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The Pattern Requirement of Civil RICO

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Peter thought, "It's lucky that the dikes are high and strong. Without these dikes, the land would be flooded and everything would be washed away."

Suddenly he heard a soft, gurgling noise. He saw a small stream of water trickling through a hole in the dike below. He couldn't believe his eyes. There in the big strong dike was a hole!

Peter slid down to the bottom of the dike. He put his finger in the hole to keep the water from coming through.

Peter knew that if he let the water leak through the hole in the dike, the hole would get bigger and bigger. Then the sea would come gushing through. The fields and the houses and the windmills would all be flooded.*

INTRODUCTION

The United States Supreme Court recently decided Sedima S.P.R.L. v. Imrex Co.,¹ which was brought under the private treble damages provision² of the Racketeer Influenced and Cor-

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¹ 105 S. Ct. 3275 (1985). Sedima was a 5-4 decision. A companion case, American Nat'l Bank and Trust Co. of Chicago v. Haroco, Inc., 105 S. Ct. 3291 (1985), was decided at the same time as Sedima. In Haroco, the United States District Court for the Northern District of Illinois had imposed the requirement of a distinct RICO-type injury. The United States Supreme Court, in affirming the Seventh Circuit’s reversal, held that a civil suit under the Racketeer Influenced and Corrupt Organizations (RICO) statute does not require “that the plaintiff have suffered damages by reason of the defendant’s violation of § 1962 through the prescribed predicate offenses,” but that an injury resulting from the predicate acts themselves was sufficient to support a claim. Id. at 3292. See also note 10 infra.

² Congress enacted RICO for the primary purpose of combating organized crime. The statute’s initial application was almost entirely confined to criminal prosecutions. See Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies, 53 Temp. L.Q. 1009, 1014-21 (1980). In addition to RICO’s criminal sanctions, Congress provided a civil cause of action in § 1964(c). See also note 20 infra.
rupt Organizations Act (RICO). Sedima, the first civil RICO action that the Supreme Court has addressed, gave private plaintiffs the green light through an expansive interpretation of RICO's statutory language as well as its application to civil actions. To the dismay of potential civil RICO defendants, many of whom are legitimate businesses, the Sedima majority eliminated the two grounds that lower courts commonly employed in dismissing private RICO claims. The Sedima holding reversed the Second Circuit's restrictive interpretation that civil RICO claims require both a previous conviction of the predicate criminal violations and an allegation of a specific RICO-type injury. The removal of these two hurdles for civil RICO plaintiffs has led many observers to fear a flood of civil RICO actions.

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4 A private plaintiff under RICO is "[a]ny person injured in his business or property by reason of a violation of section 1962." See note 20 infra.

5 See 105 S. Ct. 3275.

6 Private RICO actions have been instituted by or against such companies as Chase Manhattan Bank, General Foods, Shearson/American Express, International Business Machines, and Rockwell International Corp. See Siegel, "RICO" Running Amok in Board Rooms, L.A. Times, Feb. 15, 1984, at l, col. 4.

7 See notes 9-11 infra and accompanying text.

8 741 F.2d 482 (2d Cir. 1984).

9 The Sedima majority found no basis in either the statutory language or the legislative history for imposing a criminal conviction requirement as a condition precedent to recovery in a civil RICO action: "Had Congress intended to impose this novel requirement, there would have been at least some mention of it in the legislative history, even if not in the statute." 105 S. Ct. at 3282.

10 The Sedima majority rejected any contention that a civil RICO action must allege and prove a RICO-type injury in addition to an injury caused directly by one of the proscribed racketeering acts: "If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)." Id. at 3285.

11 The Sedima dissent expressed concern that the majority's decision would "make compensable under civil RICO a host of claims that Congress never intended to bring within RICO's purview." Id. at 3293 (Powell, J., dissenting). John M. Finch, Chairman of the National Association of Manufacturers Task Force on RICO, was quoted as saying, "The original beneficiaries of RICO were legitimate business and legitimate labor. The irony is that this shield has become a sword against the original beneficiaries. It's turned out to be..."
Nevertheless, the dike holding back this flood of litigation has not been destroyed totally. The remaining "finger in the dike" appears in Sedima as a footnote to the majority opinion and in Justice Powell's separate dissent. The issue left unresolved, and thus open to further judicial construction, is the "pattern of racketeering activity" element required for either conviction or recovery under RICO. This Comment examines and analyzes the pattern requirement and attempts to both determine the present judicial construction of the term pattern and predict what possible limiting effect this term may have in future civil RICO actions. This Comment discusses the statutory language requiring a pattern, the legislative history surrounding the term's inclusion, the judicial interpretation of pattern prior to Sedima, and Sedima's effect on the requirement.

I. A Civil RICO Cause of Action

To establish and maintain a private civil RICO action,
a plaintiff must allege that a person has engaged in a pattern of reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

The substantive requirements for a violation of 18 U.S.C. § 1962 follow:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1961(3) provides: "'person' includes any individual or entity capable of holding a legal or beneficial interest in property."

18 U.S.C. § 1961 (5) provides: "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."
of racketeering activity,23 through which the defendant, directly
or indirectly, acquired or maintained an interest in an enterprise.24

23 18 U.S.C. § 1961(1) provides:
(1) "racketeering activity" means (A) any act or threat involving murder,
kidnapping, gambling, arson, robbery, bribery, extortion, dealing in ob-
scene matter, or dealing in narcotic or other dangerous drugs, which is
chargeable under State law and punishable by imprisonment for more than
one year; (B) any act which is indictable under any of the following
provisions of title 18, United States Code: Section 201 (relating to bribery),
section 224 (relating to sports bribery), sections 471, 472, and 473 (relating
to counterfeiting), section 659 (relating to theft from interstate shipment)
if the act indictable under section 659 is felonious, section 664 (relating to
embezzlement from pension and welfare funds), sections 891-894 (relating
to extortionate credit transactions), section 1084 (relating to the transmission
of gambling information), section 1341 (relating to mail fraud), section 1343
(relating to wire fraud), sections 1461-1465 (relating to obscene matter),
section 1503 (relating to obstruction of justice), section 1510 (relating to
obstruction of criminal investigations), section 1511 (relating to the obstruc-
tion of State or local law enforcement), section 1951 (relating to interference
with commerce, robbery, or extortion), section 1952 (relating to racketeer-
ing), section 1953 (relating to interstate transportation of wagering para-
phernalia), section 1954 (relating to unlawful welfare fund payments), section
1955 (relating to the prohibition of illegal gambling businesses), sections
2312 and 2313 (relating to interstate transportation of stolen motor vehicles),
sections 2314 and 2315 (relating to interstate transportation of stolen prop-
erty), section 2320 (relating to trafficking in certain motor vehicles or
motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband
cigarettes), sections 2421-24 (relating to white slave traffic), (C) any
act which is indictable under title 29, United States Code, section 186
(dealing with restrictions on payments and loans to labor organizations),
(D) any offense involving fraud connected with a case under title II, fraud
in the sale of securities, or the felonious manufacture, importation, receiv-
ing, concealment, buying, selling, or otherwise dealing in narcotic or other
dangerous drugs, punishable under any law of the United States, or (E)
any act which is indictable under the Currency and Foreign Transactions
Reporting Act.

24 18 U.S.C. § 1961 (4) provides: "‘enterprise’ includes any individual, partner-
ship, corporation, association, or other legal entity, and any union or group of individuals
associated in fact although not a legal entity.” For a discussion of the enterprise
element, see Note, Racketeer Influenced and Corrupt Organizations: Distinguishing the
"Enterprise" Issues, 59 Wash. U.L.Q. 1343, 1345 (1981). This issue also has been
litigated extensively in the courts. See, e.g., United States v. Turkette, 452 U.S. 576,
580-85 (1981); Bennet v. Berg, 685 F.2d 1053, 1060-61 (8th Cir. 1982), adopted in
rehearing en banc, 710 F.2d 1361 (1983); United States v. Computer Sciences Corp., 689
F.2d 1181, 1190-91 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); United States v.
Bledsoe, 674 F.2d 647, 661-65 (8th Cir.), cert. denied, 459 U.S. 1040 (1982); United
States v. Hartley, 678 F.2d 961, 987-90 (11th Cir. 1982), cert. denied, 459 U.S. 1183
(1983); United States v. Mazzei, 700 F.2d 85, 87-91 (2d Cir. 1981), cert. denied, 461
In addition, activities of the enterprise must involve or affect interstate commerce, and the plaintiff's business or property must have suffered an injury resulting from the proscribed behavior.

A pattern of racketeering activity must consist of "at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." The statute does not, however, attempt to define further the term pattern.

Because the statute lacks a precise definition of the term pattern, this requirement has been at issue in several RICO cases. This lack of a definition raises three important questions: (1) whether two predicate acts committed within ten years are always sufficient to form a pattern, (2) whether there must be any relationship between the two predicate acts, and (3) whether there is a pattern of activity when the two or more predicate acts are part of a single criminal episode or transaction. Examined apart from any judicial construction, the most information that can be gleaned from the statutory language is that a pattern involves some quantitatively minimum threshold of activity, i.e., "at least two acts."

II. LEGISLATIVE HISTORY

RICO was directed expressly toward "the eradication of organized crime in the United States" and was drafted broadly to

25 The requirement that the proscribed activities affect interstate commerce is not a difficult element to satisfy. See, e.g., Patton, supra note 19, at nn.194-204 and accompanying text.

26 See 18 U.S.C. § 1964(c), supra note 20. This requirement is commonly called RICO's civil standing requirement. The Sedima Court addressed the main issues that civil standing raises. See 105 S. Ct. at 3284-88 (Sedima greatly increased the field of plaintiffs having standing to bring a civil RICO suit.).


28 See, e.g., notes 52-99 infra and accompanying text.


30 See notes 73-82 infra and accompanying text (discussing the separate criminal acts requirement in the definition of pattern).


33 See note 3 supra (explaining RICO's legislative intent).
effect this objective.\footnote{34} As a result of the statute's expansive wording, courts have rejected the theory that RICO applies only to defendants who have connections with organized crime.\footnote{35} Congress' focus in addressing RICO liability was on the defendant's conduct rather than on some association with organized crime.\footnote{36} In discussing the RICO statute, the Senate Judiciary Committee report\footnote{37} indicates that the pattern of racketeering activity concept is fundamental to the statute's application.\footnote{38} Although the Act was intended to be construed liberally, there is evidence that a wide open construction of the term pattern was not intended. The Senate Judiciary Committee report stated that a pattern is "not defined as two or more acts of racketeering activity, but requires them."\footnote{39} Because the legislature chose the word pattern to indicate the required level of racketeering activity, rather than "event" or "occurrence," RICO impliedly was not intended to punish isolated activities. The legislative history clearly supports this interpretation.\footnote{40}

\footnote{34} Congress expressly stated that the provisions of RICO "shall be liberally construed to effectuate its remedial purposes." OCCA § 904(a), at 947.

\footnote{35} See, e.g., Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983), cert. denied, 104 S. Ct. 1280 (1984). The Moss court believed that a broad application of RICO was necessary. "The language of the statute ... does not premise a RICO violation on proof or allegations of any connection with organized crime." Id. at 21. See also Schacht v. Brown, 711 F.2d 1343, 1353 (7th Cir.) (RICO's application "is not restricted to organized crime"), cert. denied, 464 U.S. 1002 (1983).


\footnote{38} The Report of the Senate Judiciary Committee stated:

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


\footnote{39} Id.

\footnote{40} See id. See also Organized Crime Control Hearings Before Subcomm. No. 5 of the House Judiciary Comm., 91st Cong., 2d Sess. (1970) [hereinafter cited as House Hearings]. Will R. Wilson, Assistant Attorney General, Criminal Division, when asked about incorporating a stricter pattern requirement into the RICO statute, answered:
Some legislators intended to require a relationship between the predicate acts themselves. The continuity of the proscribed action was also a factor that Congress considered. The record establishes, however, that these concepts were either not firmly fixed in the minds of all legislators or that there may have been some confusion as to the definition of pattern.

The legislative history is quite clear that sporadic or isolated acts were not within RICO's intended scope. While the intention that there be a relationship between the predicate acts and some continuity of action is less evident, the record indicates that, at

"We think that those additional requirements would make it [RICO] virtually unenforceable. The burden of proof [with respect to the pattern of racketeering activity] will be difficult at best." *Id.* at 664. This statement indicates that the pattern requirement was intended to be construed narrowly. Immediately following Mr. Wilson's remarks, a question was asked about the absence of a stated requirement of some connection between racketeering acts. In response, Ronald R. Gainer, Deputy Chief of the Justice Department's Legislative and Special Projects Section, said: "It [the RICO statute] says 'pattern,' and pattern has to be construed with its normal meaning.... If they are not related they would not form a pattern." *Id.* at 665. During these hearings, the Bar Association of the New York City Committee on Federal Legislation, comparing RICO to the antitrust statutes, expressed concern that the pattern definition might be too broad and thus not give effect to congressional intent: "The weakness of the 'pattern of racketeering activity' definition is to provide that any 2 prohibited acts ... constitute a pattern. Two antitrust violations ... do not make a hardened antitrust violator, let alone a pattern of antitrust activity." *Id.* at 401.

Sen. McClellan, a leading proponent of the Act, stated: "The term 'pattern' itself requires the showing of a relationship.... So, therefore, proof of two acts of racketeering activity without more, does not establish a pattern...." 116 CONG. REC. 18,940 (1970) (quoting S. REP. No. 617).

See id. Congress seemed concerned that two acts occurring very close in both place and time might be construed as a pattern, when in reality the acts were a single transaction. The continuity element contemplates action occurring over some prolonged period. See generally notes 73-82 infra and accompanying text (discussing judicial construction of the continuity element).

Compare 116 CONG. REC. 35,295 (1970) (remarks of Rep. Poff: "A 'pattern of racketeering activity' means simply two or more acts of racketeering activity, one of which ... must have occurred subsequent to the enactment of the title.") with 116 CONG. REC. 35,193 (1970) (remarks of Rep. Poff: "[R]acketeering activity—at least two independent offenses forming a pattern of conduct....") and House Hearings, *supra* note 40, at 665 (expressing concern that the application of the statutory language might be inconsistent). Senator McClellan, however, clearly contemplated that both a "relationship" and a "continuity" would be inherent in the pattern requirement. See also note 38 *supra*.

See notes 37-42 *supra* and accompanying text (discussing the legislative history of RICO's pattern requirement).
the very least, some legislators implicitly recognized this requirement.\footnote{See notes 37-43 supra and accompanying text (discussing legislative history of RICO's pattern requirement and the lack of a consensus as to what the term "pattern" meant).}

III. Judicial Interpretation of the Pattern Requirement Prior to Sedima

The absence of explicit congressional intent on the face of the statute has forced courts to attempt to construct a workable definition of the pattern requirement. The judiciary has dealt primarily with two areas of ambiguity: whether the predicate acts must be related and whether there must be separate criminal episodes.\footnote{See notes 47-103 infra and accompanying text.}

A. The Relationship Requirement

Courts have disagreed whether a connection between the predicate racketeering acts is required.\footnote{Compare notes 52-63 infra (cases in which the courts have required some type of relationship between the predicate acts) with notes 64-69 infra (cases in which no relationship between the predicate acts was required).} Furthermore, courts holding that a relationship must be present have disagreed as to exactly what kind of relationship is required.\footnote{See notes 51-63 infra and accompanying text (discussing cases requiring differing degrees of relationship before a pattern can be found).} Some courts have held that any relationship between the predicate acts is sufficient to support a pattern.\footnote{See notes 61-62 infra and accompanying text (discussing cases requiring a minimal relationship between acts).} Others have required that the predicate acts be related in the furtherance of a common scheme or objective.\footnote{See notes 51-59 infra and accompanying text.} These issues have been addressed most often in a criminal rather than a civil context.\footnote{Compare notes 52-69 infra (Many criminal cases have dealt with isolated acts of racketeering, and the lower courts have struggled to discern when these acts form a pattern.) with notes 86-103 infra (In civil RICO cases, the courts have not been forced to address instances of isolated racketeering acts and so have assumed generally that a pattern was present.).}

\footnote{409 F. Supp. 609 (S.D.N.Y. 1973).}
fending the RICO statute against a void-for-vagueness attack, suggested that there is a “relationship” requirement implicit in the term pattern. The Justice Department urged that the proscribed acts must be part of a common scheme. The Stofsky court held that the statute is not unconstitutionally vague and that pattern means “more than accidental or unrelated instances of proscribed behavior,” thereby adopting the Justice Department’s construction of the term.

Several courts followed Stofsky’s lead and required that the activities be related through a common scheme or plan. Some functional standards for the application of a common scheme requirement were set out in United States v. Dean. The Dean court strived to discern situations in which more than one distinct pattern, and thus more than one RICO offense, arise from numerous, varied racketeering acts. To aid in this determination, the Dean court listed five factors to be considered in determining a pattern: (1) the time the various activities took place, (2) the persons involved, (3) the statutory offenses, (4) the nature and scope of the activities, and (5) the places where the activities occurred. Although decided prior to Dean, Stofsky relied on some of these factors in determining the requisite common scheme de-

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53 The Justice Department stated that this relationship was “best characterized as requiring: that those offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts.” Id. at 613.
54 See id.
55 Id.
56 See id. at 614. See also note 53 supra.
57 See, e.g., United States v. Bascaro, 742 F.2d 1335, 1362 (The court approved jury instruction was: “that the offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern, and not merely a series of disconnected acts.”) (emphasis added in opinion), reh’g denied, 749 F.2d 733 (11th Cir. 1984), cert. denied, 105 S. Ct. 3476 (1985); United States v. Brooklier, 685 F.2d 1203, 1222 (9th Cir. 1982) (“The pattern may be established by showing two or more acts that constitute offenses, conspiracies or attempts of the requisite type, as long as the defendant committed two of the acts and both of them were connected by a common scheme, plan or motive.”), cert. denied, 459 U.S. 1206 (1983); United States v. Starnes, 644 F.2d 673, 678 (7th Cir.) (“When two or more of those acts are connected to each other in some logical manner so as to effect an unlawful end, a pattern of racketeering exists.”), cert. denied, 454 U.S. 826 (1981).
59 Id. at 788.
60 Stofsky was decided in 1973, eight years prior to Dean.
lationship. While not explicitly requiring a common objective, other courts have required a relationship between the racketeering activities before finding a pattern. Presumably, courts that require some relationship between the predicate RICO offenses would dismiss a claim based on activities far removed in both substance and time.

Many courts, however, have rejected the predicate acts relationship concept and have adopted a lower standard. In *United States v. Elliott*, the Fifth Circuit held that a criminal RICO action does not require any relationship between the predicate racketeering acts other than their relationship to the enterprise's affairs. In *United States v. Weisman*, the court again rejected the *Stofsky* requirement and refused to expand judicially the statutory language to require any specific relationship between the

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61 See 409 F. Supp. at 612-14. In determining what acts indicated a pattern, the *Stofsky* court looked at the statutory offenses, the time frame in which the offenses occurred, and the nature and scope of the activities.


In my judgment, there is implicit in the statutory definition of "pattern of racketeering activity" a requirement that the government must prove such an interrelatedness. . . . Absent a showing of a "pattern" or interrelatedness of such activity, § 1962(c) could be used against the isolated acts of an independent criminal; such was not the intended target of the challenged statute.

Id. at 860-61. The *White* court had said: "Use of the term 'pattern' in connection with two racketeering acts committed by the same person suggests that the two must have a greater interrelationship than simply commission by a common perpetrator." 386 F. Supp. at 883.

63 Under this interpretation, for example, presumably a RICO claim could not be founded on one act of car theft and a later unrelated act of arson. See, e.g., note 65 infra.

64 See notes 65-69 infra and accompanying text.

65 571 F.2d 880, *reh'g denied*, 575 F.2d 300 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). *Elliott* involved the prosecution of six defendants charged with committing at least twenty different but marginally related criminal acts. The activities ranged from burning an unoccupied nursing home to car theft to intimidating a witness. The six defendants did not act in concert with respect to any of the crimes charged. The Fifth Circuit found the relationship of the activities to the enterprise sufficient to support the RICO claim. See *id*.

66 See *id* at 899 n.23 (The court refused to read into the statute a relationship requirement that was not evident on the statute's face.).

Many other courts have agreed with *Elliott* and *Weisman*, holding that the only nexus required is between the predicate acts and the enterprise.\(^6^9\)

The majority of the federal circuit courts have required some sort of relationship between the predicate acts before finding a pattern of racketeering activity.\(^7^0\) In light of both the common meaning attributed to the term pattern\(^7^1\) and the evidence of congressional intent,\(^7^2\) there should be, at a minimum, some re-

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\(^6^8\) See id. The *Weisman* court stated:

[T]he statutory language does not expressly require that the predicate acts of racketeering be specifically "related" to each other and we find no affirmative evidence in the legislative history from which we should infer such a requirement. . . . [T]he enterprise itself supplies a significant unifying link between the various predicate acts specified in § 1961(1) that may constitute a "pattern of racketeering activity."

*Id.* at 1122.

\(^6^9\) See, e.g., United States v. Welch, 656 F.2d 1039, 1052, *reh’g denied*, 663 F.2d 101 (5th Cir. 1981) (agreeing with the *Elliott* court: "the enterprise supplies a unifying link between all the predicate acts charged, since all the predicate acts must be committed in the conduct of the affairs of an enterprise."). *cert. denied*, 456 U.S. 915 (1982); United States v. DePalma, 461 F. Supp. 778, 782 (S.D.N.Y. 1978) ("It was this ten year limitation that provided any requirement of nexus between the two predicate acts. . . . [H]ad it [Congress] wanted to provide for any ‘relatedness’ it had ample opportunity to do so.").

\(^7^0\) See notes 52-63 *supra* and accompanying text. The Seventh Circuit required that the predicate acts be related to each other in some logical manner. See United States v. Starnes, 644 F.2d at 678 (defendants were convicted of violating RICO through acts of arson to defraud an insurer); United States v. Kaye, 556 F.2d at 860 (defendant was convicted of violating RICO through acts that violated the Labor Management Relations Act). The Eighth Circuit required that the acts constitute a common scheme or objective. See United States v. Dean, 647 F.2d at 788 (district court's finding that a conviction under both RICO and the Travel Act amounted to double jeopardy was reversed and remanded). The Ninth Circuit also required that the acts constitute a common scheme or plan. See United States v. Brookdier, 685 F.2d at 1222 (defendants' motion to dismiss under the double jeopardy clause was dismissed because the defendants were convicted of both substantive RICO violations and conspiracy under RICO). The Eleventh Circuit likewise required a relationship between the acts that amounted to a common scheme or motive. See United States v. Bascaro, 742 F.2d at 1362 (defendants were convicted of RICO violations for conspiracy to import and distribute drugs). The Fifth Circuit, however, required no relationship between the predicate acts themselves. See United States v. Elliott, 571 F.2d at 899 (defendants were convicted of RICO violations even though the predicate acts were not related to each other). The Second Circuit also refused to require any relationship between the acts. See United States v. Weisman, 624 F.2d at 1122, *cert. denied*, 449 U.S. 871 (1980).

\(^7^1\) See note 163 *infra* (dictionary definition of pattern).

\(^7^2\) See notes 37-42 *supra* and accompanying text (discussing legislative history of RICO’s pattern requirement).
lationship before a pattern exists. Logically, it seems that such a pattern could be demonstrated either by a relationship between the predicate acts themselves or by the fact that all of the acts were intended to accomplish a common objective.

B. The Separate Criminal Episodes Requirement

A second issue that arises from the absence of a statutory definition of pattern is whether separate criminal acts in a single scheme or plan constitute single or multiple racketeering acts. Because of this uncertainty, a pattern can be constructed from acts that are so closely related in time and place that they are really a part of the same transaction. This issue arises most often when the proscribed activities involve two or more violations of the mail fraud or wire fraud statutes in furtherance of a single scheme or plan. In general, courts deciding criminal RICO cases

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73 See notes 79-82 infra and accompanying text (discussing United States v. Moeller, which involved two charged offenses arising out of the same arson attempt).

74 18 U.S.C. § 1341 (1982) provides:

> Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

75 18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

76 See, e.g., United States v. Morelli, 643 F.2d 402, 412 (6th Cir.) (One telephone call and one act of wiring money as a part of an ongoing scheme to defraud were two separate activities that formed a pattern.), cert. denied, 453 U.S. 912 (1981); United
have found that the acts, regardless of their substance, need not be completely independent to make up the requisite pattern. At least one court, however, has required that a threat of continuing activity be demonstrated before finding a pattern.

In *United States v. Moeller*, the court extensively considered the separate criminal episodes issue. The *Moeller* defendants were charged with two offenses arising during an arson attempt: arson of a business and kidnapping of three of the employees of the business. The acts occurred at the same time, in the same place, and in furtherance of a single criminal episode. The court interpreted "pattern" to imply "acts occurring in different criminal episodes," but was

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77 Acts arising out of a single criminal episode have been found sufficient to support a RICO violation. *See*, e.g., *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir.) *reh'g denied*, 766 F.2d 1493 (1985), *cert. denied*, 105 S. Ct. 879 (1985). When the defendant shot three separate officers in one incident, the court held that these were three separate violations of the attempted murder statute and were sufficient to constitute a violation of RICO; *United States v. Starnes*, 644 F.2d 673, 678 (7th Cir.) (Several acts were committed as a part of a single criminal scheme or conspiracy to effect arson and each act was held to be a separate act constituting a pattern under RICO); *cert. denided*, 454 U.S. 826 (1981); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denided*, 419 U.S. 1105 (1975). (Two acts of interstate transportation of stolen checks in furtherance of a single scheme were held to create a pattern); *cert. denided*, 429 U.S. 820 (1976). *But see*, e.g., *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1189 (4th Cir. 1982) (The court expressed "doubt that Congress ever contemplated the extension of the RICO statute to include a situation where one of the predicate offenses, separated in character and by a long time period, could combine with a set of closely related wire fraud and mail fraud claims . . . to meet the predicate requirements of so serious a statute.").


80 *See id.* at 57.

81 Judge Newman stated:

Were the question open, I would have seriously doubted whether the word 'pattern' as used in § 1962(c) should be construed to mean two acts occurring at the same place on the same day in the course of the same
compelled to follow the Second Circuit’s decision that held to the contrary.\footnote{See 402 F. Supp. at 58. But See United States v. Parness, 503 F.2d at 438 (holding two acts within a single scheme sufficient to constitute a pattern).}

To be consistent with both the common usage of the term pattern\footnote{See note 163 infra (dictionary definition of pattern).} and the congressional intent in adopting RICO,\footnote{See notes 37-42 supra and accompanying text (discussing legislative history of RICO’s pattern requirement).} the courts should require some level of continuity before finding a pattern of racketeering activity. Surely Congress did not anticipate that two telephone calls made to the same person within five minutes reasonably could be construed to show such a pattern. By requiring either continuity of activity or multiple episodes of activity, the courts could ensure that only those really engaging in a pattern of racketeering activity would fall under RICO.

\section*{C. Civil RICO Actions}

As the two previous sections indicate, the pattern requirement has been addressed most often in criminal RICO prosecutions.\footnote{See notes 52-82 supra and accompanying text (discussing cases interpreting criminal RICO’s pattern requirement).} In civil RICO cases, courts generally have assumed that the commission of any two predicate acts represents a pattern of racketeering activity and have not considered this requirement a major issue.\footnote{See Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1168 (5th Cir. 1984). Alcorn arose from illegal purchases by a county employee. On several occasions, the defendant sold office supplies at inflated prices to a county employee, violating Mississippi law. The Fifth Circuit reversed the district court’s holding that the plaintiffs had failed to allege that the defendants were connected with organized crime and therefore ineligible for civil RICO remedies. In analyzing the required RICO ele-}
ment Corp., the court recognized explicitly that the plaintiff had the burden of alleging and proving a pattern. The court, however, required only "two or more mailings incident to an essential element of a scheme to defraud . . .," without analyzing further the pattern involved.

Civil cases that have addressed expressly the substance rather than form of the pattern issue are infrequent. In *Beth Israel Medical Center v. Smith*, separate acts of mail and wire fraud were committed over an eighteen month period in connection with a single criminal scheme. The court, apparently rejecting a multiple episode requirement, found no merit in the defendants' assertion that "separate acts of mail and wire fraud arising out of a common nucleus of facts" were not separate RICO offenses. Nevertheless, the court implicitly endorsed a requirement of relationship between the predicate acts, which the court found to be consistent with its acceptance of a single episode as a pattern.

One of the few cases in which a court has dismissed a civil RICO claim for failure to show a requisite pattern occurred in *Teleprompter of Erie, Inc. v. City of Erie*. Teleprompter involved several bribes that a city councilman received at a fundraiser. The court held that these acts were not "a series of incidents and schemes which are ongoing" and were not, therefore, a pattern within RICO's reach. In dictum, the court indicated that even an extensive number of such violations occurring

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ments, the court merely assumed that the pattern of racketeering activity requirement had been met because two predicate acts had occurred. See *Sutliff, Inc. v. Donovan*, 727 F.2d 648, 653 (7th Cir. 1984). The defendants in *Sutliff* depleted a small oil company's cash and assets by taking advantage of its owner. This left the company without resources to pay its creditors. The defendants' use of the mails and telephone constituted the predicate acts upon which the RICO claim was based. The court did not even address the pattern issue, stating simply that "we believe the complaint adequately alleges a 'pattern of racketeering activity'. . ." *Id.* at 653.

86 See *id.* at 121.
87 *Id.* at 122.
89 See *id.* at 1063-64.
90 See *id.* at 1066.
91 See *id.*
93 See *id.* at 8-9.
94 *Id.* at 12-13 (emphasis in original).
95 See *id.* at 13.
at a single event still would not constitute a pattern. Teleprompter was a significant departure from other civil RICO actions that only cursorily addressed the pattern requirement.

When left to their own interpretations, courts have construed the term pattern to encompass diverse and varied elements. Some courts have examined the actual predicate acts for some common scheme or purpose; some have required no relationship at all between the acts themselves, requiring only that the acts be related to the enterprise; and still others have focused on the predicate acts underlying a single “episode.” The United States Supreme Court addressed these conflicting opinions in a back-handed way in its Sedima decision.

IV. Sedima

As previously noted, the Sedima decision was instrumental in removing several judicially imposed restrictions on private RICO claimants. The Court declined to address directly the pattern of racketeering activity requirement, stating that the requirement was not in issue. The majority, however, stated in dictum that

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98 The court stated: “Even if plaintiff could prove that each and every employee or associate . . . bribed Meredith at the fundraiser, it would only constitute one single act of unlawful activity.” Id.

99 See notes 86-89 supra and accompanying text (discussing Hulse v. Hale Farms Development Corp., indicating the ease with which civil RICO’s pattern requirement can be satisfied).

100 See notes 47-63 supra and accompanying text.

101 See notes 64-69 supra and accompanying text.

102 See notes 73-82 supra and accompanying text.

103 See notes 104-124 infra and accompanying text (discussing both majority and dissenting opinions in the Sedima decision).


105 Sedima dealt with a corporation that had entered into a joint business venture with an exporter. The corporation alleged that it had been overbilled and cheated by the exporter. The corporation sued the exporter, alleging a RICO violation based upon the predicate acts of mail and wire fraud. The trial court dismissed the RICO counts for failure to state a claim, and the Second Circuit affirmed the dismissal. The United States Supreme Court reversed, stating: “The complaint is not deficient for failure to allege either an injury separate from the financial loss stemming from the alleged acts of mail and wire fraud, or prior convictions of the defendants.” Id. at 3287.

106 See notes 7-10 supra and accompanying text (discussing the removal of both a previous conviction of predicate criminal violations and an allegation of specific RICO-type injury as bars to a civil RICO action).

107 105 S. Ct. at 3287.
one of the major factors contributing to the possibly overbroad application of RICO's civil provisions is "the failure of Congress to develop a meaningful concept of 'pattern.'"\textsuperscript{103} The Court also supplied a footnote that sheds some light on the proper interpretation of the term pattern.\textsuperscript{109} The majority stated:

[T]he definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "requires at least two acts of racketeering activity," § 1961(5), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern."\textsuperscript{110}

The Court cited RICO's legislative history,\textsuperscript{111} which it said "supports the view that two isolated acts of racketeering activity do not constitute a pattern."\textsuperscript{112} Furthermore, the Court looked to the language of another provision of the same statute, 18 U.S.C. section 3575(e),\textsuperscript{113} saying that it is "more enlightening" and might "be useful in interpreting" RICO's pattern requirement.\textsuperscript{114} Section 3575(e) uses more specific language in its definition of pattern: "[C]riminal 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."\textsuperscript{115}

The patterns that section 3575(e) addresses are similar to those

\textsuperscript{103} Id. The other major factor the Court pointed to as responsible for the "extraordinary uses to which civil Rico has been put" is the broad range of predicate offenses, which include wire, mail, and securities fraud. See id.

\textsuperscript{109} See id. at 3285 n.14.

\textsuperscript{110} Id. (emphasis added).

\textsuperscript{111} See id. See also notes 37-42 supra and accompanying text (legislative history shows some contemplation of "relatedness" and "continuity" requirements).

\textsuperscript{112} 105 S. Ct. at 3285 n.14.

\textsuperscript{113} 18 U.S.C. § 3575(e) (1982).

\textsuperscript{114} 105 S. Ct. at 3285 n.14.

\textsuperscript{115} 18 U.S.C. § 3575(e). The section provides for the sentencing of special offenders. The sentences of three specific types of criminals were increased substantially: (1) "habitual" criminals, those with at least two earlier felony convictions; (2) "professional" criminals, those for whom the crime was a part of a pattern of criminal activity designed to furnish a source of income and in which the "professional" possessed a skill; and (3) "organized" criminals, those whose criminal activity was in furtherance of a conspiracy involving a pattern of criminal conduct.
that RICO addresses—persons engaging in a continuing practice of proscribed criminal acts.\textsuperscript{116}

Justice Powell, dissenting from Sedima's majority opinion, expounded at length on the need for a specific judicial construction of the pattern requirement.\textsuperscript{117} Citing both the legislative history\textsuperscript{118} and the American Bar Association (ABA) Task Force Report on Civil RICO,\textsuperscript{119} Justice Powell conceded that the statute might be read as broadly as the majority had endorsed, but stated that he did not "believe that it must be so read."\textsuperscript{120} To effect a

\textsuperscript{116} See id. See also note 15 supra (criminals addressed by § 3575(e) are all characterized by the continuous nature of their actions).

\textsuperscript{117} 105 S. Ct. at 3290 (Powell, J., dissenting). Justice Powell noted that the majority had conceded that the "'pattern' requirement could be narrowly construed" and that this element was not at issue in the instant case. Id.

\textsuperscript{118} Justice Powell stated:

The legislative history reveals that Congress did not state explicitly that the statute would reach only members of the Mafia because it believed there were constitutional problems with establishing such a specific status offense. (citations omitted). Nonetheless, the legislative history makes clear that the statute was intended to be applied to organized crime, and an influential sponsor of the bill emphasized that any effect it had beyond such crime was meant to be only incidental. (citation omitted).

Id. at 3289.

\textsuperscript{119} Justice Powell, quoting from the ABA Task Force Report on Civil RICO [hereinafter cited as "ABA Report"], stated that the ABA Report concurred with and supported the legislative intent:

In an attempt to ensure the constitutionality of the statute, Congress made the central proscription of the statute the use of a 'pattern of racketeering activities' in connection with an 'enterprise,' rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates. 'Racketeering' was defined to embrace a potpourri of federal and state criminal offenses deemed to be the type of criminal activities frequently engaged in by mobsters, racketeers and other traditional members of 'organized crime.' The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes. The 'enterprise' element, when coupled with the 'pattern' requirement, was intended by the Congress to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime. ABA Report at 71-72.

Id.

\textsuperscript{120} Id.
statutory construction consistent with both a narrower scope of application and the legislative intent, Justice Powell would require a stricter pattern requirement.\footnote{121}

Agreeing with the ABA Task Force Report on Civil RICO,\footnote{122} Justice Powell interpreted the term pattern to require "that (i) the racketeering acts be related to each other, (ii) they be part of some common scheme, and (iii) some sort of continuity between the acts or a threat of continuing criminal activity must be shown."\footnote{123} According to Powell's analysis, the result of such a construction would further the legislative intent: "By construing 'pattern' to focus on the manner in which the crime was perpetrated, courts could go a long way toward limiting the reach of the statute to its intended target—organized crime."\footnote{124}

Considering the majority's footnoted explanation of the term pattern in conjunction with Justice Powell's dissent supplies the most information to date about the ultimate judicial interpretation of the pattern requirement. The Court probably will require at least some nexus between the predicate acts of racketeering activity and possibly some continuity of criminal action before finding a pattern in the underlying predicate acts.\footnote{125}

V. BEYOND \textit{Sedima}

A continuity of action requirement could be the element that courts focus on in limiting future civil RICO actions. The Department of Justice has already taken this approach in its criminal

\footnotesize{\begin{flushleft}
\footnote{121} See \textit{id}.
\footnote{122} See note 119 \textit{supra}.
\footnote{123} See 105 S. Ct. at 3290 (Powell, J., dissenting) (citing the ABA Report at 193-208).
\footnote{124} \textit{Id}.
\footnote{125} Both the \textit{Sedima} majority and Justice Powell's dissent mentioned a continuity of action inherent in a pattern. Justice White, quoting from the legislative history, stated: "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 \textit{continuity plus relationship} which combines to produce a pattern." \textit{Id}. at 3285 n.14 (emphasis in original). Justice Powell, citing the ABA Report, suggested that one requirement in finding a pattern should be "some sort of continuity between the acts or a threat of continuing criminal activity." \textit{Id}. at 3290 (Powell, J., dissenting).
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RICO prosecutions. In civil RICO actions, however, multiple criminal acts commonly occur during a single criminal episode. Some courts, therefore, find a pattern without requiring any real continuity of action.

If courts construe the pattern element to require racketeering activity in more than one criminal episode, a number of civil RICO actions would fail to meet this criterion, and courts could focus on the types of actions Congress intended civil RICO to address. Considering all of the facts and circumstances attendant to each case, courts could determine whether there was a continuity and interrelationship of action sufficient to form a pattern of racketeering activity.


See notes 73-82 supra and accompanying text (cases discussing the separate criminal episode requirement).

See, e.g., notes 73-77, 71-73 supra and accompanying text (discussing situation in which pattern is found in what is essentially one transaction).

See Blakey, supra note 11, at 36-37. Blakey's article cited the ABA Report, stating: "37% of civil RICO cases involve securities in a commercial or business setting. A review of most of these cases indicates that they usually involve an alleged single scheme entailing multiple mailings and telephone calls." Id. at 38 n.42.

See id. at 37. Blakey postulated: "The pattern determination, or at least one half of it, may rest upon the affirmative answer to the question, does the conduct alleged to constitute the pattern of racketeering activity span more than one episode?" If so, it is sufficiently continuous to constitute a pattern—assuming that the acts are related to one another." Id.

See id. Blakey asserts that the determination of a pattern should be independent of the quantitative element and that the requisite is fact specific:

This determination cannot universally rest on any one factor, such as duration, number of victims, number of acts or nature of acts. One cannot make hard and fast rules, such as one scheme can never be a pattern, or a pattern must involve more than one victim. Any one factor can be isolated, made constant and included in hypothetical situations from which a trier of fact may—and may not—infer a "pattern" in the broad sense of the word.

The courts may examine the totality of the circumstances and decide whether there is sufficient demonstration of continuity to warrant labeling the conduct a "pattern"—independent of the number of acts of racketeering activity involved.

Id.

H.R. 2517, 99th Cong., 1st Sess. (1985). This proposed bill provides in part:
2517 proposes changes in the portion of the statute defining a "pattern of criminal activity." In those violations common to civil RICO actions, principally mail and wire fraud, the new pattern definition would require both an interrelationship between the predicate acts and separate episodes of activity. This amendment would also make the definition of pattern consistent with definitional language elsewhere in the statute by using the wording "pattern means" instead of "pattern requires." An amendment like this, using more precise definitions, would alleviate most of the confusion over the two crucial elements necessary to constitute a pattern of racketeering activity.

In the first civil RICO case decided since Sedima, Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., the court addressed the pattern issue even though neither party briefed the issue. The court stated that the complaint's failure to allege a proper

"(5) 'pattern of criminal activity' means two or more acts of predicate criminal activity, separate in time and place—

"(A) each of which occurred not more than five years before the indictment is found, or information is instituted, that names such acts as predicate criminal activity;

"(B) all of which are not violations of the same provision of law, if that provision of law is—

"(i) the second undesignated paragraph of section 2314 (relating to the transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting) of this title;

"(ii) section 1341 (relating to mail fraud) of this title; or

"(iii) section 1342 (relating to wire fraud) of this title; and

"(C) that are interrelated by a common scheme, plan, or motive, and are not isolated events. . . ."
pattern of racketeering activity was "dispositive of Inryco's motion [to dismiss] and mandate[d] Inryco's dismissal from the Complaint." The court then discussed at length the *Sedima* pattern requirement.

The *Inryco* court rejected completely the contention of prior courts that a pattern could be formed simply from multiple acts. The dismissed complaint alleged that two mailings were made in connection with a subcontract and kickbacks. The court found that these mailings, though each was allegedly a separate act of mail fraud, were insufficient to form a pattern. While the mailings satisfied the relationship requirement, the mailings failed to establish the required continuity element. Interpretating the

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14 See id. at 830.
14 The *Inryco* court stated:

   To be sure, *Sedima* . . . also spoke in dictum. But its message was both plain and deliberate: Lower courts concerned about RICO's expansive potential would be best advised to focus on the hitherto largely ignored "pattern" concept.

   . . .

   *Sedima* thus clearly creates a whole new ballgame. With such an unmistakable signal from the Supreme Court, the Court is no longer obligated to follow contrary Court of Appeals opinions.

   Id. at 832-33.

14 The *Inryco* court, in analyzing the Seventh Circuit's opinion in United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978), agreed with requiring a relationship between the predicate acts or some common scheme, but said that the *Weatherspoon* court:

   [J]umped the tracks when it eluded the separate statutory requirement of a "pattern" by simply equating multiple acts with that requirement.

   . . .

   That non sequitur will no longer wash, in light of *Sedima* 's proper emphasis on "pattern" as an independent component of a RICO claim under the plain language of the statute.

615 F. Supp. at 833. See also note 76 supra.

14 The first violation occurred when the defendant mailed the subcontract to the subcontractor and the second occurred when the subcontractor mailed a kickback check to the defendant's employee. See 615 F. Supp. at 833.

14 See note 74 supra (18 U.S.C. § 1341, covering mail fraud).
14 See 615 F. Supp. at 833.
14 The court stated:

   True enough, "pattern" connotes similarity, hence the cases' proper emphasis on relatedness of the constituent acts. But "pattern" also connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal activity, not merely repeated acts to carry out the *same criminal activity*. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

   Id. at 831 (emphasis in original).
pattern requirement in light of *Sedima*, the court, even without the aid of a more precisely defined statute, narrowed civil RICO's application.

Several civil RICO cases have been decided since *Inryco*. While those decisions generally heed the *Sedima* warning to pay more attention to the pattern requirement,150 the standard for determining whether a pattern is present remains unresolved151 and widely varied. One court found that the pattern requirement was not at issue because three predicate acts were alleged instead of two.152 Another court interpreted *Sedima* as demanding very little beyond the requirement of two predicate acts and some relationship between them.153 Other courts have gone further by requiring continuity of action.154

In addition to the requirements that *Sedima*’s dicta suggested, two courts have addressed the holding and dicta of *Inryco*.155 One district court agreed with *Inryco*’s interpretation, requiring that the predicate acts be related and that continuity of action in the form of more than one criminal episode be present.156 In different

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150 See notes 104-125 supra and accompanying text.
151 See notes 152-160 infra and accompanying text.
153 See R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985) (Two acts of mail fraud were sufficient to form a pattern because the acts were related.).
154 See Illinois Dept. of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985). The Seventh Circuit stated that the "defendant's mailing of nine fraudulent tax returns . . . over a nine month period constitutes a pattern of racketeering activity as defined by the statute." Id. at 313. See also Alexander Grant and Co. v. Tiffany Indus., 770 F.2d 717 (8th Cir. 1985) 106 S. Ct. 799 (1986). The Eighth Circuit held that "[t]he number and nature of acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient 'continuity plus relationship' to satisfy the Supreme Court's concerns in *Sedima* that RICO not be extended to reach sporadic activity." Id. at 718 n.1. See also No. 83 Civ. 6291 (two acts of securities fraud in separate transactions held to constitute a pattern, but multiple sales, each of which possibly violated the securities law, was insufficient because each was a part of the same transaction); Papagiannis v. Pontikis, 108 F.R.D. 177 (N.D. Ill. 1985) (holding that fraudulent acts committed on multiple victims constituted a pattern). The *Pontikis* court criticized the Fifth Circuit's decision in *R.A.G.S. Couture* saying, "the opinion wholly ignores the concept of 'continuity' of criminal activity emphasized by Congress and the Supreme Court." 108 F.R.D. at 179 n.3.
155 See notes 141-162 supra and accompanying text.
opinions, the Illinois district court both agreed and disagreed with its own holding in Inrlyco. One decision agreed with Sedima’s continuity requirement as discussed in the Inrlyco holding. A second decision considered both Sedima and Inrlyco and found "that it takes at least two fraudulent schemes or episodes, related by common purposes, methods or results, to make up a 'pattern of racketeering activity.'" Several other decisions, however, have disagreed with a pattern interpretation that requires multiple schemes. As one opinion stated, “[t]he criminal acts must demonstrate both a continuity and a relationship. However, this court does not agree with the suggestion that a ‘pattern of racketeering activity’ cannot be established with respect to a single fraudulent scheme.” Further confusion was added by a subsequent crim-

court found that, in light of Sedima, the RICO complaint failed to allege wire fraud acts that would satisfy the pattern requirement. The court stated:

[T]he alleged predicate acts must show both “continuity” and “relatedness” to constitute a pattern. . . . The relatedness of the predicate acts is established through proof of common perpetrators, common methods of commission or common victims.

. . . .

To show continuity of racketeering activity, on the other hand, the predicate acts must have occurred in different criminal episodes. Such a requirement is consistent with the connotation of multiple events implicit in the term “pattern.”

. . . .

Consistent with this intent to exclude single criminal events, a “pattern” of racketeering activity must include racketeering acts sufficiently unconnected in time or substance to warrant consideration as separate criminal episodes.

Id. at 477-78.

157 Judge Shadur wrote the opinion in Inrlyco. See 615 F. Supp. 828.

158 See 108 F.R.D. 177.

159 See Evanston Bank v. Conticommodity Serv’s, Inc., 623 F. Supp. 1014, 1025 (N.D. Ill. 1985) (The court found that a pattern existed in acts of securities, wire and mail fraud.).

160 Compare notes 158-159 supra and accompanying text with notes 161-62 infra and accompanying text.

161 Trak Microcomputer Corp. v. Wearne Bros., No. 84 C. 7970 (N.D. Ill. Oct. 25, 1985). This Illinois court agreed with Judge Shadur’s Inrlyco comment that “more than a mere counting of ‘racketeering activity’ is necessary to determine whether a ‘pattern of racketeering activity’ has been stated.” Id. The court disagreed that there must be more than one scheme involved. The court stated that “[n]othing in the language of Sedima suggests that in order to find a ‘pattern of racketeering activity’ a pattern of fraudulent schemes must be pled. Rather, Sedima only requires that the racketeering activity be continuous and related.” Id. Other decisions in the same district followed
inal RICO opinion in which the court found that ten bribery payments to a single person to fix ten separate lawsuits was distinguishable from *Inryco* and constituted a pattern. This disagreement among the courts is clear evidence that *Sedima* has not laid the pattern controversy to rest.

**CONCLUSION**

When providing for a civil cause of action and treble damage remedy under RICO, surely Congress could not have intended an essential element of the statute’s application to be open to so many inconsistent judicial interpretations. The very fact that RICO was enacted as a part of the Organized Crime Control Act indicates that Congress had a particular type of offender in mind. It is also plausible that Congress intended, by its use of the term pattern, to incorporate the commonly understood definition of that word into the statutory requirement. Assuming that this was Congress’ intent, RICO should apply only to criminals with a propensity to engage in the statute’s proscribed activity.

If this construction of congressional intent is adopted, the concepts of relationship between the predicate acts and continuity of the criminal conduct become crucial elements of the pattern requirement. The presence of these elements would help to ensure that RICO was reaching those offenders at which it was originally aimed. By judicially imposing these requisites, the courts can, in effect, plug the “hole” in the statute that threatens to grow larger and larger.

Certainly, Congress ultimately will address this confused area and clarify congressional intent through a statutory amendment.

the holding in *Trak Microcomputer*, rather than *Inryco*. See also *Corcoran Partners, Ltd.* v. *Dresser Indus.*, No. 84 C. 4506 (N.D. Ill. Dec. 18, 1985) (“This court finds nothing in the language of the RICO statute which requires a plaintiff to allege a pattern of fraudulent schemes, . . .”); *Graham v. Slaughter*, 624 F. Supp. 222, 225 (N.D. Ill. 1985) (Continuous activity “requires more than a single transaction but not necessarily more than a single scheme.”).

162 United States v. *Yonan*, 623 F. Supp. 881 (N.D. Ill. 1985) (Judge Shadur wrote the opinions in both *Inryco* and *Yonan*).

163 The ordinary meaning of “pattern” is “[a]n established mode of behavior or cluster of mental attitudes, beliefs and values held in common by members of a group,” or “[a] reliable sample of traits, acts or other observable features characterizing an individual.” *Webster’s Third New International Dictionary* (P.B. Gove ed. 1970).
In fact, the *Sedima* Court has stated that it is Congress' responsibility, rather than the judiciary's, to narrow the statute's application.\(^{164}\) Until a case in which the pattern requirement is at issue is presented to the United States Supreme Court, the lower courts will continue to interpret the requirement inconsistently. The guidance of *Sedima*'s dictum, however, could effect a construction that would act as a "finger in the dike," thereby holding back a flood of unintended litigation while the courts wait patiently for a legislative rescue.

*Jamie Middleton Clark*

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\(^{164}\) *Sedima S.P.R.L.* v. *Imrex Co.*, 105 S. Ct. 3275 (1985). The Supreme Court stated that any defect inherent in the statute must be corrected by Congress: "It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications." *Id.* at 3287.