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NOTES

Reconsideration of Pattern in Civil RICO Offenses

The Racketeer Influenced and Corrupt Organizations Act (RICO)\(^1\) of the Organized Crime Control Act of 1970\(^2\) was enacted as part of an effort to deal with organized crime, which Congress described as a "highly sophisticated diversified and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct . . . ."\(^3\) In an attempt to eradicate organized crime, Congress designed RICO to include enhanced criminal penalties\(^4\) and civil sanctions\(^5\) for those who acquire or operate an enterprise through a pattern of racketeering activity. In addition, Congress directed that RICO was to be read broadly. This is clear not only from Congress' overall approach and the expansive language used, but also from its express statement that RICO was to "be liberally construed to effectuate its remedial purposes."\(^6\) Nevertheless, a number of judges have tried to narrow RICO's scope, particularly in the civil area.\(^7\)

In *Sedima, S.P.R.L. v. Imrex Co.*,\(^8\) the Supreme Court noted that civil RICO was "evolving into something quite different from the original conception of its enactors"\(^9\) partly because of the "failure of Congress and the courts to develop a meaningful legal concept of a pattern [of racketeering activity]."\(^10\) In a footnote, the Court pointed to the materials that had been largely ignored in the development by the lower courts of the concept of "pattern."\(^11\) Since *Sedima*, courts have confronted the problem of how to define "pattern" consistent with RICO's text, legislative history and purpose.

This note examines the concept of "pattern." Part I considers the statute itself by examining the literal meaning within its language, legislative history and policy. Part II focuses on case law before and after *Sedima*, and discusses the two primary theories courts have applied in de-

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\(^4\) Among RICO's enhanced criminal penalties are a fine of up to $25,000 or imprisonment of up to twenty years, or both, and forfeiture of any interest acquired or maintained in the violation.
\(^5\) Among RICO's civil penalties are divestment, imposition of restrictions, orders of dissolution or reorganization, and treble damages.
\(^7\) See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3290 (1985) (Powell, J., dissenting) ("We [have previously] ruled that the statute must be read broadly and construed liberally to effectuate its remedial purposes, but like the legislative history to which the Court alludes, it is clear we were referring there to RICO's criminal provisions.") (emphasis in original). See also *Berg v. First Am. Bankshares, Inc.*, 599 F. Supp. 500, 506 (D.D.C. 1984); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1305 (D. Colo. 1984).
\(^9\) *Id.* at 3287.
\(^10\) *Id.*
\(^11\) *Id.* at 3285 n.14. See infra note 45.
termining a pattern issue. Part III examines RICO’s substantive violations and how pattern might be defined within the context of the separate violations. Part IV concludes that no one definition of pattern exists and that the concept must be interpreted to fit within the language and purpose of the statute.

I. A General Overview of RICO and its Legislative History

To violate RICO a person must acquire or operate an enterprise through a pattern of racketeering activity. Congress defined “enterprise” by illustration only. Like “enterprise,” Congress did not define “pattern.” Instead, it limited the concept by requiring that a pattern include “at least two acts . . . one of which occurred within ten years . . . after the commission of a prior act.”

Although the legislative history of RICO does not discuss pattern in depth, it does establish certain standards for the concept. For instance,

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12 18 U.S.C. § 1961(4) (1982) provides that “enterprise” “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity.” See also American Sur. Co. v. Morotta, 287 U.S. 513, 517 (1939) (“[I]nclude is frequently, if not generally used as a word of extension or enlargement rather than as one of limitation or enumeration.”).


13 18 U.S.C. § 1961(5) (1982). In addition to this provision, “pattern” appears in the statute in five different contexts. See 18 U.S.C. § 1961(5) (“pattern” requires at least two acts of racketeering activity); 18 U.S.C. § 1962(a) (income derived from a pattern of racketeering activity used by or invested in enterprise violates RICO); 18 U.S.C. § 1962(b) (to acquire or maintain an enterprise through a pattern is a RICO violation); 18 U.S.C. § 1962(c) (to conduct or participate in an enterprise through a pattern of racketeering activity is a RICO violation); 18 U.S.C. § 1962(d) (to conspire to violate subsections (a)-(c) violates RICO). While conspiracy does not require commission of a pattern of racketeering activities, it does require contemplation of pattern. Moreover, five kinds of racketeering activity fall under RICO: (1) violence, (2) provision of illegal goods and services, (3) corruption in the labor movement, (4) corruption among public officials, and (5) commercial and other forms of fraud. See Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre Dame L. Rev. 237, 300-06 (1982). Also this complicated network includes the four kinds of RICO enterprises ((1) commercial entities, (2) benevolent organizations, (3) governmental entities, or (4) associations in fact, both licit and illicit) which can play four separate but not necessarily mutually exclusive roles in a RICO violation. The roles that enterprises can play are (1) perpetrator, (2) victim, (3) instrument, or (4) prize. See Haroco, Inc. v. American Nat’l Bank and Trust Co., 747 F.2d 384, 401 (7th Cir. 1984) (citing Blakey, supra, at 306-325), aff’d on other grounds, 105 S. Ct. 2351 (1985).

By varying the elements in a RICO violation, “pattern” may be used in at least 400 different contexts: Five “patterns” x five “racketeering activities” x four “enterprises” x four “roles” = 400 contexts. Consequently, a single definition of pattern will not achieve the various objectives of the statute.
beyond the limitation of at least two acts within ten years, the legislative history indicates that a "pattern of racketeering activity" should also reflect the twin factors of "relationship" and "continuity."\(^{14}\) The Senate report accompanying RICO explains that "the target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of \textit{continuity plus relationship} which combines to produce a pattern."\(^{15}\) Furthermore, the bill's sponsor pointed out that "the term 'pattern' itself requires the showing of a relationship,"\(^{16}\) and that "proof of two acts of racketeering activity without more does not establish a pattern."\(^{17}\) Consequently, in establishing a pattern, the language of the statute and legislative history requires nothing more than a threat of continuing criminal activity and more than one racketeering act to be effective.

II. Case Law Interpretation of Pattern Before and After \textit{Sedima}

The "continuity plus relationship" formulation of the legislative history has not enjoyed a uniform approval by the courts in determining the existence of a pattern. Courts have disagreed as to whether Congress intended "relationship" to denote a relationship between the racketeering acts, or between the acts and nature and purpose of the enterprise. As such, courts have disagreed as to when a threat of continuity exists.\(^{18}\) For instance, some courts have held that acts within a "single criminal episode" cannot constitute a pattern,\(^{19}\) while others have held that such an episode is within RICO's purpose.\(^{20}\) Likewise, some courts require that the predicate acts be part of a "common scheme,"\(^{21}\) while other courts have found a RICO violation absent a common scheme.\(^{22}\)

A. Pattern Before \textit{Sedima}

Before \textit{Sedima}, courts gave little attention to the concept of pattern. The analysis did not extend beyond two arguments: Whether a pattern can exist within a single criminal episode and whether pattern requires the presence of a common criminal scheme.

1. Single Episode

It is difficult to fit a single criminal episode (time and place) within the concept of pattern because, at first glance, it lacks "continuity." For example, in \textit{United States v. Moeller},\(^{23}\) the United States District Court for


\(^{15}\) \textit{Id.} (emphasis added).


\(^{17}\) \textit{Id.}

\(^{18}\) \textit{See infra} notes 29-32 & 64-68 and accompanying text.

\(^{19}\) \textit{See infra} notes 64-68 and accompanying text.

\(^{20}\) \textit{See infra} note 28.

\(^{21}\) \textit{See infra} notes 23-27 & 64-68 and accompanying text.

\(^{22}\) \textit{See infra} notes 39-41 and accompanying text.

the District of Connecticut held that burning a warehouse and kidnapping three employees of the warehouse during the same day constituted the pattern necessary for a RICO violation. The court stated that it would have decided the case differently if not bound by precedent. The court reasoned in dicta that because the arson and kidnapping occurred in the course of a single criminal episode, it lacked the continuity of events necessary for a pattern. Furthermore, the court stated that pattern "implies acts occurring in different criminal episodes, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity."

Most courts before *Sedima*, however, did not follow Moeller's dicta, but adopted the position that acts occurring with a single criminal episode could constitute a pattern. For instance, in *United States v. Watchmaker*, the United States Court of Appeals for the Eleventh Circuit held that three shootings of three police officers by members of the Outlaw Motorcycle Club at the clubhouse, constituted a pattern. The court stated that each of the three crimes resulted from a separate act and

24 Id. at 58.
25 Id. The court was referring to United States v. Parness, 503 F.2d 430 (2d Cir. 1974) (inter-state transportation of two illicitly attained cashier checks over the course of five days in furtherance of a single scheme to defraud and take over casino-hotel constituted a "pattern" for a RICO violation), cert. denied, 419 U.S. 1105 (1975).
26 402 F. Supp. at 58.
27 Id. at 57. This reasoning, however, is faulty. The statute in § 1961(5) requires two acts of racketeering activity, not a scheme. Furthermore, the legislative history does not mention a single episode or transaction requirement; it merely notes the requirements of "continuity plus relationship" which combine to create a pattern. See S. REP. No. 617, supra note 14, at 158. In the context of a single episode or transaction, the threat of continuity (which fulfills the other element of the pattern requirement) is not necessarily negated by the existence of a single episode or transaction. Instead, the threat of continuity could be inferred from the nature of the enterprise and the character of the offense. See, e.g., United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985) (the purpose and nature of the illicit organization constituted the threat of continuity), cert. denied, 106 S. Ct. 880 (1986); United States v. Brooklier, 685 F.2d 1208, 1217 (9th Cir. 1982) (the nature of the illicit organization constituted the threat of continuity), cert. denied, 459 U.S. 1206 (1983).

Moreover, the *Moeller* court observed: "I would further have thought that the normal canon of narrowly construing penal statutes points towards such an interpretation." 402 F. Supp. at 57-58. This notion contradicts the statute itself and its liberal construction clause, which reads "the provisions of this Title shall be liberally construed to effectuate its remedial purposes." 18 U.S.C. § 1961 (1982).
28 See, e.g., United States v. Starness, 644 F.2d 673, 677-78 (7th Cir.) (defendants conspired to engage in a pattern of racketeering in connection with a scheme to commit arson with intent to defraud insurer), cert. denied, 454 U.S. 826 (1981). In looking at the violations which included arson, mail fraud and Travel Act violations the court stated that "each act is a separate instance of racketeering activity under RICO. When two or more of these are connected to each other in the same logical manner so as to effect an unlawful end, a pattern of racketeering exists." Id. at 677-78. See also United States v. Weatherspoon, 581 F.2d 595, 602 (7th Cir. 1978) (defendant, who operated a beauty college approved for veteran's vocational training, caused false student enrollment cards and attendance certificates to be mailed to the Veteran's Administration in furtherance of a scheme to defraud the agency); United States v. Ghovannec, 407 F. Supp. 41, 44 (S.D.N.Y. 1979) (single objective to defraud a single victim constituted a RICO offense when the objective was carried out through several incidents of wire fraud). In *Weatherspoon*, the court found no support for the argument that RICO "require[s] a showing of separate and unrelated schemes as a precondition for finding two indictable acts... that would constitute a 'pattern.'" 581 F.2d at 678. The court also stated that only one objective underlying the separate acts does not diminish the applicability of RICO to those acts. Id. In essence, the court stated that merely because the acts occur within a single episode does not necessarily defeat RICO's applicability.
29 761 F.2d 1459 (11th Cir. 1985), cert. denied, 106 S. Ct. 879 (1986).
30 Id. at 1475.
therefore could constitute a pattern. Furthermore, the court found that the threat of continuity required for a pattern was satisfied by the nature and purpose of the enterprise, which existed only to engage in diversified illegal activities.

Courts should not, however, consider a single criminal episode a pattern if it does not encompass more than one criminal act. An example of a single episode which is not a pattern would be a single attempt to procure marijuana in the course of a drug deal. Although a RICO violation has been persuasively argued and found under such a circumstance, the finding was incorrect. While possessing and importing marijuana are two separate crimes under federal statutes, it mistakenly has been considered as two acts for purposes of RICO. Only one act, however, actually took place—receiving imported marijuana. Although two crimes may be defined statutorily within the one act, only one act actually takes place, and one act is not a "pattern of racketeering activity" for purposes of RICO. RICO is aimed at a pattern of criminal acts.

2. Common Scheme

When the criminal acts are part of a single common scheme, courts have been receptive to finding a pattern. For instance, in United States v. Stofsky, the United States Court for the Southern District of New York held that separate acts of extortion were a pattern. In Stofsky, the defendants, members of the fur garment union, threatened non-union fur manufacturers with injury unless they ceased subcontracting with the union shop manufacturers. The district court held that the separate acts of extortion were not a series of disconnected acts, but were related to each other by a common scheme.

Although a pattern usually exists within a common scheme, courts also have found that a pattern can exist absent a common scheme. In United States v. Elliott, the defendants were associated for the purpose of

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31 Id.
32 Id.
33 United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984), cert. denied, 105 S. Ct. 3476 (1985). In Bascaro the defendant was convicted of a substantive RICO violation as a result of a single attempt to procure marijuana. Id. at 1360-61. The United States Court of Appeals for the Eleventh Circuit held that possessing and importing marijuana were two separate crimes and consequently two separate acts for purposes of RICO. Id. at 1362.
34 Id.
35 See supra notes 14-15 and accompanying text.
37 Id. at 614.
38 Id.
39 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978). See also United States v. Weisman, 624 F.2d 1118 (2nd Cir.), cert. denied, 449 U.S. 871 (1980), where the Second Circuit held that fraud in the sale of securities and bankruptcy fraud constituted a pattern of racketeering activity even though a common scheme did not exist. Weisman involved a theater which from its inception to its collapse was operated through a wide ranging pattern of fraud. The defendant urged the court to adopt a common scheme requirement to prevent application of RICO to such sporadic activity. Unpersuaded, the court held that a pattern exists when the acts occur in the conduct of the enterprise's affairs. Id. at 1122.
40 In urging the court to adopt a common scheme requirement, the defendant provided support from Title X, 18 U.S.C. § 3575-78 (1969), a provision of the Organized Crime Control Act dealing with "Dangerous and Special Offenders." Title X specifies that "a pattern of criminal conduct"
profiting from diversified criminal activities. The court found a pattern and held that this type of enterprise was clearly the type of organized crime RICO was designed to combat.

B. The Sedima Case and its Implications

In Sedima, *S.P.R.L. v. Imrex Co.*, the Supreme Court noted Civil RICO's broad scope. Sedima involved a Belgian corporation which entered into a joint venture with the respondent, Imrex Company, to provide electronic components to a Belgian firm. Believing that the defendant had presented inflated bills, petitioner Sedima asserted a RICO claim alleging predicate acts of mail and wire fraud. Although the Court did not reach a pattern issue, Justice White stated that one of the reasons for the numerous applications of civil RICO has been the "failure of Congress and the courts to develop a meaningful concept of 'pattern.'" In a footnote, Justice White stated that "the implication [of section 1961] is that while two acts are necessary, they may not be sufficient" since "in common parlance two of anything does not generally form a pattern."

After analyzing the language of RICO and its legislative history, Justice White noted that "criminal acts . . . have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). In refusing to apply Title X, the court stated that "the fact that the two sections [Title IX and Title X] were enacted simultaneously yet embody different definitions of pattern seems to indicate that Congress intentionally chose to use the term differently in different contexts." 624 F.2d at 1123. See infra note 47 and accompanying text.

The diversified criminal activities included arson, counterfeit titles, stolen cars, stolen meats, criminal influence of judicial proceedings, murder, extortion and trafficking narcotics.

In Sedima, the Supreme Court addressed the issue of prior criminal conviction and racketeering injury requirements. The Court held that in a civil RICO action there is no prior conviction requirement nor any requirement that the plaintiff establish a "racketeering injury beyond that resulting from the predicate acts themselves." Id. at 3277. The parties presented no pattern issue to the Court.

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "requires at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance, two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also id. at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act.
tice White agreed that it is "the factor of continuity plus relationship which combines to produce a pattern." Justice White concluded by noting that Congress was more enlightening in defining "pattern" in Title X of the same bill, dealing with the sentencing of special offenders, and "that its language may be useful in interpreting other sections of the Act." Justice White seemed to suggest that since Congress did not define "pattern" on the face of Title IX but that it did on the face of Title X of the same act, courts might find some assistance from Title X's definition.

Although Sedima did not address a pattern issue, it did recall previous standards applied by the Court when interpreting RICO. Courts should apply the standards which are restated in Sedima when interpreting pattern. First, the courts must look to the language when interpreting a statute because it is the most reliable evidence of congressional intent. Second, courts must read the language of a statute with its plain meaning, yet view the statute in context. Third, courts may not read the language of RICO differently in criminal and civil proceedings. Fourth, courts must read RICO broadly and construe it liberally.

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46 Id.
47 Id. (citing 18 U.S.C. § 3575(e) (1970)). See infra notes 55-56 and accompanying text.
48 See United States v. Russello, 464 U.S. 16 (1989); and United States v. Turkette, 452 U.S. 576 (1981) for the best examples of criminal RICO cases in which the Supreme Court logically analyzed the statute through clearly stated standards.
49 See Sedima, 105 S. Ct. at 3285 n.13 ("Congress[]... [intent is] best determined by the statutory language it chooses ... [Congressional silence ... cannot override the words of the statute."); Russello, 464 U.S. at 20 ("In determining the scope of a statute, we look first to its language."); (citing United States v. Turkette, 452 U.S. at 580); Turkette, 452 U.S. at 593 ("The language of the statute ... [is] the most reliable evidence of ... [Congressional] intent ... .").
50 See Sedima, 105 S. Ct. at 3285 n.13 ("Given the plain words of the statute, we cannot agree with the court below that Congress could have had no inkling of [§ 1964(c)'s] implications."); Russello, 464 U.S. at 21 ("[W]e start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."); Turkette, 452 U.S. at 580 ("If the statutory language is unambiguous, in absence of 'a clearly expressed legislative intent' to the contrary, that language must ordinarily be regarded as conclusive.").

Because the statute provides that "pattern" only requires at least two acts within ten years and one occurring after the effective date of the law, 18 U.S.C. § 1961(5) (1984), courts must examine the plain meaning of the word. "Pattern" is defined as "(1) a design; or, (2) an arrangement or order of things or activity in abstract senses: order or form discernible in things, actions, ideas, situations, etc. Frequently with of, as pattern of behavior ... and as second element with defining word." VII THE OXFORD ENGLISH DICTIONARY 315 (1982) (emphasis added). Within the context of the purpose of the statute, the Supreme Court supplemented the plain meaning of "pattern" by stating that while two acts of racketeering are necessary, they may not be sufficient. Sedima, 105 S. Ct. at 3285 n.14. Significantly, the Court used the words "may not be sufficient" rather than "will not be sufficient." (emphasis added). This implies that under some circumstances, two acts will be sufficient, and under other circumstances two acts will be insufficient.

51 See Sedima, 105 S. Ct. at 3281 ("Section 1962 renders certain conduct 'unlawful'; § 1963 and § 1964 impose consequences, criminal and civil for 'violations' of § 1962. We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections.").
52 See Sedima, 105 S. Ct. at 3286:

RICO is to be read broadly. This is the lesson not only of Congress' self consciously expansive language and overall approach ..., but also for its express admonition that "RICO is to be liberally construed to effectuate its remedial purpose." The statute's remedial purposes are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

See also 105 S. Ct. at 3287 ("The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (citing Haroco, Inc. v. American Nat'l Bank and Trust, 747 F.2d 384, 398 (7th Cir. 1984), aff'd on other grounds, 105 S. Ct.
Sedima also directed courts to the text of RICO and its legislative history when interpreting the statute.\textsuperscript{53}

Finally, it is essential in any statutory analysis to heed the Supreme Court’s words that when Congress includes or omits limiting language in a bill it is presumed that it did so intentionally.\textsuperscript{54} Thus, although Title X’s definition of pattern may prove helpful, courts must remember to use it within the proper context and read it in light of RICO’s stated purpose. In Title X, a pattern of criminal conduct accords special offender status for purposes of sentencing.\textsuperscript{55} Title X states that “conduct forms a pattern if it embraces acts that have similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated . . . and not isolated events.”\textsuperscript{56} Significantly, Title X uses the word “if,” implying that if the subsequent conditions are met, a pattern exists. It does not use the word must, however, and thereby limits a pattern to the subsequent definition. Furthermore, the fact that Title IX and X were enacted simultaneously, yet embody different definitions of pattern, indicates that Congress intentionally chose to use the term differently in the two contexts.\textsuperscript{57}

C. “Single Episode” versus “Common Scheme” Analysis Since Sedima

In pre-Sedima cases the courts did not follow the “single episode” argument made by defendants for purposes of defeating a RICO claim because it lacked support from the statute, its purpose and legislative history.\textsuperscript{58} Now, however, courts ruling under this theory for the defendants are claiming support from Sedima.\textsuperscript{59} Furthermore, courts have blurred the distinction between the single episode and the common scheme analysis.\textsuperscript{60} The following cases are good examples of this proposition and also illustrate the tension developing between some of the district and circuit courts in finding a pattern.

In Illinois Department of Revenue v. Phillips,\textsuperscript{61} the United States Court of at 3291 (1985)); Sedima, 105 S. Ct. at 3283 n.10 (“[I]f Congress' liberal construction mandate is to be applied anywhere it is in § 1964, where RICO's remedial purposes are most evident.”). Accordingly, it would be impermissible to use the concept of “pattern” to artificially narrow RICO's scope. See Sedima, 105 S. Ct. at 3280 (“It is worth briefly reviewing the legislative history . . . .”). See also Turkette, 452 U.S. at 586 (“[T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering into a new domain . . . .”); id. at 590 (“In view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime . . . .”). The legislative history of RICO specifically states that the target is not sporadic activity. S. Rep. No. 617, supra note 14 at 158. See also supra notes 14-17 and accompanying text. In addition, the term “pattern” indicates that multiple and unrelated acts (not schemes, transactions or episodes) and the threat of continuing criminal activity are required; it “is this factor of continuity plus relationship which combines to produce a pattern.” S. Rep. No. 617, supra note 14, at 158 (emphasis added).

\textsuperscript{54} See Russello, 464 U.S. at 23 (“[W]here Congress includes particular language in one section . . . but omits it in another . . . it is generally presumed that Congress acted intentionally and purposely.”).


\textsuperscript{56} Id. (emphasis added).

\textsuperscript{57} See United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.), cert. denied, 449 U.S. 871 (1980).

\textsuperscript{58} See supra notes 23-32 and accompanying text.

\textsuperscript{59} See infra notes 64-68 & 78 and accompanying text.

\textsuperscript{60} See infra note 74 and accompanying text.

\textsuperscript{61} 771 F.2d 312 (7th Cir. 1985).
Appeals for the Seventh Circuit held that a retailer’s mailing of fraudulent tax returns constituted a pattern of racketeering activity. In *Phillips*, defendant mailed nine fraudulent tax returns to the state of Illinois over a nine month period. The court noted that since RICO defines “racketeering activity” to include mail fraud, defendant’s mailings constituted a pattern of racketeering activity as defined in the statute itself.

The *Phillips* case, however, stands in sharp contrast with *Northern Trust Bank O’Hare v. Inryco*. In *Inryco*, the trustee filed suit alleging that a contractor and employee violated RICO when they participated in a construction kickback scheme conducted through the mail with the subcontractor. The United States District Court for the Northern District of Illinois held, however, that the mailing of more than one letter was merely implementing the same or common kickback scheme and, therefore, could not constitute a pattern. The court stated that while “pattern” connotes relatedness, it similarly connotes a multiplicity of events. In light of the legislative history, the court found it difficult to see how a threat of continuity could be established in a single criminal episode. Relying on *Sedima*, the court found that the “single criminal episode” did not satisfy the requirement of relationship plus a threat of continuing criminal activity.

While these two cases were analyzed under different theories, *Phillips* under the common scheme theory and *Inryco* under the single episode theory, the cases are factually similar; each case involved a common scheme of sorts, the same parties, and the use of the mail to further a criminal scheme. Moreover, the schemes were carried out over similar periods of time. The cases differ analytically, however, because the *Phillips* court correctly refused to read *Sedima* as a rejection of the type of pattern of criminal activity which involves the same parties and the carrying out of a single criminal scheme, whereas the *Inryco* court had incorrectly interpreted *Sedima* as such a rejection. In *Inryco*, the court used the single episode theory as an illusory argument to defeat the RICO claim.

In ruling for the defendant, a court will usually distinguish a “common scheme” case from a “single episode” case. The two situations, however, are often identical. In fact, the terms “single episode” and

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62 Id. at 313.
63 Id.
64 615 F. Supp. 830 (N.D. Ill. 1985).
65 Id. at 833.
66 Id. at 831.
67 Id.
68 Id.
69 But see, S.J. Advanced Technology & Mfg. Corp. v. Jankung, 627 F. Supp. 572 (N.D. Ill. 1986). In *Jankung*, the defendant corporation misrepresented through mail and telephone communications its competitor’s solvency and ability to supply material to potential customers. The court distinguished these facts from *Inryco* by stating that this case involved separate acts of fraud over various and separate parties. Id. at 577.
70 771 F.2d at 313.
71 615 F. Supp. at 833.
72 Id.
“common scheme” have been used interchangeably by courts, often because of the lack of distinction. In one case, a court even used the hybrid term “single scheme” to describe such a situation.

Similar tensions exist between other district and circuit courts. For instance, prior to Sedima, the United States Court of Appeals for the Tenth Circuit sustained a RICO conviction in United States v. Calabrese for a “single scheme” whereby the defendants defrauded the same parties by using a Utah building supply company as a front for a fraudulent scheme to obtain building materials on credit with no intention of paying for them. While the case involved the same fraudulent acts on the same parties, federal district courts within the Tenth Circuit have precluded conviction under RICO for similar transactions since Sedima. Such an argument which cites Sedima as support, however, is illusory and courts outside the Tenth Circuit have recognized this.

Courts have held inconsistently when looking to Sedima for an interpretation of “pattern.” Because the Supreme Court did not define “pattern” in Sedima, it should not represent direct support for a lower court’s interpretation that “pattern” requires more than one criminal episode. For instance, courts claiming support from Sedima when following the “single episode” theory for the purpose of defeating RICO ignore the Court’s use of Title X’s language which encourages the finding of a common scheme. At the same time, courts requiring a common scheme should not claim support from Sedima because the Court also suggested that courts look to the legislative history as a reference when interpreting pattern. Because the legislative history states that one of RICO’s purposes is to eradicate diversified criminal activity, a common scheme requirement would preclude conviction of enterprises involved in some types of a criminal activity. Yet RICO clearly was designed to combat

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74 See, e.g., Inżyko, supra notes 64-68 and accompanying text; and Jankung, supra note 69.
75 See Jankung, supra note 69.
77 Id. at 1385.
78 See, e.g., Miller v. Calvin, No. 82-F-2253 (D. Colo. October 21, 1985) (defendants made misrepresentations in a preliminary prospectus and registration statement distributed in connection with a public offering); Professional Assets Management v. Penn Square Bank, 616 F. Supp. 1418 (D. Okla. 1985) (there was an insufficient showing of pattern when Professional Assets brought action against defendant accounting firm for the preparation and issuance of one fraudulent audit report on a bank).
79 See, e.g., Bank of Am. v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986) (accounting firm found guilty of fraudulently inducing banks to extend credit to a failing corporation through a pattern of fraud consisting of nine separate acts of mail fraud). See also R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985) wherein the United States Court of Appeals for the Fifth Circuit held that two acts of mail fraud were sufficient to constitute a pattern in a scheme to defraud a company. Id. at 1352. In Hyatt, the first mailing involved allegedly false invoices and rental fees for services performed by the defendant for the plaintiff. The second alleged act of mail fraud occurred when defendant’s counsel mailed copies of the invoices to the plaintiffs. The court was not persuaded by Sedima’s language that “while two acts are necessary, they may not be sufficient.” Id. at 1355 (quoting Sedima, 105 S. Ct. at 3285 n.14). The court stated that Sedima only implied that two isolated acts could not constitute a pattern. 774 F.2d at 1355. The court reasoned that Sedima was looking for the element of “relatedness” to be present in a pattern, and held that the alleged acts of mail fraud were sufficiently related. Id.
80 See supra note 55 and accompanying text.
81 See supra notes 1-3 and accompanying text.
this type of organized activity. Some courts, however, have properly read Sedima's dicta on pattern and analyzed the concept in the proper light. In finding a pattern, one court rejected the defendants' reliance on Sedima, pointing out that Sedima's footnote merely suggested references to use when interpreting pattern and that the Supreme Court never actually reached a pattern issue.

III. Defining Pattern Within RICO's Substantive Violations

Section 1962(a)-(d) provides the various ways to violate RICO. RICO makes it unlawful for a person to: (a) use income derived from a pattern of racketeering activity to acquire an interest in an enterprise; (b) acquire or maintain an interest in an enterprise through a pattern of racketeering activity; (c) conduct the affairs of an enterprise through a pattern of racketeering activity; or (d) conspire to commit any of these offenses.

Since the different kinds of RICO violations contained in subsections (a) through (d) contemplate different criminal circumstances, different kinds of relationships and threats of continuity should establish the pattern of racketeering activity. For example, in United States v. McNary, the court found that the defendant violated section 1962(a) by investing income derived from a pattern of bribery and extortion into a travel agency. The court found that the pattern of racketeering activity supplied the necessary nexus between the enterprise and the racketeering activity. Id. at 1116. McNary illustrates that, consistent with earlier case law, courts since Sedima have continued to recognize that while a pattern of racketeering held together by a common scheme is a pattern, a common scheme is not always necessary.

See supra notes 36-41 and accompanying text; United States v. Sinito, 723 F.2d 1250, 1261 (6th Cir. 1983) ("It is unnecessary that the underlying predicate acts be interrelated as long as the acts are connected to the affairs of the enterprise.") (citing United States v. Phillips, 664 F.2d 971, 1101 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982)), cert. denied, 105 S. Ct. 86 (1984); United States v. Sutton, 642 F.2d 1101, 1017 (6th Cir. 1980) ("The Supreme Court has never held it is a requirement of a valid conviction for conspiracy, that every conspirator must have agreed, or intended to conduct or participate in every [predicate act] committed by [the others].")

See, e.g., United Fish Co. v. Barnes, 627 F. Supp. 732 (D. Maine 1986) wherein the court held that the defendants conducted fraudulent transactions on behalf of the fish company through a pattern of mail and wire fraud. See also Hyatt, supra note 79, at 1355.

For RICO securities cases in which the courts have found patterns in light of Sedima, see Ackerman v. Schadeff, No. 82-223 (W.D. Wa. 1986), cited in RICO Bus. DISPUTES GUIDE (CCH) ¶ 6278 (July 8, 1986) (involving a limited partnership offering wherein the court found a pattern consisting of 80 separate fraudulent offerings made to investors); First Fed. Sav. & Loan v. Oppenheim, Appel, Dixon, 629 F. Supp. 427, 444 (S.D.N.Y. 1986) (the court upheld plaintiffs RICO claim and securities fraud action by investors against dealer's accounting firm based on the mailing of audit confirmation letters containing false statements).

See Barnes, supra note 83.

See Barnes, supra note 83.

82 See, e.g., United States v. Qauod, 777 F.2d 1105 (6th Cir. 1985), cert. denied, 106 S. Ct. 1499 (1986). In Qauod, the enterprise was a group of individuals who were involved in kickback schemes in order to influence judicial proceedings. The United States Court of Appeals for the Sixth Circuit held that the affairs of the enterprise which included bribery, mail fraud, and obstruction of criminal investigation, supplied the necessary nexus between the enterprise and the racketeering activity. Id. at 1116. Qauod illustrates that, consistent with earlier case law, courts since Sedima have continued to recognize that while a pattern of racketeering held together by a common scheme is a pattern, a common scheme is not always necessary. See supra notes 36-41 and accompanying text; United States v. Sinito, 723 F.2d 1250, 1261 (6th Cir. 1983) ("It is unnecessary that the underlying predicate acts be interrelated as long as the acts are connected to the affairs of the enterprise.") (citing United States v. Phillips, 664 F.2d 971, 1101 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982)), cert. denied, 105 S. Ct. 86 (1984); United States v. Sutton, 642 F.2d 1101, 1017 (6th Cir. 1980) ("The Supreme Court has never held it is a requirement of a valid conviction for conspiracy, that every conspirator must have agreed, or intended to conduct or participate in every [predicate act] committed by [the others].").
consisted of five separate real estate transactions. The Court held that the investment or use of the proceeds of such income was the exact activity proscribed by subsection (a)'s language of "using income derived from a pattern . . . to acquire an interest in an enterprise." Thus, in determining whether a pattern exists within a subsection (a) violation, courts must analyze the situation by: (1) looking to the activity proscribed by subsection (a); and then (2) defining the "relationship plus continuity" formulation in light of the crime Congress intended to eradicate.

A different situation, however, arises in the context of a subsection (b) violation. For example, in United States v. Parness, the court found the defendant guilty of a section 1962(b) violation by acquiring an enterprise (a casino hotel) through a "pattern" consisting of two acts of transporting stolen cashier checks. In Parness, the defendant owned a corporation through which he ran "junkets" and collected markers from gamblers for the hotel-casino. Parness, however, withheld $400,000 in overdue "markers," forcing the hotel-casino involved into borrowing enormous sums of money from Parness until he eventually foreclosed it. The court convicted Parness of acquiring the hotel-casino through a pattern of racketeering which consisted of the interstate transportation of two cashier checks.

Because subsection (b) prohibits maintaining or acquiring an enterprise through a pattern of racketeering activity, a common scheme is required for a subsection (b) violation since the acquisition or the maintenance is the scheme or plan. Thus, subsection (b) implicitly requires that the criminal acts be related to one another. Furthermore, the nature of the transaction involved, i.e., the takeover of the running of the enterprise, establishes the threat of continuing criminal activity until the scheme (the takeover) is accomplished. In determining whether a pattern exists within a subsection (b) violation the courts should analyze the situation by (1) looking to the activity proscribed within subsection (b); and (2) looking for the proper relationship between the acts themselves and how they work to accomplish the criminal scheme. In such a case the acts should not appear to be unrelated in time and manner as they might within a subsection (a) violation.

Subsection (c) violations arise under contexts different from those involved in either subsection (a) or (b) violations. For instance, in United States v. Elliott, the enterprise involved was an illegitimate organi-
tion—a group associated in fact with no other purpose but to engage in diversified criminal activity. The enterprise did nothing but "conduct its affairs through a pattern of racketeering activity."\textsuperscript{101} Although Congress did not intend to exclude this type of group from the reach of the statute, this would occur if the legislative history were read to require the same standard of "relationship" and "continuity" for a subsection (c) violation as it does for a subsection (b) violation.

Courts would in some cases subvert RICO's purpose by requiring a relationship between the acts in subsection (c) (or subsection (d) conspiracy violations) since little or no relationship exists between the acts of an illicit organization whose sole purpose is to engage in criminal activities. On the other hand, courts would not subvert RICO's purpose in such a case by requiring a relationship between the illicit enterprise and the acts. Moreover, the nature of the enterprise which exists only to carry out criminal activities would serve as the threat of continuing criminal activity.

The "relationship plus continuity" formulation must vary slightly within the various contexts under which a RICO violation may arise. In other words, in order for courts to reach the different kinds of activity that RICO was intended to reach, different standards for "relationship" and for "threat of continuity" are necessary in determining whether or not a pattern exists. Also, the single episode and the common scheme modes of analysis must be tailored to fit within the purpose of RICO and its proscribed activities.

For example, recall the earlier discussed \textit{Watchmaker} case\textsuperscript{102} which involved the Outlaw Motorcycle Club, a group associated in fact for the purpose of engaging in illicit activities.\textsuperscript{103} Although the acts occurred in the course of a single criminal episode, the court found that the "relationship" requirement was satisfied by the fact that the three shootings were related to the enterprise.\textsuperscript{104} The court also found that the purpose and nature of the enterprise satisfied the requirement of a threat of continuity because the motorcycle gang would continue carrying out illicit activities.\textsuperscript{105} Thus, if the \textit{Watchmaker} court had required a common scheme, the court would not have found a pattern. Yet the activity was clearly the type of activity Congress intended to reach through RICO.

Taking the analysis one step further, a "single criminal episode" case like \textit{Watchmaker} cannot be distinguished easily from a "common scheme" case such as \textit{United States v. Weatherspoon}.\textsuperscript{106} In \textit{Weatherspoon}, the defendant violated RICO through a scheme to defraud the government by a "pattern" consisting of five mailings of false statements to the Veteran's Administration.\textsuperscript{107} Both \textit{Watchmaker} and \textit{Weatherspoon} involved

\textsuperscript{102} 761 F.2d 1459 (11th Cir. 1985), cert. denied, 106 S. Ct. 881 (1986). See supra notes 29-32 and accompanying text.
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} 581 F.2d 595 (7th Cir. 1978). See supra notes 29-32 and accompanying text.
\textsuperscript{107} \textit{Id.} at 602. The court rejected the contention that constituent acts do not form a pattern unless they are performed in the course of separate criminal episodes. The court stated:
only one type of racketeering activity defined in the activities which Congress clearly intended to eradicate.\footnote{Id. at 602.}

The terms used in these cases ("single episode" and "common scheme") merely described the unlawful activities involved. They were not invoked as standards or rigid requirements for determining a pattern issue. Yet courts continue to use the single episode argument to disallow a RICO claim.\footnote{In \textit{Watchmaker} the pattern consisted of three acts of attempted murder. 761 F.2d at 1476. In \textit{Weatherspoon} the pattern consisted of five acts of mailing in a scheme to defraud the Veteran's Administration. 581 F.2d at 602. Furthermore, both crimes, the attempted murder in \textit{Watchmaker} and the mail fraud in \textit{Weatherspoon}, are listed in 18 U.S.C. § 1961(1) as "racketeering activities."} \textit{Watchmaker} illustrates a single criminal episode case which clearly falls within RICO's purpose. One cannot argue that no pattern exists because the acts occurred within the course of a single criminal episode. Neither the statute nor legislative history contain such a standard or requirement. The single episode argument represents an artificial judge-made distinction, which courts have created solely for the purpose of defeating a RICO violation. Moreover, unless the term "single episode" is defined appropriately within the purpose of RICO it cannot be viewed as a product of logical analysis. The definition of pattern should vary according to the alleged violation.

\section*{IV. Conclusion}

Courts must decide how to define "pattern," remaining consistent with RICO's text, legislative history and purpose to provide enhanced sanctions against organized crime. Reading too much into \textit{Sedima} aggravates an already existing tension among the courts. Although the Supreme Court recognized in \textit{Sedima} that a meaningful interpretation of pattern was necessary,\footnote{\textit{Sedima}, 105 S. Ct. 3275, 3287.} it did not supply any interpretation. Nowhere did the Supreme Court contend that one comprehensive scheme involving several related unlawful actions would not constitute a pattern. Nowhere did the Court establish rigid standards for satisfying the "relationship plus continuity" formulation. And nowhere did the Court even imply that only one definition would suffice. One definition will not do; the definition of pattern must vary according to the violation alleged.

The Supreme Court in \textit{Sedima} did state, however, that two acts are necessary but may not be sufficient,\footnote{\textit{Id.} at 3285 n.14.} and that isolated acts are not a pattern.\footnote{\textit{Id.}} Beyond this, courts should only interpret pattern in light of the following references suggested in a footnote by the Court: The statute, its plain language, purpose, legislative history, and other pertinent

\footnote{A "scheme to defraud" is not an "act" indictable under the mail fraud statute, for though the offense of mail fraud "has as its genesis in the scheme of defraud, the very gist of [the crime] is the use of mails in executing the scheme." U.S. v. Crummer, 151 F.2d 958, 962 (10th Cir. 1946). It is for this reason that each mailing in furtherance of a scheme to defraud is a separate offense under 18 U.S.C. § 1341 even though there is but one scheme involved.}
provisions of the Act. Courts must apply the facts of the case to the violations alleged, look to the purpose of the Act, and then apply the appropriate interpretation. If courts ignore this line of analysis in light of the explicit title of the Act, as well as the statement of purpose and the plain language of Title IX, it will not be Congress that will have failed to use the right words, but the courts that will have failed to use them properly.

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113 Id.
114 Congress has considered reforming RICO. Hearings have been held in the House and Senate on RICO reform legislation. See Oversight on Civil RICO Suits, Hearings before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1985). On October 7, 1986 the House passed H.R. 5445 which would have imposed express statutory limitations on “pattern” for private civil litigation. 132 Cong. Rec. H9377 (daily ed. Oct. 7, 1986). Under the new language, “pattern” would require at least two acts of illicit activity, one of which occurred not more than five years after the prior act of illicit activity; the acts must not have been so closely related in time and place that together they constituted a single episode; and each act, for actions brought under § 1962 (c), must be related to the affairs of the enterprise.