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NOTES

Clarifying a "Pattern" of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement

Although the Racketeer Influenced and Corrupt Organizations Act ("RICO")¹ was enacted by Congress in 1970 primarily for the purpose of providing litigants with a potent new weapon to use against organized crime,² the growing use by private plaintiffs of civil RICO's³ treble damage remedy⁴ has greatly increased the exposure of legiti-

1. 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986). RICO was originally enacted as Title IX in the twelve-title Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 1961-1968, 84 Stat. 922, 941-48 (1970).

2. The Senate noted that the bill's purpose was "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 providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." S. REP. NO. 617, 91st Cong., 1st Sess. 2 (1969) [hereinafter 1969 SENATE REPORT]. See also notes 114-17 *infra* and accompanying text.

3. RICO provides for both criminal penalties, 18 U.S.C. § 1963 (1982 & Supp. IV 1986), and civil sanctions, 18 U.S.C. § 1964 (1982 & Supp. IV 1986). Criminal RICO provides for criminal fines of not more than \$25,000, imprisonment of not more than twenty years, and forfeiture of any interest in the racketeering enterprise for violations of one of RICO's proscribed activities. 18 U.S.C. § 1963 (1982 & Supp. IV 1986). Civil RICO provides for divestment, imposition of restrictions, orders of dissolutions, and treble damages. 18 U.S.C. § 1964(a)-(c) (1982 & Supp. IV 1986). Only private plaintiffs may obtain treble recovery. See § 1964(c) and note 4 *infra*.

While this Note's suggestions for the pattern requirement must apply to both the civil and criminal components of the statute, much of the abuse that has confronted the civil provision has not affected criminal RICO. This is principally because government prosecutors have not broadened RICO's applications in the same way that civil litigants have. Indeed, these prosecutors have shown considerable restraint. See UNITED STATES ATTORNEY'S MANUAL § 9-110.200 (Mar. 9, 1984) ("[I]t is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge."); RICO: A MANUAL FOR FEDERAL PROSECUTORS 99 (1985) ("Not every case that meets the technical requirements of a RICO violation will be authorized for prosecution . . . RICO should only be invoked in those cases where it meets a special need . . ."). See also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) ("[I]n the context of civil RICO . . . the restraining influence of prosecutors is completely absent. Unlike the government, private litigants, . . . lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions.").

Because of this lack of restraint in civil suits, several courts have held that the pattern requirement should be restricted only in the civil RICO context. See *Sedima*, 473 U.S. at 526-27 (RICO's generally liberal construction clause does not necessarily apply to its civil provisions) (Powell, J., dissenting); *Franklin & Joseph, Inc. v. Continental Health Indus.*, 664 F. Supp. 719, 723 (S.D.N.Y. 1987) (restrictive interpretation of pattern is appropriate in civil, but not criminal, context). While such a position might enable government prosecutors to avoid the hurdles that a restrictive view of the civil pattern requirement would erect, no evidence exists to suggest that Congress intended a different definition of pattern in the civil context. Further, civil RICO liability is based on the same, specifically defined, criminal acts as criminal liability. See 18 U.S.C. §§ 1961(1), 1962, 1964 (1982 & Supp. IV 1986).

4. RICO's private cause of action, contained in 18 U.S.C. § 1964(c) (1982 & Supp. IV 1986), provides that "[A]ny person injured in his business or property by reason of a violation of section

mate businesses and individuals to the harsh penalties of RICO. While RICO's civil remedy was designed to allow citizens to sue and recover as "private attorneys general" in the fight against structured criminality, RICO claims are today being filed in a wide universe of commercial business disputes, and against a very diverse group of defendants.⁵ In fact, because of the relative ease with which a plaintiff can incorporate a RICO count into any civil complaint, the statute has been termed a plaintiff's "darling."⁶

Although several courts have attempted to restrain these abuses by emasculating the treble damage remedy,⁷ the Supreme Court, in *Sedima, S.P.R.L. v. Imrex Co.*,⁸ refused to grant the judiciary this remedial power. While acknowledging that "[civil] RICO [has] evol[ed] into something quite different from the original conception,"⁹ the Court stated that statutory amendments to civil RICO could not come through judicial intervention. Rather, they must come through legislative action. Although the burden of restricting RICO was placed mainly on Congress, the Court did not foreclose all judicial efforts to limit the statute's applicability. Instead, *Sedima* specifically extended an invitation to the lower courts to develop a consistent definition of a key operative term in the RICO statute: the "pattern of racketeering activity" requirement.¹⁰

The RICO statute prohibits a person from investing, acquiring, or participating in the affairs of an enterprise through a pattern of racketeering activity.¹¹ While fairly settled meanings of such operative

1962 [see note 11 *infra*] . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Only private litigants may sue under § 1964(c), as the United States does not have standing under RICO to sue for monetary damages to its business or property. See *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 683 F. Supp. 1411 (E.D.N.Y. 1988) (denying government the standing under civil RICO to sue for monetary damages to its business or property). For the view that injury to "business or property" should encompass injury to a victim's person or body as well, see Note, *Illegal Traffic in Women: A Civil RICO Proposal*, 96 YALE L.J. 1297 (1987).

5. See cases cited in notes 153-55 *infra*.

6. See Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655 (1982); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980).

7. See Part I.A. *infra* for discussion of these cases.

8. 473 U.S. 479 (1985).

9. 473 U.S. at 500.

10. 473 U.S. at 500. See also *Northern Trust Bank/O'Hare v. Inryco, Inc.*, 615 F. Supp. 828, 833 (N.D. Ill. 1985) (*Sedima* creates a "whole new ballgame" as to the meaning of the pattern requirement). For the view that *Sedima* foreclosed any attempt to limit civil RICO through the "pattern of racketeering activity" requirement, see Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83, 92-93 (1986).

11. 18 U.S.C. § 1962 (1982 & Supp. IV 1986) prohibits four types of offenses:

1) § 1962(a) makes it unlawful to invest income in an enterprise that was derived "from a pattern of racketeering activity or through collection of an unlawful debt."

2) § 1962(b) forbids "any person through a pattern of racketeering activity or through col-

terms as “person,”¹² “enterprise,”¹³ and “racketeering activity”¹⁴ have been developed, a consistent definition of “pattern”¹⁵ has eluded the courts. Because RICO’s framers believed that repeated, continuous demonstrations of illegal activity characterize professional criminal behavior, proving that the defendant has engaged in such a pattern of racketeering activity has become the focal point in many civil RICO disputes.¹⁶ Clarifying the ambiguity over pattern is thus vital to civil

lection of an unlawful debt to . . . maintain . . . any interest in or control of any enterprise which is engaged in . . . interstate . . . commerce.”

3) § 1962(c) makes it unlawful for any person to conduct the affairs of an enterprise through a “pattern of racketeering activity or collection of an unlawful debt.”

4) § 1962(d) makes it illegal “to conspire to violate any of the provisions of subsections (a), (b), or (c).”

For purposes of § 1962, plaintiffs must establish the separate existence of an underlying enterprise and a pattern of racketeering activity. In addition, the same entity cannot be both a RICO defendant and an enterprise under § 1962(c). Thus, the person who commits the pattern of racketeering activity under § 1962(c) must be separate from the underlying enterprise. See *Robinson v. Kidder, Peabody & Co., Inc.*, 674 F. Supp. 243 (E.D. Mich. 1987), *appeal dismissed*, 841 F.2d 1127 (6th Cir. 1988) (Kidder dismissed as defendant because it cannot be both the racketeer and the underlying enterprise); *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 53 (3d Cir. 1988) (single entity cannot be both defendant and the enterprise for the purposes of § 1962(c)).

12. A “person” is defined as “any individual or entity capable of holding a legal or beneficial interest in property.” 18 U.S.C. § 1961(3). Thus, a person for RICO claims can include corporations, associations, and partnerships.

13. 18 U.S.C. § 1961(4) states that an “enterprise includes any individual, partnership, corporation . . . and any union or group of individuals associated in fact although not a legal entity.” The Supreme Court, in *United States v. Turkette*, 452 U.S. 576, 583 (1981), stated that an enterprise is “proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”

Using this definition, courts have held that enterprises may be legitimate business entities, *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); labor unions, *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); and law firms, *United States v. Jannotti*, 729 F.2d 213 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984).

14. 18 U.S.C. § 1961(1) defines “racketeering activity” as any act “chargeable” under a number of state and federal criminal laws, including murder, arson, and bribery. More importantly, this description includes “any act which is indictable under . . . [18 U.S.C. §] 1341 [the federal mail fraud statute] . . . section 1343 [the federal wire fraud statute] . . . or . . . any offense involving . . . fraud in the sale of securities” It is the inclusion of these predicate acts which has led to the unexpectedly broad application of civil RICO. See also notes 122 & 158 *infra* and accompanying text.

15. 18 U.S.C. § 1961(5) reads, in pertinent part, that “‘pattern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred . . . within ten years . . . after the commission of a prior act of racketeering activity.” See Part II *infra* for further discussion of § 1961(5). Besides the requirement that the predicate acts occur within ten years of each other, the Supreme Court recently established a four-year statute of limitations for civil RICO actions. See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 107 S. Ct. 2759, 2767 (1987).

16. See 1969 SENATE REPORT, *supra* note 2, at 158 (“The concept of ‘pattern’ is essential to the operation of the statute.”). In fact, RICO defendants frequently use the plaintiff’s failure to allege a sufficient pattern as a basis for a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6). These motions are filed in slightly over 90% of RICO cases, and granted over 51% of the time. The failure to allege a sufficient pattern is responsible for 40.4% of these dismissals. See Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 619-22 (1987) (App. B) [hereinafter Blakey & Cessar, *RICO Case Study*]. Professor Blakey was Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures in

RICO's enforcement. Construing the requirement broadly would allow many claims to proceed whereas a narrow construction could restrict the statute's applicability.¹⁷

Since *Sedima*, however, the confusion over what level of wrongful activity is required to trigger RICO liability has increased. In fact, the effort to define this concept adequately has become, as one court noted, a "cottage industry,"¹⁸ and has bitterly divided both courts and commentators.¹⁹ Three major approaches have emerged in the lower courts. The most restrictive view holds that a pattern is demonstrated only if the defendant's predicate acts (e.g., mail or wire fraud) occur in multiple and separate criminal schemes or episodes.²⁰ Other courts have taken a more expansive view of pattern, stating that any two related predicate acts (e.g., two phone calls made in an attempt to defraud) can constitute a pattern of racketeering activity and subject the defendant to treble damages.²¹ A third view has rejected any bright-line test, instead preferring to analyze several factors on a case-by-case basis.²²

To illustrate the impact these positions can have, consider the case where a securities dealer, in a single sale, intentionally makes certain misrepresentations in the initial telephone calls as well as in a series of follow-up letters. In such a case, the proponents of the first view would dismiss the RICO claim since only a single commercial scheme

1969-1970, when the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941, was considered. He remains RICO's foremost academician, and often argues in favor of expanding the federal racketeering laws. Cf. *Banque Worms v. Luis A. Duque Pena & Hijos, Ltd.*, 652 F. Supp. 770, 772 n.4 (S.D.N.Y. 1986) ("The rather broad draftsmanship of RICO has resulted in its expansive application. [Professor Blakey] has stated that this broad application is what he intended. There is no indication, however, that the Congress which passed the bill was adopting his intentions.") (emphasis in original).

17. The *Sedima* Court noted the impact that differing concepts of pattern could produce by stating that the admitted breadth of the statute derived mainly from the "failure of Congress and the courts to develop a meaningful concept of 'pattern.'" 473 U.S. at 500.

18. *Morris v. Gilbert*, 649 F. Supp. 1491, 1502 (E.D.N.Y. 1986). One federal appeals court judge called the "pattern jurisprudence" a "mess," a "cacophony," and "sheer bedlam." *Furman v. Cirrito*, 828 F.2d 898, 908-10 (2d Cir. 1987) (Pratt, J., dissenting).

19. For a description of the academic confusion over the pattern requirement, see note 86 *infra*.

20. The Eighth Circuit is the only appellate court accepting the multiple schemes approach. See *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). However, numerous district courts have accepted this position. See note 57 *infra* and cases cited therein. In addition to multiple schemes, some courts have adopted the slightly less restrictive multiple or different "episodes" test. For cases following this approach, see notes 66-70 *infra*.

21. See, e.g., *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985). Cf. *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987) (following *R.A.G.S.* but requesting its reversal *en banc*; pattern requires more than just two isolated acts).

22. See, e.g., *Barticheck v. Fidelity Union Bank/First Nat. State*, 832 F.2d 36, 38-39 (3d Cir. 1987) (analyzing such factors as the number and similarity of unlawful acts, the duration of the illicit activity, and the number of victims); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 30-31 (1st Cir. 1987) (same); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986) (same; also focusing on the occurrence of distinct injuries).

to defraud is involved. Conversely, advocates of the second view would clearly support the finding of a pattern, because more than two related predicate acts are involved. The issue would be less clear for those holding the final position, because while several predicate acts are alleged, the duration of the overall fraud might not be enough to encompass a pattern.

This inconsistent application has resulted in unseemly forum-shopping.²³ Currently, similarly pled complaints can survive in the Second, Fifth and Ninth Circuits, which often adopt the expansive view, but be dismissed in the Eighth and Tenth Circuits, which utilize a more restrictive approach. The possibility exists that with the same set of facts, plaintiff's counsel could obtain a large treble recovery in one court, but suffer sanctions for bringing the same action in a different court.²⁴ The recent decision by the Supreme Court to grant *certiorari* in *H.J. Inc. v. Northwestern Bell Telephone Co.*²⁵ may result in a reduction of these inconsistencies.

In an attempt to provide some needed definitional clarity and redirect civil RICO toward its intended focus, this Note argues that the federal judiciary should interpret the pattern requirement narrowly, focusing on four basic factors that best demonstrate a prolonged, continuing example of criminal activity. By emphasizing (1) the presence of multiple victims, (2) the duration of the RICO defendant's criminal activity, (3) the number of illicit commercial transactions, and (4) the existence of independent criminal decisions, courts could consistently limit civil RICO to the most pernicious offenders. Part I of this Note will examine judicial interpretations of RICO and the current problems plaguing the application of the pattern requirement. Part II will analyze several techniques of statutory construction and will argue that while the operative pattern provision may be somewhat ambiguous, it can certainly support a narrow construction. Part III will examine the two primary justifications for interpreting the pattern requirement narrowly and will show that the original legislative command that RICO apply only to defendants engaged in repetitive and continuous criminal behavior has been ignored. Part IV identifies the goals for an optimal definition of pattern and examines the four factors necessary to limit civil RICO to repeat offenders. This section will

23. Not only do the different applications of pattern encourage litigants to search for the most sympathetic forum, but RICO's liberal venue and service of process provisions allow plaintiffs to sue in a wide range of district courts. Because 18 U.S.C. § 1965(b) (1982) authorizes nationwide service of process, there are no obstacles to suing RICO defendants in any state, unlike diversity cases which require that the defendant possess minimum contacts with the forum state. See *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987).

24. Courts are increasingly imposing attorney sanctions under FED. R. CIV. P. 11 for what are presumed to be frivolous RICO claims. See, e.g., *Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 114 F.R.D. 684 (S.D.N.Y. 1987).

25. 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988). For further discussion and analysis of this case, see notes 225-31 *infra* and accompanying text.

also discuss two recent cases, including the one currently before the Supreme Court, and will illustrate how these factors should be applied by the courts. Finally, Part V will briefly discuss the broader question of how to amend civil RICO permanently and will analyze and critique the congressional proposals currently pending.

I. CIVIL RICO'S JUDICIAL TREATMENT AND THE CURRENT CONTROVERSY

The judiciary's active treatment of civil RICO can be separated into two distinct eras: the cases decided before and after *Sedima*. Concerned with the expanding applications of RICO, several courts crafted a number of additional requirements onto the statute. In conclusively rejecting these attempts, the *Sedima* Court also directed lower courts to develop and apply a consistent meaning of the pattern requirement. Since then, the entire federal judiciary has struggled to fulfill this directive. Of the three major positions developed by the courts, only one, the multiple factors approach, comes close to providing the necessary consistency and respect for congressional intent.

A. Early Attempts To Restrict Civil RICO: The Pre-Sedima Cases

In response to the growing use of RICO in areas and against defendants that Congress never intended, judicial hostility toward civil RICO began to rise.²⁶ Rather than accept these suits, many district courts began attempting to confine RICO to traditional organized crime by imposing a number of limitations on the statute. These courts reasoned that since Congress could not have intended to federalize all "garden variety" fraud claims, the judiciary was in the best, and only, position to impose limitations on private RICO actions; this was especially true given the lack of "prosecutorial restraint" in the marginal civil cases.²⁷

Between the mid-1970s and *Sedima* (in 1985), the courts fashioned four restrictions on civil RICO claims. The initial effort concerned attempts to impose an "organized crime" requirement on the statute. Under this approach, plaintiffs were required to establish that the defendant or his activities had some connection to organized crime.²⁸ In denying a RICO claim, one court noted the "patently unfair" implication that the defendant, a telephone answering service, was somehow

26. See, e.g., *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 & nn.2-3 (S.D.N.Y. 1975) (quoting from 1969 testimony of the Attorney General of the United States before a Senate Subcommittee, the court noted that RICO was aimed not at legitimate business organizations but at combating "a society of criminals who seek to operate outside of the control of the American people and their government").

27. See, e.g., *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1361 (S.D.N.Y.), *aff'd*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); see also note 3 *supra* (discussing prosecutorial restraint).

28. See, e.g., *Barr*, 66 F.R.D. at 113.

involved in organized crime.²⁹ However, while RICO may have been intended as a weapon against organized crime, the statute obviously does not contain a *requirement* that defendants be a member of a class of organized criminals.³⁰ Because the statute explicitly rejects this requirement, and because imposing this additional RICO pleading requirement constituted an impermissible example of judicial legislating, most courts rejected the organized crime requirement.³¹

A second method used by the courts to curb inappropriate civil RICO claims was to require plaintiffs to prove some type of "competitive injury." Rather than recognizing injuries resulting from the defendants' predicate offenses, these courts allowed RICO liability to attach only when a plaintiff was injured by having to compete with an enterprise that had garnered an unfair market advantage by using income obtained from racketeering activity.³² The primary justification for this requirement was that because the civil treble damage remedy was modeled after the remedies contained in section 4 of the Clayton Act,³³ and because this language has been interpreted to require antitrust plaintiffs to show a competitive injury,³⁴ the courts reasoned that civil RICO should contain the same requirement.³⁵ Most courts, however, rejected this analysis, stating instead that the plain language of RICO mentions nothing about any competitive injury requirement.³⁶ These courts also rejected the concept that RICO is a sister to the antitrust laws. Rather, they suggested that RICO has broader aims and in fact was enacted "as a separate tool in the fight against orga-

29. 66 F.R.D. at 113.

30. For reasons why this requirement, if included, would be unconstitutional, see notes 118-19 *infra* and accompanying text.

31. See, e.g., *Owl Constr. Co. v. Ronald Adams*, 727 F.2d 540, 542 (5th Cir.), *cert. denied*, 469 U.S. 831 (1984); *Schacht v. Brown*, 711 F.2d 1343, 1353 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

32. See, e.g., *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980); *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983), *affd. on other grounds sub nom. Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984).

33. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), states that "Any person who shall be injured in his business or property . . . may sue therefore in any district court . . . and shall recover threefold the damages . . ." Because this language is virtually identical to the language in § 1964(c), see note 4 *supra*, some courts felt that the restrictions placed upon the antitrust laws should also restrain civil RICO. See note 35 *infra*.

34. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (Clayton Act § 4 requires plaintiff to show competitive injury to recover treble damages).

35. See *Bankers Trust Co. v. Feldesmann*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983), *affd. on other grounds sub nom. Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984) (because RICO's civil remedy was modeled after relief available in antitrust area, it is appropriate to limit the § 1964 private remedy to plaintiffs who have suffered a competitive injury). See also Comment, *Reading the "Enterprise" Element Back into RICO: Sections 1962 and 1964(c)*, 76 Nw. U. L. Rev. 100, 129-30 (1981) ("the fact that § 1964(c) was patterned after antitrust remedies reinforces the notion that Congress was concerned with *competitive injury*") (emphasis in original).

36. *Schacht v. Brown*, 711 F.2d 1343, 1358 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982), *affd.*, 710 F.2d 1361 (en banc), *cert. denied*, 464 U.S. 1008 (1983).

nized crime."³⁷

The final two attempts to restrict civil RICO occurred in the Second Circuit's *Sedima* decision.³⁸ There, the court held that standing in civil RICO suits could only be given to those who suffered "an injury of the type RICO was designed to prevent."³⁹ In construing section 1962 to require a "racketeering injury," the Second Circuit joined the several district courts which had adopted a similar standing restriction.⁴⁰ But more importantly, the court held that, before the treble damage remedy could be imposed, the defendant must first have been convicted of either a section 1962 offense or the underlying predicate offenses.⁴¹ By formulating this prior conviction requirement, the court adopted a severely restrictive interpretation of civil RICO; for the Second Circuit, the only way to contain the "explosive" use of civil actions against "respected businesses" was to require a criminal conviction before imposing treble damages.⁴²

Not only did this decision disregard prior case law⁴³ and congressional intent, but it markedly increased the call for an end to all the judicially imposed restrictions and requirements. Commentators asserted that until Congress manifested a contrary intent, the "federal judiciary should not restrict a statute whose plain language directs a sweeping attack at deeply entrenched economic and societal ills."⁴⁴ With the debate over the propriety of judicial reform of RICO grow-

37. *Schacht*, 711 F.2d at 1357.

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

39. 741 F.2d at 495.

40. See, e.g., *Margolis v. Republic Natl. Bank*, 585 F. Supp. 595, 596 (S.D.N.Y. 1984); *Landmark Sav. & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981).

41. *Sedima*, 741 F.2d at 496 (holding that "a prior criminal conviction is a prerequisite to a civil RICO action."). See note 11 *supra* for a list of the § 1962 offenses.

42. 741 F.2d at 500-04. Writing for a divided panel, Judge Oakes noted that since civil RICO suits did not contain an organized crime requirement, "some . . . courts . . . read various limitations into the act in order to conform its use to that thought to best effectuate the congressional purpose." 741 F.2d at 492.

43. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982).

44. Note, *The Conflict over RICO's Private Treble Damages Action*, 70 CORNELL L. REV. 902, 939 (1985). Numerous other commentators, both before and after the Second Circuit's *Sedima* opinion, were highly critical of the judicial attempts to limit RICO by fashioning new statutory restrictions. See Moran, *Pleading a Civil RICO Action Under Section 1962(c): Conflict- ing Precedent and the Practitioner's Dilemma*, 57 TEMPLE L.Q. 731, 746 (1984) (the various restrictions imposed on civil RICO by the district courts amount to an impermissible rewriting of the statute); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restrictions*, 95 HARV. L. REV. 1101, 1118-20 (1982) (courts should defer to broad congressional intent and not undertake unwarranted restrictions of RICO claims); Comment, *Putting a Halt to Judicial Limitations on Civil RICO*, 52 UMKC L. REV. 56, 71 (1983) (courts should refrain from tampering with RICO because the effect of judicial restriction conflicts with the broad goals Congress had for the statute); Comment, *Civil RICO: Pleading Fraud for Treble Damages*, 45 MONT. L. REV. 87, 111 (1984) (to limit frivolous suits under RICO, "courts should impose existing civil sanctions rather than change the substantive law" (footnote omitted)). But see Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513, 1543 (1983) (restricting

ing, and the confusion over how to reverse exploding applications increasing, the need for clear Supreme Court guidance was obvious.

B. *The Sedima Decision and Its Implications for Further Judicial Restriction of Civil RICO*

The Supreme Court's *Sedima* decision provided only partial guidance; while it firmly rejected the prior attempts to eviscerate civil RICO, the Court opened up a new avenue for narrow construction of the statute. In reversing the Second Circuit, a sharply divided Court (per Justice White) rejected both the prior conviction and racketeering injury requirements. Finding support for a criminal conviction prerequisite in neither the statutory language nor the legislative history, the Court concluded that this requirement "would be inconsistent with Congress' underlying policy concerns. Such a rule would severely handicap potential plaintiffs. . . . Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps."⁴⁵ As for the racketeering injury limitation, the Court rejected any additional standing requirements for section 1962 claims and added that plaintiffs can recover as long as they show injury to their business or property through a RICO predicate offense.⁴⁶ While the Court expressed grave doubts over the expanding applications of civil RICO, the majority stipulated that this problem should be cured through legislative amendment rather than through judicial fiat.⁴⁷

Because *Sedima* represented the Supreme Court's first examination of civil RICO,⁴⁸ its rejection of the varied attempts to limit RICO liability is surely meaningful. Limitations like the prior conviction requirement would have completely emasculated the treble damage weapon in violation of the intention of its authors. Yet it must be emphasized that *Sedima* did not extinguish *all* attempts to limit the scope of this private remedy. In the now-famous footnote 14, Justice White explored the parameters of the pattern requirement, even though this issue was not even before the Court. Indeed, Justice White specifically attributed the "extraordinary" reach of civil RICO to the "failure of Congress and the courts to develop a meaningful concept of 'pattern.'" ⁴⁹ To aid the lower courts in their effort to develop this concept, White emphasized that the target of RICO was not sporadic activity; rather, "[t]he legislative history supports the view

RICO in securities fraud cases is a desirable way to achieve goal of applying statute against organized crime).

45. 473 U.S. at 493.

46. 473 U.S. at 493-95.

47. 473 U.S. at 499 ("[RICO's] defect . . . is inherent in the statute as written, and its correction must lie with Congress.").

48. The Supreme Court's two prior RICO cases involved criminal RICO. *Russello v. United States*, 464 U.S. 16 (1983); *United States v. Turkette*, 452 U.S. 576 (1981).

49. 473 U.S. at 500.

that two isolated acts of racketeering activity do not constitute a pattern."⁵⁰ Given this intent, and the statement that the elements of "continuity plus relationship" combine to produce a pattern,⁵¹ the Court clearly signaled that a more restrictive interpretation of pattern was allowable.

C. *The Post-Sedima Debate over the Pattern Requirement*

Given that *Sedima* precluded restrictions that would vitiate the private treble damage remedy while inviting courts to limit the pattern requirement, the debate over RICO's scope has now centered on the definition of pattern. In the past three years, courts have had great difficulty interpreting *Sedima*'s invitation to develop a consistent definition of pattern. In part, this is because *Sedima* asked the courts to read RICO broadly but to read the pattern requirement narrowly. Mostly, however, confusion has resulted from the Court's failure to provide adequate direction in footnote 14. While the Court said that a pattern had to combine "continuity plus relationship" and include "more than two isolated acts,"⁵² it did not elaborate on how many "acts" or how much "continuity" was required. As a result, the federal judiciary has developed three differing views as to what the pattern requirement means.

1. "Multiple Schemes" and "Different Episodes"

Just four weeks after *Sedima* was decided, the first attempt to redefine the pattern requirement appeared. In *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*,⁵³ the defendant was accused of participating in a construction kickback scheme implemented through two acts of mail fraud (mailing the subcontract and mailing the kickback check). Noting that "*Sedima* . . . create[d] a whole new ballgame," Judge Shadur asserted that *Sedima*'s "message was both plain and deliberate: Lower courts concerned about RICO's expansive potential would be best advised to focus on the hitherto largely ignored 'pattern' concept."⁵⁴ In response to this "concern," the court held that, while the two acts were clearly related, the pattern requirement was not met because continuity of activity was absent. Pattern, Judge Shadur noted, "connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the same criminal activity. It places a real

50. 473 U.S. at 496 n.14.

51. 473 U.S. at 496 n.14 (quoting from 1969 SENATE REPORT, *supra* note 2, at 158).

52. 473 U.S. at 496 n.14.

53. 615 F. Supp. 828 (N.D. Ill. 1985) (Shadur, J.). It must be noted that *Inryco* is no longer valid law in the Seventh Circuit. See *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986).

54. 615 F. Supp. at 832-33.

strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a [pattern]."⁵⁵ The court added that even if the complaint had alleged further acts of mail fraud (in addition to the two mailings), a pattern would still not have been shown because only one overall kickback scheme was demonstrated.⁵⁶ *Inryco* thus represented a key restriction on section 1962 claims; under this approach, the issue became not how many illegal acts the defendant committed, but how many separate *schemes* of illegal activity could be demonstrated.

Requiring the plaintiff to demonstrate two separate schemes in order to show continuity has been widely accepted on the district court level.⁵⁷ However, *Inryco's* logic has been criticized by several commentators,⁵⁸ rejected by several courts of appeals,⁵⁹ and followed at the appellate level only by the Eighth Circuit in *Superior Oil Co. v. Fulmer*.⁶⁰ In *Superior Oil*, the defendant had been unlawfully processing gas from the plaintiff's pipeline, and had committed several acts of mail and wire fraud in pursuit of this one underlying activity.⁶¹ In holding that this did not possess the requisite continuity needed for pattern, the court stated that "there was no proof that [defendants] had ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere."⁶² As only "one isolated fraudulent scheme" was alleged, the court dismissed the RICO claims and restricted plaintiff's recovery to other federal and state fraud claims.⁶³ Because the multiple schemes approach results in the dismissal of claims where the predicate acts all occurred within a single scheme, *Superior Oil* and the Eighth Circuit decisions that have followed it⁶⁴ illustrate the narrowest construction of the pattern re-

55. 615 F. Supp. at 831 (emphasis in original). This interpretation of the pattern requirement first appeared in *United States v. Moeller*, 402 F. Supp. 49, 57-58 (D. Conn. 1975). In fact, *Inryco* quotes *Moeller* at length, and even suggests that "*Moeller* has now been vindicated" by *Sedima*. 615 F. Supp. at 832.

56. 615 F. Supp. at 833.

57. See, e.g., *Castle v. Cohen*, 676 F. Supp. 620 (E.D. Pa. 1987), *aff'd*, 840 F.2d 173 (3d Cir. 1988); *Johnson v. Schopf*, 669 F. Supp. 291 (D. Minn. 1987); *Petrie v. United Bank of Skyline, N.A.*, 676 F. Supp. 217 (D. Colo. 1987); *Zahra v. Charles*, 639 F. Supp. 1405 (E.D. Mich. 1986).

58. Black, *Racketeer Influenced and Corrupt Organizations (RICO) — Securities and Commercial Fraud as Racketeering Crime After Sedima: What is a "Pattern of Racketeering Activity"?*, 6 PACE L. REV. 365, 383 (1986); Moran, *The Meaning of Pattern in RICO*, 62 CHI.-KENT L. REV. 139, 154-57 (1985); Note, *RICO: Limiting Suits by Altering the Pattern*, 28 WM. & MARY L. REV. 177, 200-01 (1986).

59. See, e.g., *California Architectural Bldg. Prods. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 & n.1 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988). See also notes 65 & 89 *infra*.

60. 785 F.2d 252, 257 (8th Cir. 1986).

61. 785 F.2d at 253-54.

62. 785 F.2d at 257.

63. 785 F.2d at 257, 259. In the trial court, the jury awarded over \$145,000 to the plaintiff for wrongful conversion; \$25,000 for the RICO claim, and over \$26,000 for another claim. The trial court then trebled the damages. 785 F.2d at 253.

64. See, e.g., *Madden v. Gluck*, 815 F.2d 1163 (8th Cir.) (per curiam), *cert. denied*, 108 S. Ct.

quirement developed to date.

Recognizing that the multiple schemes approach can lead to "untenable result[s],"⁶⁵ several courts have developed a slightly less restrictive variant.⁶⁶ These courts have determined that a single scheme can constitute a pattern if it involves *different criminal episodes*.⁶⁷ An "episode" has been construed to require several separate transactions, even if the single scheme involves the same wrongdoers and the same victims. One implication of this approach is that fraud or other misconduct committed in the course of a single transaction will never constitute a pattern. As a result, courts have refused to find a pattern arising out of a single contract or sale of goods, a single audit engagement, or a single merger agreement or tender offer.⁶⁸ However, a demonstrated number of independent criminal episodes, even if perpetrated under one continuing scheme, can comprise a pattern of ongoing conduct.⁶⁹ Besides generating substantial judicial support, the different episodes test has been endorsed by two American Bar Association committees.⁷⁰

2. *A Sole Focus on Relatedness*

The broadest construction of pattern can be found in the Fifth Circuit's decision in *R.A.G.S. Couture, Inc. v. Hyatt*,⁷¹ the first appellate decision to comment on *Sedima's* footnote 14. In *R.A.G.S.*, the de-

86 (1987); *Ornest v. Delaware North Cos.*, 818 F.2d 651 (8th Cir. 1987). But see *H.J. Inc. v. Northwestern Bell Tel.*, 829 F.2d 648, 651 (8th Cir. 1987) (Gibson, J., concurring) (requesting reconsideration of *Superior Oil*), cert. granted, 108 S. Ct. 1219 (1988).

65. *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986) (criticizing multiple schemes approach because it can never impose liability on a defendant who has committed a single but large and ongoing scheme).

66. In *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986), the Seventh Circuit noted that "[a]n episode is apparently something more than an act of racketeering activity but something less than a scheme."

67. This position was first developed in *United States v. Moeller*, 402 F. Supp. 49, 57 (D. Conn. 1975). For decisions that have followed this approach, see cases collected in Note, *RICO: Limiting Suits by Altering the Pattern*, 28 WM. & MARY L. REV. 177, 199 n.128 (1986).

68. See, e.g., *Frankart Distrib. Inc. v. RMR Advertising, Inc.*, 632 F. Supp. 1198 (S.D.N.Y. 1986) (single contract); *In re Evening News Assn. Tender Offer Litig.*, 642 F. Supp. 860 (E.D. Mich. 1986) (single tender offer); *Temporaries, Inc. v. Maryland Natl. Bank*, 638 F. Supp. 118 (D. Md. 1986) (single merger); *Professional Assets Management, Inc. v. Penn Square Bank*, 616 F. Supp. 1418 (W.D. Okla. 1985) (single audit engagement).

69. See, e.g., *Graham v. Slaughter*, 624 F. Supp. 222, 225 (N.D. Ill. 1985) (continuity "requires more than a single transaction but not necessarily more than a single scheme").

70. See REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUS. L. 206-07 & n.333 (1985) [hereinafter ABA TASK FORCE REPORT] (specifically adopting test outlined in *United States v. Moeller*, 402 F. Supp. 49, 57 (D. Conn. 1975)); ABA SEC. OF CRIM. JUST., REPORT TO THE HOUSE OF DELEGATES 5-6 (1982), reprinted in ABA TASK FORCE REPORT, *supra*, app. B (also adopting the *Moeller* test).

In addition to these endorsements, the Department of Justice in 1981 mandated that RICO prosecutions should *not* be brought if only a "single criminal episode" was involved. See UNITED STATES ATTORNEY'S MANUAL, § 9-110.340.

71. 774 F.2d 1350 (5th Cir. 1985).

defendant allegedly defrauded the plaintiff by twice mailing him false invoices. Despite *Sedima*'s emphasis on relationship and continuity,⁷² the court held that continuity was unnecessary. The Fifth Circuit declared: "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."⁷³ Thus, for the *R.A.G.S.* court, a pattern required only two related mailings in furtherance of a single fraud.⁷⁴

The implications for civil RICO of such an interpretation of pattern are considerable. For example, under *R.A.G.S.*, two phone calls made in an attempt to defraud a single plaintiff out of \$1,000 could expose the defendant to treble damages and the stigma of the "racketeer" label.

While *R.A.G.S.* has come under heavy criticism, both from other courts and from its own circuit,⁷⁵ some courts have agreed with the Fifth Circuit. In *California Architectural Building Products v. Franciscan Ceramics*,⁷⁶ the Ninth Circuit also rejected a continuity requirement, holding that "the plain words of RICO . . . define[] 'pattern of racketeering activity' without mentioning continuity."⁷⁷ Instead, the court held that several related acts committed in furtherance of a single criminal episode were sufficient to form a pattern.⁷⁸ The Ninth Circuit also noted that "[t]he dictum in *Sedima* is suggestive, but without additional explication by the Supreme Court we decline to follow its lead."⁷⁹

72. 473 U.S. at 496 n.14.

73. 774 F.2d at 1355 (citation omitted).

74. 774 F.2d at 1355.

75. See, e.g., *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928 n.3 (10th Cir. 1987); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 424 (5th Cir. 1987) (following *R.A.G.S.* but requesting its reversal *en banc*).

76. 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988).

77. 818 F.2d at 1469.

78. 818 F.2d at 1469.

79. 818 F.2d at 1469. Recently, several Ninth Circuit decisions have looked beyond basic relatedness and have begun to emphasize the "threat" of continuous behavior. See, e.g., *United Energy Owners Comm., Inc. v. United States Energy Management Sys.*, 837 F.2d 356, 360 (9th Cir. 1988) (test is "whether the acts posed a threat of continuing activity") (quoting from *Sun Sav. & Loan Assn. v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987)); *Medallion Television Enters. v. SelecTV of Calif.*, 833 F.2d 1360 (9th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3649 (U.S. Mar. 5, 1988) (No. 87-1478) (circumstances of a case must suggest that predicate acts are indicative of a threat of continuing activity). Unfortunately, none of these cases has explained what level of activity constitutes a "threat" of further wrongdoing.

Besides the Ninth Circuit, the Second Circuit has occasionally applied nothing more than a relatedness test. In *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987), the Second Circuit also rejected the continuity requirement, stating that "the *Sedima* footnote does not rise to the level of a holding, [and] is [thus] not controlling." 808 F.2d at 190. Since *Ianniello*, however, the Second Circuit has moved away from its expansive interpretation of civil RICO claims and has begun to emphasize continuity of conduct in the definition of "enterprise." This Circuit thus simultaneously utilizes a broad definition of pattern with a requirement that the defendant's "enterprise," as defined in note 13 *supra*, be continuing.

3. *The Multi-Factor Approach*

While the above approaches concentrate heavily on the number of predicate acts or schemes present, other courts have expanded their inquiry beyond such issues. These courts have set forth a variety of factors that together contribute to a finding of pattern. The Seventh Circuit, in *Morgan v. Bank of Waukegan*,⁸⁰ has been the major proponent of the multi-factor approach. Although *Morgan* involved several predicate acts within a single grand scheme, the court attempted to "steer[] a middle course between" the two extremes represented by *R.A.G.S.* and *Superior Oil*.⁸¹ Stating that "the predicate acts must be ongoing over [a measurable] period of time so that they can . . . be viewed as . . . separate transactions," the court identified a number of "[r]elevant factors" that could be used to make this determination: "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."⁸² Because the acts of alleged fraud were distinct (relating to the original loan transaction and the ensuing foreclosure sale) and "ongoing over a period of nearly four years," the continuity aspect of the pattern requirement was deemed satisfied in *Morgan*.⁸³

Since *Morgan*, several appellate courts have embraced a multi-factor approach.⁸⁴ In rejecting a bright-line test, these courts have abandoned any talismanic reliance on such buzzwords as "schemes" and "episodes," and have instead performed a more sophisticated "inquiry into the extent of the racketeering activity"⁸⁵ in each individual case. While this case-by-case inquiry has made the interpretive chal-

See *Beauford v. Helmsley*, 843 F.2d 103, 110 (2d Cir. 1988) (pattern established but continuing enterprise not found because scheme was "discrete" and "finite"), *rehg. en banc granted*, Natl. L.J., May 9, 1988, at 44, col. 3 (2d Cir. Mar. 10, 1988); *Creative Bath Prod., Inc. v. Connecticut Gen. Life Ins. Co.*, 837 F.2d 561, 564 (2d Cir. 1988) (continuing enterprise not found because the defendant's fraudulent misrepresentations were made in pursuit of a "single short-lived goal"); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987) (same), *cert. denied*, 108 S. Ct. 698 (1988); *Albany Ins. Co. v. Esses*, 831 F.2d 41, 44 (2d Cir. 1987) (continuing enterprise not found because complaint "had an obvious terminating goal or date"). In an effort to reconcile these confusing interpretations of civil RICO and the pattern requirement, the Second Circuit has agreed to rehear the *Beauford* case *en banc*. *Beauford v. Helmsley*, 843 F.2d 103 (2d Cir. 1988), *rehg. en banc granted*, Natl. L.J., May 9, 1988 at 44, col. 3 (2d Cir. Mar. 10, 1988).

80. 804 F.2d 970 (7th Cir. 1986).

81. 804 F.2d at 975.

82. 804 F.2d at 975.

83. 804 F.2d at 976.

84. See, e.g., *Bartichek v. Fidelity Union Bank/First Nat. State*, 832 F.2d 36, 38-39 (3d Cir. 1987) ("pattern does not turn on the abstract characterization of . . . acts as 'continuous' and 'related' but rather on a combination of specific factors"); *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987) (" 'pattern' . . . is a fact-specific question encompassing many relevant factors"); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987) ("no one characteristic can be . . . controlling in determining whether a pattern exists.").

85. *Bartichek*, 832 F.2d at 40.

lenge posed by section 1961(5) more complex, the end result has been a more solidly consistent application of the treble damage remedy against those defendants posing the greatest criminal threat.

Although *Sedima* cut short several early attempts to restrict civil RICO judicially, the situation makes it clear that the courts have failed to carry out *Sedima*'s directive to develop a consistent and "meaningful" concept of pattern.⁸⁶ In fact, all three approaches proposed by the courts suffer from various inadequacies. The approach holding that just two related acts are sufficient to form a pattern, currently in use by the Fifth Circuit (and occasionally invoked by the Second and Ninth Circuits), glaringly ignores any requirement of continuity, thereby disobeying both congressional purpose⁸⁷ and *Sedima*'s mention of continuity.⁸⁸ In turn, the multiple schemes approach presents courts with a formidable problem of definition and leads to an overly restrictive use of the civil RICO remedy.⁸⁹ Finally, while the multiple factors position properly focuses the debate toward continuity of conduct and recognizes that the pattern riddle cannot be solved through reliance on "schemes" or "episodes," the inclusion of certain factors (such as the requirement of a separate injury for each victim) has clouded the consistency and effectiveness of the standard. Ultimately, an analysis of the relevant statutory language, the legislative history, and the current state of civil RICO abuse suggests that focusing on the four key factors best highlighting continuity produces

86. See *Sedima*, 473 U.S. at 500. The confusion in the courts has, unfortunately, been mirrored by the academic commentary. Compare Moran, *The Meaning of Pattern in RICO*, 62 CHI.-KENT L. REV. 139, 158 (1985) ("A pattern consists of two or more predicate acts which are related to . . . each other, as part of a single scheme which causes injury."), and Note, *RICO: Limiting Suits By Altering The Pattern*, 28 WM. & MARY L. REV. 177, 204 (1986) ("Congress and the courts should adopt a two-part [pattern] analysis, requiring that the predicate acts cause separate injuries and also be somewhat separated by time or place."), with Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83, 96 (1986) ("One definition [of pattern] will not do; the definition of pattern must vary according to the [§ 1962] violation alleged.").

This last point, that pattern should mean different things depending upon which § 1962 subsection is violated, is most unusual. Absolutely no evidence exists to demonstrate that Congress intended a different definition of pattern to apply for each of the three subsections of § 1962. The Senate Report cited in *Sedima* made no distinction among the three provisions when it noted that pattern required "continuity plus relationship." See 1969 SENATE REPORT, *supra* note 2, at 158 cited in *Sedima*, 473 U.S. at 496 n.14. Further, § 1962 itself makes no distinction, and in fact uses the same language in all three subsections. See note 11 *supra* for the relevant statutory language. Finally, imposing a unique pattern requirement for each § 1962 subsection seems pointless, since it has been shown that over 97% of all RICO claims allege a violation of § 1962(c). See A.B.A. TASK FORCE REPORT, *supra* note 70, at 57.

87. See Part III.A *infra*.

88. See text accompanying notes 49-51 *supra*.

89. The greatest problem with the multiple schemes position, as one court noted, is that "defendants who commit a large and ongoing scheme, albeit a single scheme, would automatically escape RICO liability for their acts, an untenable result." *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

the proper balance between consistent application of the pattern requirement and respect for the legislative intent of RICO.

II. STATUTORY ANALYSIS

The starting point in any question of statutory interpretation must be the actual language of the provision.⁹⁰ Because the word pattern, by itself, defies a precise description,⁹¹ RICO's drafters attempted to define further the required level of activity sufficient for a pattern. Section 1961(5) states that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."⁹² As has been noted, this definition stands in "contradistinction"⁹³ to the other definitions in section 1961 "in that it states that a pattern 'requires at least two acts'. . . not that it 'means' two such acts."⁹⁴ Thus, section 1961(5) only establishes a *minimum level* of required conduct for RICO liability; a "sufficient" pattern of activity is never defined.⁹⁵

Because this definition simply places a floor on the number of predicate acts necessary for a pattern, and does not specifically quantify the level of wrongful activity necessary to sustain a RICO conviction, courts have differed sharply over the interpretative values of section 1961(5). Some courts have rejected attempts to narrow the statutory definition of pattern, stating instead that the language is "unambiguous."⁹⁶ These courts have found no need to inquire into RICO's legislative history or broader policy considerations to support their broad interpretation of the pattern requirement. The Supreme Court, however, has indicated that section 1961(5) is vague, noting that "in common parlance two of anything do not generally form a 'pattern.'"⁹⁷ Because of this ambiguity, the Court found it necessary to look to other interpretive aids, like the legislative history.⁹⁸ Still other courts have noted that the "common sense interpretation of the word pattern

90. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring) ("The starting point in every case involving construction of a statute is the language of the statute itself").

91. *Black's Law Dictionary* defines pattern as "[a] reliable sample of traits, acts or other observable features characterizing an individual." BLACK'S LAW DICTIONARY 1015 (5th ed. 1979).

92. 18 U.S.C. § 1961(5) (1982) (emphasis supplied). See also note 15 *supra*.

93. A.B.A. TASK FORCE REPORT, *supra* note 70, at 193.

94. *Sedima*, 473 U.S. at 496 n.14 (emphasis in original). For example, § 1961's definition of "racketeering activity" plainly states what this activity "means," and not merely what is minimally required. See note 14 *supra* for statutory language.

95. See *Sedima*, 473 U.S. at 496 n.14 ("The implication [of this definition] is that while two acts are necessary, they may not be sufficient.").

96. See, e.g., *United States v. DePalma*, 461 F. Supp. 778, 782 (S.D.N.Y. 1978).

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

98. 473 U.S. at 496 n.14.

implies acts occurring in *different criminal episodes*," as opposed to two or three unrelated acts.⁹⁹

Because of this disagreement over the language of section 1961(5), any examination of the pattern requirement must go beyond the "plain meaning" of section 1961.¹⁰⁰ The plain meaning rule is usually invoked in situations where the statutory language is unambiguous.¹⁰¹ The obvious inconclusiveness of section 1961(5) indicates that such a situation does not exist here. Thus, it is necessary to seek the aid of additional rules of statutory construction. One technique of statutory interpretation that has been generally accepted,¹⁰² and has even been used to interpret RICO's pattern requirement, involves an analysis of the use of "pattern" in other federal statutes. In the section defining special offenders in Title X of the same Organized Crime Control Act,¹⁰³ Congress noted that a pattern of criminal conduct is formed "if it embraces criminal acts that have the same or similar purposes, results, participants, victims, . . . or otherwise are . . . not isolated events."¹⁰⁴ In its message to the lower courts to come up with a more consistent definition of pattern, the *Sedima* Court noted that this section could be used as an aid in interpreting RICO.¹⁰⁵ Taking this lead, several courts have analyzed section 3575(e) of Title X and its legislative history and concluded that it supports a narrow construction of pattern in the RICO context.¹⁰⁶ In fact, both the multiple schemes

99. *United States v. Moeller*, 402 F. Supp. 49, 57 (D. Conn. 1975) (emphasis in original). See also notes 66-70 *supra* and accompanying text for further discussion of the "different episodes" test.

100. A typical statement of the "plain meaning" rule appears in *Caminetti v. United States*, 242 U.S. 470, 485 (1917): "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." See also Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

Even if one were to take a "plain meaning" approach to the pattern debate, consider the following comment:

While the statutory definition makes clear that a pattern can consist of only two acts, I would have thought the common sense interpretation of the word "pattern" implies acts occurring in *different criminal episodes* . . . I would further have thought that the normal canon of narrowly construing penal statutes points toward such an interpretation.

United States v. Moeller, 402 F. Supp. 49, 57-58 (D. Conn. 1975) (Newman, J.) (emphasis in original).

101. For a discussion of the plain meaning rule, see Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950).

102. See, e.g., *United States v. Norton*, 808 F.2d 908, 910-11 (1st Cir. 1987) (investigating other statutory uses of the word "intimidate" to help define same term in 18 U.S.C. § 844(d)).

103. 18 U.S.C. § 3575(e), Pub. L. 91-452, 84 Stat. 948 (1970), *repealed by* Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, ch. II, § 212(a)(2), 98 Stat. 1987 (1984) (effective Nov. 1, 1987). RICO comprises Title IX of the Organized Crime Control Act of 1970. See note 1 *supra*.

104. 18 U.S.C. § 3575(e) (1982).

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

106. See, e.g., *Bank of Am. Natl. Trust & Sav. Assn. v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986); *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 256 (8th Cir. 1986); *Castle v. Cohen*, 676 F. Supp. 620 (W.D. Pa. 1987), *aff'd*, 840 F.2d 173 (3d Cir. 1988); *Foltz v. U.S. News & World Report, Inc.*, 108 F.R.D. 57, 60 (D.D.C. 1985).

approach and the requirement of related conduct can be traced directly to this passage in Title X. One court noted that section 3575(e) demonstrates that "in enacting RICO Congress intended to reach separate criminal acts or series of acts that each have the same or a similar *type* of purpose, and not acts that have only one and exactly the same purpose [singular]."¹⁰⁷ While Congress may have been remiss in not providing further clarification in RICO's definition of pattern, the description of pattern in Title X suggests that both relatedness and continuity are important. Since section 3575(e)'s legislative history is also replete with references to "professional, long-term criminal elements in society,"¹⁰⁸ the definition of pattern in Title X should be given considerable weight in the RICO context as well.

Title X's definition of pattern, therefore, suggests that some statutory basis exists for interpreting the pattern requirement narrowly. While section 1961(5) does not tell us which interpretation of pattern is justified, or how many acts (beyond the minimum of two) or separate schemes are required, neither can it be said that the section precludes fashioning a restrictive approach to pattern. Often, the courts that reject attempts to limit civil RICO through a narrow construction of pattern argue that section 1961(5) does not support such a restriction, since neither "schemes" nor "episodes" appear anywhere in the statute.¹⁰⁹ Given the vagueness of section 1961(5), however, this argument has little force. The lack of statutory precision requires courts to look for guidance beyond the particular wording of the statute.

In the effort to flesh out the best interpretation of pattern, courts will have to include guidelines to insure that consistent interpretations of the pattern requirement are rendered. Because of the ambiguity of section 1961(5), these guidelines must derive from sources *outside* the language. Thus, a "plain meaning" approach to this problem of linguistic construction is not helpful and recourse to both the legislative history and the problems plaguing civil RICO's current application is necessary.¹¹⁰

107. *Castle*, 676 F. Supp. at 630 (emphasis in original) (using § 3575(e) to support multiple schemes approach).

108. *Superior Oil*, 785 F.2d at 257 n.7 (summarizing § 3575(e)'s legislative history). See also *Organized Crime Control, Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 245 (1970) [hereinafter *House Hearings*] (statement of Assistant Attorney General Wilson) (The "pattern of conduct" requirement "would not be just another bribery count or something of that nature. It would be continuous conduct like that of a major bookie operating over a long period of time.").

109. See, e.g., *United States v. Ianniello*, 808 F.2d 184, 192 & n.15 (2d Cir. 1986), cert. denied, 107 S. Ct. 3230 (1987); *FDIC v. Kerr*, 637 F. Supp. 828, 835 (W.D.N.C. 1986).

110. See, e.g., *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972) ("But, while the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best,' and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history.") (quoting *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943)).

III. TWO JUSTIFICATIONS FOR INTERPRETING THE PATTERN REQUIREMENT NARROWLY

Comparing what RICO's drafters intended for the statute with what private litigants and federal courts have subsequently allowed to happen sheds considerable light on how the pattern requirement should be interpreted today. A liberal construction of pattern would contradict the intent to limit civil RICO to professional criminals and repeat offenders and result in a continuation of the broad and unwarranted use of the statute. A narrow interpretation, however, would refocus and redirect civil RICO prosecutions towards those criminals who commonly violate the statute's predicate offenses.

A. Congressional Intentions for RICO and the Pattern Requirement

1. *RICO's Prime Goal: Attacking the Economic Base of Organized Crime*

Although the legislative history of RICO is well documented, no consensus has been reached as to exactly what type of behavior Congress wished to proscribe. Some commentators have concluded that Congress intended RICO as a specific response to the problem of criminal infiltration of legitimate businesses,¹¹¹ while others have uncovered much broader purposes from the legislative history.¹¹² Regardless of which interpretation one chooses, however, most observers generally agree that the major thrust behind Title IX was not so much the eradication of all organized crime, but rather the minimization of organized crime influence and control over legitimate businesses.¹¹³

RICO was originally enacted as a response to studies that had demonstrated the extent to which organized crime had penetrated a wide range of legitimate businesses¹¹⁴ from jukebox sales to securities firms.¹¹⁵ In light of these findings, a key Senate proponent stated that RICO's principal aim was to "prevent organized criminals from infil-

111. See, e.g., Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 840-45, 892 (1980).

112. See, e.g., Blakey & Goldstock, "On the Waterfront": *RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341 (1980).

113. See Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 664 (1987) (also arguing that fashioning a broad, overly remedial purpose from RICO's legislative history is unwarranted).

114. See, e.g., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967); *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 88th Cong., 1st Sess. 5-35 (1963) (statement of Attorney General Robert F. Kennedy).

115. See 1969 SENATE REPORT, *supra* note 2, at 76 ("In most cities, organized crime now dominates the fields of jukebox and vending machine distribution."); *id.* at 77 ("It is most disturbing . . . to learn that organized crime has begun to penetrate securities firms and the Stock Exchange itself.").

trating legitimate commercial organizations with the proceeds of their criminal activities . . . and to remove them and their influence from such enterprises once they have been infiltrated."¹¹⁶

Because the presence of organized crime was so widespread in legitimate enterprises, Congress needed a statute that would target the specific conduct in which crime syndicates were customarily engaged.¹¹⁷ But because of the constitutional prohibitions against punishing mere status,¹¹⁸ Congress could not explicitly require the statute to reach only members of the Mafia. Consequently, the legislature drafted the language broadly.¹¹⁹ In fact, the drafters were quite concerned that restrictive language could be used to escape criminal liability, and the operative statutory language was drafted broadly to prevent this. Congress noted that "organized crime continues to grow because [the] defects in the evidence-gathering process . . . inhibit[] the development of the legally admissible evidence necessary to bring criminal . . . sanctions . . . to bear [against] those engaged in organized crime."¹²⁰ Defining "organized crime," or even the types of acts engaged in by organized criminals, is difficult, and the drafters kept the language intentionally broad to prevent criminal litigants from discovering and abusing any loopholes.

116. *House Hearings*, *supra* note 108, at 106 (statement of Senator McClellan); *see also* note 2 *supra*; *United States v. Turkette*, 452 U.S. 576, 591 (1981) ("[T]he major purpose of [RICO] is to address the infiltration of legitimate business by organized crime."). For an excellent survey of RICO's legislative history, *see* Lynch, *supra* note 113, at 666-84 (1987).

117. Congress stated that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that . . . derives a major portion of its power through money obtained . . . from . . . illegal endeavors . . . this money and power are increasingly used to infiltrate and corrupt legitimate businesses and labor unions and to subvert and corrupt our democratic processes . . ." "Statement of Findings and Purpose" accompanying the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 1073.

118. *Robinson v. California*, 370 U.S. 660, (1962). *See also* Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 956 (1987) ("It is not a crime . . . to have the character or status of a racketeer, but to be a racketeer who commits acts of racketeering.") (emphasis in original).

119. *See* Note, *Civil RICO Is a Misnomer: The Need for Criminal Procedural Protections in Actions Under 18 U.S.C. § 1964*, 100 HARV. L. REV. 1288, 1299 (1987) ("Congress was forced to make RICO as substantively broad as it did in part by its realization that a status-based statute would likely be unconstitutional.").

120. Statement of Findings and Purpose, Organized Crime Control Act, Pub. L. 91-452, 84 Stat. 922, 922-23 (1970). In order to give greater force to this intent, Congress added a provision that mandated that RICO's provisions "shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. 91-452, § 904(a), 84 Stat. 947. Some have argued that this liberal construction clause prohibits courts from construing the pattern requirement narrowly. *See, e.g.,* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1031-33 (1980); Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980). Yet the provision itself refers to RICO's overall remedial purposes, which were to combat the increasing influence of organized crime. The clause should not be used as a crutch to support a prosecution in every instance of mail and wire fraud, especially given the fact that civil RICO was passed after the liberal construction clause was inserted. *See* notes 134-39 *infra* and accompanying text.

In addition to preventing loopholes, RICO's creators were concerned with attacking the economic base of structured criminality.¹²¹ To effect this, wire, mail and securities fraud were added as predicate violations to prevent the illicit and economically harmful infiltration of legitimate business by organized crime.¹²² Further, a new remedy, criminal forfeiture, was added to the statute to deter criminal activity. This prosecutorial weapon compelled the forfeiture of assets used in connection with or derived from criminal enterprises. Criminal forfeiture provided an imposing supplement to the other traditional "economic" remedies, such as divestment and dissolution.¹²³

While RICO's framers intended to provide the government with the full panoply of criminal and civil remedies for use in the fight against organized criminal influence, RICO's extension beyond "structured criminal enterprises was intended to be incidental."¹²⁴ In order to limit RICO's application to structured criminality, the sponsors of the final Senate bill included the "pattern of racketeering" and "enterprise" elements as additional requirements. Senator McClellan, the major RICO proponent in the Senate, later emphasized that an individual had not only to commit RICO predicate violations, but to "continually engage" in a pattern of such violations so as to obtain an interest in an interstate business.¹²⁵ If these requirements were not met, then true racketeering activity was not present and the defendant was not subject to the penalties of Title IX.¹²⁶

For McClellan and the other Senate RICO supporters, the type of conduct that best characterized the true racketeer was planned, ongoing, and continuing illegal activity. As the Senate noted: "Title IX . . . is based upon the judgment that parties who conduct organizations . . . through a pattern of criminal activity are acting contrary to the public interest. To protect the public, these individuals must be prohibited from continuing to engage in this type of activity . . ."¹²⁷ Given this goal, the "pattern of racketeering activity" requirement became the centerpiece of the statute. Although the legislators wanted to draft a

121. See 1969 SENATE REPORT, *supra* note 2, at 79.

122. In the original bill introduced by Senator McClellan, RICO's predicate violations did not include wire, mail, or securities fraud. However, based on concerns expressed by the Securities and Exchange Commission that organized crime was engaged in the sale of stolen or counterfeit securities, the list of predicate acts was expanded during Committee consideration to include mail and wire fraud, and fraud in the sale of securities. See A.B.A. TASK FORCE REPORT, *supra* note 70, at 99 n.130.

123. See 18 U.S.C. §§ 1962, 1963; see also 1969 SENATE REPORT, *supra* note 2, at 79 (discussing new remedies). For an analysis of RICO's criminal forfeiture provision, see *Russello v. United States*, 464 U.S. 16 (1983).

124. A.B.A. TASK FORCE REPORT, *supra* note 70, at 124.

125. See McClellan, *The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 144 (1970).

126. *Id.*

127. 1969 SENATE REPORT, *supra* note 2, at 82.

statute broad enough to cover the traditional racketeer, there was concern that innocent businessmen would be harassed by an all-encompassing statute.¹²⁸ To ensure that RICO would only be used against the continuing offender, the Senate Judiciary Committee noted:

The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided . . . largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.¹²⁹

In addition to this report, Representative Poff, a major sponsor of the House bill, stated that the pattern requirement meant "at least two independent offenses forming a pattern of conduct."¹³⁰

The broad goals of RICO and the design of the pattern requirement reveal that only those criminals who committed the multiple, independent offenses necessary to infiltrate a legitimate business were meant to bear civil RICO's harsh penalties. This goal is often ignored by courts, however, because the judiciary is faced with the contradictory task of reconciling RICO's broad language and liberal construction clause¹³¹ with this narrow legislative goal, which clearly targets a specific criminal problem. Theoretically, a broad definition of "infiltration" or "enterprise" could result in a statute that punishes anyone who commits acts that an organized criminal might commit when corrupting a legitimate institution. Some have argued that RICO's broad language mandates such a result.¹³² Construing RICO to reach all types of traditional fraud cases, however, merely exacerbates the problems of an obviously poorly drafted statute. Because Congress originally created the broad language to strike an economic blow against the varied illegal methods of a nationwide criminal syndicate,¹³³ using civil RICO's penalties in *every* instance of commercial fraud today warps the goals of a statute that was meant to target the more professional offender.

128. In their condemnation of the overall bill, Representatives Conyers, Mikva, and Ryan stated that RICO "provides invitation for disgruntled and malicious competitors to harass innocent businessmen A competitor need only raise the claim that his rival has derived gains from two [predicate acts] . . . and . . . litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish — destruction of the rival's business." H.R. REP. NO. 1549, 91st Cong., 2d Sess. 187 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4083.

129. 1969 SENATE REPORT, *supra* note 2, at 158. This oft-cited quote was used by the *Sedima* Court in its discussion of the pattern requirement. *Sedima*, 473 U.S. at 496 n.14.

130. 116 CONG. REC. 35,193 (1970) (remarks by Rep. Poff) (emphasis added).

131. *See* note 120 *supra*.

132. *See, e.g.,* Blakey & Gettings, *supra* note 120.

133. *See Sedima*, 473 U.S. at 525 (Powell, J., dissenting) (legislative history makes clear that the statute was intended to be applied primarily against organized crime).

2. Implications of the Private Attorney General Provision

A second reason for interpreting the pattern requirement narrowly derives from the fact that the private remedy, section 1964(c), was added to Title IX at the last minute, with very little debate or consideration of the possible consequences of a "private attorney general" provision. While the proposed provisions relating to governmental prosecutions were extensively surveyed, the bill that passed the Senate mentioned nothing about a private remedy.¹³⁴ The decision to add the treble damage provision was made by a House subcommittee¹³⁵ and was debated only briefly.¹³⁶ When the House passed the slightly amended S.30 without even a conference, Senator McClellan described the House amendment as a "minor change[]."¹³⁷

As Judge Oakes noted in the Second Circuit's *Sedima* decision,¹³⁸ the last-minute addition of a private treble damage remedy "indicates that Congress did not intend [section 1964(c)] to have the extraordinary impact claimed for it. Indeed, . . . [t]he most important and evident conclusion to be drawn from the legislative history is that Congress was not aware of the possible implications of section 1964(c)."¹³⁹

When one considers how commercial fraud offenses¹⁴⁰ have come to serve as the basis for a vast majority of section 1964(c) filings,¹⁴¹ the implications of this last-minute addition are significant. Originally, securities fraud was added to the list of RICO predicate violations because organized criminal syndicates had begun to infiltrate the securities industry.¹⁴² Because the mail and telephone wires are obviously common tools used in the perpetration of this and other fraudu-

134. The "[c]ivil remedies," discussed in the 1969 Senate Report, referred solely to the Government's right to seek and obtain injunctions for divestment, restraints on future activities, and orders of dissolution for violations of section 1962. See 1969 SENATE REPORT, *supra* note 2, at 24. When S. 30 finally passed the Senate in early 1970 by a vote of 73-1, it contained no private treble damage remedy. See 116 CONG. REC. 972 (1970).

135. Originally, the idea of incorporating a private, treble damage remedy into the Senate bill came from the ABA Board of Governors. See *House Hearings*, *supra* note 108, at 543-44; see also note 144 *infra*. This proposal was then suggested to the House Judiciary Committee by Rep. Steiger. See *House Hearings*, *supra* note 108, at 518-20 (proposal of a civil damage remedy by Rep. Steiger).

136. For a discussion of how brief the discussion over § 1964(c) was, see Judge Oakes's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 488-92 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

137. 116 CONG. REC. 36,293 (1970).

138. 741 F.2d 482 (2d Cir. 1984).

139. 741 F.2d at 490, 492.

140. This term is meant to encompass mail, wire and securities fraud, the major racketeering offenses listed in § 1961(1). For a discussion of § 1961, see note 14 *supra*.

141. See Blakey & Cessar, *RICO Case Study*, *supra* note 16, at 620-21.

142. See A.B.A. TASK FORCE REPORT, *supra* note 70, at 100-02; note 122 *supra*. See also Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513, 1514-17 (1983).

lent schemes, mail fraud and wire fraud were added as well. Yet the inclusion of these activities occurred *before* the addition of the private remedy, when Congress was concerned with providing the government (and not private litigants) with broad economic weapons to use against those who corrupted legitimate enterprises. While this does not mean that the private remedy should never apply to the commercial fraud offenses, no evidence exists to show that Congress intended for treble recovery *every* time a violation occurred that was of a type associated with organized crime.¹⁴³ Thus, rather than constituting a dramatic expansion of the enforcement of the federal fraud laws, the inclusion of a private cause of action should merely be seen as providing an additional weapon to use against the corrupt infiltration of legitimate commercial activities by organized crime.¹⁴⁴

RICO's legislative history does not definitively answer the question of how best to apply the pattern requirement. However, several facets of this history should be kept in mind when considering the proper application of the statute. The first and most important factor to consider should be the congressional desire to stem the increasing infiltration of legitimate enterprises by illicit activity.¹⁴⁵ This desire must be the driving force behind the interpretation of both the criminal and civil components of the statute. Indeed, given that the private remedy received only cursory debate, consideration of this goal in the context of civil RICO assumes even greater importance. Second, the legislative history evinces a serious concern for the continuing offender.¹⁴⁶ Despite RICO's sweeping language, Congress intended for all RICO defendants to meet several statutory requirements, since mere membership in "La Cosa Nostra" was not enough to trigger RICO liability.¹⁴⁷ Consequently, Congress placed a "pattern of racketeering activity requirement" in the statute to identify a particular type of offender, the true racketeer.¹⁴⁸ Because these racketeers engage in planned, ongoing criminal activity rather than sporadic and isolated episodes of crime, the pattern element of the statute should be narrowly interpreted to target this type of prolonged criminal conduct.

143. See *Terra Resources I v. Burgin*, 664 F. Supp. 82, 84 (S.D.N.Y. 1987) ("there is no evidence that it was ever the intent of Congress to flood the federal courts with actions more properly brought under various state and other federal statutes in the name of RICO simply because of the carrot of treble recovery"); A.B.A. TASK FORCE REPORT, *supra* note 70, at 125 (Congress never stipulated that section 1964(c) should replace existing federal and state fraud remedies).

144. In its recommendation to Congress, the ABA noted that the private remedy would "be a major tool in extirpating the baneful influence of organized crime in our economic life." 116 CONG. REC. 25,190 (1970). See also note 135 *supra* (discussing the ABA proposal).

145. See notes 113-16 *supra* and accompanying text.

146. See notes 125-30 *supra* and accompanying text.

147. See notes 118-19 *supra*.

148. This conclusion as to the legislative history was also reached by the 1985 Ad Hoc Civil RICO Task Force. See A.B.A. TASK FORCE REPORT, *supra* note 70, at 123-24.

B. Current RICO Abuse and the Importance of a Narrow Construction of Pattern

Even though the legislative history suggests that RICO's applicability should be limited to the type of ongoing illegal activity associated with professional criminals, the current scope of civil RICO litigation has gone far beyond this goal. In 1985, the American Bar Association's Ad Hoc Civil RICO Task Force reported that 40% of civil RICO filings alleged securities fraud as the underlying predicate act, and an additional 37% involved allegations of common law fraud in a commercial setting.¹⁴⁹ A more recent survey shows that common law fraud constitutes the underlying dispute in almost 55% of all RICO claims, whereas securities fraud has dropped to 28.8%.¹⁵⁰ By contrast, only 9% of the hundreds of civil RICO filings involved claims based on predicate offenses commonly associated with "professional criminal type activity"¹⁵¹ something more than standard commercial fraud. Today, RICO claims are being filed in almost every dispute involving a commercial transaction.¹⁵² RICO filings have

149. A.B.A. TASK FORCE REPORT, *supra* note 70, at 55-56. This Report was cited by both the majority and the dissent in *Sedima* as evidence of the abuse and unintended direction of civil RICO. See *Sedima*, 473 U.S. at 499 n.16, 526-27.

150. Blakey & Cessar, *RICO Case Study*, *supra* note 16, at 621. This drop in securities fraud cases under RICO will probably continue as a result of the Supreme Court's recent decision in *Shearson/American Exp., Inc. v. McMahon*, 107 S. Ct. 2332 (1987). There, the plaintiff sued his broker, alleging violations of § 10(b) of the Securities and Exchange Act of 1934 and § 1964(c) under RICO. Because the customer agreement between the parties had provided for arbitration of any controversy relating to the account, the defendant moved to compel the court to stay its proceedings pending arbitration of both the § 10(b) and the RICO claims. Rejecting the argument that RICO claims are not arbitrable, Justice O'Connor stated that defendants could "effectively vindicate their RICO claim in an arbitral forum Moreover, nothing in RICO's text or legislative history . . . demonstrates congressional intent to make an exception to the Arbitration Act for RICO claims." 107 S. Ct. at 2345-46.

As arbitration clauses have become standard practice in the contracts between customers and brokers, the number of securities fraud RICO cases brought in federal district courts should decline. See *Innovative Use of Civil RICO Promises To Continue in 1988*, 3 Civ. RICO Rep. (BNA) No. 33, at 4, 5 (Jan. 26, 1988) (arguing that "RICO cases based on predicate acts of securities fraud . . . should fall off significantly"). Partially as a result of this decision, the securities industry, who before had been outspoken critics of civil RICO, has toned down its objections and lobbying efforts.

The need for clarification of the pattern requirement, however, will not be lessened, and may even be heightened, by this decision. Regardless of the forum in which these RICO claims are decided (arbitration vs. courts), the need to pinpoint the level of activity necessary to incur RICO liability remains as strong as ever. Indeed, if many RICO cases do move to arbitration, there will be fewer chances to develop and debate the pattern concept, since arbitral decisions will not contain extensive discussions of the relevant case law. Further, even if these claims are decided by arbitration, the right of appeal to the federal judiciary will still be in force. Consequently, the need for a consistent definition of pattern on the federal level remains unchanged by *Shearson/American Express*.

151. Both the 1986 figures in the Blakey article and the figures compiled for the 1985 report of the Ad Hoc Civil RICO Task Force found that 91% of the allegations in civil RICO claims did not involve "'professional criminal type' activity." See Blakey & Cessar, *RICO Case Study*, *supra* note 16, at 619; A.B.A. TASK FORCE REPORT, *supra* note 70, at 56.

152. See generally Boucher, *Closing the RICO Floodgates in the Aftermath of Sedima*, 31 N.Y. L. SCH. L. REV. 133, 140-141 (1986) (pointing out the diverse reach of RICO claims).

been included in litigation over takeover battles,¹⁵³ landlord-tenant disputes,¹⁵⁴ and matrimonial controversies.¹⁵⁵

There are several reasons for RICO's expanding scope.¹⁵⁶ First, the breadth of RICO's language, including such a diverse array of common offenses, practically invites a litigation explosion. The potential of treble recovery and the inclusion of mail, wire and securities fraud as predicate "racketeering" acts¹⁵⁷ also make it very tempting to include a RICO claim in any fraud dispute. "In view of the use of the mails and the telephone in virtually every business transaction," one Congressman has noted that "the private right of action under RICO effectively encompasses the universe of commercial disputes."¹⁵⁸ Indeed, it is so easy and tempting to allege a RICO claim that counsel may commit malpractice if a RICO claim is not made when the section 1962 statutory elements have been satisfied.¹⁵⁹

A second reason why plaintiffs find RICO attractive can be found in the statute's procedural rules, which not only contain liberal venue and service of process provisions, but allow very broad discovery as well.¹⁶⁰ For plaintiff corporations who are suing competitor corporations, such wide discovery can often yield valuable information.¹⁶¹ In addition, including RICO claims usually raises the pressure to settle these vexatious suits, because the defendant's fear of being labelled a

Boucher is a Virginia Congressman who has introduced legislation aimed at curtailing the reach of civil RICO. See H.R. 5445, 99th Cong., 2nd Sess., 132 CONG. REC. H9366 (daily ed. Oct. 7, 1986). The House passed H.R. 5445 on October 7, 1986, but the Senate narrowly defeated the bill on October 18, 1986. See RICO Bus. Disp. Guide (CCH) ¶ 6041.50. (1987); for a further discussion of H.R. 5445, see note 233 *infra* and for a discussion of other pending RICO legislation, see notes 233-38 *infra* and accompanying text.

153. *E.g.*, Warner Communications, Inc. v. Murdoch, 581 F. Supp. 1482 (D. Del. 1984) (hostile takeover target unsuccessfully alleged that its corporate adversary violated § 1961(5)).

154. *E.g.*, Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (N.D. Ill. 1983) (tenant alleged that landlord misrepresented zoning class of apartment).

155. *E.g.*, Erlbaum v. Erlbaum, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 (E.D. Pa. 1982), *dismissed*, 709 F.2d 1491 (3d Cir. 1983) (wife claimed ex-husband defrauded her of interest in jointly owned stock).

156. In early 1986, the *National Law Journal* indicated that as many as 10% of newly filed federal claims contain RICO counts. Lauter & Strasser, *The Year in Review, 1985 — Civil RICO*, Natl. L.J., Dec. 30, 1985/Jan. 6, 1986, at s-9, col. 1.

157. For relevant statutory language, see note 14 *supra*.

158. Boucher, *supra* note 152, at 140.

159. See Block, Donovan, Reeves & Wilson, *What Are the Ethical Considerations in Alleging Civil RICO?*, in 1 A.B.A., RICO: THE ULTIMATE WEAPON IN BUSINESS AND COMMERCIAL LITIGATION F-1, at 3 (1983) ("[T]he express civil remedy under RICO may become . . . a legal imperative . . .").

160. This condition results from access to federal jurisdiction and from RICO's specific provisions relating to venue and nationwide service of process. See 18 U.S.C. § 1965 (1982). See also note 23 *supra* and accompanying text.

161. "[T]he very breadth and vagueness of the RICO statute suggests that . . . a defendant may be exposed to pretrial discovery of every aspect of its business for a ten-year period." Spencer Cos. v. Agency Rent-A-Car, Inc., [1981 Transfer Binder] Fed. Sec. L. Rep (CCH) ¶ 98,361, at 92,217 (C.D. Mass. 1981).

"racketeer" gives added bargaining leverage to the plaintiffs.¹⁶²

While the scope of civil RICO may not have reached the "out of control" stage that some have suggested,¹⁶³ it is clear that civil RICO has had unexpectedly and perhaps undesirably broad effects, especially in the past several years.¹⁶⁴ Indeed, the Court noted in *Sedima* that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."¹⁶⁵ Although originally intending to cripple organized crime, Congress has unwittingly contributed to the "[t]houghtless increase in federal jurisdiction."¹⁶⁶ In 1985-1986, 41.4% of all RICO filings contained no grounds for federal jurisdiction other than section 1962.¹⁶⁷ Thus, by following congressional intent and limiting civil RICO to true continuing offenders, courts could cut hundreds of cases from the federal docket each year.

While the evidence concerning legislative intent and subsequent abuse strongly suggest that civil RICO should be restricted, the proper role of the courts in this question is somewhat controversial. Some have asserted that the judiciary should be precluded from restricting civil RICO in any way, instead arguing that this task should lie with Congress.¹⁶⁸ While congressional action may be the ultimate way to correct the problems with civil RICO's application, the failure of the

162. See *RICO Reform: Hearings Before the Subcomm. on Crim. Just. of the House Comm. of the Judiciary*, 99th Cong., 1st Sess., pt. 2, at 902 (1985) (statement of Rep. Boucher) ("For a small business person whose livelihood is largely dependent upon his reputation in the community, being named as a racketeer in a RICO civil suit can be particularly devastating."); *id.*, pt. 1, at 527 (statement of Circuit Judge Abner J. Mikva) ("often [a civil RICO claim's] sole effect is intended to or at least has the effect of pressing the other side into a settlement"); see also Strasser, *Prosecutors, Private Bar Find New Uses for RICO*, Natl. L.J., Sept. 28, 1987, at 18, col. 1 (acknowledging same pressure).

163. See, e.g., Berg & Zelikow, *The RICO Statute, 18 U.S.C. §§ 1961-1968: The Business Client as Racketeer*, 45 TEXAS B.J. 159, 164 (1986) (also comparing RICO to the "notorious Article 58 in the Soviet criminal code").

164. "Since 1982, the number of civil [RICO] suits . . . has more than quadrupled." N.Y. Times, Sept. 24, 1986, at A17, col. 1, 3. See also *Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 766 (1985) (statement of the American Property and Casualty Ins. Indus. delivered by Irvin B. Nathan) ("hundreds of . . . civil RICO actions have been brought in circumstances that [do not] . . . involve . . . allegations of serious business misconduct"). But see Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 71-84 (arguing that RICO has not been abused to excess and that vigorous enforcement remedies exist to combat any abuse); Blakey & Cessar, *RICO Case Study*, *supra* note 16, at 534 n.29 (district court concern over RICO case flood is misplaced). Professor Blakey points out that, of the total federal filings each year, RICO claims would not exceed 5,000, or 2% of the total. *Id.* Regardless of the number, however, it is the type of defendant that is being sued, not the total number of filings, that is representative of RICO abuse.

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

166. Feinberg, *The Coming Deterioration of the Federal Judiciary*, 42 THE REC. 179, 182 (1987). See also *Terra Resources I v. Burgin*, 664 F. Supp. 82, 84 (S.D.N.Y. 1987) (applying Judge Feinberg's quote to the abuses of civil RICO).

167. Blakey & Cessar, *RICO Case Study*, *supra* note 16, at 619.

168. See, e.g., Note, *The Conflict over RICO's Private Treble Damages Action*, 70 CORNELL L. REV. 902 (1985).

judiciary "to develop a meaningful concept of 'pattern' "¹⁶⁹ has certainly contributed to the abuse of the statute. Interpreting the pattern requirement narrowly represents the best and, after *Sedima*, perhaps the only way for the courts to remedy this unfortunate contribution. Thus, by developing a consistent definition of pattern, the courts could both curb some of the abuses and restrict civil RICO to its intended focus.

IV. DEVELOPING A "MEANINGFUL CONCEPT": A MULTI-FACTOR FOCUS ON CONTINUITY

A survey of RICO's legislative history demonstrates that the intended targets of the statute were those offenders who committed multiple and continuing offenses. The pattern requirement was inserted in the statute to so limit RICO. An examination of the subsequent case law, however, illustrates that RICO has been used in many unexpected areas. This has occurred mostly because of the failure of the courts to apply the key pattern requirement consistently and meaningfully. In trying to rectify this situation, courts should strive for both consistency and a way to decrease RICO's expanding applications. This can be accomplished by focusing the pattern requirement on the criminals who commonly commit true racketeering crimes and who pose the greatest threat to legitimate enterprises. With these goals in mind, the multiple factor approach emerges as the optimal solution because it provides a comprehensive and consistent framework for pinpointing the continuing offender. By defining and then applying the four factors necessary to establish continuity, this section will demonstrate how a sophisticated inquiry into illicit conduct can result in the application of the treble damage remedy against those who most deserve the penalty.

A. *Goals of an Optimal Pattern Requirement*

In developing a meaningful definition of pattern, courts should be guided by two basic goals: a respect for congressional intent and consistency of application. These goals should be emphasized because the judicial treatment of RICO demonstrates that congressional intent has been largely ignored in the morass of inconsistent and unpredictable pattern cases. An optimal approach to pattern, therefore, will have to return RICO to its intended focus (by emphasizing relationship and continuity) and provide the courts with enough direction so that the current inconsistencies are avoided.

As to the first goal, the Senate specifically mentioned relationship and continuity when drafting the pattern requirement because it felt

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

that isolated conduct should not merit RICO's penalties.¹⁷⁰ By ensuring that a defendant's recurring acts bear some relationship to the plaintiff's injury, Congress hoped to eliminate the insidious influence of structured criminality as opposed to the effects of isolated activity. While many courts have successfully developed a workable test for relatedness, the more important continuity prong has proved far more difficult to define.

With respect to "relationship," most courts have articulated a test that closely parallels the definition of pattern in Title X.¹⁷¹ These courts have taken *Sedima's* directive that this section "may be useful" in interpreting pattern and concluded that "similar purposes, results, . . . victims and methods of commission" in the perpetration of a fraudulent scheme present evidence of an adequate relationship.¹⁷² Often, if a RICO injury results from two or more acts of racketeering activity, the plaintiff can show the requisite relationship between the acts simply by demonstrating that both acts were directed at the plaintiff. Thus, while two or three acts of mail fraud should not be enough to satisfy the continuity prong, demonstrating that the acts had similar purposes or were part of a common scheme (*i.e.*, were related) generally does not prove difficult for the civil RICO litigant.

Proving the continuity element, however, should remain difficult for the RICO plaintiff.¹⁷³ Concentrating the pattern inquiry on prolonged criminal behavior constitutes the best way to achieve a key congressional goal: the limitation of treble fines to the true racketeer, "a person who commonly commits such [racketeering] crimes."¹⁷⁴ Unfortunately, while continuity may have been the concept that most concerned Congress, it is also the one that causes much of the present confusion. Any approach to defining pattern, therefore, will have to go beyond merely recognizing the importance of prolonged criminal behavior;¹⁷⁵ courts will have to provide a sophisticated and workable

170. See 1969 SENATE REPORT, *supra* note 2, at 158.

171. See 18 U.S.C. § 3575(e) (1982); see also notes 103-08 *supra* and accompanying text for a closer analysis of § 3575(e).

172. *Alexander Grant & Co. v. Tiffany Indus.*, 770 F.2d 717, 718 n.1 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). Other courts have developed a quite similar description of relatedness by requiring "that the racketeering acts [be] connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts." *Berg v. First Am. Bankshares, Inc.*, 599 F. Supp. 500, 504 (D.D.C. 1984), *aff'd*, 796 F.2d 489 (D.C. Cir. 1986).

173. Some courts do not even recognize the importance of continuity of conduct, preferring instead to focus solely on relatedness. See, e.g., *California Architectural Bldg. Prods. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988) (rejecting continuity requirement because "RICO defines 'pattern of racketeering activity' without mentioning continuity"). See also cases discussed in Part I.B.2 *supra*.

174. A.B.A. TASK FORCE REPORT, *supra* note 70, at 207-08.

175. For an example of a case that recognizes the importance of continuity but does not provide a framework for defining it, see *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988) (noting that defendant's conduct must be "extended, widespread or particularly

framework for defining continuity. The multi-factor approach suggested by this Note provides a rigorous examination of continuity and will allow the pattern requirement to perform the role it was intended to play — “focus the statute on continuing transgressors who pose the greatest threat to society.”¹⁷⁶

A second goal that an optimal interpretation of pattern should achieve is consistent and predictable application. The present situation of inter- and intra-circuit conflict cannot be allowed to continue. Not only do the approaches to pattern differ markedly among the federal courts,¹⁷⁷ but inconsistency prevails even within the application of the “multiple schemes” and “different episodes” approaches. A major problem with the current “schemes” and “episodes” tests is that a consistent definition of these buzzwords has never been developed.¹⁷⁸ Some courts seem to treat an episode as almost equivalent to a single act of racketeering activity,¹⁷⁹ while others view an episode as an entirely separate commercial transaction encompassing several acts.¹⁸⁰ Similarly, some courts have defined a scheme to encompass any one type of criminal activity,¹⁸¹ whereas other courts have required “some kind of far ranging, multi-act criminal plot.”¹⁸² Thus, the inherent difficulties of applying these one-word interpretations of pattern has led to inconsistency and, even worse, unpredictability. Similar conduct should receive similar punishment, and the unpredictable application of the pattern requirement merely furthers the abuses documented above. The prospect of every commercial establishment in the nation wondering whether its one-dimensional dispute will trigger RICO liability is entirely unacceptable.

Using these goals as basic guidelines for defining pattern, only one of the approaches currently used by the appellate courts comes close to meeting the interpretive challenge posed by section 1961(5). The multi-factor approach provides the best solution to the pattern riddle because it recognizes that section 1961(5) cannot be interpreted by using such conclusory but nondefining terms as “schemes” or “episodes.” In addition, the multi-factor approach recognizes, unlike the

dangerous” to constitute a pattern but providing little guidance on what these terms mean). For similarly conclusory language, see the Ninth Circuit cases described in note 79 *supra*.

176. Mathews & Weissman, *New Cottage Industry: Interpreting RICO's "Pattern" Requirement*, 1 *INSIDE LITIGATION* 17, 23 (Mar. 1987).

177. See Part I *supra*.

178. For further criticism of the multiple schemes approach, see note 89 *supra* and accompanying text.

179. See, e.g., *Papai v. Cremosnik*, 635 F. Supp. 1402, 1412-13 (N.D. Ill. 1986).

180. See, e.g., *Grant v. Union Bank*, 629 F. Supp. 570, 577-78 (D. Utah 1986).

181. See, e.g., *Johnson v. Schopf*, 669 F. Supp. 291, 294 (D. Minn. 1987).

182. *Roberts v. Smith Barney, Harris Upham & Co.*, 653 F. Supp. 406, 411 (D. Mass. 1986) (characterizing the definition of scheme in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986)).

two-acts-are-sufficient standard,¹⁸³ that continuity of conduct is a vital barometer of the type of behavior Congress intended RICO to proscribe. Although this section will propose a different and streamlined set of factors than courts currently use when measuring continuity, the basic notion of examining several facets of the defendant's criminal activity "strikes an appropriate balance between RICO's role as a flexible tool for discouraging criminal activity and the danger of allowing it to reach sporadic and isolated criminal activities."¹⁸⁴

B. *Factors Evincing Continuity*

A properly conceived multi-factor approach attempts to remove from the pattern debate such conclusory terms as schemes and episodes, and replace them with a more comprehensive analysis that answers the questions those tests were also posing: Does the civil RICO defendant demonstrate a practice of criminal activity and commonly commit such crimes? In the early, post-*Sedima* stages of the pattern debate, when courts were trying to stem the tide of civil RICO abuse, the schemes/episodes tests were useful counterweights to the prevailing view that *any* two related predicate acts constituted a pattern. Generally, this contrast is still helpful since the approach solely emphasizing relatedness blatantly ignores *Sedima's* mention of continuity. But as the number of pattern cases has risen, and as the debate has grown increasingly complex and sophisticated, it is time to acknowledge that continuity must involve a factually oriented standard instead of a set rule.¹⁸⁵ The following four factors, some already in use by the courts and some not, would most effectively help the judiciary determine what constitutes continuous criminal behavior.

1. *Number of Independent Victims*

Frequently, a civil RICO claim will derive from a commercial dispute (usually fraud),¹⁸⁶ and the number of victims injured in this dispute can often suggest differences about the extent of the defendant's activity. The presence of multiple victims usually connotes an activity

183. See Part I.C.2 *supra*.

184. *Roberts*, 653 F. Supp. at 412.

185. Some courts have argued that a factually oriented test would lead to even more inconsistency. See *Papai v. Cremosnik*, 635 F. Supp. 1402, 1410 (N.D. Ill. 1986) (also characterizing the multi-factor approach to defining pattern as similar to Justice Stewart's "I know it when I see it" test for obscenity articulated in his concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)). Recently, however, other courts have come to the realization that a detailed, multifaceted inquiry into continuity represents the most effective way to respond to *Sedima's* dictum. See *Robinson v. Kidder Peabody & Co.*, 674 F. Supp. 243, 245 (E.D. Mich. 1987), *appeal dismissed*, 841 F.2d 1127 (6th Cir. 1988) ("in the wake of *Sedima* it is clear that a case-by-case analysis of the facts in each case is appropriate to a determination of whether the 'pattern' requirement has been satisfactorily pleaded").

186. See *Blakey & Cessar, RICO Case Study*, *supra* note 16, at 621 (in 1986, 54.9% of RICO cases involved "common law fraud").

that has been repeated.¹⁸⁷ Where these victims were separate purchasers or suffered distinct injuries, the activity becomes "the stuff of which 'patterns' may be found."¹⁸⁸ However, in cases where all victims were injured simultaneously through, for example, a single fraudulent tender offer or the issuance of bribe payments, the presence of multiple victims becomes less indicative of continuous illegal behavior.¹⁸⁹

Conversely, activity that defrauds a single entity creates "no inference that the [single] scheme embodies a threat of continued like activity in the future."¹⁹⁰ In fact, the presence of a single victim should give rise to a presumption *against* a pattern, especially when the duration of the illegal activity is short-lived. Cases involving a single victim usually contain only a "one-shot" effort to inflict a single injury,¹⁹¹ which does not suggest that the defendant regularly engages in criminal conduct. With no evidence or threat of "continued like activity," the defrauded plaintiff should be limited to compensatory relief through other state and federal fraud remedies; with a single victim, treble recovery should not ordinarily be available.

This is not to say, however, that cases involving a single victim should *never* give rise to treble recovery. A repeated infliction of economic injury upon a single victim, comprising several independent criminal decisions and continuing over a long period of time, could form the basis for a sufficient allegation of pattern.¹⁹² This situation, unlike the "one-shot" efforts to defraud, gives rise to a reasonable inference that the perpetrator commits such crimes with regularity, or will commit them again.¹⁹³

187. See *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 810 (7th Cir. 1987) ("One factor tending to show the existence of a pattern . . . is the presence of multiple victims.").

188. *Gutfreund v. Christoph*, 658 F. Supp. 1378, 1393 n.22 (N.D. Ill. 1987) (16 victims harmed over several-month period creates pattern).

189. For examples of these types of simultaneous injuries, see the discussion of the *Barkman* and *Northwestern Bell* cases in Part IV.C *infra*.

190. *Eastern Pub. & Adv. v. Chesapeake Pub. & Adv.*, 831 F.2d 488, 492 (4th Cir. 1987). See also *Satellite Fin. Planning Corp. v. First Natl. Bank*, 646 F. Supp. 118, 120 (D. Del. 1986) ("The repetition of an act taken against a single victim . . . suggests no expansion, no ongoing design, no continuity, such as was the target of Congress" in enacting RICO.).

191. See, e.g., *Marshall-Silver Const. Co. v. Mendel*, 835 F.2d 63, 66-67 (3d Cir. 1987) (pattern not found because of presence of single victim, single injury, and single short-lived scheme to defraud), *petition for cert. filed*, 56 U.S.L.W. 3562 (U.S. Feb. 12, 1988) (No. 87-1358); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108 (7th Cir. 1987) (pattern not found because single mailing inflicted single injury on single victim).

192. In *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3531 (U.S. Jan. 28, 1988) (No. 87-1262), the defendant prepared nineteen fraudulent invoices that were sent to the plaintiff (each involving two acts of mail fraud and one act of wire fraud) over a period of seven months. Since each invoice resulted in a distinct injury, the Seventh Circuit held that this "repeated infliction of economic injury" was sufficient to establish a pattern despite the presence of only one victim. 834 F.2d at 1305. See also *Blue Cross v. Nardone*, 680 F. Supp. 195, 199 (W.D. Pa. 1988) ("repeated submissions of false claims over a thirteen month period form a pattern as defined by the Third Circuit").

193. Consequently, the presence of multiple victims should place the plaintiff's civil RICO

2. Duration of Illegal Activity

As part of the focus on ongoing conduct, several courts have noted the distinction between “open-ended” and “time-limited” criminal behavior.¹⁹⁴ Extended, “open-ended” criminal behavior that continues over time (such as six months to a year) suggests “that the perpetrator has little regard for compliance with the law.”¹⁹⁵ In *United States v. Horak*,¹⁹⁶ an open-ended demonstration of criminal conduct was suggested by monthly bribe payments lasting over a year. Consequently, the court noted that “ongoing bribes of two public officials, even if pertinent only to a single ongoing service contract, . . . establish a ‘pattern.’”¹⁹⁷

In contrast, criminal activity limited to a single-day burst is unlikely to create an inference that such behavior is representative of the defendant. As 29.3% of RICO filings in 1986 allege only a “one-place, one-time” occurrence of racketeering activity,¹⁹⁸ it is clear that significant numbers of “time-limited” RICO cases exist.

Duration alone, however, should not transform defendant’s activities into a continuing pattern. While duration is one measure of a defendant’s proclivity for illegal behavior, the presence of a single victim or the pure repetition of the same type of act could defeat the pattern claim.¹⁹⁹ For example, in *Winer v. Patterson*,²⁰⁰ the plaintiff alleged that defendant-broker “churned” the plaintiff’s securities trading account over 200 times in a nearly five-year period in order to increase his commissions. Because the defendant’s conduct involved only one victim and participant, and because “churning” was considered to comprise only a single commercial transaction, the court found

claim in the most favorable light. In *Bartichek v. Fidelity Union Bank/First Nat. State*, 832 F.2d 36 (3d Cir. 1987), several bankrupt investors brought fraud charges against the organizers of the investment claiming misrepresentations in the initial offering. In upholding plaintiffs’ § 1964(c) claim, the Third Circuit found “[m]ost significant[]” the fact that over twenty victims were involved. 832 F.2d at 39.

194. See, e.g., *Roeder v. Alpha Indus.*, 814 F.2d 22 (1st Cir. 1987) (noting the importance of defendant’s lengthy and “open-ended” activity).

195. *Mathews & Weissman*, *supra* note 176, at 24.

196. 833 F.2d 1235 (7th Cir. 1987).

197. 833 F.2d at 1240. See also *United States v. DiGilio*, 667 F. Supp. 191, 197 (D.N.J. 1987) (“Conduct carried on for more than a year has continuity” for pattern.); *Black*, *supra* note 58, at 381 (“Continuity is established by a showing that the predicate acts took place over a continuous period of time.”).

198. *Blakey & Cessar, RICO Case Study*, *supra* note 16, at 619.

199. See *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988) (“the fact that the planned injury was inflicted and suffered over a period of years cannot convert this single scheme into a pattern”). There are cases, however, where the pure repetition of an illegal act can rise to the level of a pattern. In *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3531 (U.S. Jan. 28, 1988) (No. 87-1262), described in note 192 *supra*, the presence of repetitive acts was more than outweighed by the fact that *each* fraudulent invoice constituted a separate lie and resulted in a separate overpayment, with the resulting separate injuries to plaintiff. See also note 203 *infra* and accompanying text.

200. 663 F. Supp. 723, 726 (D.N.H. 1987).

insufficient activity for a pattern.²⁰¹

Despite this reasoning, the presence of criminal activity over a significant period of time still holds an influential place in the pattern debate. Duration should also be considered together with the factors described below, which highlight the number of illicit transactions or criminal decisions made by the defendant. Often, the reason why certain conduct is "time-limited" as opposed to "open-ended" derives from the fact that a single transaction or criminal decision itself has a fixed culmination.

3. *Number of Illicit Transactions*

Because of the number of civil RICO cases involving commercial disputes, it is often helpful to analyze the number of distinct commercial transactions present in a RICO dispute. In this context, a "transaction" refers to a separate, identifiable commercial transaction — e.g., a single securities offering, a single tender offer, a single audit engagement.²⁰² When multiple transactions are involved, the probability increases that the defendant is someone who regularly commits such crimes. For example, when the defendant prepares nineteen fraudulent invoices at separate times over seven months (and commits several acts of mail and wire fraud for each invoice),²⁰³ the notion of the prolonged, continuing offender has generally been established. Alternatively, if fraud, bribery or other misconduct occurs in the course of a sole commercial transaction, courts should generally not find a pattern, even if the defendant has to commit numerous acts of mail or wire fraud to complete the criminal activity.²⁰⁴ Thus, fraud or other misconduct committed in the course of (for example) a single stock offering usually constitutes the type of isolated offender that Congress specifically ordered not be subject to a racketeering claim.²⁰⁵

201. 663 F. Supp. at 726. The court was also influenced by the fact that churning involves the same method of commission over and over again, rather than other criminal transactions, which involve other methods (like bribery, misrepresentations, etc.). Other courts, however, have concluded that a pattern does exist in these types of churning cases. See, e.g., *Robinson v. Kidder, Peabody & Co.*, 674 F. Supp. 243 (E.D. Mich. 1987), *appeal dismissed*, 841 F.2d 1127 (6th Cir. 1988).

202. This test is really a corollary to the different episodes test described in the text accompanying notes 66-69 *supra*. Focusing on "transactions" as opposed to "episodes," however, helps courts better analyze the many RICO cases involving commercial fraud.

203. *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3531 (Jan. 28, 1988) (No. 87-1262), described in note 192 *supra*, was just such a case. For further discussion of *Liquid Air*, see note 199 *supra*.

204. See, e.g., *Eastern Corporate Fed. Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F. Supp. 1532 (D. Mass. 1986). If the activity continued over a long period of time or if several discrete bribes or fraudulent misrepresentations were made, a pattern could be found in the context of a single commercial transaction. For an example of such a case, see the discussion accompanying notes 218-24 *infra*.

205. See 1969 SENATE REPORT, *supra* note 2, at 158; see also the text accompanying note 129 *supra*.

4. *Presence of Separate Criminal Decisions*

One important aspect of the number-of-transactions factor is that it distinguishes between suits that arise out of a single criminal decision and those that involve consciously separate criminal acts. Focusing on separate criminal decisions distinguishes these cases in the same way. What turns illicit acts into multiple criminal decisions is not easy to define, but one might consider the concept of new and independent formations of criminal intent. While no court has specifically referred to criminal decisions, several cases have suggested its importance. In *Bank of America National Trust & Savings Assn. v. Touche Ross & Co.*,²⁰⁶ the Eleventh Circuit rejected the multiple schemes approach because "on seven occasions defendants prepared false financial statements and reports they knew would be mailed to the banks." In another case, the Seventh Circuit found a pattern because each fraudulent tax return filed was a separate lie and resulted in a separate underpayment, independent of the other lies and underpayments.²⁰⁷ In both these cases, the court was impressed by independent formations of criminal intent that manifested itself in repeated criminal activity.²⁰⁸ Just as in the transactions analysis above, the presence of several examples of criminal intent create an inference that the defendant commits such crimes with regularity and thus should bear RICO's severe penalties.²⁰⁹

5. *Factors That Confuse the Analysis*

While the above factors pinpoint the extent of a civil RICO defendant's criminal activity, other factors currently in use by the courts tend to cloud the pattern debate. For example, some courts have looked to whether each alleged act caused a separate and independent injury.²¹⁰ While distinct injuries might generally support finding a pattern, it is not necessary to *require* that each act cause a separate

206. 782 F.2d 966, 971 (11th Cir. 1986).

207. *Illinois Dept. of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985).

208. For additional examples of this reasoning, see *United States v. DiGilio*, 667 F. Supp. 191, 197 (D.N.J. 1987) (repeated instances of extortion represents multiple formations of criminal intent); *Siegel v. Tucker, Anthony & R.L. Day, Inc.*, 658 F. Supp. 550, 555 (S.D.N.Y. 1987) ("RICO predicate acts must each be independently motivated criminal episodes . . ."); *Ghouth v. Conticommodity Servs., Inc.*, 642 F. Supp. 1325, 1339 (N.D. Ill. 1986) (four acts of forgery "were not simply ministerial acts to accomplish one fraud, but [rather were] four independently motivated crimes").

209. For further discussion of the significance of independent criminal decisions, see *Mathews & Weissman*, *supra* note 176, at 21-22.

210. See, e.g., *Long Distance Serv., Inc. v. MCI Telecommunications Corp.*, 3 Civ. RICO Rep. (BNA) No. 47, at 3 (May 3, 1988) (D.D.C. Apr. 6, 1988) (refusing to find "pattern" in part because of single non-distinct injury to the plaintiff); *Thompson v. Wyoming Alaska, Inc.*, 652 F. Supp. 1222, 1227 (D. Utah 1987) ("The occurrence of multiple injuries and independent harms . . . may be the most relevant inquiry."); *Ghouth v. Conticommodity Services, Inc.*, 642 F. Supp. 1325, 1336 (N.D. Ill. 1986) ("the most important factor is that the criminal acts cause 'independent harmful significance'").

harm, as all RICO requires is a single injury to business or property resulting from a pattern of conduct. As one court noted, "[i]t would be illogical to require a plaintiff to show that all . . . acts . . . injured him, especially in view of the fact that many such acts may be somewhat distinct and separate in time."²¹¹

Besides the independent-injury-causing-events test, courts have looked to the number of participants in the alleged crime,²¹² the underlying purpose of the criminal scheme,²¹³ and the character²¹⁴ and ultimate result²¹⁵ of the defendant's illicit activity. These factors are much less helpful in defining "pattern" because they do not focus on the continuing extent of the perpetrator's activity. The purposes or results of a criminal scheme tell us little about continuity or the defendant's proclivity for committing such crimes again. Similarly, the alleged character of the particular conduct, whether it be directed at a "legitimate goal" or more along the lines of traditional "mobster-type" activity, should not be decisive. RICO proscribes continuous illegal behavior regardless of the goals of the racketeering activity.²¹⁶

Ultimately, the four factors identified above provide the best approach to the pattern riddle. Unlike the approach solely focusing on relatedness, the multi-factors approach respects the command of *Sedima* and the intent of Congress to focus on continuity. And unlike the multiple schemes or different episodes tests, this analysis presents the judiciary with a workable, flexible solution that does not consist of conclusory and imprecise terminology.

C. Applying the Factors

When courts examine a RICO defendant's conduct using these four factors, they will gain a much more comprehensive perspective on the wrongdoer's proclivity for illegal behavior. Indeed, the factors listed in this Note provide the courts with a more finely tuned test for continuity than the other multi-factor tests currently in use.²¹⁷ To demonstrate this, consider the following two examples.

211. *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 810 (7th Cir. 1987).

212. *See, e.g., Saporito v. Combustion Eng., Inc.*, No. 87-5144, slip. op. at 26 (3d Cir. Mar. 29, 1988); *Bartcheck v. Fidelity Union Bank/First Natl. State*, 832 F.2d 36, 39 (3d Cir. 1987).

213. *See, e.g., Schaafsma v. Marriner*, 641 F. Supp. 576, 581 (D. Vt. 1986).

214. *See, e.g., Bartcheck v. Fidelity Union Bank/First Natl. State*, 832 F.2d 36, 39 (3d Cir. 1987); *see also, Saporito v. Combustion Eng., Inc.*, No. 87-5144, slip. op. at 26 n.17 (3d Cir. Mar. 29, 1988) (not applying the character test, but suggesting that "the character of the activity . . . may be relevant to the determination in some cases").

215. *See, e.g., Torwest DBC, Inc. v. Dick*, 628 F. Supp. 163, 166 (D. Colo. 1986), *aff'd.*, 810 F.2d 925 (10th Cir. 1987).

216. In addition to this problem, inserting a subjective factor such as "character of the activity" can lead to qualitative value judgments about the conduct at issue, further clouding the pattern debate. *But see Saporito*, slip. op. at 26 n.17 ("the character of the activity . . . may be relevant to the pattern determination in some cases").

217. *See* notes 83-86 *supra* and accompanying text.

In *Barkman v. Wabash, Inc.*,²¹⁸ a former shareholder of a target corporation brought an action against the target corporation, the acquiring corporation and other defendants, asserting various claims arising out of the allegedly fraudulent acquisition of the target company. The predicate acts included (1) mailing copies of the fraudulent tender offer to all shareholders; (2) receiving tendered shares and issuing payment through the mail; (3) mailing a fraudulent recommendation letter to all the shareholders; and (4) filing false statements with the Securities and Exchange Commission.²¹⁹

In such a case, a pattern is clearly demonstrated. First, multiple victims were harmed by the fraudulent tender offer, as each shareholder was personally defrauded out of varying sums of money. As the district court noted: "Each of the approximately 5,500 shareholders is an individual victim with a distinct injury . . ."²²⁰ Second, the fraudulent activity was sufficiently continuous over time. The earliest transaction, the defective SEC filings, occurred in November 1980, and the latest transaction, mailing cover-up payoffs to several brokerage houses, occurred in "early 1982."²²¹ Thus, despite the presence of only a single fraudulent scheme, the defendant's activity was sufficiently open-ended to create a strong inference that the defendant continually had "little regard for compliance with the law."²²²

While the third factor, multiple illicit transactions, cannot be demonstrated in this case since all the activity relates to one overall securities offering, this absence is more than offset by the presence of five independent criminal decisions. The defendants in this case first mailed the fraudulent tender offer and recommendations, induced the plaintiff-shareholders into selling their stock at an inferior price, filed fraudulent statements with the SEC, extended payoffs to several brokerage houses "aimed at concealing the overall scheme,"²²³ and finally failed to file an SEC disclosure statement. Each of these actions required separate formations of criminal intent, and were not just repeated instances of the same transgression. As the court noted in reference to defendant's conduct: "This is the stuff from which patterns may be found."²²⁴

In addition to *Barkman*, the Eighth Circuit's ruling in *H.J. Inc. v. Northwestern Bell Telephone Co.*,²²⁵ a decision soon to be reviewed by

218. 674 F. Supp. 623 (N.D. Ill. 1987).

219. 674 F. Supp. at 630.

220. 674 F. Supp. at 632.

221. 674 F. Supp. at 631.

222. Mathews & Weisman, *supra* note 176, at 24.

223. 674 F. Supp. at 632.

224. 674 F. Supp. at 632.

225. 829 F.2d 648 (8th Cir. 1987), *affg.*, 648 F. Supp. 419 (D. Minn. 1986), *cert. granted*, 108 S. Ct. 1219 (1988).

the Supreme Court, provides an excellent illustration of how the four factors should operate. There, the plaintiff accused the defendant utility of conducting a far-ranging scheme designed to illegally influence several members of the state regulatory commission responsible for establishing telephone rates.²²⁶ The allegedly corrupting acts included payments to several members of the commission, offers of employment to these commissioners, and assorted free gifts.²²⁷ Although these illicit activities continued for over five years, the district court dismissed plaintiff's RICO claim because all the allegations were "committed in furtherance of a single scheme"²²⁸ Applying essentially the same reasoning, the Eighth Circuit affirmed.²²⁹

Using the factors suggested in this Note mandates a different result.²³⁰ Even though the presence of multiple victims in this case is not truly indicative of continuous behavior since all the victims, the utilities customers, were injured simultaneously from each illegal act, the duration of the defendant's activity and the presence of numerous independent criminal decisions clearly indicate a pattern of racketeering activity. First, the illicit activity was sufficiently continuous over time, as the earliest attempts to influence the commissioners with gifts occurred in July 1980 and continued uninterrupted through 1985.²³¹ Second, and more vital, these actions required discrete formations of criminal intent. From an offer of employment made to a commission member in November 1984, to outright bribe payments offered to various members from 1983-85, to the provision of free vacations to still other commissioners during 1985, the defendant's conduct constituted several diverse and independently motivated crimes and were not just repeated instances of the same act. Attempting to influence several state officers through cash payments, job offers, and free gifts over a five-year period certainly creates a strong inference of continuous illegal behavior. The treble damage remedy should be available to its victims.

As *Barkman* and *Northwestern Bell* illustrate, analyzing a defendant's conduct using these four factors can properly identify the continuing offender, the criminal entity most deserving of the treble

226. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 648 F. Supp. 419, 420-22 (D. Minn. 1986), for a detailed discussion of the facts.

227. 648 F. Supp. at 421.

228. 648 F. Supp. at 425.

229. *H.J. Inc.*, 829 F.2d at 650.

230. Interestingly, U.S. District Judge Harry MacLaughlin actually utilized a multi-factor approach in a subsequent opinion rejecting plaintiff's motion to reconsider the original dismissal. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 653 F. Supp. 908, 914-16 (D. Minn. 1987). While admitting that the plaintiff had "alleged criminal activity of long duration," Judge MacLaughlin refused to find a pattern because each predicate act did not have "independent harmful significance" and because the acts were not a "regular part of the way" that defendants conducted their business. 653 F. Supp. at 915-16.

231. 648 F. Supp. at 421.

damage penalty. It is important, however, that courts apply these factors together and interchangeably. None of these factors should take on a life of its own, as have the multiple schemes and different episodes tests. As noted by the Seventh Circuit: "The doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative."²³² By using these four factors together, civil RICO cases can be properly limited to the criminals presenting the greatest threat to society.

V. THE BROADER ISSUE: THE SUFFICIENCY OF CURRENT CONGRESSIONAL ATTEMPTS TO AMEND CIVIL RICO

While the suggestions made in this Note can help courts narrow civil RICO's applicability, the broader issue posed by the pattern debate still remains: how to amend civil RICO permanently. While the suggestions presented here for the interpretation of section 1961(5) can justifiably be undertaken by the judiciary after *Sedima*, more significant limitations of civil RICO will have to come from Congress. Currently, there are two proposals under consideration by Congress that would dramatically reduce the scope of the treble damage remedy.²³³ These bills, S. 1523 and H.R. 2983,²³⁴ ignore the pattern requirement altogether; rather, they attack the treble damage remedy by tailoring the level of recovery to the nature of the individual or entity injured. For example, under both bills, suits brought by "businesses" (which of course comprise a large percentage of civil RICO plaintiffs) would be limited to actual damages, attorney's fees, and costs, unless the wrongdoer had been convicted of an underlying predicate activity or RICO violation, in which case treble damage recovery would be allowable.²³⁵

232. *Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986).

233. See RICO Bus. Disp. Guide (CCH) ¶ 6041 (1987). Prior to these bills, Congress had tried to do what the Second Circuit in *Sedima* attempted, which was to create a statutory requirement that the RICO defendant first be convicted of an underlying predicate act. In August 1986, H.R. 5445 was introduced by Rep. Boucher to the House Judiciary Committee, where it was ultimately passed by the House but narrowly rejected in the Senate. See note 152 *supra*. The bill would have eliminated treble damages under civil RICO unless the defendant was convicted of a RICO violation or a predicate act. Although defeated, H.R. 5445 marked the starting point for RICO reform in the 100th Congress.

234. S. 1523, 100th Cong., 1st Sess., 133 CONG. REC. S10,501-03 (daily ed. July 22, 1987) (introduced by Senator Metzenbaum (D-Ohio)); H.R. 2983, 100th Cong., 1st Sess., 133 CONG. REC. H6563 (daily ed. July 22, 1987) (introduced by Frederick Boucher (D-Va.)).

235. Where suits were brought by consumers or by special purpose units of the government, both bills would allow the plaintiff to recover up to twice the amount of their actual damages. Additional recovery would be based on particularly egregious behavior, defined as conduct performed with "conscious and wanton disregard of the consequences to the plaintiff . . ." When "general purpose" units of the federal, state and local government are suing as plaintiffs, both bills would authorize treble damage recovery. H.R. 2983, § 2 (amending 18 U.S.C. § 1964(c)); S. 1523, § 2 (amending 18 U.S.C. § 1964(c)). Finally, both bills eliminate all references to the term "racketeer" in the entire statute, and replace it with the term "unlawful" or in some few cases "criminal," ostensibly to soften the denigrating label that comes with a RICO conviction. H.R.

In addition, under intense pressure from the securities industry, both the House and Senate bills would eliminate treble damages if either state or federal securities laws provide an "express or implied" remedy for the type of injury presented. This "securities exemption," however, would be disallowed if a violation of the federal insider trading statute was involved.²³⁶

Unfortunately, neither S. 1523 nor H.R. 2983 addresses the requirements for a pattern of racketeering activity.²³⁷ Instead, both S. 1523 and H.R. 2983 would virtually eliminate the treble damage remedy in many civil RICO filings. The main problem with civil RICO, however, is not with the treble damage remedy itself, but rather with how the remedy is *applied*. Determining the proper civil RICO defendant has become the issue that has most plagued the courts. Therefore, Congress should concentrate on the question of liability and what types of offenders it wishes to target, and not on the remedy provided. Certain "businesses," having engaged in repeated criminal activity, deserve RICO's harsh penalties regardless of who is bringing the suit. Limiting the treble damage remedy to government or citizen plaintiffs denies an effective remedy and deterrent to the class of business plaintiffs who have been injured by professional criminals.

Restricting the treble damage remedy is thus an inadvisable way to limit civil RICO. Indeed, the bills currently under consideration fail to resolve the basic problem with civil RICO: they do not identify or distinguish between the kinds of cases which should be brought under RICO and those which should not. Since the pattern requirement was originally designed to provide this guidance, the current congressional focus should seek to remedy the problems that result from its ambiguities. Thus, even if congressional legislation is passed shortly,²³⁸ the

2983, § 1 (amending 18 U.S.C. §§ 1961-1963, 1968); S. 1523, § 1 (amending 18 U.S.C. §§ 1961-1963, 1968). See note 162 *supra* (referring to pressures associated with the "racketeer" label).

236. As of this writing, the House and Senate bills diverged on the issue of securities investors. The Senate bill (S. 1523, § 2 (amending 18 U.S.C. § 1964(c))) would still allow recovery of treble damages if the victim was a "small investor." Small investors are defined in the bill as (1) having portfolios "valued at less than or equal to the median portfolio value of all United States securities holders," or (2) possessing household incomes of no more than the U.S. median. Accordingly, S. 1523 requires the SEC to publish annually a survey indicating the nation's median portfolio. See S. 1523, § 2 (amending 18 U.S.C. § 1964(c)).

This small investor exception has met with considerable opposition from the American Institute of Certified Public Accountants, and it is expected that the Senate Judiciary Committee will soon vote to delete this provision from S. 1523. See *Senate Judiciary Postpones Action on Civil RICO Reform*, 3 Civ. RICO Rep. (BNA) No. 42, at 1 (Mar. 29, 1988).

237. See *Congress Likely To Act on RICO Reform, But "Pattern" Probably Will Be Left Alone*, 2 Civ. RICO Rep. (BNA) No. 32, at 3 (Jan. 21, 1987). A third bill, sponsored by Rep. Conyers, has also been introduced in the 100th Congress. Under the "pro-consumer" H.R. 3240, the pattern requirement would be amended to include "at least two acts of racketeering activity or fraudulent activity, or both . . . that are . . . related to the affairs of an enterprise; . . . not isolated, but they need not be part of a common scheme or plan . . ." See H.R. 3240, 100th Cong., 1st Sess. (1987); see also *Conyers Introduces RICO Bill Adding Bank Fraud as Predicate*, 3 Civ. RICO Rep. (BNA) No. 15, at 1 (Sept. 15, 1987).

238. Given the election year and the existence of more pressing business in the House and

problems of construing pattern will continue to plague the courts.²³⁹ Since Congress has chosen to ignore this serious shortcoming of RICO, it is up to the courts to identify the kinds of cases that merit civil RICO prosecutions. Using the four factors outlined in this Note should allow the courts to accomplish this task.

VI. CONCLUSION

The interpretive challenge posed by RICO's pattern requirement has caused one of the most divisive judicial conflicts in recent memory. This Note attempts to provide some clarity to the debate by providing the courts with a comprehensive framework for analyzing the merits of each RICO prosecution. By concentrating on the number of victims injured, the duration of the defendant's illicit activity, the number of separate transactions, and the presence of multiple and distinct criminal decisions, courts will be able to apply consistently the treble damage remedy against the most pernicious offenders.

The broad language of RICO, originally drafted to enable government prosecutors to combat the increasing influence of structured criminality effectively, has been abused by private plaintiffs seeking treble recovery. Faced with RICO disputes better suited to state courts or more deserving of other federal remedies, courts have often tried to craft new restrictions onto the statute. While rejecting these attempts as illegitimate judicial lawmaking, the Supreme Court in *Sedima* redirected the judiciary's attention to a previously unexplored operative provision: the pattern of racketeering activity requirement.

Severe inconsistency has resulted because the *Sedima* Court provided little guidance in its opaque footnote 14. None of the major approaches developed by the courts of appeals can be consistently applied; even worse, none of these approaches respect Congress' original desire to deny to the continuing violator the economic fruits of organized criminal activity. By rejecting these approaches in favor of a more complex analysis, the multi-factor approach can help the judiciary separate the meritorious RICO claims from the meritless ones.

Senate Judiciary Committees, it is doubtful that major amendments will pass in 1988. See *Senate Judiciary Postpones Action on Civil RICO Reform*, 3 Civ. RICO Rep. (BNA) No. 42, at 1 (Mar. 29, 1988); Mathews, Weissman & Hardin, *RICO Reform: Will the Litigious Lion Be Tamed?* (unpublished article on file with the *Michigan Law Review*) ("[P]rospects for reform this session are remote because of the pressure of more urgent legislative tasks."). See also Blakey, *"Time Is Running Out" for Congress To Revise RICO in 1988, Blakey Says*, 3 Civ. RICO Rep. (BNA) No. 35, at 1 (Feb. 9, 1988); Nathan, *A Call for Congressional Action To Reform RICO*, 3 Civ. RICO Rep. (BNA) No. 35, at 4 (Feb. 9, 1988).

239. "Suits brought under civil RICO will continue almost entirely unabated . . . [even with passage of RICO legislation in 1988] because the legislation under consideration does not change the requirements for 'pattern of racketeering,'" *Securities Exemption Supported by AICPA as "Critical" to RICO*, 3 Civ. RICO Rep. (BNA) No. 46, at 4 (Apr. 26, 1988) (statement of Philip Lacovara, spokesman for the American Institute of Certified Public Accountants).

Only then can the original designs of the federal racketeering laws be adequately respected.

— *Ethan M. Posner*