CIVIL RICO — WHAT HATH CONGRESS WROUGHT?
SUPERIOR OIL COMPANY v. FULMER

[W]e plainly did not discuss, nor did we contemplate, that this law, this statute, would get into the field of run of the mill, individual fraud cases.*

INTRODUCTION

At its annual meeting in August of 1986, the American Bar Association’s House of Delegates passed a resolution that proposed severe limitations on private lawsuits brought under the Racketeer Influenced and Corrupt Organizations Act (“RICO”). This resolution, hailed by some as placing “principle ahead of profit,” was passed easily by a vote of 174-128. Ironically, just sixteen years earlier, the American Bar Association’s Board of Governors proposed the same civil RICO provisions to Congress that prompted cries for reform at the 1986 meeting.

From the date of its enactment, RICO has had a controversial, if not a “long and dishonorable,” history. Considered to be one of the most “sophisticated” statutes ever written, RICO was originally designed to aid the government in eradicating organized crime


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groups. In recent years the amount of RICO litigation has exploded as plaintiffs discovered the statute's treble damages provisions and potential reach.

This increased use of civil RICO has recently led the Eighth Circuit Court of Appeals, among other courts, to more closely examine the definitions and boundaries of RICO's provisions. The subject of this Note, Superior Oil Co. v. Fulmer, is a case in which the Eighth Circuit narrowly defined a "pattern of racketeering activity" and thus made it more difficult for private plaintiffs to bring suit under the statute.

The purpose of this Note is threefold. First, the Note examines the legislative history of RICO. Next, the shifting judicial interpretations of the statute are reviewed along with their subsequent effects upon Superior Oil. Finally, some of the problems arising out of civil RICO are analyzed and solutions are proposed.

BACKGROUND

LEGISLATIVE HISTORY

By the late 1960s, crime had become a major concern to the vast majority of Americans, which placed pressure upon the Congress to take action in response to rising crime rates. Organized crime became the main target of Congressional attention for two reasons:


9. 785 F.2d 252 (8th Cir. 1986).

10. "'Pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;" 18 U.S.C. § 1961(5) (Supp. II 1984).

11. Id. at 251.

12. See infra notes 15-38 and accompanying text.

13. See infra notes 39-139 and accompanying text.

14. See infra notes 140-220 and accompanying text.

15. Disorder in U.S. at a Climax, U.S. NEWS & WORLD REP., June 17, 1968, at 31 (describing the increase of crime in America); King, Beyond the Los Angeles Riots, SAT. REV., Nov. 13, 1965, at 34 (listing organized crime as one reason for ghetto problems).

first, its extensive infrastructure allowed almost any crime to be committed with impunity; and second, organized crime was the main catalyst behind many crimes on the street level, such as narcotics trafficking, gambling, and prostitution.

As a result of the growing threat of organized crime and a belief that existing criminal law was inadequate to meet it, the Congress acted. Senate Bill 30 ("S. 30"), the Organized Crime Control Act, was introduced on January 15, 1969, by Senator John L. McClellan. For almost the next two years this bill was the subject of intense debate.

What is known today as RICO was the offspring of the marriage of S. 30, Senate Bill 1861 ("S. 1861"), and Senate Bill 1623 ("S. 1623"). S. 30 was the foundation of the Organized Crime Control Act, which contains Article IX, RICO. S. 30 included a variety of new devices to strengthen law enforcement, including: immunity to gather testimony that would normally be self-incriminating and thus unobtainable (Title II); and the criminal sanctions counterpart to RICO's civil sanctions, namely Title VIII which provided stiff sentences (up to thirty years) for habitual or professional criminals and organized crime leaders.

S. 1861 was the foundation for RICO, and upon its provisions the present law was built. The bill introduced the provisions that allowed federal courts to issue orders directing persons to divest from certain financial ventures or cease participation in the same. In addition, it estopped defendants who had been found guilty in criminal prosecutions of racketeering from contesting the verdict in any sub-

18. Id. See also King, supra note 15, at 34.
22. 115 Cong. Rec. 9566-71 (daily ed. April 18, 1969). S. 1861 was introduced by Senators Hruska and McClellan and was a bill to prohibit the infiltration of legitimate organizations by racketeers. Hearings, supra note 21, at 61-82.
26. Id. at 21-29.
28. Hearings, supra note 21, at 68.
sequent civil proceeding.\textsuperscript{29} However, the important difference between S. 1861 and the present RICO statute is that S. 1861 allowed only the United States to bring civil action, not private individuals.\textsuperscript{30}

The privilege of asserting a private cause of action under RICO first appeared in S. 1623.\textsuperscript{31} At first glance, S. 1623 is merely a bill that prevents investment of income derived from racketeering activity into legitimate businesses.\textsuperscript{32} However, section 4(a) of the bill allowed an individual who had been injured by the investment of racketeering funds in legitimate businesses to sue privately and recover treble damages.\textsuperscript{33} Although this liberal grant of litigation privilege applied only to those injured from violations of S. 1623, these same privileges were eventually made available to those injured by any racketeering activities.\textsuperscript{34} The bill's sponsor, Senator Roman L. Hruska, did not realize that section 4(a) of S. 1623 would evolve into its present status, nor did he believe that his colleagues would have predicted what has happened with civil RICO. He stated:

I feel confident that had they [Congress] realized [or] had they been told, "wait a minute! Seventy percent of these cases will be against stock brokers, against accountants, against lawyers and businessmen, and \textit{they} will be trebled damaged, \textit{they} will have the burden of proof, \textit{they} will at their own peril, engage in many common commercial pursuits," I doubt very much that the Congress would have passed that bill.\textsuperscript{35}

On January 23, 1970, the Senate overwhelmingly passed the Organized Crime Control Act by a vote of 73-1.\textsuperscript{36} In the House the bill was examined, debated, and restructured over the course of almost nine months, but ultimately the House, like the Senate, passed the bill by an overwhelming majority of 341-26.\textsuperscript{37} After a short ceremony in the Department of Justice building, the bill was signed into

\begin{itemize}
  \item \textsuperscript{29} Id. at 69.
  \item \textsuperscript{30} Id. at 68-69. S. 1861 did not provide for private civil actions brought by those injured as a result of racketeering activity, unlike the current version of RICO which does contain a private cause of action provision. 18 U.S.C. § 1964(c) (Supp. II 1984). Another difference between S. 1861 and RICO is that S. 1861 defined a "pattern of racketeering activity" as including at least one act of racketeering, \textit{Hearings, supra} note 21, at 65, while the present version of RICO requires two such acts. 18 U.S.C. § 1961(5) (Supp. II 1984).
  \item \textsuperscript{31} \textit{Hearings, supra} note 21, at 41.
  \item \textsuperscript{32} \textit{See supra} note 23.
  \item \textsuperscript{33} \textit{Hearings, supra} note 21, at 41-42.
  \item \textsuperscript{34} 18 U.S.C. § 1964(c) (Supp. II 1984).
  \item \textsuperscript{35} Interview with Roman L. Hruska, Of Counsel for Kutak, Rock and Campbell, in Omaha (Feb. 9, 1987) (emphasis is Senator Hruska's) (tape of interview available at the Creighton Law Review Office, Creighton Univ. School of Law, Omaha).
  \item \textsuperscript{36} 116 CONG. REC. 972 (daily ed. Jan. 23, 1970).
  \item \textsuperscript{37} Id. at 35363 (daily ed. Oct. 7, 1970).
\end{itemize}
law by former President Richard M. Nixon on October 15, 1970.38

THE TARGET OF THE STATUTE

As expected and predicted, RICO was challenged unsuccessfully on constitutional grounds soon after it went into effect.39 Since the

39. One of the major complaints about RICO was that the statute was unconstitutionally vague. A statute is vague if it “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” Connally v. General Const. Co., 269 U.S. 385, 391 (1925).

A typical vagueness attack on RICO was brought in United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973), aff’d, 527 F.2d 237 (2d Cir. 1975). In Stofsky, union officials were charged with various crimes, including accepting payments from manufacturers in exchange for allowing them to subcontract work to nonunion shops in violation of collective bargaining agreements. Id. at 611. The acceptance of these payments was charged as a violation of RICO. Id. In response, the defendants made a motion to dismiss the charges on the grounds that the racketeering statute under which they were prosecuted was unconstitutionally vague. Id. at 612. The court denied the motion and held that RICO was not vague, as “the elements of the predicate offenses are well-defined and established.” Id.

The requirement that a “pattern of racketeering activity” be engaged in before civil RICO sanctions can be imposed is defined as requiring at least two acts of racketeering activity. 18 U.S.C. § 1961(5) (Supp. II 1984). The primary act must have occurred after the effective date of the statute; the other act must have occurred ten years before or after the primary act. Id. Thus, until Oct. 15, 1980, an act committed prior to RICO’s enactment could be coupled with an act occurring after RICO’s enactment to satisfy the “pattern of racketeering activity” requirement. Under these circumstances, charges of unconstitutionality based on claims that RICO was an ex post facto law prohibited by U.S. CONST. art I, § 9, cl.3 were soon heard.

One of the earliest cases to address this issue was United States v. Campanale, 518 F.2d 352 (9th Cir.), cert. denied, 423 U.S. 1050, reh’g denied, 424 U.S. 950 (1975). Here the defendant reasoned that since part of the “pattern of racketeering activity” that he engaged in took place before RICO existed, the statute was an ex post facto law and thus unconstitutional. Id. at 356.

The court, in delivering not only a well written opinion but an excellent lesson in jurisprudence, clearly explained why the statute was not an ex post facto law. Id. at 3464-65. An “ex post facto law,” as defined by the court, is one that makes certain acts criminal which prior to the law’s passage were not criminal. Id. Since the racketeering activities of the defendant were always considered criminal, RICO was not ex an post facto law because it did not make previous innocent acts criminal, but merely increased the penalty for certain criminal acts. Id.

Since RICO made common law crimes, which had previously been the exclusive domain of the State courts, subject to federal prosecution, questions were raised concerning whether the statute infringed on personal and State rights in violation of the ninth and tenth amendments to the Constitution. U.S. CONST. amend. IX, X. These challenges have been dismissed in one of two ways.

One approach was taken by the Fifth Circuit in United States v. Martino, 648 F.2d 367 (5th Cir.); cert. denied, 456 U.S. 943 (1981). In this case, it was held that RICO did not intrude upon Florida’s sovereignty by subjecting state common law crimes to federal prosecution. Id. at 381. The reason given was that RICO only included under the federal umbrella criminal enterprises based on state common law crimes and not the crimes themselves. Id.

Not nearly as creative as the Martino approach was the approach taken in United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa.), aff’d, 605 F.2d 1199 (3d Cir. 1979), cert.
constitutional challenges to RICO were unsuccessful, some defendants claimed as an alternative defense that they were not the parties at whom the statue was directed. This alternative defense failed because the courts did not restrict RICO's application exclusively to villains commonly depicted in late show gangster movies.

Three cases that illustrate the Eighth Circuit's Progression towards this line of reasoning are United States v. Anderson, United States v. Bledsoe, and Bennett v. Berg.

In United States v. Anderson the defendants in Anderson, Leslie Anderson and Leonard Mooney, were both county judges in Arkansas whose duties also included administrative tasks. They were indicted and convicted under RICO for accepting kickbacks for the purchase of various equipment and supplies on behalf of their respective counties. On appeal, the defendants asserted that the trial court erred in the application of RICO to their case because they were not acting as an "enterprise" as required by the statute.

The crux of the court's opinion was in determining if Judges Anderson and Mooney participated in the type of "enterprise" defined in section 1961(4). After a lengthy analysis, the court concluded

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See infra notes 42-60 and accompanying text.

40. See infra notes 42-60 and accompanying text.

41. See infra notes 42-60 and accompanying text.

42. 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981) (holding that only organizations with purposes beyond the commission of criminal acts constitute an "enterprise" under RICO).

In RICO an "enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;" 18 U.S.C. § 1961(4) (Supp. II 1984).

43. 674 F.2d 647, 661-62 (8th Cir.), cert. denied, 459 U.S. 1040 (1982) (holding that RICO was not intended to encompass every association as an "enterprise."). See generally supra note 42.

44. 685 F.2d 1053, 1063 (8th Cir. 1982), cert. denied, 464 U.S. 1008 (1983) (holding that RICO suits are not limited to those in which a tie to organized crime is alleged).

45. Anderson, 626 F.2d at 1361.

46. Id. at 1360-61.

47. Id. at 1362.

that they had not.\textsuperscript{49} The \textit{Anderson} opinion was openly antagonistic toward other courts that held contrary views, and labeled the Sixth Circuit as the court's "only declared ally" because that court had also narrowly construed RICO.\textsuperscript{50} The \textit{Anderson} court stated that it was obvious that the Congress "carefully planned" RICO to apply only to criminal organizations that had infiltrated legitimate businesses.\textsuperscript{51} Accordingly, the court held that Anderson's and Mooney's escapades did not fall into that category.\textsuperscript{52}

The Eighth Circuit's narrow interpretation of RICO was reiterated in \textit{Bledsoe}, in which the defendants were charged with various offenses under RICO, including the fraudulent sale of securities in agricultural cooperatives.\textsuperscript{53} Again the Eighth Circuit held that not every association of individuals could constitute an enterprise under RICO, and concluded that the statute did not apply to the defendants in the instant case.\textsuperscript{54} In addition, the Eighth Circuit again chided other courts for their broad interpretation of RICO.\textsuperscript{55}

However, the narrow construction of "enterprise" established in \textit{Anderson} and \textit{Bledsoe} did not last long. Two years after \textit{Bledsoe}, the Eighth Circuit joined the majority of courts which had given RICO a broad interpretation. This new view of RICO was set down in \textit{Bennett} which concerned residents of a nursing home who sued the administrator and several other parties under RICO for fraud and jeopardizing the "life care" promised to the residents after payment of an initial fee and monthly service charges.\textsuperscript{56} The trial court dismissed the plaintiffs' RICO allegations for failure to state a claim.\textsuperscript{57} On appeal, the Eighth Circuit did not specifically overrule \textit{Anderson} in remanding the case for further proceedings, but did abandon \textit{Anderson}'s narrow interpretation of RICO.

The \textit{Bennett} court made several references to the \textit{Anderson} opinion concerning the requirements for a criminal enterprise, but no references were made to \textit{Anderson}'s limited application of RICO.\textsuperscript{58}

\textsuperscript{49} \textit{Anderson}, 626 F.2d at 1362-69.
\textsuperscript{50} \textit{Id.} at 1372. The case referred to in which the Sixth Circuit narrowly construed RICO was United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), \textit{rehearing en banc}, 642 F.2d 1001 (6th Cir. 1980), \textit{cert. denied} 453 U.S. 912 (1980). On rehearing, an \textit{en banc} decision of the Sixth Circuit held that RICO should be broadly construed, unlike the three judge panel decision cited in \textit{Anderson}. In reality, the Eighth Circuit soon had no allies.
\textsuperscript{51} \textit{Id.} at 1371.
\textsuperscript{52} \textit{Id.} at 1369.
\textsuperscript{53} \textit{Bledsoe}, 674 F.2d at 651.
\textsuperscript{54} \textit{Id.} at 660-65.
\textsuperscript{55} \textit{Id.} at 662.
\textsuperscript{56} \textit{Bennett}, 685 F.2d at 1056-57.
\textsuperscript{57} \textit{Id.} at 1057.
\textsuperscript{58} \textit{Id.} at 1060 & n.9.
Instead, the Bennett court stated clearly that RICO did not apply exclusively to traditional organized crime. As evidence of the court’s disapproval of Anderson, the Bennett court stated: “We join an increasing number of courts and commentators in concluding that RICO suits are not limited to contexts in which a tie to organized crime is alleged.”

THE INTERPRETATION OF A “PATTERN OF RACKETEERING ACTIVITY”

Pre-Sedima

Judicial interpretation of RICO’s “pattern of racketeering activity” have been anything but consistent. One of the earliest cases addressing this issue was United States v. Parness, decided by the Second Circuit in 1974. In this case, a husband and wife were convicted under RICO of an illegal hotel takeover scheme. This scheme was accomplished through two acts of interstate transportation of stolen property and one act of interstate travel in furtherance of the scheme. Two of these acts occurred on February 4, 1971, and the third on February 9th of the same year.

The defendants appealed their convictions in part on the ground that their actions did not constitute a “pattern of racketeering activity” under RICO. The Second Circuit upheld the Parness’ conviction and recognized that a pattern of racketeering activity can be established by two criminal acts, even if the acts occurred on the same day.

The Seventh Circuit espoused an even broader interpretation of the pattern requirement in 1979. United States v. Aleman was a case that upheld the RICO conviction of two Chicago burglars. The burglars belonged to a club that provided information which assisted criminals in the commission of robberies. The defendants claimed that their activities were not the intended targets of RICO and that,

59. Id. at 1063.
60. Id. For a discussion of the way courts have interpreted RICO, see Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 HARV. L. REV. 1101, 1105-15 (1982).
61. 503 F.2d 430, 438 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975) (holding that any two acts of racketeering are sufficient to constitute a “pattern”).
62. Id.
63. Id. at 432-33.
64. Id. at 433.
65. Id. at 434-35.
66. Id. at 435. See also supra note 10.
67. Id. at 438.
68. See Aleman, 609 F.2d at 303-06. See generally supra note 39.
69. 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).
70. Id. at 301-06.
71. Id. at 301-02.
in any event, they did not engage in a pattern of racketeering activity.\textsuperscript{72}

In one of the broadest interpretations of RICO ever handed down, the Seventh Circuit stated that RICO's provisions were not limited to organized crime,\textsuperscript{73} that RICO violations can include State crimes,\textsuperscript{74} that RICO did not impose cruel and unusual punishment,\textsuperscript{75} and most importantly for the purposes of this Note, that a "pattern of racketeering activity" can be proved by showing the commission of only two crimes, even if they are traditional common law offenses like burglary.\textsuperscript{76}

\textbf{Sedima and Its Note Fourteen}

As a result of the variance in lower court interpretations of RICO, particularly in regard to standing requirements, the Supreme Court granted certiorari to review Sedima, \textit{S.P.R.L. v. Imrex Co.},\textsuperscript{77} in order to provide guidance to lower courts in the resolution of RICO cases.\textsuperscript{78} \textit{Sedima} was a case in which a Belgian corporation sued its American supplier for acts of mail and wire fraud under RICO.\textsuperscript{79} The primary issue in the case was not a question of what constituted a "pattern of racketeering activity," but rather the requirements for standing to sue under RICO.\textsuperscript{80} Nevertheless, \textit{Sedima} has had a significant effect on the definition of a "pattern of racketeering activity" due largely to note fourteen of the Court's opinion.\textsuperscript{81}

\textsuperscript{72} Id. at 303-04.
\textsuperscript{73} Id. at 303.
\textsuperscript{74} Id. at 304.
\textsuperscript{75} Id. at 306. \textit{See generally supra} note 39.
\textsuperscript{76} Id. at 304.
\textsuperscript{77} 105 S. Ct. 3275 (1985).
\textsuperscript{78} Id. at 3280.
\textsuperscript{79} Id. at 3275.
\textsuperscript{80} Id. at 3284.
\textsuperscript{81} \textit{See supra} note 10 and \textit{infra} notes 85-102, 145-50, 154-96 and accompanying text. \textit{See also Comment, Pattern Requirements of Civil RICO, 74 KY. L.J. 623, 625 (1986).} \textit{Sedima's} note 14 reads:

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in \$ 1961 in that it states that a pattern "\textit{requires} at least two acts of racketeering activity," \$ 1961(5) (emphasis added), not that it "\textit{means}" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of \textit{continuity plus relationship} which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that, "[t]he term 'pattern' itself re-
Note fourteen simply stated that two criminal acts may not be sufficient to constitute a "pattern." In addition, the note stated that a common connection among the acts must be present. Based upon these few words, courts have taken differing directions in defining a "pattern of racketeering activity."

Post-Sedima

A broad holding such as the Seventh Circuit’s in Aleman can be cheered as being powerful weaponry in the war against crime, or scorned for clogging the courts with cases that may belong elsewhere. Used improperly as authority, note fourteen of Sedima can provide new weaponry in the war against overburdened dockets by allowing courts to narrowly construe the pattern requirement and thus dismiss most RICO cases. However, most courts have resisted that temptation.

In the months after the decision was rendered, two cases were handed down with holdings that construed note fourteen. The first case, R.A.G.S. Courture, Inc. v. Hyatt, was a Fifth Circuit case in which the defendant was charged under RICO with defrauding the plaintiff by submitting false invoices for equipment repairs. The district court granted the defendant’s motion for summary judgment because no pattern of racketeering activity was shown.

On appeal, the Fifth Circuit dismissed the defendant’s arguments that note fourteen of Sedima narrowed the pattern requirement for stating a cause of action to the extent that the defendant’s activities

quires the showing of a relationship. ... So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern ...” 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also id., at 35193 (statement of Rep. Poff) (RICO “not aimed at the isolated offender”); House Hearings, at 665. Significantly, in defining “pattern” in a later provision of the same bill, Congress was more enlightening: “criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. Iannelli v. United States, 420 U.S. 770, 789, 95 S. Ct. 1284, 1295, 43 L. Ed. 2d 616 (1975).

83. Id.
84. See generally supra note 10 and infra notes 85-102, 145-50, 154-96 and accompanying text.
85. See supra notes 68-76 and accompanying text.
87. See infra notes 88-102, 172-96 and accompanying text.
88. 774 F.2d 1350. (5th Cir. 1985).
89. Id. at 1351-52.
90. Id. at 1353.
did not constitute a pattern of racketeering activity. In response to this argument the Fifth Circuit stated that the Sedima Court only "implied" that two isolated acts would not be sufficient to constitute a pattern. The acts alleged in R.A.G.S. were not isolated, but related, and therefore the Fifth Circuit found that the defendant's activities constituted a pattern of racketeering.

In justifying its broad interpretation of RICO, the Fifth Circuit stated almost apologetically: "It may be unfortunate for federal courts to be burdened by this kind of case, but it is not for this court to question policies decided by Congress and upheld by the Supreme Court. The broad language of the statute and the Sedima decision provide us with clear guidance."

The Eleventh Circuit, like the Fifth Circuit in R.A.G.S., declined to narrowly construe the pattern requirement of RICO. In Bank of America v. Touche Ross & Co., the Eleventh Circuit reversed a district court's ruling that was based in part on the determination that the plaintiffs failed to prove a pattern of racketeering activity sufficient to state a RICO claim. The plaintiffs were five banks, which had provided financing to a corporation that subsequently went bankrupt. The defendant accounting firm had prepared false financial statements that were relied upon by the banks in financing the corporation. The banks sued the defendant accounting firm for acts of fraud under RICO. The banks alleged nine separate acts of wire and mail fraud, involving the same parties over a period of three years. The Eleventh Circuit held that these acts satisfied the RICO pattern requirement. The court further held that "[a]cts that are part of the same scheme or transaction can qualify as distinct predicate acts" for purposes of proving a pattern under RICO.

In light of this varied and confusing legislative and judicial history, Superior Oil Co. v. Fulmer is now examined.

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91. Id. at 1355.
92. Id.
93. Id.
94. Id.
95. 782 F.2d 966 (11th Cir. 1986).
96. Id. at 967.
97. Id. at 968.
98. Id.
99. Id.
100. Id. at 971.
101. Id.
102. Id.
103. 785 F.2d 252 (8th Cir. 1986).
FACTS AND HOLDING

In the early 1960s, Huey Fulmer started working in the oilfields of southwestern Arkansas. He maintained oil wells for Austral Oil Company and, beginning in the late 1970s, for the company that had purchased those wells, Superior Oil Company. Fulmer also leased to Austral, and later to Superior, a compressor which was to increase the pressure and amount of gas and oil produced at a certain well known as International Paper 2 ("I.P. 2"). This particular well had a pipeline connecting it to an International Paper Company plant that made use of liquid petroleum gas produced from the well.

In 1981, Fulmer formed a partnership with James Branch and Roy Nichols whereby they installed a cryogenic plant on the I.P. 2 pipeline. A cryogenic plant is used to remove the heavier hydrocarbons from the natural gas, which consequently lowers the BTU capacity and thus the amount of energy that can be obtained from the burning of the gas. Although Fulmer obtained a letter of permission to install a dryer on the pipeline to remove water from the natural gas, in reality, the defendants installed the cryogenic plant. Fulmer also gave International Paper the impression that the installation of the cryogenic plant (or dryer as International believed) was undertaken on behalf of his employer, Superior Oil, and not to benefit himself and his partners.

After installing the cryogenic plant, the BTU capacity of the gas sold to International dropped from approximately 1,170-1,200 to approximately 1,050. International had a contract with Superior which provided that natural gas supplied to its plant would have a minimum BTU of 1,000. Furthermore, the contract stated that International pay premiums for gas received with a BTU above 1,000.

104. Brief for Appellee at 4, Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986).
105. Brief for Appellant at 8-9, Superior Oil.
106. Superior Oil, 785 F.2d at 253.
107. Id.
108. Id.
109. BTU or British Thermal Unit is a unit used to measure heat. One BTU raises the temperature of one pound of water one degree Fahrenheit. 4 ENCYCLOPEDIA AMERICANA British Thermal Unit 581 (1981).
111. Superior Oil, 785 F.2d at 253 The appellants' brief states that "the issue of whether or not International Paper Company actually knew the real purpose for the plant was hotly contested" at trial. Brief for Appellant at 11, Superior Oil.
112. Superior Oil, 785 F.2d at 253.
113. Id.
114. Id.
115. Id.
To conceal the fact that International was being billed for more gas than it received and that the gas received had a reduced BTU, Fulmer removed a metering device which served as the basis for billing International and measuring the amount and BTU capacity of the gas.\textsuperscript{116} The metering device was placed at a point preceding the cryogenic plant so that the gas had a high BTU at the point of measurement for billing purposes instead of the low BTU that International eventually received after processing through the cryogenic plant.\textsuperscript{117}

Fulmer had also reported to Superior Oil that the oil pressure and production of the well were so low that a compressor was required to make the well profitable.\textsuperscript{118} However, the oil pressure and production of the well were sufficient to make the compressor unnecessary.\textsuperscript{119} Testimony indicated that the compressor was used to increase the efficiency of Fulmer's cryogenic plant.\textsuperscript{120} Since the well was more productive than Superior Oil realized, a substantial amount of unaccounted oil was produced.\textsuperscript{121} This excess oil was sold to third parties by Fulmer for personal profit.\textsuperscript{122}

Fulmer's entire scam came to Superior's attention in early 1982 as the result of an anonymous letter revealing Fulmer's activities.\textsuperscript{123} Superior notified the F.B.I. and after an investigation Fulmer was arrested and the cryogenic plant confiscated.\textsuperscript{124} Soon afterward, Superior brought a civil suit against Fulmer and his accomplices in the Chancery Court of Lafayette County, Arkansas.\textsuperscript{125} The case was removed from the Chancery Court to federal district court by Fulmer on the basis of diversity of citizenship.\textsuperscript{126} Subsequently, Superior amended its complaint to include claims under RICO.\textsuperscript{127}

After a three-day trial,\textsuperscript{128} the evidence was submitted to a six-person jury.\textsuperscript{129} The jury found Fulmer liable and awarded Superior money damages on the following three causes of action:

\begin{itemize}
  \item \textsuperscript{116} Id. See also Brief for Appellant at 10-12, Superior Oil.
  \item \textsuperscript{117} Brief for Appellant at 10-12, Superior Oil.
  \item \textsuperscript{118} Superior Oil, 785 F.2d at 253-54.
  \item \textsuperscript{119} Id. at 254.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} Id. According to the court, "under Fulmer's operation, the well produced approximately seventeen barrels of oil for every million cubic feet of gas. When Superior undertook operation of the plant, oil production increased to approximately thirty-five barrels per million cubic feet of gas." Id.
  \item \textsuperscript{122} See Brief for Appellee at 3, Superior Oil. See also Superior Oil, 785 F.2d at 254.
  \item \textsuperscript{123} Superior Oil, 785 F.2d at 254.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Brief for Appellant at 5, 13, Superior Oil.
  \item \textsuperscript{127} Id. at 13.
  \item \textsuperscript{128} Brief for Appellant at 13, Superior Oil.
  \item \textsuperscript{129} Brief for Appellee at 1, Superior Oil.
\end{itemize}
1. Wrongful conversion of oil, gas, and liquid petroleum gas products — $145,125.00.

2. Fraud for rental of a compressor that was unnecessary — $26,397.70.

3. Racketeering activity — $25,000.00 (which was trebled to $75,000.00 as prescribed by RICO).\textsuperscript{130}

The defendants then appealed and Superior filed a cross-appeal to the Eighth Circuit Court of Appeals.\textsuperscript{131} On appeal, Superior Oil argued that the damages awarded under two of the causes of action, the damages for wrongful conversion under the first cause and fraud under the second cause, should have been trebled because they arose out of the racketeering activity of the third cause of action, which had already been trebled.\textsuperscript{132} The defendants, Fulmer, Branch, and Nichols, appealed on the grounds that they did not commit any acts of wrongful conversion or fraud and that, in any event, RICO did not apply to their case.\textsuperscript{133} The Eighth Circuit ruled that Superior provided sufficient evidence to sustain a jury verdict against Fulmer and his accomplices for wrongful conversion and fraud and that the damage awards should be allowed to stand under the first and second causes of action.\textsuperscript{134}

In review of the third cause of action, however, the court relied on\textit{Sedima} and held that since the defendants did not engage in a "pattern of racketeering activity" as interpreted through note fourteen of \textit{Sedima}, no RICO liability could exist and thus the $25,000 damage award was vacated.\textsuperscript{135} The \textit{Superior Oil} court also found that since there was no RICO liability, there could be no treble damages for causes 1 and 2.\textsuperscript{136}

The Eighth Circuit reasoned that Fulmer's activities constituted an "isolated fraudulent scheme"\textsuperscript{137} and thus did not constitute a pattern of criminal acts necessary to sustain a RICO judgment against him.\textsuperscript{138} It apparently made no difference to the Eighth Circuit that Fulmer's isolated fraudulent scheme extended over the course of years and even decades.\textsuperscript{139}

\textsuperscript{130} \textit{Superior Oil}, 785 F.2d at 253. RICO's treble damages provision is at 18 U.S.C. § 1964(c) (Supp. II 1984).

\textsuperscript{131} Brief for Appellee at 1, \textit{Superior Oil}.

\textsuperscript{132} Id. at 6.

\textsuperscript{133} \textit{Superior Oil}, 785 F.2d at 254.

\textsuperscript{134} Id. at 258-59.

\textsuperscript{135} Id. at 254-57, 259. \textit{See generally supra} note 79 and accompanying text.

\textsuperscript{136} \textit{Superior Oil}, 785 F.2d at 258. Under RICO, treble damages are only awarded to persons who are injured by a violation of the statute's provisions. 18 U.S.C. § 1964(c) (Supp. II 1984).

\textsuperscript{137} \textit{Superior Oil}, 785 F.2d at 257.

\textsuperscript{138} Id.

\textsuperscript{139} Id.
ANALYSIS

THE EIGHTH CIRCUIT'S REASONING IN RENDERING A DECISION

In justifying its decision in Superior Oil, the Eighth Circuit relied on three points: (1) that its interpretation of the statute was in accordance with legislative intent;\(^\text{140}\) (2) that according to precedent established by the Supreme Court in Sedima, the activities of Fulmer, Branch, and Nichols did not constitute a "pattern of racketeering activity" under RICO;\(^\text{141}\) and (3) that in any event the activities of the three defendants were but an "isolated fraudulent scheme" and thus not subject to the statute.\(^\text{142}\) This Note now discusses each of these points in turn.

THE EIGHTH CIRCUIT'S INTERPRETATION OF LEGISLATIVE INTENT

The Eighth Circuit in Superior Oil relied heavily on Sedima for support of its conclusion that the Congressional intent behind RICO would not have supported application of the statute to the instant case.\(^\text{143}\) However, the court indicated that it would have probably reached the same decision in Superior Oil based upon its independent interpretation of Congressional intent, and absent what the court perceived as authority from Sedima.\(^\text{144}\)

For support of its interpretation of Congressional intent, the Eighth Circuit cited note fourteen of Sedima and the four Congressional sources therein.\(^\text{145}\) The first Congressional source used in note fourteen was an excerpt from the Senate Report on the bill which stated: "'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.'"\(^\text{146}\)

The second source quoted by the court in support of its limited interpretation of RICO was a statement by Senator McClellan which read: "'The term "pattern" itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern.'"\(^\text{147}\)

\(^{140}\) Id. at 257 n.7.

\(^{141}\) Id. at 254-57.

\(^{142}\) Id. at 257.

\(^{143}\) Id. at 254-57.

\(^{144}\) Id. at 257 n.7.

\(^{145}\) Id. at 256 (citations omitted).

\(^{146}\) Id. (emphasis added in Sedima, 105 S. Ct. at 3285 n.14 and quoted in Superior Oil).

\(^{147}\) Id. (quoting Sedima, 105 S. Ct. at 3285 n.14).
quoted by the Eighth Circuit was a statement made by Representative Poff, who said that RICO was "'not aimed at the isolated offender.'" 148

Finally, to further assist the court's interpretation of the definition of "pattern," the Eighth Circuit recognized the importance of 18 U.S.C. § 3575(e), which was originally a part of the Organized Crime Control Act. 149 The section reads in part: "'[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" 150

Thus, the Eighth Circuit was correct in concluding that Congress did not intend that RICO be applied to "garden variety" criminals such as Huey Fulmer. 151 Congress' flurry of activity in 1969 and 1970...
was not a result of concern over the dangers of perpetrators of common law fraud, like Fulmer. Crimes of this type, prior to RICO, had been efficiently adjudicated in the State courts. However, large criminal organizations, which had continuously eluded traditional police and judicial procedure, were having an extremely adverse effect upon the country. RICO was directed at these groups, not at the perpetrators of common law fraud.

**THE EIGHTH CIRCUIT'S INTERPRETATION OF SEDIMA**

The Eighth Circuit, in deciding Superior Oil, used Sedima as its primary judicial authority. However, note fourteen of the Sedima opinion was erroneously construed by the Eighth Circuit to justify an interpretation of RICO that is contrary to the spirit of the Sedima holding.

In Sedima, the Supreme Court stated that RICO was to be construed broadly. The primary issue in the case was whether a plaintiff had standing to sue under RICO when the defendant had not been criminally convicted of racketeering. The Supreme Court held that a criminal conviction was not a prerequisite to bringing a private civil suit, and thus the statute was given a broad construction even in cases involving non-traditional organized crime.

In writing for the Sedima majority, Justice White listed the elements necessary to state a valid claim under RICO. One of those elements is that a "pattern of racketeering activity" be alleged. Justice White annotated the term "pattern" with note fourteen; which has received considerable subsequent attention by other courts, including the Eighth Circuit.

In note fourteen, Justice White stated that a "pattern" does not necessarily consist of only two acts of racketeering activity, but rather that although two acts are needed, they may not be suffi-

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153. See supra notes 15-18 and accompanying text.
154. Superior Oil, 785 F.2d at 254-57.
155. Sedima 105 S. Ct. at 3286.
156. Id. at 3284.
157. Id.
158. Id. at 3285.
159. Id.
160. See supra notes 81, 85-102, 143-50 and infra notes 172-96 and accompanying text.
cient.\textsuperscript{161} To support this reading, Justice White cited legislative statements that were subsequently relied upon by the Eighth Circuit in \textit{Superior Oil}.\textsuperscript{162} Justice White did not assert a revolutionary idea, but simply stated that the word "pattern" should be interpreted according to its normal meaning in the English language.\textsuperscript{163} This straightforward approach to defining RICO's provisions explains why the statute was so broadly interpreted in \textit{Sedima}. After \textit{Sedima}, anyone who had been injured by violations of RICO would be allowed standing to sue under the civil provisions of the statute.\textsuperscript{164} Thus, it is illogical to assume, although the Eighth Circuit must have, that the Court that endorsed a broad interpretation of civil RICO's standing provisions would have condoned severe limitations upon that standing by narrowly interpreting the pattern requirement for stating a claim.

Furthermore, the Eighth Circuit must have failed to read the last paragraph of the \textit{Sedima} opinion, a paragraph that recognized note fourteen as dicta.\textsuperscript{165} The \textit{Sedima} Court concluded its opinion in part by stating: "The questions whether the defendants committed the requisite predicate acts, and whether the commission of those acts fell into a pattern, are not before us."\textsuperscript{166} The Eighth Circuit failed to qualify its use of \textit{Sedima} by admitting that their "authority" for the \textit{Superior Oil} decision was dicta and thus, the court created the perception that note fourteen carried greater authority than it really did.\textsuperscript{167}

The Eighth Circuit also improperly stated that the Supreme Court in \textit{Sedima} "disagreed with [the] broad construction of 'pattern.'"\textsuperscript{168} In support of this construction, the \textit{Superior Oil} court quoted the following passage from \textit{Sedima}: "The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern.'"\textsuperscript{169} The conclu-
sion reached by the Supreme Court was not that the broad interpretation of "pattern" was wrong. Instead, the Court concluded that the reason civil RICO was put to such "extraordinary uses" was that the listed predicate offenses were broad and that no solid definition of pattern existed.\footnote{Sedima, 105 S. Ct. at 3287.} This conclusion is entirely consistent with the rest of the \textit{Sedima} opinion. The "extraordinary uses" are a result of the broad language of the statute.\footnote{Id.} The broad interpretation of the statute established in \textit{Sedima} is a result of the broad language used in drafting the statute, and thus the "extraordinary uses" become reasonable when viewing them in light of this language.

In the months following the Eighth Circuit's decision in \textit{Superior Oil}, the Seventh Circuit has also decided what constitutes a "pattern" under RICO. Like the Fifth Circuit in \textit{R.A.G.S.},\footnote{774 F.2d 1350, 1355 (5th Cir. 1985). See also supra notes 88-94 and accompanying text.} the Seventh Circuit in \textit{Morgan v. Bank of Waukegan}\footnote{804 F.2d 970, 975 (7th Cir. 1986).} rejected a narrow interpretation of the pattern requirement. The plaintiff in \textit{Morgan} alleged fraud against the defendant bank for its role in financing several corporations that later went bankrupt.\footnote{Id. at 972.} The bank's role included committing various acts of mail fraud over a four-year period.\footnote{Id. at 973.} The district court dismissed the case for failure to allege facts sufficient to constitute a pattern of racketeering activity.\footnote{Id.} The Seventh Circuit reversed, rejecting the district court's narrow construction of the pattern requirement.\footnote{Id. at 975-76.} The \textit{Morgan} court stated that even if several acts are part of the same scheme or involve the same person, they will not be precluded from meeting the pattern requirement.\footnote{Id. at 977.}

The court explained that its broad construction of the pattern requirement met the directive set down in \textit{Sedima} that "[a]ny construction of the statute must comport with its plain and unambiguously broad language."\footnote{Id. at 974 (citing Sedima, 105 S. Ct. at 3287).} Referring to the court's role in construing the statute, the \textit{Morgan} court stated: "The sweep of RICO is admittedly broad, and our function is to apply the language of the statute as drafted by Congress, not to rewrite the statute as we might prefer it to be."\footnote{Id. at 974 (citing Sedima, 105 S. Ct. at 3287).} In addition, the Seventh Circuit made clear that "if Congress should decide to narrow civil RICO, the courts will respect its
restrictions."181

Consistent with the broad sweep of the Morgan court, the Second Circuit in United States v. Ianniello,182 flatly disagreed with the Eighth Circuit’s interpretation of note fourteen of Sedima.183 The defendants in this case were charged with several illegal activities under RICO, most notably tax evasion accomplished through the “skimming” of funds from the profits of several New York City nightclubs.184 The Second Circuit held that the defendants participated in a pattern of racketeering activity despite arguments that note fourteen of Sedima mandated a narrow construction of the pattern requirement.185 Using Sedima as support, the Ianniello court stated that “any further narrowing of RICO, however appropriate that may be, is a job for Congress, not the courts.”186 In addressing note 14 directly, the Second Circuit properly characterized the weight of the note’s authority by stating that “the Sedima footnote does not rise to the level of a holding, it is not controlling.”187 The Second Circuit then set down its standard for the pattern requirement by stating, “we hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the Sedima footnote construes section 1962(c) to include are satisfied.”188

The Second Circuit did not stop there, but went on to criticize the Eighth Circuit’s holding in Superior Oil.189 The Ianniello court referred to the Eighth Circuit’s narrow construction of the pattern requirement as a “strained and inappropriate reading of the statutory language” and to the holding as an “incongruous result.”190

One court that has sided with the Eighth Circuit’s narrow construction of the pattern requirement is the Fourth Circuit. In International Data Bank v. Zepkin,191 a corporation brought a RICO action against two individuals who defrauded the corporation through a false stock prospectus and fraudulent claims for expenses.192 The Fourth Circuit affirmed the district court’s dismissal

181. Id. at 977.
182. 808 F.2d 184 (2d Cir. 1986).
183. Id. at 192.
184. Id. at 186.
185. Id. at 192.
186. Id. at 192 n.15 (citing Sedima, 105 S. Ct. at 3287).
187. Id. at 190.
188. Id. at 192.
189. Id.
190. Id.
191. 812 F.2d 149 (4th Cir. 1987).
192. Id. at 150.
of the suit because the plaintiff did not state facts sufficient to allege a pattern of racketeering activity.\textsuperscript{193}

The court, like the Eighth Circuit in \textit{Superior Oil}, supported its holding through an interpretation of Congressional intent, note fourteen of \textit{Sedima}, and the belief that if a broad construction of the pattern requirement was adopted, then "every fraud would constitute 'a pattern of racketeering activity.'"\textsuperscript{194} In light of the many circuits that have construed the pattern requirement broadly, even after the impact of \textit{Sedima}'s note fourteen, it seems that the statement of Judge Gibson in \textit{United States v. Anderson}\textsuperscript{195} has become true again, as the Eighth Circuit has only one "declared ally" in its narrow reading of RICO: this time, the Fourth Circuit.\textsuperscript{196}

\textbf{THE EIGHTH CIRCUIT'S INTERPRETATION OF THE PATTERN REQUIREMENT}

The Eighth Circuit in \textit{Superior Oil} was firm in its holding that Huey Fulmer's criminal activities did not constitute a pattern of racketeering activity necessary for liability under RICO.\textsuperscript{197} Rather, the court considered Fumliner's activities to constitute an "isolated fraudulent scheme."\textsuperscript{198}

In fact, Fulmer's activities were much more than an "isolated" incident; his activities comprised a pattern of racketeering activity for the following reasons. First, Fulmer defrauded both Austral Oil Company and later Superior Oil Company by leasing to them a compressor that was not necessary for the efficient operation of the I.P. well.\textsuperscript{199} This particular act of fraud was carried out for approximately twenty years.\textsuperscript{200} Second, he and his partners, through the use of their cryogenic plant and the positioning of the gas metering device, stole natural gas and liquid petroleum gas.\textsuperscript{201} They also defrauded International Paper Company by stealing and transporting gas to their plant with a reduced BTU and by allowing International to pay for gas never received and premiums for the gas that they be-

\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.} at 154-55.
\textsuperscript{195} 626 F.2d 1358, 1372 (8th Cir. 1980), \textit{cert. denied}, 450 U.S. 912 (1981). \textit{See supra note} 50 and accompanying text.
\textsuperscript{196} \textit{Superior Oil}, 785 F.2d at 257. The Second, Fifth, Seventh, and Eleventh Circuits have interpreted the pattern requirement broadly. \textit{See supra} notes 88-102, 172-90 and accompanying text.
\textsuperscript{197} \textit{Superior Oil}, 785 F.2d at 257.
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.} at 253-54. \textit{See also supra} 106, 118-22 notes and accompanying text.
\textsuperscript{200} Brief for Appellant at 9, \textit{Superior Oil}.
\textsuperscript{201} \textit{Superior Oil}, 785 F.2d at 253. \textit{See also supra} notes 108-17 and accompanying text.
lieved had a higher BTU. These acts of wrongful conversion and fraud extended over a period of one year. Third, Fulmer gave false reports to Superior that the oil production of the I.P. 2 well was much lower than it actually was. Fulmer then sold this excess oil for personal profit. These acts of wrongful conversion extended over a period of several years. Lastly, Fulmer’s criminal activities were not only damaging to Superior Oil Company, but to the previous owner of the I.P 2 well, Austral Oil Company, and to one of Superior’s customers, International Paper Company.

It is apparent that Fulmer committed several acts of wrongful conversion in stealing various petroleum products. Several acts of fraud were also committed. Three separate parties suffered damages as a result of these criminal acts that were carried out over periods of time ranging from one to twenty years. In light of these facts, no reasonable person could conclude that only an “isolated” criminal act had taken place. Thus, it appears that the Eighth Circuit erred in finding that Fulmer had not engaged in a “pattern of racketeering activity.”

RESOLUTION OF THE RICO DISPUTE

In rendering the Superior Oil decision, the Eighth Circuit was forced to deal with three separate issues: First, whether the Congress intended RICO to reach criminals like Fulmer and his accomplices; second, whether the opinion of the Supreme Court in Sedima, which established a broad interpretation of RICO, would logically extend to the pattern requirement; and third, whether the facts of the case and the broad language of RICO ultimately should have made Fulmer and his accomplices susceptible to its provisions.

It is clear from the Superior Oil opinion that legislative intent, as reviewed in note 14 of Sedima, was the Eighth Circuit’s primary support for its decision. However, legislative intent should only be considered in interpreting a statute when the words of that statute do
not convey a clear meaning. This rule of statutory interpretation must also be applied to statutes that convey a clear, but unpopular, meaning. The proper way to interpret statutes is to examine the plain meaning of the words contained therein and the logical application of those words to a particular situation.

Of course, as new situations arise, the statute may be made applicable to situations that the drafters did not foresee or intend. In those cases, courts could either try to glean the legislative intent from the legislative history and make a ruling based upon it, or continue to interpret the statute according to its plain meaning. Looking into the "crystal ball" of legislative intent is uncertain, interpreting statutes through the plain meaning of their language is not. Thus, the uncertainty of statutory interpretation should be resolved in favor of the plain meaning of the words of the statute and not what may have been in the hearts and minds of the people who drafted it.

Certainly the holding in Superior Oil alters the pattern requirement of RICO in the Eighth Circuit so as to not include those whose actions constitute an "isolated fraudulent scheme," regardless of the extent and period of time in which the scheme is carried out. The Superior Oil holding, without doubt, substantially restricts the applicability of RICO in direct contrast to the plain language of the statute.

211. J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 238 (1891) (stating: "If the language be plain, unambiguous and uncontrollable by other parts of the act, . . . courts cannot give it a different meaning to subserve public policy or to maintain its constitutionality.").

212. Id.

213. Id.

214. See United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805), in which Chief Justice Marshall instructed: "Where the mind labours to discover the design of the legislature, it seizes every thing [sic] from which aid can be derived." Id. at 386. See also Pine Hill Coal Co. v. United States, 259 U.S. 191 (1922) Justice Holmes for the majority stated: "It is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage."

215. Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527 (1947). Justice Frankfurter warned that reading beyond the plain meaning of statutory language is "to usurp a power which our democracy has lodged in its elected legislature." Id. at 533.

216. The narrow interpretation of the pattern requirement set down in Superior Oil has been followed in two recent Eighth Circuit cases.

In Holmberg v. Morrisey, 800 F.2d 205 (8th Cir. 1986), the court reversed a district court's finding of RICO liability based upon the defendant's common law fraud. Id. at 206. Citing Superior Oil, the court held that the defendant's actions did not constitute a pattern of racketeering activity under RICO as "the present case [was] legally indistinguishable from Superior Oil." Id. at 209-10.

In Devries v. Prudential-Bache Securities, 805 F.2d 326 (8th Cir. 1986), the plaintiff claimed that the defendant, a stock brokerage firm, committed RICO violations in "churning" his account in order to generate large commission fees. Id. at 327. The
The resolution of this interpretational dispute cannot be left to the judicial branch, which has no authority to write or amend laws, but rather should be left to the Congress, with whom the proper exercise of that power rests. As stated by the Supreme Court in Sedima and quoted by the Eighth Circuit in Superior Oil, the reason RICO is being applied to such "extraordinary" situations is because of the broad language contained in the statute. Since the Congress wrote that language, and that language creates disputes, then it is up to the Congress, and only the Congress, to amend or replace it. For the courts to do so is judicial legislating and a violation of the constitutionally mandated separation of powers.

CONCLUSION

RICO is a statute that was created with the best of intentions. Its enumerated purpose was the "eradication of organized crime." Unfortunately, good intentions, along with most everything else in Washington, eventually gets overwhelmed by politics, symbolism, and compromise.

RICO is a statute that was framed in broad language to avoid conflicts and to insure its passage. Because the wording of the statute is broad, RICO has been applied to crimes and situations that cover a greater spectrum than envisioned by Congress.

In Superior Oil there were no men in pinstripe suits making deals in dark, downtown cafes, as envisioned by the 91st Congress. However, there was racketeering activity clearly defined by the words contained in RICO. This statute makes no distinction between traditional or non-traditional organized crime. It simply states that certain acts are illegal and subject to civil liability. Huey Fulmer's acts were among those proscribed by the statute. This may not have been what the Congress intended, but the laws that Congress writes are to be enforced, not the thoughts of individual members of that body. Let those who lament the chaos that civil RICO has brought

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217. See Sedima, 105 S. Ct. at 3287.
218. Id.; Superior Oil, 785 F.2d at 256.
about take their cause to Capitol Hill. The courthouses are too crowded already.

Robert J. Sivick — '88