RICO "PATTERN" BEFORE AND AFTER 

H.J. INC.: A PROPOSED DEFINITION

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INTRODUCTION

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) as part of Title IX of the Organized Crime Control Act of 1970. The primary purpose of the Organized Crime Control Act was to eradicate organized crime in the United States. Congress drafted RICO specifically to provide a more effective means of combatting organized crime through new remedies and enhanced sanctions that Congress mandated "be liberally construed to effectuate . . . remedial purposes." The RICO statute codifies civil and criminal provisions in the United States criminal code. Section 1961 defines "racketeering activity" by listing specific state and federal crimes. The enumerated crimes are called predicate crimes because, if two or more are committed, a RICO claim can be based upon them. In the early

6. Id. § 1961(1)(A)-(E); see also infra text accompanying note 29 (listing crimes).
1970s, commentators hailed the criminal provisions of RICO as "the new darling of the prosecutor's nursery." By the early 1980s, however, critics were charging that civil RICO provisions were over-used and misdirected. In particular, the inclusion of mail, wire, and securities fraud as predicate acts is often blamed for the explosive use of RICO over the past ten years. The availability of these commercial fraud predicates to establish a RICO violation allows plaintiffs and prosecutors to extend civil RICO beyond its intended purpose and to use it against established businesses, including law, banking, and insurance firms.

A liberal construction of the statute's broad language means not only that the discretion to invoke RICO remains with prosecutors and plaintiffs' lawyers, but also that the courts must define RICO's scope and prevent its abuse. In 1985, the Supreme Court's dicta

8. Tarlow, RICO: The New Darling of the Prosecutor's Nursery, 49 FORDHAM L. REV. 165, 169 (1980) (referring to recent expanded use and broadened construction of RICO statute); see Blakey, Study of Allegations of Litigation Abuse, 5 Civil RICO Rep. (BNA) No. 4, at 5 (June 20, 1989) (noting that, in 1970s, United States Department of Justice (DOJ) moved slowly in using RICO's criminal provisions and even more slowly in using its civil provisions, but that today RICO is prosecutor's tool of choice in combatting particular crimes).


11. See Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 501 (1985) (Marshall, J., dissenting) (identifying mail and wire fraud as "single most significant reason for the expansive use of civil RICO" and noting that, before RICO, no federal law provided private damage remedies based on these violations); see also Crovitz, R-I-C-O and the Man, REASON, Mar. 1990, at 27, col. 2 (observing that "[n]early half of the private civil RICO cases rely solely on allegations of mail or wire fraud and another third rely primarily on allegations of securities fraud.").

12. See Comment, supra note 9, at 667 (maintaining that civil RICO used in settings not anticipated by drafters); see also DeConcini Rejects Suggestion that RICO Reform Bill is "Done Deal", 5 Civil RICO Rep. (BNA) No. 3, at 4 (June 13, 1989) (noting that many practitioners and scholars agree that civil RICO is abused) [hereinafter DeConcini Rejects Suggestion]; Mansnerus, As Racketeering Law Expands, So Does Pressure to Rein It In, N.Y. Times, Mar. 12, 1989, at 1, col. 1 (acknowledging RICO was intended to "bring broader powers to bear against criminals who had proved to be difficult to prosecute"). But see Blakey, supra note 8, at 6 (arguing that critics of civil RICO overestimate litigation abuse).

13. Harrison, Look Who's Using RICO, A.B.A. J., Feb. 1989, at 56, col. 1 (recognizing that RICO has upset "rules of the game" in areas of labor, employment, and bankruptcy law); DeConcini Rejects Suggestion, supra note 12, at 4 (expressing concern that increasing number of lender liability suits will have negative impact on small businesses dependent on community banks for loans); Mansnerus, supra note 12, at 1, col. 1 (stating businesses, securities dealers, and accountants are most frequent targets of civil RICO).


in Sedima, S. P. R. L. v. Imrex Co.\textsuperscript{16} suggested that courts could limit the scope of RICO’s application by narrowing the definitions of RICO’s key elements, “person,” “enterprise,” and “pattern of racketeering activity.”\textsuperscript{17} The Sedima language triggered a debate among the circuit courts about how the pattern element is established.\textsuperscript{18} Five tests emerged, each attempting to define RICO’s pattern element.\textsuperscript{19} The Eighth Circuit’s multiple schemes test, however, was the most stringent.\textsuperscript{20} Predictably, a case originating in the Eighth Circuit provided an opportunity for the Supreme Court to establish a definite standard.\textsuperscript{21}

In \textit{H.J. Inc. v. Northwestern Bell Telephone Co.},\textsuperscript{22} the Court formulated a test to determine the existence of a RICO pattern of racketeering.\textsuperscript{23} Under this test, two or more predicate acts comprising the pattern must: 1) be related to each other or to “some external organizing principle,” and 2) amount to continuous criminal activity or pose a threat of continued criminal activity.\textsuperscript{24} The \textit{H.J. Inc.} test eliminates the need to show that the racketeering predicates were committed to further multiple criminal schemes.\textsuperscript{25} According to the Court, multiple predicates committed to further a single illegal scheme may be sufficient to form the requisite “pattern of racketeering activity.”\textsuperscript{26}

This Comment analyzes the Supreme Court’s decision in \textit{H.J. Inc.}, focusing on the test the Court formulated to define a RICO pattern.

\textsuperscript{16} 473 U.S. 479 (1985).
\textsuperscript{17} Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985). The majority focused on the definition of “pattern of racketeering activity” and held that, although two acts are necessary to establish a pattern, two isolated acts may not be sufficient. \textit{Id.}
\textsuperscript{18} Although beyond the scope of this Comment, Sedima also created a split of authority among the lower courts over the “enterprise” requirement. For a thorough discussion of the “enterprise” requirement, see Comment, \textit{The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View}, 62 Tul. L. Rev. 1419, 1424-47 (1988) (examining nexus between “enterprise” and “pattern of racketeering activity”); Comment, \textit{supra} note 9, at 677-91 (analyzing components of RICO “enterprise” requirement); U.S. Dep’t of Just. RICO Manual, \textit{supra} note 7, at 25-34 (identifying types of “enterprises”).
\textsuperscript{19} \textit{See infra} notes 44-67 and accompanying text (examining multiple scheme, Blockburger, totality of circumstances, Blockburger enhanced, and Sedima tests).
\textsuperscript{20} \textit{See infra} notes 46-49 and accompanying text (describing application of Eighth Circuit’s multiple schemes test).
\textsuperscript{22} 109 S. Ct. 2893 (1989).
\textsuperscript{23} \textit{H.J. Inc.}, 109 S. Ct. at 2900; \textit{see infra} notes 94-98 and accompanying text (articulating two-pronged continuity plus relationship test); \textit{see also} notes 109-18 and accompanying text (elaborating requirements of continuity prong).
\textsuperscript{24} \textit{H.J. Inc.}, 109 S. Ct. at 2900.
\textsuperscript{25} \textit{Id.} at 2901.
\textsuperscript{26} \textit{Id.} at 2902.
Part I presents an overview of RICO's pattern requirement and discusses Sedima, the first Supreme Court decision to address it. Further, Part I identifies the five tests developed in the circuit courts to determine the existence of a RICO pattern before H.J. Inc. Part II reviews the facts, procedural history, and holding of H.J. Inc. Part III explores the contours of the H.J. Inc. Court's pattern test and addresses Justice Scalia's concern that RICO may be unconstitutionally vague. Part III also identifies the significant consequences of the Court's decision by analyzing post-H.J. Inc. pattern decisions. Part IV describes the most recent congressional efforts to amend RICO. Part V identifies five options to limit RICO, examines language used in state "little" RICO statutes, and proposes a new statutory definition of pattern that captures the concept of continuing illegal activity. This Comment concludes that legislative action is needed to narrow the definition of pattern in order to restrict RICO's scope to a more traditional notion of organized crime.

I. BACKGROUND

A. An Overview of the Pattern Requirement in RICO

The definition of "pattern of racketeering activity" is extremely important because it is a key element of each substantive civil and criminal offense RICO creates. Section 1961(5) states that a "pattern of racketeering activity" "requires" that at least two acts of "racketeering activity" occur within a ten-year period. Additionally, conspiring to commit any of these three offenses is also unlawful under federal RICO. The Supreme Court held that the language in both the civil and the criminal provisions requires consistent construction. See H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2899 (1989) (noting pattern requirement applies to both criminal and civil RICO cases); Russello v. United States, 464 U.S. 16, 20 (1983) (maintaining that even when language is ambiguous, it must be regarded as conclusive if no contrary legislative directive is available) (citing United States v. Turkette, 452 U.S. 576, 580 (1981)). The statute requires that one predicate act be committed after the effective date of RICO, excluding any period of imprisonment. 18 U.S.C. § 1962(d).
murder, robbery, extortion, gambling, bribery, arson, kidnapping, and select federal crimes including obstruction of justice, dealing in obscene material, wire fraud, bank fraud, mail fraud, and securities fraud. According to the statute, two or more such enumerated crimes, or predicates, can form a pattern of racketeering even if both are state offenses. The basis for federal jurisdiction is a nexus between the acts of racketeering charged and an "enterprise" that affects interstate or foreign commerce.

The use of civil RICO has increased dramatically since 1981 as plaintiffs extended its application to diverse situations not routinely described as organized crime. Because the definition of pattern can affect the statute's scope, not surprisingly, it is the most controversial and litigated issue in RICO jurisprudence today.

The first Supreme Court effort to interpret the pattern requirement was in 1985, in Sedima, S.P.R.L. v. Imrex Co. The Sedima Court suggested that a "pattern of racketeering activity" is established if satisfies the ex post facto clause requirement of necessary notice).
the predicate acts are continuous and related, but did not explain what it meant by continuity or relationship.36 The Court acknowledged that RICO's broad language resulted in unanticipated applications of the statute but explained that Congress has the responsibility to correct this defect if it desires to do so.37

Sedima generated extensive commentary on the scope of RICO in civil suits.38 Courts that wished to limit civil RICO embraced Sedima's "continuity" language.39 By requiring continuity as part of the pattern or "enterprise" element, judges could dismiss cases for failure to plead continuity, thus significantly restricting the scope of RICO.40 Before Sedima, there was no judicial requirement that the predicate acts pose a threat of continued racketeering activity.41

37. Id. at 499. The Supreme Court's decision in Sedima does not resemble Congress' intentions regarding the pattern requirement in that no meaningful continuity or relationship requirement was discussed in the original RICO bill. S. 1861, 91st Cong., 1st Sess. § 1961 (1969). The bill that eventually became RICO defined "pattern of racketeering activity" as including at least one act that had occurred after the effective date of the chapter. Id. § 1961(1)(A). After the Department of Justice concluded that "pattern of racketeering activity" meant at least two acts, Congress amended the definition to provide that a pattern included at least two acts, with the caveat that one of the acts occur after the effective date of the chapter. Id. § 1961(6). Concern that the definition lacked a temporal restriction resulted in the addition of a requirement that each predicate act occur within 10 years, excluding imprisonment, after the commission of a prior act of "racketeering activity." 18 U.S.C. § 1961(5) (1988); see United States v. DePalma, 461 F. Supp. 778, 782 (S.D.N.Y. 1978) (interpreting 10-year limitation). In its present form, pattern is not defined but "requires" that at least two acts of "racketeering activity" be committed within a 10-year period. 18 U.S.C. § 1961(5) (1988). Whether the 10-year limitation could be read as requiring that there be a nexus between the two predicate acts was uncertain. DePalma, 461 F. Supp. at 782 (arguing 10-year limitation in statute provides nexus between two predicate acts). The definition, however, does not explicitly require that the predicate acts be related or continuous. 18 U.S.C. § 1961(5) (1988). Moreover, because the legislative history reveals that Congress spent a significant amount of time in choosing the definition of pattern, yet failed to require a causal nexus, some courts held that the only relationship requirement that can be imposed is that the two predicate acts occur within 10 years of each other. See DePalma, 461 F. Supp. at 782 (holding that definition of pattern contains no mention of relatedness).

Finally, it is interesting to note that in United States v. Turkette, 452 U.S. 576 (1981), the Supreme Court simply stated that there is no limitation on the type of association embraced by RICO's pattern element. Turkette, 452 U.S. at 580. This broad interpretation of pattern suggests that the Court was not then concerned with limiting RICO's scope by requiring a form of continuity. D. Reed & T. Smith, supra note 15, at 4-12.


39. See U.S. DEP'T OF JUST. RICO MANUAL, supra note 7, at 54 (emphasizing "continuity" language not necessary to Sedima Court's decision).
40. D. Smith & T. Reed, supra note 15, at 4-5 to 4-6.
41. Id. at 4-2. A few cases decided before Sedima did recognize or suggest that the term pattern implied a requirement of continuity. See, e.g., United States v. Young, 745 F.2d 733,
The Supreme Court elaborated upon this concept in *H.J. Inc. v. Northwestern Bell Telephone Co.*[42] wherein the Court articulated a two-pronged continuity test.[43]

**B. Pre-H.J. Inc. Circuit Court Pattern Tests**

The definitions of pattern adopted by the circuit courts that addressed it can be categorized loosely into five approaches.[44] These pre-*H.J. Inc.* approaches may be identified as follows: 1) the multiple schemes test, 2) the *Blockburger* test, 3) the totality of the circumstances test, 4) the *Blockburger* enhanced test, and 5) the *Sedima* continuity plus relationship test.[45]

The Eighth Circuit adopted the multiple schemes test. Following the Supreme Court’s decision in *Sedima*, the Eighth Circuit consistently held that a single scheme involving the commission of numerous related acts, over a substantial period of time, is not sufficient for a pattern and that a RICO pattern requires that the multiple acts be in furtherance of multiple schemes.[46] The Eighth Circuit failed

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[44] The Special Counsel to the Chief, Organized Crime and Racketeering Section, Criminal Division, United States Department of Justice developed the categorization and description of the tests. Interview with Frank J. Marine, Special Counsel to the Chief, in Washington, D.C. (Nov. 3, 1989) [hereinafter Interview].

[45] A sixth approach, the multiple episodes test, has not been squarely adopted by a court of appeals, but the Department of Justice uses this test as its general internal guideline in reviewing proposed RICO actions. See U.S. Dep’t of Just. RICO Manual, supra note 7, at 57-58.

The multiple episodes test requires proof of multiple episodes, de-emphasizes the continuity concept, and suffers from the same statutory construction problems as the multiple schemes test; it is not supported by RICO’s definition of pattern or “racketeering activity,” and is contrary to the explicit use of acts as the measuring units. 18 U.S.C. § 1961(5) (1988).

DOJ terms the multiple episodes test “the single episode rule.” U.S. Dep’t of Just. RICO Manual, supra at 52. Using this rule, two or more predicate acts that stem from a single episode may not constitute multiple racketeering acts. Id. at 57-58. Moreover, the RICO manual notes that the offenses of narcotics importation and possession with intent to distribute would be considered a single episode. Id. at 58. Finally, it is worthy to note that the Seventh Circuit defined episode to be more than a single predicate act but less than a scheme. Lipin Enter., Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986).

[46] See Phoenix Fed. Sav. & Loan Ass’n, F.A. v. Shearson Loeb Rhoades, Inc., 856 F.2d 1125, 1128 (8th Cir. 1988) (affirming dismissal of RICO claim involving single scheme), cert. denied, 109 S. Ct. 1340 (1989); Terre Du Lac Ass’n, Inc. v. Terre Du Lac, Inc., 834 F.2d 148, 149-50 (8th Cir. 1987) (holding that acts of mail fraud constituted single scheme and did not meet multiple schemes requirement for establishing pattern, but vacated in light of *H.J. Inc.*), vacated, 57 U.S.L.W. 3853 (1989); United States v. Kragness, 830 F.2d 842, 858-59 (8th Cir. 1987) (establishing that several ventures to import and traffic drugs satisfied RICO’s multiple scheme requirement and stating that each defendant need not personally participate in two
to recognize that neither the plain terms of the RICO statute nor the Sedima decision require multiple schemes; the word scheme is nowhere mentioned in the statute. Rather, the RICO statute provides that a "pattern of racketeering activity" requires at least two acts of racketeering activity.

The Eleventh Circuit applied the Blockburger double jeopardy test to RICO. In pre-Sedima cases, the Fifth and Seventh Circuits also followed this approach. The Blockburger test is based on the principle that multiple offenses arising out of the same transaction may be different schemes); Madden v. Gluck, 815 F.2d 1163, 1164 n.1 (8th Cir.) (disagreeing with United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986), and stating that pattern requires multiple schemes), cert. denied, 483 U.S. 1006 (1987); De Vries v. Prudential-Bache Sec, Inc., 805 F.2d 326, 329 (8th Cir. 1986) (stating that numerous fraudulent securities sales over six-year period, pursuant to single plan to produce excessive sales commissions, did not constitute pattern); Holmberg v. Morissette, 800 F.2d 205, 209-10 (8th Cir. 1986) (holding that multiple acts of mail and wire fraud, relating to single scheme to defraud, do not constitute pattern), cert. denied, 481 U.S. 1028 (1987); Superior Oil Co. v. Fulmer, 785 F.2d 252, 254-58 (8th Cir. 1986) (holding that pattern requires proof of "continuity plus relationship" and that several related acts of mail and wire fraud pursuant to single scheme to defraud did not constitute pattern).

47. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 484-86 (1985) (alleging only single fraudulent scheme whose sufficiency for pleading was not questioned).
51. See United States v. Colacurcio, 659 F.2d 684, 688 n.4 (5th Cir. 1981) (determining each act of bribery pursuant to single scheme to be separate act), cert. denied, 455 U.S. 1002 (1982); United States v. Martino, 648 F.2d 367, 402-03 (5th Cir. 1981) (determining that arson and mail fraud arising from same fire are separate acts), cert. denied, 456 U.S. 949 (1982); United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976) (holding defendants' participation in several card games over 19 month period sufficient for pattern); United States v. Starnes, 644 F.2d 673, 677-78 (7th Cir.) (holding that arson and interstate travel to commit arson are separate acts and, therefore, form requisite pattern), cert. denied, 454 U.S. 826 (1981); United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978) (holding that five mailings
considered separate and distinct violations of different statutes.\textsuperscript{52} Two offenses arising from the same criminal transaction are considered to be separate racketeering acts if each offense requires proof of an element that the other does not.\textsuperscript{53} When a single statute is involved, courts following the \textit{Blockburger} test rely on the law governing the statute to determine whether multiple offenses may be charged.\textsuperscript{54} The \textit{Blockburger} test does not include any relationship or continuity requirement.

The Third and Ninth Circuits used the totality of circumstances test to determine whether the pattern requirement was fulfilled. Under this multi-factor test, the number of unlawful acts, victims, and perpetrators are considered, as well as the character and similarity of the unlawful acts and the length of time over which they were committed.\textsuperscript{55} The totality of circumstances test is highly fact-

\textsuperscript{52} Blockburger v. United States, 284 U.S. 299, 302-04 (1932).
\textsuperscript{53} See id. at 304.
\textsuperscript{54} See supra notes 50-51 (listing cases applying \textit{Blockburger} test to RICO).
\textsuperscript{55} See United States v. Zauber, 857 F.2d 137, 148-49 (3d Cir. 1988) (finding pattern that satisfied Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36 (3d Cir. 1987) criteria even though multiple kickback payments were alleged as only one predicate), cert. denied, 109 S. Ct. 1340 (1989); United States v. Echeverri, 854 F.2d 658, 649 (3d Cir. 1988) (finding possession of narcotics with intent to distribute, conspiracy among many participants, large volumes of drugs, and large number of potential victims fulfilled pattern requirement); Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1063 (3d Cir. 1988) (holding that RICO pattern does not require multiple schemes or open-ended scheme); Paradise Hotel Corp. v. Bank of Nova Scotia, 842 F.2d 47, 53 (3d Cir. 1988) (noting bank's allegedly unlawful involuntary bankruptcy petition filing against plaintiff was insufficient to fulfill pattern requirements under Marshall-Silver Constr. Co. v. Mendel, 835 F.2d 63 (3d Cir. 1987)); Saporito v. Combustion Eng'g Inc., 843 F.2d 666, 667-78 (3d Cir. 1988) (holding that multiple schemes are not required for pattern and that numerous indictments of various employees, over extended time period, would constitute pattern), vacated, 109 S. Ct. 1306 (1989); Marshall-Silver Constr. Co. v. Mendel, 835 F.2d 63, 66-67 (3d Cir. 1987) (rejecting Eighth Circuit's multiple schemes test and adopting multi-factor "case-by-case analysis" of factors listed in Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36 (3d Cir. 1987)), vacated, 57 U.S.L.W. 3853 (1989) (vacating in light of \textit{H.F. Inc.}; Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987) (rejecting multiple schemes test and holding pattern is determined by considering various factors including "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"); Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1266-68 (3d Cir. 1987) (declining to require multiple schemes, but holding that several bribes in two transactions established pattern); Petro-Tech, Inc. v. W. Co., 824 F.2d 1349, 1353-56 (3d Cir. 1987) (declining to specify particular test for determining pattern in civil RICO case, but holding that allegations met all various tests advanced); United States v. Grayson, 795 F.2d 278, 288-90 (3d Cir. 1986) (deciding to decide what pattern required, but holding that multiple acts of manufacturing, possessing, and distributing narcotics constituted pattern), cert. denied, 481 U.S. 1018 (1987); Malley-Duff & Assoc., Inc. v. Crown Life Ins. Co., 792 F.2d 341, 353 n.20 (3d Cir. 1986) (observing that \textit{Sedima} gave little guidance on pattern definition, and holding that allegation of similar conduct, in different cities, was sufficient to satisfy even most stringent post-\textit{Sedima} pattern test), aff'd, 483 U.S. 143 (1987); United States v. Boffa, 688 F.2d 919, 934 (3d Cir. 1982) (holding that four separate payments for monthly automobile use constituted four separate violations of Taft-Hartley, 29 U.S.C. § 186(a) (1988), and four predicate
specific and is criticized because it rejects the "enterprise" as an additional source of continuity, results in repetition of factors, and lacks predictability.

The Second Circuit used a modified form of the Blockburger test, referred to here as the Blockburger "enhanced" test. This test added to Blockburger the more specific requirements of "relationship and continuity." Only the Second Circuit, for example, held explicitly that the "continuity and relationship" requirement is fulfilled when the two predicate acts are related to the "enterprise" and either the predicate acts or the "enterprise" poses a threat of continuity. The Second Circuit defines a unit of "racketeering activ-
ity" as an act that violates the state or federal statutes explicitly enumerated in RICO section 1961(1).60 The Second Circuit's approach does not read a requirement of multiple schemes or episodes into the statute.61 Furthermore, this approach addresses the need for "relationship and continuity" without getting tangled in a myriad of factors that could lead to a requirement of multiple schemes or episodes.62

The Sedima test was applied by the Fourth, Fifth, Seventh, and Tenth Circuits,63 which held that a "pattern of racketeering activity" must reflect "continuity plus relationship" such that "proof of two acts of racketeering, without more, does not establish a pattern."64

The formulation and basic approach of this test are similar to those of the totality of circumstance test65 and to the Second Circuit's Blockburger "enhanced" test.66 Moreover, except for explicitly enumerating the list of factors to be considered under the totality of circumstances test, the Sedima test is essentially the same as the totality of circumstances test.67

An analysis of the diverse methods that have been employed by

60. See 18 U.S.C. § 1961(1) (1988) (listing statutory violations that are included in definition of "racketeering activity"); see also supra note 58 (illustrating Second Circuit's approach to defining pattern).

61. See supra note 58 and accompanying text (listing Second Circuit cases that reject multiple schemes requirement).


63. See, e.g., LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n, 830 F.2d 522, 529 (4th Cir. 1987) (finding that single breach of fiduciary duty did not constitute pattern), cert. denied, 484 U.S. 1065 (1988); HMK Corp. v. Walsey, 828 F.2d 1071, 1073-77 (4th Cir. 1987) (refusing to adopt all-encompassing definition of pattern but holding that "existence of a pattern thus depends on context, particularly on the nature of the underlying offenses"), cert. denied, 484 U.S. 1009 (1988); Montesano v. SeaFirst Commercial Corp., 818 F.2d 423, 425-26 (5th Cir. 1987) (relying on Sedima dictum and holding that preparatory acts pursuant to single objective did not establish pattern); Morgan v. Bank of Waukegan, 804 F.2d 970, 973-76 (7th Cir. 1986) (rejecting multiple episodes or schemes requirement in civil RICO case, holding that racketeering acts must be separate and continue, over time, to form pattern); Pitts v. Turner & Boisseau, Chartered, 850 F.2d 650, 652 (10th Cir. 1988) (noting that plaintiff only alleged one scheme, even though many acts may have occurred, and one scheme was insufficient to establish pattern with requisite continuity), cert. denied, 109 S. Ct. 838 (1989); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 927-29 (10th Cir. 1987) (holding that, under Sedima, requisite continuity of unlawful activity was lacking when fraudulent activity continued over time but was not alleged to continue after single goal accomplished).


65. See supra notes 55-57 and accompanying text (examining factors totality of circumstances test considers in discerning pattern).

66. See supra notes 58-62 and accompanying text (examining Second Circuit's Blockburger "enhanced" test).

67. Compare supra notes 55-57 (examining totality of circumstances test) with supra notes 63-64 (discussing Sedima continuity plus relationship test).
the circuit courts to determine whether a RICO pattern exists suggests that no standard is entirely satisfactory. The factors that satisfy the RICO pattern requirement are almost exclusively of judicial construct and are primarily designed to circumscribe the use of RICO.68 Because the RICO statute does not explain how the predicate acts must be connected in order to form a pattern, there is no principled basis for choosing one test over another.69 Critics claim that the application of different tests results in unequal treatment of RICO litigants.70 Faced with varying interpretations of the meaning of "pattern of racketeering activity," the Supreme Court, in H.J. Inc. v. Northwestern Bell Telephone Co.,71 sought to define meaningfully the pattern requirement.


A. Factual and Procedural History

In H.J. Inc., the plaintiffs, a Minnesota corporation and Minnesota residents, purchased telecommunication goods and services from Northwestern Bell.72 They brought a class action suit alleging that Northwestern Bell, through its corporate agents, violated RICO by seeking to influence illegally members of the Minnesota Public Utilities Commission (MPUC), the regulatory body that sets rates for the services Northwestern Bell provides.73 The plaintiffs alleged that Northwestern Bell bribed certain MPUC members between 1980 and 1986 with intent to influence the commissioners to approve unfair and unreasonable rates.74 The plaintiffs further alleged that Northwestern Bell's acts of bribery constituted a "pattern of racketeering activity" that was used to operate the telephone company as a RICO "enterprise."75 They sought treble damages and an injunction forbidding defendants from engaging in further unlawful

68. D. Smith & T. Reed, supra note 15, at 4-6.
73. Id. at 2897-98.
74. Id. at 2897.
75. Id. The first count in plaintiffs' complaint alleged a pendent state claim that Northwestern Bell violated the Minnesota bribery statute as well as the state common law bribery prohibition. Id. Counts two through four of the complaint alleged four separate claims under section 1962. Id.; see supra note 27 (listing § 1962 offenses).
activity.\textsuperscript{76}

Using the \textit{Sedima} continuity plus relationship test, the district court found that the plaintiffs alleged a relationship between the predicate acts of bribery by pleading that the acts were all designed to influence illegally MPUC members.\textsuperscript{77} The district court, however, held that the plaintiffs failed to satisfy the continuity prong of the \textit{Sedima} test because each of the fraudulent acts committed was in furtherance of a single scheme to influence Commission members.\textsuperscript{78} Holding that a RICO pattern is fulfilled only by the existence of multiple illegal schemes, the court thus held that the alleged payments, spanning six years, fell short of establishing a pattern and dismissed the civil RICO claim.\textsuperscript{79}

The Eighth Circuit affirmed the dismissal, stressing that, in order to establish a "pattern of racketeering activity," appellees must prove relationship and continuity.\textsuperscript{80} According to the court, multiple illegal acts committed to further a single fraudulent effort or scheme fails the continuity prong of the test and is insufficient to show a pattern.\textsuperscript{81} Although two acts are required to establish a "pattern of racketeering" under the RICO language, the court held that two acts, without more, are not sufficient to establish a pattern.\textsuperscript{82} The Supreme Court granted \textit{certiorari} to resolve the dispute in the lower courts about whether a RICO pattern must be established by multiple acts of racketeering committed to further multiple illegal schemes or whether multiple acts committed to further a single fraudulent scheme could suffice.\textsuperscript{83}

\textbf{B. The Supreme Court's Decision}

The United States Supreme Court unanimously reversed the judgment of the Eighth Circuit and remanded for further proceedings in \textit{H.J. Inc.}\textsuperscript{84} In attempting to define pattern, the Court, in an opinion by Justice Brennan, grappled with the ambiguities of the

\textsuperscript{76} Id.
\textsuperscript{78} Id. at 425-26.
\textsuperscript{79} Id.
\textsuperscript{80} H.J. Inc., 829 F.2d 648, 650 (8th Cir. 1987).
\textsuperscript{81} Id.
\textsuperscript{82} Id. (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)).
\textsuperscript{84} Id. at 2906. Justice Brennan delivered the opinion of the Court, joined by Justices White, Marshall, Blackmun, and Stevens. Id. Justice Scalia filed a concurring opinion in which Chief Justice Rehnquist and Justices O'Connor and Kennedy joined. Id. Argued on November 8, 1988, \textit{H.J. Inc.} was the oldest undecided case on the Court's docket. \textit{Broad Use of RICO is Upheld}, N.Y. Times, June 27, 1989, at A1, col. 1.
statute. Brennan admitted that "developing a meaningful concept of 'pattern' ... proved to be no easy task." The Supreme Court began its analysis by examining the text of the RICO statute. The Court remarked that the statute does not provide an exacting definition of "pattern of racketeering activity." Rather, the statute states "a minimum necessary condition for the existence of such a pattern." Upon reviewing the legislative history of the statute, the Court determined that Congress intended a flexible definition of pattern. The Court concluded that, in order to prove a "pattern of racketeering activity," a plaintiff or prosecutor must show not only that at least two racketeering predicate acts are related, but also that they are continuous or that they threaten continuity. The Court repudiated the inflexible "multiple schemes" test, which required that continuity be established by showing that the predicate acts furthered multiple illegal schemes. It reasoned that multiple predicate acts committed to further a single illegal scheme could demonstrate the continuity necessary for a pattern.

The Court broadly defined "relationship" as requiring that the predicate acts be related to one another, or to some "external organizing principle." According to the Court, the term "continuity," which is more difficult to define than "relationship," is a

86. Id.
87. Id.
88. Id.
89. Id.
90. Id. at 2899-900.
91. Id. at 2900.
92. Id. at 2901.
93. Id.
94. Id. at 2900. The H.J. Inc. Court looked to the partially repealed Dangerous Special Offender Act (DSOA) for guidance in defining "relationship." Id. at 2900-01; see 18 U.S.C. § 3575(e) (1988) (enacted Oct. 12, 1984 but repealed in part Nov. 1, 1986, pursuant to section 235 of Pub. L. No. 98-476 (defining DSOA's pattern requirement in terms of relationship between criminal acts). Because the DSOA was enacted as a companion provision in the 1970 statute that contained RICO, the H.J. Inc. Court maintained that RICO's definition of the term pattern should be construed consistently with the term as used in DSOA. H.J. Inc., 109 S. Ct. at 2901. Like RICO, the focus of DSOA was organized crime. Id. at 2902. Unlike RICO, DSOA contained an elaborate definition of the term pattern: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e) (1988). DSOA's definition of pattern is substantially similar to the totality of circumstances test's definition. See supra notes 55-57 and accompanying text (describing contours and criticisms of totality of circumstances test's definition). DSOA's definition would allow multiple predicates committed in furtherance of a single common scheme to fulfill the requirements of pattern. See Brief for United States, supra note 62, at 10 (criticizing Eighth Circuit's interpretation of pattern for requiring separate schemes).
temporal concept and can be "closed-ended" or "open-ended." 95 Closed-ended continuity includes related predicates occurring over a finite period of time longer than a few weeks or months. 96 Open-ended continuity encompasses predicates bearing a distinct threat of long-term racketeering activity. 97 Despite the urging of various amici, the Court refused to define "relationship" and "continuity" narrowly in order to target organized crime in its traditional sense. 98 Explaining the Court’s unwillingness to construe narrowly the RICO statute’s pattern element by requiring proof of an organized crime nexus, Justice Brennan noted that although RICO may be a poorly drafted statute, any revision of RICO is a task for the legislature, and not the Court. 99

Justice Scalia, in a scathing concurring opinion, criticized the Court’s interpretative effort. 100 Justice Scalia saw little value in the Court’s attempt to clarify the pattern requirement, calling the "continuity plus relationship" standard as helpful as the platitude "life is a fountain." 101 He interpreted the Court’s closed-ended continuity concept, which encompasses predicates that do not pose a threat of continuity but are committed over a substantial period of time, to mean that one can engage in a few months of racketeering activity without fear of RICO liability. 102 He concluded that "something more" than two mere acts of racketeering is required to form a RICO pattern, but he could not provide the additional element. 103 Moreover, Justice Scalia noted that the Court’s inability to provide anything more than "meager guidance" in interpreting the statute

96. Id. at 2902.
97. Id.
98. Id. at 2902-03; see Brief for Amicus Curiae American Institute of Certified Public Accountants (AICPA) in Support of Respondents at 21, H. J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893 (1989) (No. 87-1252) (arguing against fulfilling requirements of pattern with single criminal episode or transaction). AICPA expressed special interest in addressing the proper construction of pattern because

[w]hen independent auditors express opinion on a client’s financial statements, they become exposed to RICO actions brought by investors, creditors and others who may claim to have relied upon those statements in making important decisions that ultimately prove unsatisfactory or in entering into business transactions with the auditor’s [sic] clients that do not meet expectations.

Brief for AICPA, supra, at 2; see also Brief for Amicus Curiae National Association of Manufacturers in Support of Respondents at 5, H. J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893 (1989) (No. 87-1252) (arguing that pattern requires multiple criminal schemes and that such a requirement will exclude routine commercial dispute from statute’s reach "thereby curbing the primary abuse of civil RICO.").

100. Id. at 2906-09 (Scalia, J., concurring).
101. Id. at 2907 (Scalia, J., concurring).
102. Id. at 2908 (Scalia, J., concurring).
103. Id. (Scalia, J., concurring).
brings into question the constitutionality of RICO. He predicted that after H.J. Inc., lower courts would continue to develop irreconcilable tests. He called such ambiguity "intolerable" in a statute such as RICO, which has criminal as well as civil provisions.

III. Analysis

A. Continuity and Relationship Revisited

In H.J. Inc., the Supreme Court built upon the continuity and relationship standard articulated in Sedima by creating two distinct methods by which continuity is established. The two new categories, closed-ended and open-ended continuity, highlight the durational nature of continuity.

The first category, closed-ended continuity, refers to a series of related predicate acts that occur over a substantial period of time. Presumably, any series of predicate acts lasting more than a few weeks or months will constitute closed-ended continuity.

The second category, open-ended continuity, is more amorphous because of the fact-specific nature of "continued racketeering activity." In order to constitute this type of continuity, the related predicate acts must present a distinct threat of long-term racketeering activity, either implicit or explicit. The Court posed a hypothetical to illustrate how the open-ended continuity concept would work in practice. A hoodlum who collects protection money from a shopkeeper, over a short period of time, but tells the victim that he will return, engages in a "pattern of racketeering activity" that demonstrates open-ended continuity. The Court reasoned that although the racketeering acts occurred close together in time, they carry indefinitely the threat of repetition.

Another guideline the Court provided to discern open-ended continuity is that the related predicates be "part of an ongoing en-

104. Id. at 2909 (Scalia, J., concurring).
105. Id. at 2908 (Scalia, J., concurring).
106. Id. at 2908-09 (Scalia, J., concurring).
108. Id. at 2901-02.
109. Id. at 2902.
110. See id. (describing closed-ended continuity).
111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
tity's regular way of doing business." 116 This guideline may be honored in two ways. First, predicates committed by a person "as part of a long-term association that exists for a criminal purpose" would suffice. 117 The guideline may also be honored by showing that the predicates are the usual way of conducting an ongoing legitimate business or an ongoing and legitimate RICO "enterprise." 118

Fact situations that do not constitute closed-ended or open-ended continuity do not form a "pattern of racketeering activity" and therefore cannot be sanctioned under RICO. 119 Yet, one commentator predicts that H.J. Inc.'s only substantive impact will be to eliminate from the scope of RICO only a rather narrow category of cases —those in which the "pattern of racketeering activity" consists of "several nearly simultaneous predicate acts." 120 This is because simultaneous acts, by definition, do not occur over a substantial period of time and are unlikely to pose a threat of continued action. A literal reading of the Court's decision supports such a prediction.

B. Is RICO's Pattern Requirement Unconstitutionally Vague?

The Supreme Court in H.J. Inc. did not address the constitutionality of RICO's pattern requirement. 121 In his concurring opinion, however, Justice Scalia surmised that a constitutional attack on RICO is imminent and that the Court's opinion in H.J. Inc. contributes to RICO's vulnerability to such an attack. 122 The most probable attack on the constitutionality of RICO's "pattern of racketeering activity" requirement is that it is vague and therefore violates due process. 123

Before H.J. Inc., federal RICO's pattern element specifically had

116. Id.
117. Id. These associations not only include traditional organized crime groups but other groups formed for illegitimate purposes as well. Id.
118. Id.
119. Id. at 2908 (Scalia, J., concurring). Justice Scalia suggested that RICO would not apply to a gang that commits an act of extortion in a different city every day for one week, and then completely disbands at the end of the week. Id. (Scalia, J., concurring).
122. H.J. Inc., 109 S. Ct. at 2909 (Scalia, J., concurring) (lamenting that high Court's inability to provide anything more than "meager guidance," in interpreting RICO, "bodes ill for the day when . . . [constitutional] challenge is presented").
123. CATO Institute Conference on RICO, Rights and the Constitution, Address by G. Robert Blakey: Is "Pattern" Within RICO Unconstitutionally Vague?—A Comment on Justice Scalia's Opinion that RICO May Be Void-for-Vagueness 19 (Oct. 18, 1989) (copyrighted manuscript) [hereinafter Blakey—CATO Conference] (commenting that Justice Scalia's concur-
not been subjected to a facial overbreadth or vagueness attack.\textsuperscript{124} An Indiana state RICO statute, however, which provided a definition of “pattern of racketeering activity” analogous to the federal law,\textsuperscript{125} survived such a challenge in \textit{Fort Wayne Books, Inc. v. Indiana.}\textsuperscript{126} According to the Court in \textit{Fort Wayne Books}, the pattern requirement in RICO makes the statute less vague than the state obscenity law, in which one need not be guilty of a pattern of ob-

\textsuperscript{124} Ring opinion in \textit{H.J. Inc.} invites vagueness challenge to RICO’s pattern requirement); see U.S. Const. amends. V & XIV, § 1.


Because a strong presumption of validity attaches to an act of Congress, United States v. National Dairy Prods. Corp., 372 U.S. 29, 32 (1963), courts consistently seek to uphold statutory interpretations that support the constitutionality of legislation. United States v. Harris, 347 U.S. 612, 618 (1954). A leading Supreme Court case on vagueness holds that the requirements of the due process clause are fulfilled in the case of overlapping criminal provisions if the statute clearly defines conduct prohibited and the punishment authorized. United States v. Batchelder, 442 U.S. 114, 123 (1979). The Supreme Court rejected the contention that a statute challenged on vagueness grounds may be tested solely “on its face.” \textit{National Dairy Prods. Corp.}, 372 U.S. at 32. In a vagueness challenge to a statute that does not involve first amendment guarantees, the facts of the instant case are critical to the outcome. United States v. Mazurie, 419 U.S. 544, 550 (1975) (citing United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963)). That Congress could have chosen precise and unambiguous language in drafting a statute, yet did not, does not necessarily mean that a statute is unconstitutionally vague. United States v. Powell, 423 U.S. 87, 94 (1975). Where first amendment rights are implicated, however, a defendant may challenge a statute’s vagueness “on its face” and may assert that the statute is vague as applied to marginal situations not before the court. \textit{National Dairy Prods. Corp.}, 372 U.S. at 36.

Statutes with provisions similar to RICO were upheld as valid against void for vagueness attacks. See generally United States v. Cravero, 545 F.2d 406, 410 (5th Cir.) (rejecting argument that several terms in 21 U.S.C. § 848 are unconstitutionally vague), cert. denied, 429 U.S. 1100 (1976); United States v. McCoy, 539 F.2d 1050, 1058 (5th Cir.) (holding § 1955 not void for vagueness), cert. denied, 431 U.S. 919 (1976); United States v. Villano, 529 F.2d 1046, 1055 (10th Cir.) (upholding constitutionality of 18 U.S.C. § 1952 as not void for vagueness despite ambiguity in terminology of § 1952 because first amendment guarantees not implicated), cert. denied, 426 U.S. 953 (1976); United States v. Hawes, 529 F.2d 472, 477 (5th Cir. 1976) (rejecting vagueness challenge to 18 U.S.C. § 1952 as not void for vagueness) (reaffirming that § 848, which prohibits engaging in continuous criminal enterprise involving narcotics, is not void for vagueness), cert. denied, 420 U.S. 962 (1975); Spinelli v. United States, 382 F.2d 871, 890 (8th Cir. 1967) (stating that § 1952 is not void for vagueness), rev’d on other grounds, 393 U.S. 410 (1969).

124. Other elements of RICO had been challenged as unconstitutionally vague. See, e.g., United States v. Tripp, 782 F.2d 38, 41-42 (6th Cir.) (finding no reason to depart from precedent and rejecting argument that RICO’s adoption of state law in defining “racketeering activity” violates due process), cert. denied, 475 U.S. 1228 (1986); United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (noting that RICO conspiracy is not unconstitutionally vague and that shifts in definition of “enterprise” are validated as necessary in light of fluid nature of criminal associations), cert. denied, 441 U.S. 993 (1979); United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976) (holding definition of “enterprise” is not unconstitutionally vague despite its breadth).

125. See IND. CODE ANN., infra note 207 (setting forth Indiana RICO statute’s pattern requirement).

The Court held that if the underlying predicate obscenity offenses are not unconstitutionally vague, then RICO cannot be vague. Thus, the holding in *Fort Wayne Books* implies that to challenge successfully the pattern element as unconstitutionally vague, the underlying predicate offenses on which the determination of a pattern is based first must be deemed unconstitutionally vague. Regardless of whether a court chooses to honor the *Fort Wayne Books* approach, the constitutionality of RICO's pattern elements will be litigated frequently and it is likely that a court will find grounds to find the definition of pattern unconstitutionally vague.

### C. Significant Consequences of *H.J. Inc.*

Although consumer groups praised the Supreme Court's decision in *H.J. Inc.*, the business community charged that the Court construed RICO too broadly, to the great detriment of American business. Sentiment that RICO use against legitimate businesses would increase and that traditional business fraud cases would be brought as civil RICO suits was widespread. Moreover, it was suggested that the Court's decision would not end the intensifying controversy over use of RICO in business fraud cases.

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128. *Id.* at 924-25.
130. *See* Broad Use of RICO is Upheld: Unanimous Ruling By Supreme Court in Phone-Rate Case, *N.Y. Times*, June 27, 1989, at A1, col. 1 (stressing that Court's decision rejects interpretation of RICO as requiring connection to organized crime); *Court Refuses to Cap Punitive Damages*, Chicago Trib., June 27, 1989, at A1, col. 5 (enumerating possible post-*H.J. Inc.* applications of RICO); *High Awards for Injuries are Upheld*, Boston Globe, June 27, 1989, at 70, col. 2 (emphasizing breadth of Court's unanimous ruling); *High Court Refuses to Curb RICO Scope, Doesn't Limit Civil Suit Punitive Damages: Justices Vote 9-0 on Issue; 4 Say Ruling Increases Vagueness of 1970 Law*, Wall St. J., June 27, 1989, at A3, col. 1 (quoting authority stating Court's decision is victory for consumer groups and predicts increased number of RICO suits); *Supreme Court Backs Use of RICO Statute Damages: Application of Antiracketeering to Business is Made Easier*, Wash. Post, June 27, 1989, at Cl, col. 3 (quoting authority asserting that thieves in "Brooks Brothers suits" have reason to fear Court's decision); *Supreme Court Deals a Double Blow to Business: Justices Reject Limits on Punitive Damage Awards, Use of Racketeering Law*, *L.A. Times*, June 27, 1989, at CCl, col. 4 (stating that "Big Business" was disappointed that Supreme Court did not curtail RICO use against legitimate business); *Top Court Deals Blow to Business: Punitive and RICO Penalties Sustained*, June 27, 1989, Phil. Inquirer, June 27, 1989, at D-1, col. 1 (noting setback to American business from Court's refusal to limit application of RICO to traditional organized crime groups only).
131. *High Court Rejects Limits on Personal-Injury Awards*, *St. Louis Post-Dispatch*, June 27, 1989, at 1B, col. 1 (stating that Court's decision made use of RICO more feasible for prosecutors to proceed against businesses charged with fraud); Dennison, *Supreme Court Upholds Multi-million-dollar Punitive Damages*, June 27, 1989, Balt. Sun, at 2E, col. 6 (stating *H.J. Inc.* is not likely to end intensifying controversy over use of RICO in business fraud cases).
controversy about using RICO to obtain treble damages for business fraud. Because the H.J. Inc. Court failed to require a nexus between organized crime and the pattern concept, illegal business conduct of legally recognized firms continues to fall under the newly constructed definition of pattern.

An analysis of thirty circuit and district court civil RICO cases decided between June 27, 1989 and January 24, 1990, reveals that fifteen of them resulted in dismissal on the ground that no pattern could be shown. At this time, it is difficult to determine whether

132. Dennison, supra note 131, at 1A, col. 6.
133. See supra note 99 and accompanying text (noting Court's rejection of organized crime nexus); Stewart, Scoping Out Statutes, A.B.A. J., Sept. 1989, at 54, col. 3 (criticizing H.J. Inc. Court's generous interpretation of RICO that will allow present uses of statute to continue). But see Blakey-CATO Conference, supra note 123, at 34 (commenting that "[n]o person seeking to keep his conduct within the law need fear RICO. All he must do is not violate the predicate offense.").
134. See Fleet Credit Corp. v. Sion, 893 F.2d 441 (1st Cir. 1990) (reversing dismissal because 95 acts of mail fraud over four and one-half-year period sufficient for pattern); United States v. Gelb, 881 F.2d 1155 (2d Cir. 1989) (relying on H.J. Inc., finding predicate acts of meter tampering, mailing, and bribing related to cheating postal service and continued for five years constituted pattern); United States v. Kaplan, 886 F.2d 536 (2d Cir. 1989) (holding two acts of bribery stemming from one conversation may be separately counted and suffice for RICO pattern); Jacobsen v. Cooper, 882 F.2d 717 (2d Cir. 1989) (noting that predicates related to depriving plaintiff of his interest in real estate "enterprise" and extending over many years fulfilled pattern requirement); Swistock v. E.L. Jones, 884 F.2d 755 (3d Cir. 1989) (reversing district court's dismissal on pattern grounds in suit alleging six acts of mail fraud and eight acts of wire fraud pursuant to lease negotiations); Combs v. Bakker, 886 F.2d 673 (4th Cir. 1989) (finding multiple acts of mail and wire fraud to sell "lifetime partnerships" in Heritage Village Missionary, Inc., established pattern); United States v. Cooper, 880 F.2d 415 (6th Cir. 1989) (rejecting defendant's challenge of RICO count on grounds that evidence was insufficient to prove pattern or "enterprise" because evidence revealed defendants continued generic drug distribution scheme for nearly five years after being warned it was wrong); Newmeyer v. Philatelic Leasing Ltd., 888 F.2d 385 (6th Cir. 1989) (reversing dismissal on pattern grounds); Cemar Inc. v. Nissan Motor Corp., No. 87-165 (D. Del., Jan. 8, 1990) (ruled that four false statements in nine years to obtain car dealership agreements meet H.J. Inc. continuity and relationship standards for pattern); Freeman v. Arizona World Nurseries Ltd., No. 86 Civ. 9834 (KC) (S.D.N.Y. Jan. 24, 1990) (finding fraudulent scheme lasting few months satisfied H.J. Inc. standards); Obee v. Teleshare Inc., 725 F. Supp. 913 (E.D. Mich. 1989) (finding that telephone conversations, over two-year period, fulfilled continuity plus relationship requirements set out in H.J. Inc.); Eichenholtz v. Brennan, No. 88-515 (JCL) (D.N.J. filed July 27, 1989) (holding alleged acts of securities fraud committed over period of several years sufficient for pattern under standard set out in H.J. Inc.); Klein v. Churchill Coal Corp., No. 84 Civ. 6509 (S.D.N.Y. Aug. 11, 1989) (holding that repeated acts of wire and mail fraud constitute RICO pattern, in light of Court's "expansive definition" of pattern in H.J. Inc., because acts were "proximate in time and allegedly committed to advance a common purpose" of defrauding plaintiff investors and defendants' alleged persistence in conduct over several years and through multiple investment programs supplied continuity); Perez-Rubio v. Wyckoff, 718 F. Supp. 217 (S.D.N.Y. 1989) (concluding that comprehensive scheme spanning six-year period fulfilled H.J. Inc. pattern test); Dooner v. NMI Ltd., 725 F. Supp. 153 (S.D.N.Y. 1989) (finding predicate acts extending over 18-month period sufficient for pattern); see also Marshall-Silver Constr. Co. v. Mendel, 894 F.2d 593 (3d Cir. 1990) (affirming dismissal for lack of continuity necessary for pattern); Fiorentino v. Converse, 884 F.2d 1383 (3d Cir. 1989) (finding businessman's alleged fraudulent scheme to transfer corporate assets to be "isolated short-term conduct" falling short of providing continuity necessary for pattern); Parcol Corp. v. NOWSCO Well Serv. Ltd., 887 F.2d 502 (4th Cir. 1989) (affirming dismissal of four month scam involving 17 predicate acts as lacking continuity required for post-H.J. Inc. pattern);
the _H.J. Inc._ decision will substantially contract the scope of RICO. It appears, however, that the Court's decision has not substantially altered the precedents on which the courts rely.135 Some courts are even interpreting _H.J. Inc._ as broadening, not limiting, the pattern element.136

Another significant consequence of _H.J. Inc._ is that it added the terms "closed-ended" and "open-ended" continuity to the judicial vocabulary.137 The use of these terms focuses attention on the duration of the illegal scheme.138 Post- _H.J. Inc._ cases reveal that illegal activity ranging in duration from one and one-half years to nine

Menasco Inc. v. Wasserman, 886 F.2d 68 (4th Cir. 1989) (using "common-sensical fact-specific approach" set forth by _H.J. Inc._ Court, pattern was not established by alleged scheme that lasted approximately one year and involved oil opportunities sold at five times their worth); Sutherland v. O'Malley, 882 F.2d 1196 (7th Cir. 1989) (determining that alleged multiple acts of mail fraud did not fulfill _H.J. Inc._'s continuity requirement and this did not constitute "pattern of racketeering activity"); Management Computer Serv., Inc. v. Hawkins, Ash, Baptie & Co., 883 F.2d 48 (7th Cir. 1989) (determining that unauthorized copying of computer program involving single victim, one transaction between parties, and, at most, two predicate acts failed to fulfill pattern requirement as construed in _H.J. Inc._); Triad Assoc. v. Chicago Hous. Auth., No. 88-1353 (7th Cir., Dec. 26, 1989) (dismissing for insufficient allegations of pattern despite repeated acts of mail and wire fraud); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262 (10th Cir. 1989) (using closed- or open-ended continuity language from _H.J. Inc._, court held that newspaper publication of two allegedly defamatory articles about attorney on same day, researched near time of publication, did not form pattern); Trundy v. Strumsky, 729 F. Supp. 178 (D. Mass. 1990) (ruling alleged nine month scheme to obtain interest in firm lacked continuity and failed to establish pattern); Service Eng'g Co. v. Southwest Marine, Inc., 719 F. Supp. 1500 (N.D. Cal. 1989) (applying continuity concepts derived from _H.J. Inc._, court held that allegedly fraudulent acts carried out by shipbuilding company over few weeks and months did not constitute "pattern of racketeering activity"); Pyramid Sec. Ltd. v. International Bank, No. 87-3541 (CRR) (D.D.C. Dec. 19, 1989) (dismissing suit involving stock churning episode lasting three months for lack of continuity); Hutchinson v. Wickes Co., 726 F. Supp. 1315 (N.D. Ga. 1989) (finding alleged acts over two year period against plan buyer insufficient for pattern); Arcos Management Corp. v. Aguilera, No. 89 C 4320 (N.D. Ill. Aug. 25, 1989) (concluding that, under continuity standard elucidated in _H.J. Inc._, performer who failed to show up at two concerts did not engage in pattern of racketeering); Orchard Hills Coop. Apts., Inc. v. Germania Fed. Sav. & Loan Ass'n, 720 F. Supp. 127 (C.D. Ill. 1989) (briefing all issues raised by _H.J. Inc._ including those of constitutional dimension, but failing to reach constitutional issue because action was dismissed for lack of pattern demonstrating requisite relationship or continuity); Disandro-Smith & Assoc. v. Edron Copier Serv., Inc., 722 F. Supp. 912 (D.R.I. 1989) (dismissing complaint after finding inadequate allegations of closed-ended continuity).


136. See, e.g., Swistock v. E.L. Jones, 884 F.2d 755, 758 (3d Cir. 1989) (stating that although before _H.J. Inc._ plaintiffs may only have had state law fraud case, court must now give allegations broader interpretation); Landoil Resources Corp. v. Alexander & Alexander Servs., Inc., No. 87 Civ. 8133 (S.D.N.Y. Aug. 11, 1989) (remarking that _H.J. Inc._ Court provided "expansive" definition of "pattern of racketeering activity").


138. _Id._ at 2902 (explaining that series of related predicates that extend over substantial
years fulfilled the pattern requirement, whereas illegal activity ranging in duration from a few days to approximately two years did not.

Inviting constitutional challenge to RICO is another significant consequence of *H.J. Inc.* In the five month period following *H.J. Inc.*, RICO was attacked on vagueness grounds in three civil cases. In the only case that reached the constitutional issue, the Southern District of New York held that Justice Scalia's concurring opinion in *H.J. Inc.* did not provide a formal legal basis to justify declaring RICO unconstitutional. In addition, vagueness challenges involving RICO's pattern element failed in four post-*H.J. Inc.* criminal cases.

Interestingly, the First and Third Circuits demonstrated a willingness to find the continuity and relationship necessary for a pattern in the relationship of the predicate acts to the "enterprise." According to the First and Third Circuits, a vagueness challenge to RICO is more likely to succeed in a case involving a legitimate business than in a case involving an organized crime "family" or widespread public corruption.

Although judicial interpretations of the pattern requirement continue to evolve in an unclear and inconsistent manner, relief may

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139. See *Cemar Inc. v. Nissan Motor Corp.*, No. 87-165 (D. Del. Jan. 8, 1990) (noting that schemes were conducted for nine years); *Landoil Resources Corp. v. Alexander & Alexander Servs.*, Inc., No. 87 Civ. 8139 (S.D.N.Y. Aug. 11, 1989) (noting that fraudulent activity persisted for over one and one-half years).

140. See *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273 (10th Cir. 1989) (discussing alleged scheme by newspaper to defame attorney by publishing two articles on same day); *Service Eng'g Co. v. Southwest Marine, Inc.*, 719 F. Supp. 1500 (N.D. Cal. 1989) (involving alleged fraudulent activity that extended over only few weeks or months); *Hutchinson v. Wickes Co.*, 726 F. Supp. 1315, 1320 (N.D. Ga. 1989) (finding acts over two-year period insufficient for pattern).


143. *United States v. Gleicer*, No. 88-3417, slip op. at 1 n.1 (7th Cir. Jan. 8, 1991) (agreeing with First and Third Circuits that RICO is constitutional in public corruption case); *United States v. Woods*, 915 F.2d 854, 863-64 (3d Cir. 1990) (finding "hardcore" political corruption fulfilled pattern requirement "by any standard"); *United States v. Pungitore*, 910 F.2d 1084, 1104-05 (3d Cir. 1990) (holding person of ordinary intelligence would realize that Scarfo crime family's illegal activities constituted pattern); *United States v. Angiulo*, 897 F.2d 1169, 1180 (1st Cir. 1990) (stating that RICO may be vague in some contexts but not in case involving Patriarca crime family).

144. *Pungitore*, 910 F.2d at 1104; *Angiulo*, 897 F.2d at 1180.

145. *Woods*, 915 F.2d at 864; *Pungitore*, 910 F.2d at 1105; *Angiulo*, 897 F.2d at 1180.
appropriately come from a non-judicial forum. Congress, well aware of the extensive applications of RICO, is considering amending the statute.

IV. CONGRESSIONAL PROPOSALS TO AMEND RICO

Congress has proposed legislation that attempts to reassert the original goals of RICO. H.R. 1046, introduced on February 22, 1989, and its identical counterpart, S. 438, introduced the next day, are known as the RICO Reform Acts of 1989.146 The proposals, however, only address certain issues raised in private civil RICO litigation.147 Specific issues arising out of civil actions brought by the government and criminal RICO actions are not addressed in the bills.148 Similarly, the proposed bills do not address the fundamental definitions of "pattern of racketeering activity" and "enterprise."149

The bills' twelve main provisions can be summarized as follows: 1) codifying the preponderance of the evidence burden of proof for all suits brought by the government;150 2) adding new predicate offenses;151 3) providing for international service of process;152 4) reducing recovery from treble damages to actual damages for Indian tribes, labor unions, businesses, non-profit organizations, and individuals other than consumers victimized by patterns of criminal conduct,153 but permitting recovery of actual and punitive damages by any person who suffers bodily injury from a RICO violation;154 5) permitting punitive damages plus attorneys' fees for unreasonably burdened or victimized consumers;155 6) eliminating treble damage recoveries when state or federal securities or commodities laws pro-


147. RICO Reform Acts, supra note 146; see DeConcini Rejects Suggestion, supra note 12, at 4 (recognizing AFL-CIO representative's observation that issues raised by bills are limited in scope and that broader issues may need to be raised in the future).

148. RICO Reform Acts, supra note 146.

149. Id.

150. Id. § 4.

151. Id. § 2. The predicates proposed to amend section 1961(1) include acts sanctioned by federal statute that relate to forging of treasury or other securities, fraud and other activities in connection with access devices, destruction of aircraft, protection of foreign officials, and counterfeiting. Id.

152. Id. § 5.

153. Id. § 4.

154. Id.

155. Id.
vide a remedy, while not restricting the government’s ability as a civil plaintiff to recover treble damages; 1) conditioning a victim’s right to recover treble damages on whether the defendant was previously convicted of a felony “based on the same conduct upon which the plaintiff’s action is based”; 2) authorizing procedural delays for regulated industries based on their use of an “affirmative defense” that they acted in good faith and in reliance upon the decisions of a federal or state agency; 3) extending the statute of limitations to six years after accrual of the cause of action for suits by the United States; 4) prohibiting the use of terms such as “racketeer,” “pattern of racketeering activity,” and “organized crime” in civil actions that fail to allege a crime of violence; 5) placing exclusive jurisdiction over RICO actions in federal courts; and 6) imposing stricter pleading requirements.

Specific provisions in the bills received varying levels of support from a diverse reform coalition, ranging from business corporations to organized labor. Moreover, reform groups and the business sector, with strong lobbies, recommended further reform in accordance with their special interests. The House Committee on

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156. Id.
157. Id.
158. Id. § 4; see DeConcini Rejects Suggestion, supra note 12, at 2 (commenting that DOJ prefers requiring that conviction be for RICO or specified act of racketeering, thus preventing confusion and vagueness challenges regarding the relatedness of prior conviction).
159. RICO Reform Acts, supra note 146, § 4.
160. Id.
161. Id.
162. Id. § 6.
163. Id. § 4. On April 24, 1990, S. 438 was amended to exclude first amendment protected activity from RICO’s scope. RICO Reform Act of 1989, S. 438, 101st Cong., 2d Sess. (1990). Organizing, participating, or supporting any “non-violent demonstration, assembly, protest, rally or other similar form of public speech” that is not undertaken for economic or commercial gain was excluded from RICO’s definition of “racketeering activity.” Id.
165. See DeConcini Rejects Suggestion, supra note 12, at 3 (including NAAG recommendations that S. 438 provide “true parens patriae standing to allow government entities to redress the rights of victims too vulnerable to be effective plaintiffs; require greater specificity in pleading the pattern and enterprise elements as well as the predicate acts of fraud; impose financial counter-incentives to bringing a frivolous RICO claim.”). But see SEC Supports, supra note 164, at 2 (reporting commentator’s belief that Federal Rules of Civil Procedure’s sanction for frivolous litigation provides “ample safeguards” against those who misuse RICO). The ABA recommended that the pejorative term “punitive damages” be replaced with the less inflammatory term “additional damages”; a judge rather than a jury determine the extent of
Crime incorporated some of the recommendations, including a definition of pattern into H.R. 5111, a bill that supplants H.R. 1046. The new House bill is known as the RICO Amendments Act of 1990 and has nine key provisions. The first is defining “pattern of racketeering activity” as requiring at least two acts “which are related to one another or to a common external organizing principal and constitute or pose a threat of continuing racketeering activity.” Two or more acts “which are part of a single episode” would constitute a single act of racketeering. The remaining provisions are: declaring that the scope of RICO’s treble damage remedy is “extraordinary” and may be used only when it “clearly serves damage awards; and a three-year limitation period tied to the time a cause of action accrued be imposed. DeConcini Rejects Suggestion, supra, at 4. The AFL-CIO proposed that “the most desirable response” is to “repeal the private civil RICO action in its entirety.” Id. at 4. NASCAT felt that Congress should adopt “more moderate measure that will leave civil RICO more intact.” Supporters of RICO, supra note 34, at 2. NASCAT suggested the name of the statute be changed in private civil actions and that a business dispute exception to the rule of automatic trebling be created. Id. Other commentators suggested that proposed legislation could be improved by “avoiding adding further complexities to an already complex statute.” SEC Supports, supra, at 3. U.S. PIRG suggested tightening the definition of pattern. DeConcini Rejects Suggestion, supra, at 3. G. Robert Blakey, who was the chief counsel to the Subcommittee on Criminal Laws and Procedures of the United States in 1969-1970 when the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970) was processed, suggested that the Committee enact remedial legislation that addresses the “definition of ‘pattern,’ ‘necessities’ in pre-trial restraints in forfeitures, and litigation abuses in the First Amendment area.” SEC Supports, supra, at 3. Blakey is active in the reform movement and prepared two comprehensive proposals. Blakey, Alternative Legislative Proposals to “The RICO Reform Act of 1989”, 5 Civil RICO Rep. (BNA) No. 12, at 1, 1-12 (Aug. 15, 1989) [hereinafter Blakey—Alternative Legislation]. The first proposal retains the basic design of the proposed legislation and the second completely re-designs the proposed legislation. Id.
the public interest" and "provides appropriate deterrence against repetition of egregious criminal conduct";\textsuperscript{170} requiring particularity of pleading for all elements of RICO;\textsuperscript{171} establishing the court as a "gatekeeper" for treble damage claims under civil RICO;\textsuperscript{172} explicitly imposing sanctions for frivolous suits;\textsuperscript{173} changing the burden of proof in civil RICO litigation from a preponderance of the evidence to clear and convincing evidence;\textsuperscript{174} granting exclusive jurisdiction to federal courts for civil actions;\textsuperscript{175} explicitly making the first amendment protections applicable to RICO;\textsuperscript{176} and allowing retroactive application of the Amendments Act.\textsuperscript{177}

RICO's broad scope is due, in part, to its use of vague terms such as "pattern of racketeering activity" and "enterprise" that allow plaintiffs and prosecutors to plead easily the requisite elements of a RICO cause of action.\textsuperscript{178} The \textit{H.J. Inc.} Court failed to restrict substantially the definition of pattern.\textsuperscript{179} The RICO reform bill proposed by the Senate, which does not address the definition of pattern, will fail to limit sufficiently the application of civil RICO. The new RICO reform bill proposed by the House, which amends the definition of pattern by codifying the \textit{H.J. Inc.} Court's ambiguous wording modified only by the practice of the Department of Justice,\textsuperscript{180} must rely on additional amendments such as the gatekeeper concept to achieve a more limited application of civil RICO. The House reliance on numerous amendments to achieve a more limited

\textsuperscript{170} H.R. 5111, § 3.
\textsuperscript{171} Id. § 4.
\textsuperscript{172} Id. § 5. At a hearing, the plaintiff must show that the civil RICO suit is "extraordinary," "clearly serves the public interest," and is appropriate to "deter future egregious conduct" in order to pass the "gate." \textit{Id.} If the plaintiff cannot show the latter or meet a number of other criteria, including that the defendant was convicted of RICO or one of its predicate offenses, the court is required to dismiss the RICO suit. \textit{Id.}
\textsuperscript{173} Id.
\textsuperscript{174} Id. § 6.
\textsuperscript{175} Id. § 7.
\textsuperscript{176} Id. § 8.
\textsuperscript{179} \textit{See supra} notes 91-99, 108-120 and accompanying text (analyzing \textit{H.J. Inc.} Court's holding and exploring scope of closed- and open-ended continuity concepts).
\textsuperscript{180} \textit{See supra} note 45 (discussing DOJ application of single episode rule).
application of civil RICO may not be prudent, given the wide disparity between the House and the Senate as to how much reform is needed.181 In other words, there is no guarantee that the Senate will want to erect a “gate,” without which the proposed definition of pattern will not substantially curb inappropriate uses of RICO.

V. RECOMMENDATIONS

A. Available Options

Forty percent of the post-Sedima (pre-H.J. Inc.) civil RICO filings were dismissed,182 often imposing tremendous costs on inappropriate defendants. This high rate of dismissal strongly suggests the need for civil RICO reform. Indeed, there is little disagreement that something is wrong;183 the disagreement centers on how to remedy the wrong.

Many options exist that could prevent the use of RICO to coerce settlements and sanction inappropriate defendants.184 Five approaches that have not yet been incorporated in the RICO reform bills but are discussed frequently at RICO conferences and in specialized RICO publications185 are briefly examined and critiqued in this section. The first option is to abolish civil RICO altogether, leaving the government and private parties to resort to other statutes for relief. Although other statutes may provide some relief, RICO provides powerful equitable relief.186 RICO allows restruc—
turing of corrupt organizations, removal of "puppets," and appointment of trustees so that industries infiltrated by organized crime may be redeemed.\(^\text{187}\) There have been cases, particularly those brought by private parties, that sound in abuse, yet there are many civil cases brought by the government demonstrating that RICO can effectively combat organized crime.\(^\text{188}\) Therefore, abolishing civil RICO altogether will frustrate a serious effort to eradicate organized crime.

The second option is to establish a central authority in the Department of Justice to screen private civil RICO claims.\(^\text{189}\) Those not meeting certain minimum criteria would be barred.\(^\text{190}\) One proposed objective standard is whether a criminal prosecutor "in a world of unlimited resources" would have filed charges.\(^\text{191}\) Requiring executive branch review of private RICO claims, however, would defeat a significant objective of the statute—to enable private plaintiffs to attack racketeering "enterprises" independently of the government.\(^\text{192}\) In addition, requiring the executive branch to carry such a burden would strain its resources.\(^\text{193}\) Finally, the exercise of such discretion by the executive branch might create a separation of powers problem and result in a quasi-judicial proceeding wherein the prospective plaintiff must prove his case to the satisfaction of the executive branch, whose decision to deny the right to sue might itself be subject to judicial review.\(^\text{194}\)

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\(^{187}\) Id. § 1964(a).

\(^{188}\) See United States v. Lucchese Organized Crime Family, No. CV-891848 (E.D.N.Y. June 7, 1989) (seeking to eliminate racketeering influence over Long Island garbage disposal industry in action naming 112 defendants and Lucchese and Gambino crime families); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1419 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989) (seeking to enjoin organized crime family from engaging in certain illegal activity allegedly including 199 acts of racketeering and to appoint trustees and receiver to oversee union and eight businesses respectively); United States v. Local 560, 581 F. Supp. 279, 337 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985) (enjoining two remaining members of criminal group from having any future contacts with Local 560, removing entire executive board of Local, and appointing trustee to remain until free elections were held), cert. denied, 476 U.S. 1140 (1986).

\(^{189}\) See New Justice Authority, supra note 185 (reporting law professor's suggestion that "having federal prosecutors screen private complaints is a sensible way to limit private civil RICO").

\(^{190}\) Id.

\(^{191}\) Id. at 6.


\(^{193}\) New Justice Authority, supra note 185, at 6 (quoting commentator who acknowledges resources expended in screening and suggests plaintiff's lawyer is better screener).

\(^{194}\) See Administrative Procedure Act, 5 U.S.C. § 702 (1988) (providing for judicial review of administrative actions at behest of aggrieved party); see also New Justice Authority, supra note 185, at 6 (noting leading RICO defense attorney's lack of confidence in federal prosecutors' judgement).
The third option is to reduce the list of predicate acts that accumulate to form a RICO pattern. Removing fraud offenses from the list of predicate acts, for example, would eliminate white collar offenses and many potentially abusive cases. The problem with more narrowly defining the predicate acts is that professional criminal associations often engage in fraudulent activity and non-violent crimes.

The fourth option is to excise, amend, and rename the civil provisions of RICO for private litigants, leaving the criminal provisions and the government's ability to use the civil provisions intact. The "new" statute would not be linked with RICO and would not refer to racketeers. Such a statute was proposed for inclusion among other civil provisions of the United States Code. Under this option, the government could continue to use the powerful reorganization provisions of civil RICO. The "new" statute could provide for double damages to preserve the incentive for private parties to challenge "enterprises" that can and do engage in pervasive fraud, but discourage abuse. While the assumption behind this proposal appears to question appropriately whether treble damages and attorneys' fees have motivated private parties to use RICO against wholly illegitimate "enterprises," the broad list of predicate acts suggests that Congress intended that private actions not be limited to those against "enterprises" that engage only in fraudulent activity.

The fifth option is to amend the current definition of pattern with more precise and substantive language. Increased precision and substance would safeguard the pattern element against a successful void for vagueness attack. It would also provide potential defendants with greater notice that their illegal conduct is subject to

196. See United States v. Rastelli, 870 F.2d 822 (2d Cir. 1989) (affirming, inter alia, defendants' (including Bonanno organized crime family) conviction for conspiring to commit and committing mail fraud); United States v. Indelicato, 865 F.2d 1370 (2d Cir.), cert. denied, 110 S. Ct. 56 (1989) (affirming defendant's conviction for conspiracy to conduct operations of La Cosa Nostra "Commission").
197. See CATO Institute Conference on RICO, Rights and the Constitution, Address by Joseph diGenova: The Powers of the Prosecutor (Oct. 18, 1989) (proposing change that will limit private parties' access to civil RICO while keeping tools for federal prosecutors intact).
198. Id. The proposed name of the statute was "Complex Fraud Statute of 1990." Id.
199. Id.
200. Id.
202. See supra notes 121-29 and accompanying text (examining pattern element's susceptibility to attack for vagueness).
sanction under RICO, and reduce the use of RICO against legitimate businesses.

Although abolishing private civil RICO actions is the most comprehensive means to halt civil RICO abuse, redefining RICO's pattern element is a less drastic yet adequate means to reduce the number of frivolous suits. In formulating a new definition of pattern, language found in state RICO statutes offers useful guidance.

B. State RICO Statutes

Twenty-seven states and Puerto Rico enacted statutes modeled after the federal RICO statute. Of these twenty-eight "little" RICO statutes, twenty-five use and define the word pattern. The other three state statutes omit the term pattern.

203. See supra note 33 (describing cases in which pleadings are clearly insufficient on their face or presumably initiated to embarrass or harass opponent).


206. 18 U.S.C. §§ 1961-1968 (1988); see Strasser, More States Are Adopting Racketeering Laws, Nat'l L.J., Mar. 20, 1989, at 34, col. 1 (stating that "[a]lthough state RICO laws receive little attention ... they give state and local prosecutors the same enormous powers as the federal law").

207. See Cal. Penal Code § 186.2(b) (West 1989) (providing that "[p]attern of criminal profiteering activity' means engaging in at least two incidents of criminal profiteering activity which ... (1) Have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics"); Colo. Rev. Stat. § 18-17-103(3) (1989) (providing that "[p]attern of racketeering activity' means engag-
ing in at least two acts of racketeering activity which are related to the conduct of the enterprise, if at least one of such acts occurred within ten years (excluding... imprisonment) after a prior act of racketeering activity"; CONN. GEN. STAT. ANN. § 53-394(e) (West 1985) (providing that "'[p]attern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred... within five years after a prior incident of racketeering activity"; DEL. CODE ANN. tit. 11, § 1502(5) (1985) (providing that "'[p]attern of racketeering activity' shall mean 2 or more incidents of conduct: a. That: 1. Constitute racketeering activity; 2. Are related to the affairs of the enterprise; 3. Are not so closely related to each other and connected in point of time and place that they constitute a single event; and b. Where:... 2. The last incident of conduct occurred within 10 years after a prior occasion of conduct; and 3. As to criminal charges, but not as to civil proceedings, at least 1 of the incidents of conduct constituted a felony"); FLA. STAT. ANN. § 895.02(4) (West Supp. 1989) (providing that "'[p]attern of racketeering activity' means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred... within 5 years after a prior incident of racketeering conduct"; GA. CODE ANN. § 16-14-3(8) (Supp. 1989) (noting that "'[p]attern of racketeering activity' defined same as Florida statute, supra, except... provided... the last of such incidents occurred within four years, excluding... imprisonment, after the commission of a prior incident of racketeering activity"; IDAHO CODE § 18-7803(d) (Supp. 1989) (defining "'[p]attern of racketeering activity' same as Florida statute, supra; ILL. ANN. STAT., Ch. 56 1/2, para. 1653(2)(b) (Smith-Hurd 1985) (providing that "'[p]attern of narcotics activity' means 2 or more acts of narcotics activity of which at least 2 such acts were committed within 5 years of each other. At least one of those acts of narcotics activity... shall be or shall have been punishable as a ... felony"); IND. CODE ANN. § 35-45-6-1 (West 1986) (defining "'[p]attern of racketeering activity' same as Florida statute, supra; LA. REV. STAT. ANN. § 15:1352(C) (West Supp. 1989) (providing that "'[p]attern of drug racketeering activity' means engaging in at least two incidents of drug racketeering activity that have the same or similar intents, results, principals, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents... occurs within five years after a prior incident of drug racketeering activity"; MISS. CODE ANN. § 97-43-3(d) (Supp. 1989) (defining "'[p]attern of racketeering activity' same as Florida statute, supra); NEV. REV. STAT. § 207.390 (1986) (providing that "'[r]acketeering activity' means engaging in at least two crimes related to racketeering" but otherwise same as Florida statute, supra; N.J. STAT. ANN. § 2C:41-1(2)(d) (West Supp. 1989) (providing that "'[p]attern of racketeering activity' requires (1) Engaging in at least two incidents of racketeering conduct... occurring] within 10 years (excluding... imprisonment) after a prior incident of racketeering activity; and (2) A showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents... occurs within five years after a prior incident of drug racketeering activity"; N.M. STAT. ANN. § 30-42-3(D) (Supp. 1989) (providing that "'[p]attern of racketeering activity' means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited acts set forth... provided... the last of which occurred within five years after the commission of a prior incident of racketeering"); N.Y. PENAL LAW § 460.10(4) (McKinney 1989) (providing that "'[p]attern of criminal activity' means conduct engaged in by persons charged in an enterprise corruption count constituting three or more criminal acts that: (a) were committed within ten years of the commencement of the criminal action; (b) are neither isolated incidents, nor so closely related and connected in point of time or circumstance of commission as to constitute a criminal offense or criminal transaction... and (c) are either: (i) related to one another through a common scheme or plan or (ii) were committed, solicited, requested, imported or intentionally aided by persons acting with the mental culpability required for the commission thereof and associated with or in the criminal enterprise"); N.C. GEN. STAT. § 75D-3(b) (1987) (defining "'[p]attern of racketeering activity' same as Florida statute, supra, except provided that "at least one other of such incidents occurred within a four-year period... excluding... imprisonment, after the commission of a prior incident of racketeering activity"; N.D. GEN. CODE § 12.1-06.1-01(2)(d) (Supp. 1989) (providing that "'[p]attern of
racketeering activity' requires at least two acts of racketeering activity . . . the last of which occurred within ten years, excluding . . . imprisonment, after the commission of a prior act of racketeering activity' (槿); OHIO REV. CODE ANN. § 2923.31(E) (Page Supp. 1988) (providing that "'[p]attern of corrupt activity' means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event . . . Unless any incident was an aggravated murder or murder, the last of the incidents . . . shall occur within six years after the commission of any prior incident forming the pattern, excluding . . . imprisonment served by any person engaging in the corrupt activity. For the purposes of the criminal penalties that may be imposed . . . at least one of the incidents forming the pattern shall constitute a felony"); OR. REV. STAT. § 166.715(4) (1989) (defining "'[p]attern of racketeering activity'" same as Florida statute, supra); 18 PA. CONS. STAT. ANN. § 911(E)(h)(4) (1983) (providing that "'[p]attern of racketeering activity' refers to a course of conduct requiring two or more acts of racketeering activity one of which occurred after the effective date of this section"); P.R. LAWS ANN. tit. 25, § 971a(i) (Supp. 1988) (providing that "'[p]attern of organized criminal activity . . . requires at least two (2) acts of organized criminal activity within a ten- (10-) year period . . . [In] computing the ten (10-) year period . . . any jail term served by the accused shall be excluded"); TENN. CODE ANN. § 39-12-203 (Supp. 1989) (defining "'[p]attern of racketeering activity' same as Florida statute, supra, except "provided that at least one (1) of such incidents occurred after July 1, 1986, and that the last of such incidents occurred within two (2) years after a prior incident of racketeering conduct"); UTAH CODE ANN. § 76-10-1602(2) (Supp. 1989) (providing that "'[p]attern 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 recent act constituting part of a pattern . . . shall have occurred within five years of the commission of the next preceding act alleged as part of the pattern"); WASH. REV. CODE § 9A.82.010(15) (Supp. 1989) (providing that "'[p]attern of criminal profiteering activity' means engaging in at least three acts of criminal profiteering . . . the last of which occurred within five years, excluding . . . imprisonment, after the commission of the earliest act of criminal profiteering. In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise . . . " (槿)); WIS. STAT. ANN. § 946.82(3) (West Supp. 1989) (providing that "'[p]attern of racketeering activity' means engaging in at least 5 incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided . . . the last of the incidents occurred within 7 years after the first incident of racketeering activity. Acts occurring at the same time and place which may form the basis for crimes punishable under more than one statutory provision may count for only one incident of racketeering activity' (槿). 208. See ARIZ. REV. STAT. ANN. § 13-2301(C)(2) (1989) (defining "criminal syndicate" as "any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuing basis in conduct which violates any one or more provisions of any felony statute of this state"); HAW. REV. STAT. §§ 842-1 to -12 (1985 & Supp. 1988) (failing to define pattern or similar term); R.I. GEN. LAWS § 7-15-2(a) (1985) (providing simply that "[i]t shall be unlawful for any person who knowingly received any income derived, directly or indirectly, from a racketeering activity or through collection of an unlawful debt, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in the acquisition of an interest in, or the establishment or operation of any enterprise")
word pattern, require proof of "racketeering," not proof of a pattern, for a violation.²⁰⁹ Hawaii and Rhode Island curtailed the scope of such broad language by restricting the predicate acts that constitute "racketeering" to violent crimes and felonies.²¹⁰ By tailoring the predicate acts narrowly, the Hawaii and Rhode Island statutes do not reach all the activity encompassed by the federal RICO statute.²¹¹ In contrast, the Arizona statute enumerates more predicate acts.²¹² The Arizona statute is more expansive than federal RICO because it lacks a pattern requirement altogether and provides a wider range of civil remedies.²¹³

Many of the state RICO statutes that define pattern incorporate language that has greater substance, a more definitive scope, and a stronger emphasis on the concept of "continuity" than does the corresponding provision in the federal statute.²¹⁴ For example, most of the state RICO statutes specify what a pattern "means,"²¹⁵ rather than what a pattern "requires."²¹⁶ In addition, sixteen states emphasize "continuity" by mandating that the constituent elements of a pattern occur over a time period less than the ten-year period stipulated by federal RICO.²¹⁷ Most states stipulate a maximum separation of four or five years.²¹⁸

The state RICO statutes' definitions of pattern vary subtly but significantly from the federal definition. For example, under federal RICO, "acts" are the core elements that accumulate to form the pat-

²¹⁴. Compare supra note 28 (presenting federal RICO's definition of pattern) with supra note 207 (presenting state RICO statutes' definitions of pattern).
²¹⁷. The separation of time for some of the states include: Connecticut (5 yrs.); Florida (5 yrs.); Georgia (4 yrs.); Idaho (5 yrs.); Illinois (5 yrs.); Indiana (5 yrs.); Louisiana (5 yrs.); Mississippi (5 yrs.); Nevada (5 yrs.); New Mexico (5 yrs.); North Carolina (4 yrs.); Ohio (6 yrs.); Oregon (5 yrs.); Utah (5 yrs.); Washington (5 yrs.); Wisconsin (7 yrs.). See supra note 207 (providing relevant sections of these state statutes).
²¹⁸. Id.
tern. In contrast, a majority of the state RICO statutes that define pattern require an aggregation of "incidents," not simply "acts," to form the requisite pattern. Delaware and Ohio provide that the "incidents" cannot be "so closely related in time and place that they constitute a single event." Nevada counts "crimes," and the Utah statute requires multiple "episodes." Moreover, many states expressly provide that "isolated" conduct is not within the scope of their respective statutes. Seven states require not only that the requisite predicates be related to each other, but also that they be related to the "enterprise."

As the various state RICO statutes demonstrate, there are many different ways of defining the units that accumulate to form a pattern and the necessary relationship among those units. The subtle variations are significant because they affect whether a "pattern of racketeering activity" may be proven. The more easily a pattern can be proven, the broader RICO's scope will be.

Formal definition and common usage suggest that the terms "incident," "episode," and "event" are broader than the term "act." Numerous "acts" are required to constitute a single "incident," "episode," or "event." Thus, by referring to "incidents," "episodes," or "events," rather than to "acts," a legislature may narrow the scope of a RICO statute.

220. These states include: California, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee, and Wisconsin. See supra note 207 (providing statutes of these states).
222. NEV. REV. STAT. § 207.390 (1986).
223. UTAH CODE ANN. § 76-10-1602(2) (Supp. 1989).
224. These states include: Connecticut, Florida, Idaho, Louisiana, Mississippi, New Jersey, New York, and Washington. See supra note 207 (quoting relevant sections of these state "little" RICO statutes).
225. These states include: Colorado, Connecticut, Delaware, New York, Ohio, Utah, and Washington. See supra note 207 (quoting relevant sections of these "little" RICO statutes).
226. See BLACK'S LAW DICTIONARY 762 (6th ed. 1990) (defining incident as "anything which . . . is connected . . . with another, or connected for some purposes, though not inseparably").
227. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 765 (1981) (defining episode as "an occurrence . . . which may be viewed as distinctive and apart although part of a larger or more comprehensive series"); see also Lipin Enters. Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986) (stating episode is more than mere act but less than scheme).
228. See BLACK'S LAW DICTIONARY 555 (6th ed. 1990) (defining event as "the issue or outcome of an action as finally determined; that in which an action, operation, or series of operations, terminates").
229. See BLACK'S LAW DICTIONARY 25 (6th ed. 1990) (stating that act is "[e]xpression of will or purpose . . . a performance; a deed").
C. Proposed Definition of "Pattern of Racketeering Activity"

The goal of changing the language of section 1961(5) should be clarity. Accordingly, a new definition of pattern should not merely codify the test articulated in H.J. Inc.230 The Court admitted that its explanation of pattern lacked definitiveness and focused its discussion on what did not constitute a pattern rather than providing a clear definition of the term.231

In order to change the statute's definition of pattern to reduce the number of unjustified civil RICO suits232 that result from the present ambiguous wording, this Comment proposes that section 1961(5) be amended to read as follows:

(5) "pattern of racketeering activity" means at least two events of racketeering activity

(A) which are related to one another or effectuate the goal(s) of the enterprise whose purpose or method of operation was the commission of unlawful acts;

(B) the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior event of racketeering activity; and

(C) the last of which occurred more than six months after the first.

For the purposes of this subsection, many illegal acts may constitute a single event.

Using the term "means" adds definitiveness and eliminates the need to look beyond the codified definition to discern what is neces-


232. Because the definitions in section 1961 apply to both RICO's civil and criminal provisions, altering the definition of pattern will affect the institution of criminal RICO suits. 18 U.S.C. §§ 1961-1968 (1988). The effect will be minimal, however, as DOJ-approved criminal prosecutions generally involve substantial illegal activity and numerous predicates that would satisfy a two "event" requirement. See UNITED STATES ATTORNEYS' MANUAL, supra note 14, §§ 9-110.200, 9-110.340 (1984) (stressing, inter alia, that not every case that technically meets statute's requirements will result in DOJ approval and that "[n]o indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction."); see also United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990) (affirming Patriarca "Family" members' convictions for conspiracy to participate and participating in an "enterprise" through "pattern of racketeering activity" in violation of 18 U.S.C. § 1962(c)-(d) (1988), as well as numerous racketeering, loansharking, and gambling offenses); United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990) (affirming convictions related to dismantling of Philadelphia branch of La Costa Nostra (LCN)). Appellants, members of the Scarfo crime family, participated in a conspiracy lasting 11 years. Id. at 1084-86. The Family's "criminal activities included nine murders, four attempted murders, drug trafficking, the conduct of illegal gambling businesses, the extortionate collection of 'street taxes' from non-LCN drug dealers and operators of illegal gambling businesses, the collection of unlawful gambling debts, and the collection of various usurious loans." Id.
sary and sufficient for a RICO pattern.\textsuperscript{233} The term "event" notifies potential parties that isolated acts will not form a pattern, and that many separately indictable or unlawful acts can be combined to constitute one "event."\textsuperscript{234} Borrowing language used in the Delaware and Ohio state RICO statutes,\textsuperscript{235} the word "event" conceptualizes something larger and more significant than a mere act, therefore precluding related predicates with the requisite continuity from forming a pattern if these predicates are in furtherance of only one "event."\textsuperscript{236} The word "event" is comparable but preferable to the word "episode" because it does not carry as much legal "baggage."\textsuperscript{237} In addition, the term "event" is not so rigid as to foreclose the flexibility courts need to address the wide variety of facts with which they are presented.

The first half of the alternative in subsection (A) would codify one "relationship" standard articulated in \textit{H.J. Inc.}\textsuperscript{238} Because of the potential breadth of the Court's "some external organizing principle" concept,\textsuperscript{239} it is omitted from the proposed definition. The second half of the alternative would require a nexus to an illegal or illegitimate "enterprise." To the extent that sections 1962(a)-(c) contain a nexus requirement between the "pattern of racketeering activity" and the "enterprise," including such a requirement in section 1961(5) would be redundant.\textsuperscript{240} Such repetition, however, serves the two important functions of reasserting RICO's purpose and increasing the likelihood that the pattern definition will withstand vagueness challenges.


\textsuperscript{234} For example, 20 mailings to further the sale of worthless property cannot be charged as 20 counts of mail fraud—two of which, demonstrating relationship and continuity, would fulfill the present definition of pattern—because the mass mailing is only one "event."

\textsuperscript{235} DEL. CODE ANN. tit. 11, § 1502(5) (1985); OHIo REV. CODE ANN. § 2923.31(E) (Page Supp. 1988).

\textsuperscript{236} See \textit{H.J. Inc.}, 109 S. Ct. at 2902 (concluding that related predicates, which exhibit closed- or open-ended continuity, will fulfill pattern requirement while acknowledging that precise amount of continuity required cannot be fixed in advance).

\textsuperscript{237} The word "episode," as used in H.R. 5111's definition of pattern may confuse courts into requiring multiple episodes which does not appear to be the intention of its drafters because the word "acts" is retained. See H.R. 5111, \textit{supra} note 166, at 2 (amending definition of pattern); \textit{supra} note 45 (discussing DOJ single episode rule also known as multiple episodes test).

\textsuperscript{238} \textit{H.J. Inc.}, 109 S. Ct. at 2900; \textit{see supra} text at note 94 (identifying standard).

\textsuperscript{239} \textit{H.J. Inc.}, 109 S. Ct. at 2900.

\textsuperscript{240} See 18 U.S.C. § 1962(a)-(c) (1988) (including nexus for each substantive offense by forbidding investment of income derived from "pattern of racketeering activity" in an "enterprise," acquiring interest in "enterprise" through "pattern of racketeering activity," and conducting affairs of "enterprise" through "pattern of racketeering activity"); \textit{see also supra} note 225 and accompanying text (identifying seven state RICO statutes that include nexus requirement).
Subsection (B) restates the temporal relationship requirement currently in section 1961(5), but omits reference to the effective date of the statute. Subsection (C) codifies the judicial concept of "continuity." Continuity is established strictly by a minimum length of time—six months—over which the "events" must extend. This method eliminates the need for the "but for" test used by the Second Circuit in an effort to apply the open-ended continuity concept articulated by the *H.J. Inc.* Court. Specifically, this method eliminates the need to make tenuous predictions that "but for" being discovered, the defendant would have continued his illegal conduct.

**CONCLUSION**

*H.J. Inc.* is the Supreme Court's second attempt to clarify the pattern requirement of RICO. An analysis of the cases decided after *H.J. Inc.* reveals that the Court's decision has not adequately defined RICO's pattern requirement. Because lower court rulings continue to present inconsistent interpretations of the pattern requirement, remedial legislation is necessary. Such legislation should go beyond that which Congress is presently considering and amend the definition of pattern with tight and unambiguous language in order to limit significantly the number of inappropriate RICO suits. Although excising the provision of the statute granting private parties a RICO cause of action would be necessary in order to eliminate inappropriate uses of private civil RICO, redefining pattern can substantially limit abuse without eliminating the statute's beneficial applications.

The definition of pattern proposed by this Comment is based on the premise that RICO ought to be used to target professional criminals dedicated to a life of crime. The proposed definition does not approach mathematical certainty, but its substance and clarity

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242. *See* Sedima, 473 U.S. at 496 (establishing continuity concept); *H.J. Inc.*, 109 S. Ct. at 2900 (noting continuity requirements in light of congressional intent).


244. United States v. Gelb, 881 F.2d 1155, 1163-64 (2d Cir.) (noting that "but for" defendant's discovery, his scheme to avoid paying postage on mailings would have continued), *cert. denied*, 110 S. Ct. 544 (1989).

245. Both the *Sedima* and *H.J. Inc.* Courts stressed that Congress, if it is so inclined, may curtail the broad language that results in unanticipated uses of RICO. *Sedima*, 473 U.S. at 499; *H.J. Inc.*, 109 S. Ct. at 2905; *supra* note 37 and accompanying text; *supra* note 99 and accompanying text.
will discourage litigation about whether the definition of pattern in RICO is unconstitutionally vague, provide courts with greater guidance, ensure that defendants receive equal treatment, and reduce the number of inappropriate suits. In short, this definition will substantially curb civil RICO abuse that burdens inappropriate defendants and thereby save them, and the judicial system, time and money.