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H.J. Inc. v. Northwestern Bell Telephone Co.: Another Contribution To RICO Confusion

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RICO's Pattern Element

The United States Supreme Court recently had the opportunity to clarify an area of the law which has plagued the entire judicial system with confusion and inconsistency. Under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, one must engage in a "pattern of racketeering activity" in order to violate the statute.[1] The statute explicitly defines what is meant by racketeering activity.[2] It does not, however, clearly explain what is meant by a "pattern of racketeering activity." While a pattern is defined in the statute as "requir[ing] at least two acts of racketeering activity" within a ten year period,[3] the legislative history of RICO makes it clear that something more is needed to constitute a pattern. The principal sponsor of the statute stated that "proof of two acts of racketeering activity, without more, does not establish a pattern."[4] Unfortunately, neither the sponsor nor the other drafters elaborated on what those additional requirements might be.

The Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*[5] held that at least two predicate acts must have a relationship between them and be continuous or have a threat of continuing activity in order to form a pattern and that multiple schemes need not be alleged. The Court stated that "[i]t is this factor of *continuity plus relationship* which combines to produce a pattern."[6] Whether the Su-

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1. 18 U.S.C. §§ 1961-1968 (1988).

2. Id. at § 1961(1). This section provides:

> (1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery) . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . .

3. Id. at § 1961(5). This section provides that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

4. 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan).

5. 109 S. Ct. 2893 (1989).

6. Id. at 2900 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)).

preme Court's decision in *H.J. Inc.* makes RICO any less confusing and more consistent than it has been in the past is the subject of this note.

The Court's Opinion

The dispute in *H.J. Inc.* arose from allegations that Northwestern Bell attempted to persuade members of the Minnesota Public Utilities Commission (MPUC) to perform their duties in a manner favorable to the telephone company. The petitioners, customers of Northwestern Bell, claimed that the telephone company, through acts of bribery including cash payments made to commissioners, negotiations for future employment, and payments for entertainment, caused the MPUC to approve rates for the company which were unfair and unreasonable. The petitioners raised four claims under section 1962 of RICO that Northwestern Bell allegedly violated.[7] The District Court, however, dismissed the com-

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7. Petitioners claim: Section 1962(a) was violated when Northwestern Bell used income obtained from a pattern of racketeering activity consisting of predicate acts of bribery in its business, an interstate enterprise.

Section 1962(b) was violated by respondents obtaining an interest or control in the MPUC, also an interstate enterprise, through the same pattern of racketeering activity.

Section 1962(c) was violated by respondents' affairs through a pattern of racketeering activity.

Section 1962(d) was violated by respondents' conspiring together to violate § 1962 (a), (b), and (c).

Section 1962 provides:

> (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 or the issuer.
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> (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.
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> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

plaint for failure to state a claim upon which relief could be granted,[8] based upon the holding of the Eighth Circuit in *Superior Oil Co. v. Fulmer*[9] that a pattern of racketeering activity required more than one continuing scheme.[10] The District Court in *H.J. Inc.* adopted the *Fulmer* court's interpretation of the *continuity plus relationship* requirement,[11] finding that only one scheme alleged in the case was not enough to meet the continuity requisite. The Court of Appeals for the Eighth Circuit affirmed the District Court's decision dismissing the petitioners' complaint.[12]

The Supreme Court reversed both lower courts, finding that it was possible that the petitioners had stated a claim under RICO. Because the petitioners alleged numerous acts of bribery, which is one of the racketeering activities set out in RICO,[13] the complaint did contain at least two predicate acts which are required to form a pattern. It was the Court's view that the petitioners might also have been able to meet the *continuity plus relationship* requirement. The relationship factor might be satisfied by the allegation that all the acts of bribery took place for the sole purpose of influencing the Commissioners of MPUC to grant unfair and unreasonable rates to Northwestern Bell. The continuity factor might be satisfied by the allegation of frequent racketeering activity over a six-year period. Alternatively, a threat of continuing activity might be established if it could be shown "that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business."[14] Since it appeared that a sufficient cause of action was stated, the Court remanded the case to the lower court.

Analysis of the Decision

The *H.J. Inc.* opinion, however, does not clearly express what will constitute a pattern under RICO. Instead, the Court acknowledges that

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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.

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

18 U.S.C. § 1962 (1988).

8. H.J. Inc. v. Northwestern Bell Tel. Co., 648 F. Supp. 419 (D. Minn. 1986).

9. Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1985).

10. Id. at 257. This court felt that many acts which lead to one scheme are not a pattern, but that multiple schemes are required to form a pattern.

11. This requirement was first enunciated by the Supreme Court in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14, 105 S. Ct. 3275, 3285 n.14 (1985) (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)).

12. H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987).

13. 18 U.S.C. § 1961(1) (1988). See supra note 2.

14. H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2906 (1989).

continuity plus relationship may be proved in a variety of ways and then merely lists a few examples. While holding that a pattern requires *continuity plus relationship* may sound as though it benefits the practitioner, it actually adds nothing more to the understanding of a pattern than did *Sedima, S.P.R.L. v. Imrex Co., Inc.*,[15] a prior RICO case considered by the Supreme Court. *Sedima* did not turn on the definition of "pattern of racketeering activity" or the determination of whether the predicate acts constituted a pattern. The focus of *Sedima* was that to proceed in a civil RICO action there is no need that the defendant have been convicted of a predicate act of a RICO violation and that the plaintiff need not establish a "racketeering injury" separate from the injury of the predicate acts. In explaining the meaning of the pattern requirement of a violation of § 1962(c),[16] the Court articulated a test for finding a pattern, but buried it in a footnote.[17] The *Sedima* Court's basis for finding that a pattern is formed only when *continuity plus relationship* exists between the predicate acts was in the legislative history of RICO. The history explicitly states that two predicate acts alone do not form a pattern. The Senate Report provides that "[i]t is this factor

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15. *Sedima*, 473 U.S. 479, 105 S. Ct. 3275 (1985).

16. See supra note 7.

17. Footnote fourteen provides:

> 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: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act.

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14, 105 S. Ct. 3275, 3285 n.14 (1985) (quoting S. Rep. No. 617, 91st Cong., 1st Sess., at 158 (1969)). Cf. *Iannelli v. United States*, 420 U.S. 770, 789, 95 S. Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).

of *continuity plus relationship* which combines to produce a pattern"[18] and also provides that "sporadic activity"[19] is not the target of RICO.

The majority in *H.J. Inc.* based its decision on the footnote in *Sedima* and on the legislative history contained in the footnote. There are distinct problems, however, in using the language of *Sedima* to establish the definition of a pattern in *H.J. Inc.* The history of RICO must be understood in order to comprehend the difficulties involved.

History of the Pattern Requirement

Controversy has surrounded RICO since its passage in 1970 as part of the Organized Crime Control Act.[20] The statute was enacted as a way to fight organized crime after Congress determined this type of criminal activity was threatening the nation's economic system.[21] The congressional purpose of RICO was to eliminate organized crime in the United States.[22] In order to accomplish this goal, RICO provides for both civil and criminal penalties.[23] The severity of the civil penalty, which provides for treble damages as well as attorney's fees,[24] has been the subject of much debate. Because of the possibility of such a tremendous award, potential for abusing the statute exists. As a result, many have argued for the limitation of the statute by narrowly construing the pattern element to require proof of a link to organized crime. Although this argument was urged by the amici[25] in *H.J. Inc.*,[26] the

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18. S. Rep. No. 617, 91st Cong., 1st Sess., at 158 (1969) (emphasis added).

19. Id.

20. Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 922 (1970).

21. Congress established in its statement of findings and purpose:

> (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; . . . (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. . . .

Id. at 922-23.

22. Id. at 923. Congress stated that the purpose of the Act is: "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."

23. 18 U.S.C. §§ 1963-1964 (1988).

24. Id. at § 1964(c).

25. Black's Law Dictionary 75 (5th ed. 1979) defines *amicus curiae* as "[a] person with strong interest in or views on the subject matter of an action [who] may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to

Court refused to find that RICO was limited to organized crime.[27] The Court noted that Congress used broad concepts so the statute could apply to other situations besides organized crime.[28]

The *Sedima* decision discussed this continuing controversy by noting that since RICO was enacted there has been concern that the statute "provided too easy a weapon against 'innocent businessmen'[29] . . . and would be prone to abuse. . . ."[30] Despite the fact that private civil actions under RICO are being brought mostly against the everyday businessman instead of the stereotypical gangster,[31] the *Sedima* court did not think that the statute was ambiguous. The Supreme Court in *Sedima* made it clear that even though RICO has developed into something more than the drafters may have envisioned, if a defect exists, it "is inherent in the statute as written, and its correction must lie with Congress."[32] Therefore, in response to those who argue that RICO is too broad, the Court replied: "The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern.'"[33]

Inconsistency in the Judicial System After Sedima

After *Sedima*, lower courts have attempted to develop a "meaningful concept of pattern" as they believed the Court had directed them to do. Different circuits, however, have adopted inconsistent tests. Uncertainty still existed concerning whether to construe the pattern element

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suggest a rationale consistent with its own views." Those involved here were the Washington Legal Foundation, the American Federation of Labor and Congress of Industrial Organizations, the National Association of Manufacturers, and the American Institute of Certified Public Accountants.

26. H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2902-03 (1989).

27. Id. at 2905.

28. Id.

29. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498, 105 S. Ct. 3275, 3286 (1985) (quoting H.R. Rep. No. 1549, 91st Cong., 1st Sess. 187 (1970)).

30. Id., 105 S. Ct. 3275, 3286 (1985) (referring to 116 Cong. Rec. 35342 (1970)).

31. The *Sedima* court provides in note 16:

> The ABA Task Force found that of the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common law fraud in a commercial or business setting, and only 9% "allegations of criminal activity of a type generally associated with professional criminals." ABA Report, at 55-56. Another survey of 132 published decisions found that 57 involved securities transactions and 38 commercial and contract disputes, while no other category made it into double figures. . . .

Id., 105 S. Ct. 3275, 3286 n.16 (1985).

32. Id. at 499, 105 S. Ct. at 3286-87.

33. Id. at 500, 105 S. Ct. at 3287.

broadly, so as to eliminate all organized crime possible, or narrowly, so as to avoid the abuse of RICO. Predictably, since some circuits wished to curtail civil RICO actions and some did not, it was interpreted at both ends of the spectrum.

The most restrictive view was utilized by the Eighth Circuit, the same circuit in which *H.J. Inc.* arose. Under that court's interpretation of *continuity plus relationship*, only multiple schemes, and not multiple predicate acts which form only one single scheme, constitute a pattern. *Superior Oil Co. v. Fulmer*[34] is a good example of this approach. The oil company brought actions for wrongful conversion against Fulmer, claiming that over a period of time Fulmer fraudulently took gas from the pipeline he was to oversee. Employing a restrictive view of a pattern, the appellate court found that Superior Oil had alleged only one continuing scheme—to convert gas from the pipeline—despite the number of acts constituting the offense. In order to satisfy the *continuity plus relationship* requirement, the plaintiff had to prove multiple schemes, not just multiple acts leading up to one big scheme. Thus, Superior Oil did not state a RICO claim since no pattern existed. This approach severely limits RICO actions.

A second approach toward interpreting *Sedima* was to define a pattern broadly, as was done before that opinion was rendered. Under pre-*Sedima* law many circuits required merely two predicate acts in order to form a pattern.[35] The Fifth Circuit employed this approach in *R.A.G.S. Couture, Inc. v. Hyatt*.[36] R.A.G.S. complained that the defendant mailed false invoices twice in an attempt to defraud the company on the repair of certain equipment. The appellate court found that because the two acts of mail fraud were related, a pattern was sufficiently established to support a RICO claim. The court stated that *Sedima* bars only two isolated acts from forming a pattern, not two related ones.[37] This approach broadens RICO to allow only two related acts to be sufficient to constitute a pattern.

A third test adopted after *Sedima* fell somewhere between these two approaches. A few circuits adopted a flexible test relying on multiple factors whereby satisfaction of the *continuity plus relationship* requirement is dependent upon the facts of each case. For example, in *Bar-*

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34. Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986).

35. United States V. Jennings, 842 F.2d 159, 163 (6th Cir. 1988); United States v. Ianniello, 808 F.2d 184, 190 (2d Cir. 1986) cert. denied 483 U.S. 1006, 107 S. Ct. 3230 (1987) (explaining *Sedima's* pattern requirement as dictum); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985) (two predicate acts may form a pattern).

36. *R.A.G.S. Couture, Inc.*, 774 F.2d. 1350 (5th Cir. 1985).

37. Id. at 1355. The Court stated: "The Supreme Court in *Sedima* implied that two 'isolated' acts would not constitute a pattern. *Id.* In this case, however, the alleged acts of mail fraud are related."

ticheck v. Fidelity Union Bank/First National State[38] the Third Circuit found that a scheme involving several individuals and two entities, a partnership and a bank, who made repeated misrepresentations to over twenty investors constituted a "pattern" under the ordinary meaning of the word. The factors used to determine that a pattern existed were "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity."[39] This case rejected the concept that racketeering acts of a single scheme constitute a pattern only if the scheme is likely to be ongoing, in favor of a case-by-case analysis to determine the continuity element.[40]

Because of the great disparity among the lower courts in determining what constituted a pattern, the Supreme Court decided to hear *H.J. Inc.* in an effort to resolve this conflict.

What H.J. Inc. Actually Says

H.J. Inc. makes it clear that for a plaintiff to establish a pattern of racketeering activity in a RICO claim he must at least prove two predicate acts and *continuity plus relationship* of those two acts. Therefore, the acts must be related and continuous or threaten continuity.[41] Because this test had not been applied uniformly in the past, the Supreme Court attempted to expand upon what it had said earlier in *Sedima* so that lower courts would have some guidance in their decision-making.

Despite all the debate on whether the pattern element should be construed narrowly in order to eliminate the abuse of RICO, the Court evidently will continue to interpret a pattern broadly in accord with the expansive concepts and terms contained in the statute.[42] If the statute is being used in a different manner than the drafters intended, it is because the language is overly broad. It is up to Congress to limit the statute.[43] Otherwise, the Court will continue to construe RICO as written—expansively.

In giving meaning to the *continuity plus relationship* element, the Court began with what it perceived to be the easier term to define: relationship. It simply adopted the requirements of another title of the Organized Crime Control Act of 1970 (OCCA).[44] Title X, which is the

38. 832 F.2d 36 (3d Cir. 1987).

39. Id. at 39.

40. Id.

41. H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2900 (1989).

42. Id. at 2899 (citing Russello v. United States, 464 U.S. 16, 21, 104 S. Ct. 296, 299 (1983).

43. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499, 105 S. Ct. 3275, 3286-87 (1985).

44. Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 922 (1970), of which RICO formed Title IX.

Dangerous Special Offender Sentencing Act, defines a pattern "solely in terms of the *relationship* of the defendant's criminal acts one to another: '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.'"[45] The Court did not think Congress intended to restrict the relationship requirement of RICO's pattern element any more than was necessary.[46] This part of the test poses little problem. Courts have used similar definitions in the past which produced analogous results.[47]

The more difficult task was to give meaning to continuity. The Court determined that to prove continuity the racketeering activity must be shown to be continuous or have a threat of becoming continuous. In other words, the alleged racketeering activity may have been continuous and be completed before trial, or it may pose a threat of continuity, indicating that it is ongoing. The alleged activity does not have to be open-ended, which means that the plaintiff does not always have to prove the activity will continue in the future. If the activity was continuous in the past and is completed by trial, that is sufficient to establish continuity. The plaintiff does not have to wait until the activity is completed in order to bring an action. However, the majority did determine that an essential factor to establishing continuity is time. The related predicate acts must have taken place over a "substantial period of time."[48] The Court explained that because long-term criminal conduct was the focus of RICO, showing predicate acts which extend over only a few weeks or months do not satisfy the continuity requirement.[49] If the RICO action is brought before continuity can be established, then a *threat* of continuity must be demonstrated.[50]

Because these determinations are factually based, the Court listed several examples to guide lower courts in their decision-making. The first of these is that a pattern is definitely formed if the related predicate acts themselves constitute a clear threat of long-term racketeering activity. By way of illustration the Court stated:

> Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though

45. *H.J. Inc.*, 109 S. Ct. 2893, 2901 (1989) (quoting 18 U.S.C. § 3575(e) (1988)).
46. Id. at 2901.
47. D. Smith & T. Reed, Civil RICO ¶ 4.03 at 4-21 (1990).
48. H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893, 2902 (1989).
49. Id.
50. Id. (citing S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)).

> the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity.[51]

A second example is "by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business."[52] Therefore, continuity exists when the predicate acts are part of a long-term association which exists for criminal purposes. Although not clearly explained by the Court, apparently a business which exists for criminal purposes would fit into this category. An example is a business that smuggles drugs or extorts money. A third example is when "the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'"[53] This is best illustrated by one who has a legitimate business which is run by continually committing mail or wire fraud when dealing with customers. Of course, all of these illustrations must be over a "substantial period of time" to qualify as a pattern.

Criticisms in the Concurring Opinion

Although the intention of the majority in *H.J. Inc.* in providing examples was to expand on the *Sedima* footnote and provide guidance to the lower courts, the concurrence felt that the illustrations may be counterproductive.

Four justices concurred in the view that nothing supports the proposition that predicate acts which make up only a single scheme are never sufficient to satisfy the pattern element under RICO.[54] They disagreed, however, with the reasoning of the majority. Believing that the majority's opinion did nothing to make the statute less confusing than before its decision, Justice Scalia stated that defining a pattern as "continuity plus relationship" for the lower courts was "about as helpful to the conduct of their affairs as 'life is a fountain.'"[55]

The concurrence believed that the majority falsely perceived the relatedness requirement as conceptually simple, when in fact the majority had to pull the definition from another title.[56] Normally when an ex-

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51. Id.

52. Id.

53. Id.

54. Justice Scalia, The Chief Justice, Justice O'Connor, and Justice Kennedy concurred in the opinion.

55. H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2907 (1989).

56. Id. The definition was taken from 18 U.S.C. § 3575 (1988) which is Title X, the Dangerous Special Offender Sentencing Act.

pression is provided in one section of a statute and omitted from a separate section of the Act, the omission is viewed as an intentional means of not having the expression apply to the section in which the words do not appear.[57] Despite this jurisprudential rule and the criticism by the concurrence, lower courts have had no problem deciding which predicate acts are related. Section 3575(e) of Title X, from which the majority drew the relatedness definition, is broad enough that the lower courts can fit almost anything under it. After *Sedima*, lower courts virtually ignored the relatedness element, paying attention instead to continuity. Those cases not addressing the relatedness issue had little difficulty finding a sufficient relationship between the predicate acts.[58]

Even if the majority's definition of relatedness provides a sufficient test, the concurrence disagreed with the Court's explanation of the continuity requirement. This disagreement stems from the requirement that the alleged activity must occur over a "substantial period of time." The Court explicitly rejected those predicate acts which last only a few weeks or months with no threat of continuing activity as sufficient to constitute the pattern requirement. As Justice Scalia pointed out, it is absurd to allow criminals who commit racketeering acts for a whole week or month and then disband (so no threat of continuity exists) to be unreachable under the RICO statute. Essentially, then, criminal conduct which constitutes racketeering activity is "free, as far as RICO is concerned"[59] for at least a few months.

The majority disagreed with the position of those concurring on the "substantial period" requirement.[60] It claimed that short periods of criminal conduct were not meant to be covered by RICO when the statute was drafted. Without citing any support for this proposition, the majority stated that Congress' intention that continuity be demonstrated to form a RICO pattern meant RICO should "reach activities that amount to or threaten long-term criminal activity."[61]

The ordinary meaning of continuity is "the state or quality of being uninterrupted in sequence or succession, or in essence or idea; connectedness, coherence, unbrokenness."[62] This definition does not suggest that the activity must be long-term to be continuous. Accordingly, conduct which is repeated over a short period of time could be continuous. Hence, because the majority cites no legislative authority for this definition of continuity, nor does its definition comport with the ordinary meaning of the word, defining continuous as long-term is not

57. Id. (citing Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983)).
58. D. Smith & T. Reed, Civil RICO ¶ 4.03 at 4-21 (1990).
59. *H.J. Inc.*, 109 S. Ct. at 2908.
60. Id. at 2902 n.4.
61. Id.
62. 3 Oxford English Dictionary 830 (2d ed. 1989).

well-founded. Congress also may have intended short-term, continuous activity to be covered by RICO, inasmuch as the Congressional reports do not contain any restriction to long-term activity. Legislative history does not support the proposition that criminals committing racketeering activity over a short period of time should be permitted to escape the punishment of RICO.

Aside from the definitional problems with relatedness and continuity, the concurring opinion found the examples of continuity given by the majority so vague as to add nothing to the understanding of the concept. The examples, particularly the last two, may make it even more difficult for one to ascertain whether his activity falls within the scope of RICO. These examples state that continuity exists when "the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes," and when "the predicates are a regular way of conducting defendant's ongoing legitimate business."[63] Both may be impossible to apply by the courts. It is possible that the judicial system will get trapped in defining a "*regular* way of doing business."[64] If only two predicate acts are alleged, it will be very difficult for a court to find that these contain regularity sufficient to constitute continuity. The result would be to increase the minimum number of predicate acts required under RICO to a number that courts find "regular." This would be contrary to the statute which only requires a minimum of two predicate acts. The courts may also become entangled in determining which associations have existed long enough to be characterized as "long-term" and which exist for criminal purposes. Although these are only examples, the practical application of them may become so obscured in defining what exactly is covered in each one that the usefulness of the illustrations is abrogated.

The concurring justices also expressed concern as to the constitutionality of RICO should such an attack arise. Because the statute contains criminal applications, its civil applications must have the same degree of certainty that is required of criminal laws.[65] The RICO statute contains severe civil and criminal penalties. In a civil RICO case the plaintiff is allowed attorney fees, costs, and treble damages, in addition to branding his opponent as a racketeer. These stringent penalties have resulted in many debates over whether to construe the statute narrowly, making it difficult to prove, or broadly, allowing abuse of the statute by the unscrupulous or by innocent and legitimate businessmen. The concurrence did not believe that *H.J. Inc.* makes RICO more certain;

63. H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2902 (1989).

64. Id. (emphasis added).

65. Id. at 2909 (citing FCC v. American Broadcasting Co., 347 U.S. 284, 296, 74 S. Ct. 593, 600 (1954)).

hence, the Court may have lost an opportunity to clarify RICO before a real constitutional attack arises because of its vagueness.

While the concurrence admitted that it did not have a better solution to this seemingly impossible definition, it was unable to accept that this latest "guidance" to the lower courts will help the courts at all. The majority's decision, the concurrence believed, will not create a situation that will unify the judicial system any more than the *Sedima* decision did. The only significant contribution the concurrence perceived was that it is now clear RICO may be violated even when only a "threat of continuity" exists and a single episode of racketeering activity may constitute a cause of action under RICO.

Future of a Pattern

While the majority rejected two of the methods which have developed since *Sedima*, that is, the restrictive multiple schemes approach and the broad approach requiring only two predicate acts, no mention was made about the intermediate multiple factor approach. It is unclear why the Court explicitly addressed two methods without even mentioning the third one, but the Court's silence could be construed as an implicit recommendation of the flexible approach.

This intermediate flexible approach calls for analysis of many factors, none of which is determinative. Rather, all of the particular facts of each case are taken into account in deciding if the pattern requirement is met. This allows the lower courts flexibility in determining who has violated RICO. The first court of appeals to adopt the multiple factor approach was the Seventh Circuit in the decision of *Morgan v. Bank of Waukegan*.[66] In this case, the court favored a balancing of *continuity plus relationship*, reasoning that "[t]o focus excessively on either continuity or relationship alone effectively negates the remaining prong."[67] The court proposed that the factors needed to determine whether predicate acts satisfy the *continuity plus relationship* requirement include "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries."[68] Applying these factors it was found that several acts of mail fraud occurring over several years relating to two foreclosure sales were sufficient to establish a pattern. Hence, *Morgan* espoused an analysis which was dependent on all the facts and circumstances of each case while not relying on any one factor.[69]

66. Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986).
67. Id. at 975.
68. Id.
69. Id. at 975-76.

The Third Circuit also used a flexible approach in *Barticheck v. Fidelity Union Bank/First Nat. State* to decide that a pattern existed. As stated earlier, the relevant factors in the court's determination included "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity."[70] In *Barticheck*, the court found that the number of victims was critical in finding a pattern existed where several individuals and two entities made repeated misrepresentations to over twenty investors.[71] The Third Circuit has utilized this approach in several other cases. In *Rose v. Bartle*[72] the court viewed several factors to decide that a RICO claim had been established. Those factors were that there were two perpetrators, four victims, six months of activity and allegations of bribery and extortion, with none of these being dispositive.[73] In *Saporito v. Combustion Engineering Inc.*,[74] the court applied the flexible approach to find that numerous inducements by the company's officers to retire made to at least thirty-two employees over a prolonged period of time were sufficient to constitute a pattern of racketeering activity.

This approach has also been used by the Third Circuit to find that a pattern did not exist. For example, *Marshall-Silver Construction Co. v. Mendel*[75] involved an engineering firm, its officers, and a law firm which filed a petition to involuntarily bankrupt a general contractor and contacted the press with this information. Because the press reported that the contractor was bankrupt, his business was destroyed. The court found that no pattern existed since this was only a single victim, a single injury, a short-lived scheme with no threat of continuing and involved only two perpetrators.

There are several reasons why the judicial system should apply the flexible test to the pattern element of RICO. First, as evidenced by these cases, the multiple factor test allows the court to examine all of the factors surrounding the allegations to decide if a pattern has been established. It also allows the courts the chance to apply RICO as it was intended. The flexible approach is not overly broad nor is it too narrow. It permits both plaintiff and defendant the chance to prevail after the facts are set forth. The restrictive approach practically eliminates the occasion for the plaintiff to successfully state a RICO cause of

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70. Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987).

71. D. Smith & T. Reed, Civil RICO ¶ 4.04 at 4-26.7 (1990).

72. Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989).

73. Id. at 365-66.

74. Saporito v. Combustion Engineering Inc., 843 F.2d 666, 678 (3d Cir. 1988).

75. 835 F.2d 63 (3d Cir. 1987), aff'd, 894 F.2d 593 (3d Cir. 1990). (In light of *H.J. Inc.*, the RICO claim was dismissed since it did not reflect long-term activity or threaten future conduct.)

action, while the expansive approach does the opposite, exposing to RICO liability an overly broad range of defendants. The multiple factor interpretation of a pattern eliminates rigidity in deciding what activity falls into a pattern. Because of this flexibility, the margin of error will be reduced and effectiveness will be restored to RICO. Circuits, such as the Eighth, will not be able to automatically deny a RICO claim simply because the illegal acts involved only one scheme. The flexible approach will force them to weigh all the factors of the case, none of which is dispositive. At the same time, circuits, such as the Fifth, will weigh all the factors without automatically granting RICO relief simply on the basis of two predicate acts.

Another reason the flexible test would be better is because it satisfies the *continuity plus relationship* requirement of *H.J. Inc.* The district court simply uses the various factors to determine if the predicate acts are continuous and related. It permits the courts to deal with the multitude of different circumstances which may arise. It also warns violators that the totality of their actions will be taken into account in determining the continuity and relationship of the predicate acts. The flexible test eliminates the possibility that those who commit racketeering activities for only a few weeks or a few months could escape RICO's reach.

The multiple factor approach is favorable because it does not lead to the complexities associated with defining terms and illustrations for every conceivable situation that may arise. As evidenced by the *H.J. Inc.* case, the words used to define a concept must themselves be defined. The examples given to interpret the new definition may also require explanation. It is a vicious cycle that only obscures the meaning of the original term which was to be defined. It results in the original term being construed in a manner never intended by the drafters.

The Supreme Court did not reject the multiple factor test as it did the other tests which were being applied to the pattern element. Consequently, *H.J. Inc.* may be interpreted as encouraging the use of the multiple factor approach. The decision contains several references to flexibility based upon the facts of each case. Justice Brennan, author of the majority opinion, stated:

> It is reasonable to infer, from this absence of any textual identification of sorts of pattern that would satisfy § 1962's requirement, in combination with the very relaxed limits to the pattern concept fixed in § 1961(5), that Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set.[76]

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76. H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2900 (1989).

Another reference to this type of flexible test is the statement that, "[w]hether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities—preferring to deal with this issue in the context of concrete factual situations presented for decision—we offer some examples. . . ."[77] The mere giving of examples rather than a rule is evidence that it realized each case would be dependent upon its specific facts and that no bright line could be drawn.

The greatest support for the use of this multi-factored test is found in the majority's statement that its decision cannot be made clear until courts actually have to deal with the various situations which may arise. Justice Brennan stated that the concepts of relatedness and continuity forming a pattern "cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists. The development of these concepts must await future cases."[78]

Thus, it is apparent that the Supreme Court did not intend to do away with the multiple factor test or it would have explicitly done so. Considering the harsh penalties of RICO, courts should use their discretion in weighing the various factors to determine whether a pattern of racketeering activity exists. This intermediate approach would ensure that only the intended perpetrators are caught within the web of RICO. The basic criticism of this test is its inherent unpredictability. Recognizing this problem, the Seventh Circuit stated that "[a] test that depends on a case-by-case analysis will necessarily be a bit rough around the edges at first, but as courts begin to apply it to a greater number of factual patterns, its contours should become clearer."[79]

CONCLUSION

The Supreme Court may have had the Seventh Circuit's quote in mind when it rendered the *H.J. Inc.* opinion. Because the decision implicitly encourages the use of the flexible approach, it is evident that the Court wanted to send this new definition, along with a few examples, to the district courts to see if a clear, uniform rule of law will emerge. Although *H.J. Inc.* does not clearly define what constitutes a pattern of racketeering activity in a manner useful to practitioners, it is clear that the Court will continue to construe RICO broadly in accordance with its expansive terms until congressional action is taken.

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77. Id. at 2902.
78. Id.
79. Morgan v. Bank of Waukegan, 804 F.2d. 970, 977 (7th Cir. 1986).

H.J. Inc. is suggesting to Congress that RICO needs to be redrafted in a manner which embraces the flexible approach of using the totality of a perpetrator's acts to decide if his activity creates a pattern of racketeering activity. Until Congress acts, lower courts have two options: they can continue on the same path of treading through the entanglement and uncertainty of RICO, or they can construe *H.J. Inc.* to mean that *continuity plus relationship* is dependent upon the specific facts each case presents.

If Congress fails to act, it is possible RICO may be challenged by a constitutional attack which, as Justice Scalia fears, the statute may not be able to withstand.[80] It would be in the nation's best interest for Congress to act in an expedient manner in this situation. Otherwise, the RICO statute may be struck down, leaving the justice system no way to fight the organized criminal activity which infests our businesses and costs our society so much.[81]

Dawn Theresa Trabeau

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80. *H.J. Inc.*, 109 S. Ct. at 2909.

81. Before Congress now is a proposal to amend RICO which will severely limit the damages available under the statute. A plaintiff will only be allowed treble damages if the defendant had been convicted of a felony based on the same conduct. Most plaintiffs will be limited to recovering actual damages. Punitive damages will be available in certain consumer fraud cases under a clear and convincing standard, but the damages will be limited to twice the actual damages. This proposal will restrict the number of civil RICO cases, but it avoids the real problem with the statute: the definition of a "pattern of racketeering activity." 136 Cong. Rec. S438 (daily ed. Feb. 5, 1990).