1988

The Pattern Requirement in Civil RICO Is Working: Case Law after Sedima

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THE PATTERN REQUIREMENT IN CIVIL RICO IS WORKING: 
CASE LAW AFTER SEDIMA

I. INTRODUCTION

The number of civil suits brought under the Racketeer Influenced and Corrupt Organizations Act (RICO)\(^1\) has risen dramatically since 1980, demonstrating that RICO is realizing its potential as the expansive and powerful tool Congress intended it to be.\(^2\) This increase in the number of cases also indicates a potential for abuse of civil RICO in the hands of overzealous plaintiffs who see it as a federal cause of action for all seasons.\(^3\) In *Sedima*, *S.P.R.L.* v. *Imrex Co.*, the Supreme Court stated in dicta that the lower federal courts might curtail perceived abuses of civil RICO by developing a "meaningful" interpretation of the previously ignored statutory requirement that the unlawful conduct form a "pattern of racketeering activity."\(^4\) Not surprisingly, what began as a footnote in *Sedima* has developed into a large body of case law with a split among the federal courts of appeals over the correct interpretation of the pattern requirement.\(^5\) This Note attempts to make sense of the state of confusion surrounding the pattern requirement in civil RICO by chronicling the activity in the federal courts of appeals and comparing the various analyses used to determine when a pattern exists.\(^6\)

RICO was enacted by Congress in 1970 for the purpose of seeking "the eradication of organized crime in the United States."\(^7\) It prohibits

2. *See* *Sedima*, *S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 481 n.1 (1985). The Supreme Court stated: "Of 270 District Court RICO decisions prior to this year, only 5% (nine cases) were decided throughout the 1970s, 2% were decided in 1980, 7% in 1981, 13% in 1982, 83% in 1983, and 43% in 1984." *Id.* (citing REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55 (1985) [hereinafter ABA REPORT]).
3. *See* *Sedima*, *S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985); *see also* ABA REPORT, supra note 2, at 55-69.
5. *See* *Sedima*, 473 U.S. at 496 n.14.
6. For an overview of the various interpretations of the pattern requirement, see infra notes 55-60 and accompanying text. For a discussion of the similarities, differences, strengths, and weaknesses of the different interpretations, see infra notes 144-57 and accompanying text.
7. 18 U.S.C. § 1961. According to the statement of findings and purposes: It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by pro-

(205)
any "person" from investing in, acquiring an interest in, or conducting the affairs of an "enterprise" through a "pattern of racketeering activity." The enterprise can be any group of individuals associated in fact or any legal entity. The statute defines "racketeering activity" in terms of a long list of crimes, commonly referred to as "predicate acts," which are the building blocks of RICO violations. The list of predicate acts includes state offenses ranging from arson to murder, and federal offenses such as mail, wire and securities fraud. "Pattern" is defined in

providing enhanced sanctions and new remedies to deal with the unlawful activities of those involved in organized crime.

Id.

8. See id. § 1962. This section contains the substantive RICO prohibitions. Every RICO charge must be based on a violation of at least one of the subsections of section 1962. See id. Subsection (d) prohibits conspiring to violate subsections (a), (b), or (c), but it is rarely utilized. Subsection (c), which prohibits conducting the affairs of an enterprise through a pattern of racketeering activity, is the subsection upon which most RICO violations are based. See ABA REPORT, supra note 2, at 57; see also Sedima, 473 U.S. 479 (1986) (a); Petro-Tech v. Western Co. of N. Am., 824 F.2d 1349 (7th Cir. 1987) (§ 1962(c)); Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986) (§ 1962(a) and (c)).

Section 1962 states in pertinent part:

(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 . . . 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 . . .

(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 an enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or the collection of an unlawful debt.


RICO defines person as including "any individual or entity capable of holding a legal or beneficial interest in property." Id. § 1961(3).

9. See 18 U.S.C. § 1961. This section contains definitions. An enterprise is defined as "[a]ny individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity." Id. § 1961; see also United States v. Turkette, 452 U.S. 576, 590 (1981) (holding that "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises).

10. See 18 U.S.C. § 1961(1). The Supreme Court summarized racketeering activity as follows: "RICO takes aim at 'racketeering activity,' which it defines as any act 'chargeable' under several generically described state criminal laws, any act 'indicable' under numerous federal criminal provisions, including mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud or drug-related activities that is 'punishable' under federal law." Sedima, 473 U.S. at 481-82 (citing 18 U.S.C. § 1961(1)).

the statute as requiring at least two predicate acts within a ten year period, although since Sedima, courts have interpreted it to require something more.

In addition to providing criminal penalties and enforcement, RICO provides a civil remedy which allows plaintiffs to recover treble damages and attorneys’ fees for injuries to business or property as a result of a RICO violation.

The proliferation of cases in the 1980’s was accompanied by a perceived misuse of civil RICO against legitimate businesses involved in garden variety fraud and breach of contract disputes. The lower federal courts responded by enacting various restrictions on the cause of action. The Supreme Court in Sedima struck down two of these restric-

12. See id. § 1961(5). Section 1961(5) states: “ ‘P’attern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted 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.” Id.

Every substantive violation of RICO requires either a “pattern of racketeering activity” or “the collection of an unlawful debt.” See id. § 1962. Plaintiffs have rarely based their complaints upon the collection of an unlawful debt and this Note will therefore not discuss the issue. See ABA REPORT, supra note 2, at 52 n.56.

13. See, e.g., Sedima, 473 U.S. at 496 n.14 (pattern requires “continuity plus relationship” among predicate acts); Bartieck v. Fidelity Union Bank/First Nat’l State, 832 F.2d 36, 39 (3d Cir. 1987) (existence of pattern depends on several factors); Sun Sav. and Loan Ass’n v. Dierdorff, 825 F.2d 187, 193-94 (9th Cir. 1987) (predicate acts cannot be isolated or sporadic); Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986) (predicate acts must be separated in time and place so that they can be viewed as separate transactions); Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986) (predicate acts comprising single scheme do not constitute pattern); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985) (two predicate acts constitute pattern).


15. See id. § 1964. To recover in a civil RICO action, the plaintiff must plead and prove the following elements:
(1) at least two of the predicate acts listed in the statute under “racketeering activity”; see id. § 1962; see also § 1961(1) (defining “racketeering activity”);
(2) the existence of an “enterprise”; see id. § 1962; see also § 1961 (defining “enterprise”); United States v. Turkette, 452 U.S. 576, 590 (1981) (enterprise can be legitimate or illegitimate);
(3) a pattern among the predicate acts; see 18 U.S.C. § 1962; see also id. § 1961(5) (defining pattern); Sedima, 473 U.S. at 496 n.14 (suggested interpretation of pattern);
(4) a nexus between the pattern and the enterprise; the defendant must have invested in, acquired an interest in or conducted the affairs of the enterprise through a pattern of racketeering activity; see 18 U.S.C. § 1962; and
(5) an injury to business or property as a result of the RICO violation; see id. § 1964(c).

16. See Sedima, 473 U.S. at 499; see also ABA REPORT, supra note 2, at 55-69.

17. See generally Black, Racketeer Influenced and Corrupt Organizations (RICO)—
tions on the grounds that they were not rooted in the language or history of the statute. The Court called for a broad reading of the statute, but expressed concern about the "extraordinary" uses of civil RICO.

The Supreme Court attributed the abuses of civil RICO to the wide range of predicate acts enumerated in the statute as well as to "the failure of Congress and the courts to develop a meaningful concept of 'pattern.'" Prior to Sedima, most courts required nothing more than proof of two predicate acts within a ten year period to establish a pattern. Thus, by criticizing the lower courts for not developing the pattern requirement, the Supreme Court directed them to focus on pattern as a legitimate means of controlling the civil RICO explosion. In addition, the court in footnote fourteen of Sedima supplied a suggested interpretation of "pattern." Drawing from the legislative history, the Court stated that RICO is not aimed at "sporadic activity" and while the statute "requires at least two acts of racketeering activity," two acts may not be sufficient. Moreover, "continuity plus relationship" among the acts is required to produce a pattern.

The federal courts of appeals have recognized the significance of

Securities and Commercial Fraud as Racketeering Crime after Sedima: What is a "Pattern of Racketeering Activity"?, 6 PAGE L. REV. 365 (1986). Among the judicially created restrictions were requirements that the plaintiff plead a "racketeering injury" and that the defendant have a "prior criminal conviction," both of which were invalidated in Sedima. See Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), rev'd, 473 U.S. 479 (1985). For a discussion of these requirements and Sedima, see infra notes 32-54 and accompanying text. Some courts required that the plaintiff show that they were competitively injured in business by the RICO violation. See, e.g., Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983); North Barrington Dev. Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980); see also ABA REPORT, supra note 2, at 292-95. Other courts have required that in addition to the connection between the pattern and the enterprise, see 18 U.S.C. § 1962, the plaintiff had to allege a nexus with organized crime. See, e.g., Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 642-44 (C.D. Cal. 1983); Minpeco v. Conticommodities Services Inc., 558 F. Supp. 1348, 1351 (S.D.N.Y. 1983); see also ABA REPORT, supra note 2, at 163-93.

19. Id. at 500.
20. Id.
23. Id. (emphasis in original).
24. Id. (emphasis in original). For the full text of footnote fourteen of Sedima, see infra note 42.
the Supreme Court's comments in Sedima.\textsuperscript{25} Ten circuits have discussed the pattern requirement in light of Sedima, seven of these have expressly adopted some version of the Supreme Court's interpretation, and of the remaining three, only one has declined to follow Sedima.\textsuperscript{26} The seven circuits which accept continuity and relationship as the basic definition of pattern are generally in agreement on what it means for predicate acts to be related.\textsuperscript{27} These courts are, however, widely split over the meaning of continuity, and in effect have created different definitions of pattern.\textsuperscript{28}

This Note will discuss the impact of Sedima by tracing the split among the circuits and analyzing and comparing the various interpretations of the pattern requirement.\textsuperscript{29} It will also compare these interpretations as a means of examining whether it is possible to interpret RICO broadly, as mandated by the express language of the statute, and at the same time control civil RICO through a restrictive interpretation of pattern.\textsuperscript{30} The conclusion of this Note is that the pattern requirement in civil RICO is working, at least in those circuits which have developed restrictive interpretations. Moreover, the most suitable interpretation of pattern is one which does not treat any one factor as determinative but rather focuses on the extent of the criminal activity in each case.\textsuperscript{31}

\begin{enumerate}
\item[25.] See Bartichek v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 38 (3d Cir. 1987) ("The Sedima dictum has been widely viewed as a signal to the federal courts to fashion a limiting construction of RICO around the pattern requirement and the concepts of 'continuity' and 'relationship.'").
\item[26.] For a list of the principle cases in which ten federal courts of appeals have discussed the pattern requirement in light of Sedima, see infra note 55.
\item[27.] For a discussion of what it means for predicate acts to be related, see infra note 56 and accompanying text.
\item[28.] For a discussion of the split among the circuits over the pattern requirement, see infra notes 55-127 and accompanying text. Some courts and commentators have pointed out a basic difficulty which inheres in the terms "continuity" and "relationship." Continuity suggests predicate acts which are separated in time and purpose; relationship suggests predicate acts which are close together. See Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986); see also Black, supra note 17, at 580.
\item[29.] For a complete discussion of Sedima, see infra notes 32-54 and accompanying text. For an overview of the split among the federal courts of appeals over the pattern requirement, see infra notes 55-60 and accompanying text. For a comparison of the various interpretations of the pattern requirement, see infra notes 129-57 and accompanying text.
\item[30.] For a discussion of whether it has been possible for the federal courts of appeals to reconcile a restrictive interpretation of the pattern requirement with RICO's liberal construction clause, see infra notes 144-57 and accompanying text.
\item[31.] For a discussion of the most suitable interpretation of pattern, referred to herein as the flexible approach, see infra notes 74-95, 156-57 and accompanying text.
\end{enumerate}
II. Background


Sedima was the first case in which the United States Supreme Court discussed civil RICO.32 The case involved the issue of judicially created requirements that had to be met in order to maintain a civil RICO action.33 One requirement was that the plaintiff prove a distinct "racketeering injury" to business or property separate from the injury caused by the predicate acts.34 The other requirement was that the defendant

32. See Sedima, 473 U.S. 479 (5-4 decision). Previously, the Supreme Court had decided two cases involving criminal RICO. See Russello v. United States, 464 U.S. 16, 22 (1983) (insurance proceeds received as result of arson activity constitute "interest" within meaning of § 1963(a) and are therefore subject to forfeiture); United States v. Turkette, 452 U.S. 576, 590 (1981) (holding that term "enterprise" used in RICO encompasses both legitimate and illegitimate enterprises).

The Supreme Court decided another case involving civil RICO on the same day Sedima was decided. See American Nat'l Bank and Trust Co. v. Haroco, 473 U.S. 606, 608 (1986) (rejecting variation of "racketeering injury" requirement). Since Sedima, the Supreme Court has decided two cases involving civil RICO. See Agency Holding Corp., et al., v. Malley-Duff & Assocs., Inc., 107 S. Ct. 2759 (1987) (four year statute of limitation applicable in Clayton Act civil enforcement applied in civil RICO enforcement action); Shearson/Am. Express, Inc. v. McMahon, 107 S. Ct. 2332, 2345-46 (1987) (holding that RICO claims are not excludable from arbitration under Arbitration Act). The impact of Shearson on the proliferation of civil RICO litigation could be significant since arbitration agreements are now enforceable under the Arbitration Act as to RICO claims, and as of 1985, approximately 35% of all RICO claims were based solely or primarily on allegations of securities fraud. See Shearson, 107 S. Ct. at 2345-46; ABA REPORT, supra note 2, at 57; Strasser, Prosecutors. Private Bar Find New Uses for RICO, 10 Nat'l L.J. 36 (Nov. 2, 1987).

33. See Sedima, 473 U.S. 479. The dispute in Sedima had as its origin a joint venture between Imrex, an American firm, and Sedima, a Belgian firm, to supply electronic components to another Belgian firm. Id. at 483. Sedima received the orders, Imrex filled them and shipped them to Europe, and the two firms split the profits. Id. at 483-84. The agreement worked until Sedima became convinced that Imrex was cheating it by filing inflated expense reports. Id. at 484. Sedima filed suit in federal district court alleging predicate acts of mail and wire fraud. Id.

The district court dismissed the complaint for failure to state a claim. Sedima, S.P.R.L. v. Imrex Co., 574 F. Supp. 963 (E.D.N.Y. 1983), aff'd, 741 F.2d 482 (2d Cir. 1984), rev'd, 473 U.S. 479 (1985). The district court held that a civil action under RICO must state a "racketeering injury" distinct from and in addition to any injury suffered as a result of the predicate acts of mail and wire fraud. Id. at 965.

The United States Court of Appeals for the Second Circuit affirmed the lower court's order. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), rev'd, 473 U.S. 479 (1985). The court of appeals also found the complaint defective on alternative grounds, holding that to state a claim under civil RICO the plaintiff must allege that the defendant has already been convicted of the predicate acts of mail or wire fraud, or of a RICO violation. Id. at 496.

The Supreme Court granted certiorari because of the proliferation of civil RICO cases in the appellate courts and because of the variety of approaches being taken to civil RICO. Sedima, 473 U.S. at 486.

34. Sedima, 473 U.S. at 484.
have a "prior criminal conviction" for the predicate acts or for a RICO violation.\textsuperscript{35} Neither requirement was derived from the language of the statute.

The Supreme Court invalidated the "prior criminal conviction" requirement on the grounds that it was not supported by the language, history, or policy of the statute.\textsuperscript{36} The Court also invalidated the "racketeering injury" requirement because it was not grounded in the language of the statute and because it contravened the general principle that "RICO is to be read broadly."\textsuperscript{37}

Recognizing that the court of appeals' restrictive holding was motivated by a desire to prevent civil RICO from being used against legitimate businesses rather than "mobsters and organized criminals," the Supreme Court emphasized that in enacting RICO Congress had intended to reach legitimate as well as illegitimate organizations.\textsuperscript{38} The Court concluded therefore, that any "defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress."\textsuperscript{39}

The Court expressed concern about the use of civil RICO predominantly against legitimate businesses, but stated that this would not justify the imposition of judicially created restrictions on the statutory scheme.\textsuperscript{40} Instead, the Court criticized Congress and the lower federal

\textsuperscript{35} Id.
\textsuperscript{36} Id. at 488-93. The Court noted that the Second Circuit had imposed the "prior criminal conviction" requirement in part to avoid supposed practical difficulties. Id. at 490. The court of appeals believed that without a prior conviction to rely on, the plaintiff would have to prove the predicate acts beyond a reasonable doubt. Id. This would lead to difficulties because the jury would have to be given different instructions regarding standards of proof for different parts of the case. Id. The Supreme Court stated that the predicate acts need not necessarily be proven beyond a reasonable doubt, but it did not decide the issue. Id. at 491.
\textsuperscript{37} Id. at 493-500. In regard to its directive that RICO be read broadly, the Court stated:
This is the lesson not only of Congress' self-consciously expansive language and overall approach, see United States v. Turkette, 452 U.S. 576, 586-587 (1981), but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,' Pub. L. 91-452, § 904(a), 84 Stat. 947. The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity.
Id. at 497-98. For a discussion of Congress' intent that RICO be construed broadly, see Note, \textit{RICO and the Liberal Construction Clause}, 66 \textit{Cornell L. Rev.} 167 (1980).
\textsuperscript{38} Sedima, 473 U.S. at 499.
\textsuperscript{39} Id.
\textsuperscript{40} Id. The court stated:
[O]f the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common law fraud in a commercial or business setting, and only 9% 'allegations of criminal activity of a type generally associated with professional criminals.' ABA REPORT, at 55-56. Another survey of 132 published decisions found that 57 involved securities transactions and 38 involved commercial and contract dis-
courts for failing "to develop a meaningful interpretation of 'pattern.'" 41

In evaluating the meaning of Sedima, a reasonable conclusion is that the Supreme Court was sending a signal to the lower courts that a more rigorous interpretation of the pattern requirement would be a legitimate means of controlling civil RICO. Sedima, however, also stands for the proposition that any restriction on civil RICO must be grounded in the language of the statute and consistent with a broad reading of it.

The lower courts were thus presented with the formidable task of developing an interpretation of "pattern" that would restrict the abuses of civil RICO but which would avoid the flaws of previous restrictive interpretations. To assist the lower courts, the Supreme Court in footnote fourteen of Sedima supplied a suggested interpretation of the pattern requirement. 42 This interpretation focuses on Congress' intent that the statutory requirement of "at least two acts of racketeering activity" be only a minimum requirement. 43 According to the Court, "while two acts are necessary, they may not be sufficient." 44 In order to estab-

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41. See Sedima, 473 U.S. at 500. The Court attributed the abuses of civil RICO not only to the failure of Congress and the courts to devise a restrictive interpretation of the pattern requirement, but also to "the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud." Id.

42. Id. at 496 n.14. The Court stated: [T]he legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern. S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the report, pointed out to his colleagues that "[t]he 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. 18940 (1970) (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the act. Cf. Iannelli v. United States, 420 U.S. 770, 789 (1975).


44. Sedima, 473 U.S. at 496 n.14.
lish a pattern, the plaintiff must also demonstrate a showing of "continuity plus relationship" among the predicate acts.45

In dissent, Justice Marshall expressed concern that the majority's broad reading of civil RICO validated the federalization of common law fraud, traditionally a state concern.46 Justice Marshall also stated that the decision displaced areas of federal law, such as the securities laws, by providing a more attractive legal remedy.47 Justice Marshall suggested a resolution of these issues based on a narrow interpretation of RICO and a requirement that the plaintiff in a civil RICO action allege a distinct "racketeering injury."48

Justice Powell wrote a separate dissenting opinion in which he reasoned that the Court was not bound to interpret civil RICO so broadly as to authorize its use against legitimate businesses involved in ordinary commercial disputes.49 According to Justice Powell, the words used in the title of RICO, as well as its legislative history, indicate that it was intended to be used against organized crime.50 Justice Powell stated that the only reason that the statute did not explicitly refer to the Mafia was Congress' belief that to do so would create an unconstitutional status offense.51

Justice Powell would have effectuated Congress' intent that RICO be used only against organized crime by interpreting the pattern requirement narrowly.52 Justice Powell did, however, agree with the majority that "continuity plus relationship" among the predicate acts satisfies the pattern requirement.53 Nevertheless, Justice Powell concluded that the lower courts would be unable to reconcile a broad reading of civil RICO with a restrictive interpretation of the pattern requirement.54

45. Id. (emphasis in original).
47. Id. at 505 (Marshall, J., dissenting).
48. Id. at 521 (Marshall, J., dissenting).
49. Id. at 524 (Powell, J., dissenting). Justice Powell disagreed with the majority's conclusion that civil RICO must be broadly interpreted. Id. at 529 (Powell, J., dissenting). He distinguished earlier decisions which called for a broad reading of RICO on the grounds that they involved only its criminal provision. Id. (Powell, J., dissenting).
50. Id. at 524 (Powell, J., dissenting).
52. Id. at 529 (Powell, J., dissenting).
53. Id. at 525 (Powell, J., dissenting) (emphasis in original).
54. Id. (Powell, J., dissenting). The discussion section of this Note explores whether it has been possible to reconcile a broad reading of civil RICO with a restrictive interpretation of the pattern requirement. For a discussion of the strengths and weaknesses of the various approaches of the federal courts of appeals to this difficult problem, see infra notes 144-57 and accompanying text.
B.  The Federal Courts of Appeals Split Over "Pattern"

After the Supreme Court in Sedima suggested a more restrictive interpretation of the pattern requirement, the lower federal courts struggled to apply the Court's comments in various factual contexts. The debate which ensued over the pattern requirement has culminated in several different interpretations of pattern being taken by the federal courts of appeals. Seven out of ten circuits accept the main proposition of Sedima's footnote fourteen that in order to establish a pattern there must be continuity and relationship among the predicate acts.\(^{55}\) Furthermore, the circuits generally agree that relationship is established by proof of a common plan, common victims, common perpetrators or common methods of commission or closeness in time between the acts.\(^{56}\) The circuits are split, however, over the meaning of continuity.

There are four basic approaches to the continuity prong of the pattern requirement. One interpretation, referred to here as the two-scheme approach, requires that the predicate acts be part of at least two separate criminal schemes.\(^{57}\) Another interpretation, referred to here as the flexible approach, focuses on the extent of the criminal activity with-

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55. See, e.g., Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 38-40 (3d Cir. 1987); Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187, 191-94 (9th Cir. 1987); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 30-31 (1st Cir. 1987); International Data Bank Ltd. v. Zepkin, 812 F.2d 149, 154-55 (4th Cir. 1987); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 927-29 (10th Cir. 1987); Morgan v. Bank of Waukegan, 804 F.2d 970, 973-77 (7th Cir. 1986); Superior Oil Co. v. Fulmer, 785 F.2d 252, 254-58 (8th Cir. 1986) (following Sedima generally); see also United States v. Ianniello, 808 F.2d 184, 189-93 (2d Cir. 1986) (declining to follow Sedima), cert. denied, 107 S. Ct. 3229 (1987); Bank of Am. v. Touche Ross & Co., 782 F.2d 966, 970-71 (11th Cir. 1986) (acknowledging Sedima); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985) (acknowledging Sedima). For a discussion of these cases, see infra notes 61-127 and accompanying text.

56. See, e.g., Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187, 192 (9th Cir. 1987) (relationship exists among predicate acts that have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics"); Morgan v. Bank of Waukegan, 804 F.2d 971, 975 (7th Cir. 1986) ("relationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct").

57. For a discussion of the two-scheme approach, which is utilized by the Eighth and Tenth Circuits, see infra notes 63-73 and accompanying text.
out relying on a single determinative factor. The third interpretation holds that predicate acts are continuous and thus constitute a pattern if they are not "isolated or sporadic." This approach is referred to here as the not-isolated approach. The final group is those circuits which adhere to the pre-\textit{Sedima} view that any two acts can constitute a pattern. All these approaches are discussed below.

1. \textit{The Two-Scheme Approach (Eighth and Tenth Circuits)}

The two-scheme approach is based upon the formulation of continuity and relationship articulated in \textit{Sedima}. To satisfy the pattern requirement under this approach, the predicate acts must be related and must comprise more than one criminal scheme. If both requirements are not fulfilled, then the complaint will be dismissed for lack of a pattern.

a. Eighth Circuit

In \textit{Superior Oil Co. v. Fulmer} the United States Court of Appeals for the Eighth Circuit adopted the two-scheme approach. The defendants in \textit{Superior Oil} were involved in a single scheme to steal gas from an oil company. Since there was no proof that they had engaged in this activity in the past or were presently engaged in it elsewhere, the court held that the pattern element was not established and dismissed the RICO claim. In cases subsequent to \textit{Superior Oil}, the Eighth Circuit has

58. For a discussion of the flexible approach, which is utilized by the Third, Fourth and Seventh Circuits, see infra notes 74-95 and accompanying text.

59. For a discussion of the not-isolated approach, utilized by the First and Ninth Circuits, see infra notes 96-111 and accompanying text.

60. For a discussion of the pre-\textit{Sedima} approach, taken by the Second, Fifth and Eleventh Circuits, see infra notes 112-27 and accompanying text.


62. See \textit{Superior Oil}, 785 F.2d at 257.

63. Id. at 257 (citing Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 832 (D.C. Ill. 1985)). Prior to \textit{Superior Oil}, the leading case for the two-scheme approach was \textit{Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.}, which was also the first case to adopt the Supreme Court's suggestion in \textit{Sedima} that pattern is a separate element of a RICO claim. Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828 (D.C. Ill. 1985). The two-scheme approach pronounced by the district court in \textit{Northern Trust}, however, was never adopted by the Seventh Circuit. For a discussion of the Seventh Circuit's approach and its rejection of the two-scheme approach, see infra notes 76-83 and accompanying text.

64. \textit{Superior Oil}, 785 F.2d at 253-55. An employee and two others stole liquid petroleum from Superior Oil's pipeline. \textit{Id.} Acts of mail and wire fraud were committed in the course of obtaining the oil from the pipeline and in filing fraudulent reports regarding the pressure at the well. \textit{Id.} at 257.

65. \textit{Id.} at 257-58. Conversely, the court stated that "it may be that proof of a threat of continuing racketeering activities in the future could, in combination
consistently upheld the requirement of two schemes.\textsuperscript{66}

b. Tenth Circuit

The United States Court of Appeals for the Tenth Circuit has not yet spoken definitively of the pattern issue but in several cases has used a method resembling the two-scheme approach to determine that a pattern was not stated.\textsuperscript{67} In \textit{Torwest DBC, Inc. v. Dick} the Tenth Circuit ac-

with ongoing acts of racketeering be sufficient to establish a "pattern of racketeering." \textit{Id.} at 257.

It is worth noting that the court characterized the activity at hand as "one continuing scheme." \textit{Id.} Apparently the court found some continuity present but not enough to establish a pattern.

66. \textit{See} Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc., 834 F.2d 148 (8th Cir. 1987) (alleged predicate acts of mail fraud relating to development of parcel of property constituted single fraudulent scheme to market property; therefore no pattern); United States v. Kragness, 830 F.2d 842, 858 (8th Cir. 1987) (pattern was stated where evidence indicated that there were three separate schemes involving illicit drugs which involved different drugs, suppliers, countries and bases of operations); H.J.I., Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648, 650 (8th Cir. 1987) (pattern not stated where complaint alleged series of fraudulent acts committed in furtherance of single scheme to influence commissioners of public utility commission); Allright Mo., Inc. v. Billeter, 829 F.2d 631, 641 (8th Cir. 1987) (limited partner's allegations that general partner illegally transferred land to third party were insufficient to establish pattern even though acts occurred over several years and were directed against several individuals and entities in limited partnership where only single scheme to deprive limited partners of interest was shown); Ornest v. Delaware N. Cos., 818 F.2d 651, 652 (8th Cir. 1987) (owners of sports arena failed to state pattern in RICO claim that operators of concessions defrauded arena owners and predecessors over eight year period of contractual share of vending machine sales where only single scheme was shown and no allegation was made that operators had engaged in similar activities in past or were engaged in other criminal activities elsewhere); Madden v. Gluck, 815 F.2d 1163, 1164 (8th Cir.) (single scheme to keep corporation afloat in order to loot corporation did not establish pattern even though alleged acts included checkkiting, diversion of corporate assets and defrauding of creditors), \textit{cert. denied}, 108 S. Ct. 86 (1987); Devries v. Prudential-Bache Sec., Inc., 805 F.2d 326, 329 (8th Cir. 1986) (investor's allegations that securities brokerage firm and its employee generated excessive sales commissions by recommending unsuitable investments and churning investor's account failed to establish pattern because it consisted of only single scheme); Holmberg v. Morrisette, 800 F.2d 205, 209-10 (8th Cir. 1986) (pattern not stated where drawing down of three letters of credit securing exportation of goods constituted single scheme), \textit{cert. denied}, 107 S. Ct. 1953 (1987).

67. \textit{See} Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987) (where majority shareholder made several secret withdrawals from corporate income in attempt to have loan he made to company repaid out of company funds and had single objective, pattern not stated); Condict v. Condict, 815 F.2d 579, 582-84 (10th Cir. 1987) (allegations of common law fraud, deceit and misrepresentation arising from family dispute over family ranching operations failed to state pattern); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928-29 (10th Cir. 1987) (allegations that corporation's directors secretly purchased real property and sold it at profit to corporation failed to establish pattern where there was no indication that activity was other than isolated incident and single scheme at issue had one victim and one goal).
accepted continuity plus relationship as the basis of the pattern requirement.\footnote{68}{810 F.2d 925, 928 (10th Cir. 1987).} Furthermore, the Torwest court held that the numerous racketeering acts in question did not evince continuity because "a scheme to achieve a single discrete objective does not of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished."\footnote{69}{Id. at 928-29.} Although this proposition may seem to be merely a recapitulation of the two-scheme approach as set forth by the Eighth Circuit in Superior Oil,\footnote{70}{See Superior Oil, 785 F.2d at 257.} the Torwest court declined "to go beyond the facts before us to formulate a bright-line test in the abstract."\footnote{71}{Id. at 926.} While the Tenth Circuit has affirmed the use of this modified two-scheme approach in cases subsequent to Torwest,\footnote{72}{See also Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987).} it is unclear whether the method will be retained in a potential future case which presents a high level of continuity but only a single scheme, such as is the case with an ongoing or

\footnote{68}{810 F.2d 925, 928 (10th Cir. 1987).} The court reviewed the Supreme Court's comments in \textit{Sedima} and stated that "\textit{Sedima} thus makes clear that a RICO violation requires continuous and related racketeering acts." \textit{Id.} The court found the relationship aspect satisfied because the acts were part of a "common fraudulent scheme." \textit{Id.} (citing Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986)). The case involved two corporations, Vace and Great-West, which formed a new corporation, Torwest, to engage in the business of acquiring and developing real estate. \textit{Id.} at 926. Instead of finding property for acquisition by Torwest as agreed, Vace secretly bought land and sold it to Torwest at an inflated price. \textit{Id.} at 927. The court assumed for purposes of the ruling that the defendants had engaged in numerous acts of racketeering. \textit{Id.} at 928.

\footnote{69}{Id. at 928-29.} The court refused to characterize the activity in question as "a scheme that contemplated open ended fraudulent activity over a period of time." \textit{Id.} at 929. Instead, the court determined that the scheme at issue had a single goal and that there was no evidence on which to suppose that the activity would continue after the goal was achieved. \textit{Id.} Thus, no threat of continuing activity could be inferred. \textit{Id.}

\footnote{70}{See Superior Oil, 785 F.2d at 257.} In a subsequent case the Tenth Circuit declared its approach "similar" to that of other courts, including the classic expositions of the two-scheme approach, \textit{Superior Oil} and \textit{Northern Trust Bank/O'Hare v. Inyoro}. \textit{See Condict v. Condict, 815 F.2d 579, 584 n.3 (10th Cir. 1987).} For a discussion of \textit{Superior Oil, Northern Trust} and the two-scheme approach in the Eighth Circuit, see infra notes 63-66 and accompanying text.

\footnote{71}{Id.; see also Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987).} In Garbade the court suggested that a different test might be applied for determining what constitutes a pattern as opposed to what does not constitute a pattern. The court stated that "\textit{Torwest} decided what was \textit{not} a pattern of racketeering activity, as did \textit{Condict v. Condict}, 815 F.2d 579 (10th Cir. 1987). We will do the same and again not attempt to construct an affirmative definition of what would constitute such a pattern." \textit{Garbade, 831 F.2d at 214} (emphasis in original).

\footnote{72}{See Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987) (where majority shareholder made several secret withdrawals from corporate income in attempt to have loan he made to company repaid out of company funds and had single objective, pattern not stated); \textit{Condict v. Condict}, 815 F.2d 579, 582-84 (10th Cir. 1987) (allegations of common law fraud, deceit and misrepresentation arising from family dispute over family ranching operations failed to state pattern).}
open ended scheme.\textsuperscript{73}

2. The Flexible Approach (Seventh, Third and Fourth Circuits)

The United States Courts of Appeals for the Seventh, Third and Fourth Circuits have rejected the two-scheme approach\textsuperscript{74} in favor of a flexible analysis which does not turn on any one factor or any verbal formula but rather focuses on the facts and circumstances of each case.\textsuperscript{75} The methods used by these circuits are similar but not identical.

73. In Torwest, the court rejected the plaintiff-appellant's argument that it was presented with such a case. 810 F.2d at 929. The implication is that the case may have been decided differently if the scheme at issue was open ended or continuous. If so, this would have been a substantial deviation from the two-scheme approach of Superior Oil, where no pattern was held to be established despite the existence of "one continuing scheme." See Superior Oil, 785 F.2d at 257.

A future rejection by the Tenth Circuit of the two-scheme approach, however, would be consistent with the treatment given to the two-scheme approach by other circuits in similar circumstances. The Third Circuit for example, prior to rejecting the two-scheme approach, used that approach to demonstrate that a pattern was established in a situation which demonstrated a high level of continuity. See Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1354-55 (3d Cir. 1987) (fraud involving services for eighty oil wells performed pursuant to two contracts covering different time periods constituted more than one scheme). When later presented with a marginal case of continuity, however, the Third Circuit rejected the two-scheme approach and adopted another approach. See Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 38-40 (3d Cir. 1987) (investment fraud scheme carried out by several individuals and two separate entities and which involved similar misrepresentations to more than 20 investors constituted pattern despite existence of single scheme). For a discussion of the Third Circuit's approach, see infra notes 84-90 and accompanying text.

74. All three circuits have rejected the two-scheme approach on the grounds that it would allow a large and ongoing single scheme to escape RICO liability. See Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987); International Data Bank Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987); Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986). For a further discussion of the Third Circuit's treatment of the two-scheme approach, see infra note 84.

The Seventh Circuit's rejection of the two-scheme approach in Morgan v. Bank of Waukegan, 804 F.2d at 975, was a major setback for the two-scheme approach because the district court decision in the same case, Morgan v. Bank of Waukegan, 615 F. Supp. 836 (N.D. Ill. 1985) (Shadur, J.), rev'd, 804 F.2d 970 (7th Cir. 1986), was a companion case to Northern Trust Bank/O'Hare v. Inryco, 615 F. Supp. 828 (N.D. Ill. 1985) (Shadur, J.), the progenitor of the two-scheme approach. The two-scheme approach was thereby abandoned in the Seventh Circuit. For a discussion of Morgan and Northern Trust, see Batista, 7th Circuit Complicates RICO Defense, 9 Nat'l L.J. 15 (June 8, 1987).

75. See, e.g., Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 40 (3d Cir. 1987) ("We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be 'continuous.'"); International Data Bank Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987) ("In our view, no mechanical test can determine the existence of a RICO pattern."); Morgan v. Bank of Waukegan, 804 F.2d 970, 976 (7th Cir. 1986) ("The doctrinal requirement of a pattern is a standard, not a rule, and as such its determination de-
The differences have to do with the articulation of specific factors and the factual circumstances in which the cases arose. However, the methods of analyzing the pattern requirement in civil RICO claims are sufficiently similar to be considered as one general approach.

a. Seventh Circuit

In the Seventh Circuit the flexible approach was set forth in *Morgan v. Bank of Waukegan*. To establish a pattern under this approach the predicate acts must demonstrate both continuity and relationship. To satisfy the continuity prong the predicate acts must be sufficiently distinct from each other in time and place so as to be considered "separate transactions." The *Morgan* court listed as factors to be used in determining whether separate transactions exist "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." No one of these factors is to be considered determinative, rather the facts and circumstances of each case must be taken into account.

The continuity and relationship aspects of pattern were satisfied in *Morgan* because the predicate acts took place over a period of several years apart. Id. at 972. The episode was facilitated by various acts of mail fraud committed over a four year period. Id. at 973.

In a previous case the Seventh Circuit had recognized that the purpose of the pattern requirement is "to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes." Lipin Enters., Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986) (citing ABA REPORT, supra note 2, at 203-08 (1985)).

76. 804 F.2d 970 (7th Cir. 1986). The facts in *Morgan* involved misrepresentations made to the plaintiffs for the purpose of inducing them to invest in a series of corporations and two subsequent foreclosure sales which occurred two years apart. Id. at 972. The episode was facilitated by various acts of mail fraud committed over a four year period. Id. at 973.

77. *Morgan*, 804 F.2d at 975. The court noted that the aspects of continuity and relationship may sometimes be difficult to reconcile with each other; relationship implies that the acts occurred closely in time to each other and continuity implies acts occurring at different points in time. Id.

78. Id. Relationship among the acts, the other prong of the *Sedima* pattern formulation, "implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct." Id. The author submits that it is the rare case in which the relationship aspect is not met. In virtually all of the cases involving the pattern issue it is the continuity aspect which is in controversy.

79. Id. The court described this approach as a "middle course" between two extremes. Id. The two extremes are represented by the two-scheme approach and by the pre-*Sedima* view, still held by some courts, that mere commission of two predicate acts within a ten year period suffices for a pattern. Id.

80. Id.; see also Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806, 810 (7th Cir. 1987).
years and were distinct in that they related to two separate foreclosures and a fraudulent loan transaction.\textsuperscript{81} Since Morgan, the Seventh Circuit has had an opportunity to apply the flexible approach several times and has held that continuity is not shown where the predicate acts merely lead up to or further a single illegal transaction.\textsuperscript{82} But a pattern does exist where each predicate act in a series inflicts economic injury, even though there is but a single scheme and a single victim.\textsuperscript{83}

b. Third Circuit

The United States Court of Appeals for the Third Circuit adopted the flexible approach in Bartichek v. Fidelity Union Bank/First National State but with a conceptual framework slightly different from that employed by the Seventh Circuit.\textsuperscript{84} Rather than characterizing predicate

\textsuperscript{81} Morgan, 804 F.2d at 976. The Morgan court reexamined two previous post-Sedima pattern cases in light of its new method. Id. Illinois Department of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985), involved a defendant who mailed nine fraudulent sales tax returns in nine consecutive months. The panel hearing the appeal decided the case on the basis of the pre-Sedima view that each mailing was a separate offense and that all that was required for a pattern was more than one predicate act within a ten year period. The Morgan court analyzed this activity as nine separate transactions. Morgan, 804 F.2d at 976. In Lipin Enterprises Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986), the defendant allegedly defrauded the plaintiff out of $960,000 worth of stock in one transaction. The court held that no pattern was stated, despite multiple predicate acts, because the activity only comprised one scheme or episode. Id. The Morgan court analyzed this as a single transaction, single scheme, single victim and single injury, all of which transpired over a short period of time. Thus, the continuity prong was not satisfied. Morgan, 804 F.2d at 976-77.

\textsuperscript{82} See Skycom Corp. v. Telstar Corp., 813 F.2d 810, 818 (7th Cir. 1987) (false representations leading up to single contract and transfer of single business opportunity did not constitute pattern); Marks v. Forster, 811 F.2d 1108, 1112 (7th Cir. 1987) (no pattern stated where accountants participated in scheme to divert capital from partnership by twice mailing false tax schedules, filing false tax return and denying information to investor); Elliott v. Chicago Motor Club Ins., 809 F.2d 347, 350 (7th Cir. 1986) (allegations that insurance company engaged in scheme to delay settlement of claim did not state pattern where all predicate acts related to same transaction involving single insurance policy and arising out of single automobile accident); Tellis v. U.S. Fidelity & Guar. Co., 826 F.2d 477, 479 (7th Cir. 1986) (fraudulent mailings by employer to induce employee to settle worker's compensation claim did not amount to pattern).

\textsuperscript{83} See Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987). Liquid Air involved an employee of the company and two representatives of a distributor who bilked the company out of cylinders for compressed gas as well as the rental and replacement fees for the cylinders by falsifying 19 shipping orders. The court held that repeated infliction of economic injury upon a single victim through a single scheme was sufficient to establish a pattern. Id.; cf. Illinois Dept' of Rev. v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985) (nine fraudulent sales tax returns in nine consecutive months satisfies pattern).

\textsuperscript{84} 832 F.2d 36 (3d Cir. 1987). For the facts of Bartichek, see infra note 89 and accompanying text.

In several previous cases the Third Circuit dealt with the pattern issue without adopting a specific approach. Instead, since each case presented a series of
acts as "continuous" and "related," the Third Circuit interprets pattern directly based "on a combination of different factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators and the character of the unlawful activity." The Third Circuit treats continuity, which the Supreme Court emphasized in Sedima and which was drawn from RICO's legislative history, as merely calling for an inquiry into the extent of the illegal activity. However, the Third Circuit does not use a verbal formula for determining when activity is sufficiently extensive to constitute a pattern, instead it looks to the facts and circumstances of each case.

Thus, in Barticheck a pattern existed where several individuals and two separate entities made misrepresentations to more than twenty investors in furtherance of a single fraudulent scheme. In a subsequent

acts which satisfied the two-scheme approach, the most rigorous test for a pattern, the RICO claims were allowed to stand. See Town of Kearney v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1267-68 (3d Cir. 1987) (two separate schemes to bribe city officials); Petro-Tech Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1354-55 (3d Cir. 1987) (fraud involving services for eighty oil wells performed pursuant to two contracts covering different time periods); United States v. Grayson, 795 F.2d 278, 289-90 (3d Cir. 1986) (seven racketeering acts, performed over period of more than year, involving manufacture, distribution and sale of methamphetamine and phenacyclidine), cert. denied, 107 S. Ct. 927 (1987); Malley-Duff & Assocs. v. Crown Life Ins. Co., 792 F.2d 341, 353 n.20 (3d Cir. 1986) (fraudulent termination of insurance agencies in several cities), aff'd on other grounds, 107 S. Ct. 2759 (1987).

In Barticheck the United States Court of Appeals for the Third Circuit rejected the two-scheme approach not only because of the definitional problems presented by the term scheme, but also because it would allow a large and ongoing single scheme to escape RICO liability. See Barticheck, 832 F.2d at 39. The latter reason for rejecting the two-scheme approach is somewhat inconsistent with the Third Circuit's treatment of it in a previous case where rather than allow a large and ongoing single scheme to escape liability, the court read the term scheme expansively and used the two-scheme approach, without adopting it, to hold that a pattern existed. See Petro-Tech Inc., 824 F.2d at 1355.


87. Barticheck, 832 F.2d at 40. This inquiry into the extent of the illicit activity is consistent with the purpose of RICO, which is to reach "criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." See Marshall-Silver Constr. Co. v. Mendel, 835 F.2d 63 (3d Cir. 1987).

88. Barticheck, 832 F.2d at 40; see also, Marshall-Silver Constr. Co. v. Mendel, 835 F.2d 63 (3d Cir. 1987).

89. Barticheck, 832 F.2d at 39. Barticheck involved various entities and individuals which formed a limited partnership to engage in oil and gas drilling and which arranged with Garden State National Bank to have the Bank lend money to investors. Id. at 37. The Bank authorized the organizers to process the loan applications. Id. The organizers then approached the plaintiffs, 23 investors, and made material misrepresentations regarding the safety of the investment. Id. As a result the plaintiffs borrowed over two million dollars to invest in the venture. Id. Their interests later proved to be worthless and they charged that
Third Circuit case, however, no pattern was held to exist where there were two perpetrators but only a single victim, a single injury and a single scheme over a short period of time.\textsuperscript{90}

c. Fourth Circuit

In \textit{International Data Bank Ltd. v. Zepkin}, the Fourth Circuit adopted a flexible approach to the pattern requirement, declining to adopt a single test or formula.\textsuperscript{91} It described its method as "a case by case standard akin to that announced by the Seventh Circuit in \textit{Morgan}."\textsuperscript{92} Under this approach, the existence of a pattern is a matter of "criminal dimension and degree."\textsuperscript{93} While the Fourth Circuit has not set forth a list of specific factors, it has made clear that the existence of a pattern depends on the context in which the alleged illegal activity took place and especially on the nature of the predicate offenses.\textsuperscript{94}

the organizers were acting as agents of the Bank. Fidelity Union Bank later became the successor to Garden State Bank. \textit{Id.}

The court stated that this activity comported with the ordinary understanding of the term "pattern" and properly fell within the reach of civil RICO. \textit{Id.}

90. \textit{See Marshall-Silver Constr. Co. v. Mendel}, 835 F.2d 68 (3d Cir. 1987). The defendants in \textit{Marshall-Silver} were subcontractors on a job for which Marshall-Silver was the contractor. \textit{Id.} When Marshall-Silver did not pay them the subcontractors filed to have Marshall-Silver put into involuntary bankruptcy and contacted financial reporting services to report the bankruptcy. \textit{Id.} The subcontractors dropped the bankruptcy suit when required to post a bond. \textit{Id.} Marshall-Silver subsequently sued on RICO charges. \textit{Id.}

In dismissing the case for lack of a pattern, the court compared it to two Seventh Circuit cases decided under the flexible approach. \textit{Id.} (citing Marks v. Forster, 811 F.2d 1108 (7th Cir. 1987); Lipin Enters., Inc. v. Lee, 803 F.2d 322 (7th Cir. 1986)).

91. 812 F.2d 149 (4th Cir. 1987). \textit{Zepkin} involved RICO charges by investors against the ousted founders of a business who allegedly made fraudulent statements in the prospectus, falsified the amount of their advance to the company and fraudulently obtained reimbursement. \textit{Id.} at 150-51. The court held that no pattern was stated in this single scheme to defraud and that all that existed were ordinary claims of fraud, not RICO claims. \textit{Id.} at 154-55. Furthermore, the court rejected the two-scheme approach and any method that relied on the number of predicate acts involved. \textit{Id.} The court stated that "[n]o mechanical test can determine the existence of a pattern." \textit{Id.}


94. \textit{See HMK Corp. v. Walsey}, 828 F.2d 1071, 1073 (4th Cir. 1987), \textit{cert. denied}, 108 S. Ct. 706 (1988). In \textit{Walsey}, the plaintiffs bought property bordering a parcel owned by the defendant's and sued on RICO charges alleging that the defendants, through a series of misrepresentations, tricked the state and local governments into granting numerous zoning benefits for their parcel while placing zoning burdens on the plaintiffs' parcel. \textit{Id.} at 1072. This activity took place over a four year period. \textit{Id.} The court held that no pattern existed in this situation despite the length of time and large number of predicate acts alleged. \textit{Id.} at 1075. The court's reasoning was that the context of this situation, a mixed commercial and political process which is by its nature complex and lengthy, ac-
To date the Fourth Circuit has concentrated on what is not a pattern. It is clear that a single scheme to defraud a single victim is not a pattern.\footnote{5} However, the Fourth Circuit has not had an opportunity to define what is a pattern.

3. The "Not-Isolated" Approach (Ninth and First Circuits)

The Ninth and First Circuits employ similar methods for determining the existence of a civil RICO pattern. Both circuits accept the Sedima dicta that something more than just two acts is required to establish a pattern; there must be a "threat of continuing activity."\footnote{6} Rather than focus specifically on the standard of "continuity plus relationship" enunciated by the Supreme Court, however, as the majority of circuits have done,\footnote{7} the Ninth and First Circuits frame the inquiry in terms of whether the predicate acts are "isolated" and therefore do not rise to the level of a pattern.\footnote{8}

a. Ninth Circuit

The United States Court of Appeals for the Ninth Circuit defined the contours of the pattern requirement in Sun Savings and Loan Association v. Dierdorff.\footnote{9} The Ninth Circuit's approach to the pattern requirement is unique because it follows the Sedima suggestion that something more than two acts is required to establish a pattern,\footnote{10} but maintains counted for the large number of predicate acts over a span of time. \textit{Id.} at 1074-75. The court noted that in a purely commercial context a lengthy scheme might contribute to the finding of a pattern. \textit{Id.} at 1075. Furthermore, the court emphasized that its holding did not mean that it was impossible to have a RICO claim in a zoning context. \textit{Id.}

\footnote{5}{See Eastern Publishing & Advertising v. Chesapeake Publishing & Advertising, 831 F.2d 488, 492 (4th Cir. 1987) (RICO action by publisher against competitor for multiple acts of mail and wire fraud in misleading customers to advertise with competitor did not state pattern); Zepkin, 812 F.2d at 154 (suit by investors against ousted founders of business alleging fraudulent statements in prospectus and fraudulent reimbursement did not state pattern).}

\footnote{6}{Sedima, 473 U.S. at 496 n.14.}

\footnote{7}{For an overview of the various approaches to the pattern requirement taken by the circuits, see supra notes 55-60 and accompanying text.}

\footnote{8}{See, e.g., Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187, 191-94 (9th Cir. 1987); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 30-31 (1st Cir. 1987). For a discussion of Roeder and the First Circuit's approach, see infra notes 108-11 and accompanying text. For a discussion of Sun Savings and the Ninth Circuit's approach, see infra notes 99-107 and accompanying text.}

\footnote{9}{825 F.2d 187, 191-94 (9th Cir. 1987). Sun Savings involved the former president of a bank who had allegedly received a series of kickbacks and favors from loan customers of the bank. \textit{Id.} at 190. The bank sued on civil RICO charges alleging four predicate acts of mail fraud based on letters the president sent to various entities fraudulently concealing his illicit activities. \textit{Id.}}

\footnote{10}{See \textit{id.} at 191 (quoting Sedima, 473 U.S. at 496 n.14). Three months prior to its decision in Sun Savings, the Ninth Circuit had expressly declined to follow the Supreme Court's suggestion in Sedima that a pattern requires something more than just two predicate acts. See California Arch. Bldg. Prod. v. Fran-}
that the Supreme Court did not intend to establish "‘continuity plus relationship’ as a determinative two-pronged test."\(^{101}\) Rather, the Ninth Circuit’s approach is premised on the conclusion that the Supreme Court used that formulation "to demonstrate how the pattern requirement should be interpreted to prevent the application of RICO to the perpetrators of ‘isolated’ or ‘sporadic’ criminal acts."\(^{102}\)

Therefore, instead of defining “pattern” through the use of extraneous criteria such as the number of schemes or the extent of the continuity,\(^{103}\) the Sun Savings court held that a RICO pattern requires predicate acts which are not “isolated or sporadic.”\(^{104}\) The court reasoned, furthermore, that this determination depends upon whether the predicate acts pose “a threat of continuing activity.”\(^{105}\) While the court
ciscan Ceramics, 818 F.2d 1466 (9th Cir. 1987), cert. denied, 108 S. Ct. 698 (1988). The court in Franciscan stated: “The dictum in Sedima is suggestive, but without additional explication by the Supreme Court we decline to follow its lead.” \(\text{Id.}\) at 1469. Thus, the court held that two or more acts of racketeering activity constitute a pattern. \(\text{Id.}\) In Sun Savings the court offered no explanation for its different interpretation of the pattern requirement.

\(^{101}\) Sun Savings, 825 F.2d at 192 (quoting Sedima, 473 U.S. at 496 n.14 (emphasis omitted)).

\(^{102}\) \(\text{Id.}\) at 192 (citing Note, Reconsideration of Pattern in Civil RICO Offenses, 62 \(\text{NOTRE DAME L. REV.}\) 83, 96 (1986)); \(\text{see also}\) Medallion Television Enter., Inc. v. SelecTV, 833 F.2d 160 (9th Cir. 1987).

\(^{103}\) The court emphasized that the requirement of “continuity” stressed in Sedima is designed to prevent RICO from being used against “perpetrators of isolated or sporadic acts” and not to limit it to “complicated systems or multiple schemes of criminal activity.” Sun Savings, 825 F.2d at 193-94. The Ninth Circuit in Sun Savings concluded that, furthermore, courts should not create limitations upon RICO claims which are not found in the statute. \(\text{See id.}\) (citing Sedima, 473 U.S. at 499-500).

\(^{104}\) Sun Savings, 825 F.2d at 194. While the Ninth Circuit framed its inquiry in terms of acts which are “not isolated or sporadic,” it did not dismiss the formulation of continuity and relationship as irrelevant. \(\text{Id.}\) at 192; \(\text{see also}\) Medallion Television Enter., Inc. v. SelecTV, 833 F.2d 1360 (9th Cir. 1987) (“those factors are relevant considerations”). Thus, the Sun Savings court declared that predicate acts which are not “isolated or sporadic” demonstrate that the criminal activity is “continuous.” 825 F.2d at 192. According to the court, the element of continuity is most often in controversy in cases involving the pattern requirement. \(\text{Id.}\)

In addition to examining the continuity factor, the court accepted the Supreme Court’s determination that relationship exists “among acts that have ‘the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics.’” Sun Savings, 825 F.2d at 192 (quoting Sedima, 473 U.S. at 496 n.14); \(\text{see also}\) 18 U.S.C. § 1961(5)(e). The predicate acts in the case at hand demonstrated relationship because they all furthered the same scheme. Sun Savings, 825 F.2d at 191.

\(^{105}\) Sun Savings, 825 F.2d at 193. In a later case the Ninth Circuit explained that its inquiry posits the issue as “whether the acts are isolated or sporadic, on the one hand, or whether they indicate a threat of continuing activity, on the other.” Medallion Television Enter., Inc. v. SelecTV, 833 F.2d 1360, 1365 (9th Cir. 1987). The court admitted that its approach “does not provide a bright-line rule” but reasoned that application of the test would become easier when more cases were decided on the basis of it. \(\text{Id.}\) at 1365.
did not define this phrase, it held that the criminal activity at hand posed such a threat because the four predicate acts covered up a series of illegal kickbacks and receipts of favors, occurred over a period of several months and did not complete the criminal scheme. In subsequent cases the Ninth Circuit has found no threat of continuing activity where the predicate acts implement a single criminal objective, except where the objective is an ongoing one; relevant factors considered in those cases included the number of victims and the amount of time over which the activity took place.

b. First Circuit

Roeder v. Alpha Industries, Inc. is the only case to date in which the United States Court of Appeals for the First Circuit has discussed the pattern issue. In Roeder, the court held that predicate acts must be related and "must threaten to be more than an isolated occurrence" in order to establish a pattern. Furthermore, the Roeder court recognized that there is a point at which acts become so close in time and

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106. The Sun Savings court demonstrated the meaning of "threat of continuing activity" by comparing the facts at hand to those of Schreiber Distributing Co. v. Serv-Well Furniture Co. Sun Savings, 825 F.2d at 193 (citing Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393 (9th Cir. 1986)). In Schreiber, the two predicate acts at hand "did not pose a threat of continuing activity because they furthered the diversion of a single shipment of goods and appear[ed] to have occurred at nearly the same time, and because once the acts were complete[d], defendant had no further need to commit predicate acts." Id. For a discussion of the Ninth Circuit's application of "threat of continuing activity" in subsequent cases, see infra note 108 and accompanying text.

107. See, e.g., United Energy Owners v. United Energy Management, 837 F.2d 556, 361 (9th Cir. 1988) (multiple acts involving multiple victims over more than year satisfy pattern requirement); Medallion Television Enter., Inc. v. Select TV, 833 F.2d 1360 (9th Cir. 1987) (no threat of continuity where company involved single fraud with single victim); Jarvis v. Regan, 833 F.2d 149 (9th Cir. 1987) (no threat of continuity where legal aid organization allegedly committed three predicate acts of mail and wire fraud in obtaining single federal grant to defray cost of opposing ballot initiative); Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 918 (9th Cir. 1987) (13 acts of fraud related to ongoing scheme to embezzle company funds involving multiple victims established pattern).

108. 814 F.2d 22, 30-31 (1st Cir. 1987). The plaintiff in Roeder was a stockholder in Alpha Industries, Inc. who brought a class action suit under the securities laws and under RICO against the officers and directors of the corporation alleging that the defendants were liable for not disclosing that Alpha had paid a bribe for a contract. Id. at 23-24. The alleged predicate acts were eleven phone calls and eight letters sent in the course of making three payments on a single bribe. Id. at 31.

109. Id. at 30. The court did not explain the meaning of "isolated" or further define its conception of the pattern requirement. The Roeder court rejected the two-scheme approach as a definition of pattern on the ground that it substitutes the difficulty of defining "scheme" for the difficulty in defining "pattern." Id. Furthermore, the court disavowed the two-scheme approach because it would allow "a large and ongoing scheme, albeit a single scheme," to escape RICO liability. Id. (quoting Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986)).
function that no threat of continuity exists.\textsuperscript{110} Therefore, according to the reasoning of the court, the single instance of bribery in \textit{Roeder} could not become a pattern merely because it was carried out in several steps and was communicated through a series of letters and phone calls.\textsuperscript{111}

4. \textit{Approaches Unchanged by Sedima (Second, Fifth and Eleventh Circuits)}

The Second, Fifth and Eleventh Circuits have not significantly changed their interpretations of the pattern requirement following the Supreme Court's comments on the subject in \textit{Sedima}. The Second and the Fifth Circuits continue to hold, as they did prior to \textit{Sedima}, that two predicate acts suffice to constitute a pattern.\textsuperscript{112} The extent to which the Eleventh Circuit follows \textit{Sedima} is uncertain, but it has retained its rule that separate predicate acts are considered to be distinct in determining whether a pattern exists, irrespective of whether they occurred as part of a single scheme or transaction.\textsuperscript{113}

a. Second Circuit

The Second Circuit has taken the position that its interpretation of the pattern requirement, established prior to \textit{Sedima}, need not be altered to conform with \textit{Sedima}.\textsuperscript{114} In \textit{United States v. Ianniello}, the court affirmed

\textsuperscript{110} See \textit{Roeder}, 814 F.2d at 31 (citing Marks v. Forster, 811 F.2d 1108 (7th Cir. 1987)).

\textsuperscript{111} Id. According to the court, a bribe is "solitary and isolated" and cannot be transformed into a pattern just by multiple acts of communication. \textit{Id.} The court stated: "This is especially true when the acts involve wire and mail fraud. 'In today's integrated interstate economy, it is the rare transaction that does not somehow rely on extensive use of the mails or the telephone.'" \textit{Id.} (quoting Eastern Corp. Fed. Credit Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1592, 1535 (D. Mass 1986)).


\textsuperscript{113} See \textit{Bank of Am. v. Touche Ross & Co.}, 782 F.2d 966 (11th Cir. 1986). For a discussion of \textit{Bank of America}, see infra notes 124-27 and accompanying text.

\textsuperscript{114} See \textit{United States v. Ianniello}, 808 F.2d 184, 189-93 (2d Cir. 1986), cert. denied, 107 S. Ct. 3229 (1987). In \textit{Ianniello}, the court declined to reconsider \textit{United States v. Weisman}, 624 F.2d 1118 (2d Cir.), cert. denied, 449 U.S. 871 (1980), which held that two predicate acts suffice to establish a pattern. \textit{Ianniello}, 808 F.2d at 189-90. In the Second Circuit one panel is bound by the decision of a prior panel until overruled by the Supreme Court or by the United States Court of Appeals for the Second Circuit en banc. \textit{Id.} at 190 (citing \textit{In re Jaylaw Drug, Inc.}, 621 F.2d 524, 527 (2d Cir. 1980); Boothe v. Hammock, 605 F.2d 661, 663-64 (2d Cir. 1979)). Since the Supreme Court's comments in \textit{Sedima} were dicta, the court found it unnecessary to reconsider the earlier decision. \textit{Id.} Furthermore, the court stated that it would be inappropriate to do so because \textit{Weisman} addressed the same concerns addressed in \textit{Sedima}, including the elements of continuity and relationship. \textit{Id.} (citing \textit{Weisman}, 624 F.2d at 1121-23).
that two predicate acts will suffice to establish a pattern.\textsuperscript{115} The court held that continuity and relationship among the predicate acts are supplied through its definition of the “enterprise” requirement.\textsuperscript{116} In the Second Circuit, an enterprise must be a continuing operation and the acts must be related to the common purpose of the enterprise.\textsuperscript{117} Thus, the difference between the Second Circuit’s interpretation of pattern and \textit{Sedima} “is one of form and not of substance.”\textsuperscript{118}

\textsuperscript{115} 808 F.2d 184, 190 (2d Cir. 1986) (citing United States v. Weisman, 642 F.2d 1118, 1121-23 (2d Cir.), \textit{cert. denied}, 449 U.S. 871 (1980)), \textit{cert. denied}, 107 S. Ct. 3229 (1987). \textit{Ianniello} involved a large group of defendants who skimmed profits from bars and restaurants they owned in New York. \textit{Id.} at 186. The criminal scheme included plans to defraud the state of taxes by understating gross receipts, to defraud legitimate creditors of one of the bars by skimming receipts while it was in bankruptcy and to cheat on their personal income tax returns. \textit{Id.} The predicate acts alleged were multiple acts of mail and bankruptcy fraud. \textit{Id.} at 189. The court held that proof of two or more predicate acts satisfied the pattern requirement. \textit{Id.} at 190. Furthermore, since the jury was instructed that the acts must be related to the enterprise and that the enterprise must be a continuous operation, any failure to charge the jury in exactly the language of \textit{Sedima} would have been harmless error at best. \textit{Id.} at 191.

\textsuperscript{116} \textit{Id.} at 192. Under the \textit{Ianniello} court’s analysis, relatedness is supplied by the requirement that all the predicate acts occur within a ten year period, as set forth in 18 U.S.C. § 1961(5), as well as by the requirement that they be committed in connection with an enterprise, as set forth in 18 U.S.C. § 1962(c). See \textit{Ianniello}, 808 F.2d at 190 (citing United States v. Weisman, 642 F.2d 1118, 1121-23 (2d Cir.), \textit{cert. denied}, 449 U.S. 871 (1980)). The enterprise also provides continuity because “an enterprise is a continuing operation.” \textit{Id.} at 190-91 (citing United States v. Turkette, 452 U.S. 576, 583 (1981); Moss v. Morgan Stanley Inc., 719 F.2d 5, 21-22 (2d Cir. 1983), \textit{cert. denied}, 461 U.S. 945 (1983)). For an explanation of the enterprise requirement, see supra note 9 and accompanying text.


\textsuperscript{118} \textit{Id.} (footnote omitted). One of the defendants in \textit{Ianniello} put forth the argument that the two predicate acts which he was convicted of could not constitute a pattern because they were both designed to further a single discrete crime, fraudulent renewal of the license for a bar. \textit{Id.} The court rejected this argument in accord with its holding that two predicate acts can constitute a pattern. \textit{Id.} The court recognized that under its approach, continuing criminal activity with a single purpose can provide a basis for RICO liability. \textit{Id.} The court noted that the Eighth Circuit in \textit{Superior Oil v. Fulmer}, 785 F.2d 252, 257 (8th Cir. 1986), had reached a contrary result by holding that more than one scheme was required to constitute a pattern. \textit{Ianniello}, 808 F.2d at 192. The court stated that the requirement of more than one scheme was “a strained and inappropriate reading of the statutory language.” \textit{Id.} In addition, the court noted that such a requirement would undercut section 1962(b) of RICO which prohibits predicate acts designed to take over an enterprise. As the court stated, section 1962(b) “prohibits one scheme to acquire an interest in an interstate enterprise.” \textit{Id.} Requiring two schemes for the same purpose “would effectively eliminate this provision.” \textit{Id.} (footnote omitted).

In a subsequent case, Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 (2d Cir. 1987), \textit{cert. denied}, 108 S. Ct. 698 (1988), the Second Circuit reaffirmed the analysis of \textit{Ianniello} and once again rejected the contention that a pattern requires more than one criminal scheme. \textit{Beck}, 820 F.2d at 51. How-
b. Fifth Circuit

R.A.G.S. Couture, Inc., v. Hyatt set the precedent for the pattern requirement in the Fifth Circuit.\(^{119}\) The R.A.G.S. court held that two acts of mail fraud aimed at obtaining a single payment constituted a pattern.\(^ {120}\) R.A.G.S. represents the same approach the Fifth Circuit took prior to Sedima; any two acts can constitute a pattern.\(^ {121}\) Other panels in the Fifth Circuit have questioned R.A.G.S. and urged that it be over-

however, the court held that the enterprise element was not satisfied because the alleged enterprise had only a single shortlived goal. \(\text{id.}\) Therefore, the continuity element required for an enterprise was not established and the RICO claim was dismissed. \(\text{id.}\) at 51-52; see also Creative Bath Prods., Inc. v. Connecticut Gen. Life Ins. Co., 837 F.2d 561, 564 (2d Cir. 1988) (complaint dismissed because entity was short lived and thus lacked continuity); United States v. Benevento, 836 F.2d 60, 72 (2d Cir. 1987) (continuity element met where enterprise was long and elaborate); Albany Ins. Co. v. Esses, 831 F.2d 41, 44 (2d Cir. 1987) (continuity element not met where enterprise had obvious date of termination).

Similarly, in Furman v. Cirrito, 828 F.2d 898 (2d Cir. 1987), the RICO claim was dismissed because the enterprise had been dissolved and thus did not display the requisite continuity. \(\text{id.}\) at 902-05. The dissent criticized this result because the enterprise was dissolved after the criminal activity complained of was completed. \(\text{id.}\) (Pratt, J., dissenting). The dissent also criticized Beck for equating the alleged criminal activity with the enterprise. \(\text{id.}\) (Pratt, J., dissenting). By equating the two, and then requiring that the enterprise have more than a single goal, the court in Beck created a requirement of two schemes, which had been rejected in Ianniello. \(\text{id.}\) (Pratt, J., dissenting). Therefore, according to the dissent, the result of Beck was that it made a "mess" of the RICO decisions in the district courts of the Second Circuit. \(\text{id.}\) (Pratt, J., dissenting).

119. 774 F.2d 1350, 1355 (5th Cir. 1985).

120. \(\text{id.}\) R.A.G.S. Couture, Inc., a clothing manufacturer, sued its former president, Hyatt, and another individual, Wellborne, for allegedly trying to defraud it by twice mailing false invoices regarding sewing machine rentals. \(\text{id.}\) at 1352. There was a dispute as to whether R.A.G.S. or Wellborne owned the sewing machines in question. \(\text{id.}\) The predicate acts alleged in the complaint were two acts of mail fraud, one for the mailing of repair and rental invoices, and the other for mailing a demand for payment. \(\text{id.}\)

The defendants argued that in light of Sedima the two predicate acts did not constitute a pattern. \(\text{id.}\) at 1355. The court replied: "We are not persuaded by the defendant's argument. The Supreme Court in Sedima implied that two 'isolated' acts would not constitute a pattern. In this case, however, the alleged acts of mail fraud are related." \(\text{id.}\) (citation omitted).

The court's reasoning that acts which are related are not isolated differs from the view taken by other circuits. Other circuits take the view that the two aspects present entirely different issues. See, e.g., Sun Savings, 825 F.2d at 192-94 (equating "not isolated" with continuity, distinct from "relationship"). Furthermore, since relationship among the predicate acts is virtually never in controversy, see \(\text{id.}\) at 192, even if R.A.G.S. stands for the proposition that the predicate acts must be related, the effect is that almost any two acts will constitute a pattern.

121. In Montesano v. Seafirst Commercial Corp., 818 F.2d 423 (5th Cir. 1987), the court stated: "Before Sedima, we had not attempted to define fully the meaning of pattern. An imaginative plaintiff could take virtually any illegal occurrence and point to acts preparatory to the occurrence, usually the use of the telephone or mails, as meeting the requirement of pattern." \(\text{id.}\) at 424 (citation omitted).
turned in favor of a rule that predicate acts which are merely preparatory to a single offense do not constitute a pattern. However, because of that court's policy that one panel cannot overturn another, R.A.G.S. remains the rule. The

c. Eleventh Circuit

The Eleventh Circuit, in Bank of America v. Touche Ross & Co., reaffirmed its pre-Sedima view that separate violations of the state and federal statutes in question are considered distinct predicate acts, regardless of whether they occur as part of the same scheme or transaction. The court in Bank of America noted that because the predicate acts in question were separate violations of the mail and wire fraud statutes, they satisfied the Eleventh Circuit's definition of pattern. The


In Smoky Greenhaw, the court suggested that the pattern issue was an open question and stated that "the Supreme Court appeared to challenge the lower courts to develop a more rigorous interpretation of 'pattern.'" Smoky Greenhaw, 785 F.2d at 1280-81 n.7. In Cowan, the pattern issue was once again referred to as if it were an open question; the court stated that "[w]e read this language in Sedima to direct a narrower interpretation of pattern than has sometimes been employed." Cowan, 814 F.2d at 227 (footnote omitted).

In Montesano, however, the court declined to adopt a rule that acts preparatory to a discrete offense cannot constitute a pattern. Montesano, 818 F.2d at 426. The case involved a RICO claim based upon a single illegal repossession of a boat where the predicate acts consisted of telephone calls (wire fraud) during the repossession. Id. at 424. The court emphasized that in light of the legislative purpose of RICO, the activity at hand should not be considered a pattern, but declared that R.A.G.S. "blocks this path." Id. at 426. In a subsequent case the correctness of the R.A.G.S. approach was again questioned. Crocker v. Federal Deposit Ins. Corp., 826 F.2d 347, 348 n.2 (5th Cir. 1987).

123. See Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 425-26 (5th Cir. 1987). The court stated:

[O]ur rule that one panel cannot overturn another serves a somewhat different purpose of institutional orderliness, a distinction evidenced by our insistence that, in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel, regardless of how wrong the earlier panel decision may seem to be. Equally significant, drawing too fine a distinction here would invite further confusion in an already troubled subject.

Id.

124. 782 F.2d 966, 971 (11th Cir. 1986) (citing U.S. v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985)). The plaintiffs in Bank of America were five banks which sued Touche Ross, an accounting firm, on the basis of an allegedly fraudulent audit. Id. at 968. The alleged predicate acts were nine incidents of mail and wire fraud engaged in for the purpose of inducing the banks to extend credit to a venture which later failed. Id. at 971.

125. Id. The court quoted Watchmaker:

The standard which has been applied in this Circuit is whether each act constitutes 'a separate violation of the [state or federal] statute' gov-
court also stated that the predicate acts satisfied the definition of pattern in 18 U.S.C. § 3575(e), which the Supreme Court quoted in Sedima.\textsuperscript{126} While it noted the Supreme Court’s comments on pattern, however, the court in Bank of America did not explicitly state how those comments affected its definition of pattern. In the only subsequent Eleventh Circuit case which considered the pattern requirement, the court stated that Sedima “does not necessarily change this circuit’s rule.”\textsuperscript{127} Therefore, the effect of Sedima upon the pattern requirement in the Eleventh Circuit remains somewhat of a mystery, at least until that circuit is faced directly with the issue.

III. Analysis

The current state of conflict among the federal courts of appeals over the pattern requirement in civil RICO raises several issues regarding the development of the civil RICO action. First, under what circumstances do the various interpretations of pattern give different results? Next, have the federal courts of appeals reconciled a restrictive interpretation of the pattern requirement with the statutory mandate that RICO be “liberally construed,” and if so, which interpretation best reconciles these competing objectives?\textsuperscript{128} Finally, what does the development of the pattern requirement mean for the future of civil RICO?

A. The Practical Significance of the Different Interpretations

In this section, the different interpretations of the pattern requirement are compared and analyzed with the objective of demonstrating how and under what circumstances they lead to different results. The interpretations are examined through a series of hypothetical models. These models of basic factual situations represent a situation where the predicate acts demonstrate very little relationship, a situation where they present very little continuity and a situation where they present substantial continuity but only one criminal scheme. Logically, the next basic factual situation would be a situation where there is a significant degree

\textsuperscript{126} Id. 18 U.S.C. § 3575(e) states in pertinent part: “[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.” Bank of America, 782 F.2d at 971 (citing Sedima, 473 U.S. at 496 n.14). The complaint satisfied the pattern requirement under Sedima because the predicate acts involved the same parties over a three year period and all were aimed at the same purpose. Id.


of continuity and multiple schemes. In that situation, however, a pattern would be established regardless of the interpretation used. Therefore, it is only necessary to examine the first three situations.

Model A

Consider the following: In 1979 an executive of corporation C fraudulently conceals material corporate information in connection with a securities offering. Then in 1985 a different executive of corporation C commits wire fraud in connection with a sales transaction. Assume that all the elements for a civil RICO action have been established except for the pattern requirement.

The predicate acts in this model are completely unrelated because the victims, perpetrators, results and method of commission are all different. Therefore, under any interpretation of pattern based on the Sedima formulation of continuity and relationship, the complaint would be dismissed. The court would never need to reach the continuity aspect.

The outcome would be different under the pre-Sedima approach in which any two predicate acts within a ten year period constitute a pattern. Thus, the facts of model A would constitute a pattern in the Second Circuit because it flatly rejects Sedima. The Fifth and Eleventh Circuits have not clearly stated their positions in regard to Sedima, but have not renounced their pre-Sedima views that any two acts can constitute a pattern. Therefore, a strong argument could be made in these circuits that the facts of model A should not constitute a pattern because Congress could not have intended the severe penalties of civil RICO to apply where the predicate acts are completely unrelated.

129. See, e.g., Sun Savings, 825 F.2d 187. The Sun Savings court stated "relationship exists among acts that have 'the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics.'" Id. at 192 (quoting Sedima, 473 U.S. at 496 n.14). For a discussion of the relationship aspect, see supra note 56 and accompanying text.

130. Interpretations of pattern based on Sedima include the two-scheme approach, the flexible approach and the not-isolated approach. For a discussion of the two-scheme approach, see supra notes 61-73 and accompanying text. For a discussion of the flexible approach, see supra notes 74-95 and accompanying text. For a discussion of the not-isolated approach, see supra notes 96-111 and accompanying text.

131. For a discussion of the pre-Sedima view that any two acts constitute a pattern, see supra notes 112-27 and accompanying text.

132. See Ianniello, 808 F.2d 184. For a discussion of Ianniello, see supra notes 108-11 and accompanying text.

133. See Bank of America, 782 F.2d 966; R.A.G.S., 774 F.2d 1350. For a discussion of R.A.G.S., see supra notes 119-23 and accompanying text. For a discussion of Bank of America, see supra notes 124-27 and accompanying text.

134. The Senate Report states that: 'one isolated 'racketeering activity' was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies dispropor-
Model B

Consider the following: An executive of corporation C cheats a customer by conducting a single fraudulent sales transaction. The deal takes place over a two month period and during this time the executive communicates with the customer three times over the phone and twice by mail. Assume that all of the elements for a civil RICO action have been established except for the pattern requirement.

This situation is different from model A because these predicate acts of mail and wire fraud are clearly related; the criminal activity involved the same perpetrator, transaction and victim. The next step under any approach that follows Sedima is to determine whether there is sufficient continuity for a pattern.

A complaint based upon the facts of model B would be dismissed under the two-scheme approach because all of the predicate acts furthered a single scheme to defraud a single customer.\footnote{See, e.g., Superior Oil, 785 F.2d 252. For a discussion of Superior Oil, see supra notes 63-66 and accompanying text.} Under the not-isolated approach, it would be necessary to determine whether the predicate acts posed a threat of continuing activity.\footnote{See, e.g., Sun Savings, 825 F.2d at 192. For a discussion of Sun Savings, see supra notes 99-107 and accompanying text.} Because the facts of model B involve only a single victim and objective and the predicate acts completed the fraudulent scheme, the criminal activity would be considered isolated with no threat of continuity present.\footnote{The facts in the model are substantially similar to the facts of Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1399 (9th Cir. 1986), where the complaint was dismissed for lack of a pattern. For a discussion of Schreiber, see supra note 106.} The complaint would therefore be dismissed. Under the flexible approach the extent of the criminal activity would be examined without relying on a single determinative factor.\footnote{See, e.g., Bartichek, 832 F.2d at 39; Morgan, 804 F.2d at 975. For a discussion of Bartichek, see supra notes 84-90 and accompanying text. For a discussion of Morgan, see supra notes 76-83 and accompanying text.} Instead, a number of factors would be considered.\footnote{See, e.g., Bartichek, 832 F.2d at 38-39 ("existence of a RICO pattern [turns on] a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of perpetrators, and the character of the unlawful activity"); Morgan, 804 F.2d at 975 ("Relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.").} A complaint based on model B would be dismissed under that approach because the predicate acts are substantially similar, they occurred over a relatively short period of time, they represent only a single scheme and because there was only a single victim and perpetrator.
A pattern would be established on the facts of model B under the pre-Sedima approach because there were more than two predicate acts within a ten year period. Under this interpretation of pattern, state law fraud is automatically bootstrapped into a federal offense just because the defendants used the telephone and the mails in the course of their criminal activity. A similar result would be reached with regard to any single crime which is perpetrated by the commission of multiple acts of mail and wire fraud.

Model C

Consider the following: Corporation C sells chemicals in tanks and drums. Executives of corporation C devise and carry out a plan to increase the corporation’s profits by systematically cheating a customer out of a large amount of chemicals over a long period of time. They achieve this by slightly underfilling each drum delivered to the customer. This fraudulent scheme continues for five years before the customer is tipped off and sues on RICO charges. The predicate acts which the customer alleges include multiple acts of mail and wire fraud. These represent fraudulent invoices and telephone calls between the customer and corporation C during the time the illegal activity was occurring. Assume that all of the elements for a civil RICO action have been established except for the pattern requirement.

There is no problem of relationship among the predicate acts in this model. The sole question is whether it presents the requisite continuity for a pattern. An analysis of the model under the two-scheme approach leads inexorably to the conclusion that a pattern would not be established on these facts because the criminal activity represents but a single scheme to defraud a single customer.

A pattern would be established on the facts of model C under the not-isolated approach because the situation posed a threat of continuing activity; the predicate acts occurred over a long period of time and would have continued indefinitely if the customer had not been warned. Similarly, under the flexible approach a pattern would be established on the facts of model C because of the extent of the criminal activity. The existence of multiple perpetrators and multiple predicate

140. See, e.g., Ianniello, 808 F.2d 184; Bank of America, 782 F.2d 966; R.A.G.S., 774 F.2d 1350. For a discussion of these cases, see supra notes 112-27 and accompanying text. Note that in model A there was some discrepancy as to whether a pattern would have been established in the Fifth and Eleventh Circuits. There would not be the same issue in regard to model B because both circuits have held that a pattern was stated under similar circumstances. See Bank of America, 782 F.2d at 971; R.A.G.S., 774 F.2d at 1355.

141. See Superior Oil, 785 F.2d 252. For a discussion of Superior Oil, see supra notes 63-66 and accompanying text.

142. See Sun Savings, 825 F.2d at 192 ("The four predicate acts in this case did pose a threat of continuing activity because they . . . occurred over several months, and in no way completed the criminal scheme.")
acts occurring over a substantial period of time far outweigh the fact that there was only a single scheme and a single victim.  

What this comparison shows is that the various interpretations often lead to the same result. In a situation such as model A, where there is little relationship between the predicate acts, the complaint would be dismissed for lack of a pattern if the circuit follows Sedima. Conversely, if the circuit does not follow Sedima, the pattern requirement will be satisfied. In a situation such as model B, where a small degree of continuity is present, the outcome will, again, depend entirely on whether the circuit follows Sedima. A circuit which follows Sedima would not find a pattern and a circuit which takes the pre-Sedima approach would find a pattern. But in a situation such as model C, where there is a substantial amount of continuity present but only a single scheme, a pattern would be established under any interpretation except the two-scheme approach. This leads to the conclusion that in terms of results there are only a few basic differences between the approaches. As the next section explains, however, there are other significant differences.

B. Reconciling Sedima With RICO's Liberal Construction Clause

To ensure RICO's effectiveness, Congress included in the statute a clause which states that "the provisions of this title shall be liberally construed to effectuate its remedial purposes." The importance of this clause was demonstrated in Sedima where the Supreme Court invalidated the judicially created restrictions at issue, in part because they represented a narrow construction of RICO. Therefore, the Sedima suggestion that the lower federal courts develop an effective interpretation of the pattern requirement must be implemented with the liberal construction clause in mind. The split among the federal courts of appeals over the pattern requirement is proof that this has not been easy. Justice Powell predicted that this would be a problem when he stated in dissent in Sedima that "[t]he Court has read the entire statute so broadly that it will be difficult, if not impossible, for courts to adopt a reading of 'pattern' that will conform to the intention of Congress."  

This section of this Note will examine the strengths and weaknesses of the various approaches and will focus in particular on how well each interpretation has reconciled a restrictive and useful interpretation of pattern with a liberal reading of the statute.

One advantage of the two-scheme approach is that it is the most

143. See Barticek, 832 F.2d at 39. The facts of Barticek also involved a significant amount of criminal activity which nonetheless constituted a single scheme. Id.
146. Id. at 528 (Powell, J., dissenting). For a discussion of Justice Powell's dissent, see supra notes 49-54 and accompanying text.
effective interpretation in terms of restricting the uses of civil RICO. As demonstrated in model C above, the pattern requirement is not met under the two-scheme approach even where other approaches would clearly find a pattern. Indeed, the most prevalent single criticism of the two-scheme approach is that it is too restrictive; it would allow a large, ongoing single scheme to escape RICO liability. In addition to being the most effective in terms of limiting civil RICO, the two-scheme approach is also the easiest interpretation to apply; it is a bright line test. This functional practicability cannot be credited to the existence of a concise workable definition of scheme; no court employing the two-scheme approach has yet developed such a definition. Instead, the ease of application seems to result from the fact that scheme is easily conceptualized.

There is, however, the possibility that any criminal activity could be broken up and analyzed as involving multiple schemes. This possibility itself demonstrates a problem with the two-scheme approach which undercuts the benefits of the approach. The fraudulent shipments described in model C, for example, could each be considered a separate scheme. This type of analysis would destroy the bright line quality of the two-scheme approach and thus diminish one of the strengths of the two-scheme approach, its ease of application. Furthermore, it would become necessary to define exactly what constitutes a scheme. At that point, the problem of defining scheme would have been substituted for the problem of defining pattern.

The most significant problem with the two-scheme approach, however, is unrelated to the conceptual and practical difficulties which it presents. Its main flaw is that it violates the liberal construction clause of RICO by relying on a single determinative factor which is not found in the language or legislative history of the statute. This interpretation comes too close to recommitting the sins of the restrictive interpretations which were invalidated in Sedima.

At the opposite end of the spectrum from the two-scheme approach is the pre-Sedima view that any two acts within a ten year period constitute a pattern. In reality, this is not an interpretation of pattern at all because it reads the requirement right out of the statute. The pre-Sedima view is the least suitable approach to the pattern requirement because it does nothing to restrict and control civil RICO and thus ignores the guidance of Sedima.

In between these two extreme approaches, however, lie the flexible

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147. See, e.g., Morgan, 804 F.2d at 975. For a discussion of this reason for rejecting the two-scheme approach, see supra note 74 and accompanying text.
148. The Third Circuit made these observations in Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1354-55 (3d Cir. 1987). For a discussion of Petro-Tech, see supra note 84 and accompanying text.
149. See, e.g., Ianniello, 808 F.2d 184; Bank of America, 782 F.2d 966; R.A.G.S., 774 F.2d 1350.
and not-isolated approaches.\textsuperscript{150} These two interpretations are proof that it is possible to reconcile a broad reading of RICO with a restrictive interpretation of pattern. The analytical models used in the previous section demonstrated that the flexible, not-isolated and two-scheme approaches all limit civil RICO but of the three, the two-scheme approach is the most effective. While the flexible and not-isolated approaches are somewhat less effective, this slight deficiency is outweighed by the compatibility of both approaches with a liberal construction of the statute. This is true because neither approach relies on a single determinative factor or upon a limitation not rooted in the language or legislative history of the statute.\textsuperscript{151} Instead, they further the remedial purposes of the statute by focusing on the facts of each case on an individual basis to determine if the extent of the criminal activity rises to the level of a pattern.\textsuperscript{152}

This is not meant to suggest, however, that the not-isolated and flexible approaches are completely alike. The internal logic of the two interpretations is quite different. The not-isolated approach does not accept continuity and relationship as the basis of “pattern.”\textsuperscript{153} Rather, the focus is on whether the predicate acts represent “isolated” activity.\textsuperscript{154} This in turn depends on whether there is a threat of continuing activity.\textsuperscript{155} This analysis is logically consistent, but it does not offer much in the way of guidance to the lower courts.

The flexible approach, on the other hand, is an easier concept to apply, especially as it is used by the Third and Seventh Circuits. It requires a case by case examination of the criminal activity in order to determine whether the requisite continuity and relationship for a pattern are demonstrated.\textsuperscript{156} Furthermore, the Third and Seventh Circuits strengthen the analysis conceptually by focusing on a set of specific factors, no one of which is determinative.\textsuperscript{157}

The flexible approach is the most suitable interpretation of pattern, not only because it best reconciles a restrictive interpretation of pattern

\textsuperscript{150} For a discussion of the not-isolated approach, see supra notes 96-111 and accompanying text. For a discussion of the two-scheme approach, see supra notes 61-73 and accompanying text.

\textsuperscript{151} See Bartichek, 832 F.2d at 38-40; Sun Savings, 825 F.2d at 194; Morgan, 804 F.2d at 975-76.

\textsuperscript{152} See Bartichek, 832 F.2d at 40 (“This determination [of continuity] necessarily depends on the circumstances of the particular case”); Sun Savings, 825 F.2d at 194 (“We prefer simply to examine the predicate acts to see whether they are in fact isolated or sporadic.”); Morgan, 804 F.2d at 976 (“determination [of pattern] depends on the facts and circumstances of the particular case”).

\textsuperscript{153} See Sun Savings, 825 F.2d at 192.

\textsuperscript{154} Id. at 194.

\textsuperscript{155} Id.

\textsuperscript{156} See Bartichek, 832 F.2d at 38-39; Morgan, 804 F.2d at 975-76.

\textsuperscript{157} See Bartichek, 832 F.2d at 38; Morgan, 804 F.2d at 975.
with the liberal construction clause, but also because it presents a simple and straightforward analysis.

C. What the Development of the Pattern Requirement Means for the Future of Civil RICO

The experience of the Third and Seventh Circuits with the flexible interpretation of pattern is proof that the pattern requirement in civil RICO is working. The two-scheme and not-isolated approaches, despite their flaws, also demonstrate that the pattern requirement can work. All of these interpretations are eliminating civil RICO claims based on isolated and unrelated criminal activity.

Civil RICO claims are, of course, still being brought against legitimate businesses. Critics may call for an even more restrictive interpretation of civil RICO because the title and purpose of the Act state that RICO was intended to be used against organized crime. This criticism fails to recognize that the statute does not define organized crime. The statute does, however, state the requirements for a civil RICO claim. If the defendant participated in criminal activity, and all the requirements for civil RICO are satisfied, then liability properly results regardless of whether the defendant is a legitimate business.

Conversely, there may be critics who argue that a restrictive interpretation of pattern is inconsistent with the express statutory definition of pattern and with RICO’s liberal construction clause. Such criticism is dispelled by a careful reading of footnote fourteen of Sedima which is based directly on the language and legislative history of RICO. Furthermore, giving meaning to every element of the statute as Congress intended is in no way inconsistent with the liberal construction clause.

In 1986, a bill was defeated in the Senate that would have changed several aspects of civil RICO, including the definition of pattern. The relevant portion of the bill stated that a pattern would require at least two predicate acts which “are not so closely related in time and place that they constitute a single episode.” This would not have been a useful addition to the present definition of pattern. It would have simply created a new definitional problem and caused intense judicial speculation about what constitute an “episode.” Furthermore, it would have created confusion about the relationship of the new definition to the Supreme Court’s comments in Sedima. Therefore, unless Congress wishes to overhaul the entire civil RICO action, it would be best not to change the statutory definition of pattern.

158. See, e.g., Sedima, 473 U.S. at 524 (Powell, J., dissenting).
160. Id.
161. Prior to Sedima, the Ad Hoc Civil Rico Task Force of the ABA made several recommendations regarding the future of civil RICO. Included were recommendations that courts give greater meaning to the pattern requirement and that Congress consider amending the definition of pattern. The report

Published by Villanova University Charles Widger School of Law Digital Repository, 1988
The principal reason for not amending the statute in a piecemeal fashion is that the courts are still responding to the Supreme Court's guidance in Sedima, and are bringing civil RICO into a state of equilibrium without an amendment. Moreover, since a majority of circuits are effectively reigning in civil RICO, any amendment at this time jeopardizes the progress that has been made and threatens to create further confusion and less predictability.

IV. Conclusion

The pattern requirement in civil RICO is working, at least in those circuits which have followed the seminal comments of the Supreme Court in Sedima.162 By developing restrictive interpretations of pattern, these circuits are foreclosing the opportunity to litigate civil RICO claims which are based on isolated and unrelated predicate acts, thus fulfilling the intent of Congress.

All the interpretations of pattern which follow Sedima have merit, but the best interpretation is the flexible approach as used by the Third and Seventh Circuits. This interpretation effectively restricts the use of civil RICO and is consistent with a liberal construction of the statute. Moreover, it is analytically simple, which means that it is easy to apply and that it contributes to predictability in civil RICO litigation.

The statute does not need to be amended to prevent civil RICO from being misused. In enacting RICO, Congress clearly intended the pattern requirement to serve a limiting function.163 All that is required to vindicate the statutory scheme is for the federal courts of appeals to unify behind a single restrictive interpretation of pattern.

Stephen G. Harvey

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162. For a discussion of the approaches taken by the federal courts of appeals, see supra notes 55-60 and accompanying text.
163. See Sedima, 473 U.S. at 496 n.14; ABA REPORT, supra note 2, at 193-94.