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RICO's Pattern Requirement: Clarified or Further Confused

John Bioff

RICO'S PATTERN REQUIREMENT: CLARIFIED OR FURTHER CONFUSED?

H.J. Inc. v. Northwestern Bell Telephone Co.[1]

The Racketeer Influenced and Corrupt Organizations Act (RICO)[2] has become a routine addition to civil actions which, before 1980, would never have seemed appropriate under a statute relating to "racketeering." The statute provides for treble damages and attorney's fees which make it alluring.[3] Its open-ended language allows broad application. In fact, Congress intentionally drafted RICO broadly to snare the widest range of defendants.[4] In the years since its inception, however, the original intention of Congress has been undercut by the problems resulting from the statute's lack of clarity.

The requirement that a pattern of racketeering activity exist for RICO is one such ambiguity in the statute. In *H.J. Inc. v. Northwestern Bell Telephone Co.*,[5] the Supreme Court recently attempted to put an end to confusion in the lower courts as to what constitutes a pattern of racketeering activity. The Court rejected the restrictive Eighth Circuit "multiple scheme" requirement.[6] The Eighth Circuit test required that the defendant be engaged in two or more schemes constituting a "pattern" for RICO.[7] This ambiguous requirement allowed the Eighth Circuit to dismiss every civil RICO claim until *H.J. Inc.*[8] The Supreme Court replaced the multiple scheme test with its own interpretation of pattern and held that a pattern is "a closed period of repeated conduct, or . . . past conduct that by its nature projects into the future with a threat of repetition."[9] Shortly before the *H.J. Inc.* decision,[10] a new

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1. 109 S. Ct. 2893 (1989).
2. 18 U.S.C. §§ 1961-1968 (1988).
3. 18 U.S.C. § 1964(c) (1988).
4. *See, e.g.*, H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2905 (1989).
5. *Id.*
6. *Id.* at 2899.
7. *See infra* notes 52-60 and accompanying text.
8. *See infra* notes 61-62, and accompanying text for a discussion of the Eighth Circuit multiple scheme requirement.
9. *H.J. Inc.*, 109 S. Ct. at 2902. For a complete discussion of the holding in *H.J. Inc.*, see notes 63-139 and accompanying text.

bill, H.R. 1046,[11] was introduced in the House of Representatives to amend the RICO statute.[12] Currently, H.R. 1046 is silent about the pattern requirement.[13]

After discussing the pattern requirement set out in *H.J. Inc.*, this Note will propose, in lieu of H.R. 1046, a new statutory definition of pattern. This new definition would resolve several problems created by the present RICO statute and *H.J. Inc.'s* interpretation of "pattern." Section I reviews the RICO statute.[14] Section III examines how courts have interpreted the statute to define "pattern."[15] It also includes a discussion of the *H.J. Inc.* holding and the new definition of "pattern."[16] Finally, section III proposes a new definition of "pattern" which could be appended to the statute through H.R. 1046.[17]

I. THE RICO STATUTE

RICO was enacted as Title IX of the Organized Crime Control Act of 1970 (OCCA).[18] As the name suggests, its purpose was "to destroy the power of organized crime groups."[19] The statute allows for civil[20] and criminal[21] actions. Under civil RICO, a plaintiff may recover treble damages and attorney's fees.[22]

The elements of a RICO claim have been condensed by one scholar into a checklist of key terms: "[the plaintiff must show he suffered] (1) an *injury* in his business or property because the defendant (2) while involved in one or more enumerated relationships with an *enterprise* (3)

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10. *H.J. Inc.* was decided on June 26, 1989.

11. H.R. 1046, 101st Cong., 1st Sess. (1989).

12. *See infra* notes 140-43 and accompanying text for amendments to RICO in H.R. 1046.

13. *See* H.R. 1046, 101st Cong., 1st Sess. (1989).

14. *See infra* notes 18-32 and accompanying text.

15. *See infra* notes 33-62 and accompanying text.

16. *See infra* notes 63-139 and accompanying text.

17. *See infra* notes 140-151 and accompanying text.

18. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 4 Stat. 922 (codified as amended in various sections of 18, 28 U.S.C. (1982 & Supp. IV 1986)).

19. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 200 (1967); *see also* Abrams, *Civil RICO's Cause of Action: The Landscape After Sedima*, 12 TUL. MAR. L.J. 19, 20 (1987); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249-80 (1982).

20. 18 U.S.C. § 1964(a), (b) (1988).

21. *Id.* § 1963.

22. *Id.* § 1964(c).

engaged in a *pattern* of racketeering activity."[23] It is helpful to recognize these terms as they appear in the statute because they produce the bulk of litigation.

Civil RICO is located in Title 18 sections 1961-68 of the United States Code.[24] A walk-through of the statute begins with section 1964(c) which requires that to maintain a civil action the plaintiff be "*injured* in his business or property by reason of a violation of section 1962."[25] Turning to section 1962, a violation occurs under subsection (c) if the defendant was "employed 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."[26]

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23. Abrams, *supra* note 19, at 25.

24. 18 U.S.C. §§ 1961-1968 (1988).

25. *Id.* § 1964(c) (emphasis added). Section 1964(c) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.* Sedima S.P.R.L v. Imrex Co., 473 U.S. 479, 494 (1985), established that an injury under this section did not have to be one that places the victim at a competitive disadvantage in the marketplace, or be an actual racketeering injury of the type normally associated with organized crime to count as an injury.

26. 18 U.S.C. § 1962(c) (1988) (emphasis added). Subsection (c) is the subsection under which civil RICO actions are most commonly brought. There are three other subsections in section 1962:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Section 1961 defines some of the terms used in section 1962.[27] "Racketeering activity" is defined in section 1961(1) by a listing of applicable federal and state laws which satisfy the preliminary activity requirement, commonly referred to as "predicate acts," which must have occurred to allege RICO.[28] Included in 1961(1) are such crimes as murder, kidnapping, and extortion—crimes which satisfy traditional notions of organized crime.[29] Others, such as mail and wire fraud and fraud in the sale of securities, are somewhat of a surprise for a racketeering statute. These inclusions have the effect of greatly expanding the application of the statute against businesses as opposed to traditional organized crime networks.[30]

Section 1961(5) defines "pattern of racketeering" as requiring "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."[31] By requiring "two acts of racketeering activity," this subsection refers to the predicate acts listed in section 1961(1).[32] Thus, the statute's only attempt to define "pattern" is its requirement of "at least" two section 1961(1) predicate acts. It was this broad language that opened the door for judicial interpretation.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

. . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Id. § 1962(a), (b), (d).

27. Section 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1988). The Supreme Court held in U.S. v. Turkette, 452 U.S. 576, 586-87 (1981), that an "enterprise" includes illegitimate as well as legitimate entities.

28. *See* 18 U.S.C. § 1961(1) (1988) for a complete list of the various federal and state violations which qualify as predicate acts for a RICO allegation.

29. *See id.*

30. *See* Abrams, *supra* note 19, at 42 (citing 18 U.S.C. § 1961(1)(b), (d) (1988)).

31. 18 U.S.C. § 1961(5) (1988).

32. *Id.* § 1961(1).

II. JUDICIAL INTERPRETATION OF "PATTERN"

A. Background

Civil RICO actions began to blossom in the early 1980's.[33] The first Supreme Court decision addressing the "pattern" element was *Sedima S.P.R.L. v. Imrex Co.*[34] *Sedima* held that a prior conviction of a predicate act, racketeering injury (as defined above), or of RICO was not necessary to an action under section 1964(c) of the statute.[35] *Sedima* brought RICO specifically into the civil arena and the Court held that no separate racketeering injury, beyond proving injury from the predicate acts themselves, needs to be shown.[36] In reaching its decision, the Court looked to statutory language and legislative history to infer congressional intent.[37] An underlying conflict with RICO has been whether it is designed exclusively for traditional organized crime members or for any person or business engaging in criminal activity that resembles the sort of activity engaged in by organized crime. The Court noted that Congress was aware of the potential for RICO's abuse because it passed the statute "over the dissent of three members, who feared the treble damages provision would be used for malicious

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33. *See* Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 481 (1985). RICO has been far-reaching. More colorful defendants have included: the Ku Klux Klan, *see* Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982); the Church of Scientology, *see* Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125 (D. Mass. 1982); lawyers and law firms, *see* Elliott v. Chicago Motor Club Ins., 809 F.2d 347 (7th Cir. 1986); Butchers Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535 (9th Cir. 1986); Proctor & Gamble Co. v. Big Apple Indus. Bldgs., Inc., 655 F. Supp. 1179 (S.D.N.Y. 1987).

34. *Sedima*, 473 U.S. 479 (1985).

35. *See id.* at 500; *see also* Abrams, *supra* note 19, at 20 ("Not only did lawmakers recognize that proving organized-crime membership had traditionally been difficult and often impossible; they also concluded that an express organized-crime prohibition might have led courts to strike down RICO for creating an unconstitutional status defense.").

36. *Sedima*, 473 U.S. at 493-500.

37. *See id.* at 487. The Court used the following legislative sources: *Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520 (1970); 116 CONG. REC. 35,295 (1970); S. REP. NO. 91-617, 91st Cong., 1st Sess. (1969); *Measures Relating to Organized Crime, Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 388 (1969) (statement of Rep. Poff); 116 CONG. REC. 35,313 (1970) (statement of Rep. Minish); Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970); 116 CONG. REC. 6,993-94 (1969); H.R. REP. NO. 91-1549, 91st Cong., 2nd Sess. (1970); 116 CONG. REC. 35,342 (1970); 115 CONG. REC. 6,995 (1969) (ABA Comments on S. 2048).

harassment of business competitors."[38] After reviewing the legislative history, the *Sedima* Court concluded: "It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than the archetypical, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress."[39]

The Court discussed whether RICO was intended to apply only to traditional "gangsters" or to anyone engaged in section 1961 criminal activity:

> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate enterprises." Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. The former enjoy neither an inherent capacity for criminal activity nor immunity from its consequences.[40]

In *Sedima* the Court addressed "pattern" for the first time. It broke "pattern" down into a two-prong test: relationship and continuity.[41] The Court concluded in an often quoted footnote:

> 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 . . . . 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.[42]

As one scholar has observed, "*Sedima* made the pattern element RICO's newest major battleground."[43] The language of *Sedima*'s footnote scattered the circuit courts in various directions in developing a test for "pattern." For a time, the Second Circuit represented the most liberal application, holding that "two predicate acts suffice to establish a RICO pattern. . . ."[44] The Second Circuit emphasized "enterprise"

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38. *Sedima*, 473 U.S. at 487 (citing H.R. REP. NO. 91-1549, 91st Cong., 2nd Sess. (1970)).

39. *Id.* at 499.

40. *Id.* at 524.

41. *Id.* at 496.

42. *Id.* (quoting S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969)).

43. Abrams, *supra* note 19, at 46.

44. United States v. Indelicato, 865 F.2d 1370, 1377 (2d Cir. 1989).

instead of "pattern," and required a "'continuing operation' under section 1962(c), by showing 'an ongoing organization' and 'evidence that the various units function as a continuing unit'" to show an "enterprise."[45] The Seventh Circuit's interpretation of pattern required only that the acts be "separate transactions" even if they were part of a single scheme.[46] The Eleventh Circuit held that "a series of predicate acts related to one fraudulent scheme or criminal episode can constitute a pattern [so long as] each act constitutes a separate violation of federal or state law listed in section 1961(1) 'irrespective of the circumstances under which [the acts] arose.'"[47]

Other circuits decided RICO cases without developing a specific test. The Sixth Circuit held that two acts as part of a single count are sufficient for a pattern.[48] The Ninth Circuit held that "a series of acts that were part of a single scheme constituted a RICO pattern because they posed [a] threat of continuing activity."[49] The First Circuit held that "several acts of mail and wire fraud in furtherance of a single isolated bribe (paid in three installments) did not constitute a pattern."[50] The Fourth Circuit held that a single scheme was not sufficient.[51]

The Eighth Circuit first confronted the pattern element of RICO in *Superior Oil Co. v. Fulmer*.[52] Superior Oil brought a civil RICO action against a former employee and two officers for wrongful conversion of liquid petroleum gas.[53] The court entered judgment for Superior Oil.[54] The panel sustained the wrongful conversion claim but reversed the RICO claim.[55] The court used *Sedima* to establish the Eighth

45. *Id.* (citations omitted).

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

47. *Indelicato*, 865 F.2d at 1380 (quoting Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986)).

48. *Id.* (quoting United States v. Jennings, 842 F.2d 159, 163 (6th Cir. 1988)).

49. *Id.* at 1381 (citing Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 194 (9th Cir. 1987)).

50. *Id.* (citing Roeder v. Alpha Indus., Inc., 814 F.2d 22, 30-31 (1st Cir. 1987)).

51. *Id.* (citing International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154-155 (4th Cir. 1987)).

52. 785 F.2d 252 (8th Cir. 1986).

53. *Id.* at 253.

54. *Id.* The jury returned a verdict on the RICO claim for $26,397.70, which the court then trebled. *Id.*

55. *Id.* at 254.

Circuit "multiple scheme" test.[56] In *Superior Oil* the court used *Sedima*,[57] legislative history,[58] and a Second Circuit decision[59] to conclude that the plaintiffs had failed to satisfy the continuity prong of the pattern element for RICO because "the record reveal[ed] one isolated fraudulent scheme."[60]

After *Superior Oil*, the Eighth Circuit used its multiple scheme test to dismiss every civil RICO claim prior to *H.J. Inc.*[61] The Eighth Circuit "multiple scheme" test was by far the most restrictive test for pattern. One scholar likened the Eighth Circuit test to a catch-22:

> [Once the] underlying acts of fraud are sufficiently disparate to constitute entirely separate schemes, . . . then they are unlikely to be sufficiently connected to meet the "continuity plus relationship" requirement of *Sedima*. But if, conversely, the underlying acts of fraud form a continuous and interrelated pattern sufficient to satisfy *Sedima*, they are likely to be viewed together as a single scheme, and thus fail to satisfy the Eighth Circuit's multiple scheme requirement.[62]

B. H.J. Inc. v Northwestern Bell Telephone Co.

As a result of the widespread confusion over the definition of "pattern" among the circuits, the Supreme Court granted certiorari in

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56. *Id.* at 257; *see* Abrams, *supra* note 19, at 46-47. "*Sedima* made the pattern element civil RICO's newest major battleground . . . . The Eighth Circuit's 'multiple scheme' test and the Second Circuit's 'continuing enterprise' test highlight the polar extremes." *Id.*

57. *Superior Oil*, 785 F.2d at 257.

58. *Id.* at 257 n.7. The Court stated: "Although our research reveals no judicial interpretations of [the] pattern requirement, the legislative holding behind this element indicates that it was intended to isolate the professional, long-term criminal elements in society." *Id.*; *see* 116 CONG. REC. 847 (daily ed. Jan. 22, 1970) (statement of Sen. Hruska).

59. 785 F.2d at 257 (citing Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828 (E.D. Ill. 1985)).

60. *Id.*; *see* Abrams, *supra* note 19, at 49. No other circuit adopted the Eighth Circuit "multiple scheme" test. *See also* H.J. Inc. v. Northwestern Bell Tel. Co., 648 F. Supp. 419, 426 n.6 (D. Minn. 1986).

61. *See, e.g.*, Phoenix Fed. Sav. & Loan v. Sherson Loeb R. Hoades, 856 F.2d 1125, 1128 (8th Cir. 1988); Madden v. Gluck, 815 F.2d 1163 (8th Cir. 1987) (per curiam); Holanberg v. Morrisette, 800 F.2d 205 (8th Cir. 1986); Sinan v. Frebourg, 650 F. Supp. 319 (D. Minn. 1986); Clodfelter v. Thurston, 637 F. Supp. 1034 (E.D. Mo. 1986); Allbright Missouri, Inc. v. Billeteri, 631 F. Supp. 1328 (E.D. Mo. 1986).

62. Rakoff, *The Crazy Quilt "Pattern"*, N.Y.L.J., May 24, 1988, at 3, 32.

H.J. Inc., to decide the pattern issue.[63] The court pointed to the inclusion of mail and wire fraud[64] and lack of express direction in the statute itself as requiring an expansive reading of the term "pattern."[65] The Court granted certiorari because Congress had done nothing after *Sedima's* initial invitation[66] for legislative clarification, and the various courts of appeals were producing widely disparate views.[67]

H.J. Inc. was a Minnesota corporation with its principal place of business in Minnesota.[68] H.J. Inc. and other individually named plaintiffs each purchased products and services from the defendant, Northwestern Bell Telephone Company.[69] The defendants included members of the Minnesota Public Utilities Union Commission (MPUC), counsel for the Minnesota Telephone Association, and officers and employees of Northwestern Bell.[70]

The plaintiffs alleged that Northwestern Bell, through the other defendants as agents, "initiated a scheme designed to illegally influence various members of the MPUC, the regulatory body that sets rates which Northwestern Bell may charge for [its] goods and services."[71] The scheme generally involved making illicit payments and offers of benefits to MPUC commissioners in an effort to influence them to use their positions for the benefit of Northwestern Bell.[72] The plaintiffs brought a class action in United States District Court for the District of Minnesota against Northwestern Bell and other defendants, seeking damages for statutory[73] and common law bribery.[74] In addition, the

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63. *H.J. Inc.*, 109 S. Ct. at 2897. The Eighth Circuit Court of Appeals also dismissed the RICO claim because it did not meet the requirement for enterprise. The Supreme Court declined to address this issue. *Id.* at 2898 n.1. The dispute over "enterprise" is whether there must be an enterprise proven separately from the defendant. *Id.* The lower court held in the affirmative. 648 F. Supp. at 428-29.

64. *H.J. Inc.*, 109 S. Ct. at 2900; *see* Abrams, *supra* note 19, at 42 (civil RICO has been likened to a treasure hunt where non-racketeers are pursued using wire, mail, and securities fraud).

65. *H.J. Inc.*, 109 S. Ct. at 2900.

66. *Sedima*, 473 U.S. at 524.

67. *H.J. Inc.*, 109 S. Ct. at 2899.

68. *H.J. Inc.*, 648 F. Supp. at 419-20.

69. *Id.* at 420.

70. *Id.*

71. *Id.* at 421.

72. *Id.*

73. *See* MINN. STAT. § 609.42.1(1), (2) (1988).

74. *H.J. Inc.*, 648 F. Supp. at 421.

plaintiffs sought recovery under section 1964(c) of RICO,[75] suing for treble damages and an injunction against the defendants.[76]

The district court granted the defendants' motion to dismiss for failure to state a claim upon which relief may be granted. The court held that the plaintiffs had not alleged a pattern of racketeering activity because the defendants' acts constituted a single scheme which, by itself, did not satisfy the Eighth Circuit's definition of pattern.[77] The Eighth Circuit required multiple schemes to satisfy the pattern element.[78] The district court dismissed the two bribery claims as well.[79] The court discussed other elements of civil RICO, but held that "plaintiff's failure to satisfy the continuity prong of the *Sedima* pattern test is fully dispositive of plaintiff's RICO claims."[80] On appeal, the Eighth Circuit Court of Appeals affirmed.[81]

The United States Supreme Court reversed the judgment and remanded the cause.[82] All nine Justices rejected the Eighth Circuit view. The Supreme Court provided its own interpretation of the pattern requirement for RICO and held:

(1) "pattern" is a two prong test requiring *relationship* between predicate acts, and *continuity*;[83]
(2) two predicate acts alone do not satisfy the relationship prong;[84]
(3) relationship is proved by showing "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;"[85]
(4) continuity is "a closed period of repeated conduct, or . . . past conduct that by its nature projects into the future with a threat of repetition;"[86]
(5) to establish continuity the conduct must have lasted at least a few weeks or months;[87]

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75. *Id.* at 422.
76. *Id.*
77. *Id.* at 425.
78. *See* Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986) (established the Eighth Circuit multiple scheme test).
79. *H.J. Inc.*, 648 F. Supp. at 430.
80. *Id.* at 426.
81. *H.J. Inc.*, 829 F.2d at 650.
82. 109 S. Ct. at 2906.
83. *Id.* at 2900.
84. *Id.*
85. *Id.* at 2901.
86. *Id.* at 2902.
87. *Id.*

(6) a pattern does not require that the perpetrator have been involved in traditional organized criminal activity.[88]

The Court began its discussion of the pattern requirement by describing what "pattern" is not. It held that a pattern is not established by two predicate acts with nothing more.[89] Noting that section 1961(5) states that "pattern of racketeering activity requires at least two acts of racketeering activity,"[90] the Court re-emphasized *Sedima* in which it decided that this language meant two predicate acts *and* something more must be established to find a pattern.[91] The Court relied on Senator McClellan's comments to suggest that two predicate acts alone do not satisfy pattern[92] and that the predicate acts do not have to be "indicative of a perpetrator involved in organized crime or its functional equivalent."[93]

Seeking to fulfill legislative intent,[94] the Court used the plain meaning of the word "pattern" as taken from the Oxford English Dictionary. Pattern is defined as "an arrangement or order of things or activity."[95] Building on this, the Court reasoned that a specific number of predicate acts will not of itself constitute an "arrangement."[96] The predicates must show a relationship to each other or to "some external organizing principle."[97] The Court noted that the statutory language does not shed any light on determining what form the relationship should take.[98]

Based on the absence of direction in the statute itself, and the open-ended definition of pattern in section 1961(5),[99] the court concluded that the legislative history of the act should determine the meaning of pattern.[100] The Court turned to its own decisions which discussed the

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88. *Id.* at 2905.

89. *Id.* at 2900.

90. *Id.* at 2899 (citing 18 U.S.C. § 1961(5) (1988)).

91. *Id.*; *see Sedima*, 473 U.S. at 496 n.14.

92. 109 S. Ct. at 2900 (citing 116 CONG. REC. 18,940 (1970)).

93. *Id.*

94. *Id.*; *see* Richards v. United States, 369 U.S. 1, 9 (1962) (ordinary meaning of statutory language is assumed to be legislature's intent).

95. 11 OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989).

96. 109 S. Ct. at 2900.

97. *Id.*

98. *Id.*

99. *See supra* notes 31-32 and accompanying text for a discussion of the definition of pattern in section 1961(5).

100. 109 S. Ct. at 2900.

legislative history of RICO,[101] and used its own two-prong relationship/continuity test for "pattern."[102] A definition from another section of the Organized Crime Control Act of 1970 (OCCA), of which RICO is Title IX, was inserted to define the relationship prong.[103] A relationship is shown between predicate acts 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."[104] The Court thus defined what was needed to show a relationship between predicate acts.

Sedima's second prong, continuity, was deemed a separate inquiry from relationship.[105] The continuity prong was the real dispute in *H.J. Inc.* because it was this aspect of "pattern" that the Eighth Circuit had interpreted as requiring multiple schemes.[106] The Court stated that the multiple scheme test is "highly relevant" as to whether continuity is satisfied.[107] Yet the Court refused to require the multiple scheme test. First, the Court noted that the test was a creation of the Eighth Circuit, and is not in the actual statutory language of RICO or the relevant legislative history.[108] Second, the Court reasoned that adding the multiple scheme test would solve nothing because to do so would merely replace the need for defining "continuity" with a need to define "scheme."[109]

The Court defined "continuity" as a "closed period of repeated conduct, or . . . past conduct that by its nature projects into the future with a threat of repetition."[110] To satisfy continuity, the predicate acts

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101. *See Sedima*, 473 U.S. at 486-90; Russello v. United States, 464 U.S. 16, 26-29 (1983); United States v. Turkette, 452 U.S. 576 (1981) (cases where the Supreme Court interpreted RICO using legislative history).

102. 109 S. Ct. at 2900 (citing *Sedima*, 473 U.S. at 496 n.14).

103. *See* The Dangerous Special Offender Act, Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001(a), 84 Stat. 922 (1970) (codified at 18 U.S.C. § 3575(e) (1988)).

104. *Id.*

105. 109 S. Ct. at 2900.

106. *Id.* at 2901; *see* 829 F.2d at 650 (lower court opinion).

107. 109 S. Ct. at 2901.

108. *Id.*

109. *Id.*

110. *Id.* at 2902. There seems to be an inconsistency in the Court's description of continuity. The Court first defined continuity as an "open- or close-ended" concept. *Id.* It described close-ended as "a closed period of repeated conduct," and open-ended as "conduct that by its nature projects into the future with a threat of repetition." *Id.* The Court then added, "a party alleging a RICO violation may demonstrate continuity over a *closed period* by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future

would have to extend at least "a few weeks or months" and continuously threaten criminal activity.[111] In a footnote, the majority stated that Congress intended the statute to apply to long-term criminal activity, regardless of whether criminal activity considered appropriate for this act could be carried out in a very short period.[112] Satisfaction of the test for continuity depends upon the facts of each case.[113] The Court concluded its discussion of continuity and relationship by adding that "the development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope."[114]

It was argued that the pattern requirement should be construed so as to include only racketeering activities resembling organized crime in "the traditional sense" or "organized crime perpetrators."[115] The Court, again turning to statutory language and legislative history, held that the pattern element should not be limited in this way, stating, "the argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text, and is at odds with the tenor of its legislative history."[116] Looking first at RICO's language, the Court found no evidence that the statute was meant to apply to an association exclusively rather than an individual.[117] Traditional organized crime, the Court reasoned, necessarily requires more than one individual.[118] Second, the Court noted that although "organized crime" could have been used in the language of RICO defining pattern, and has been used in other provisions of the

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criminal conduct do not satisfy this requirement." *Id.* (emphasis added).

By definition, "'open-ended' predicate acts" means acts threatening future criminal activity. The Court is apparently requiring "close-ended" predicate acts to threaten future activity as well. Yet, the definition of "closed-ended" necessarily entails a "closed period." Requiring both open- and close-ended predicate acts to threaten future activity seems to negate the very distinction between the two unless an unexpressed meaning is meant by the terms. *See id.* at 2907-08 (Scalia, J., concurring) (discussing other problems with this language).

111. *Id.* at 2902.

112. *Id.* at 2902 n.4.

113. *Id.*

114. *Id.*

115. *Id.* at 2902-03; *see supra* notes 38-40 and accompanying text for discussion of this proposition. A constant tension exists over whether RICO was meant to be applied to traditional "gangsters" or anyone engaging in the specified criminal activity.

116. *H.J. Inc.*, 109 S. Ct. at 2903.

117. *Id.*

118. *Id.*

OCCA, it was not included and, therefore, should not be read into the statute.[119]

Turning to the legislative history of RICO, the Court suggested that "Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime."[120] Organized criminal activity was not intended as a requirement for several reasons. "Organized crime" is almost impossible to define.[121] Furthermore, traditional organized criminal activity is breaking down and crossing the line into "legitimate enterprises."[122] Finally, Congress purposely drafted a broad statute to encompass many crimes and perpetrators. Restricting the statute to organized criminal activity would stifle this purpose.[123] The Court concluded its analysis by noting that while "RICO may be a poorly drafted statute . . . rewriting it is a job for Congress, if it is so inclined, and not for this court."[124] Applying its analysis to *H.J. Inc.*, the Court held that H.J. Inc.'s allegations that Northwestern Bell Telephone Co. engaged in bribery over a six year period were sufficient to survive a motion to dismiss.[125]

Justice Scalia concurred in the opinion, and was joined by Justices O'Connor, Rehnquist, and Kennedy. The concurrence agreed that a single scheme could constitute a pattern and, thus, the lower court order was properly overturned.[126] Those concurring thought the majority opinion only further confused what is required to constitute a pattern.[127] Among its complaints, the concurrence took exception to the majority's new "open- and close-ended concept" approach to the continuity prong of the pattern requirement.[128] It noted that "virtually all allegations of racketeering activity . . . will relate to past periods

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119. *Id.* The Court compared RICO with the Omnibus Crime Control and Safe Streets Act of 1968 (OCCA), Pub. L. No. 90,351, § 601(b), 82 Stat. 209 (1968), which defines organized crime. 109 S. Ct. at 2905. Amici argued that OCCA's preamble which states the purpose of RICO to be "the eradication of organized crime in the United States," supported the narrowing of pattern to include only traditional organized crime elements." *Id.* The Court refused to accept this argument. *Id.* at 2904.

120. *H.J. Inc.*, 109 S. Ct. at 2904. The court cited Senator McClellan, 116 CONG. REC. 18,913-914 (1970), and Rep. Poff, 116 CONG. REC. 35, 204 (1970).

121. *H.J. Inc.*, 109 S. Ct. at 2905. Representative Poff brought out a related problem with narrowing the statute to organized crime: the implications in criminal law of making status an element of a crime. 116 CONG. REC. at 35,204.

122. *H.J. Inc.*, 109 S. Ct. at 2905.

123. *Id.*

124. *Id.*

125. *Id.* at 2906.

126. *Id.* at 2909.

127. *Id.* at 2908.

128. *Id.* at 2907.

that are 'closed' (unless one expects plaintiff . . . to establish that the defendant not only committed the crimes he did, but is still committing them)."[129] The concurrence pointed out that a possible interpretation of "closed ended" is a single scheme which would not fall under RICO unless it threatened to continue into the future.[130] If this were so, "open ended" would have to mean "multiple schemes" sufficient to fall under RICO alone.[131] This interpretation was rejected because the majority rejected the Eighth Circuit multiple scheme test; therefore, "open ended" would not be used in this way.[132] The concurrence seemed to imply that use of the language "open- and close-ended" for the continuity prong injects new language into the statute. The concurrence pointed out that multiple schemes could not be used to explain "open- and close-ended" because the majority rejected it for "introducing a concept . . . that appears nowhere in the language or legislative history of the Act."[133]

The concurrence took exception as well to the definition used for the "relationship prong" of the pattern element.[134] The objection was based on the rule stated in *Russello v. United States*[135] that if there is particular language in one section of a statute but not in another, it is presumed that the language was included or excluded intentionally. This meant that the majority should not have used the definition for "relatedness" taken from section 3575 (e),[136] another section of the OCCA.[137] The concurrence objected to the minimum time limit of "a few weeks or months" placed on the continuity-prong of pattern.[138] It felt this minimum of a few weeks meant that a short period of racketeering activity was "free" for the defendant.[139] It did not mention, however, the majority's rejection of the idea that RICO should be applied only in cases of traditional organized criminal activity.

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129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 2907-08.
134. *Id.* at 2907.
135. 464 U.S. 16, 23 (1983).
136. The Dangerous Special Offender Act, Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001(a), 84 Stat. 922 (1970) (codified at 18 U.S.C. § 3575(e) (1988)).
137. 109 S. Ct. at 2907.
138. *Id.*
139. *Id.* at 2908.

III. LEGISLATIVE "PATTERN" DEFINITION

Several members of the House of Representatives have introduced House Bill 1046[140] which would amend the RICO statute.[141] Major additions in H.R. 1046 include: (1) a government entity may now bring a civil RICO action, (2) a statute of limitations which provides that a civil action may not be commenced "after the latest of four years after the date the cause of action accrues," (3) an affirmative defense if the defendant "acted in good faith and in reliance upon an official, directly applicable regulatory action . . . by an authorized federal or state agency," and (4) federal RICO actions are under exclusive federal jurisdiction.[142] H.R. 1046, however, is silent about the pattern element.[143] A definition of pattern modeled after state RICO pattern definitions should be included in H.B. 1046 to amend the current federal RICO statute. Adding an appropriate definition of pattern into H.R. 1046 could help alleviate some major problems with RICO, and would afford a better result than continued silence which would allow *H.J. Inc.*'s pattern interpretation to stand.

Several state RICO statutes contain more specific language than federal RICO to explain what is required for a pattern.[144] At least twelve states define pattern as "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."[145] This language is from Title X of the Dangerous

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140. H.R. 1046 was picked for this Note because it is immediately available. This Note advocates revising RICO to include a definition of "pattern" through any means, however, including future bills introduced to the floor.

141. H.R. 1046, 101st Cong., 1st Sess. (1989).

142. *Id.*

143. The proposed bill would change "pattern of racketeering" in Section 1961(5) to "pattern of unlawful activity." *See id.* at 11. This change is to avoid problems with the word "racketeering" and does not affect the pattern element.

144. Federal RICO provides only that a pattern "requires at least two acts of racketeering activity" within a ten year period. 18 U.S.C. § 1961(5) (1988).

145. *See, e.g.*, 182 UTAH CODE ANN. § 76-10-1602(2) (1987). Other states with the same or similar definitions include: Florida, FLA. STAT. ANN. § 895.02(4) (West 1981); Georgia, GA. CODE ANN. § 16-14-3(2) (1980); Idaho, IDAHO CODE § 18-7803(d) (1989); Louisiana, LA. CODE CRIM. PROC. ANN. Art. 11, § 1352(c) (West 1983); Nevada, NEV. REV. STAT. ANN. § 207.390 (Michie 1983); New Jersey, N.J. REV. STAT. § 2C:41-1(a) (1987); North Carolina, N.C. GEN. STAT. § 75D-3(B) (1986); Oregon, OR. REV. STAT. § 166.715(4) (1983); Tennessee, TENN. CODE. ANN. § 39-1-1003(6) (1986); Washington, WASH. REV. CODE § 9A.82.010 (15) (1985); Wisconsin, WIS. STAT. ANN. § 946.82(3) (West 1985). The word "purposes" is substituted for "intents," and the word "participants" is substituted for "accomplices" in several of the statutes.

Special Offender Sentencing Act[146] and is the same language that the Supreme Court approved for the relationship prong of the test for pattern.[147] The test for whether to use specific language to define pattern should be whether the language clarifies the term or further confuses any understanding of it. Justice Scalia thought the above language would do the latter:

> It hardly closes in on the target to know that "relatedness" refers to acts that are related by "purposes, results, participants, victims . . . methods of commission, *or* [just in case that is not vague enough] *otherwise*." Is the fact that the victims of both predicate acts were women enough? Or that both acts had the purpose of enriching the defendant? . . . I doubt that the lower courts will find the Court's instructions much more helpful than telling them to look for a 'pattern'—which is what the statute already says.[148]

This proposed language, however, *does* clarify what constitutes pattern. "Purposes," "results," "participants," "victims" and "methods of commission" are not abstractions. They are similar to language used in the criminal law context, and would require as much litigation to define as does, for example, "intentional infliction of emotional distress." These terms are far less ambiguous than the majority's "open- and close-ended concept" terminology used in *H.J. Inc.*[149] Perhaps most importantly, they are terms that cumulatively begin to bring the word "pattern" out of the abstract. One would begin to see a pattern if similar victims repeatedly appeared, or the criminal used the same method of commission to accomplish the crime. Finally, the language arguably is not unconstitutionally vague if the Supreme Court has used it for the same purpose.

The Utah Pattern of Unlawful Activity Act[150] is a model example of a definition of pattern. The statute reads in relevant part:

> "Pattern of unlawful activity" means engaging in conduct which constitutes the commission of at least three episodes of unlawful activity which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise . . . . The most

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146. 18 U.S.C. § 3575(e) (1970).

147. *See H.J. Inc.*, 109 S. Ct. at 2901; *see also supra* note 35 and accompanying text.

148. *H.J. Inc.*, 109 S. Ct. at 2907.

149. *Id.* at 2901.

150. UTAH CODE ANN. § 76-10-1602(2) (1987).

> recent act constituting part of a pattern of unlawful activity . . . shall have occurred within five years of the commission of the next preceding act alleged as part of the pattern.[151]

Note the important aspects of the Utah statute. The three acts must be: (1) not isolated, which means similar purposes, victims, etc. and (2) cumulatively must demonstrate continuity and relationship to each other or to the enterprise. The Utah RICO statute differs from federal RICO in that it requires three acts. It contains the "purposes" language, however, and the two prong relationship/continuity test from *H.J. Inc.* It therefore does not diverge entirely from established RICO concepts.

While the language of the Utah statute is more concrete than the *H.J. Inc.* test, because it gives defendants better notice of what constitutes a RICO offense, the language is not so specific that it detracts from Congress' intention to keep the statute broad to reach as many defendants as possible. It is sufficiently broad because the continuity/relationship requirement counterbalances any fear by prosecutors that the "purposes" language narrows the definition too much. Additionally, the language "or otherwise are interrelated by distinguishing characteristics" is a catch-all phrase so that the "purposes" language is not exhaustive.

The statute is more concrete than *H.J Inc.* because three acts instead of two replace the "open- and close-ended," language which reduces the number of vague terms which will have to be litigated. Three acts which must have "similar purposes, results, victims, or methods of commission" constitute a total definition. As discussed previously, the terms "victims," "purposes," "methods of commission," and "results" are more recognizable as a starting point to define than an "open- and close-ended" concept. Thus there would be no need for the extra "open- and close-ended concept" language. The statute indicates that continuity and relationship are shown by a totality of circumstances using the "purposes" language. The statute focuses primarily on the "purposes" language, while *H.J. Inc.* included the language only to cover its relationship prong. *H.J. Inc.* focused on relationship/continuity, which is more ambiguous than the "purposes" language, and injected yet more ambiguous language, the "open- and close-ended concept" language, to explain the continuity prong of the test. By doing so, *H.J. Inc.* over-complicated the pattern requirement. The Utah RICO statute is efficient but carries less baggage.

The Utah definition of pattern requires less analysis to achieve the same result as the pattern definition used in *H.J. Inc.* It is still broad enough to quell fears that it would unduly hamper prosecutors. Yet, its

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151. *Id.*

terms are less abstract which means less litigation over their meaning. Remaining silent in H.R. 1046 and letting *H.J. Inc.* stand does not remove the possibility that Congress may step in to amend the statute in the future. If Congress arrives at a consensus on a definition of pattern and includes it in H.R. 1046, judges and attorneys could rely on a set definition without fear that *H.J. Inc.* could be moot in the future. Timing this close to *H.J. Inc.* is crucial. If Congress is ever going to change RICO to include a definition of pattern, it should do so immediately. Otherwise the circuits will begin relying on *H.J. Inc.* as the definitive word on the subject.

If included in H.R. 1046, the Utah definition of pattern would clarify RICO. The Utah definition does not sacrifice the interests of the prosecutor, plaintiff, defendant, or judge. Defining pattern, as a crucial portion of RICO, is the proper responsibility of Congress, and should be done now before *H.J. Inc.* becomes solidified as precedent.

JOHN BIOFF