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THE PATTERN REQUIREMENT OF CIVIL RICO: H. J. INC. V. NORTHWESTERN BELL TELEPHONE CO.

INTRODUCTION

Twenty years after the enactment of the Racketeer Influenced and Corrupt Organizations (RICO) Act, debate is still raging about the intended reach of this statute. Opinions of the legal and business communities range from characterizing the civil RICO statute as a powerful tool to combat the evils of organized crime to a "juggernaut in the legal system." Behind all the opinions and jargon is the central issue of whether Congress intended civil RICO to extend beyond the expressed purpose in the statute of eradicating organized crime and, if so, what are the outer limits of the reach of this statute.

Congress enacted the Organized Crime Control Act of 1970 (the Act) for the expressed purpose of "seek[ing] the eradication of organized crime in the United States." Title IX of the Act,

2. Russelo v. United States, 464 U.S. 16, 26 (1983) ("The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.").
5. Id. at 922—23. Congress expressed its purpose in enacting the statute:

Statement of Findings and Purpose

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its
RICO, provides criminal penalties and civil remedies for violations of the prohibited racketeering activities.

G. Robert Blakely, principal drafter of the Act, began with the premise that effectively fighting organized crime or group crime requires methods different from those used in fighting street crime. Prior criminal and common law methods were aimed at individual prosecutions. The RICO statute strikes at criminal organizations. A major concern of Congress was the infiltration of legitimate business by organized crime. To aggressively attack this infiltration, the Act strikes at the economic roots of the criminal organizations.

The Supreme Court has relied on comments made in House and Senate hearings during consideration of the RICO bill, to support the conclusion that one of the main purposes of the statute is to strike at the infiltration of legitimate businesses by organized crime. The Court has found that the legislative history indicates that the statute intends to provide new weapons to strike at an organization's economic roots and thereby separate the racketeer from his ill-gotten gains. In two cases, the Court has pointed to a Senate Report that states:

citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Id. at 922—23.
11. Id. at 974 n.18.
13. Strasser, supra note 9, at 32, col. 2.
What is needed here ... are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.17

However, civil RICO defendants have not been limited to archetypal mobster, organized crime defendants but have also included white collar criminals such as judges, lawyers, politicians, and accountants;18 anti-abortion protestors;19 and, in the Comment case, a public utility and a public utilities commission.20 Even RICO supporters should agree that private civil RICO actions against such defendants have expanded the reach of the statute beyond Congress' expressed intent of eradicating organized crime and its infiltration of legitimate businesses.

A federal court of appeals judge, Judge Abner J. Mikva, who was a member of Congress when RICO was enacted, believes that Congress had no idea of the scope and breadth of the statute when it enacted RICO.21 Judge Mikva said that "RICO points out what happens when someone writes an idea on the back [of] the envelope and doesn't put it through the normal committee procedures ... I like Blakely [principal drafter of RICO], but he is dead flat wrong on a number of things, and one is that Congress had any idea what civil RICO was about."22

This Comment examines the expansion of the civil RICO action beyond the archetypal organized crime defendant and analyzes the attempts of lower courts to limit this expansion beyond Congress' expressed intent of eradicating organized crime. The Supreme Court has repeatedly struck down these limitations.23

The Comment case, H. J. Inc. v. Northwestern Bell Telephone

17. Russelo, 464 U.S. at 27; Turkette, 452 U.S. at 591.
18. See, e.g., Goldsmith, supra note 10, at 995.
21. Strasser, supra note 9, at 33, col. 4.
22. Id.

Section I reviews relevant statutory provisions. Section II examines lower court attempts to limit civil RICO's application to organized crime and the Supreme Court's rejections of these restrictive interpretations. Section III reviews the standards formulated by the lower courts for the pattern requirement and, in the Comment case, the Supreme Court's adoption of a standard of continuity plus relatedness. The final section examines possible challenges to the RICO statute.

I. STATUTORY PROVISIONS

Before the Comment examines the courts' struggles with civil RICO, a brief examination of the statutory language is necessary to provide a framework for this discussion. The RICO statute sought to eradicate organized crime by striking at its economic roots. A chief concern of Congress was the infiltration of legitimate businesses by organized crime; thus, the statute was directed at this infiltration. The statute defines racketeering activities in section 1961, then in section 1962 targets the infiltration of businesses by racketeers. Section 1962 prohibits using income from the defined racketeering activities in the business or enterprise; the section also prohibits conducting or

26. See cases cited supra note 23.
27. Strasser, supra note 9, at 32, col. 2.
acquiring an interest in an enterprise through a pattern of racketeering.\textsuperscript{30}

Section 1961 is the definitional section of the statute.\textsuperscript{31} Racketeering activity is defined to include the kinds of acts one would expect the archetypal organized criminal to engage in, such as murder, kidnapping, arson, and dealing in narcotics.\textsuperscript{32} The statute goes further, however, and prohibits activities not typically associated solely with organized crime,\textsuperscript{33} such as wire and mail fraud, bankruptcy fraud, and dealing in obscene matter.\textsuperscript{34} The inclusion of wire and mail fraud has been called "[the] single most significant reason for the expansive use of civil RICO."\textsuperscript{35} The extensive listing of predicate acts that are defined as racketeering activities brings ordinary fraud claims within the reach of the statute. Consequently, actions formerly brought as state law claims and areas regulated under other federal laws are being brought as RICO actions.\textsuperscript{36} Chief Justice Rehnquist has urged Congress to limit RICO to organized crime defendants.\textsuperscript{37} The Chief Justice stated that RICO is now being used for "'garden variety' civil fraud cases of the type traditionally litigated in state courts."\textsuperscript{38}

Section 1962 is aimed at the infiltration of enterprises by the racketeering activities and contains the pattern requirement.\textsuperscript{39} "Pattern of racketeering activity" is defined in section 1961 as at least two violations of the predicate acts listed in section 1961.\textsuperscript{40} Then, in section 1962, certain conduct through a pattern of racketeering activity is prohibited.\textsuperscript{41}

Section 1962 prohibits: the use of income derived from a pattern of racketeering activity in any enterprise; acquiring an interest

\begin{itemize}
\item \textsuperscript{32} Id.
\item \textsuperscript{33} See Lowenthal, supra note 3.
\item \textsuperscript{36} See also id. at 500 (majority opinion agreeing with dissent on this point).
\item \textsuperscript{37} Id. at 501.
\item \textsuperscript{38} Strasser and Coyle, RICO Reform Runs Into an Unexpected Rut, Nat'l L.J., May 22, 1989, at 5, col. 3.
\item \textsuperscript{39} Id.
\end{itemize}
in an enterprise through a pattern of racketeering activity; conducting an enterprise's affairs through a pattern of racketeering activity; or conspiring to violate any other provisions of this section. The Congress intended the pattern requirement to limit civil RICO to "planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes" and to require something more than simply a violation of the predicate acts listed in section 1961.

The civil remedy of RICO provides for three times the damages sustained, costs, and attorney fees for persons damaged in their business or property by a violation of section 1962. The Supreme Court has rejected lower courts' attempts to interpret this section to require a distinct racketeering injury analogous to the standing requirements in the Sherman Act. The Court has held that the statute requires only that plaintiffs prove injury to their business or property by the racketeering acts. This provision has made the potential windfall recovery under a civil RICO action attractive to plaintiffs and feared by defendants.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity of collection of unlawful debt.
(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Id.

46. Sedima, 473 U.S. at 498.
47. Id. at 496.
48. Lowenthal, supra note 3, at col. 3.
Congress included language in the Organized Crime Control Act which provides that the statute should be "liberally construed to effectuate its remedial purpose;" this has contributed to the courts' difficulty in containing RICO. The Supreme Court has found that this expressed congressional intent requires a broad and liberal construction of RICO. This liberal construction provision, combined with the breadth of the predicate acts in section 1961 and the broad interpretations of the statute by the Supreme Court, has expanded the civil RICO action to what one writer has characterized as the "Legal Galaxy's Black Hole."

The statute does not define the term "organized crime" and targets an individual's conduct rather than an individual's association with a particular group. Congress did not expressly state that the statute was aimed at mobster organizations for fear that making a person's association with a particular group criminal would prompt constitutional challenges under the first amendment. Justice Powell, dissenting in Sedima, S.P.R.L. v. Imrex Co., believed that the legislative history of RICO makes it clear that Congress intended the statute to target organized crime. Justice Powell disagreed with the majority's finding of congressional intent. The majority pointed to objections raised during Congressional hearings on the RICO bill as evidence that Congress intended the statute to reach beyond organized crime. The main objection was that the statute could be applied to defendants other than organized crime individuals. Justice Powell believed that objections made during the passage of a bill are not indications of congressional intent.

In summary, the inclusion of mail and wire fraud as racketeering activities, the liberal construction clause in the Act, and the enticement of treble damages have extended civil RICO actions beyond traditional organized crime defendants. This expansion

50. Sedima, 473 U.S. at 498.
52. See, e.g., Comment, The RICO Pattern After Sedima — A Case for Multifaceted Analysis, 19 Seton Hall L. Rev. 73, 76 (1989).
54. 473 U.S. at 479.
55. Id. (Powell, J., dissenting).
56. Id. 
57. Id.
58. Id.
has led to a struggle in the courts to limit the scope of this broad statute.

II. THE SUPREME COURT'S EXPANSION OF CIVIL RICO BEYOND ORGANIZED CRIME

The lower courts have struggled with interpreting the RICO statute and ascertaining the scope of activities and persons that Congress intended to target under the civil remedies provision. The legislative history of the civil remedy provision affords courts little direction.⁵⁹ After the Senate passed the bill, a House amendment added the treble damages provision.⁶⁰ The bill was reported back to the Senate near the end of the session and passed without a conference.⁶¹ The expressed intent of the statute was the eradication of organized crime.⁶² The lower courts have attempted to interpret the statutory provisions to limit RICO actions to this expressed intent of eradicating organized crime. The Supreme Court, however, has repeatedly struck down these attempts, finding no textual authority or support in the legislative history for the limits.⁶³

A. The Enterprise Element

In United States v. Turkette,⁶⁴ the Supreme Court found that the term “enterprise” encompassed legitimate as well as illegitimate enterprises.⁶⁵ Enterprise is defined in section 1961 (4) of the RICO statute as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”⁶⁶ Section 1962, which is aimed at the infiltration of businesses by organized crime, proscribes defendants from: using income in an enterprise that is derived from a pattern of racketeering activity; acquiring

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⁵⁹. See, e.g., Comment, supra note 52 at 80 (discussion referring to the addition of the civil remedy provision in the House and passage by the Senate without a conference).
⁶¹. Id. at 519.
an interest in an enterprise through a pattern of racketeering activity; conducting an enterprise’s affairs through a pattern of racketeering activity; or conspiring to violate any of these provisions.67

In Turkette, a criminal indictment was brought under RICO against a defendant who was alleged to be the leader of a criminal organization that engaged in such predicate acts as drug trafficking, arson, mail fraud, bribery, and corruptly influencing state court proceedings.68 The defendant argued that RICO was intended solely to protect legitimate businesses from infiltration by racketeers and was not applicable to criminal organizations that had not infiltrated legitimate businesses.69 The court of appeals agreed and held that “enterprise” did not include organizations that were wholly criminal in nature.70

The Supreme Court reversed and held that “enterprise” encompasses legal entities, such as partnerships and corporations, and even associations of persons that are not legal entities.71 The Court found textual support in the language of the statute that includes in the definition of enterprise any association; the language does not restrict the term to a particular type of association.72 The Court found that if Congress had not intended to include illegitimate associations, it simply would have included the term “legitimate” in the definition.73 The Court added that enterprise includes “a group of persons associated together for a common purpose of engaging in a course of conduct.”74

The Turkette Court rejected the argument that interpreting “enterprise” broadly to include illegitimate enterprises would enable the RICO statute to be used in a manner not intended by Congress.75 The defendant argued that RICO was aimed at the infiltration of legitimate businesses by racketeers and was not aimed at wholly criminal enterprises.76 The Court found that Congress intended to reach organized crime whether in the form

68. Turkette, 452 U.S. at 579.
69. Id. at 579—80.
70. Id. at 578.
71. Id. at 582.
72. Id. at 580.
73. Id. at 581.
74. Id. at 583.
75. Id. at 584.
76. Id. at 579—80.
of legitimate businesses or in the form of criminal organizations.\textsuperscript{77} The Court relied on the expressed purpose of Congress to provide new tools and enhanced sanctions to fight organized crime.\textsuperscript{78}

The \textit{Turkette} Court also stated that the enterprise requirement is separate from the requirement of a pattern of racketeering activity, which is “a series of criminal acts as defined by the statute.”\textsuperscript{79} An enterprise is proven by evidence of ongoing activity as a unit, while a pattern is proved by evidence of the required number of racketeering acts.\textsuperscript{80}

B. \textit{Distinct Racketeering Injury and Prior Criminal Convictions}

\textit{Sedima, S.P.R.L. v. Imrex Co.}\textsuperscript{81} involved a dispute between two companies engaged in a joint venture to supply electronic parts to another firm, with an agreement to split the profits.\textsuperscript{82} Sedima, one of the companies involved in the dispute, alleged that Imrex, the other company in the joint venture, was cheating Sedima out of profits by inflating expense bills.\textsuperscript{83} In addition to contract claims, conversion claims, and unjust enrichment claims, Sedima brought a civil RICO action based on allegations of mail and wire fraud by Imrex and two of its officers.\textsuperscript{84}

The district court dismissed the complaint for failure to allege a RICO-type injury.\textsuperscript{85} The court interpreted the civil remedies provision of RICO, which states that “[a]ny person injured in his business or property by reason of a violation of section 1962” may bring a private civil RICO action,\textsuperscript{86} as a standing requirement.\textsuperscript{87} The district court held that the plaintiff must allege a “RICO-type injury,” which is different from the direct injury resulting from violations of the predicate acts in section 1961 of the statute.\textsuperscript{88} In this case, the plaintiff made no allegations

\textsuperscript{77} Id.
\textsuperscript{78} Id. at 588—89 (referring to the Statement of Findings and Purpose and the liberal construction clause in the Organized Crime Control Act of 1970).
\textsuperscript{79} Id. at 583.
\textsuperscript{80} Id.
\textsuperscript{81} 473 U.S. 479 (1985).
\textsuperscript{83} Id. at 484.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{88} Id.
of injury other than the direct injury from the predicate acts of mail and wire fraud. 89

The Court of Appeals for the Second Circuit affirmed the district court's holding that a "RICO-type injury" is required. 90 Further, the appellate court found the complaint defective because it failed to allege prior criminal convictions of the predicate acts of mail and wire fraud. 91

The Supreme Court rejected the lower courts' holdings that a civil RICO action required either a prior criminal RICO conviction or a distinct racketeering-type injury. 92 The Court found that the civil remedy under RICO was available to a person injured in his business or property by a defendant who engaged in a pattern of racketeering activity, and did not require a distinct racketeering injury. 93 The Court found it significant that a proposal to amend the Sherman Act with a RICO-type remedy failed because of the precedential strict standing requirements of the Sherman Act and obstacles that such precedent would present to a private plaintiff. 94 The Court pointed out that RICO was intended to be "a major new tool" to fight organized crime and reading that such a requirement into the statute would defeat congressional intent. 95

The Sedima Court found no language in the statute supporting the appellate court's requirement of a prior criminal conviction and reasoned that had Congress intended this requirement, it would have expressed such intent. 96 The absence of the word "conviction" in sections 1961, 1962, and 1964, and its inclusion in section 1963, the forfeiture provision of RICO, indicates that Congress intended a requirement of a prior criminal conviction in the latter provision but not the former. 97 The Court also found support for this interpretation in the legislative history. 98 The Court referred specifically to an objection to the treble damages provision, raised during the passage of the statute, to support

89. Id.
90. Id. at 484—85.
91. Id. at 485.
92. Id. at 481.
93. Id. at 495.
94. Id. at 498.
95. Id.
96. Id. at 488.
97. Id. at 489 n.7.
98. Id. at 489—90.
its finding that a civil RICO action does not require a prior criminal conviction.\textsuperscript{99} 

The \textit{Sedima} Court recognized that underlying the appellate court's restrictive holding was the concern that civil RICO was being used against legitimate businesses for run-of-the-mill fraud cases rather than against organized crime defendants.\textsuperscript{100} The Court recognized the lower courts' attempts to read limitations in the statute for these perceived misuses. The Court stated, "We understand the [lower] court[s'] concern over the consequences of an unbridled reading of the statute;"\textsuperscript{101} however, if there is a defect in the statute, "its correction must lie with Congress."\textsuperscript{102} The Court found no textual or legislative support for the lower courts' restrictive interpretations of the requirements for civil RICO actions.\textsuperscript{103} Justice Powell, dissenting, believed that the majority's broad interpretation was not necessary, would encourage the expansion of RICO for fraud and contract violations, and would defy "rational belief, particularly in light of the legislative history, that Congress intended this far reaching result."\textsuperscript{104}

C. \textit{Pattern of Racketeering Activity}

In \textit{Sedima}, while rejecting the lower courts' attempts to narrow the scope of civil RICO, the Court agreed that the civil RICO action had expanded beyond Congress' original intent.\textsuperscript{105} The Court stated that the expansion beyond organized crime defendants was due in part to the inclusion of wire, mail, and securities fraud as predicate acts and in part to the failure by Congress or the courts to develop a meaningful standard for the pattern requirement.\textsuperscript{106} The Court suggested to the lower courts that the pattern requirement might be a basis for judicially limiting the scope of RICO.\textsuperscript{107} In his now well-known footnote

\begin{quote}
\textsuperscript{99} Id. at 490.
\textsuperscript{100} Id. at 499.
\textsuperscript{101} Id. at 481.
\textsuperscript{102} Id. at 499.
\textsuperscript{103} Id. at 498, 495.
\textsuperscript{104} Id. at 530 (Powell, J., dissenting).
\textsuperscript{105} Id. at 500.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 496 n.14. The Court stated in this footnote:
As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it
\end{quote}
fourteen, Justice White stated that the starting point for the definition of "pattern of racketeering activity" was in the definition of the term in section 1961, which states in part that "a pattern of racketeering activity requires at least two acts of racketeering."108 The use of the term "requires" means that at least two such acts are necessary, but does not mean that two acts will be sufficient in all cases.109 Justice White then pointed to a Senate Report and discussion of the bill by its sponsor, Senator McClellan, which indicate that the target of RICO was not sporadic acts and that a "pattern" required "continuity plus relationship."110 The Court did not, however, expound the meaning of "continuity plus relationship." Finally, Justice White directed attention to another section of the Organized Crime Control Act, which did not contain the language of "continuity plus relationship" in the definition of "pattern."111

Justice Powell, dissenting, believed that the broad reading of the entire statute by the majority would make it almost impossible for lower courts to develop a standard for the pattern requirement which would reflect the congressional intent of targeting organized crime.112 Justice Powell disagreed with the majority's conclusion equating congressional awareness that RICO could be used against

*states that a pattern "requires at least two acts of racketeering activity," (citation omitted) 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." (emphasis in original) (citation omitted) 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 ...." (citation omitted) 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." (citation omitted) This language may be useful in interpreting other sections of the Act. (citation omitted)*
legitimate businesses with congressional intent. Justice Powell directed attention to Congress' expressed purpose when enacting the statute, which was "to seek the eradication of organized crime in the United States" and stated, "It is the duty of this Court to implement the unequivocal intent of the Congress." In reaching this conclusion, Justice Powell conceded that the statute may be read as broadly as the majority read it, but believed such a broad interpretation was not compelled by the language of the statute nor necessary to effectuate the intent of Congress. Justice Powell urged a narrower interpretation that would confine the statute's reach to the conduct that Congress intended to reach. Justice Powell indicated his agreement with the Report of the Ad Hoc Civil RICO Task Force of the American Bar Association Section of Corporation, Banking and Business Law (ABA Report). The ABA Report states that Congress intended the pattern requirement to be read in conjunction with the enterprise element to limit the statute to traditional organized crime. Additionally, the ABA Report states that the pattern requirement is met when a plaintiff shows acts that are related to each other; are part of a common scheme; and have some sort of continuity between them or threaten to become ongoing criminal activity. Nevertheless, Justice Powell believed the RICO statute had already been interpreted so broadly that it would be nearly impossible for lower courts to develop a meaningful standard for the pattern requirement that would limit the statute to its intended target, organized crime.

Thus, after Sedima, a private civil RICO action brought under section 1962(c) required four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The lower courts set out to develop a standard for the pattern requirement, following the meager guidance given by the Court in a footnote.

113. Id. at 525 (Powell, J., dissenting).
114. Id. at 524 (Powell, J., dissenting).
115. Id. at 527 (Powell, J., dissenting).
116. Id. at 528—29 (Powell, J., dissenting).
117. Id. at 527 (Powell, J., dissenting).
118. Id. at 528 (Powell, J., dissenting).
119. Id. at 526 (Powell, J., dissenting).
120. Id. at 528 (Powell, J., dissenting).
121. Id.
122. Id. at 496.
III. LIMITS ON THE SCOPE OF RICO: THE PATTERN REQUIREMENT

A. Split in Circuits on Standard for Pattern Requirement

After Seima, lower courts attempted to develop a standard or test for the pattern requirement with guidance taken from footnote fourteen in Seima, which stressed "continuity plus relationship."123 The Seima Court stated that the definition of "pattern" in section 1961 provides only that a pattern requires at least two predicate acts of racketeering activity; the implication was that two such acts may not be sufficient to establish a pattern.124 Furthermore, the Court stated that the legislative history supports the view that two isolated acts are not enough to prove a pattern; rather, a showing of "continuity plus relationship" is required.125

The lower courts' attempts to develop a standard for the pattern requirement in civil RICO actions "produced the widest and most persistent circuit split on an issue of federal law in recent memory."126 Besides the courts' struggles to restrict RICO to organized crime defendants, this divergence of standards has also resulted from the inherent tensions between the concepts of relationship and continuity.127 "Relationship" implies that the racketeering acts are related to each other, while "continuity" implies a separatedness.128 The different approaches of the lower courts in developing a standard for the pattern requirement are discussed in the context of the Comment case.


The conflict in the circuit courts' interpretations of the pattern requirement and the evidence required to show "continuity plus

123. Id. at 496 n.14.
124. Id.
125. Id.
127. Note, Civil RICO — Interpretation and Application of the Pattern of Racketeering Activity Requirement After Seima, J. CORP. LAW 1073, 1086—87 (1988) ("continuity" implies different predicate acts or different victims while "related" implies a connection between the predicate acts; Goldsmith, supra note 10, at 974.
128. Id.
relationship” led the Supreme Court to grant certiorari in *H. J. Inc. v. Northwestern Bell Telephone Co.* In *Northwestern*, customers of Northwestern Bell Telephone Company brought a class action against Northwestern Bell and the Minnesota Public Utilities Commission (MPUC). In addition to state law claims of bribery, the complaint alleged RICO violations based upon a scheme by officers and employees of Northwestern Bell to illegally influence members of the MPUC to approve rate increases. The petitioners claimed this scheme consisted of illicit payments to MPUC employees by Northwestern in the forms of cash, offers of employment, entertainment, airplane tickets, gifts, meals, and parties.

Although petitioners claimed this scheme began in 1980 and continued through the filing of the complaint, the district court found that this was a single scheme meeting only the relatedness prong of *Sedima*. Under the Eighth Circuit’s test in *Superior Oil Co. v. Fulmer*, to meet the pattern requirement, a plaintiff had to prove the racketeering acts related to a common scheme and had to show continuity by either multiple criminal schemes or ongoing criminal activity that threatened to continue into the future. The district court in *Northwestern*, following the test enunciated in *Superior Oil*, stated that continuity requires the plaintiff to show the defendants had either engaged in such activities in the past or were presently engaged in other criminal activities. In the present case, the plaintiffs had alleged several racketeering acts that the district court found to be in furtherance of a single fraudulent scheme to influence members of the MPUC.

The Court of Appeals for the Eighth Circuit affirmed the district court’s decision by stating that the plaintiffs must allege either similar schemes in the past or other criminal activities to prove the continuity element of the pattern requirement.
two concurring opinions agreed with the dismissal of plaintiff's claim for failure to meet the continuity prong of the pattern requirement. The two justices, concurring separately, believed that the Eighth Circuit's multiple schemes test should be reconsidered. One justice criticized the multiple schemes test as straying from the language of the RICO statute, while the other justice urged reconsideration of the test because of contrary views in other circuits.

After Sedima, the circuits developed three approaches to the pattern requirement. The most restrictive approach was the Eighth Circuit's "multiple schemes" test. The most expansive view was that a finding of two related predicate acts was sufficient to show a pattern of racketeering activity. The latter approach was followed by the Sixth Circuit in United States v. Jennings, which found that the pattern requirement was satisfied by two telephone calls made by the defendant on the same day for narcotics deals. Finally, the middle approach was not a bright-line test, but required the court's analysis of the facts and circumstances of each case to determine if a sufficient showing of continuity had been made.

In Northwestern, the Supreme Court rejected the Eighth Circuit's test for the pattern requirement of "multiple illegal schemes" as being too restrictive. Although this "multiple illegal schemes" test utilized both the related prong and the continuity prong, continuity was satisfied merely by a finding of multiple schemes or episodes. A finding of a single scheme would not satisfy the pattern requirement regardless of the number of predicate acts alleged by the plaintiff. Nor did the Court find this test had the advantage of certainty. In a footnote, the Court stated that the definition of "scheme" was dependent on

139. Id. at 650—51.
140. Id. at 651 (Gibson, J., concurring).
141. Id. at 650—51 (McMillian, J., concurring).
143. Id.
144. 842 F.2d 159 (6th Cir. 1988).
146. Comment, supra note 52, at 91—92.
149. Id. See also, Comment, supra note 52, at 88.
150. Northwestern, 109 S. Ct. at 2901 n.3.
the court's characterization of the racketeering acts.\textsuperscript{151} In the present case, the Court stated that the racketeering acts could be viewed either as a single scheme to influence rates set by the MPUC, or as multiple schemes to influence the votes of individual members of the MPUC.\textsuperscript{152}

The \textit{Northwestern} Court also rejected the test adopted by the Sixth Circuit in \textit{United States v. Jennings} which was that two predicate acts are sufficient to meet the pattern requirement.\textsuperscript{153} The Court found that Congress intended something more than allegation and proof of two related predicate acts and that this approach did not reflect the continuity prong.\textsuperscript{154}

The Court also rejected \textit{amici} arguments asserting that a pattern of racketeering activity required an organized crime nexus.\textsuperscript{155} The Court found no textual support for this requirement in the language of the statute or the legislative history.\textsuperscript{156} The Court stated that this approach would focus on the organization's functions rather than on an individual's conduct; this limitation was not expressed in the statute.\textsuperscript{157} Although the Court recognized that organized crime was the main target of RICO, it found that the legislative history indicated that Congress knew that the language of the statute would not limit its application to organized crime and reiterated that such limits were for Congress to impose.\textsuperscript{158}

The \textit{Northwestern} Court adopted the test of continuity and relationship suggested by the \textit{Sedima} Court in footnote fourteen.\textsuperscript{159} The five-member majority interpreted the definition of "pattern of racketeering activity" in section 1961 as stating the minimum number of racketeering acts required in a civil RICO action, rather than as defining the term.\textsuperscript{160} The Court stated that the definition of "pattern" in section 1961(5) "requires at least two

\begin{footnotesize}
\begin{enumerate}
\item[151.] Id.
\item[152.] Id.
\item[153.] Id. at 2899.
\item[154.] \textit{See also} Comment, supra note 52, at 86 (The "expansive approach" which finds that two related predicate acts satisfy the pattern requirement has been criticized for relying solely in the relatedness prong of the pattern requirement and ignoring the continuity prong.).
\item[155.] \textit{Northwestern}, 109 S. Ct. at 2901—02.
\item[156.] Id. at 2903.
\item[157.] Id. at 2903—04.
\item[158.] Id. at 2905.
\item[160.] \textit{Northwestern}, 109 S. Ct. at 2899.
\end{enumerate}
\end{footnotesize}
acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years ... after the commission of a prior act of racketeering activity’” indicates that two predicate acts are necessary and in some cases may be sufficient.161 The Court interpreted the language “requires at least” as implying that two predicate acts may not be sufficient in some cases.162 The Court found that this placed a broad “outer limit” on the pattern requirement, but something “beyond simply the number of predicate acts involved” would be required to show the existence of a pattern of racketeering activity.163 The Court’s discussion of continuity focused on this “something more” aspect of the pattern requirement.

The Northwestern Court began its analysis of the definition of the pattern requirement with the assumption that Congress intended the ordinary use of the word “pattern” — commonly defined as “an arrangement or order of things or activity.”164 Thus, simply alleging a number of predicate acts without order or arrangement would not meet the pattern requirement.165 Next, the Court found that the first prong of the test determined the existence of an ordered relationship between the predicate acts.166 The Court found guidance for the legislative intent for the relationship prong in another provision of the Organized Crime Control Act of 1970, which defined a “pattern” as criminal acts which are interrelated and not isolated events.167

The Court found that the pattern requirement’s second prong of continuity is met by showing the defendant’s acts constitute continuing racketeering activity, or a threat of continuing racketeering activity.168 The majority viewed continuity as both a closed and open-ended concept. Continuity is a closed concept in the sense that it can be shown by a “series of related predicates

161. Id.
162. Id.
163. Id.
164. Id. at 2900 (quoting OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989)).
165. Id.
166. Id.
167. Id. at 2900—01 “[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” Id. (quoting Title X of the Organized Crime Control Act, 18 U.S.C. § 3575(e) (1982 & Supp. V 1988)).
extending over a substantial period of time.” The only indication of what constitutes a “substantial period of time” came from the Court’s statement that the mere fact that the predicate acts were committed over the period of a few weeks or months would not be sufficient. The concurring opinion by Justice Scalia questioned whether this means that a “few months of racketeering activity (and who knows how much more) is generally for free.” Using an example of an organization committing an act of extortion each day, consecutively, for a one week period, Justice Scalia stated that the majority cannot mean this would not constitute a pattern, but he questioned what other meaning can be given to the majority’s “closed period of time” concept.

Continuity is open-ended because it can be shown by a threat that criminal activity will extend into the future. To satisfy the continuity prong by finding a threat of ongoing criminal activity, a court must conduct a case-by-case factual inquiry. The questions to be addressed include: whether the predicate acts are part of the defendant’s operation of the criminal organization, and whether the predicate acts are a regular way of conducting a legitimate business. Thus, continuity can be exhibited by a criminal organization or a legitimate business operation.

In considering the facts of Northwestern, the majority indicated that the plaintiffs may be able to prove a pattern of racketeering activity. The plaintiffs had alleged multiple racketeering acts of bribery over a six-year period for the common purpose of influencing members of the MPUC. The Court found that continuity could be shown either by the period of time, or alternatively, by showing that these acts were a regular way of Northwestern Bell’s doing business or participating in the conduct of the enterprise, the MPUC.

169. Id. at 2902.
170. Id.
171. Id. at 2908 (Scalia, J., concurring) (parenthetical in original).
172. Id. (Scalia, J., concurring).
173. Id. at 2902.
174. Id.
175. Id.
176. Id. The majority rejected amici arguments that continuity could only be shown by a nexus to organized crime. The legislative history shows that the statute was also an attempt to reach the infiltration of legitimate businesses. Id. at 2902–05.
177. Id. at 2906.
178. Id. The Court reversed and remanded.
IV. CHALLENGES TO THE PATTERN REQUIREMENT OF CIVIL RICO

A. Hints of Constitutional Challenge

In a concurring opinion in *Northwestern*, Justice Scalia, joined by Chief Justice Rehnquist, Justice O’Connor and Justice Kennedy, believed that the majority had not given the lower courts guidance because the Court’s opinion was not “much more helpful than telling them to look for a ‘pattern’ - which is what the statute already says.” Although agreeing with the majority’s rejection of the “multiple illegal schemes” test, the concurring justices found that the rejection of this bright-line test and the failure to provide more meaningful guidance suggests that notice to a potential defendant that his conduct may be in violation of RICO is even less likely.

Although a constitutional challenge was not raised, Justice Scalia commented “[t]hat the highest Court in the land has been unable to derive from this statute anything more than today’s meager guidance bodes ill for the day when that challenge is presented.”

B. Criminal Statutes Must Provide Notice

Since RICO is both a criminal and civil statute, it must possess the degree of certainty required for criminal laws. The definition of “pattern of racketeering activity” applies to both civil and criminal provisions of RICO. Thus, the interpretation of “pattern” must be consistent in both civil and criminal actions. Certainty is a constitutional requirement which “is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”

In *Sedima*, the Court of Appeals for the Second Circuit held that a civil RICO action required a prior criminal conviction and

\[179. \text{Id. at 2906 (Scalia, J., concurring).} \]
\[180. \text{Id. at 2907 (Scalia, J., concurring).} \]
\[181. \text{Id. at 2907–08 (Scalia, J., concurring).} \]
\[182. \text{Id. at 2909 (Scalia, J., concurring).} \]
\[183. \text{Id. (citing FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954)).} \]
\[185. \text{Id. (citing Northern Securities Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).} \]
\[186. \text{United States v. Harriss, 347 U.S. 612, 617 (1954).} \]
found that interpreting the statute without such a requirement would raise constitutional issues.\textsuperscript{187} The court of appeals reasoned that not requiring a prior criminal conviction would be circumventing constitutional criminal law protections by allowing a civil remedy for essentially criminal offenses.\textsuperscript{186} The Supreme Court, however, reversed the appellate court's decision and stated, "We do not view the statute as being so close to the constitutional edge."\textsuperscript{189} The \textit{Sedima} Court further stated that if a civil RICO action were considered quasi-criminal, the solution would be to offer the constitutional protections in civil RICO proceedings, but not to require that the defendant have had the benefit of those protections by a prior criminal proceeding.\textsuperscript{190}

C. Criminal Statutes Constrained in Favor of Leniency

Ambiguity in a criminal statute is to be resolved in favor of leniency, based on the principle of giving fair warning of what is criminal conduct;\textsuperscript{191} it is for the legislature, not the courts, to say what is criminal activity.\textsuperscript{192} \textit{Russelo v. United States},\textsuperscript{193} involved an interpretation of the criminal forfeiture provisions of RICO. The Supreme Court held that the rule of lenity did not apply to the construction of the provision at issue.\textsuperscript{194} The defendant in \textit{Russelo} had been indicted under the criminal provisions of RICO for racketeering acts which included arson committed for the purpose of collecting money for fraudulent insurance claims.\textsuperscript{195} The district court entered a forfeiture judgment under section 1963(a)(1) of the RICO statute which provides for forfeiture of any interest acquired from a violation of section 1961.\textsuperscript{196} The defendant argued that the forfeiture provision only applied to interests in an enterprise and that the insurance proceeds were not an "interest" within the meaning of the statute.\textsuperscript{197} The Supreme Court affirmed the forfeiture judgment and found that "interest" included any interest in the enterprise as well as any interest in

\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 493.
\textsuperscript{192} Id.
\textsuperscript{193} 464 U.S. 16 (1983).
\textsuperscript{195} Id. at 18.
\textsuperscript{196} Id.
\textsuperscript{197} Id. at 20.
ill-gotten gains, which in that case included insurance proceeds.\textsuperscript{198}

The \textit{Russelo} Court found that the statutory language was clear and the rule of lenity did not apply to the case fact pattern.\textsuperscript{199} The rule of lenity is applied in situations of statutory ambiguity and only after interpreting congressional intent.\textsuperscript{200} The Court found that the meaning of "any interest" in the statute was clear, and furthered Congress' intent to strike organized crime at its economic roots.\textsuperscript{201}

In \textit{United States v. Turkette},\textsuperscript{202} the Court also found that the rule of lenity did not apply in interpreting the enterprise element of a RICO action.\textsuperscript{203} The Court stated that because both the language and the legislative history of the statute were clear, and there was no ambiguity, the rule of lenity did not come into play.\textsuperscript{204}

Petitioners in \textit{Northwestern} argued that the rule of lenity does not apply to RICO because the predicate acts which are defined in section 1961 give fair warning of what is proscribed in the statute.\textsuperscript{205} The petitioners also argued that congressional intent suggests that the rule of lenity does not apply to RICO because of its remedial purpose and because of the liberal construction clause in the Act.\textsuperscript{206}

\textit{Amici} in \textit{Northwestern}, however, argued that the rule of lenity does apply to RICO actions because the pattern requirement is an essential element of a RICO action.\textsuperscript{207} Pattern of racketeering activity is defined in section 1961 which contains the definitions that apply to both criminal and civil actions.\textsuperscript{208}

\textbf{D. Clear Congressional Intent to Displace State Law}

Congress must clearly express its intent to change the balance between federal and state law.\textsuperscript{209} Justice Marshall, dissenting in

\begin{thebibliography}{99}
\bibitem{198} Id. at 22.
\bibitem{199} Id. at 29.
\bibitem{200} Id.
\bibitem{201} Id.
\bibitem{202} 452 U.S. 576 (1981).
\bibitem{204} Id.
\bibitem{206} Id. at 23.
\bibitem{208} Id.
\end{thebibliography}
Sedima,\textsuperscript{210} joined by Justices Brennan, Blackmun, and Powell, believed that the expansive interpretation of civil RICO has federalized broad areas of what had been state law and displaced existing federal law.\textsuperscript{211} Justice Marshall stated that the issue is not whether Congress has the power to federalize areas of state law, but whether this was Congress' intention.\textsuperscript{212} The dissent found nothing in the statute or legislative history to indicate a clear congressional intent to displace the balance of federal and state laws or existing areas of federal laws and regulations.\textsuperscript{213} The dissent pointed out that the House added the civil remedy provision to the Senate version of the RICO bill "almost as an afterthought." The Senate then passed the bill without requesting a conference. Had Congress intended to bring about such a drastic change, more than "cursory attention" would have been given to the civil RICO provision.\textsuperscript{214} Justice Marshall stated, "Congress simply does not act in this way when it intends to effect fundamental changes in the structure of federal law."\textsuperscript{215} However, based on comments made in hearings and debate during the passage of the RICO statute, the majority in Turkette stated that Congress was aware that it was making changes in the federal-state balance.\textsuperscript{216}

\textbf{Conclusion}

Congress intended RICO to be a new weapon to attack organized crime and its pervasive influence on the economic well-being of the Nation. The extensive definition of prohibited racketeering acts has placed "garden variety" fraud claims within the reach of the statute and displaced the federal-state balance of criminal law in these areas. This extensive definition of predicate acts together with the Supreme Court's expansive interpretation of the liberal construction provision, has resulted in the expansion of the scope of the statute well beyond Congress' expressed intent of eradicating organized crime. As Justice Powell predicted in \textit{Sedima}, the RICO statute has been interpreted so broadly that the courts have been unable to develop a meaningful standard for the pattern requirement that would limit RICO to its intended

\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 506--07.
\textsuperscript{213} Id. at 507.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
target, organized crime. Consequently, the courts have thus far been unable to define the outer limits of the reach of this very broad statute.

The standard adopted in Northwestern does not provide any more meaningful guidance to the lower courts than prior decisions or the statutory language. Rather, as the concurring opinion stated, this decision increased the vagueness of the pattern requirement. Considering the divergent standards adopted in the circuits for the pattern element of RICO before Northwestern, it is unlikely that a consistent approach will follow in the circuits. Since RICO is both a civil and criminal statute, this ambiguity in the statutory language does not provide fair notice of conduct prohibited by the statute and may be found unconstitutional by the Supreme Court at a later date.

Robbie J. Dimon