The Pattern Element of RICO before and after Sedima: A Look at both Federal and Florida RICO

Sandra Bower Ross

Follow this and additional works at: https://ir.law.fsu.edu/lr

Part of the Criminal Law Commons

Recommended Citation
https://ir.law.fsu.edu/lr/vol15/iss2/4

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.
THE PATTERN ELEMENT OF RICO BEFORE AND AFTER SEDIMA: A LOOK AT BOTH FEDERAL AND FLORIDA RICO

SANDRA BOWER ROSS

THE RACKETEER Influenced and Corrupt Organizations Act (RICO)\(^1\) makes it unlawful for any person to: use the proceeds from a “pattern of racketeering activity”; to acquire an interest in an enterprise affecting interstate commerce;\(^2\) acquire or maintain such an enterprise through a pattern of racketeering activity;\(^3\) conduct or participate in such an enterprise through a pattern of racketeering activity;\(^4\) or conspire to violate any of these provisions.\(^5\) “Pattern of racketeering activity” is described, but not defined, as “requir[ing] 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.”\(^6\) Racketeering activity, in contrast, “means” any of a number

---

2. 18 U.S.C. § 1962(a) (1982) provides in relevant part:
   
   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.

3. 18 U.S.C. § 1962(b) (1982) provides: “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.”

4. 18 U.S.C. § 1962(c) (1982) provides:

   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.

5. 18 U.S.C. § 1962(d) (1982) provides: “It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.”

of listed state and federal crimes.\textsuperscript{7} Because Congress chose to describe this critical element of RICO in terms of what it is not, that is less than two racketeering acts, instead of what it is, the courts have been struggling since RICO's passage to determine the content of the pattern element. Must the acts be connected to each other by a common scheme or motive, or is relationship to the enterprise enough? Should multiple acts in furtherance of a single scheme be construed as a pattern, or should those acts be considered part of the same criminal episode and hence, only one act of racketeering?

The United States Supreme Court has addressed the issue only once, in an oblique footnote in \textit{Sedima, S.P.R.L. v. Imrex Co.}\textsuperscript{8} Because the Court did not decide whether there was a pattern present in the case before it, the meaning of its footnote remains open to interpretation. As a result, not only are the federal courts still struggling with the definition of pattern, but now they must also define \textit{Sedima}.

In this Comment the author analyzes the pattern element both before and after \textit{Sedima} and discusses the implications for RICO if

\textsuperscript{7} 18 U.S.C. § 1961(1) (1982). Among the acts listed are murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in drugs, mail fraud, wire fraud, and extortionate credit transactions.

\textsuperscript{8} 473 U.S. 479, 496 (1985). In footnote 14 the Court stated:

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "requires at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship... So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern..." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also id., at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. \textit{Cf. Iannelli v. United States}, 420 U.S. 770, 789 (1975) [parallel citations omitted].
pattern requires both separate criminal episodes and a common scheme or motive. The Comment also examines Florida RICO and the interpretation of its pattern requirement by the Florida courts.

I. BEFORE SEDIMA: COMMON SCHEME AND SINGLE EPISODE

The cases before Sedima dealt primarily with either of two main issues: whether the racketeering acts, in order to form a pattern, must be held together by a common scheme or plan, or whether a pattern exists if, in the course of a single transaction, multiple acts occur. Generally, the courts were divided on the need for a common scheme and found that multiple acts within a single transaction could be considered a pattern of racketeering activity.

A. Common Scheme

One of the earliest cases to deal with the pattern element was United States v. Stofsky. The case involved alleged racketeering activity by seven leaders and employees of a fur garment union, as well as four officials from union shop manufacturers. The allegations included twenty-one instances of bribery of union officials to allow union shop manufacturers to subcontract out work to non-union shops and twelve occasions when defendants allegedly threatened non-union shop manufacturers with bodily injury if they continued to solicit subcontracts from union shops. Citing the Senate Report on RICO, the court noted that Congress' main concern when it enacted the legislation was the "special danger to legitimate business of a continuity of racketeering activity." In light of this concern, the court found that pattern required "the racketeering acts [be] connected with each other by some common scheme, plan or motive . . . and not simply a series of disconnected acts." The court noted that its construction of pattern was supported by 18 U.S.C. § 3575(e), a provision of Title 18 passed along with RICO, that defined a pattern of criminal conduct for special offender sentencing purposes as "having the same or similar purposes, results, participants, victims, or methods of com-

10. Id. at 611-12.
12. Id. at 614. See also Sedima, S.P.R.L. v. Imrex Co., 473 U.S. at 479, 496 n.14 (quoting from the Senate Report). The text of footnote 14 is set out in full, supra note 8.
mission or otherwise are interrelated by distinguishing characteristics and are not isolated events.'”

While conceding that the analysis in Stofsky was “far from frivolous,” the Second Circuit Court in United States v. Weisman\(^\text{16}\) nevertheless rejected the conclusion that a common scheme was required to prevent application of RICO to isolated or sporadic criminal activity. In Weisman the court was dealing with numerous allegations of securities and bankruptcy fraud stemming from the construction and operation of the Westchester Premier Theatre. The defendants were accused of filing false statements concerning the prospectus with the Securities and Exchange Commission and of systematically skimming money from the theater’s ticket and concession sales. The court first noted that the Senate Report relied on in Stofsky did not state whether the relationship must be between the acts or between the acts and the enterprise, then inferred that the statute meant that the acts must be related only in terms of conducting the affairs of the enterprise.\(^\text{17}\) The court determined that Congress must not have intended that the acts themselves be related because of the variety of predicate acts Congress decided would trigger RICO. In addition, the court found that because the statute makes it unlawful to conduct an enterprise through a pattern of racketeering activity, it is the enterprise that is the “unifying link” that precludes isolated criminal activity from falling within RICO.\(^\text{18}\)

Similarly, in United States v. Elliott,\(^\text{19}\) the Fifth Circuit Court found that although RICO was not aimed at isolated criminal activity, that nevertheless did not prevent its application to organiza-

---

15. Stofsky, 409 F. Supp. at 614. See Sedima, 473 U.S. at 496 n.14. The text of footnote 14 is set out in full, supra note 8. Similarly, in United States v. Chovanec, 467 F. Supp. 41 (S.D.N.Y. 1979), the Southern District of New York again ruled that a common scheme or motive was required in connection with an alleged wire fraud. The defendant argued that since he was accused of defrauding only one victim, the six occasions of supposed wire fraud over a four week period constituted only one act. The court rejected this contention, finding that the lone victim was actually the “connecting link” required to establish a pattern.


17. Id. at 1122 n.3.

18. Id. at 1122. It is interesting that both Stofsky and Weisman rely on the statutory construction principle in pari materia to reach contrary results. In Stofsky, the court reasoned that it would be illogical for Congress to mean two different things by “pattern” in the context of two pieces of legislation passed simultaneously, while the Weisman court, just as plausibly, found that since Congress passed both definitions simultaneously, they must have intended that the two be different. Otherwise, Congress would have made them identical.

19. 571 F.2d 880 (5th Cir. 1978), cert. denied sub nom. Delph v. United States, 439 U.S. 953 (1978). See also United States v. Bright, 630 F.2d 804 (5th Cir. 1980) (although two acts
tions engaged in "diversified activity." In fact, it was precisely this type of organization that Congress targeted in passing RICO.20

The analysis in Weisman and Elliott is better reasoned than that in Stofsky. Surely, if RICO means anything, it must apply to an organization that operates by criminal activity, even if that activity is diverse. Otherwise, two-bit mail frauders are subject to the severest of penalties, while multi-crime conglomerates go free, only because the latter were sophisticated enough to branch out. Certainly an enterprise that traffics in drugs on the one hand and peddles pornography on the other is what Congress had in mind when it passed RICO. While the acts may be related to each other, they should not have to be.

Nevertheless, the common scheme requirement lived on in some jurisdictions in pre-Sedima days. The Ninth Circuit Court of Appeals in United States v. Brooklier21 held that in order to convict, the jury must find that the racketeering offenses were connected by a common scheme, plan or motive. Even though the court disapproved of the portion of the jury instructions that required act-

of bribery were related to each other and to the enterprise, the acts need only be related to the enterprise to establish pattern).

20. 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 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 engaging in organized crime and because 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.


tual participation on the part of the defendants to show their guilt in a RICO conspiracy, the court explicitly stated that a common scheme was required.\footnote{Id. at 1222.}

These conflicting decisions could be reconciled if the courts read common scheme broadly to include the plan of furthering the enterprise, instead of the more immediate result, i.e., mail fraud or arson. Requiring then that acts be in furtherance of a common scheme would be the same as requiring that they be related to the enterprise. The courts should not lose sight of RICO's underlying premise, that is, the notion that the traditional criminal model is not always appropriate in today's complex society. The model of an individual perpetrator committing murder or robbery in one incident no longer suffices for all antisocial behavior; forcing RICO into these common law pigeon-holes will not achieve Congress' goals.

B. Single Episode

The second major pre-\textit{Sedima} issue was whether multiple acts in a single transaction could constitute a pattern for RICO purposes. The argument advanced by defendants was that inherent in the concept of pattern is the notion of continuity, of repetition. The Oxford English Dictionary defines pattern as "design," "[a]n arrangement or order of things or activity in abstract senses: order or form discernible in things, actions, ideas, situations." The plausible objection raised by pre-\textit{Sedima} defendants was that a single criminal episode did not indicate the necessary design or order of things. RICO was not intended to apply to gunmen who rob a 7-Eleven and take the clerk hostage; those two acts do not constitute a pattern of behavior (or so the argument went). Before \textit{Sedima}, that argument generally lost. The courts found that two acts, even in a single criminal episode, satisfied RICO's pattern requirement.

Sometimes that finding was made grudgingly, however. In \textit{United States v. Moeller},\footnote{402 F. Supp. 49 (D. Conn. 1975).} District Judge Newman expounded on what he termed the "common sense" interpretation of pattern which, he believed, would not extend to a kidnapping and arson occurring on the same day, at the same place and in furtherance of a single plan to commit that arson.
Were the question open, I would have seriously doubted whether the word 'pattern' as used in § 1962(c) should be construed to mean two acts occurring at the same place on the same day in the course of the same criminal episode. While the statutory definition makes clear that a pattern can consist of only two acts, I would have thought the common sense interpretation of the word 'pattern' implies acts occurring in different criminal episodes, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity.  

However, Judge Newman found that the Second Circuit Court's decision in United States v. Parness foreclosed any resolution other than a finding that a pattern existed. Parness involved a defendant who was convicted of acquiring a foreign gambling casino through a pattern of racketeering activity. The predicate acts constituting the pattern were two counts of causing interstate transportation of stolen property and one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud.

It is open to question whether Parness actually did foreclose Judge Newman's analysis. The defendant in Parness challenged the statute for vagueness and did not argue that the acts did not constitute a pattern. Even if challenged on that basis, the facts in Parness are distinguishable from Moeller. The acts in Parness took place over a longer period of time, even though they were part of a single scheme, while the arson in Moeller appears to have been a one day affair. Nevertheless, the court in Moeller found that "there is no indication in Parness that the Court of Appeals requires anything more for the establishment of a 'pattern' within the meaning of section 1961(5) than two acts of racketeering, regardless of whether their occurrence implies continuing activity."  

Similarly, in United States v. Starnes, the court found that a conspiracy to commit a single act of arson satisfied the pattern element because the conspirators contemplated several acts to accomplish that objective. The acts included travelling interstate to set

24. Id. at 57.
27. 503 F.2d at 438.
29. Id.
the fire, setting the fire, and using the mails to complete the scheme to defraud the insurer. All three were found to be separate acts of racketeering. "[T]he fact that there is but one objective underlying the separate acts does not diminish the applicability of RICO to those acts."  

Even separate acts are sometimes unnecessary, as long as there are at least two offenses present. In a particularly mechanistic application of the rule, the Eleventh Circuit Court in United States v. Bascaro found a pattern to exist when the defendant both possessed and imported marijuana. Pattern "requires the commission of at least two predicate crimes," the court noted (emphasis in original). The court found that because possessing and importing marijuana were two separate crimes, a pattern of racketeering activity existed. However, the Eleventh Circuit Court's analysis seems applicable only to the limited number of activities that are listed in section 1961(1)(D). Unlike the other four subsections of section 1961 in which racketeering activity is defined as an "act," subsection (D) defines activity as "any offense" involving securities fraud or narcotics. It is arguable that Bascaro, in which two crimes were found sufficient for a pattern even when both crimes actually arose out of the same act, will be limited only to section 1961(1)(D) "activity."

An explanation for the pre-Sedima reluctance of the courts to reject RICO when there were multiple acts within the same episode can be found in the Seventh Circuit case of United States v. Weatherspoon. There the court found that the operator of a beauty school engaged in a pattern of racketeering activity when she mailed, on several occasions, false information to the Veteran's Administration in an effort to defraud that agency. The defendant argued that because there was only a single scheme to defraud, only one "act" of racketeering had occurred. The court suggested that adopting her position would implicate RICO's constitutionality, in light of two district court rulings requiring that the acts be connected by a common scheme. A finding that separate and unre-

31. Id. at 678.
33. Id. at 1360.
34. 581 F.2d 595 (7th Cir. 1978).
35. Id. at 601.
lated schemes must exist would raise constitutional vagueness problems, the court concluded. It is ironic that the court chose to reject the argument because of the precedent of two district court opinions. What is even more interesting is the lack of any consideration that the notions of common scheme or single episode were judicially imposed constraints on RICO. Those words do not appear in RICO, nor were they discussed in Congress before RICO's passage. If mechanically applied, these judicially-created elements threaten to gut RICO.

A better approach would be to consider the "single episode" in the context of the kind of enterprise that is involved. For example, the Eleventh Circuit Court in United States v. Watchmaker was faced with the question of whether the shootings of three police officers at a club in Tampa, Florida, by a member of the Outlaw Motorcycle Club constituted a pattern of racketeering behavior. The court resolved the issue merely by stating that other courts have rejected the contention that "acts which are part of the same scheme or transaction cannot qualify as distinct predicate acts," and holding that three separate murders could therefore be considered three predicate acts constituting a RICO offense. Although reaching the right result, the court should have abandoned this mode of analysis by discussing the shootings in terms of the nature of the enterprise—here, the motorcycle club—and asking whether the acts furthered the enterprise or indicated continuity. That way, the court could have spared future jurists from wrangling with the idea of single criminal episodes. Sometimes RICO should apply in a single episode, sometimes it should not. For example, in Watchmaker, prosecution of the gunman under RICO seems appropriate. The gunman should not be spared from RICO simply because he was fortunate enough to find the officers all at one place, provided that the shootings were shown to have furthered the enterprise, the outlaw Motorcycle Club. On the other hand, it made little sense to use RICO against the "enterprise" in Moeller, where it was apparently a one time scheme. The participants tem-

37. 581 F.2d at 601 n.2. This catch-22 resurfaces in the wake of Sedima, because the courts have required both a common scheme and separate episodes. Only if episode is construed narrowly—on the same day, for example—will the two be able to coexist. If episode is read broadly, then confusion will result as courts attempt to determine when the acts are connected enough to be part of a common scheme, yet unconnected enough to be separate transactions.
38. 761 F.2d 1459 (11th Cir. 1985), cert. denied, 106 S. Ct. 879 (1986) (decided slightly more than one month before Sedima).
39. Id. at 1475.
porarily banded together burn a building, but it does not appear that there was any ongoing organization. Inquiring into the nature of the enterprise would allow the courts to make more sense of the cases, or at least, resolve the cases in a way that makes sense.

II. SEDIMA AND FOOTNOTE 14

*Sedima* involved a Belgian corporation (Sedima), which had entered into a joint venture with Imrex Co., an American exporter, to supply items to a firm in Belgium.40 In its suit against Imrex, Sedima alleged that Imrex had overbilled and cheated Sedima of its rightful share of the profits. Among other charges, Sedima contended that Imrex and two of its officers had violated RICO based on alleged acts of mail and wire fraud.41 Although the existence of a pattern was not at issue, the court nonetheless commented on the definition of this element of RICO, noting that “[t]he ‘extraordinary’ uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses . . . and the failure of Congress and the courts to develop a meaningful concept of ‘pattern.’”42 Although extensively relied on in subsequent decisions, the Court’s footnote really said nothing new.43 The Court merely reiterated statements in the Senate Report and comments made by the legislators during the debate over RICO, then noted that the definition of “pattern” differs from the other definitional provisions in section 1961 in that it uses “requires” instead of “means.” “The implication is that while two acts are necessary, they may not be sufficient.”44 While this may not be a startling revelation, the *Sedima* decision nevertheless has led to changes in the approach to the pattern element taken by the lower federal courts.

Interestingly, Justice Powell’s dissent in *Sedima* seems to have had the most significant impact on the lower courts’ treatment of the pattern element. Powell suggested that because pattern is defined as requiring at least two acts, the definition should be interpreted to mean that something more than the presence of the predicate acts is required for a “pattern” to be proved.45 Powell

---

41. Id. at 500.
42. Id.
43. Id. at 496 n.14. The text of footnote 14 is set out in full *supra* note 8.
44. Id.
45. Id. at 527 (Powell, J., dissenting).
cited an American Bar Association Report\textsuperscript{46} which recommended that pattern be interpreted to require that the racketeering acts be related to each other, that they be part of some common scheme, and that there be some continuity or threat of continuing criminal activity. "By construing 'pattern' to focus on the manner in which the crime was perpetrated, courts could go a long way toward limiting the reach of the statute to its intended target—organized crime," Powell wrote.\textsuperscript{47}

III. The Aftermath of Sedima

If the Court in Sedima intended to provide the long-awaited meaning for pattern, it failed. The divergent interpretations of the lower federal courts show that the meaning of pattern is still not clear. In the circuit courts, Sedima is cited frequently, but the courts seem to rule precisely as they would have without the Supreme Court's decision. The district courts often cite Sedima as well, but have reached no consensus about what Sedima requires. One apparent result of Sedima, however, is that some courts are now adopting the argument that there can be no pattern within a single episode. Additionally, some courts are requiring that the racketeering acts be connected by a common scheme. There is still much disagreement about what pattern means, but the arguments that lost prior to Sedima now seem to be making headway.

A. Circuit Court Jurisprudence

Most of the post-Sedima circuit court cases that deal with pattern are in the area of civil RICO, an area of expressed concern by several courts.\textsuperscript{48} Despite the concern, and the pleas of distress,\textsuperscript{49} the courts are generally allowing the RICO claims.


\textsuperscript{47} Sedima, 473 U.S. at 528 (Powell, J., dissenting).

\textsuperscript{48} See Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 317 (7th Cir. 1985):

Perhaps we can take solace in the fact that the Illinois Department of Revenue promised in oral argument that such tax collection cases will be few, but we doubt, once the cause of action is established, that this will be true. We can only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit, as only it is empowered to, the statute's application to cases such as the one before us now.

\textsuperscript{49} See also Sedima, 473 U.S. at 529 (Powell, J., dissenting):

It is neither necessary to the Court's decision, nor in my view correct, to read the civil RICO provisions so expansively. We ruled in Turkette and Russello that the statute must be read broadly and construed liberally to effectuate its remedial
One explanation for the grudging application of RICO in several of the circuit court cases is that each case involved allegations of numerous predicate acts, rather than merely two or three. For example, in *Bank of America National Trust & Savings Association v. Touche Ross & Co.*, the court found that nine acts of wire and mail fraud over a three-year period satisfied the pattern requirement under *Sedima*. The court rejected the defendants' contentions that the predicate acts were all part of the same alleged scheme to induce banks to extend credit to a certain business and so should be regarded as a single criminal episode. In rejecting this argument the court restated its earlier holding in *United States v. Watchmaker* (pre-*Sedima*) in which it ruled that acts which are part of the same scheme or transaction may qualify as predicate acts. The court stated: "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." 

Similarly, in *Illinois Department of Revenue v. Phillips*, the Seventh Circuit Court ruled that a defendant who filed fraudulent sales tax returns for each month over a nine month period had engaged in a pattern of racketeering activity. The court cited *United States v. Weatherspoon* (pre-*Sedima*) for the proposition that each mailing in a mail fraud scheme is a separate act of racketeering activity. Perhaps a better approach than simply counting the number of mailings, as the court did in *Phillips*, is to examine

purposes, but like the legislative history to which the Court alludes, it is clear we were referring there to RICO's criminal provisions. It does not necessarily follow that the same principles apply to RICO's private civil provisions.

50. 782 F.2d 966 (11th Cir. 1986).
51. 761 F.2d 1459 (11th Cir. 1985).
52. 782 F.2d at 971 (quoting United States v. Watchmaker, 761 F.2d at 1475).
53. 771 F.2d 312 (7th Cir. 1985).
54. 581 F.2d 595 (7th Cir. 1985).
55. 771 F.2d at 313. Despite the court's obvious reluctance to allow RICO to be used as a method for states to recover delinquent taxes, it held that it is up to Congress to narrow RICO's scope, if it so chooses. The court stated:

Nevertheless, it does not seem fitting for us to attempt to narrow the statute in ways which are nearly impossible to rationalize merely to exclude subjects of this kind. For to say that Congress did not anticipate this subject is not to say that Congress would have excluded it if the subject had been brought explicitly to its attention. Congress appears to have preferred a broad statute, even if overinclusion might result.
both the number and the periodic nature of the acts. Such an analysis was used by the Eighth Circuit Court in Alexander Grant & Co. v. Tiffany Industries, in which the court found a pattern in twenty-six acts of mail fraud and four acts of wire fraud in connection with a single scheme to obtain a favorable audit. The court wrote: "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 in Sedima that RICO not be extended to reach sporadic activity." More difficult to explain is the Fifth Circuit Court's decision in R.A.G.S. Couture, Inc. v. Hyatt where the court found that the defendants, who mailed two false invoices concerning the repair of a sewing machine, had engaged in a pattern of racketeering activity. The court interpreted Sedima's language that "while two acts are necessary, they may not be sufficient" to imply that two "isolated" acts would not constitute a pattern. Here, because the two alleged mailings were related, there was a pattern of activity.

The court ruled this way despite its professed concern about the scope of civil RICO.

An allegation of fraud in a contract action can transform an ordinary state law claim into a federal racketeering charge. It may be unfortunate for federal courts to be burdened by this kind of case, but it is not for this Court to question policies decided by Congress and upheld by the Supreme Court. The broad language

---

Id. at 317 (quoting Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 389 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985)).

While concern about the scope of RICO is beyond the scope of this paper, it is worth noting that sentiment, if only for possible insight into future decisions refining pattern, as well as the entire RICO statute.

56. 770 F.2d 717 (8th Cir. 1985), cert. denied, 106 S. Ct. 799 (1986).

57. Id. at 718 n.1. See also James v. Meinke, 778 F.2d 200 (5th Cir. 1985) (multiple allegations of stock fraud involving single investment scheme constituted a pattern). Some district courts also are following this lead in which numerous acts over some period of time are found to constitute a pattern. See United States v. Dellacroe, 625 F. Supp. 1387 (E.D.N.Y. 1986) (15 acts over long period constitute pattern); United States v. Louis, 625 F. Supp 1327 (S.D.N.Y. 1985) (street gang's 85 acts over 11-year period sufficient to show continuity plus relationship), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986); Rush v. Oppenheimer & Co., 628 F. Supp. 1188 (S.D.N.Y. 1985) (multiple acts over 18 month period constitute pattern), rev'd on other grounds, 779 F.2d 885 (2d Cir. 1985).

58. 774 F.2d 1350 (5th Cir. 1985).

of the statute and the Sedima decision provide us with clear guidance.60

But it seems the court could as easily have been “clearly guided” by Sedima to find that no pattern existed here. What the court has ignored is Sedima’s call to examine pattern in terms of “common parlance.”61 Common usage surely would not ascribe a pattern of racketeering behavior to two false invoices dealing with the repair of sewing machines. Also considering RICO’s purpose, the result in R.A.G.S. seems clearly wrong. Certainly Congress was not referring to one instance of sewing machine repair fraud when it talked about “highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America’s economy by unlawful conduct . . . .”62 Surely common parlance would require more than one mailing by the defendants and one mailing by the defendants’ attorney. At least, a pattern implies that there has been some sort of observable trait, a tendency for certain behavior, or as Sedima requires, the threat of continuity. There was none of that here. Even if it is true that RICO is to be liberally construed and ambiguity should be resolved in favor of remedy, there are limits to a liberal construction.

Perhaps, and this is mere conjecture, the court is expanding RICO beyond its intended scope precisely because of its expressed concern about RICO’s breadth. That is, if the courts adopt a broad view, Congress—a different body than the one which passed RICO—will strictly limit or kill it.

Of course, RICO is not receiving expansive treatment in all circuits. In Superior Oil Co. v. Fulmer,63 the Eighth Circuit Court found that several acts of mail and wire fraud undertaken in pursuit of a wrongful conversion of petroleum gas did not constitute a pattern of racketeering activity. The court held that the defendants had engaged in only “one isolated fraudulent scheme,” and that there was no evidence of a threat of similar gas conversion schemes in other locations.64 While the result seems to be correct, the court’s focus on a “single scheme” is misplaced. As will be seen in the district court jurisprudence,65 a blanket requirement of mul-

60. R.A.G.S., 774 F.2d at 1355.
63. 785 F.2d 252 (8th Cir. 1986).
64. Id. at 257.
65. See infra text accompanying notes 79-108.
multiple schemes is not workable, particularly if the requirement is interpreted to apply to all subsections of section 1962. Application of a multiple scheme requirement to subsection (b), for example, would render the statute meaningless. Multiple acts taken in pursuit of acquiring a single enterprise would not, under this analysis, constitute a pattern. The single goal of taking over CBS, for example, would arguably be only one scheme, and hence outside the scope of RICO. But if a purpose of RICO is to "eradicate organized crime," and one facet of organized crime is the infiltration of legitimate business, then a multiple scheme requirement is clearly contrary to congressional intent.

The Second Circuit Court criticized this requirement of multiple schemes as "incongruous" in its decision in United States v. Ian- niello. Instead of requiring multiple schemes, the court found that a pattern results when a "person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated." Similarly, the better reasoning for Superior Oil would have been to examine the underlying theft of gas that was at issue. That theft was really only one continuous taking, and really only one act. If the court required multiple schemes to constitute a pattern, any future acts taken by the defendants in response to changes in Superior Oil's operations would not form a pattern. Even if Superior Oil shut down the affected line and opened another, under a single scheme analysis the defendants could still commit further acts of stealing from Superior Oil without a pattern being formed. On the other hand, if the court followed the reasoning in Ianniello, additional acts committed in furtherance of the criminal enterprise would constitute a pattern.


67. [O]rganized 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. . . . [T]his money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes . . . .


68. 808 F.2d 184 (2d Cir. 1986).

69. Id. at 192.

70. Superior Oil Co. v. Fulmer, 785 F.2d 252, 253-54 (8th Cir. 1986).
It is helpful, as the court did in *Ianniello*, to consider pattern in the context of its relationship to the enterprise. For example, in *United States v. Ellison,*\(^7\) the defendant was convicted of violating section 1962(c) by participating in an enterprise that conducted its affairs through a pattern of racketeering activity. Ellison was the founder and leader of a white supremacy group known as, among other things, the Covenant, the Sword and the Arm of the Lord (CSA). The government alleged commission of two predicate acts of arson: burning Ellison's sister's house so she could collect the insurance proceeds, and burning a church whose members allegedly included homosexuals. "These activities were intended to produce operating funds, to plunder the property of certain 'unacceptable' groups, and to hasten the collapse of the government."\(^7\) The court found that proof of the two arsons sufficiently showed a pattern because they stemmed from the same or similar purposes, involved the same group of participants, and had similar methods of commission. The evidence also showed that there was every likelihood that such activities would continue indefinitely. We are satisfied that the government amply fulfilled its burden of showing a pattern of racketeering activity and its direct relationship to CSA as an enterprise.\(^7\)

To the court, the relationship of the predicate acts to CSA as an enterprise was key. This relationship is a useful way of analyzing pattern, at least in terms of 1962(c). The clear statutory language of 1962(c) prohibits participation in "the conduct of [an] enterprise's affairs through a pattern of racketeering activity."\(^7\) It is conducting an enterprise through a pattern of activity that is unlawful here; courts should not lose sight of that.\(^7\) If the enterprise is kept in sight, the existence of a pattern may also become visible.

Finally, a particularly thoughtful approach to pattern was taken by the Fourth Circuit Court in *International Data Bank v.*

\(^7\) 793 F.2d 942 (8th Cir. 1986), cert. denied, 107 S. Ct. 415 (1986).
\(^7\) Id. at 945.
\(^7\) Id. at 950. It is interesting to note that both *Ellison* and *Superior Oil* were decided by the Eighth Circuit Court of Appeals. While *Superior Oil* requires multiple schemes, *Ellison* focuses on the relationship of the acts to the enterprise. Cf. *Alexander Grant & Co. v. Tiffany Industries*, 770 F.2d 717 (8th Cir. 1985) (pattern sufficiently established in series of acts undertaken with goal of obtaining a favorable audit), cert. denied, 106 S. Ct. 799 (1986).
\(^7\) See supra note 18 and accompanying text.
At issue in that case was whether an allegedly fraudulent statement in a newly formed corporation's prospectus constituted a pattern of racketeering activity when the prospectus reached numerous investors. The court determined that it did not. "In the present case, the element of relationship between the predicate acts is undoubtedly present, but the element of continuity is absent."77 The court noted the two distinct camps of post-\textit{Sedima} jurisprudence, but rejected what it termed a "mechanical test," calling a RICO pattern a "matter of criminal dimension and degree."

The number of predicate acts is not an appropriate litmus test, as the perpetration of numerous acts of mail and wire fraud 'may be no indication of the requisite continuity of the underlying fraudulent scheme.' [citations omitted]. The focus of \textit{Superior Oil} on the scope of criminal activity is proper, but the 'one continuing scheme' test enunciated in that case will not always hold true. As the \textit{Lipin Enterprises} court noted, such a test may 'allow a large, continuous scheme to escape the enhanced penalties of RICO liability' [citations omitted].78

\textbf{B. District Court Jurisprudence}

The district courts also disagree as to what \textit{Sedima} requires. As in pre-\textit{Sedima} days, the disagreement focuses on whether there should be a common scheme; unlike the pre-\textit{Sedima} cases, however, the courts now tend to require one.79 The old argument that there can be no pattern within a single episode is also experiencing newfound approval. And perhaps illogically, the courts often are requiring both a common scheme \textit{and} different episodes. Because the reasoning of those courts requiring either relatedness or different episodes, but not both, is similar to the pre-\textit{Sedima} cases, only the cases which require both relatedness \textit{and} different episodes are discussed at any length here.

\begin{itemize}
  \item 76. 812 F.2d 149 (4th Cir. 1987).
  \item 77. \textit{Id.} at 154 (citations omitted).
  \item 78. \textit{Id.} at 155.
\end{itemize}
In *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*[^80] District Judge Shadur found that two mailings—of a phony contract and a kickback payment—did not satisfy the pattern element of RICO. (Shadur also observed that three alleged additional kickbacks over an 11-month period also did not constitute a pattern because the payments were in furtherance of the same fraudulent scheme.)

True enough, ‘pattern’ connotes similarity, hence the cases’ proper emphasis on relatedness of the constituent acts. But ‘pattern’ also connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a ‘pattern of racketeering activity.’[^81]

Judge Shadur revisited the issue a few months later in *United States v. Yonan*,[^82] which involved a lawyer accused of making seven bribes in a scheme to fix several cases in the Cook County Circuit Court. Shadur found that Yonan’s activity did constitute a pattern under RICO, even though the payments were all made to one person and, arguably, were made in pursuit of a single fraudulent scheme. Shadur distinguished the case from *Inryco*: “[S]eparate acts of bribery to fix ten separate cases, involving as many different criminal defendants, contrast sharply with the mailing of more than one letter to implement a single kickback scheme (the situation in *Inryco*).”[^83]

Shadur could as easily have found that the kickback payments in *Inryco* constituted a pattern under RICO. If, as in *Yonan*, the kickbacks were seen as separate payments, rather than installments of a single payment, then five payments surely constituted a pattern. That is particularly so in light of the extended time period over which the payments were made. Judge Shadur is correct in requiring some continuity of crime; his mistake was in not seeing the continuity in the case before him.

The court in *Allington v. Carpenter*[^84] adopted Shadur’s reasoning in *Inryco*, finding that multiple episodes are required, both by legislative history and by *Sedima*. *Allington* involved a scheme to

[^81]: Id. at 831 (emphasis in original).
[^83]: Id. at 728.
falsely promise high rates of return on loans secured by worthless promissory notes on real estate trust deeds. Several fraudulently induced loans were alleged to have resulted from the scheme. In finding that three acts of wire fraud in furtherance of the scheme did not constitute a pattern, the court wrote: “[R]acketeering activity must include racketeering acts sufficiently unconnected in time or substance to warrant consideration as separate criminal episodes.” Here, according to the court, each act was part of the same criminal episode: a phone call to induce the victim to send money to Switzerland, the victim’s wiring of the money the next day, and a telephone call six weeks later to set up an account transferring the money.

At the same time, however, the acts must be related to each other through some common scheme or motive in order to satisfy the continuity plus relationship standard of Sedima. Thus, the plaintiff is put in the dilemma of showing that the acts are related enough to show continuity, yet unconnected enough to be separate transactions. This is a difficult task at best, impossible at worst.

Recent cases continue to rely on the requirement of both relatedness and unconnectedness to exclude RICO’s application. In Fleet Management Systems v. Archer-Daniels-Midland Co., the court held that eight instances of mail and wire fraud over a two-year period did not constitute a pattern because it was a “single criminal episode” in pursuit of a single fraudulent scheme. The

85. Id. at 478.
86. Id.
87. Id. at 477-78. “The relatedness of the predicate acts is established through proof of common perpetrators, common methods of commission, or common victims.”
88. But not even all Judge Shadur’s colleagues in the Northern District of Illinois adopt in full his analysis of RICO and Sedima. In Systems Research, Inc. v. Random, Inc., 614 F. Supp. 494 (N.D. Ill. 1985), the court found a pattern in several acts of mail fraud in connection with a scheme to defraud an employment agency out of its commissions for placing job applicants. The court, without analysis, found that because mail and wire fraud were listed as prohibited activities under the statute and were “alleged to be related to the scheme to divert applicants from the plaintiffs,” a pattern had been sufficiently alleged. Id. at 497.

See also Torwest DBC Inc. v. Dick, 628 F. Supp. 163 (D. Colo. 1986) (no pattern where there was “only one purpose, one result, one set of participants, one victim and one method of commission . . .”); aff’d, 810 F.2d 925 (10th Cir. 1987); Lipin Enters. v. Lee, 625 F. Supp. 1098 (N.D. Ill. 1985) (12 acts of mail fraud insufficient because failure to allege continuity necessary to establish pattern), aff’d, 803 F.2d 322 (7th Cir. 1986); Graham v. Slaughter, 624 F. Supp. 222 (N.D. Ill. 1985) (multiple episodes are required, but not necessarily multiple schemes); Professional Assets Management v. Penn Square Bank, 616 F. Supp. 1418 (W.D. Okla. 1985) (separate fraudulent actions in preparation of audit report still part of single transaction and so do not constitute a pattern).
court noted that RICO's broad sweep in recent years has been due to the inclusion of mail and wire fraud in the statute as predicate acts. "The potential effects of reading two related mail or wire fraud violations as forming a 'pattern' on our federal system are staggering and can lead to some totally unforeseeable results," the court wrote.\textsuperscript{90} The court then suggested that a college student who turned back the odometer on a car he was selling and then both called and wrote a friend concerning the deal could be subject to prosecution under the current reading of RICO. "Such a result is patently absurd. Although the student has committed a crime, he certainly is not involved in the kind of ongoing criminal enterprise that characterizes mob activity. Although the statute's language arguably applies to the foregoing example, Congress certainly did not intend that result."\textsuperscript{91}

No doubt Congress did not intend that result. But it is hard to see how this college student would be prosecuted even under the current reading of RICO. Can he be both the enterprise and the person associated with it? The court's analogy is poor, but it is prompted out of the ever-present concern that RICO is being used most often for "garden-variety fraud" and not for mobsters. Citing the American Bar Association Report, the court noted that "[o]nly 9% of all civil RICO cases have involved allegations of criminal activity normally associated with professional criminals. The central purpose that Congress sought to promote through civil RICO is now a mere footnote."\textsuperscript{92} While mail and wire fraud remain as predicate offenses, the court noted, the "concept of 'a pattern of racketeering activity' can and should be read narrowly to confine its reach to the type of conduct Congress had in mind."\textsuperscript{93} Thus, pattern requires "two or more criminal episodes through which the enterprise achieves its illegal goal."\textsuperscript{94} The episodes must be related by "similar purposes, results participants, victims, or methods of commission, or otherwise . . . interrelated by distinguishing characteristics and not [be] isolated events."\textsuperscript{95} The court then found that the mail and wire fraud violations involved only one criminal episode—a scheme to market the plaintiff's computer program under a different name—and that there was no threat of ongoing activity.

\textsuperscript{90} Id. at 554-55.
\textsuperscript{91} Id. at 555 n.2.
\textsuperscript{92} Id. at 555.
\textsuperscript{93} Id. at 557.
\textsuperscript{94} Id. at 559.
\textsuperscript{95} Id. (quoting Sedima, 473 U.S. at 496 n.14).
As in Inryco, the court's equation of a single scheme with a single criminal episode is in error. The defendants engaged in numerous fraudulent acts over a two-year period, albeit with the goal of defrauding a single victim. The goals of punishing ongoing criminal activity and avoiding severe sanctions for sporadic or isolated acts would surely be satisfied by prosecuting the defendants for committing multiple acts over a long period of time.

Although it used much of the same rhetoric, the New Jersey District Court reached the proper result in Kredietbank, N.V. v. Joyce Morris, Inc. The case dealt with the mailing of two false affidavits in support of a lawsuit to recover on a loan. The court rejected the Fifth Circuit Court's holding in R.A.G.S. Couture, Inc. v. Hyatt in finding that pattern required something more than these two mailings.

Congress nowhere indicated that we should redefine our common notion of what constitutes a pattern of activity to include a single repetition of a single act in some circumscribed circumstance, simply because two acts have occurred. Where a single criminal act is repeated against a second victim, or repeated in a time and place removed from its first commission, the two acts arguably suggest a design or configuration, and may satisfy the pattern requirement. But the repetition of an act taken against a single victim or set of victims following closely on the heels of the original wrong, in some circumscribed circumstance, is completely unidimensional.

Here, the court properly viewed the relatedness and continuity notions as tools in determining whether a pattern exists. There is less of the mechanistic discussion seen in other decisions, i.e. single victim equals single criminal episode and hence, no pattern. Instead the court apparently is trying to infuse some common sense into the discussion.

Perhaps a good way of approaching the relatedness/single episode dilemma is that promoted by at least one judge in Illinois' Northern District. Judge Susan Getzendanner first stated in Graham v. Slaughter the theory that while multiple transactions are

96. No. 84-1903 (D.N.J. Jan. 9, 1986) (available on LEXIS, Genfed library, newer case file).
97. See supra note 56 and accompanying text.
98. No. 84-1903 (D.N.J. Jan. 9, 1986) (available on LEXIS, Genfed library, newer cases file).
required, multiple schemes are not. "[A]n open-ended scheme may include a sufficient number of independent criminal episodes to satisfy the 'continuity' factor of Sedima." As Getzendanner notes, it is possible that Judge Shadur implicitly adopted this theory in Yonan. In Graham, twenty predicate acts of mail and wire fraud in connection with the embezzlement of about $60,000 over a two-year period were found to satisfy the pattern element. The court noted that the acts alleged were not "ministerial acts performed in the execution of a single fraudulent transaction, but appear[ed] to be independently motivated . . . ." Even so, the court apparently believed that RICO should not apply in this context and reiterated the Seventh Circuit Court's message to Congress pleading for a limit to the statute's private application.

Even without congressional action, however, Judge Getzendanner was loath to allow a RICO claim based on several supposedly fraudulent mailings in connection with a group of physicians who contracted to provide emergency room care in Medical Emergency Service Associates v. Foulke. The complaint alleged that the doctors persuaded a hospital to terminate its relationship with Medical Emergency Services Associates (MESA) and that the doctors provided the same emergency room services through another association, in breach of their fiduciary duty to MESA. Several mailings in which they failed to disclose their plan to MESA constituted the predicate acts for the RICO claim. The court held that there was only a single transaction and a single injury, and therefore, no pattern. "This case falls within that part of Inryco with which I agree. Multiple mailings in furtherance of a single criminal episode are insufficient to allege a pattern of racketeering under section 1961," Getzendanner wrote. Getzendanner found this ruling consistent with the controlling Seventh Circuit Court decision in Illinois Department of Revenue v. Phillips, because each mailing in Phillips constituted a separate fraud. Here, she wrote, no mailing resulted in separate injury or separate fraud.

Judge Getzendanner was given the opportunity to further explain these two decisions in a third case, Heritage Insurance Co. of

100. Id. at 225.
101. Id.
102. See supra note 47 and accompanying text.
104. Id. at 157.
105. 771 F.2d 312.
America v. First National Bank\textsuperscript{106} which, according to the court, involved a set of facts falling somewhere in between the two previous cases. Heritage involved a bank that had entered into several escrow agreements between an insolvent contractor and the State of Illinois. Instead of maintaining the escrow agreements, the bank used the payments to retire the contractor's debt with the bank. There were five escrow agreements, which involved about twelve mailings over a six month period.

The court first restated its earlier holdings that repeated criminal acts affecting a single victim, involving the same or similar purpose and using the same means, may nonetheless constitute a pattern under RICO. "Otherwise, the requirement that criminal acts be 'related' as well as 'continuous' would be meaningless, since the relationship in most circumstances would vitiate a finding of continuity."\textsuperscript{107} Examining this case in light of Graham and Foulke, the court declined to view the fraud as a single scheme to misappropriate escrow funds and found that because there were five separate agreements executed on four occasions, a pattern had been sufficiently alleged.

Getzendanner's approach seems to make good sense, at least in that it allows inclusion of some single victim scams within RICO. Although still capable of being manipulated,\textsuperscript{108} at least it is a step away from rigidly stating that multiple mailings in a single scheme does or does not equal RICO.

IV. Florida RICO

Like its federal counterpart, the Florida Racketeer Influenced and Corrupt Organization Act\textsuperscript{108} was motivated by a desire to combat organized crime.\textsuperscript{110} As first enacted, it was similar to federal

\textsuperscript{106} 629 F. Supp. 1412 (N.D. Ill. 1986).
\textsuperscript{107} Id. at 1416.
\textsuperscript{108} Id. at 1417. The court noted that if the facts were considered from a different angle, no pattern would exist.
\textsuperscript{110} Ch. 77-334, 1977 Laws of Florida 1399. The preamble of the act provided that: WHEREAS, the Legislature finds that organized crime is a highly sophisticated, diversified, and widespread problem which annually drains billions of dollars from the national economy by various patterns of unlawful conduct, including the illegal use of force, fraud, and corruption, and WHEREAS, organized crime exists on a large scale within the State of Florida, and it engages in the same patterns of unlawful conduct which characterize its activities in other states, and WHEREAS, seventeen of the twenty-one publicly identified organized crime "families" are reported to operate within Florida, and because no single "family" is considered by the other "families" to have exclusive dominion in the state, Florida is considered
RICO in both the activity it proscribed\textsuperscript{111} and the penalties for violation.\textsuperscript{112} However, in 1986 the legislature eliminated Florida RICO's strong civil remedies that allowed a private citizen injured by racketeering conduct to recover treble damages, shifting the damages remedy\textsuperscript{113} to those victimized by less inflammatory, but nearly identical, "criminal activity."\textsuperscript{114} The shift was apparently by organized criminal operatives as an "open state" and other organized criminal operatives are now migrating to Florida from other states, and WHEREAS, organized crime is infiltrating and corrupting legitimate businesses operating within this state and this infiltration and corruption uses vast amounts of money, power, and all the techniques of violence, intimidation, and other forms of unlawful conduct to accomplish its goals, and WHEREAS, in furtherance of such infiltration and corruption, organized criminal operatives utilize and apply to their unlawful purposes laws of the State of Florida conferring and relating to the privilege of engaging in various types of business enterprises, and WHEREAS, infiltration and corruption of legitimate business provide an outlet for illegally obtained capital, harm innocent investors, entrepreneurs, merchants, and consumers, interfere with free competition, and thereby constitute a substantial danger to the economic and general welfare of the State of Florida, and WHEREAS, in order to successfully resist and eliminate such infiltration, it is necessary to provide new criminal and civil remedies and procedures, NOW, THEREFORE, [Florida RICO is enacted].

The Florida Supreme Court has held that the preamble, with its emphasis on organized crime infiltration of legitimate business, did not require the court to invalidate the portion of the statute which prohibited infiltration of illicit enterprises. Dorsey v. State, 402 So. 2d 1178, 1180 (Fla. 1981) (construing FLA. STAT. § 934.461(3) (1977) (current version at FLA. STAT. § 895.02(3) (1985 & Supp. 1986)) ("It is well settled that such 'prefatory language' cannot expand or restrict the otherwise unambiguous language of a statute.")

\textsuperscript{111} Ch. 77-334, § 3, 1977 Laws of Florida 1399, 1402 (1977) (current version at FLA. STAT. § 895.03 (1986)) made it unlawful:

(1) [F]or any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or to invest, whether directly or indirectly, any part of such proceeds; or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in real property, or the establishment or operation of any enterprise. (2) [F]or any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property. (3) [F]or any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt. (4) [F]or any person to conspire or endeavor to violate any of the provisions of subsections (1), (2), or (3).

\textsuperscript{112} Id. §§ 4-5 (current versions at FLA. STAT. §§ 895.04-05 (1985 & Supp. 1986). The criminal penalties remain the same. Conviction under Florida RICO is punishable by up to 30 years in prison and a fine of $10,000 or three times the "gross value gained or . . . gross loss caused" by the racketeering conduct. FLA. STAT. §§ 775.082-83 (1985).

\textsuperscript{113} Private plaintiffs may still seek to enjoin defendants from continuing to engage in the prohibited conduct. FLA. STAT. §§ 895.05(1),(6) (Supp. 1986).

\textsuperscript{114} Ch. 86-277, § 3, 1986 Laws of Florida 2033, 2036-39 (1986) (codified at FLA. STAT. ch. 772 (Supp. 1986)). "Criminal activity" is defined as conduct prohibited by numerous state laws and the federal RICO provisions. The enumerated list of over 30 state laws which
made for aesthetic reasons because of the negative connotation attached to the label of “racketeer” and the apparent frequency with which a RICO claim was appended to private claims of fraud.\textsuperscript{116} Thomas R. Tedcastle, Staff Attorney for the Judiciary Committee of the Florida House of Representatives, testified before the Subcommittee on the Court System that some financial institutions were upset at the publicity and negative connotations surrounding the word racketeer.\textsuperscript{116} According to Tedcastle, these financial institutions would not proceed with a foreclosure out of fear that the irate plaintiff would claim fraud in the contract and label the institution a racketeer, which carries a message of “organized crime.”

Whether or not “criminal” is a more palatable label than racketeer, the creation of chapter 772 to house the treble damages remedy essentially makes this chapter the operative statute for private plaintiffs injured by particular kinds of criminal conduct. As such, it is important to consider the concept of “pattern” in both RICO and chapter 772.

The “pattern” definition in Florida RICO is nearly identical to the federal statute provision noted by the United States Supreme Court in Sedima and by numerous other lower federal courts.\textsuperscript{117} It is defined to “mean engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated constitute “criminal activity” differs from that which was prohibited by Florida RICO as “racketeering activity” in only a handful of instances.\textsuperscript{115} It is important to note that the government may still choose to label one a racketeer and still be entitled to treble damages in a civil suit. Fla. Stat. § 895.05(7) (Supp. 1986) provides:

The state, including any of its agencies, instrumentalities, subdivisions, or municipalities, if it proves by clear and convincing evidence that it has been injured by reason of any violation of the provisions of s. 895.03, shall have a cause of action for threefold the actual damages sustained and shall also recover attorneys’ fees in the trial and appellate courts and costs of investigation and litigation, reasonably incurred. In no event shall punitive damages be awarded. The defendant shall be entitled to recover reasonable attorneys’ fees and court costs upon a finding that the claimant raised a claim which was without substantial factual or legal support.

\textsuperscript{116} Fla. H.R., Committee of Judiciary, Subcommittee on the Court System, tape recording of proceedings (April 9, 1986) (on file with committee).

\textsuperscript{117} See 18 U.S.C. § 3575(e)(1982); Sedima, 473 U.S. at 496 n.14; Stofsky, 409 F. Supp. 609, supra notes 14-15 and accompanying text. The motivation of the Legislature in adopting this language has not escaped the notice of the Florida Supreme Court. In Moorehead v. State, 383 So. 2d 629, 631 (Fla. 1980), the court held that the pattern definition was not unconstitutionally vague, stating that the Florida Legislature “incorporated the federal case law” in defining pattern in this manner and that specifically including interrelated incidents “clarifies the definition.”
incidents.”118 “Pattern of criminal activity” is identically defined, with the additional proviso that it “shall not include two or more incidents of fraudulent conduct arising out of a single contract or transaction against one or more related persons.”119 Presumably then, the government can prosecute fraudulent conduct arising out of a single contract under the RICO provision, but private individuals cannot under their chapter 772 remedies.

Only a handful of cases construe Florida RICO,120 and of those, only a few construe the “pattern” element. As of yet no reported cases deal with the new chapter 772.

The Florida Supreme Court dealt with “pattern” in Bowden v. State121 by stating that it required “proof that a continuity of particular criminal activity exists.” Noting that this construction was similar to that of the federal district court in Stofsky,122 the court found that the statutory definition “clearly requires more than accidental or unrelated instances of proscribed behavior.”123 The court stated that such construction would result in RICO prosecu-

118. FLA. STAT. § 895.02(4) (1985).
119. FLA. STAT. § 772.102(4) (Supp. 1986).
120. See, e.g., Carlson v. State, 405 So. 2d 173 (Fla. 1981) (double jeopardy principles prevented subsequent RICO prosecution of defendant convicted of maintaining a house of prostitution); Cantrell v. State, 403 So. 2d 977 (Fla. 1981) (RICO held not to be unconstitutionally vague); Bowden v. State, 402 So. 2d 1173 (Fla. 1981) (RICO not unconstitutionally vague and does not unconstitutionally prohibit freedom of association); Dorsey v. State, 402 So. 2d 1178 (Fla. 1981) (enterprise includes both licit and illicit organizations); State v. Whiddon, 384 So. 2d 1269 (Fla. 1980) (only one of the two predicate acts must have occurred after RICO's effective date); Moorehead v. State, 383 So. 2d 629 (Fla. 1980) (definition of pattern which requires interrelated incidents is not unconstitutionally vague); State v. Russo, 493 So. 2d 504 (Fla. 4th DCA 1986) (Florida RICO requires two incidents of racketeering conduct, not merely two predicate acts); Finkelstein v. Southeast Bank, 490 So. 2d 976 (Fla. 4th DCA 1986) (denied injunction to prohibit distribution of family trust while RICO action pending) (for a good discussion of this case, see Note, Plaintiffs Under Florida RICO Must Meet Traditional Equity Requirements When Seeking Temporary Injunctions to Safeguard Assets, 14 FLA. ST. U.L. REV. 975 (1987)); Banderas v. Banco Central del Ecuador, 461 So. 2d 265 (Fla. 3d DCA 1985) (scheme to defraud Ecuadoran government by presenting fraudulent statements for medical services and equipment constituted a pattern of activity); Beatty v. State, 418 So. 2d 271 (Fla. 2d DCA 1982) (information which failed to state with particularity the predicate acts charged was found to be insufficient); Dean v. State, 414 So. 2d 1096 (Fla. 2d DCA 1982) (insufficient allegation of proper venue in information waived where defendants were told they had a right to be tried where crimes took place); State v. Bowen, 413 So. 2d 798 (Fla. 1st DCA 1982) (a sole proprietor engaged in a pattern of racketeering activity may be prosecuted under RICO); Delisi v. Smith, 401 So. 2d 925 (Fla. 2d DCA 1981) (attorney general must bear burden of proof for preliminary injunctive relief under RICO).
121. 402 So. 2d 1173, 1174 (Fla. 1981).
123. Bowden, 402 So. 2d at 1174.
tions aimed at "the professional or career criminal and not non-racketeers who have committed relatively minor crimes." 124

However, Bowden is not particularly helpful because it gives little guidance as to what the court views as "similar" or "interrelated" or what proof would constitute a showing of "continuity." The opinion sheds little light on whether a pattern existed in the case at bar because the no contest pleas were appealed solely on the constitutionality of Florida RICO. That is, the appellants argued that RICO was vague and overbroad and that it imposed liability upon constitutionally protected activities such as freedom of association. Thus, the court was not asked to rule on whether violations of the state's obscenity statute, the predicate acts in the case before it, constituted a pattern. While the court anticipated Sedima by requiring continuity of criminal activity, it did not establish any sort of guideline to determine when such continuity exists. Nor did the court suggest, even in dicta, what it meant by similar or related activities. The opinion gives no clue whether the high court will apply a single episode or common scheme analysis, the more common-sensical transactional approach, or whether it will chart a new course.

The Third District Court of Appeal found that a pattern sufficient to invoke RICO existed in a scheme to defraud the Ecuadoran government in Banderas v. Banco Central del Ecuador. 125 There, the bank alleged that the defendants submitted some seventy fraudulent bills to the bank indicating payment and receipt of medical care in the United States and importation of certain machinery into Ecuador. An Ecuadoran program provided a favorable currency exchange rate to citizens who either received medical care or imported machinery. The court found that RICO covered exactly this sort of activity. "This was a well organized, on-going, systematic, criminal scheme devised by appellants to defraud the government of Ecuador—their own government." 126

Again, Banderas is not particularly instructive. While clearly reaching the right result, the court left the concept of "pattern" largely undefined. Perhaps the court in Banderas, like its counterparts in the federal system, found a pattern because it also was influenced by the sheer number of fraudulent invoices and the long period of time involved. 127

124. Id.
125. 461 So. 2d 265 (Fla. 3d DCA 1985).
126. Id. at 270.
127. See supra note 57 and accompanying text.
V. Conclusion

Apparently the courts are stuck, for now, with interpreting RICO unaided. They will find little help from prosecutorial guidelines. The United States Attorney's Manual states that "[n]o indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction."\(^{128}\) The purpose of the guideline, according to the manual, "is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the language of the statute."\(^{129}\) However, the manual does not define "single episode or transaction," so it merely reflects what many courts have been saying all along.

The courts should be sensitive to the possibility that pattern means something different depending on what section of RICO is involved. Perhaps Congress could not specifically define pattern because the definition varies. Limiting RICO's section 1962(c) application to multiple schemes could have significant consequences if that limitation is extended to sections 1962(a) and (b) cases. As the court noted in *Paul S. Mullin & Associates v. Bassett*,\(^{130}\) a requirement for multiple schemes is subject to "manipulative semantics":

For example, an attempt by a racketeering enterprise to infiltrate General Motors could involve countless acts of mail fraud, extortion, securities fraud, and bribery. One could argue, however, that only one criminal scheme is involved because only one company was subverted. Under this view, a "pattern" would come into existence only after the same enterprise began to infiltrate Chrysler or Ford. On the other hand, the enterprise, in infiltrating General Motors, undoubtedly had committed criminal acts of a sufficient number and variety, over a sufficient period of time, to suggest the existence of an elaborate design. This should be enough to create a "pattern."\(^{131}\)

Perhaps the courts should also interpret "related" to require only a relationship to the enterprise and not between the acts

\(^{129}\) Id.
\(^{131}\) Id. at 541.
themselves. The court in *Torwest DBC, Inc. v. Dick*\(^ {132}\) provided a good definition of relationship, which varied depending on what section of 1962 was charged. For a section 1962(a) violation, "the predicate acts must be related in the sense that they produce proceeds which are then invested in an enterprise."\(^ {133}\) A section 1962(b) violation requires that the acts be related to acquiring or maintaining control of an enterprise and a section 1962(c) violation mandates that "the acts be related to the conduct of the affairs of the enterprise."\(^ {134}\) Courts should shift the focus from a narrow look at the acts only to an examination of the activity and its relationship to the prohibited conduct. The courts should consider pattern in terms of the particular section of RICO at issue. Arguably this is precisely the meaning Congress intended when it chose not to be explicit about "pattern."

The alternative, if relationship and common scheme are read narrowly, is to preclude RICO from being used to combat truly organized crime. If the acts are related, a court is likely to find them part of a single episode and exclude RICO. As noted earlier, if the acts must be related to each other and in pursuit of a common scheme, then diversified criminal activity could be beyond its reach. Only if common scheme is interpreted broadly to mean achieving the prohibited conduct, and if episode is restricted to those acts proximate in time, can RICO exist within these judicially-imposed parameters.

Because Florida's RICO statute and its newly-created criminal activity provisions have been closely patterned after federal RICO, the courts would do well to consider and avoid the pitfalls that have befallen the federal courts. As yet, the Florida courts have not strictly defined "pattern." They, too, should consider whether a different definition should attach depending on what section of the statute is claimed to have been violated. They, too, should consider the "interrelatedness" aspect of pattern as perhaps pertaining to the relationship to the "enterprise" and not necessarily between the predicate "incidents" themselves. At the very least, the courts should avoid developing a mechanistic test that is likely to prove unworkable in most instances and which would thwart legislative intent that habitual criminals be punished. Florida courts

\(^{132}\) 628 F. Supp. 163 (D. Colo. 1986), aff'd, 810 F.2d 925 (10th Cir. 1987).
\(^{133}\) Id. at 166.
\(^{134}\) Id.
have an opportunity to learn from the federal struggle, and to avoid making the same mistakes.