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Articles

Racketeer Influenced and Corrupt Organizations (RICO) — Securities and Commercial Fraud as Racketeering Crime after *Sedima*: What is a “Pattern of Racketeering Activity”?

Barbara Black†

I. Background

A. *The Statute*

Congress enacted the Racketeer Influenced and Corrupt Organizations Act¹ (RICO) in 1970 in order to stem the infiltration and corruption of legitimate businesses by organized crime.² During the 1970's, civil litigants virtually ignored the statute,³ but in the 1980's the utility of RICO's civil provisions has come

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1. 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985).

2. The statement of findings and purpose of the act recites that “[i]t is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.” Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (1970), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 1073.

For a comprehensive discussion of the legislative history of RICO, see Blakey, *The RICO Civil Fraud Action In Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME LAW. 237, 249-80 (1982); Milner, *A Civil RICO Bibliography*, 21 CASE W. RES. L. REV. 409 (1985).

3. See Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1101 n.7 (1982); see also REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55 (1985).

to be generally recognized.⁴ Attorneys representing the victims of securities and commercial fraud now routinely add a claim alleging a RICO violation.⁵ It is the attractiveness of the remedy — the successful plaintiff's recovery of treble damages and attorney's fees — that has led to this ever increasing use of RICO.⁶

To establish a claim, a plaintiff must show that the defendant violated section 1962 of the statute and injured the plaintiff in his business or property by reason of such activity. Section 1962 makes it unlawful to invest in an enterprise income derived from a pattern of racketeering activity or through the collection of an unlawful debt;⁷ to acquire or maintain an enterprise through a pattern of racketeering activity or the collection of an unlawful debt;⁸ and to conduct the affairs of an enterprise through a pattern of racketeering activity or the collection of an

4. Some attribute the sudden increase in civil RICO litigation to an article co-authored by the Chief Counsel to the Senate Subcommittee which proposed RICO, Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980). Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 486-87 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

5. See, e.g., Moss v. Morgan Stanley, Inc., 719 F.2d 5 (2d Cir. 1983), *cert. denied sub nom.*, Moss v. Newman, 465 U.S. 1025 (1984) (plaintiffs, shareholders who sold stock on the open market prior to announcement of a tender offer, charged that traders who purchased on the basis of nonpublic information had a duty to disclose); Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984) (plaintiff was the target of a bankruptcy fraud).

6. 18 U.S.C. § 1964(c) (1982 & Supp. III 1985) states: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . . shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

In addition, bringing a RICO claim affords plaintiffs other advantages. A RICO count assures the plaintiff of a federal forum, Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 492, 503 (2d Cir. 1984) (disallowing this result because of the "clanging silence of the legislative history"), *rev'd*, 105 S. Ct. 3275 (1985); it creates a private cause of action for many federal crimes where none previously existed, Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1242 (S.D.N.Y. 1983) (refusing to allow this "revolutionary consequence" without a single mention in the legislative history) (quoting Moss v. Morgan Stanley, Inc., 553 F. Supp. 1347, 1361 (S.D.N.Y.), *aff'd*, 719 F.2d 5 (2d Cir. 1983), *cert. denied sub nom.*, Moss v. Newman, 465 U.S. 1025 (1984)); it creates alternative remedies for federal crimes which explicitly provide for private causes of action, Feldesman, 566 F. Supp. at 1241 (refusing to make a "fundamental change in the nature of private damage remedies" without clear congressional intent); and it may broaden the scope of discovery since, under the definition of "pattern of racketeering activity," see *infra* note 13, ten years may elapse between the predicate acts.

7. 18 U.S.C. § 1962(a) (1982).

8. 18 U.S.C. § 1962(b) (1982).

unlawful debt.⁹ In addition, it is illegal to conspire to do any of the above.¹⁰ Section 1961 provides definitions for the Act's operative terms, including "racketeering activity,"¹¹ "enterprise,"¹² "pattern of racketeering activity,"¹³ and "unlawful debt."¹⁴ Section 1963 provides criminal penalties for violations of section 1962.¹⁵ Finally, section 1964 provides civil remedies, including a private cause of action for any person "injured in his business or property by reason of a violation of section 1962."¹⁶

A key element in proving a RICO violation is the "pattern of racketeering activity." A "pattern of racketeering activity" requires the commission of at least two acts of racketeering activity (commonly referred to as predicate offenses) within a ten-year period.¹⁷ "Racketeering activity" is defined in terms of a number of state and federal offenses.¹⁸ Plaintiffs in securities and commercial fraud cases typically rely on three of the enumerated predicate offenses: any offense involving fraud in the sale of securities punishable under any law of the United States;¹⁹ any act indictable under the federal mail fraud statute;²⁰ and any act indictable under the federal wire fraud

9. 18 U.S.C. § 1962(c) (1982) states:

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

10. 18 U.S.C. § 1962(d) (1982).

11. 18 U.S.C. § 1961(1) (Supp. III 1985) defines "racketeering activity" in terms of a number of state and federal offenses, including "(B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . [or] (D) any offense involving . . . fraud in the sale of securities . . ."

12. 18 U.S.C. § 1961(4) (1982) states: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

13. 18 U.S.C. § 1961(5) (1982) states: "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

14. 18 U.S.C. § 1961(6) (1982).

15. 18 U.S.C. § 1963 (Supp. III 1985).

16. See *supra* note 6.

17. See *supra* note 13.

18. See *supra* note 11.

19. 18 U.S.C. § 1961(1)(D) (Supp. III 1985). See *supra* note 11.

20. 18 U.S.C. § 1961(1)(B) (Supp. III 1985). This section refers to 18 U.S.C. § 1341.

statute.²¹

Establishing the predicate offenses, however, is not in itself sufficient to establish a RICO violation. The illegal conduct must have been committed for one of the illegal purposes specified in section 1962.²² Plaintiffs in securities and commercial fraud cases commonly use section 1962(c).²³ Interpreting the various elements of the statute, and their relationship to each other, has caused considerable judicial confusion. In addition, the courts have engaged in continuing attempts to limit the scope of the private RICO claim.

B. *Early History of Private Litigation*

Many district courts used a number of different theories in order to restrict the application of civil RICO. Initially, the most popular rationale for dismissing a plaintiff's RICO claim was that the defendant must have some nexus with organized crime.²⁴ As alternative or additional approaches, many courts reasoned that Congress could not have intended to federalize all business fraud cases²⁵ or to supplant the fraud provisions in

See supra note 11.

21. 18 U.S.C. § 1961(1)(B) (Supp. III 1985). This section refers to 18 U.S.C. § 1343. *See supra* note 11.

22. *See supra* notes 7-10 and accompanying text.

23. *See supra* note 9. Under § 1962(c), a corporate entity may not simultaneously be the "enterprise" and the "person" who conducts the affairs of the enterprise through a pattern of racketeering activity. *Bennett v. United States Trust Co. of N.Y.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 800 (1986). The Seventh Circuit has held that under § 1962(a), the liable person may be a corporation using the proceeds of a "pattern of racketeering activity" in its operations. *Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397 (7th Cir. 1985). This holding, which is questionable, may cause plaintiffs to attempt to recast § 1962(c) claims into § 1962(a) claims.

24. *Waterman Steamship Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981) (legislative history reveals a clearly expressed legislative intent that RICO should only apply to organized crime); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 746-48 (N.D. Ill. 1981) (legislative history shows that the Act's application is limited to entities involved with organized crime or activities within the penumbra of that phrase); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (Act is "aimed at a society of criminals who seek to operate outside of the [law]").

25. *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1361 (S.D.N.Y.), *aff'd*, 719 F.2d 5 (2d Cir. 1983), *cert. denied sub nom*, *Moss v. Newman*, 465 U.S. 1025 (1984); *Waterman Steamship Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981).

other federal statutes;²⁶ and that the judiciary must impose limits on private RICO claims because there is no "prosecutorial discretion" to weed out marginal cases.²⁷ Courts also tried to curb the application of civil RICO by asserting that the injury complained of must result from "enterprise" involvement in racketeering activity, rather than from the racketeering activity itself,²⁸ or that the plaintiff must suffer a "competitive"²⁹ or "racketeering"³⁰ injury. Most of these analyses did not survive scrutiny at the circuit court level until the Second Circuit's decision in *Sedima, S.P.R.L. v. Imrex Co.*³¹

In *Sedima*, the Second Circuit imposed two restrictions on private RICO actions. First, the defendant must have been convicted of either the RICO offense or the underlying predicate offenses.³² Second, the plaintiff must suffer a special RICO

26. *Aliberti v. E.F. Hutton & Co.*, 591 F. Supp. 632 (D. Mass. 1984); *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982).

27. See *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 497 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985) (citing to UNITED STATES ATTORNEYS' STAFF MANUAL, EXECUTIVE OFFICE FOR U.S. ATTORNEYS, RICO GUIDELINES (Jan. 30, 1981)).

28. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 492 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985); *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981).

29. *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983) (it is appropriate to limit the extraordinary private remedy of § 1964 to persons who have suffered a competitive injury by reason of racketeering activity); *North Barrington Dev. Corp. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980) (plaintiff must allege how he was injured competitively by the RICO violation in order to state a cause of action).

30. *Willamette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415, 1428-29 (D. Or. 1984) (a racketeering enterprise injury would occur if the defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering activity); *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 851-52 (E.D. Va. 1983) (Section 1964(c) compensates plaintiffs who suffer racketeering injuries, not injuries resulting solely from predicate acts); *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982) (because Congress could not have intended to grant treble damages to those persons injured directly from the predicate acts, a racketeering injury requirement is entirely consistent with the legislative history of the statute).

31. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985). *Sedima*, the plaintiff, was a Belgian supplier of aerospace and defense equipment, and the defendant, *Imrex*, was a New York based exporter of aviation parts. The two companies entered a joint venture for the purpose of supplying parts to a European customer. *Sedima* charged that *Imrex* submitted fraudulently inflated bills, thereby receiving disbursements in excess of what was actually due. *Id.* at 484-85. The complaint contained counts in unjust enrichment, conversion, breach of contract, breach of fiduciary duty, breach of a constructive trust as well as RICO violations.

32. *Id.* at 496-504.

injury.³³

There was no justification for the prior conviction requirement in either the statute or its legislative history. Other courts had considered and rejected the requirement of a conviction as a prerequisite to a private RICO suit.³⁴ To justify this requirement, the *Sedima* court set forth a tortured construction of the statute.³⁵ The *Sedima* court's central concern, however, was the difficulty in determining criminal conduct in a civil trial³⁶ because of what it viewed as due process requirements.³⁷

33. *Id.* at 494-96.

34. *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) (holding that a private civil suit under § 1964(c) exists without a prior conviction under § 1963); *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (holding that a civil proceeding under § 1964 by the federal government is an allowable alternative to a criminal proceeding under § 1963). *Contra* *Rush v. Oppenheimer & Co.*, 592 F. Supp. 1108 (S.D.N.Y. 1984) (holding that a prior criminal conviction is required); *Bennett v. E.F. Hutton & Co.*, 597 F. Supp. 1547 (N.D. Ohio 1984) (holding that plaintiff must establish that there is probable cause to believe that the predicate acts were committed); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983) (holding that plaintiff must establish that there is probable cause to believe that the predicate acts were committed).

35. The Second Circuit relied on what it deemed a "plausible" definition of the words "indictable" and "chargeable" in § 1961(a): "[T]hat Congress did not intend to give civil courts power to determine whether an act is 'indictable' in the absence of a properly returned indictment or 'chargeable' absent an information," *Sedima*, 741 F.2d at 499-500.

The court also compared the RICO remedy to the antitrust remedy. It noted that § 4 of the Clayton Act allowed recovery for anybody "injured in his business or property by reason of anything forbidden in the antitrust laws," Clayton Act § 4, 15 U.S.C. 15(a) (1983), while § 1964(c) allows recovery if the injury was "by reason of a violation of section 1962." The court reasoned that use of the word "violation," rather than the phrase "anything forbidden," indicated a legislative intent to require a criminal conviction for the predicate acts. *Sedima*, 741 F.2d at 498-99.

36. This argument was based primarily on the burden of proof. It was noted that no court had ever required that the predicate acts be proved beyond a reasonable doubt in a private RICO action. *Sedima*, 741 F.2d at 501 n.53. Nevertheless, since RICO only punishes criminal conduct, the court concluded that when there is no previous conviction for the predicate acts, the plaintiff must meet the burden of proof required in a criminal proceeding. The court believed that requiring the jury to apply the beyond a reasonable doubt standard to the predicate acts and a preponderance standard to all other elements would impose too great a burden on the jury. A previous conviction requirement would eliminate this difficulty. *Id.* at 501-02.

37. This rationale presumed that RICO was a criminal statute and as a result must be strictly construed. In light of this conclusion, the court felt that the liberal construction provision, Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970), would be unconstitutional, and would therefore be useless unless a criminal conviction was required. *Sedima*, 741 F.2d at 502-03.

The requirement of a special RICO injury was derived from the fact that Congress had looked to the private antitrust remedy³⁸ as a model for section 1964(c), i.e., "any person injured . . . by reason of a violation of section 1962" may recover treble damages. Because this language in the antitrust law created the requirement of a "competitive injury,"³⁹ the court concluded that the RICO statute required an analogous "racketeering injury."⁴⁰ The Second Circuit, however, developed this requirement to revive the previously discredited⁴¹ "mafia defendant" argument. This is evident in the court's statement that:

RICO was not enacted merely because criminals break laws, but because mobsters either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systematic harm to competition and the market, and thereby injure investors and competitors It is only when injury caused by this kind of harm can be shown, therefore, that we believe that Congress intended that standing to sue civilly should be granted.⁴²

Sedima provides no specific examples of this "special injury."

It is interesting to note that the Second Circuit revived this "mafia defendant" requirement after explicitly rejecting it in *Moss v. Morgan Stanley, Inc.*⁴³ The fact that the *Moss* decision was explicitly mentioned by the *Sedima* court⁴⁴ as eliminating a requirement of a connection with organized crime⁴⁵ lends credence to the idea that the Second Circuit was striving to find a way to dismiss this case and thereby limit the use of civil RICO.

Additionally, the court was reluctant to brand a defendant a "racketeer" without first convicting him of a crime. *Id.* at 487-88.

38. 15 U.S.C. § 15(a) (1982), which states in part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor" (emphasis added).

39. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

40. *Sedima*, 741 F.2d at 495.

41. *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied sub nom.*, *Moss v. Newman*, 465 U.S. 1025 (1984).

42. *Sedima*, 741 F.2d at 495-96.

43. 719 F.2d 5, 21-23 (2d Cir. 1983), *cert. denied sub nom.*, *Moss v. Newman*, 465 U.S. 1025 (1984).

44. *Sedima*, 741 F.2d at 492 n.31.

45. *See supra* note 41.

Sedima was the first of three RICO cases decided by the Second Circuit in a three-day period.⁴⁶ The second, *Bankers Trust Co. v. Rhoades*,⁴⁷ agreed with *Sedima*'s reasoning⁴⁸ and attempted to clarify it by defining a racketeering injury by example. The *Rhoades* court concluded that a RICO plaintiff can only recover if he is damaged by the pattern of racketeering activity itself, and not merely by the predicate acts.⁴⁹ The court gave as an example a plaintiff who is victimized by multiple acts of arson committed by a defendant and is subsequently denied fire insurance based on this history. If he should later suffer fire damage not caused by defendants, he has incurred a racketeering injury to the extent of the uninsured fire loss.⁵⁰ Under this definition, then, plaintiff can only recover for his indirect injuries.⁵¹

The division within the judiciary with respect to the scope of the private RICO claim was exemplified by the third decision of the Second Circuit's trilogy, *Furman v. Cirrito*.⁵² The panel deciding this case was compelled to follow *Sedima* and *Rhoades* as binding precedent, but dissented from the reasoning of these cases.⁵³ Clearly, the matter was ripe for Supreme Court review.

C. The Supreme Court's Decision in *Sedima*

The Supreme Court reversed the Second Circuit in a five-to-four decision.⁵⁴ The Court first addressed the prior conviction requirement. The Court found nothing in the statutory language to support a prior conviction requirement,⁵⁵ nor did it find sup-

46. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985); *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984); *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984).

47. 741 F.2d 511 (2d Cir. 1984).

48. *Id.* at 516-17.

49. *Id.* at 516-18.

50. *Id.* at 517.

51. *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 396-97 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985), (criticizing this example as compensating only indirect injuries).

52. 741 F.2d 524 (2d Cir. 1984).

53. *Id.* at 525.

54. 105 S. Ct. 3275 (1985). Chief Justice Burger, Justices White, Rehnquist, Stevens and O'Connor in the majority; Justices Brennan, Marshall, Blackmun and Powell dissenting.

55. *Id.* at 3281-84. The Court was unimpressed with the Second Circuit's argument

port for the Second Circuit's interpretation in the legislative history.⁵⁶ In fact, the Court noted that "[t]he only specific reference in the legislative history to prior convictions . . . [was] an objection that the treble damages provision is too broad precisely because 'there need *not* be a conviction under any of these laws for it to be racketeering.'"⁵⁷

After rejecting the Second Circuit's due process related arguments, the Court stated:

In sum, we can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists.⁵⁸

There was no dissent on this point.⁵⁹

The Court next addressed the requirement of a "racketeering injury." The Court first noted that it was unclear whether the Second Circuit intended the "special injury" requirement as a standing requirement or as a limitation on damages. What the Second Circuit intended, however, was irrelevant to a majority of the justices.⁶⁰ In rejecting this requirement, the Court relied on the unambiguous language of the statute and on the Congressional mandate that it was to be "liberally construed to effectuate its remedial purposes."⁶¹ The Court made it clear that a violation of section 1964(c) is established by showing: "(1) con-

that the use of the word "violation" in § 1964(c) mandated a criminal conviction. The Court refused to look past the ordinary meaning of the word, i.e., "[i]t refers only to a failure to adhere to legal requirements." *Id.* at 3281. Additionally, the Court noted that the Act's definition of "racketeering activity" refers to acts for which a defendant could be convicted, not for which he has been convicted, i.e., the Court did not agree that the words "indictable" and "chargeable" required that an indictment or information be in force. *Id.* at 3281; see *supra* note 35 and accompanying text.

56. *Sedima*, 105 S. Ct. at 3281.

57. *Id.* at 3282 (quoting 116 CONG. REC. 35, 342 (1970) (emphasis added by the Court)).

58. *Sedima*, 105 S. Ct. at 3284.

59. *Id.* at 3288-91 (Powell, J., dissenting); *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3292 (1985) (Marshall, J., dissenting to both the *Sedima* and *Haroco* decisions by separate opinion).

60. *Sedima*, 105 S. Ct. 3284-87.

61. *Id.* at 3286, (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970)). See also *supra* note 37.

duct (2) of an enterprise (3) through a pattern (4) of racketeering activity. . . . In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."⁶² Imposing any additional requirements would emasculate the civil provision and as a result, the remedial purpose of the Act.⁶³ In closing, the majority noted that the Act was not being used as originally intended by Congress; it was unwilling, however, to create a judicial amendment to a legislative act.⁶⁴

D. *The Importance of Sedima*

Sedima was the Supreme Court's first examination of civil RICO; the two previous RICO cases decided by the Court involved criminal proceedings.⁶⁵ Thus, the Court's decision was important as the first indicator of the Court's views on civil RICO. In addition, since the Second Circuit in *Sedima* practically eliminated the private remedy, the Court's decision determined the fate of the private remedy at the judicial level. While the Court had adopted a broad view of RICO in the previous criminal cases, many expected that the Court would not accept the federalization of commercial fraud and would, therefore, restrictively interpret private RICO claims. Contrary to the Second Circuit, the *Sedima* Court made it clear that civil RICO is indeed a federal business fraud statute.⁶⁶ The Court cited figures from the Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law stating that only nine percent of private suits involve allegations of criminal activity of a type generally associated with organized crime, forty percent involve securities fraud, and thirty-seven

62. *Sedima*, 105 S. Ct. at 3285.

63. *Id.* at 3286.

64. *Id.* at 3287. The dissents of Justice Powell, *Id.* at 3288, and Justice Marshall, *Id.* at 3292, agreed that the majority decision permitted the use of civil RICO in situations never intended by Congress. They took the view that the legislative history showed an intent to limit the Act to those engaged in organized crime and that the racketeering injury requirement was necessary to achieve this goal. Additionally, the dissenting Justices were unwilling to permit the drastic legal results which would stem from the majority's holding. See *supra* note 6.

65. *Russello v. United States*, 464 U.S. 16 (1983); *United States v. Turkette*, 452 U.S. 576 (1981).

66. *Sedima*, 105 S. Ct. at 3287.

percent common law fraud in a commercial or business setting.⁶⁷ Nevertheless, the Supreme Court, while doubting the wisdom of the policy, made it clear that policy was a Congressional decision. Congress had expressly provided a private remedy with tremendous breadth. The fact that private RICO was evolving into something quite different from the original conception of its enactors was, therefore, not grounds for judicial activism.⁶⁸

Thus, the Court in *Sedima* placed responsibility for amending the RICO statute on Congress. Nevertheless, the Court did not close the door on all judicial attempts to limit private RICO's scope. The Court extended an invitation to the lower courts to develop a meaningful concept of a "pattern of racketeering activity."⁶⁹ The Court emphasized that the definition of "pattern of racketeering activity" requires "at least two acts of racketeering activity . . . not that it *means* two such acts. . . . [W]hile two acts are necessary, they may not be sufficient."⁷⁰ The Court noted that "in common parlance, two of anything do not generally form a 'pattern.'"⁷¹ It found support in the legislative history for "the view that two isolated acts of racketeering activity do not constitute a pattern."⁷²

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

67. *Sedima*, 105 S. Ct. at 3287 n.16 (citing REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55-56 (1985)).

68. *Sedima*, 105 S. Ct. at 3287.

69. *Id.*

70. *Id.* at 3285 n.14 (emphasis added).

71. *Id.*

72. *Id.*

665.⁷³

It also referred to the definition of "pattern" in another section of the bill: "'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.'"⁷⁴

II. "Pattern of Racketeering Activity" After *Sedima*

Since *Sedima*, the courts have been struggling to determine what is necessary to have "more than two isolated acts." The focus has been on two concepts, relationship and continuity.⁷⁵ These elements can be exemplified by contrasting two significant post-*Sedima* cases.

In *R.A.G.S. Couture, Inc. v. Hyatt*,⁷⁶ plaintiff sued two defendants who allegedly attempted to defraud him by twice mailing him false invoices. Judge Wisdom, speaking for the Fifth Circuit, found a "pattern" here because these acts were related and were not two isolated events.⁷⁷ Judge Wisdom observed that this case "stretches the statutory language to its limit,"⁷⁸ yet he declined the Supreme Court's invitation to develop yet another approach to restrict RICO.

In contrast, in *Northern Bank/O'Hare v. Inryco, Inc.*,⁷⁹ a bank charged a contractor with participation in a kickback scheme. Plaintiff alleged as the requisite predicate offenses the mailing of a subcontract and the mailing of a kickback check. The district court found no "pattern" here, because a pattern connotes a multiplicity of events.⁸⁰ "Surely the continuity inherent in the term presumes repeated criminal activity, not merely

73. *Id.*

74. *Id.* (quoting 18 U.S.C. § 3575(e) (1970)).

75. See *supra* note 73 and accompanying text.

76. 774 F.2d 1350 (5th Cir. 1985).

77. *Id.* at 1355.

78. *Id.* at 1357. But see *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith*, 785 F.2d 1274 (5th Cir. 1986), where a different panel expressed no opinion as to whether *Sedima* required a narrower interpretation of pattern and made no reference to *Hyatt*.

79. 615 F. Supp. 828 (N.D. Ill. 1985).

80. *Id.* at 829-30.

repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'"⁸¹ A subsequent district court opinion noted that *Inryco* involved merely two "ministerial acts performed in the execution of a single fraudulent transaction."⁸² Under *Inryco*, two allegations of mail fraud do not constitute a pattern.⁸³ In dictum, moreover, the court stated that even if plaintiff amended his complaint to allege that three additional kickback payments involved use of the mails, there still would not be a pattern because there is still but one fraudulent scheme. Unless plaintiff can show similar racketeering acts occurring in different criminal episodes, there is no continuity.⁸⁴

In the RICO securities and commercial fraud cases, there is typically a fraudulent scheme effected through multiple mailings, so that at least one, and often all, of the predicate offenses is a mail (or wire) fraud violation.⁸⁵ Establishing a relationship between the predicate acts is not a problem. Indeed, the problem the *Inryco* court had with these cases is that the acts are too related. While each mailing in furtherance of the fraud may technically be a separate violation of the mail fraud statute, *Inryco* is saying that plaintiff's complaint alleges one discrete fraud which cannot be subdivided into two parts for purposes of establishing a RICO claim.⁸⁶ Plaintiff's claim may fail, then, for failure to establish the requisite continuity. To illustrate, assume that plaintiff sues his partner in a joint venture, alleging that defendant had, on one occasion, defrauded him by sending him a telegram of a false invoice and also, on the same day, mailing an identical copy. After *Sedima*, most courts, with the possible exception of the Fifth Circuit, would almost certainly not find a pattern here, because there is no continuity. This is in contrast to the pre-*Sedima* case law, where most courts found a pattern

81. *Id.* at 831 (emphasis in original).

82. *Graham v. Slaughter*, 624 F. Supp. 222, 225 (N.D. Ill. 1985).

83. *Inryco*, 615 F. Supp. at 833.

84. *Id.* at 831-32 (quoting *United States v. Moeller*, 402 F. Supp. 49, 57-58 (D. Conn. 1975)).

85. See, e.g., *supra* notes 76-84 and accompanying text.

86. *Inryco*, 615 F. Supp. at 831-34.

automatically upon the finding of two predicate acts.⁸⁷

On the other hand, assume that plaintiff alleges that his partner defrauded him over a period of time by mailing him a series of false invoices. By increasing the number of predicate acts, by varying the contents of each communication in order to make each appear more "separate," and by extending them over a period of time in order to make the fraud appear more continuous, the argument that this is only one indivisible fraud is weakened. Is this enough to find a pattern, or must plaintiff show something more?

To date, only one circuit court opinion has required something more to satisfy the element of continuity. In *Superior Oil Co. v. Fulmer*,⁸⁸ the Eighth Circuit held that plaintiff failed to prove that the conversion of liquid petroleum gas by a former employee and his associates was anything more than one isolated fraudulent scheme. Continuity was not established by proving that defendants' actions comprised "one continuing scheme."⁸⁹ There must be proof that defendants had previously engaged in these activities, or that they were engaged in other criminal activities elsewhere, or, perhaps, that they threatened similar future frauds.⁹⁰ In contrast, in another Eighth Circuit opinion, *Alexander Grant & Co. v. Tiffany Industries*,⁹¹ an accounting firm charged a scheme of mail and wire fraud designed by its corporate client in order to obtain a favorable audit for one year. The original complaint alleged at least twenty-six acts of mail fraud and four acts of wire fraud. The Eighth Circuit held that this constituted a pattern: "The number and nature of acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient 'continuity plus relationship' to satisfy the Supreme Court's concerns . . . that RICO not be extended to

87. There were a few exceptions to the pre-*Sedima* trend. *Exeter Towers Assoc. v. Bowditch*, 604 F. Supp. 1547 (D. Mass. 1985); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6 (W.D. Pa. 1981). Both opinions emphasized the congressional purpose of fighting organized crime.

88. 785 F.2d 252 (8th Cir. 1986).

89. *Id.* at 257.

90. *Id.*

91. 770 F.2d 717 (8th Cir. 1985), *cert. denied sub nom.*, *Kahn v. Alexander Grant & Co.*, 106 S. Ct. 799 (1986).

reach sporadic activity.”⁹²

The Seventh Circuit upheld a RICO claim brought by state taxing authorities against a retailer that mailed nine fraudulent state sales tax returns over a nine-month period in *Illinois Department of Revenue v. Phillips*.⁹³ Although decided within two months after *Sedima*, the opinion contains no discussion of “pattern.” Subsequent district court opinions in the Seventh Circuit have reasoned that there was a pattern in *Phillips* because each mailing was a separate offense causing a separate injury. In this way the district courts have attempted to distinguish *Phillips*⁹⁴ from *Inryco*,⁹⁵ where the predicate acts were multiple mailings in a single fraudulent scheme.⁹⁶ This attempted distinction ignores the fact that under the mail and wire fraud statutes each communication is technically a separate offense. The difference here is one of degree, not of kind. Nevertheless, the courts are right that there is a difference: the retailer in *Phillips* might well be prosecuted for filing one fraudulent sales tax return, but the contractor in *Inryco* would never be prosecuted under the mail fraud statute for mailing one subcontract.

Finally, among the circuits, in *Bank of America National Trust & Savings Association v. Touche Ross & Co.*,⁹⁷ the Eleventh Circuit held that the plaintiff banks had stated a RICO cause of action against the accounting firm of a corporation to which the plaintiffs lent money. Subsequently, the corporation went into bankruptcy.⁹⁸ A pattern was alleged where the banks specified nine separate acts of wire and mail fraud, involving the

92. *Id.* at 718 n.1.

93. 771 F.2d 312 (7th Cir. 1985).

94. *Medical Emergency Serv. Assocs. v. Foulke*, 633 F. Supp. 156 (N.D. Ill. 1986); *Graham v. Slaughter*, 624 F. Supp. 222 (N.D. Ill. 1985). These opinions were both written by Judge Getzendanner.

95. On the other hand, some district courts in the Seventh Circuit are unable to harmonize the *Inryco* and *Phillips* decisions. *Shore v. Freitag Realty, Inc.*, No. 83-C-2582 (N.D. Ill. Feb. 10, 1986) (available July 22, 1986, on LEXIS, Genfed library, Dist file); *Aetna Casualty & Sur. Co. of Ill. v. Levy*, No. 83-C-3566 (N.D. Ill. Nov. 7, 1985) (available July 22, 1986, on LEXIS, Genfed library, Dist file). Some district court opinions in the Seventh Circuit have rejected *Inryco*'s requirement of different criminal episodes. *Trak Microcomputer Corp. v. Wearne Bros.*, 628 F. Supp. 1089 (N.D. Ill. 1985).

96. See *supra* notes 79-84 and accompanying text.

97. 782 F.2d 966 (11th Cir. 1986).

98. *Id.* at 971.

same parties over a period of three years, for the purpose of inducing the banks to extend credit to the bankrupt corporation.

The standard which has been applied in this Circuit is whether each act constitutes "a separate violation of the [state or federal] statute" governing the conduct in question If distinct statutory violations are found, the predicate acts will be considered to be distinct irrespective of the circumstances under which they arose.⁹⁹

There is, however, a substantial body of case law at the district court level for the view that continuity does require something more.¹⁰⁰ The *Inryco* dictum of separate criminal episodes is the most common judicial gloss to the definition of "pattern." A pattern, in the view of one district court, "must include racketeering acts sufficiently unconnected in time or substance to warrant consideration as separate criminal episodes."¹⁰¹ The definition of pattern, then, becomes paradoxical: the acts must be "related," yet "unconnected." Under this interpretation, our hypothetical RICO plaintiff would, for example, have to allege not only that his partner defrauded him by mailing him false invoices, but also that he defrauded him by burning down partnership property. Plaintiff must now also be concerned that a court might find these separate criminal episodes unrelated. Other ways to establish continuity through emphasis on different crim-

99. *Id.* (quoting *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir. 1985)).

100. *Soper v. Simmons Int'l, Ltd.*, 632 F. Supp. 244 (S.D.N.Y. 1986); *Dunham v. Independence Bank of Chicago*, 629 F. Supp. 983 (N.D. Ill. 1986); *Torwest DBC, Inc. v. Dick*, 628 F. Supp. 163 (D. Colo. 1986); *Medallion TV Enters., Inc. v. SELECTV of Cal., Inc.*, 627 F. Supp. 1290 (C.D. Cal. 1986); *Fleet Management Sys., Inc. v. Archer-Daniels-Midland Co.*, 627 F. Supp. 550 (C.D. Ill. 1986); *Kredietbank v. Joyce Morris, Inc.*, No. 84-1903 (D.N.J. Jan. 9, 1986) (available July 22, 1986, on LEXIS, Genfed library, Dist file); *Modern Settings, Inc. v. Prudential Bache Sec., Inc.*, 629 F. Supp. 860 (S.D.N.Y. 1986); *Medical Emergency Serv. Assocs. v. Foulke*, 633 F. Supp. 156 (N.D. Ill. 1986); *Fagenholz v. AMF, Inc.*, No. 85-C-3456 (N.D. Ill. Dec. 5, 1985) (available July 22, 1986, on LEXIS, Genfed library, Dist file); *International Television Prods., Ltd. v. Twentieth-Century Fox Television Div.*, 622 F. Supp. 1532 (S.D.N.Y. 1985); *Professional Assets Management, Inc. v. Penn Square Bank*, 616 F. Supp. 1418 (W.D. Okla. 1985); *Allington v. Carpenter*, 619 F. Supp. 474 (C.D. Cal. 1985); *Morgan v. Bank of Waukegan*, 615 F. Supp. 836 (N.D. Ill. 1985); *Rojas v. First Bank Nat'l Assoc.*, 613 F. Supp. 968 (E.D.N.Y. 1985). *Cf.* *SJ Advanced Technology & Mfg. Corp. v. Junkunc*, 627 F. Supp. 572 (N.D. Ill. 1986).

101. *Allington v. Carpenter*, 619 F. Supp. 474, 478 (C.D. Cal. 1985).

inal episodes would be to show that plaintiff and defendant had been involved in other ventures where the defendant had committed similar fraud, or that defendant had committed similar frauds on other firms.¹⁰²

To other district courts, continuity embodies a requirement that the fraud be ongoing.¹⁰³ This interpretation is based on *Sedima's* quotation from the Senate Report on "the threat of continuing activity."¹⁰⁴ In *Rojas v. First Bank National Association*,¹⁰⁵ plaintiff alleged that defendant bank fraudulently induced him to execute a guaranty and a note to back up several loans defendant made to a shipping corporation formed by plaintiff and his associates, of which plaintiff was the president.¹⁰⁶ The court, in awarding summary judgment for the defendant, found that plaintiff introduced no evidence to support a finding of fraud.¹⁰⁷ Furthermore, the court observed that even if plaintiff had proven fraud, he could not demonstrate a pattern, because all he alleged were two discrete transactions with defendant.¹⁰⁸ Although the court did not elaborate, the court apparently determined that because these transactions were concluded, there was no threat of continuing activity.¹⁰⁹

On the other hand, other district court decisions have noted the period of time over which the acts took place, reasoning that continuity is established by showing that the predicate acts took place over a continuous period of time.¹¹⁰ Unlike the suggestion

102. See, e.g., *SJ Advanced Technology & Mfg. Corp. v. Junkunc*, 627 F. Supp. 572 (N.D. Ill. 1986); *Kredietbank v. Joyce Morris, Inc.*, No. 84-1903 (D.N.J. Jan. 9, 1986) (available July 22, 1986, on LEXIS, Genfed library, Dist file); *Papagiannis v. Pontikis*, 108 F.R.D. 177 (N.D. Ill. 1985).

103. See, e.g., *Rojas v. First Bank Nat'l. Assoc.*, 613 F. Supp. 968, 971 n.1. (E.D.N.Y. 1985).

104. *Sedima*, 105 S. Ct. at 3285 n.14. See *supra* notes 69-74 and accompanying text.
105. 613 F. Supp. 968 (E.D.N.Y. 1985).

106. *Id.* at 969.

107. *Id.* at 971.

108. *Id.* at 971 n.1. See also *Lipin Enters., Inc. v. Lee*, 625 F. Supp. 1098 (N.D. Ill. 1985) (twelve transactions were not sufficient).

109. *Rojas*, 613 F. Supp. at 971.

110. *Corcoran Partners, Ltd. v. Dresser Indus., Inc.*, No. 84-C-4506 (N.D. Ill. Dec. 18, 1985) (available Apr. 6, 1986, on LEXIS, Genfed library, Dist file); *Trak Microcomputer Corp. v. Wearne Bros.*, 628 F. Supp. 1089 (N.D. Ill. 1985). Compare *Modern Settings, Inc. v. Prudential Bache Sec. Inc.*, 629 F. Supp. 860, 864 (S.D.N.Y. 1986) ("single episode of fraud, [plaintiff alleged malicious liquidation of its accounts] decried by plaintiffs for its very hastiness," even though each of the multiple sales may have violated the

in *Rojas*, however, these courts do not require that the fraud be ongoing at the time the suit is brought.

Thus, the circuit court opinions and a sizable number of the district court opinions decided to date¹¹¹ evidence an emerging consensus of what pattern requires, a middle position between Judge Wisdom's dispensing with any requirement of continuity¹¹² and either *Inryco's* requirement of at least two separate criminal episodes¹¹³ or *Rojas's* suggested requirement of ongoing activity.¹¹⁴ The relevant factors are the number of predicate offenses (the more the better), the separateness of each offense (the more it looks like a separate crime or tort, the better) and the duration (the longer, the better). Specific examples of what constitutes a "pattern" include: plaintiff alleging that it bought a division from defendant based on a balance sheet which overstated assets and understated liabilities;¹¹⁵ plaintiff alleging churning, misrepresentations as to riskiness, profitability, type of activity in account, and deceptions as to broker's skills, over an eighteen-month period;¹¹⁶ and plaintiff alleging a two-year practice of embezzling funds from a corporation.¹¹⁷

securities laws).

111. *First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 629 F. Supp. 427 (S.D.N.Y. 1986); *LSC Assocs. v. Lomas & Nettleton Fin. Corp.*, 629 F. Supp. 979 (E.D. Pa. 1986); *Shore v. Freitag Realty, Inc.*, No. 83-C-2582 (N.D. Ill. Feb. 10, 1986) (available July 22, 1986, on LEXIS, Genfed library, Dist file); *Lumpkin v. International Harvester Co.*, No. 81-C-6674 (N.D. Ill. Feb. 7, 1986) (available July 22, 1986, on LEXIS, Genfed library, Dist file); *United Fish Co. v. Barnes*, 627 F. Supp. 732 (D. Me. 1986); *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188 (S.D.N.Y. 1986); *Corcoran Partners, Ltd. v. Dresser Indus., Inc.*, No. 84-C-4506 (N.D. Ill. Dec. 18, 1985) (available July 22, 1986, on LEXIS, Genfed library, Dist file); *Graham v. Slaughter*, 624 F. Supp. 222 (N.D. Ill. 1985); *Aetna Casualty & Sur. Co. of Ill. v. Levy*, No. 83-C-3566 (N.D. Ill. Nov. 7, 1985) (available July 22, 1986, on LEXIS, Genfed library, Dist file); *Trak Microcomputer Corp. v. Wearne Bros.*, 628 F. Supp. 1089 (N.D. Ill. 1985); *Conan Properties, Inc. v. Mattel, Inc.*, 619 F. Supp. 1167 (S.D.N.Y. 1985).

112. See *supra* notes 76-78 and accompanying text.

113. See *supra* notes 79-84 and accompanying text.

114. See *supra* notes 103-09 and accompanying text.

115. *Corcoran Partners, Ltd. v. Dresser Indus., Inc.*, No. 84-C-4506 (N.D. Ill. Dec. 18, 1985) (available July 22, 1986, on LEXIS, Genfed library, Dist file).

116. *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188 (S.D.N.Y. 1986).

117. *Graham v. Slaughter*, 624 F. Supp. 222 (N.D. Ill. 1985).

III. Conclusion

This "middle position"¹¹⁸ in the case law is the correct approach. The legislative history cited in *Sedima* evidences more concern about a relationship between the predicate acts than continuity. In particular, the definition of "pattern" from another provision of the same bill, which is quoted in a footnote to the opinion,¹¹⁹ is exclusively focused on the relatedness of the acts.¹²⁰ Nevertheless, some of the quoted legislative history does deal with the element of continuity.¹²¹ Hence, Judge Wisdom's elimination of a continuity requirement in *R.A.G.S. Couture, Inc. v. Hyatt*¹²² goes too far. Moreover, there is something to be said for *Sedima*'s "common parlance" argument: two is usually not a pattern. On the other hand, *Inryco* and *Rojas* may place too much emphasis on continuity. To accept *Inryco*'s holding that two acts of mail fraud which are merely ministerial acts in furtherance of one indivisible scheme are not a pattern is not necessarily to accept the view that two criminal episodes are required for a finding of a pattern. Similarly, the *Rojas* view that the fraud must be ongoing should not be extended into a requirement that the wrongdoing continue until the date of the suit. Rather, continuity is established by a showing that the acts took place over some period of time.

This article, however, cannot conclude without at least raising the larger issue — whether RICO should be amended. Several legislative proposals have been introduced in Congress.¹²³ While hearings were held in the Fall of 1985, none of the proposals has been reported out of committee to date.

House Bill H.R. 2517 proposes a number of changes in the definitional and offense provisions, including a new definition of "pattern."¹²⁴ It specifies that the predicate acts must be "sepa-

118. See *supra* notes 111-14 and accompanying text.

119. See *supra* note 74 and accompanying text.

120. *Id.*

121. See *supra* text accompanying note 73.

122. See *supra* notes 76-78 and accompanying text.

123. S. 1521, 99th Cong., 1st Sess. (1985) (introduced by Sen. Hatch on July 29, 1985); H.R. 2943, 99th Cong., 1st Sess. (1985) (introduced by Rep. Boucher on July 10, 1985); H.R. 2517, 99th Cong., 1st Sess. (1985) (introduced by Rep. Congers on May 15, 1985).

124. The proposal would also amend the statute to delete use of the term "racke-

rate in time and place" and "interrelated by a common scheme, plan or motive, and are not isolated events."¹²⁵ In addition, all of the predicate acts cannot be violations of the same statute, if that statute is the mail or wire fraud statute.¹²⁶

The other two proposals would amend only section 1964(c). House Bill H.R. 2943 would permit private civil RICO suits only against defendants that have been convicted of racketeering activity or of a violation of section 1962.¹²⁷ In addition, a civil RICO action would have to be brought within one year after the latest conviction.¹²⁸

Senate Bill S. 1521 would require plaintiff to establish a "competitive, investment, or other business injury" in order to recover treble damages.¹²⁹ In addition, only with respect to section 1964(c) actions, one of the predicate offenses would have to be an act other than mail or wire fraud or an offense involving fraud in the sale of securities.¹³⁰ Moreover, the court would have

teering," so § 1961(5) would become the definition for "pattern of criminal activity." H.R. 2517, 99th Cong., 1st Sess. § 1 (1985).

125. Each of the predicate offenses must also have occurred "not more than five years before the indictment is found, or information is instituted, that names such acts as predicate criminal activity." *Id.* The proposal does not specify the consequences if there is no indictment or information.

H.R. 2517's definition of "pattern" is similar to a proposed definition of "pattern" made by the ABA's Criminal Justice Section RICO Cases Committee: "two or more occasions of conduct that constitute criminal activity, are related to the affairs of the enterprise, are not isolated, and are not so closely related to each other and connected in point of time and place that they constitute a single event." A similar redefinition of "pattern" is proposed by the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law: "requiring (i) that the underlying predicate offenses be connected to each other by a common scheme and (ii) that the underlying predicate offenses arise in two or more separate and distinct criminal episodes." REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 208 (1985).

126. H.R. 2517, 99th Cong., 1st Sess. § 1 (1985). This is also true if the statutory provision relates to the transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting. As drafted, if the other requirements were met, a pattern would be found if there was one violation of the mail fraud statute and one violation of the wire fraud statute. *Id.*

127. H.R. 2943, 99th Cong., 1st Sess. (1985).

128. *Id.* A committee of the Bar Association of the City of New York has also recommended a prior conviction requirement, but would extend it only to private civil actions. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON FEDERAL LEGISLATION, REFORM OF THE PRIVATE CIVIL ACTION PROVISION OF RICO 21-23 (1986).

129. S. 1521, 99th Cong., 1st Sess. (1985).

130. *Id.*

discretion to award costs, including attorney's fees, to the defendant if it determined that the suit was frivolous and without merit.¹³¹

House Bill H.R. 2517's redefinition of "pattern" might have an adverse effect on the criminal RICO prosecutions. The Department of Justice criticized House Bill H.R. 2517's redefinition as excluding certain types of criminal activity from RICO's scope. For example, "several individuals could simultaneously perform racketeering acts in concert at separate locations and not come under RICO as amended."¹³² Moreover, while generally the Justice Department does not bring RICO actions for schemes involving mail or wire fraud unless there are two separate criminal episodes, there are situations where the Department may feel it is appropriate to bring such an action, as where large sums of money are involved or where there are multiple victims.¹³³

House Bill H.R. 2943 and Senate Bill S. 1521, since they amend only the private RICO action, would be preferable. Senate Bill S. 1521, however, by adding a special injury requirement, adds an additional complexity to an already complex statute, and thus is undesirable.¹³⁴ House Bill H.R. 2943 is virtually the equivalent of eliminating the private suit. It is preferable to the other two proposals in that it deals specifically with the private remedy, and its solution is a simple one.¹³⁵ Congressional consideration of these proposals, then, should be directed at this most basic question: should there be private RICO suits at all?

The private treble damages remedy was added to the bill late in the legislative process and without extended discussion. There is no doubt that private RICO has gone far beyond what Congress originally intended. It is, therefore, appropriate for Congress to reevaluate the private remedy in light of the past fifteen years' experience.

131. *Id.*

132. Testimony of John C. Keeney, deputy assistant attorney general, before the House Judiciary Criminal Justice Subcommittee, 17 SEC. REG. & L. REP. (BNA) 1659 (Sept. 20, 1985).

133. Interview with Associate Deputy Attorney General Jay B. Stephens, 17 SEC. REG. & L. REP. (BNA) 1790 (Oct. 11, 1985).

134. See *supra* notes 129-31 and accompanying text.

135. See *supra* notes 127-28 and accompanying text.

There are two arguments for retaining private RICO actions:¹³⁶ the concept of the private attorney general and the desirability of a federal commercial fraud statute.

The prior conviction requirement eliminates the use of the private attorney general to supplement prosecutorial efforts. The Department of Justice cannot prosecute all RICO violators. Those violators that escape detection, that are weeded out during the screening process or that simply are not prosecuted due to lack of resources, would be immune from civil RICO liability.¹³⁷ The RICO private remedy, however, has not developed as a supplement to federal enforcement. The report cited by the Supreme Court in *Sedima* states that only nine percent of the private suits involve allegations of criminal activity of a type generally associated with professional criminals.¹³⁸ Seventy-seven percent of the suits involve allegations of securities and commercial fraud.¹³⁹ Therefore, whether a prior conviction requirement should be enacted turns on a congressional determination as to whether it is indeed appropriate to provide victims of fraud with a federal forum and to permit them to recover treble damages and attorney's fees.

Respectable arguments in support of a federal general fraud statute can be made based upon deterrence and compensation. There is a perception among some that there is a substantial amount of ongoing fraud,¹⁴⁰ suggesting that common law fraud actions provide inadequate deterrence. Since many frauds go undetected, a defrauder may feel attempting fraud is worth the risk if the risk upon detection is merely payment of compensa-

136. This is apart from the limited purpose of compensating the victims of criminal RICO fraud, which is maintained in the proposed amendment. The author is aware of no treble damages suit brought by a victim of organized crime. As many have observed, it is unlikely any of these victims would dare to sue.

137. In addition, the plea-bargaining process may be distorted because of a defendant's desire to avoid conviction of a RICO offense or predicate act. Testimony of John C. Keeney, deputy assistant attorney general, before the House Judiciary Criminal Justice Subcommittee, reported in 17 SEC. REG. & L. REP. (BNA) 1659 (Sept. 20, 1985).

138. See *supra* note 67 and accompanying text. In this author's opinion, nine percent is high.

139. *Id.*

140. "White collar fraud in America is a 'growth industry' netting \$40 billion a year" Testimony of Philip A. Feigin, on behalf of the North American Securities Administrators Association, before the Senate Judiciary Committee, reported in 17 FED. SEC. & L. REP. (BNA) 1447 (Aug. 9, 1985).

tory damages.

Furthermore, plaintiffs' difficulties in proving fraud and in establishing damages, along with the delays and expenses of litigation, make it unlikely, in the view of some, that they will be fully compensated. Accordingly, allowing them to recover treble damages and attorney's fees corrects the current deficiencies of fraud victims' damage awards.

It is time for Congress to address these issues directly. Under the current scheme, a victim of securities fraud, for example, may be able to recover either compensatory damages under the federal securities law or treble damages under RICO. Without a Congressional determination that the remedies provided by existing securities laws are inadequate, this result is inexplicable and unjustifiable. Until Congress speaks, federalization of commercial fraud will continue as an unintended collateral effect of a criminal legislative scheme, and many judges and commentators will continue to feel uneasy about this developing body of law.