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Committee on Federal Courts of the New York State Bar Association

THE PATTERN OF RACKETEERING ELEMENT OF RICO LIABILITY

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INTRODUCTION

The widespread use of RICO's provisions in civil and commercial litigation has been a matter of great concern in recent years. It is difficult to accept that Congress intended RICO to provide a treble damage remedy in a routine business or securities law case—yet that is what some proponents of civil RICO argue a literal reading of the statute permits.[1] While this broad reading of RICO was received favorably by some courts,[2] it

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The Sub-committee on RICO was comprised of Mitchell A. Lowenthal (Chair), Austin J. Campriello, Ellen M. Coin, Edmund H. Kerr, Eli R. Mattioli, Alan J. Russo, Jordan S. Stanzler, and Richard P. Swanson.

The Addendum was written by Robert E. Trop, Associate Editor of Touro Law Review.

1. For illustration of this position, see Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982); Note, *The End of Court Imposed Limitations to Civil RICO—Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275 (1985)*, 1986 ARIZ. ST. L.J. 521.

2. *See, e.g.*, Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984) (agreeing with those circuits which read the "injury" requirement of 18 U.S.C. § 1964(c) broadly); Alexander Grant & Co. v. Tiffany Indus., 742 F.2d 408 (8th Cir. 1984) (noting it was not within the court's authority to restrict the reach of civil RICO), *cert. denied*, 474 U.S. 1058 (1986); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984) (a restriction of civil RICO would reduce the Act's civil provisions to a trivial remedy, denying any mandate for racketeering injury requirement), *aff'd*, 473 U.S. 606 (1985); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982) (rejecting the necessity for commercial injury or an organized crime nexus), *aff'd in part and rev'd in part en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

generally was resisted by courts within the Second Circuit,[3] the home of the nation's capital markets and an overwhelming proportion of federal securities litigation.

Struggling with the anomaly of reconciling a criminal provision that calls for liberal construction with private actions that attempt to utilize RICO in circumstances Congress plainly did not contemplate, the Second Circuit issued a series of opinions stating and restating the various elements of RICO liability.[4] These ranged from limiting private civil RICO liability to defendants who had been convicted of predicate "racketeering acts,"[5] to finding criminal liability only where the defendant was found to have engaged in at least two racketeering acts through an ongoing enterprise.[6]

In the two recent rulings of *Beauford v. Helmsley*[7] and *United States v. Indelicato*,[8] the Second Circuit appears to have abandoned its efforts to limit the scope of civil RICO liability, choosing instead to embrace a literal reading of the statute. We believe that these rulings, issued by the Second Circuit en banc, will have unfortunate consequences to the administration of justice. First, they are likely to increase the volume of federal litigation by permitting the "federalization" of much

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3. *See, e.g.*, Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984) (holding that a claimant must have been injured by a pattern and that a proprietary injury from predicate acts was insufficient), *vacated*, 473 U.S. 922 (1985); *compare* Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984) (relied on previous decisions such as *Bankers Trust* but noted racketeering injury limitation would contravene congressional intent), *vacated sub nom.* Joel v. Cirrito, 473 U.S. 922 (1985). *Rhoades* and *Cirrito* were remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of American Nat'l Bank & Trust v. Haroco, Inc., 473 U.S. 606 (1985) and Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

4. Beauford v. Helmsley, 865 F.2d 1386 (2d Cir. 1989) (en banc); United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) (en banc); Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988); Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

5. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

6. United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 483 U.S. 1006 (1987).

7. 865 F.2d 1386 (2d Cir. 1989) (en banc).

8. 865 F.2d 1370 (2d Cir. 1989) (en banc). *Helmsley* and *Indelicato* were decided the same day.

ordinary commercial litigation. Indeed, given the prospect of treble damages, costs, and attorney's fees to successful private litigants, there will be a tremendous incentive to scrutinize allegations in order to fit them within RICO's embrace.

Second, these rulings are likely to result in the addition of RICO claims to much private civil litigation previously brought under the federal securities laws. There is not now, nor was there at the time the private right of action under RICO was enacted, evidence that private litigants need additional encouragement to pursue securities-related claims. We are concerned that RICO will operate as a coercive settlement weapon and that applying the statute to its fullest extremes may disrupt, if not undermine, decades of case law developed under the federal securities laws.

I. BACKGROUND — THE STATUTE

The Racketeer Influenced and Corrupt Organizations Act[9] was added to the federal criminal code in 1970, and, generally, makes it unlawful for any person employed by, or associated with, an enterprise to conduct or participate in the conduct of the enterprise's affairs through "a pattern of racketeering activity."[10] The statute defines a "pattern of racketeering activity" to be at least two acts of racketeering activity within ten years of each other.[11] "Racketeering activity," in turn, is defined to include offenses such as murder,[12] kidnapping,[13] gambling,[14] arson,[15] robbery,[16] bribery,[17] extortion,[18] drug deal-

9. 18 U.S.C. §§ 1961-1968 (1988).

10. *Id.* § 1962(C) (1988).

11. *Id.* § 1961(5) (1988).

12. *Id.* § 1961(1)(A) (1988).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

ing,[19] and obstruction of justice,[20] as well as mail fraud,[21] wire fraud,[22] and "fraud in the sale of securities."[23]

RICO provides an express private cause of action to persons injured in their "business or property" by reason of the operation of an "enterprise" through a "pattern of racketeering activity."[24] Like the antitrust laws, RICO offers treble damages, attorney's fees, and costs to successful private litigants.[25] It also reduces some of the ordinary procedural hurdles facing plaintiffs.[26] As a result, there already has been a virtual explosion of civil RICO litigation.

As noted, the statute does not define "pattern of racketeering activity" except to say that "at least two acts of racketeering activity" within ten years of one another are necessary.[27] A literal reading of RICO suggests that a plaintiff who can allege he was the victim of a common law fraud or a securities fraud perpetrated through two letters, two telephone calls, or one letter and one telephone call can sue for treble damages because he, arguably, has suffered injury to his business or property by reason of two acts of mail, wire, or securities fraud. The temptation for plaintiffs to assert such claims in many otherwise routine commercial cases has proved irresistible.[28] This problem has been compounded by the broad reading given to RICO

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19. *Id.*

20. 18 U.S.C. § 1503 (1982).

21. *Id.* § 1341 (1982).

22. *Id.* § 1343 (1982).

23. *Id.* § 1961(1)(D) (1982).

24. *Id.* § 1964(c) (1988). Although other private remedies are available, this is the most common provision invoked by plaintiffs in civil actions. *See* Cole & McNamara, *Civil RICO After Sedima*, 12 LITIG. 24 (1986); Harrison, *Look Who's Using RICO*, 75 A.B.A. J. 56 (1989); Horn, *When to Bring a Racketeering Claim*, 9 LITIG. 33 (1983).

25. 18 U.S.C. § 1964(c) (1988).

26. *Id.* § 1965 (1988).

27. *Id.* § 1961(5) (1988).

28. *See, e.g.*, Creative Bath Products, Inc. v. Connecticut Gen. Life Ins. Co., 837 F.2d 561 (2d Cir. 1988) (insurance company made fraudulent representations in selling policies), *cert. denied*, 109 S. Ct. 3241 (1989); Albany Ins. Co. v. Esses, 831 F.2d 41 (2d Cir. 1987) (company and proprietor induced insurance company to pay false claim); Haroco, Inc. v. American Nat'l Bank and Trust Co., 747 F.2d 384 (7th Cir. 1984) (defendants charged excessive interest rates on commercial loans), *aff'd*, 473 U.S. 606 (1985).

in criminal cases,[29] which has made it difficult to resist an equally broad reading in civil cases.[30]

The radical potential that RICO has to expand liability and "federalize" many seemingly routine cases has led to the effort by many courts to restrict RICO's breadth. In the Second Circuit, the court of appeals, in *Sedima, S.P.R.L. v. Imrex Co.*, ruled that the defendant had to have been convicted of racketeering acts before private litigants could claim those acts constituted a pattern of racketeering under RICO.[31] *Sedima* thus prevented the use of RICO by private litigants where the government either did not believe the conduct merited indictment or was unable to obtain a conviction. In this way, the Second Circuit prevented private litigants from essentially overriding the prosecutor's judgment. The Supreme Court, however, reversed *Sedima*, finding no basis in the statutory language for a prior conviction requirement.[32] Following the Supreme Court's decision in *Sedima*, the principal manner in which courts have attempted to restrict RICO's reach, with mixed success and many conflicting results, is to require a great deal more than simply two unrelated acts of fraud, or two acts in support of

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29. *See, e.g.*, United States v. Benevento, 836 F.2d 60 (2d Cir. 1987) (two predicate acts can be sufficient to form a pattern), *cert. denied*, 486 U.S. 1043 (1988); United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986) (pattern of racketeering activity can be established by predicate acts having the "common purpose of furthering a continuing criminal enterprise"), *cert. denied*, 483 U.S. 1006 (1987); United States v. Mazzei, 700 F.2d 85 (2d Cir.) (pattern and enterprise do not have to be independent of one another as long as proof satisfies both elements), *cert. denied*, 461 U.S. 946 (1983); United States v. Weisman, 624 F.2d 1118 (2d Cir.) (predicate acts of racketeering do not have to be specifically related), *cert. denied*, 449 U.S. 871 (1980). In *Indelicato*, the Second Circuit characterized footnote 14 of *Sedima* as dicta, and, therefore, the need for a *relationship* and *continuity* among different acts was not mandated. Hence, merely two predicate acts could be sufficient to find a pattern. United States v. Indelicato, 865 F.2d 1370, 1377 (2d Cir. 1989) (en banc).

30. This impulse is exemplified by the Second Circuit's decision in *Helmsley*, as the court relied on its analysis in *Indelicato*. Beauford v. Helmsley, 865 F.2d 1386, 1391 (2d Cir. 1989) (en banc). Also indicative of this tendency is City of New York v. Balkan, Inc., 656 F. Supp. 536 (E.D.N.Y. 1987) (two predicate acts sufficient to form a pattern in a civil RICO case).

31. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 503 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

32. *Sedima*, 473 U.S. at 493.

one fraudulent scheme, to constitute a "pattern."[33] This approach is based on the statement in footnote 14 of the Supreme Court's decision in *Sedima* that, while "two acts are necessary, they may not be sufficient"—what is required to constitute a pattern is *"continuity plus relationship"* among the various predicate acts.[34]

It is this "pattern" language, as set forth in greater detail below, that the Second Circuit recently was asked to construe in the *Beauford v. Helmsley* and *United States v. Indelicato* decisions.

II. THE EN BANC OPINIONS

A. Beauford v. Helmsley

Helmsley was a purported class action brought on behalf of approximately 8,000 residents of a Bronx rental apartment complex that was undergoing a conversion to condominiums. The plaintiffs claimed that the offering statement contained material misstatements and omissions that were not corrected in subsequent amendments.[35] Since the statement and the amendments were mailed to the 8,000-odd residents, the plaintiffs claimed that each such mailing was a separate act of mail fraud, which, collectively, constituted a pattern of racketeering activity.[36]

The district court dismissed the RICO claims holding that, "[e]ven under the most liberal reading of 'pattern,' the defrauding of potential buyers of condominium units by individually mailing them copies of a single fraudulent document and failing to remedy the fraud in subsequent amendments does not constitute a pattern of racketeering activity."[37]

A three judge panel of the Second Circuit affirmed the district court's ruling. The panel held that a single alleged scheme

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33. *See generally* Batista, *'Patterns' Under RICO—A Circuit-by-Circuit Review*, N.Y.L.J., Dec. 12, 1988, at 1, col 1.

34. *Sedima*, 473 U.S. at 496 n.14.

35. Beauford v. Helmsley, 650 F. Supp. 548, 550 (S.D.N.Y. 1986), *aff'd*, 843 F.2d 103 (2d Cir. 1988), *vacated en banc*, 865 F.2d 1386 (2d Cir. 1989).

36. *Helmsley*, 650 F. Supp. at 550.

37. *Id.* at 551.

to defraud tenants and other prospective buyers is not sufficient to permit a plaintiff to take advantage of RICO where the scheme, though "widespread," is "discrete," and, though "continuing," is " finite."[38]

A petition for rehearing by the entire court en banc was granted, however, and, with three judges dissenting, the en banc court vacated the panel's ruling. It stated that "a RICO pattern may be established without proof of multiple schemes, multiple episodes, or multiple transactions; acts that are not widely separated in time or space, nonetheless, may properly be viewed as separate acts of racketeering activity for purposes of establishing a RICO pattern."[39] Further, the *Helmsley* en banc court specifically found that "there can be no question that the thousands of alleged mail frauds here had the necessary interrelationship to be considered a pattern."[40] The test adopted by the court requires a complaint to contain allegations "from which it [can] be inferred that the acts of racketeering activity [are] neither isolated nor sporadic."[41]

B. United States v. Indelicato

Under the RICO statute, a jury convicted Anthony Indelicato of having executed three individuals in a Brooklyn restaurant upon instruction from the La Cosa Nostra "Commission." The victims were vying for control of the Bonanno family, and the Commission ordered their murders to end factional disputes and to realign the leadership of the Bonanno family. Relying on case law developed in civil actions under RICO, Indelicato argued that the practically simultaneous execution of the victims was, at most, a single criminal transaction or episode insufficient to establish a pattern of racketeering activity.[42]

The en banc Second Circuit unanimously rejected Indelicato's argument. The court concluded:

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38. *Helmsley*, 843 F.2d at 110.
39. *Helmsley*, 865 F.2d at 1391.
40. *Id.* at 1392.
41. *Id.* at 1391.
42. United States v. Indelicato, 865 F.2d 1370, 1372 (2d Cir. 1989) (en banc).

> proof of two acts of racketeering activity without more does not suffice to establish a RICO pattern; that the concepts of relatedness and continuity are attributes of activity, not of a RICO enterprise, and that a RICO pattern may not be established without some showing that the racketeering acts are interrelated and that there is continuity or a threat of continuity; *that a pattern may be established* without proof of multiple schemes, multiple episodes, or multiple transactions; and that racketeering acts that are not widely separated in time or space may nonetheless, given other evidence of the threat of continuity, constitute a RICO pattern.[43]

Thus, employing this standard, the court had "little difficulty" concluding that Indelicato's nearly simultaneous execution of three Bonanno family members, at the behest of the Commission, constituted a pattern of racketeering activity under RICO.[44]

III. ANALYSIS

The consequences of interpreting RICO in the manner chosen by the Second Circuit may be dramatic. The circuit court's effort, in cases such as *Indelicato*, to insure the broadest possible scope of potential criminal prosecutions under RICO necessarily also broadens the scope of private civil RICO litigation. Thus, it appears that, in order to affirm Indelicato's criminal conviction, the court felt compelled to sustain the sufficiency of the complaint in *Helmsley*.

By doing so, the court essentially appears to have abandoned its efforts to turn the tide of civil RICO lawsuits. Certainly, if the widespread mailing of an offering plan allegedly containing misleading statements can constitute a pattern, as appears to be the case, then virtually any public offering, tender offer, proxy context, or other securities transaction involving the widespread dissemination of written materials is now subject to suit under RICO. Under *Helmsley*, each separate mailing of a document allegedly containing a material misstatement or omission can be both an act of mail fraud and, where the documents relate to securities transactions, a securities fraud. Thus, the Second Circuit's approach is likely to result in the addition

43. *Id.* at 1381 (emphasis added).

44. *Id.* at 1384.

of RICO claims to virtually every prospective or pending suit that otherwise would be brought under the federal securities laws. We fail to see what purpose this serves in light of the general agreement that the sparse legislative history behind RICO's private right of action contains no evidence that Congress intended the statute to have this result.

Additionally, opening the floodgates to civil RICO claims also threatens settled jurisprudence under the securities laws. For example, Justice Rehnquist justified, in part, the adoption of the purchaser/seller rule[45] in *Blue Chip Stamps v. Manor Drug Stores*[46] on the ground that it was appropriate, if not essential, for the Court to impose limitations on the scope of the implied cause of action under Rule 10b-5[47] in order to deter vexatious litigation.[48] There is little doubt, however, that the plaintiff's allegations in *Blue Chip* stated a mail fraud violation, since the mail fraud statute,[49] and its wire fraud counterpart,[50] have no purchaser/seller limitation. Under *Helmsley*, therefore, it is likely that the conduct complained of in *Blue Chip* would state a treble damage RICO claim. Ironically, RICO was enacted five years before the Supreme Court issued its *Blue Chip* opinion. We find it hard to believe that the Court would have desired a different result if the plaintiff in *Blue Chip* had brought suit under RICO rather than Rule 10b-5. An expansive reading of RICO, however, coupled with emphasis on the mail and wire fraud statutes as predicate acts, threatens the salutary purposes of the purchaser/seller rule first adopted by Judge Augustus Hand in *Birnbaum*.[51]

Further, the literal reading of RICO suggested by the Second Circuit generally will defeat early motions to dismiss

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45. This rule (also known as the *Birnbaum* rule) holds that the appropriate plaintiff class for private damage securities actions based on Rule 10b-5 is limited to purchasers and sellers of securities. The rule first was enunciated in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

46. 421 U.S. 723 (1975).

47. 17 C.F.R. § 240.10b-5 (1988).

48. *Blue Chip*, 421 U.S. at 739-49.

49. 18 U.S.C. § 1341 (1982).

50. *Id.* § 1343 (1982).

51. Birnbaum v. Newport Steel Corp., 193 F.2d 461, 464 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

RICO claims and, instead, will require the discovery process to run its course, thereby forcing a trial where there are material factual issues in dispute. Given RICO's treble damage remedy, defendants will be under enormous pressure to settle disputes rather than risk an adverse judgment.

In addition, activity that otherwise might not give rise to federal claims at all is likely to be recast under a RICO mantle. The *Helmsley* case is a good example. There is no private right of action under the mail or wire fraud statutes. Accordingly, absent a RICO cause of action, the plaintiffs would have had only state law fraud claims with recovery limited to actual damages. After *Helmsley*, many parties with garden variety state law fraud claims will be able to invoke the jurisdiction of federal courts, and the potential awards of treble damages, attorneys' fees, and costs will give them substantial incentive for such invocation.

CONCLUSION

The contours of RICO's "pattern" element already are pending before the Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*[52] We are hopeful that, as in *Blue Chip*, the Court will not allow a federal fraud claim to have almost limitless application. The overwhelming backlog in the federal district courts, coupled with the prospect of treble damages, makes it particularly necessary to place limitations on the breadth of civil RICO. If the Court concludes that it cannot impose such a limitation, we encourage prompt congressional action.

ADDENDUM

In June of last year, the Supreme Court decided *H.J. Inc. v. Northwestern Bell Telephone Co.*[53] The Court reversed the Eighth Circuit Court of Appeals, which had affirmed the dis-

52. 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 487 U.S. 1203 (1988).
53. 109 S. Ct. 2893 (1989).

trict court's refusal to find a viable RICO claim. In trying to delineate what constitutes a "pattern," Justice Brennan noted that the conflict in the circuits subsequent to the *Sedima* decision was indicative of the arduous task facing the Court, i.e., to try to fashion a workable test under the nebulous concept of "pattern" as that word appears in the RICO statute.[54] It is questionable whether the Court completed its task, but it is clear that the Court refused to narrow the application of civil RICO.

H.J. Inc. arose out of the alleged unscrupulous pricing tactics of Northwestern Bell. The complaint asserted that, for several years, Northwestern Bell bribed the Minnesota Public Utilities Commission (MPUC) to obtain approval for excessive rates.[55] The petitioners, customers of Northwestern Bell, stated four claims based on section 1962 of RICO and a pendant state law claim.[56] In affirming the district court's dismissal of petitioners' claims, the Eighth Circuit concluded that petitioners alleged only a single predicate act, and, hence, their RICO claims were deficient.[57] In deciding what constitutes a "pattern," the Supreme Court cast aside the Eighth Circuit's re-

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54. *Id.* at 2899.

55. *Id.* at 2897. The various activities used to influence the MPUC commissioners were "cash payments to commissioners, negotiating with them regarding future employment, and paying for parties and meals, for tickets to sporting events and the like, and for airline tickets." *Id.*

56. *Id.* The RICO claims alleged that Northwestern Bell, in violating section 1962(a):

> derived income from a pattern of racketeering activity involving predicate acts of bribery and used this income to engage in its business as an interstate "enterprise." . . . [In addition, the claims alleged] that, through this same pattern of racketeering activity, respondents acquired an interest in or control of the MPUC, which was also an interstate "enterprise." . . . [Further,] petitioners asserted that respondents participated in the conduct and affairs of the MPUC through this pattern of racketeering activity, contrary to § 1962(c). Finally, . . . [it was] alleged that respondents conspired together to violate §§ 1962(a), (b), and (c), thereby contravening § 1962(d).

Id. at 2897-98.

57. H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648, 650 (8th Cir. 1988), *rev'd*, 109 S. Ct. 2893 (1989). The Eighth Circuit relied on its decision in Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986), where it had required proof of multiple and separate illegal schemes to constitute a viable RICO claim. *H.J. Inc.*, 829 F.2d at 650.

strictive test; but it also gave short shrift to both the courts, which had concluded merely that two predicate acts were sufficient to constitute a "pattern," and to amici, who argued "pattern" applied only to individuals or entities associated with organized crime or activities that operated in a similar manner.[58]

The Supreme Court did not articulate any new standard that is likely to limit the assertion of civil claims arising out of securities and other commercial transactions. In fact, the short answer given by the Court only reaffirmed what was said previously in *Sedima* in footnote 14,[59] i.e., the "factor of *continuity plus relationship* . . . combines to produce a pattern."[60] Furthermore, referring to legislative history, the Court restated that "continuity plus relationship" (or pattern) requires that the predicate acts "amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity."[61]

It is clear the Supreme Court was paying homage to the approach announced in *Sedima*. Yet, in grasping for some guidance as to the meaning of "pattern," Justice Brennan consulted the Oxford English Dictionary and noted: "A 'pattern' is an 'arrangement or order of things or activity.' "[62] He went on to state:

> The mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged." The text of RICO conspicuously fails anywhere to identify, however, forms of relationship or external principles to be used in determining whether racketeering activity falls into a pattern for purposes of the Act.[63]

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58. *H.J. Inc.*, 109 S. Ct. at 2899.

59. In footnote 14 of *Sedima*, the Supreme Court quoted the Senate Report and stated: "[t]he target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985).

60. *H.J. Inc.*, 109 S. Ct. at 2900 (quoting S. REP. No. 91-617, 91st Cong., 1st Sess. 158 (1969)).

61. *Id.* at 2901.

62. *Id.* at 2900.

63. *Id.*

Due to the lack of guidance in the statute, Justice Brennan concluded Congress did not envision a cramped application of RICO. Various "ordering principles" or "relationships between predicates" would be sufficient to constitute a "pattern."[64]

In fleshing out the "continuity plus relationship" standard, the *H.J. Inc.* Court indicated that the difficulty with the standard is not in defining a "relationship"[65] but, rather, in determining what constitutes continuing activity, i.e., "continuity."[66] The Court noted that " 'continuity' is both a closed and open-ended concept, referring either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition."[67] Thus, "continuity" is indeed a broad concept, which consequently means that a "pattern" of prohibited activity under RICO can be asserted easily; the flexibility of "continuity plus relationship" is precatory language for civil plaintiffs waiting in the wings to mold their allegations into acceptable claims.

Future civil RICO plaintiffs could find access to federal court limited, however, if the Supreme Court engrafted some type of limitation onto the "continuity plus relationship" test, such as a requirement that the alleged illegal activity be "characteristic . . . of organized crime in the traditional sense, or of . . . an association dedicated to the repeated commission of criminal offenses."[68] But, the Court has refused to limit the expansive reach of civil RICO because, despite "the merits and demerits of such a limitation, . . . [it] finds no support in the Act's text and is at odds with the tenor of its legislative history."[69] The Court further noted that Congress was well aware

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64. *Id.*

65. *Id.* at 2901. The Court stated:

> Congress defined . . . [the] pattern requirement solely in terms of the *relationship* of the defendant's criminal acts one to another: "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."

Id. (quoting 18 U.S.C. § 3575(e)).

66. *Id.*

67. *Id.* at 2902.

68. *Id.* at 2903.

69. *Id.*

that the statutory machinery of RICO would encompass activities other than those of traditional organized crime.[70]

In refusing to narrow the breadth of civil RICO, the Supreme Court conceded: "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for [the] Court."[71] Thus, the Second Circuit's approach to RICO as exemplified in *Helmsley* and *Indelicato* is still in good standing, with *H.J. Inc.* serving as the Court's imprimatur on a broad reading of civil RICO. Civil RICO's threat of supplanting securities laws and further burdening the overworked federal judiciary looms ominously unless Congress decides to act post haste.

70. *Id.*

71. *Id.* at 2905.