendix A (1985).

165. 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1983).

166. *Id.* at 899 n.23 (emphasis added); *see* United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980).

167. *See* Report to the House of Delegates, 1982 A.B.A. Sec. Crim. Just. Rep. 6, *reprinted in* Criminal Justice Section, Am. Bar Ass'n, A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee, Appendix A (1985).

168. *See id.*

169. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1412 (N.D. Ill. 1986) (pattern requirement focuses on "defendant's conduct as it is expressed through the predicate acts, rather than on the acts alone").

170. *See id.*

of person committing the act.[171] Without an inquiry into motive, the threat of continuing activity to be derived from such acts can, at best, be remote.[172]

Since *Sedima*, the Second Circuit ostensibly requires proof of a relationship among the acts constituting a pattern.[173] The requirement is satisfied, however, by finding a per se relationship among acts committed by a continuous enterprise.[174] Thus, its position that the two acts need not be related remains in place, and the existence of a continuous enterprise appears to trigger the statute.[175]

A premise of the multiple acts approach is that the desire to benefit the enterprise—to make money for the enterprise[176]—provides the requisite relationship among the acts.[177] The approach, however, does not reveal the likelihood of future violative conduct. Furthermore, any enterprise, whether legitimate or illegitimate, arguably bases all its actions on the prospect of pecuniary advantage. Such motivation does not engender any particular type of conduct. Thus, the relatedness requirement under this approach lacks substance.

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171. An example shows that the *Elliott* rationale would require only a procedural relationship between the predicate acts. Suppose the president of a corporation bribes a legislator in 1960 to help the manufacturing activities of an enterprise and then in 1970 commits mail fraud to obtain a service contract. *See* Report to the House of Delegates, 1982 A.B.A. Sec. Crim. Just. Rep. 6-7, *reprinted in* Criminal Justice Section, Am. Bar Ass'n, A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee, Appendix A (1985). The *Elliott* view would conclude that a pattern exists in this situation. *See id.* The fact that the same business/enterprise, however, is involved does not show the requisite relationship between two farflung and unconnected acts under *Sedima*. *See id.*

172. *See id.*

173. *See* United States v. Ianniello, 808 F.2d 184, 191 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987).

174. *See* United States v. Coonan, 839 F.2d 886, 889 n.3 (2d Cir. 1988); Creative Bath Prods. v. Connecticut Gen. Life Ins. Co., 837 F.2d 561, 564 (2d Cir. 1988); United States v. Benevento, 836 F.2d 60, 72 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2035 (1988); *supra* note 113 and accompanying text.

175. Because the Second Circuit's position has not changed, it effectively has ignored the Supreme Court's comments in *Sedima*. *Compare* United States v. Ianniello, 808 F.2d 184, 190 (2d Cir. 1986) (the pattern requirement calls for two acts committed by a continuous enterprise), *cert. denied*, 107 S. Ct. 3229 (1987) *with* United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.) (the pattern requirement is satisfied when an enterprise commits two acts of racketeering activity), *cert. denied*, 449 U.S. 871 (1980).

The Ninth and Eleventh Circuits also appear to have ignored the Supreme Court's call to develop a more meaningful definition of pattern, as they maintain the same pre-*Sedima* views with which the Supreme Court voiced discontent. *See* California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1469 (9th Cir. 1987) (declining to follow the Supreme Court's dictum and adopting a multiple acts requirement), *cert. denied*, 108 S. Ct. 698 (1988); Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986) (multiple acts sufficient to satisfy the pattern requirement); United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.) (pre-*Sedima* holding that two acts of racketeering activity satisfy the pattern requirement), *cert. denied*, 449 U.S. 871 (1980).

176. *See* United States v. Elliott, 571 F.2d 880, 898 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1983).

177. *See id.*

Moreover, the requirement that an enterprise be responsible for the predicate acts is an element distinct from that of relatedness and continuity of the predicate acts.[178] It therefore must be proved separately.[179] Thus, to equate an enterprise with a pattern misreads the Supreme Court precedent on this issue.[180]

The multiple acts approach also allows two acts of mail or wire fraud to satisfy the pattern requirement,[181] while many other courts and commentators have concluded that two acts of mail or wire fraud, on their own, are insufficient.[182] The *Sedima* Court noted that the inclusion of mail and wire fraud as predicate acts contributed to the rapid expansion of civil RICO.[183] In an effort to curb this growth, some courts have begun to require at least one predicate act other than mail or wire fraud before they will find a pattern.[184]

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178. *See* United States v. Turkette, 452 U.S. 576, 583 (1981) ("The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.").

179. *See id.* The circuits are divided over whether the enterprise in fact must be distinct from the pattern of racketeering activity. *See* Abrams, *supra* note 19, at 419. *Compare* United States v. Bledsoe, 674 F.2d 647, 665-66 (8th Cir.) (enterprise may have existence wholly apart from the pattern of racketeering activity), *cert. denied*, 459 U.S. 1040 (1982) *with* Moss v. Morgan Stanley Inc., 719 F.2d 5, 22 (2d Cir. 1983) (enterprise is no more than the sum of the predicate acts), *cert. denied*, 465 U.S. 1025 (1984).

RICO incorporates two types of enterprises: legal entities and associations in fact. *See* United States v. Turkette, 452 U.S. 576, 581-82 (1981). When a legal entity is involved, the enterprise clearly is distinct from the pattern of racketeering activity, which is predicated on illegal acts. *See, e.g.*, *Bledsoe*, 674 F.2d at 660 (a real estate co-operative, a legal entity, could qualify as an enterprise under RICO).

180. *See supra* note 178.

181. *See* United States v. Ianniello, 808 F.2d 184, 190 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987).

182. *See, e.g.*, Lipin Enters. v. Lee, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring).

> Mail fraud and wire fraud are perhaps unique among the various sorts of 'racketeering activity' possible under RICO in that the existence of a multiplicity of predicate acts . . . may be no indication of the requisite continuity of the underlying fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate directly into a 'pattern' of racketeering activity.

Id.; United States v. Weiss, 752 F.2d 777, 791 (2d Cir.) (Newman, J., dissenting), *cert. denied*, 474 U.S. 944 (1985); Fleet Mgmt. Sys. v. Archer-Daniels-Midland Co., 627 F. Supp. 550, 551-52 (C.D. Ill. 1986); Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. of Corp., Banking and Business Law 205. For a contrary viewpoint, see Comment, *The Pattern Element of RICO Before and After* Sedima: *A Look at Both Federal and Florida RICO*, 15 Fla. St. U.L. Rev. 322, 339-41 (1987) (criticising the holding in *Fleet Mgmt*).

183. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985).

184. *See* Fleet Mgmt. Sys. v. Archer-Daniels-Midland Co., 627 F. Supp. 550, 554 (C.D. Ill. 1986). Because mail and wire fraud are expressly included as predicate acts under the statute and, as such, are difficult to alter, removal of these acts is not likely to be used to narrow RICO. The pattern requirement, on the other hand, remains substantively undefined in the statute. *See* 18 U.S.C. § 1961(5) (1982); Medallion Television Enters. Inc. v. SelecTV, Inc., 833 F.2d 1360, 1362-63 (9th Cir. 1988), and therefore can be used to limit RICO's expansive use.

The Second, Fifth, and Seventh Circuits all have held that two acts of mail or wire

2. The Case-by-Case Approach

The case-by-case approach of the Court of Appeals for the Seventh Circuit, although intellectually appealing, is not helpful here. The alleged conflict between the continuity and relatedness elements is not as fatal as the *Morgan* court made it seem.[185] The relationship that the statute implicitly tries to uncover is a person's tendency to act a certain way over time[186]—one that materializes upon the commencement of a second scheme. Thus, the same two acts can satisfy the continuity-plus-relationship requirement,[187] and the multiple schemes decisions clearly indicate that continuity and relationship, in fact, are compatible.

Since the inception of the case-by-case standard, courts following this analysis have approached the pattern inquiry inconsistently. The Seventh Circuit has held in several recent cases that multiple acts of mail fraud committed in furtherance of a single criminal scheme involving one victim and relating to one basic transaction cannot constitute the necessary pattern.[188] Because the courts are establishing a more rigid formula, the circuit has abandoned its previous preference for a case-by-case approach, diminishing the approach's self-proclaimed effectiveness. In fact, because several of its recent decisions seemed to have searched for the likelihood of a second criminal scheme[189] in order to satisfy the pattern requirement, the Seventh Circuit could be accused of moving closer to the multiple schemes approach. This likelihood can be supplied only by the existence and proof of at least one such scheme in the past.

Despite this developing trend, the Seventh Circuit recently held in *Liquid Air Corp. v. Rogers*[190] that "the repeated infliction of economic injury upon a single victim of a single scheme *is* sufficient to establish a pattern

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fraud satisfy the pattern requirement of RICO. *See* Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988); Morgan v. Bank of Waukegan, 804 F.2d 970, 976 (7th Cir. 1986); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985). The inclusion of mail and wire fraud as predicate acts under the multiple acts approach has received substantial criticism for allowing almost every claim to come under RICO. The Court of Appeals for the Seventh Circuit since has moved away from this position. *See* Tellis v. United States Fidelity & Guar. Co., 826 F.2d 477, 478 (7th Cir. 1987).

185. *See* Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986).

186. *See* Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertsing, Inc., 831 F.2d 488, 492 (4th Cir. 1987).

187. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1408 (N.D. Ill. 1986).

188. *See* Tellis v. United States Fidelity and Guar. Co., 826 F.2d 477, 479-80 (7th Cir. 1987); Skycom Corp. v. Telstar Corp., 813 F.2d 810, 818 (7th Cir. 1987); Elliot v. Chicago Motor Club Ins., 809 F.2d 347, 350 (7th Cir. 1986).

189. In Lipin Enters. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986) and Marks v. Pannell Kerr Forster, 811 F.2d 1108, 1112 (7th Cir. 1987), the courts conclusion that the requirement had not been met seemed to be based on the fact that the defendants either had not acted in the same way in the past or were not likely to do so in the future. *See Lipin*, 803 F.2d at 324 (single instance of fraud with only one victim insufficient); *Marks*, 811 F.2d at 1112 (single scheme to defraud a single victim in what appears to be a 'one-shot' effort to inflict a single injury).

190. Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1305 (7th Cir. 1987), *cert. filed*, 56 U.S.L.W. 3531 (U.S. Jan. 1, 1988) (No. 87-1262).

of racketeering activity for purposes of civil RICO."[191] That case involved a scheme by a partnership to defraud Liquid Air of goods owed it by using falsified shipping orders documenting returns.[192] Although nineteen shipping orders were falsified, the court held that they formed only one scheme and that the scheme had only one purpose.[193] Under *Liquid Air* it would appear that any scheme to defraud a person of a specified amount, $1,000 for example, that requires more than two acts for completion would fall within the purview of a civil RICO violation under the case-by-case approach,[194] opening the door to many more civil RICO cases and potential abuse.

As a result of its fluid, ill-defined nature, critics justifiably liken the Seventh Circuit's view to Justice Stewart's "I know it when I see it" expression of the standard for judging pornography.[195] Although this approach avoids definitional problems, it does little to clear up an already confused situation.

3. The Multiple Episodes Approach

This approach views open-ended schemes, characterized by a long duration, as being capable of simultaneously satisfying the continuity and relatedness requirements.[196] Advocates of the multiple episodes approach claim "that it deflects 'garden variety' fraud cases while sweeping into the RICO net those cases which are large in scale albeit monolithic."[197] Thus, this approach selectively allows certain single schemes to satisfy the pattern requirement. Several courts, however, have rejected the proposition that a large, open-ended scheme falls within the scope of civil RICO.[198]

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191. *Id.* (emphasis added).

192. *See id.* at 1300-01.

193. *See id.* at 1304.

194. *See id.* at 1305.

195. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1410, (N.D. Ill. 1986); Morgan v. Bank of Waukegan, 804 F.2d 970, 977 (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

196. H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 914 (D. Minn.), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988); *see* Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118, 122-24 (D. Md. 1986); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 809 (E.D. La. 1986); United States v. Freshie Co., 639 F. Supp. 443, 445 (E.D. Pa. 1986).

197. The cases have focused attention primarily on the continuity element. *See* Ghouth v. ContiCommodity Servs., 642 F. Supp. 1325, 1338 (N.D. Ill. 1986) ("We [have] tried to give content to continuity, in a way which gives it some sense yet retains the liberal spirit of the statute.").

198. *See* Barticheck v. Fidelity Union Bank, 832 F.2d 36, 40 (3d Cir. 1987) (rejecting the idea of a single, open-ended scheme in favor of the multiple acts approach); Madden v. Gluck, 815 F.2d 1163, 1164 (8th Cir. 1987) (holding one long, fraudulent scheme did not meet the pattern requirement); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154 (4th Cir. 1987) (holding that issuance of a misleading prospectus to ten investors did not meet pattern requirement); Marks v. Pannell Kerr Forster, 811 F.2d 1108, 1112 (7th Cir. 1987) (finding multiple acts that would necessarily end after the completion of one limited goal fail to satisfy the pattern requirement); Louisiana Power and Light Co.

The multiple episodes approach is more difficult to define succinctly than any of the other views and likely will yield inconsistent results.[199] In fact, in a number of cases with similar fact patterns, some courts found a pattern to be present while others did not.[200] In addition, several cases have focused on the presence of several victims to support the finding of a pattern,[201] while others have found several episodes to be present when only one victim was involved.[202] Thus, the *hope* expressed by these cases—that a coherent test will emerge[203]—is not enough, especially in light of the contradictory holdings mentioned above.

CONCLUSION

RICO seems destined to play an important role in the future of civil litigation in the United States. Allowing such a potent weapon for combating wrongdoing to remain on an uncharted course is of little benefit.[204] The need for uniformity is clear.

The first step in putting civil RICO back on course is to limit its application to "enterprise criminality." This will give effect to Congress' broad purpose in enacting RICO, making those persons functioning as a part of systematic, ordered organizations its focus. The second step is to adopt the multiple schemes requirement, which will narrow the RICO net to achieve this goal, removing a cloud from the horizon of civil litigation. In addition, it carries with it the added benefit of greater predictability and consistency in this field. The multiple schemes test gives meaning and substance to the continuity-plus-relationship formulation and shows that the continuity-plus-relationship test is capable of giving RICO definition and integrity.

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v. United Gas Pipe Line Co., 642 F. Supp. 781, 809 (E.D. La. 1986) ("When a plaintiff is hurt by one fraud which is only furthered by several mailings rather than hurt by repeated acts of fraud, the [c]ourts are reluctant to impose RICO damages.").

199. *See* Barticheck v. Fidelity Union Bank, 832 F.2d 36, 39 (3d Cir. 1987) ("We do not believe, however, that the notion of continuity compels a requirement of 'open-endedness.' At the very least, such a requirement would produce anomalous results.").

200. For an excellent survey of the inconsistent results among courts applying the multiple episodes approach, see Brainerd & Bridges v. Weingeroff Enters., No. 85-C-493 (N.D. Ill. Sept. 18, 1986) (LEXIS, Genfed library, Dist file).

201. *See id.*

202. *See id.*

203. *See* Ghouth v. Conticommodity Servs. Inc., 642 F. Supp. 1325, 1337 (N.D. Ill. 1986).

204. A similar problem exists in the criminal area, but prosecutors, given a weapon that could be used virtually against any kind of criminal activity, have responded by using it in a few, identifiable patterns. *See Lynch I*, *supra* note 20, at 663-64. A similar restraint is needed in the civil area.