The RICO Pattern After *Sedima*—A Case For Multifactored Analysis

I. Introduction

"To suggest that the scope of Civil RICO is a current legal issue would be an absurd understatement."[1] The absurdity is evident, given the recent proliferation of suits under the Racketeering Influenced and Corrupt Organizations Act[2] (RICO) and the divergent treatment afforded its provisions in judicial opinions[3] and scholarly commentary.[4] At the heart of the controversy is the award of treble damages and attorneys' fees RICO provides to the successful plaintiff.[5] The debate rages over whether pri-

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[1] Griffin v. O'Neal, Jones & Feldman, Inc., 604 F. Supp. 717, 722 n.6 (S.D. Ohio 1985).

[2] 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

[3] *See, e.g.*, Medallion Television Enters. v. SelecTV, Inc., 833 F.2d 1360 (9th Cir. 1988); H.J. Inc. v. Northwestern Bell Tel., 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988); Furman v. Cirrito, 828 F.2d 898 (2d Cir. 1987); Skycom Corp. v. Telestar Corp., 813 F.2d 810 (7th Cir. 1987); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985); Alexander Grant & Co. v. Tiffany Indus., 770 F.2d 717 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

[4] *Compare* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982) (advocating broad application of the statute) *with Report of the Ad Hoc Civil RICO Task Force*, A.B.A. Sec. Corp., Banking and Bus. Law 1 (1985) [hereinafter *Ad Hoc Report*] (recommending legislative narrowing of scope).

[5] The Act provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor[e] in any appropriate United States district court and shall recover threefold the damages

vate plaintiffs are abusing the statute by invoking its liberal provisions in lawsuits not intended by Congress.[6]

The United States Supreme Court, in its landmark opinion, *Sedima, S.P.R.L. v. Imrex Co.*,[7] indicated that closer scrutiny of RICO's pattern requirement[8] might check the statute's potential for abuse.[9] Subsequently, lower courts have seized on *Sedima*'s "challenge"[10] and have begun constructing various approaches to analyzing the pattern requirement. At least three such approaches—an "expansive approach,"[11] a "restrictive approach"[12]

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he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c).

6 At least one judicial opinion questions whether "any self-respecting plaintiff's lawyer [would] omit a RICO charge these days?" Papagiannis v. Pontikis, 108 F.R.D. 177, 179 n.1 (N.D. Ill. 1985). *But see* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restraint*, 95 HARV. L. REV. 1101, 1105-15 (1982) (suggesting that restrictions on plaintiffs' causes of action are contrary to congressional intent).

7 473 U.S. 479 (1985).

8 *Id.* at 500. The activities prohibited by RICO must be undertaken through a pattern of racketeering activity. *See* 18 U.S.C. § 1962.

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

10 Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274, 1280-81 n.7 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 3211 (1987) (interpreting *Sedima* as a "challenge [to] the lower courts to develop a more rigorous interpretation of 'pattern' "). *See also* Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828, 833 (N.D. Ill. 1985) (*Sedima* created a "whole new ballgame" with respect to Civil RICO litigation); Lawaetz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1285 (D. V.I. 1987) (*Sedima* viewed as "universal starting point" for pattern analysis).

11 Under the expansive approach, a pattern is found whenever a defendant commits at least two predicate acts (such as mail or wire fraud) in furtherance of a single fraudulent scheme. *See* R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985). This approach is considered the most lenient standard under which a plaintiff can satisfy the pattern requirement. *See* Wing and Cailteux, *RICO: Patterns of Racketeering and Proposals for Reform*, in FOURTH ANNUAL RICO LITIGATION SEMINAR 563, 572 (1987). Under expansive approach analysis, courts have reasoned that Congress' use of broad terminology precludes a narrow interpretation of the statute. *See R.A.G.S.*, 774 F.2d at 1355. For further discussion of the expansive approach, *see infra* notes 103-26 and accompanying text.

12 To establish a pattern under the restrictive approach, plaintiff must show that defendant committed the predicate acts in separate schemes. *See, e.g.*, Ornest v. Delaware North Cos., 818 F.2d 651, 652 (8th Cir. 1987); Deviries v. Prudential-Bache Sec., 805 F.2d 326, 329 (8th Cir. 1986); Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986). Unlike the expansive approach, the restrictive approach advocates limited access to RICO's provisions. *See* Lawaetz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1286 (D. V.I. 1987). The rationale behind restrictive analysis is prompted by the concern that "RICO could effectively replace whole bodies of state statutory and common law." *See* Note, *supra* note 6, at 1103. For a further discussion of the restrictive approach, see *infra* notes 127-64 and accompanying text.

and a "moderate" or "multifactored approach"[13] have been identified. However, the analysis under each of these approaches is far from uniform and their application by the various courts often results in conflicting opinions.[14] The Supreme Court is now in a position to consider the merits of each approach, as certiorari has been granted to a post-*Sedima* pattern case.[15]

The purpose of this article is to suggest that the moderate approach be adopted as the uniform judicial standard in determining the existence of a RICO pattern. In so doing, the article will review the legislative development and judicial interpretation of the statute and analyze each of the three aforementioned approaches. The article will also suggest the inclusion of an additional criminal factor[16] as an element in the moderate approach analysis.

II. LEGISLATIVE HISTORY

RICO was enacted as part of the Organized Crime Control

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[13] The moderate approach rejects both the "two act" standard of the expansive approach and the "two scheme" standard of the restrictive approach. *See* Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986). Rather than adopt either bright-line standard, the moderate approach proceeds on a case-by-case basis and considers a number of factors in determining the existence of a pattern. *Id.* at 975. *See also* Skycom Corp. v. Telstar Corp., 813 F.2d 810, 818 (7th Cir. 1987); Tellis v. United States Fidelity & Guar. Co., 826 F.2d 477, 479 (7th Cir. 1986). Among the factors considered are the length of time over which the predicate acts were committed and the existence of common perpetrators or victims. *Morgan*, 804 F.2d at 975. For a further discussion of the moderate approach analysis, see *infra* notes 165-95 and accompanying text.

[14] *Compare R.A.G.S.*, 774 F.2d at 1350 (pattern existed in mailing two false invoices in furtherance of same fraudulent scheme); *Morgan*, 804 F.2d at 970 (commission of several acts of mail fraud over several years constituted pattern); *with Fulmer*, 785 F.2d at 252 (no pattern found in several acts of mail fraud in furtherance of same scheme to convert gas from pipeline); H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988) (multiple bribes over seven-year period did not qualify as a pattern).

[15] H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988). The court in *H.J. Inc.*, in line with other Eighth Circuit decisions, applied restrictive approach analysis in dismissing the RICO charges. *H.J. Inc.*, 829 F.2d at 650.

[16] The pattern requirement applies in both criminal prosecutions brought by the government and civil actions brought by private plaintiffs. *See* 18 U.S.C. § 1962 (1982 & Supp. IV 1986). Under moderate approach analysis, courts consider a number of elements in each case to determine whether a pattern exists. *See infra* notes 165-95 and accompanying text. This author suggests that in prosecutions by the government, courts should consider this "criminal factor" as indicium that a pattern does exist. For further discussion of inclusion of the criminal factor, see *infra* notes 224-32 and accompanying text.

Act of 1970.[17] Passage of the Act represented the culmination of years of congressional efforts to confront the growing and well-documented threat posed by organized crime.[18] In enacting the statute, Congress found that organized crime derived a major portion of its power and financing through such illicit operations as gambling, loan sharking, theft and other forms of societal exploitation.[19] Congress was particularly concerned that organized crime was using this power and money to infiltrate legitimate businesses and threaten the economic stability of the nation as a whole.[20] RICO was intended to be a powerful new tool to combat this infiltration, as the existing legal framework was "unnecessarily limited in scope and impact" to eradicate the threat.[21]

Accordingly, RICO contains broad language to ensure its effectiveness.[22] A plaintiff bringing a RICO suit must allege that a person,[23] through a pattern of racketeering activity,[24] has invested, acquired or participated[25] in the affairs of an interstate enterprise.[26] The statute makes no express reference to organized crime, as the term proved too difficult to define.[27] Moreover, Congress feared that RICO would be susceptible to constitutional attack if it attempted to outlaw membership in a

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17 Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986)).

18 For a chronological overview of the various precursors to RICO and earlier legislative efforts to combat organized crime, see *Ad Hoc Report*, *supra* note 4, at 72-122. *See also* Blakey, *supra* note 4, at 249-80.

19 In its statement of findings and purpose, Congress determined that:

> (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation.

84 Stat. at 922-23.

20 *Id.*

21 *Id.* at 923.

22 *See* 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986). *See also* Lewis v. United States, 445 U.S. 55, 61 (1980) (breadth of language reflects expansive legislative approach).

23 18 U.S.C. § 1961(3).

24 *Id.* § 1961(5).

25 *Id.* § 1962(a)-(c). Any persons conspiring to violate § 1962(a)-(c) are also subject to RICO's provisions. *See id.* § 1962(d).

26 *Id.* § 1962(c). In addition, a private party bringing a RICO action must allege injury by reason of this activity. *See id.* § 1964(c).

27 *See* Moran, *The Meaning of Pattern in RICO*, 62 CHI.[-]KENT L. REV. 139, 142-43 (1985).

specific organization such as the Mafia, La Cosa Nostra or some other syndicate normally associated with organized crime.[28] Therefore, Congress targeted an individual's conduct (i.e., racketeering activity) rather than his or her association with a particular group.[29]

The statute's breadth can be traced to the extensive list of conduct qualifying as "racketeering activity."[30] The definition of racketeering activity currently includes a variety of generic acts chargeable under state law, including murder, bribery, narcotics dealing, and gambling.[31] Also included are acts indictable under specific federal statutes, such as mail, wire and securities fraud.[32] These predicate acts are offenses commonly, although not exclusively, committed by participants in organized crime.[33] Thus, predicate-act offenders unassociated with organized crime are also subject to sanctions under RICO. Courts view this wide range of liability as a deliberate attempt by Congress "to avoid opening loopholes through which the minions of organized

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28 *Ad Hoc Report*, *supra* note 4, at 71. The *Ad Hoc Report*, however, did not identify the exact basis of this constitutional infirmity. One possible concern may have been that RICO would be attacked as violative of the constitutional ban on bills of attainder. *See* U.S. CONST. art. I, § 9, cl. 3. A noted constitutional scholar explained that:

> The essence of the bill of attainder ban is that it proscribes legislative punishment of specified persons—not of whichever persons might be judicially determined to fit within properly general proscriptions duly enacted in advance. Whether the persons improperly specified are being punished for conduct lawful when engaged in, and hence in violation of ex post facto clause principles, or by reason of their religious or political beliefs, and hence in violation of first amendment principles, or as a result of legislative distaste for them as individuals, the bill of attainder prohibition is fully applicable. But its application necessarily depends on the presence of improper *specification* by the legislature of the individuals singled out for punishment. If a law merely designates a properly general characteristic, such as employment in a regulated industry, and then imposes upon all who have that characteristic a prophylactic measure reasonably calculated to achieve a nonpunitive public purpose, no attainder may be said to have resulted from the mere fact that the set of persons having the characteristic in question might in theory be enumerated in advance and that the set is in principle knowable at the time the law is passed.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-4, at 643 (2d ed. 1988) (emphasis added).

29 *See* 18 U.S.C. § 1962(a)-(c) (enumerating prohibited activities). *See also* Moran, *supra* note 27, at 142-43.

30 *Id.* § 1961(1).

31 *Id.* § 1961(1)(A).

32 *Id.* § 1961(1)(B),(D).

33 *See* McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME L. REV. 55, 142-43 (1970).

crime might crawl to freedom . . . ."[34]

The commission of racketeering activity in itself does not trigger RICO's provisions. As noted, a party bringing a RICO suit must allege that the defendant's racketeering activities were conducted as part of a "pattern."[35] A pattern of racketeering activity requires the commission of at least two predicate acts,[36] one of which must occur after the effective date of the statute and the other within ten years of the commission of the post-enactment violation.[37]

As originally passed by the Senate, enforcement of RICO's provisions was left entirely to the government.[38] During debate in the House of Representatives, however, various amendments to the Senate bill were proposed. Included among these proposals was the addition of a private cause of action whereby treble damages and attorneys' fees would be awarded to successful plaintiffs.[39] Representative Steiger likened the private treble damages provision to the remedy found in anti-trust laws in that it could provide legal redress to individuals harmed by organized crime.[40] He suggested that such a remedy "would enhance the effectiveness of [the statute's] prohibitions."[41] Despite criticism that the private recovery provisions could be used to harass business competitors, the House passed this amended version of the

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[34] Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984). *See also* Schacht v. Brown, 711 F.2d 1343, 1353 (7th Cir. 1983) (determining that Congress intended statute to apply broadly), *cert. denied*, 464 U.S. 1002 (1983).

[35] 18 U.S.C. § 1962.

[36] *See id.* § 1961(5). The requirement of two acts does not mean that separate classes of violations (e.g., mail and wire fraud) must occur. Rather, two violations of the same statute may suffice. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985).

[37] 18 U.S.C. § 1961(5). For example, presume the first predicate act was committed on October 16, 1970, one day after the effective date of the statute. To satisfy § 1961(5), a second predicate act would have to have been committed on or after October 16, 1960 (within 10 years of the post-enactment violation).

[38] *See* S. 30, 91st Cong., 2d Sess., 115 CONG. REC. 769 (1969). However, earlier versions of the Senate bill contained private treble damage remedies in precisely the terms eventually adopted by both Houses. S. 1623, 91st Cong., 1st Sess. (1969); S. 2048, 90th Cong., 1st Sess. (1967); S. 2049, 90th Cong., 1st Sess. (1967). *See also* Blakey and Gettings, *Racketeering Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980) (reviewing RICO's legislative history).

[39] H.R. 19215, 91st Cong., 2d Sess., 116 CONG. REC. 31,914 (1970); H.R. 19586, 91st Cong., 2d Sess., 116 CONG. REC. 35,242 (1970).

[40] *Organized Crime Control Act: Hearings on S.30, and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520 (1970) (statement of Rep. Steiger).

[41] *Id.*

bill.[42]

On October 12, 1970, the Senate received the amended bill which included the private treble damages provision. Pressured by the end of the congressional session and with elections nearing,[43] the Senate concurred with the House's version of RICO without seeking a conference on the amendment.[44] Three days later, the President signed the Organized Crime Control Act of 1970 into law.[45]

The vast potential of Civil RICO remained largely unnoticed in the years immediately following its passage.[46] Eventually, however, the lure of treble damages and attorneys' fees began attracting the attention of private civil litigants.[47] The statute's extensive list of offenses qualifying as predicate acts provided plaintiffs with a limitless pool of possible defendants.[48] Moreover, the statute itself contained an express provision for liberal construction.[49]

III. JUDICIAL TREATMENT

A. Pre-Sedima Application

As RICO's popularity grew, so did concern that courts were extending its civil provisions to actions not intended by Congress.[50] Commentators charged that "almost none of the uses of the civil remedy has involved organized crime figures or the kinds of offenses committed by organized crime figures."[51] Complaints that private plaintiffs were abusing the statute's provisions

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42 116 CONG. REC. 35,363-64 (1970).

43 *See* Blakey and Gettings, *supra* note 38, at 1021.

44 116 CONG. REC. 36,296 (1970).

45 *Id.* at 37,264.

46 The report commissioned by the ABA found that "[o]f approximately 270 trial court decisions . . . [involving RICO through 1984], three percent were decided before 1980, two percent in 1980, seven percent in 1981, 13 percent in 1982, 33 percent in 1983 and 43 percent in 1984." *Ad Hoc Report*, *supra* note 4, at 55.

47 *See Ad Hoc Report*, *supra* note 4, at 21-23. *See also* Buffone, *Defending a Civil RICO Case: Motion, Defenses, Strategies and Tactics*, in PRACT. L. INST., CIVIL RICO 203, 206 (1986) (expanded use of RICO in criminal prosecution lead to increased awareness of its potential among civil litigants).

48 *See* 18 U.S.C. § 1962(a)-(c) (1982).

49 Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970). The statute provides that "the provisions of this title . . . shall be liberally construed to effectuate its remedial purpose." *Id.*

50 *See* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, *The Authority to Bring Private Treble-Damage Suits Under 'RICO' Should be Reformed*, in AICPA WHITE PAPER ON CIVIL RICO 1, 9 (1984) [hereinafter AICPA WHITE PAPER]. *See also* Buffone, *supra* note 47, at 205.

51 AICPA WHITE PAPER, *supra* note 50, at 9.

prompted the American Bar Association Section of Corporation, Banking and Business Law to appoint an ad hoc task force to review Civil RICO. The report issued by the task force identified the fear that "RICO was being used against legitimate businesses as a substitute for traditional private civil remedies" including those provided by federal securities and commodities laws and common law fraud actions proscribed under state law.[52] Given the statute's applicability to such garden-variety fraud actions, the task force concluded that RICO was "grossly overbroad"[53] and advocated both judicial restraint and legislative amendment.[54]

The debate over the proper scope of Civil RICO was also evident in early judicial opinions interpreting the statute.[55] The general principles and structure of the statute fueled the debate, as its broadly worded provisions seemed to belie the specific goal of combatting organized crime.[56] Resort to RICO's legislative history afforded the courts little direction since the private civil remedies were added without much congressional discussion.[57] It was this "clanging silence"[58] which occasioned a drastic split among the lower federal courts confronted with the issue.

Believing that private Civil RICO was being used in actions unrelated to the statute's expressed purpose, several jurisdictions undertook a more restrictive application of its provisions.[59]

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[52] *Ad Hoc Report*, *supra* note 4, at 23.

[53] *Id.* at 1.

[54] *See id.* at 9. Generally, the Task Force members believed that the courts, through judicial interpretation, were capable of avoiding the abuse of Civil RICO but had failed to do so. Thus, the report advocated a legislative amendment to narrow the scope of the statute. *Id.*

[55] Some district courts required a plaintiff to prove a separate racketeering injury. *See, e.g.*, Margolis v. Republic Nat'l Bank, 585 F. Supp. 595, 597 (S.D.N.Y. 1984); Guerrero v. Katzen, 571 F. Supp. 714, 718-19 (D.D.C. 1983); Harper v. New Japan Sec. Int'l, 545 F. Supp. 1002, 1006-08 (C.D. Cal. 1982). Other district courts did not require a plaintiff to allege a separate racketeering injury. *See, e.g.*, Wilcox v. Ho-Wing Sit, 586 F. Supp. 561, 568-69 (N.D. Cal. 1984); Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); Eisenberg v. Gagnon, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983).

[56] *See* Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 387 (7th Cir. 1981), *aff'd*, 473 U.S. 606 (1985) (court noted that RICO's use in "garden variety" fraud caused "extended debates in the federal courts").

[57] *See supra* notes 38-45 and accompanying text. *See also* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 492 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985). In *Sedima*, the court of appeals reviewed RICO's legislative history which revealed that relatively little material existed concerning the statute's private civil remedy. *Sedima*, 741 F.2d at 492.

[58] *Sedima*, 741 F.2d at 492.

[59] *See, e.g.*, Clute v. Davenport Co., 584 F. Supp. 1562, 1570 (D. Conn. 1984)

This narrowed view was prompted by concern that respected businesses such as American Express, Lloyds of London and Merrill Lynch were " 'stigmatized' by their 'indictment' at the hands of a 'one man grand jury.' "[60] Accordingly, these courts required a direct relation between a defendant's conduct and organized crime, and created substantial barriers to recovery under the statute.[61]

Judicial efforts to restrict the scope of Civil RICO reached its height in the Second Circuit's opinion in *Sedima, S.P.R.L. v. Imrex Co.*[62] In *Sedima*, a divided panel affirmed the district court's dismissal of RICO counts by erecting perhaps two of the most restrictive barriers to recovery.[63] The *Sedima* court held that the defendant must be convicted of the predicate acts[64] and that the plaintiff must have suffered some type of racketeering injury beyond that occasioned by the predicate acts themselves.[65] The impact of these requirements was great, as "[t]he judicial recognition of both [elements] virtually interred the private RICO action in the Second Circuit."[66]

Other jurisdictions, however, adhered to a more literal reading of the statute.[67] These courts believed that the legislature's

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("Congress meant to limit redress to injuries caused by racketeering"); Johnson v. Rogers, 551 F. Supp. 281, 285 (C.D. Cal. 1982) ("Congress . . . did not intend to provide an additional remedy for an already compensable injury"); Landmark Sav. & Loan v. Rhoades, 527 F. Supp. 206, 208 (E.D. Mich. 1981) (to bring RICO action, plaintiff must allege a "racketeering enterprise injury").

60 *Sedima*, 741 F.2d at 508 (Cardamone, J., dissenting).

61 *See id.* at 503 (separate racketeering injury and prior conviction of predicate acts required), *rev'd*, 473 U.S. 479 (1985); Bankers Trust v. Rhoades, 741 F.2d 511, 516 (2d Cir. 1984) (causal connection between defendant's conduct and plaintiff's injury required), *vacated*, 473 U.S. 922 (1985); Furman v. Cirrito, 741 F.2d 524, 527 (2d Cir. 1984) (separate racketeering injury required), *vacated*, 473 U.S. 922 (1985).

62 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

63 *See* Fitzpatrick and O'Neill, *Elements of a RICO Action*, in PRACT. L. INST., CIVIL RICO 9, 13 (1988) (interpreting the Second Circuit's ruling in *Sedima* as imposing two of the statute's most restrictive requirements).

64 *Sedima*, 741 F.2d at 503. The court stated that requiring the defendant to be convicted of the predicate acts would not "create a significant additional barrier." *Id.* Significantly, however, the current statute makes reference only to "chargeable" or "indictable" acts. *See* 18 U.S.C. § 1961(1)(a), (b) (1982 & Supp. IV 1986).

65 *Sedima*, 741 F.2d at 496.

66 Fitzpatrick and O'Neill, *supra* note 63, at 13.

67 *See, e.g.*, Schacht v. Brown, 711 F.2d 1343, 1353 (7th Cir. 1983), *cert. denied*, 464 U.S. 1002 (1983) (court unable to restrict scope of RICO in light of broad statutory language); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982) (beyond court's authority to restrict reach of RICO), *aff'd in part, rev'd in part*, 710 F.2d 1361 (8th Cir. 1983), *cert. denied sub nom.* 464 U.S. 1008 (1983). *See also* Note, *supra* note 6, at 1103 (judicial restrictions "contradict both the language of the statute and the express congressional intent").

deliberate use of comprehensive language required a broad interpretation of RICO.[68] Noting the inherent limitations imposed by the separation of powers doctrine, these courts considered it "beyond [their] authority to restrict the reach of the statute,"[69] as it was not the judiciary's "role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime."[70]

Representative of this approach was the Seventh Circuit's opinion in *Haroco, Inc. v. American National Bank & Trust Co.*[71] In *Haroco*, the appellate court reversed a district court decision dismissing plaintiff's RICO claims for failure to allege a separate racketeering injury.[72] In so doing, the *Haroco* court expressly addressed and rejected the Second Circuit's position in *Sedima* which imposed a similar requirement.[73] The *Haroco* court conducted its own review of the legislative history of the statute and found that the intentionally broad terminology used by Congress offered "few toeholds for courts seeking to narrow RICO's application."[74]

Faced with the contradicting positions taken by the lower courts,[75] the Supreme Court granted certiorari in *Sedima*.[76] The

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68 *See, e.g., Schacht*, 711 F.2d at 1354-55. The *Schacht* court found that "Congress chose to provide civil remedies for an enormous variety of conduct, balancing the need to redress a broad social ill against the virtues of tight, but possibly overly astringent, legislative draftsmanship. It is not for this court to reassess the balance struck." *Id.*

69 *Bennett*, 685 F.2d at 1064 (citing United States v. Turkette, 452 U.S. 576, 587 (1981)).

70 *Schacht*, 711 F.2d at 1361 (citing United States v. Turkette, 452 U.S. 576, 586-87 (1981)).

71 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam).

72 *Haroco*, 747 F.2d at 485.

73 *Id.* at 393-95 (citing Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 495-96 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985)). The *Haroco* court also discussed and rejected the Second Circuit's imposition of a separate racketeering injury in a post-*Sedima* opinion. *Id.* at 395-98 (citing Bankers Trust v. Rhoades, 741 F.2d 511 (2d Cir. 1984), *vacated*, 473 U.S. 922 (1985)).

74 *Id.* at 391.

75 Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 486 (1985). The Supreme Court noted "the variety of approaches taken by the lower courts" on the issues of separate racketeering injury and prior conviction. *Id.* at 486. *See, e.g.*, Sedima, S.P.R.L. v. Imrex, Co., 741 F.2d 482 (2d Cir. 1984) (separate injury and prior conviction required), *rev'd*, 473 U.S. 479 (1985); Bankers Trust v. Rhoades, 741 F.2d 511 (2d Cir. 1984) (separate racketeering injury required), *vacated*, 473 U.S. 922 (1985); *but see* Haroco, Inc. v. American Nat'l Bank & Trust, Co., 747 F.2d 384 (7th Cir. 1984) (rejecting separate injury requirement); Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983) (no prior conviction required).

76 Sedima, S.P.R.L. v. Imrex Co., 469 U.S. 1157 (1985). The Court also granted

Supreme Court directly addressed the requirements of prior criminal conviction and separate racketeering injury and found that neither was a prerequisite to recovery under RICO.[77] While conceding that private Civil RICO was "evolving into something quite different from the original conception of its enactors,"[78] the Court nonetheless held that the restrictions imposed by the Second Circuit were unsupported by the statute.[79] The majority viewed the imposed limitations as a form of "statutory amendment [in]appropriately undertaken by the courts."[80] Accordingly, the Supreme Court reversed the circuit court's decision.[81]

B. Sedima and Footnote 14

Although *Sedima* severely restricted judicial attempts to narrow RICO's scope, the Supreme Court's opinion hardly foreclosed all such efforts. The shared doubt over the increasingly divergent use of Civil RICO prompted the *Sedima* Court to hint at other avenues which could limit the statute's application.[82] The most promising of these avenues, at least from a judicial perspective, was for the courts to develop a more meaningful concept of "pattern."[83] Indeed, in its "now celebrated"[84] footnote 14, the *Sedima* majority focused on the pattern element when discussing the various requirements of a successful RICO action.[85]

In footnote 14, the majority undertook an analysis of the legislative history concerning the pattern requirement.[86] Justice White, writing for the majority, initially noted that a careful distinction must be made when reading the statute's definition of pattern.[87] He cautioned that the commission of two acts of rack-

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certiorari to a Seventh Circuit decision, American Nat'l Bank & Trust Co. v. Haroco, Inc., 469 U.S. 1157 (1985).

77 *Sedima*, 473 U.S. at 493, 498-500.

78 *Id.* at 500.

79 *Id.* at 498-500.

80 *Id.* at 500.

81 *Id.* In a succinct opinion relying heavily on its analysis in *Sedima*, the Supreme Court affirmed the lower court opinion in *Haroco*. *See* American Nat'l Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606 (1985) (per curiam). For an explanation of the Seventh Circuit's decision in *Haroco*, see *supra* notes 71-74 and accompanying text.

82 *See Sedima*, 473 U.S. at 500.

83 *Id.* The majority also suggested that legislative clarification of the pattern requirement might curb some of RICO's abuse. *Id.*

84 Batista, *7th Circuit Complicates RICO Defense*, Nat'l L.J., June 8, 1987 at 15, col. 1.

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

86 *Id.*

87 *Id.*

eteering activity did not necessarily establish the existence of a pattern.[88] Justice White explained that while RICO requires at least two such acts, the statute implies that two acts alone may not be sufficient.[89]

In support of his position, Justice White quoted RICO's legislative history which indicated that the target of the statute was not isolated or sporadic activity.[90] Rather, Justice White noted that Congress sought to eradicate related and continuing racketeering activity.[91] Relying on excerpts from the Senate hearings on RICO, Justice White concluded that "[i]t is this [dual] factor of *continuity plus relationship* which combines to produce a pattern."[92] In his dissenting opinion, Justice Powell quoted this same passage in support of his position that "something more"[93] than the mere commission of two predicate acts was necessary to establish a pattern.

The Supreme Court's decision in *Sedima* created a "whole new ballgame"[94] in the judicial interpretation of Civil RICO. Lower courts interpreted *Sedima* as a "challenge"[95] to develop a more meaningful concept of pattern in order to arrest the explosive growth of suits under the statute.[96] Consequently, footnote 14 became the universal starting point from which courts began to define the scope of Civil RICO.[97]

Although starting from this common source, subsequent treatment by the lower courts of the pattern requirement has hardly been uniform. The Supreme Court's commentary in footnote 14 is recognized as dictum, thereby tempering its jurisprudential impact.[98] Moreover, while encouraging lower courts to

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88 *Id.* (citing 18 U.S.C. § 1961(5) (1982)).

89 *Id.*

90 *Id.* (quoting S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969)).

91 *Id.*

92 *Id.* (quoting S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969)) (emphasis in original).

93 *Id.* at 527 (Powell, J., dissenting).

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

95 Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 785 F.2d 1274, 1280-81 n.7 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 3211 (1987).

96 H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 910 (D. Minn. 1987), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

97 *See, e.g.*, Lawaetz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1285 (D. V.I. 1987).

98 Ghouth v. Conticommodity Serv., Inc., 642 F. Supp. 1325, 1333 (N.D. Ill. 1986) (describing footnote 14 as "[p]ure *dictum*"). *See also* Selan, *Interpreting RICO's Pattern of Racketeering Activity Requirement After Sedima: Separate Schemes, Episodes or Re-*

refine the definition of pattern, the Court failed to provide any definitive standards by which to proceed.

In an attempt to adhere to the "cryptic"[99] message of footnote 14, at least three distinct and somewhat contradictory approaches to the judicial analysis of the pattern requirement have emerged. This article identifies the three as the expansive approach,[100] the restrictive approach[101] and the moderate approach.[102] Each of these approaches are discussed below.

IV. POST-*SEDIMA* APPROACHES

A. Expansive Approach

The definition of pattern under the expansive or lenient[103] approach appears to be the least influenced by the narrowing direction offered by footnote 14. Courts adopting this approach remain faithful to a literal interpretation of the statute, finding a pattern whenever at least two predicate acts are committed.[104] Under expansive approach analysis, courts interpret *Sedima* to require only that the acts be related in order to find a pattern.[105]

The Fifth Circuit's decision in *R.A.G.S. Couture, Inc. v. Hyatt*[106] was one of the first post-*Sedima* cases to apply expansive approach analysis. In *R.A.G.S.*, plaintiff corporation brought a Civil RICO action alleging that the defendants engaged in a scheme to defraud it of ownership of certain machinery. Plaintiffs alleged that the scheme was implemented by mailing fraudulent invoices on two separate occasions, thus satisfying the pattern requirement.[107] Defendants argued that the mere commission of two acts of mail fraud did not constitute a pattern, citing *Sedima* for the proposition that " 'while two acts are neces-

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lated Acts?, 24 CAL. W.L. REV. 1, 2 (1987-88) (noting that some courts have resisted the urge to rewrite RICO's requirements based on dictum in footnote 14).

99 *Ghouth*, 642 F. Supp. at 1333.

100 *See infra* notes 103-26 and accompanying text.

101 *See infra* notes 127-64 and accompanying text.

102 *See infra* notes 165-95 and accompanying text.

103 Wing and Cailteux, *supra* note 11, at 572.

104 *See, e.g.*, R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1354-55 (5th Cir. 1985); Bush Dev. Corp. v. Harbour Place Assoc., 632 F. Supp. 1359, 1364-66 (E.D. Va. 1986); Conan Properties v. Mattel, Inc., 619 F. Supp. 1167, 1170 (S.D.N.Y. 1985); Systems Research, Inc. v. Random, Inc., 614 F. Supp. 494, 497 (N.D. Ill. 1985).

105 *Systems Research*, 614 F. Supp. at 497.

106 774 F.2d 1350 (5th Cir. 1985).

107 *Id.* at 1352.

sary they may not be sufficient.' "[108]

The *R.A.G.S.* court was unpersuaded by the defendants' argument. The court interpreted *Sedima* to imply that two "isolated" acts do not constitute a pattern.[109] Finding the two mailings related, not isolated, the court held that the plaintiff had alleged a pattern of racketeering activity.[110] The court concluded its opinion by reiterating the *Sedima* Court's concern over the breadth of the statute but noted that it was without authority to narrow RICO's application.[111]

Both courts and commentators have criticized the *R.A.G.S.* court's use of expansive approach analysis for its exclusive reliance on the relatedness aspect of the pattern requirement.[112] Viewing this approach as paying "lip service"[113] to *Sedima*, critics contend that it "wholly ignores the concept of continuity [of criminal activity] emphasized by Congress and the Supreme Court."[114] Courts note that under the expansive approach, the pre-*Sedima* concern over the abuse of RICO survives, especially when mail and wire fraud allegations are used to sweep nearly all state and common law claims into federal court.[115]

Despite the *R.A.G.S.* decision, the continued application of the expansive approach is in serious doubt. Subsequent appellate decisions within the Fifth Circuit have questioned *R.A.G.S.*'s position on the pattern requirement and indicated that a different approach should be adopted. For example, in *Smoky Greenhaw Cotton Co. v. Merrill Lynch*,[116] the court noted *Sedima*'s encourage-

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108 *Id.* at 1355 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)).

109 *Id.* (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)).

110 *Id.* The court reversed the district court's order of summary judgment, finding that material questions of fact existed concerning the existence of two acts of mail fraud. *Id.*

111 The court stated that the policies decided by Congress and upheld by the Supreme Court could not be questioned at the appellate level. *Id.*

112 *See, e.g.*, Papagiannis v. Pontikis, 108 F.R.D. 177, 179 n.3 (N.D. Ill. 1985); *see also* Wing and Cailteux, *supra* note 11, at 572 (it "appear[s] unlikely that many courts today would follow this Fifth Circuit decision").

113 Chepiga & Khuzami, *The Evolving Concept of "Pattern" Under the Racketeering and Corrupt Organizations Act*, in PRACT. L. INST., CIVIL RICO 99, 122 (1988).

114 *Papagiannis*, 108 F.R.D. at 179 n.3; *see also* Note, *RICO: Limiting Suits by Altering the Pattern*, 28 WM. & MARY L. REV. 177, 199 n.131 (1986) (citing *R.A.G.S.* for the proposition that several post-*Sedima* courts failed to incorporate the continuity element into the pattern requirement).

115 Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 809 (E.D. La. 1986) (citing Medallion TV Enters. v. SelecTV, Inc., 627 F. Supp. 1290, 1297 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1988)).

116 785 F.2d 1274 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 3211 (1987).

ment "to develop a more rigorous interpretation" of the pattern requirement.[117] Acknowledging that the pattern issue was not properly before it,[118] the *Greenhaw* court nevertheless cited a series of opinions in other jurisdictions which rejected the expansive approach.[119] In remanding the case, the court instructed the district court to carefully consider the meaning of pattern should the issue be properly raised by the plaintiff.[120]

Two other Fifth Circuit appellate decisions also have questioned the *R.A.G.S.* holding. In *Cowan v. Corley*,[121] the court observed that both *Sedima* and *Greenhaw* supported a narrower interpretation of RICO.[122] Further, the court expressly stated that the commission of two illegal acts would not in every instance constitute a RICO pattern.[123] In *Montesano v. Seafirst Commercial Corp.*,[124] a different panel openly urged the Fifth Circuit to overturn en banc the *R.A.G.S.* court's interpretation of the pattern requirement.[125] The *Montesano* court adhered to the approach adopted in *R.A.G.S.* but only because a Fifth Circuit procedural rule prohibited one panel from overturning another, "regardless of how wrong the earlier panel decision may seem to be."[126]

B. Restrictive Approach

Courts view the restrictive approach as being "at [the other] end of the spectrum"[127] from the expansive approach analysis.

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117 *Id.* at 1280-81 n.7 (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)).

118 *Id.* At issue before the *Greenhaw* court was whether RICO claims were subject to arbitration. *Id.* at 1281. In answering the question in the negative, the court reasoned that "the public interest in the enforcement of RICO [is] more compelling than the policy favoring arbitration over litigation." *Id.* Subsequently, the Supreme Court determined that arbitration agreements under RICO are enforceable. *See* Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987), *reh'g denied*, 108 S. Ct. 31 (1987).

119 *Greenhaw*, 785 F.2d at 1280-81 n.7 (citing Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828 (N.D. Ill. 1985); Rojas v. First Bank Nat'l Assoc., 613 F. Supp. 968 (E.D.N.Y. 1985); Teleprompter of Erie Inc. v. City of Erie, 537 F. Supp. 6 (W.D. Pa. 1981)).

120 *Id.*

121 814 F.2d 223 (5th Cir. 1987).

122 *Id.* at 227.

123 *Id.*

124 818 F.2d 423 (5th Cir. 1987).

125 *Id.* at 426.

126 *Id.* at 425-26. The *Montesano* court proceeded to dismiss the RICO counts on other grounds. *Id.* at 426-27.

127 H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 912 (D. Minn. 1987), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

As its label indicates, the restrictive approach advocates a more limited access to RICO's provisions. The limitation is accomplished by stressing both prongs of the *continuity plus relatedness* factor referenced in *Sedima*'s footnote 14.[128] The relatedness prong focuses on the similarity that the predicate acts have to one another and is easily satisfied upon a showing of common perpetrators, common victims, similar motives or similar types of misconduct.[129]

The continuity prong is more problematic[130] and requires a showing that the pattern arose during the course of separate "episodes"[131] or "schemes."[132] The existence of separate episodes or schemes is established by showing that racketeering activity had previously occurred or that defendants participated in other criminal activities.[133] Under restrictive approach analysis, courts will dismiss pleadings that allege only one scheme regardless of the number of predicate acts involved.[134]

The earliest use of the restrictive approach occurred just

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[128] *Sedima*, 473 U.S. at 496 n.14 (emphasis in original). See *supra* notes 17-49 and accompanying text for a discussion of the legislative history of RICO.

[129] *H.J. Inc.*, 653 F. Supp. at 910-11 (citations omitted).

[130] *Id.* at 911.

[131] The terms "episodes" and "schemes" are among the "[n]ew terminology [which] has entered RICO lexicon in this post-*Sedima* age." Chepiga & Khuzami, *supra* note 113, at 120. An "episode" is defined by one commentator as "the total number of predicate or racketeering acts which coalesce at a single time in a single illegal transaction." *Id.*

[132] A "scheme" is "the total number of predicate or racketeering acts or criminal episodes committed in furtherance of a criminal objective involving the same participants as targets." *Id.* (citation omitted). Despite the attempt to distinguish between "episodes" and "schemes," courts discussing the restrictive approach appear to use the terms interchangeably. For example, the court in Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986), cited approvingly from an earlier decision requiring the existence of separate "episodes" to establish a pattern. *Id.* at 257 (citing Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828, 832 (N.D. Ill. 1985)). However, the *Fulmer* court ultimately dismissed the RICO charges on the basis that only one scheme was alleged. *Id.* at 258. In turn, a subsequent decision interpreted *Fulmer* as a "multiple episodes case." Lawaetz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1286 (D. V.I. 1987).

[133] *See* Holmberg v. Morrisette, 800 F.2d 205, 209 (8th Cir. 1986) (citing Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986)) (requiring previous activities or other criminal activities to constitute the schemes needed to establish a pattern), *cert. denied*, 107 S. Ct. 1953 (1987).

[134] *See Fulmer*, 785 F.2d at 258. *See also* H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648, 650 (8th Cir. 1987) (no pattern found despite allegations of multiple bribes over seven-year period), *cert. granted*, 108 S. Ct. 1219 (1988); Ornest v. Delaware N. Cos., 818 F.2d 651, 652-53 (8th Cir. 1987) (pattern not found in defrauding various vendors of sales commissions over eight-year period); Deviries v. Prudential-Bache Sec., 805 F.2d 326, 329 (8th Cir. 1986) (pattern did not exist despite several allegations of fraudulent securities sales over six-year period).

weeks after the Supreme Court's decision in *Sedima*.[135] In *Northern Trust Bank/O'Hare v. Inryco, Inc.*,[136] plaintiff brought RICO charges against a construction company for its alleged involvement in a kickback scheme during the construction of a warehouse.[137] The court, "virtually on a sua sponte basis," applied its interpretation of the analysis contained in footnote 14 to the facts of the case.[138] Although plaintiff alleged that defendant mailed at least two of the kickback payments, the court dismissed the RICO charges for failure to plead a pattern.[139] The court noted that the alleged acts occurred during the course of the *same* fraudulent scheme, thus leaving the continuity aspect of the pattern requirement unsatisfied.[140]

Although *Inryco* is recognized as "the most widely-cited case in support of the multiple episodes requirement,"[141] the Eighth Circuit opinion in *Superior Oil Co. v. Fulmer*[142] is currently the better placed authority.[143] The *Fulmer* court relied heavily on the analysis undertaken in *Inryco*, and agreed that it placed " 'a real strain on the language' " of the statute to find a pattern of racketeering in a single fraudulent effort.[144] In *Fulmer*, the court found that despite numerous allegations of mail and wire fraud, defendants' actions comprised a single scheme to convert gas from plaintiff's gas line.[145] The RICO charges were dismissed, as the plaintiff failed to allege that defendants had done the activities in the past or intended to engage in similar gas conversion efforts at other locations.[146]

Subsequent Eighth Circuit opinions observed that the *Fulmer* decision "thoroughly discussed" the parameters of the pattern

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135 *See* Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828 (N.D. Ill. 1985).

136 *Id.*

137 *Id.* at 829-30.

138 Batista, *supra* note 84, at 15, col. 3.

139 *Inryco*, 615 F. Supp. at 833.

140 *Id.* (emphasis in original).

141 Lawaetz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1286 (D. V.I. 1987).

142 785 F.2d 252 (8th Cir. 1986).

143 The *Inryco* decision was rendered by Judge Shadur sitting in the district court for the Northern District of Illinois. The Seventh Circuit subsequently rejected the restrictive approach analysis in favor of a more flexible inquiry. *See* Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986). Commentators now believe that *Inryco's* doctrinal underpinnings have been vitiated in the Seventh Circuit. *See* Batista, *supra* note 84, at 18, col. 3.

144 *Fulmer*, 785 F.2d at 257 (quoting Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828, 832 (N.D. Ill. 1985)).

145 *Id.*

146 *Id.*

requirement and often found their cases "legally indistinguishable" from its facts.[147] In *Deviries v. Prudential-Bache Securities, Inc.*,[148] plaintiff failed to satisfy the continuity prong of the pattern requirement in a RICO complaint brought against a securities broker.[149] Although plaintiff alleged that the defendant committed multiple fraudulent acts in churning plaintiff's account over a six-year period, the court found that "at worst" these acts comprised one scheme to generate excessive fees.[150] In another decision, the court determined that a single scheme existed in a complaint alleging the fraudulent skimming of receipts from various vending machines over an eight-year period.[151] Similarly, the Eighth Circuit also has held that a seven-year continuing effort to bribe members of a public utilities commission constituted a single scheme, and thus, did not satisfy the pattern requirement.[152]

As with expansive approach analysis, the restrictive approach has been subject to criticism. Critics assert that the multiple scheme requirement lacks statutory foundation, as the legislative history of RICO is devoid of any suggestion that a pattern requires separate criminal schemes.[153] The restrictive approach is considered an overreach of judicial authority and is likened to the artificial barriers erected by pre-*Sedima* courts uncomfortable with the breadth of the statute.[154] For this reason, critics believe that this approach violates *Sedima*'s admonishment "against placing reactionary judicial restrictions on Civil RICO plaintiffs."[155]

In addition to questioning its statutory basis, courts have criticized the restrictive approach for the practical effect it has on Civil RICO suits. The concern is that excessive focus on the con-

147 Holmberg v. Morrisette, 800 F.2d 205, 209-10 (8th Cir. 1986).

148 805 F.2d 326 (8th Cir. 1986).

149 *Id.* at 329.

150 *Id.*

151 *See* Ornest v. Delaware N. Cos., 818 F.2d 651, 652-53 (8th Cir. 1987).

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

153 *See* United States v. Ianniello, 808 F.2d 184, 192 n.16 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987); Lawaetz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1286 (D. V.I. 1987); United States v. Freshie Co., 639 F. Supp. 442, 445 (E.D. Pa. 1986).

154 *See Freshie*, 639 F. Supp. at 445 (finding restrictive approach analysis subject to same type of statutory attack as the requirements of prior conviction and separate racketeering injury). *See also* Bush Dev. Corp. v. Harbour Place Assocs., 632 F. Supp. 1359, 1366 (E.D. Va. 1986) (analogizing restrictive view of pattern requirement to interpretation rejected by the Supreme Court in *Sedima*).

155 *Lawaetz*, 653 F. Supp. at 1286-87 (citations omitted).

tinuity prong of the pattern requirement will allow defendants engaged in a large, ongoing (albeit singular) operation to automatically escape RICO liability.[156] The belief that in proper instances such monolithic operations are subject to RICO sanctions has prompted courts to reject the restrictive approach.[157]

Finally, courts have questioned whether the pattern standard set by the Eighth Circuit can be satisfied by a private RICO plaintiff. One judicial opinion interpreted *Fulmer* to require a plaintiff, in addition to his own injury, to allege that the defendant has harmed other parties through a separate scheme.[158] The Court posited that a private plaintiff would never have standing to present such proof, as criminal activity injuring third parties would not be relevant to his suit.[159] A RICO action, therefore, could never be sustained, and the statute's private civil remedies would be reduced to a nullity.[160]

Due to the increasing criticism, judges within the Eighth Circuit have begun to question the viability of the restrictive approach. In *H.J. Inc. v. Northwestern Bell Telephone Co.*,[161] two separate concurring opinions urged the circuit to undertake an en banc reconsideration of its pattern analysis.[162] Although "compelled" by precedent to agree with the majority, one of the concurring judges maintained that the multiple scheme requirement "strays from the statutory language of RICO."[163] This dissatisfaction expressed by Eighth Circuit judges undoubtedly played an important role in the United States Supreme Court's granting certiorari in *H.J. Inc.*[164]

C. *Moderate Approach*

Between the restrictive and expansive extremes lies a moderate approach which rejects the application of a definitive test to determine the existence of a RICO pattern. Courts adopting this approach acknowledge that the commission of two predicate acts

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

157 *Id.* at 975.

158 Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 808 (E.D. La. 1986).

159 *Id.* at 808-09.

160 *See id.* at 808.

161 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

162 *Id.* at 650-51 (McMillan, J., concurring); *id.* at 651 (Gibson, J., concurring).

163 *Id.* at 651 (Gibson, J., concurring).

164 108 S. Ct. 1219 (1988).

is not per se sufficient to satisfy the pattern requirement.[165] However, proponents of the moderate approach also refute the proposition that at least two separate schemes are always required.[166] Rather, courts adopting the moderate approach conduct a flexible inquiry into a number of factors to determine whether a pattern exists.[167]

Among the relevant factors considered are "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries."[168] Additional factors identified by courts include the commission of predicate acts as a regular part of the defendant's business and the method by which the acts are committed.[169] These factors do not represent an exhaustive list of elements to be considered nor must each be present in order to establish a pattern.[170] The moderate approach proceeds on a case-by-case basis with the pattern question determined upon consideration of all the alleged facts.[171] The enumeration of specific factors is intended to explain the underlying concept of the pattern issue and provide a more uniform adjudication in the future.[172]

Moreover, the moderate approach attempts to reconcile the inherent tension[173] between the continuity prong (which requires separateness of schemes) and the relatedness prong (where similarity of conduct is essential). Under the moderate approach

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

166 *Id.* at 975.

167 *Id.*

168 *Id.* These same factors have been identified in other moderate approach decisions although they are given different labels. For example, in Ghouth v. Conticommodity Serv. Inc., 642 F. Supp. 1325 (N.D. Ill. 1986), the court acknowledged the length-of-time factor by questioning whether the scheme was "open-ended or of very long duration." *Id.* at 1337. Similarly, the *Ghouth* court's consideration of an "independent harmful significance," for example, "whether *one* scheme harms *one* victim *once*," is analogous to a distinct injury inquiry. *Id.* (emphasis in original).

169 H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 915 (D. Minn. 1987), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988). The district court, although adhering to the Eighth Circuit's restrictive approach, enumerated several factors common to the moderate approach. *H.J. Inc.*, 653 F. Supp. at 915. The court also stated that arguments in support of the moderate approach would be persuasive if it were writing "on a clean slate." *Id.* at 914.

170 *See Morgan*, 804 F.2d at 975-76. *See also Ghouth*, 642 F. Supp. at 1337 (all factors are not needed to find a pattern).

171 *See Ghouth*, 642 F. Supp. at 1337. The court noted that "the pattern question remains one to be decided in teh [sic] context of a given case, upon consideration of all the facts alleged." *Id.*

172 *Id.*

173 *See* United States v. Freshie Co., 639 F. Supp. 442, 445 (E.D. Pa. 1986).

analysis, the court attempts to discern whether related acts are sufficiently separated in time and place to constitute continuing activity.[174] Although only one scheme might be alleged, related predicate acts may still satisfy the pattern requirement if the court finds adequate separation in time and place.[175]

The Seventh Circuit opinion in *Morgan v. Bank of Waukegan*[176] is most frequently cited as representing the moderate approach analysis.[177] In its opinion, the *Morgan* court acknowledged the conflicting views of the restrictive and expansive approaches arising in the aftermath of footnote 14.[178] It refused, however, to adopt either view and instead sided with those lower court opinions which "steered a middle ground between the two extremes."[179]

In *Morgan*, the court found that plaintiffs satisfied the pattern requirement by alleging several acts of mail fraud concerning an initial loan transaction and two separate foreclosure sales.[180] Plaintiff claimed that the foreclosure sales were fraudulent attempts to recover the collateral used to secure the loan.[181] Although categorizing defendants' conduct as an overall single scheme to defraud the plaintiffs, the court noted that the fraudulent mailings for the loan and subsequent foreclosure sales comprised at least three distinct acts which occurred over a four-year period. Accordingly, the court held that the pattern requirement had been satisfied.[182]

The *Morgan* court was able to reconcile two earlier post-*Sedima* Seventh Circuit opinions which had not directly embraced the moderate approach. In a post-hoc review of the facts of *Illinois Department of Revenue v. Phillips*,[183] the *Morgan* court found that a pattern existed by virtue of defendant's mailing nine monthly tax returns, with each return constituting a separate falsehood resulting in a separate underpayment.[184] Similarly, the

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174 *See Morgan*, 804 F. 2d at 977.

175 Graham v. Slaughter, 624 F. Supp. 222, 225 (N.D. Ill. 1985) (quoting United States v. Moeller, 402 F. Supp. 49, 57-58 (D. Conn. 1975)).

176 804 F.2d 970 (7th Cir. 1986).

177 Chepiga and Khuzami, *supra* note 113, at 124.

178 *Morgan*, 804 F.2d at 974.

179 *Id.* at 975.

180 *Id.* at 976.

181 *Id.* at 972.

182 *Id.* at 976.

183 771 F.2d 312 (7th Cir. 1985).

184 *Morgan*, 804 F.2d at 976 (citing Illinois Dep't of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985)). In *Phillips*, the state required the defendant to submit monthly returns stating gross receipts and to remit six percent of that sum as tax payment.

Morgan court found the denial of a RICO complaint in *Lipin Enterprises Inc. v. Lee*[185] consistent with its newly announced approach.[186]

The *Morgan* court concluded its discussion of the pattern issue by acknowledging the criticisms leveled at the moderate approach.[187] It conceded that a standard based on a case-by-case analysis was "less than precise" and would "be a bit rough around the edges at first."[188] However, the court rejected the claim that the approach would necessarily produce inconsistent results and refuted the analogy to a "know it when I see it" test.[189] The *Morgan* court believed that as the test was applied to a greater number of cases, its contours would become clearer and a uniform judicial approach would develop.[190]

Subsequent opinions in the Seventh Circuit have begun to flush out the contours alluded to in *Morgan*. In *Elliot v. Chicago Motor Club Insurance*,[191] the court of appeals affirmed the dismissal of RICO charges, finding no pattern to exist in a claim based on one insurance policy involving several parties injured in a single automobile accident.[192] Conversely, in *United States v. Garver*,[193] the court held that defendants' bribery of government officials to obtain reduced tax assessments on two separate real estate par-

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Phillips, 771 F.2d at 313. The nine underpayments occurred during the course of the same year, and resulted in an aggregate underpayment of $14,500. *Id.*

185 803 F.2d 322 (7th Cir. 1986).

186 *Morgan*, 804 F.2d at 976-77 (citing Lipin Enters. v. Lee, 803 F.2d 322 (7th Cir. 1986)). In *Lipin*, plaintiff brought a RICO suit alleging that defendants engaged in fraudulent business negotiations by submitting false financial statements and opinion letters. *Lipin*, 803 F.2d at 323. The *Morgan* court found that these facts did not satisfy the pattern requirement, as they were committed over a short period of time and were related to a single transaction involving only one victim. *Morgan*, 804 F.2d at 976-77. The *Morgan* court, like the court in *Lipin*, emphasized that merely because complex transactions provide numerous opportunities for fraudulent acts did not mean that the conduct was ongoing over a period of time sufficient to satisfy the pattern requirement. *Morgan*, 804 F.2d at 976-77.

187 *Morgan*, 804 F.2d at 977.

188 *Id.*

189 *Id.* The *Morgan* court was referring to the famous test for obscenity announced by Justice Stewart over twenty years earlier. *Id.* (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

190 *Id.*

191 809 F.2d 347 (7th Cir. 1986).

192 *Id.* at 350. Although five members of a family were injured in *Elliot*, the court found that the injuries were not distinct since they all arose from the insurer's failure to settle a single accident claim. *Id.* The court also noted that multiple allegations of mail fraud, although occurring over several years, would not necessarily satisfy the pattern requirement. *Id.*

193 809 F.2d 1291 (7th Cir. 1987).

cels satisfied the pattern requirement.[194] Other Seventh Circuit opinions, in light of *Morgan* and its related authority, have found it "easy to dispatch" the pattern issue in Civil RICO actions.[195]

V. ANALYSIS

A. *Adoption of the Moderate Approach*

The intensity of the current judicial debate over the pattern requirement rivals that of the pre-*Sedima* efforts to establish the proper scope of Civil RICO. The debate has lead not only to contrasting views among the circuit courts[196] but has spawned dissension among judges within the same circuit. In addition to encouraging forum shopping among Civil RICO plaintiffs, the failure to establish a uniform standard has left pattern analysis in a state of "sheer bedlam."[197]

Recognizing the problems caused by this lack of uniformity,

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194 *Id.* at 1300.

195 Skycom Corp. v. Telstar Corp., 813 F.2d 810, 818 (7th Cir. 1987). In *Skycom*, the court found that the defendants' allegedly fraudulent representations, resulting in the transfer of a single business opportunity, mirrored the circumstances in an earlier decision and dismissed the RICO complaint. *Id. See also* Tellis v. United States Fidelity & Guar., 826 F.2d 477 (7th Cir. 1986). In *Tellis*, the court noted a plethora of Seventh Circuit opinions attempting to give meaning to the pattern requirement. *Id.* at 478. It held that a pattern did not exist in the allegedly fraudulent settlement of a workman's compensation claim involving a single victim and a single injury occurring over a two-month period. *Id.*

196 *See, e.g.*, Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986) (adopting moderate approach); Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986) (adopting restrictive approach); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985) (adopting expansive approach).

197 Furman v. Cirrito, 828 F.2d 898, 909 (2d Cir. 1987) (Pratt, J., dissenting). In so concluding, the dissent in *Furman* listed over two dozen district court opinions in the Second Circuit which adopted contrasting approaches to pattern analysis. *Id.* at 908-09. *See, e.g.*, Continental Health Indus., Inc. v. Franklin & Joseph, Inc., 664 F. Supp. 719 (S.D.N.Y. 1987); Andreo v. Friedlander, 660 F. Supp. 1362, 1369-70 (D. Conn. 1987); *In re* Gas Reclamation, Inc. Sec. Litig., 659 F. Supp. 493, 514-15 (S.D.N.Y. 1987); Siegel v. Tucker, 658 F. Supp. 550, 554-55 (S.D.N.Y. 1987); United States v. Weinberg, 656 F. Supp. 1020, 1024-25 (E.D.N.Y. 1987); City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 544-45 (E.D.N.Y. 1987); Procter & Gamble Co. v. Big Apple Indus. Bldgs., 655 F. Supp. 1179, 1182-84 (S.D.N.Y. 1987); Corcoran v. American Plan Corp., No. CV 86-1729 (E.D.N.Y. Feb. 6, 1987).

The conflict within the Second Circuit prompted that court to order en banc review of two unrelated pattern cases. *See* United States v. Indelicato, No. 87-1085 (Apr. 1, 1988) (order granting en banc review); Beauford v. Helmsley, No. 87-7216 (Apr. 1, 1988) (order granting en banc review). The move is viewed as "highly unusual," as full court review in the Second Circuit is rare and the orders were entered sua sponte. *See Full Circuit Court to Rehear Arguments in Two Civil RICO Cases*, 199 N.Y.L.J. 1 (Apr. 7, 1988). Arguments were heard on June 13, 1988, with no opinion issued as of the date of this Comment.

the United States Supreme Court granted certiorari to the Eighth Circuit's case of *H.J. Inc. v. Northwestern Bell Telephone Co.*[198] In *H.J. Inc.*, the nation's highest court has the opportunity to expand on its cryptic reference to the pattern requirement as an avenue through which the proper scope of Civil RICO can be defined. With the benefit of a considerable number of decisions which accepted *Sedima*'s "challenge," the Supreme Court is now in a position to review the various pattern analysis approaches and refine or redirect those which are inconsistent with RICO's legislative mandate.

It is suggested that the Supreme Court adopt the moderate approach as the standard by which RICO pattern adjudication should proceed. In comparing the three existing approaches, the moderate approach represents the most faithful judicial interpretation of the statute. Moreover, a more flexible, multifactored approach is best suited to achieve the goals Congress set when passing RICO. Finally, the Supreme Court should also recognize the criminal nature of the case as a factor in determining the existence of a pattern.[199]

The expansive approach adopted by the various courts is an inappropriate standard because it perpetuates the pre-*Sedima* misinterpretations of the statute. In *Sedima*, the Court emphasized that RICO is not aimed at the isolated offender and that the pattern requirement demands more than simply counting predicate acts.[200] In interpreting the statutory definition of pattern, the Court found that while two acts are necessary, they may not be sufficient.[201] The expansive approach, however, ignores this important caveat and effectively applies RICO as though two acts *shall* be sufficient.

Accordingly, the expansive approach analysis establishes an artificially low threshold and exposes the statute to potential abuse. Rather than take *Sedima*'s cue in checking this abuse, courts applying the expansive approach do little more than mimic the Supreme Court's concern over the breadth of the statute and echo the Court's call for legislative amendment.[202] This

198 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

199 *See infra* notes 224-32 and accompanying text.

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

201 *Id.*

202 *See, e.g., R.A.G.S.*, 774 F.2d at 1355. Rather than attempt a more in-depth analysis of the pattern requirement, the *R.A.G.S.* court yielded to the "unfortunate" burden of an ill-defined congressional policy and reversed the dismissal of the RICO charges. *Id.*

approach is particularly inappropriate given the recent legislative efforts to amend the statute[203] and the continued proliferation of suits under RICO.

The restrictive approach is similarly flawed by its misinterpretation of *Sedima*'s teachings. Where the expansive approach is faulted for holding that two acts shall be a pattern, the restrictive approach errs by finding that two acts *shall not* be a pattern. The requirement of two separate schemes renders it impossible for two acts under any circumstances to constitute a pattern. Courts adopting the restrictive approach fail to recognize that the *Sedima* Court did not foreclose the possibility that two acts *might* constitute a pattern. Indeed, the relevant (and operative) term found in RICO's legislative history and cited by the Supreme Court is that two acts *may* not be sufficient to satisfy the pattern requirement.[204] The use of the permissive "may," rather than the mandatory "shall," must be viewed as deliberate, in light of the undeniable legal distinctions between the terms.

By avoiding either extreme, the moderate approach is not bound by a definitive standard of what shall or shall not constitute a pattern. The moderate analysis recognizes two acts as the statutory minimum and then determines whether these two acts are sufficient. Thus, the approach acknowledges the "implication"[205] raised by the *Sedima* majority that at least two acts are required but maintains that these two acts alone are not dispositive in establishing a pattern.

The flexibility of the moderate approach makes it the most capable of reaching the depths at which organized crime has infiltrated the economy. In enacting the Organized Crime Control Act of 1970, Congress found that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption . . . ."[206] The threat posed by organized crime is en-

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203 Recent legislative efforts to amend RICO have failed. *See* Strasser, *Prosecutors, Private Bar Find New Uses for RICO*, Nat'l. L.J., Sept. 28, 1987, at 18, col. 2-4 (discussing unsuccessful bills introduced in both the House of Representatives and the Senate aimed at defining RICO's scope). In light of these recent failures, commentators believe that "prospects for legislative action now have dimmed." *Id.* at col. 4. Given Congress' unwillingness to clarify the scope of Civil RICO, this author suggests that the judiciary continues to analyze the statute in its present form and develop a workable context for private actions.

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

205 *Id.*

206 The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84

hanced by its ability to infiltrate legitimate businesses and avoid detection and prosecution.[207] Congress drafted RICO broadly as its intended target is not readily identifiable nor amenable to succinct classification.[208]

Thus, RICO's application should not depend on a hermetic definition of pattern. A bright-line test is incapable of combating an enemy whose organizational and operational methods can be easily reformed to fall outside the scope of the statute. If a definitive test is adopted, organized crime targets would be able to immunize themselves from RICO liability simply by departmentalizing or specializing their activities to conform to a single scheme operation. To be effective, RICO adjudication must be able to respond to the chameleon-like changes of the statute's violators.

The flexibility of the moderate approach allows the courts to respond to the complex and transitional fronts on which organized crime threatens society. Significantly, no one factor is considered dispositive in a case. The relevant factors of a particular case are identified and considered in relation to all of the circumstances.[209] Further, the use of a flexible inquiry would avoid the confusion inherent in the post-*Sedima* lexicon of schemes, events and episodes.[210] Since these terms are less important in a multifactored analysis, a defendant could not escape RICO liability by playing the "semantical game"[211] of characterizing all of his conduct as a single scheme or episode.

It is through this same fact-sensitive inquiry that courts are also able to check plaintiff abuse of Civil RICO. For example, commentators have suggested that RICO is most susceptible to abuse when the underlying predicate acts involve mail and wire fraud.[212] The majority in *Sedima* found that the inclusion of wire and mail fraud "in particular" has lead to the "extraordinary"

Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986)).

207 *See* United States v. Turkette, 452 U.S. 576, 591-93 (1981).

208 *See* Lewis v. United States, 445 U.S. 55, 61 (1980). *See also supra* notes 17-49 and accompanying text (discussing legislative history of RICO statute).

209 *See* Morgan v. Bank of Waukegan, 804 F.2d 970, 976 (7th Cir. 1986); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 809 (E.D. La. 1986).

210 *See supra* notes 131-32 and accompanying text (defining "scheme" and "episode" in context of RICO).

211 Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426 (5th Cir. 1987).

212 *See, e.g.*, Bookin and Moritz, *Mail Fraud, Wire Fraud and Securities Fraud as Predicate Acts in Civil RICO Actions*, in PRACT. L. INST., CIVIL RICO 37, 75-77 (1988); *Ad Hoc Report, supra* note 4, at 57-59.

use of Civil RICO.[213] Other courts have been more graphic in their concern, noting that "if Civil RICO is a cancer, the inclusion of mail fraud as a predicate offense is the carcinogen."[214] The concern is based on the recognition that almost all substantial business transactions include at least two uses of the mail or telephone.[215] As a result, courts fear that RICO could effectively sweep a great majority of all commercial fraud cases into federal court.[216]

A multifactored analysis is best equipped to prevent RICO litigation of such "garden variety" fraud claims without diluting the effectiveness of the statute. As noted, no one factor is dispositive of a pattern under the moderate approach. Therefore, the sheer number of mailings or telephone calls is not conclusive in establishing a pattern of racketeering activity. Courts applying the moderate approach recognize the vital and recurring role that the mail and telephone play in everyday business transactions and can therefore closely scrutinize claims which allege the use of these instruments to satisfy the statutory requirement.[217] Potential abuse can be checked by acknowledging the unique characteristics that a particular predicate act might have in a given circumstance.[218]

Charges that such a fact-sensitive approach reduces the pattern requirement inquiry to a "know it when I see it" test are not justified.[219] In *Sedima*, the Court recognized that two acts alone may not be sufficient[220] and Justice Powell, in dissent, added that "something more"[221] was required to satisfy the pattern requirement. In another context, the Supreme Court has realized that the "something more" needed to place an activity within the pur-

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

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

215 *Id.*

216 *See* Medallion TV Enters. v. SelecTV, Inc., 627 F. Supp. 1290, 1297 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (1988); Frankart Distrib. v. RMR Advertising, Inc., 632 F. Supp. 1198, 1201 (S.D.N.Y. 1986).

217 *Morgan*, 804 F.2d at 976. In *Morgan*, the court noted "[t]he mere fact that the complexity of the transaction generates numerous pieces of paper and hence a greater number of possible fraudulent acts does not make these predicate acts ongoing over a period of time so as to constitute separate transactions that are distinct in time and place." *Id.*

218 Lipin Enters. v. Lee, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring) (mail and wire fraud recognized as "unique" among predicate acts since they may not indicate the requisite continuity of the underlying illegal activity).

219 *See supra* note 189 and accompanying text.

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

221 *Id.* at 527 (Powell, J., dissenting).

view of an ambiguous federal statute "might vary with the circumstances of the case."[222] Indeed, in discussing the merits of a civil rights claim, the Court noted that it is " '[o]nly by sifting facts and weighing circumstances can the non-obvious . . . conduct of [a defendant] be attributed its true significance.' "[223]

Organized crime's ability to infiltrate legitimate businesses and avoid detection is no less obvious and similarly requires a case-by-case, fact-sensitive inquiry. As adjudication continues under moderate approach analysis and the relevant factors are adequately addressed, a workable standard will emerge. Judicial treatment of the pattern requirement is not per se whimsical or defective simply because a bright-line test has not been imposed.

B. Criminality As A Factor

The statutory requirements of RICO apply equally to civil actions brought by private plaintiffs and to criminal prosecutions brought by the government.[224] Therefore, the pattern standard ultimately adopted by the Supreme Court will apply in both types of suits. This dichotomy has created what some commentators describe as a "tension"[225] between Civil and Criminal RICO.

The tension arises when judicial efforts to curtail civil litigation establishes a precedent which simultaneously narrows the scope of criminal prosecutions under RICO. For example, a jurisdiction concerned with the abuse of Civil RICO might adopt the restrictive approach analysis to limit private plaintiffs' resort to the statute. However, courts in the same jurisdiction would also be compelled to apply the restrictive approach in criminal prosecutions, making it equally difficult for the government to prevail. Conversely, a jurisdiction adopting the expansive approach analysis to facilitate criminal prosecutions would have to afford private civil plaintiffs this same liberal, and potentially abusive, access.

Unfortunately, neither the restrictive nor expansive ap-

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[222] Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982). In *Lugar*, the Court was called upon to interpret the provisions of 42 U.S.C. § 1983 (1982) to determine if defendant's actions had occurred under "color of state law." *Lugar*, 457 U.S. at 924. Without the benefit of a clear legislative definition of the phrase, the Court reviewed its prior decisions on the issue and found the determination of state action was "necessarily [a] fact-bound inquiry." *Id.* at 939.

[223] *Id.* (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).

[224] The sole distinction the statute makes between private plaintiff suits and government action is that the former must also allege injury by reason of the racketeering activity. *See* 18 U.S.C. § 1964(c) (1982).

[225] Chepiga & Khuzami, *supra* note 113, at 138.

proach is capable of accommodating these competing interests. Courts are faced with the untenable choice of limiting private access to RICO and impeding criminal suits or allowing criminal prosecutions to proceed unchecked at the expense of continuing the flood of civil actions.[226] Perhaps most alarming is the belief that the pattern analysis adopted by a particular circuit may depend on nothing more fortuitous than whether a criminal or civil case "[wins] the race to the appellate courthouse steps."[227]

In order to avoid this tension, the criminal nature of the case should be used as an additional factor under moderate approach analysis to indicate the existence of a pattern. The recognition of an additional factor is consistent with the overall flexible inquiry upon which the moderate approach is based. The list of factors identified in the decisions employing the moderate approach does not purport to be exhaustive. Moreover, the use of this criminal factor as evidence of a pattern can easily be justified.

In his dissent in *Sedima*, Justice Marshall pointed out that Congress recognized the restraining influence that prosecutorial discretion would have in bringing suits under the statute.[228] Justice Marshall cited the Department of Justice's written policy that RICO's drastic provisions required careful and reasoned application.[229] In a separate dissenting opinion, Justice Powell also recognized that Congress intended that some deference be given to criminal prosecutions under the statute.[230] He noted that "[i]t does not necessarily follow that the same principles [authorizing criminal prosecutions] apply to RICO's private civil provisions."[231] Thus, the use of criminality as a factor would afford the courts a principled method to preserve the vitality of government prosecutions without subjecting the statute to private abuse.

However, the mere fact that criminal action is brought should not be conclusive of the existence of a pattern. The criminal nature of a suit (as are length of time and type of predicate acts) is but one factor to be considered in moderate approach

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226 *Id.* at 139.

227 *Id.*

228 *Sedima*, 473 U.S. at 503 (Marshall, J., dissenting).

229 *Id.* at 502-03 (citing UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-110.200 (Mar. 9, 1984)).

230 *Id.* at 529 (Powell, J., dissenting). Similarly, the report prepared by the Task Force on Civil RICO on behalf of the American Bar Association refers to the Department of Justice Guidelines as an effective limitation on abuse of the statute. *See Ad Hoc Report*, *supra* note 4, at 20.

231 *Sedima*, 473 U.S. at 529 (Powell, J., dissenting).

analysis. Judicial opinions which adopt one pattern standard for criminal prosecution and another for civil actions are inherently flawed, and therefore, should not be followed.[232] Rather, the adoption of criminality as a non-dispositive factor would strike the appropriate balance between the competing concerns without exceeding judicial authority under the statute.

The moderate approach also allows the court to examine possible abuse of prosecutorial discretion when deciding RICO suits. Should the facts of a given case indicate such abuse exists, this approach provides for the lessening of the weight attributed to the factor of criminality. Accordingly, courts can define the proper scope of RICO without abdicating that responsibility to the prosecutor's office.

VI. CONCLUSION

Neither the expansive approach nor the restrictive approach is capable of satisfying the legislative goals set by Congress in enacting RICO. More appropriately, moderate approach analysis is capable of fulfilling RICO's legislative mandate without subjecting the statute to unmitigated abuse. The addition of criminality as a factor will further insure that RICO accomplishes its intended purpose.

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232 *See, e.g.*, Shopping Mall Investors v. E.G. Frances & Co., No. 84-1469 (S.D.N.Y. Jan. 30, 1987) (LEXIS, Genfed Library, Dist file). In *Shopping Mall*, the district court applied the restrictive approach's two-scheme requirement to a civil action, despite the application of the expansive approach analysis by an earlier appellate panel in a Criminal RICO prosecution. *Id.* (citing United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986)). The district court reasoned that in light of the excessive use of RICO in the civil context, the distinction in approaches was not only justified but required. *Id.*