

## CIVIL RICO—THE PATTERN OF RACKETEERING REQUIREMENT: *LOUISIANA POWER AND LIGHT v. UNITED GAS PIPELINE*

The Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>1</sup> provides an enticing private civil action to recover treble damages for injury by reason of a violation of its substantive provisions.<sup>2</sup> The statute<sup>3</sup> outlaws, *inter alia*, the use of income derived from a pattern<sup>4</sup> of racketeering activity.<sup>5</sup>

The Supreme Court recently observed, in *Sedima, S.P.R.L. v. Imrex*,<sup>6</sup> that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."<sup>7</sup> Following this observation, the Court called upon Congress and the courts to develop a meaningful concept of "pattern."<sup>8</sup>

Purportedly in response to this instruction, the Eastern district of Louisiana in *Louisiana Power & Light Co. v. United Gas Pipe Line Co. (LP&L)*<sup>9</sup> held that sending of monthly bills constituted multiple fraudulent mailings, each with an independent harm, in furtherance of a single alleged scheme to defraud, constituting "related, multiple, and ongoing criminal episodes" sufficient to constitute a pattern of racketeering activity.<sup>10</sup> This note will examine the reasoning and ramifications of the *LP&L* decision in light of the controversy and confusion associated with the use of civil RICO in the commercial arena.

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1. Pub. L. No. 91-452, 84 Stat. 941 (1970), (codified as amended at 18 U.S.C. §§ 1961-1968 (1982)).

2. "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1982).

3. In relevant part, section 1962(a) provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt. . . to use or invest, directly or indirectly, any part of such income in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

18 U.S.C. § 1962(a) (1982).

4. "Pattern of racketeering activity" is defined as requiring "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1982).

5. "Racketeering activity" is defined as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense" involving bankruptcy, securities fraud or drug-related activities that are "punishable" under federal law. 18 U.S.C. § 1961(1) (1982).

6. 105 S. Ct. 3275 (1985).

7. *Id.* at 3287.

8. *Id.*

9. 642 F. Supp. 781 (E.D. La. 1986) [hereinafter *LP&L*].

10. *Id.* at 809.

## I. STATEMENT OF THE CASE

On May 6, 1968, Louisiana Power & Light Co. (LP&L) and United Gas Pipe Line Co. (United) entered into a cost-based contract whereby "United would supply and LP&L receive all of the fuel required at LP&L's Ninemile Power Plant in Westwego, Louisiana, until such time as a new power producing unit was installed at the plant."<sup>11</sup> The parties' disputes centered around the interpretation of certain provisions in the 1968 contract.

The first dispute was over the interpretation of Article XIV of the 1968 contract, the rates provision, which set out the method for determining the weighted average purchase price of gas (WAPPOG).<sup>12</sup> Also attached to the contract, as Exhibit A, was a map of the local Southeast region<sup>13</sup> which the court found constituted the contract "area."<sup>14</sup> Due to the short supply of local gas in the 1970s, United was forced outside of the contract area to obtain gas to fulfill its contractual obligations to LP&L.<sup>15</sup> United believed the contract al-

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11. *Id.* at 786.

12. *Id.* at 789. The contract provided the WAPPOG should be calculated as follows:

Weighted average purchase price of gas in the New Orleans area, or any other area, as outlined in Exhibit A attached hereto, shall be determined by: (1) adding together all the volumes of gas which Seller purchased in the area and transferred into the area during the preceding billing month; (2) adding together the cost payable by Seller for the gas it purchased in the area and the cost assignable to the gas transferred into the area during the preceding billing month; and (3) dividing the total of said costs payable by the total of said volumes purchased in and transferred into the area. The resulting quotient shall be the weighted average purchase price of gas in the area. In computing weighted average purchase price, costs as used in the steps outlined above shall be:

(a) Cost assignable to gas transferred into an area shall be the result obtained by multiplying the weighted average purchase price of gas in the area, from which the gas is transferred, by the volume of gas transferred.

(b) Cost of gas purchased on the seaward side of the shorelines of Florida, Alabama, Mississippi, Louisiana and Texas, under contracts executed after January 1, 1968, shall be the amount payable to the producer, pipeline or other seller thereof, plus the amount, if any, payable by Seller to others for delivery of the gas onshore; or, if Seller's facilities are used to deliver such gas onshore, an amount obtained by (i) dividing 1/12th of 25% of the depreciated investment, at the beginning of the preceding billing month, in Seller's facilities used to deliver such gas onshore by the total volume of gas delivered through such facilities during said billing month, and (ii) multiplying the result so obtained by the volume of gas purchased under contracts executed after January 1, 1968, and delivered through such facilities during said billing month.

(c) The cost of any other gas purchased by Seller shall be the amount payable by Seller to the producer, pipeline or other seller thereof; provided, that in the computation of the weighted average purchase price for the Jackson Area neither the cost nor volumes of gas purchased by Seller from Tennessee Gas Pipeline Company for sale in northern Mississippi shall be included in the computation.

*Id.* at 789-90.

13. Exhibit A outlined a number of "areas" in red as follows: The Southwest Texas Area, the Northern Area, the Beaumont-Houston Area, the Lafayette Area, the New Orleans Area, and the Jackson Area. These areas cover East Texas, Louisiana, Southern Mississippi, and small parts of Alabama and Florida panhandle. *Id.* at 790. *See also id.* at 812 (Exhibit A).

14. *Id.* at 790. ("The term 'area' is not defined in the contract, and the only hint as to what it might mean is Exhibit A;" *see supra* note 13).

15. United purchased gas for delivery from, among other places, Oklahoma, Arkansas, and northern Mississippi; none of which were included in Exhibit A. *Id.* at 786.

lowed them to include these additional costs in its calculation of the price chargeable to LP&L.<sup>16</sup> However, the court did not agree and found the short supply of gas to be a risk assumed by United.<sup>17</sup>

The parties also contested a number of other factors relating to the calculation of the various WAPPOGs. These included certain refunds received by United,<sup>18</sup> and the allocation of offshore transportation costs to the various areas contemplated by Exhibit A.<sup>19</sup> United also entered into an exchange agreement with Northern Natural Pipe Line Company in a further effort to combat the difficulty in obtaining local gas.<sup>20</sup> The court found the inclusion of the costs associated with the Northern Natural exchange were improper because they were again incurred outside of the Exhibit A areas. In order to facilitate a calculation of the damages owed LP&L resulting from these overcharges, the court next undertook a lengthy analysis of the delivery obligations imposed by the 1968 contract.<sup>21</sup>

On November 25, 1985, LP&L amended its complaint to allege a cause of action under the RICO statute for treble damages and attorneys' fees.<sup>22</sup> The amended complaint alleged the invoices United mailed to LP&L under the 1968 contract were fraudulent<sup>23</sup> and that United often quoted prices over the telephone which were fraudulent.<sup>24</sup> LP&L further alleged that these predicate acts constituted a pattern of racketeering activity, and United used the funds it acquired by its fraud to operate its business,<sup>25</sup> all in violation of the RICO statute.

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16. United argued that the gas obtained outside of the contract area should have been includable in the costs charged to LP&L because it was actually used to supply LP&L, and because the spirit of the contract was to tie the price charged to the cost of supplying. Initial Post-Trial Brief of Defendant United Gas Pipe Line Company at 34, *Louisiana Power & Light v. United Gas Pipe Line Co.*, 642 F. Supp. 781 (E.D. La. 1986).

17. *LP&L*, 642 F. Supp. at 791.

18. *Id.* at 792. The parties agreed at trial that some amount is due to LP&L for refunds received by United from producers of gas that flowed to LP&L.

19. *Id.*

20. *Id.* at 796. Under the agreement, United purchases gas at the Canadian border and transports it to Ventura, Iowa, where it is then delivered to Northern Natural. In exchange, Northern Natural delivers an equivalent amount of gas, which it has purchased locally, to United in the New Orleans, Lafayette and Jackson areas. *Id.*

21. *Id.* at 796-800.

22. *Id.* at 802.

23. *Id.* See 18 U.S.C. § 1341 (1948) (mail fraud).

24. *LP&L*, 642 F. Supp. at 802. See 18 U.S.C. § 1343 (1956) (wire fraud). LP&L alleged the "amount of overcharge of LP&L and its customers because of erroneous billing of United Gas" exceeded \$31,000,000.00. LP&L further alleged:

These acts, too numerous to mention individually, have included the preparation and submission of fraudulent invoices and quotations of prices for natural gas deliveries by mail and wire on a monthly and daily basis, at least since 1976, and continuing to the present. United Gas has consciously overstated the price of natural gas due for deliveries pursuant to the Gas Sales Agreement when it knew that such overcharges were not due or appropriate under the agreement.

Supplemental and Amending Complaint at 6, *Louisiana Power & Light v. United Gas Pipe Line Co.*, 642 F. Supp. 781 (E.D. La. 1986).

25. *LP&L*, 642 F. Supp. at 802.

## II. PRIOR RICO DECISIONS

A brief examination of the legislative history behind RICO is needed before looking at the case law. The Senate Committee on the Judiciary, which reported the Act, stated:

The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of Title IX 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 fact of *continuity plus relationship* which combines to produce a pattern.<sup>26</sup>

Congress attempted to "strike a mortal blow"<sup>27</sup> against organized crime with the enactment of civil RICO.

The aggressive measures encompassed in RICO reflect the realization that criminal organizations possess an overwhelming amount of money and power<sup>28</sup> and are using these resources to infiltrate and corrupt legitimate businesses.<sup>29</sup> Congress was concerned that present democratic and economic systems were gradually being subverted by these criminal forces.<sup>30</sup> In response to this threat, Congress acted drastically in its adoption of civil RICO by providing the private civil litigant a powerful tool to attack the lifeline of organized crime—its profits.<sup>31</sup>

Pre-*Sedima*<sup>32</sup> courts were skewed toward a very liberal interpretation of the pattern requirements under the RICO statute.<sup>33</sup> The great majority of these decisions held that a pattern of racketeering activity could be proven simply by showing the commission of two acts of racketeering activity within the previous ten years.<sup>34</sup> Moreover, these predicate acts were allowed to stem from only one fraudulent effort,<sup>35</sup> implemented by a series of fraudulent acts.<sup>36</sup> These inter-

26. S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969)(original emphasis).

27. 116 CONG. REC. 602 (1970) (Statement of Sen. Hruska).

28. Pub. L. No. 91-452, 84 Stat. 922-23 (1970) (the Statement of Findings and Purpose).

29. *Id.* See also 115 CONG. REC. 6993 (1969) (Sen. Hruska).

30. *Id.*

31. Friend, *Civil RICO: The Resolution of the Racketeering Enterprise Injury Requirement*, 21 CAL. W.L. REV. 364 (1985) (citing S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969) (Sen. McClellan) ("What is needed . . . are new approaches that will deal not only with individuals, but also with an economic base to which those individuals constitute such a serious threat to the economic well-being of the nation . . . [a]n attack must be made on their source of economic power itself, and the attack must take place on all available fronts.")).

32. For a discussion of *Sedima*, see *infra* note 39 and accompanying text.

33. See e.g., *Alexander Grant & Co. v. Tiffany*, 742 F.2d 408, 410 (8th Cir. 1984), *vacated*, 105 S. Ct. 3550 (1985), *on remand*, 770 F.2d 717 (8th Cir. 1985); *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied* 419 U.S. 1105 (1975).

34. See *supra* note 33.

35. The courts have consistently confused the terminology used in defining "pattern." A fraudulent "scheme" or "effort" is comprised of various "episodes" or "acts" in furtherance of that scheme. See *infra* notes 91-95 and accompanying text.

36. See *United States v. Starnes*, 644 F.2d 673, 677 (7th Cir. 1981) (acts taken in furtherance of a single criminal end are sufficiently related to satisfy the "pattern" requirement); *United States v. Weather- spoon*, 581 F.2d 595, 601 (7th Cir. 1978) (rejected the argument that predicate acts do not form a pattern

pretations facilitated enormous amounts of "garden variety"<sup>37</sup> commercial fraud cases to be prosecuted under the civil RICO statute, contrary to original congressional intent.<sup>38</sup>

In the midst of this influx of civil RICO claims, the Supreme Court decided *Sedima, S.P.R.L. v. Imrex Co., Inc.*<sup>39</sup> The *Sedima* Court reviewed the lower courts' requirements that a RICO plaintiff must allege a "racketeering injury"<sup>40</sup> and must prove the defendants have already suffered previous criminal convictions for the underlying acts forming the basis of the civil RICO claim. The Second Circuit imposed these restrictions in response to what it termed the "extraordinary, if not outrageous," uses to which civil RICO has been put.<sup>41</sup> The Supreme Court was likewise concerned about the recent developments of civil RICO, but declined to adopt the steps the Second Circuit had taken to control the problem.<sup>42</sup> The majority, while giving little guidance to the interpretation of "pattern" because the issue was not before the Court, encouraged Congress and the courts to develop a "meaningful concept of pattern."<sup>43</sup>

Justice Powell, in his dissenting opinion in *Sedima*, more adamantly voiced his discontent with the way civil RICO cases were being handled. Justice Powell observed:

Only a small fraction of the scores of civil RICO cases now being brought implicate organized crime in any way. Typically, these suits are being brought—in the unfettered discretion of private litigants—in federal court against legitimate businesses seeking treble damages in ordinary fraud and contract cases.<sup>44</sup>

Powell, however, agreed with the majority that the scope of the "pattern" requirement was not a question before the Court on appeal.<sup>45</sup> Justice Powell noted his concurrence with the ABA Report<sup>46</sup> which was also cited by the

unless they are performed in the course of separate criminal events).

37. See *Papai v. Cremosnik*, No. 84-C-10433 (N.D. Ill. May 30, 1986).

38. See *supra* note 6 and accompanying text. Of 270 district RICO decisions prior to 1985, only 3% (nine cases) were decided throughout the 1970s, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. *Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law* 55 (1985) [hereinafter ABA Report].

39. 105 S. Ct. 3275 (1985).

40. An injury "different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *Sedima*, 741 F.2d 482, 496 (2d Cir. 1984).

41. *Id.* at 487.

42. *Sedima*, 105 S. Ct. at 3287 ("Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy"). See *supra* note 40 and accompanying text.

43. *Sedima*, 105 S. Ct. at 3287.

44. *Id.* at 3291 (Powell, J., dissenting) (footnotes omitted).

45. *Id.* at 3290.

46. The Task Force Report states:

[i]n an attempt to ensure the constitutionality of the statute, Congress made the central proscription of the statute the use of a 'pattern of racketeering activities' in connection with an 'enterprise,' rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates. 'Racketeering' was defined to embrace a potpourri of federal and state criminal offenses deemed to be the type of criminal activities frequently engaged in by mobsters, racketeers, and other traditional members of 'organized crime.' The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic,

majority.

The ABA Report's major contribution to RICO analysis was the suggestion that "pattern" connotes "multiple criminal episodes," something more than the predicate acts alone. Subsequent to *Sedima*, this point of interpretation has been the most controversial and most studied element of civil RICO.

Acting upon the directive from *Sedima*, a number of courts have attempted to develop a meaningful concept of "pattern" of racketeering activity. In *Superior Oil Co. v. Fulmer*,<sup>47</sup> the Eighth Circuit held that one isolated fraudulent scheme to convert gas from Superior's pipeline, even though effectuated through multiple related acts of mail and wire fraud, did not constitute a pattern of racketeering activity.<sup>48</sup> The Eighth Circuit agreed that "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'"<sup>49</sup>

The Southern District of New York in *Frankart Distributors, Inc. v. RMR Advertising, Inc.*<sup>50</sup> recognized the general consensus among the courts as being that "*Sedima's* 'continuity' element requires that the predicate racketeering acts alleged in the complaint must have occurred in different criminal episodes."<sup>51</sup> The *Frankart* court rejected the RICO claim, stating the case was "essentially a breach of contract action" and it would be "inappropriate" to

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unrelated, isolated criminal episodes. The 'enterprise element, when coupled with the 'pattern' requirement, was intended by Congress to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime.

ABA Report, *supra* note 38, at 71-72.

47. 785 F.2d 252, 257 (8th Cir. 1986).

48. The court reiterated language from *Northern Trust Bank v. Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill. 1985), which concluded that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode." *Id.* at 832.

49. 785 F.2d at 257. For similar Post-*Sedima* decisions, see *Soper v. Simmons Int'l, Ltd.*, 632 F. Supp. 244 (S.D.N.Y. 1986) (requisite pattern was lacking where over 20 predicate acts involving at least three different third parties, committed over two years, were merely ministerial acts in furtherance of single fraudulent scheme); *Modern Settings v. Prudential-Bache Sec., Inc.*, 629 F. Supp. 860 (S.D.N.Y. 1986) (multiple sales of customer's securities in malicious liquidation amounted to a single scheme insufficient to establish pattern of racketeering activity); *Medallion TV Enter., Inc. v. SelecTV of Calif., Inc.*, 627 F. Supp. 1290 (C.D. Cal. 1986) (two telephone calls setting up conference between three people and one person's transfer of letters of credit as a result of that conference, related to telecast of heavyweight prizefight, constituted a single scheme and not a pattern of racketeering); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F. Supp. 1418 (W.D. Okla. 1985) (preparation of audit by accounting firm involving numerous actions was a single unified transaction and not a pattern); *Allington v. Carpenter*, 619 F. Supp. 474 (C.D. Cal. 1985) (pattern of racketeering activity must include racketeering acts sufficiently unconnected in time or substance to warrant consideration as separate criminal episodes); *Rojas v. First Bank National Assoc.*, 613 F. Supp. 968, 971 (E.D.N.Y. 1985) (several isolated acts do not a pattern make; must be threat of continuing activity); *Fleet Management Systems v. Archer-Daniels-Midland Co.*, 627 F. Supp. 550 (C.D. Ill. 1986) (an isolated criminal episode, though accomplished through a number of fraudulent acts, does not evidence the threat of continuity or organized crime element necessary for a pattern).

50. 632 F. Supp. 1198 (S.D.N.Y. 1986) (Advertiser overcharged plaintiff for hundreds of advertising time slots under single contract).

51. *Id.* at 1200. See also *Rush v. Oppenheimer & Co.*, No. 84 Civ. 3219 (RWS), slip op. (S.D.N.Y. Jan. 2, 1986) (the enhancement of the "continuity" aspect of the pattern requirement casts doubt on the continued validity of cases which carve one criminal episode into multiple predicate act "pieces").

impose RICO liability in such a case.<sup>52</sup>

On the other end of the spectrum are those cases which retain the pre-*Sedima* mentality<sup>53</sup> without expending much analytical effort in the spirit of *Sedima*. These cases have held that any two related predicate acts committed as part of a single fraudulent transaction constitute a pattern.<sup>54</sup> An excellent example of this type of weak analysis is *Illinois Department of Revenue v. Phillips*.<sup>55</sup> In *Phillips*, the court held the mailing of nine fraudulent tax returns constituted a pattern of racketeering activity as defined in the statute.<sup>56</sup> In so doing, the court relied on *United States v. Weatherspoon*,<sup>57</sup> which was the exact type of case which concerned the Supreme Court in *Sedima*. The *Phillips* court was aware of the *Sedima* opinion<sup>58</sup> yet *Weatherspoon* was the only case cited under the "pattern" element.

The final category of post-*Sedima* caselaw can probably best be described as a middleground. Actually, this category contains the decisions which have given a thorough analysis of the "pattern" requirement but have distinguished between multiple criminal "episodes" and multiple criminal "schemes." The most recent case in this category is *Papai v. Cremosnik*.<sup>59</sup> The *Papai* court articulated a "multiple episodes evincing a regular, ongoing course of conduct"<sup>60</sup> standard for defining "pattern."<sup>61</sup> *Papai* concluded that requiring plaintiffs to prove multiple criminal schemes—in the sense either of the same scheme being perpetrated on different entities or different schemes inflicted on the same entities—would not be "in keeping with RICO's purpose."<sup>62</sup> This "compromise" position is what the *LP&L* court followed to a large extent.<sup>63</sup>

52. *Id.* "The real issue in the case at bar is whether the defendants performed in accordance with the terms of the 1982 contract or whether they attempted to overcharge the plaintiff for goods and services rendered under the contract. The case revolves entirely around a single contract, which was to be performed within a limited period of time." *Id.* at 1201.

53. See *supra* note 39 and accompanying text.

54. See, e.g., *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985); *Conan Properties Inc. v. Mattel, Inc.*, 619 F. Supp. 1167 (S.D.N.Y. 1985); *Systems Research, Inc. v. Random, Inc.*, 614 F. Supp. 494 (N.D. Ill. 1985).

55. 771 F.2d 312 (7th Cir. 1985).

56. *Id.* at 313.

57. 581 F.2d 595, 602 (7th Cir. 1978) (each mailing in a scheme to defraud is a separate offense so that several separate acts of mail fraud constitute a pattern of racketeering activity).

58. *Phillips*, 771 F.2d at 314.

59. 635 F. Supp. 1402 (N.D. Ill. 1986).

60. The court defined multiple criminal episodes as "illegal transactions separated in time." *Id.*

61. *Id.*

However, we do not stop at requiring a showing of multiple episodes because this alone does not adequately resolve the tension between isolated and ongoing activity. We find that RICO's purposes are best served by also requiring that, from the pleadings, a reasonable inference can be made that these episodes were not an aberration in the way a defendant conducted his business. Rather, the pattern made up of multiple episodes must be a regular part of the way a defendant does business and in that sense, ongoing.

*Id.*

62. *Id.* The court further stated, without any explanation thereof, that requiring proof of a pattern of multiple schemes is a larger loophole for clever defendants and their lawyers than Congress intended.

63. For other decisions following similar reasoning, see *Graham v. Slaughter*, 624 F. Supp. 222, 225 (N.D. Ill. 1985); *Trak Microcomputer Corp. v. Wearne Bros.*, 658 F. Supp. 1089 (N.D. Ill. 1985). Other courts recognizing this approach include, *McLendon v. The Continental Group*, Civ. A. No. 83-1340

### III. THE LP&L DECISION

Initially, the court held that "United's conduct did not sink below the level of moral uprightness, fundamental honesty, fair play and right dealing"<sup>64</sup> during the great majority of the period for which LP&L alleged fraud.<sup>65</sup> The court noted United had been forced, during the 1970s and early 1980s, to acquire gas in ways not foreseen by the 1968 contract. United interpreted the contract as allowing them to pass these added costs on to LP&L "because the contract did contemplate that United would receive a cost-plus price for the gas it supplied to LP&L."<sup>66</sup>

The court next examined United's contract interpretations in light of *Mississippi Power & Light v. United Gas Pipeline Co. (MP&L)*.<sup>67</sup> The *MP&L* decision was an affirmance by the Fifth Circuit of a district court order which had enjoined United from including in its WAPPOGs to MP&L costs which were "virtually identical to those LP&L complaints of here."<sup>68</sup> The Fifth Circuit held in *MP&L* that "the district court properly concluded that the probability of success weighed substantially in MP&L's favor."<sup>69</sup> United argued the *MP&L* decision was only a preliminary finding<sup>70</sup> but the court held that MP&L "should have indicated to United that it should back off from its interpretation of the contract it had with LP&L."<sup>71</sup> As a result, the court found the invoices after the *MP&L* decision constituted mail fraud.<sup>72</sup>

United's second line of defense throughout the proceedings was that LP&L failed to prove a racketeering injury<sup>73</sup> "by reason of" the use or investment of the funds in dispute. The question presented was whether a civil

(D.N.J. July 31, 1986) and *Eastern Corporate Fed. Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F. Supp. 1532 (D. Mass. 1986).

64. The court cited *United States v. Fowler*, 735 F.2d 823, 827-28 (5th Cir. 1984) (citing *United States v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982)). *See also* *United States v. Frick*, 588 F.2d 531, 536 (5th Cir. 1979), *cert. denied*, 441 U.S. 913 (a "knowing intent to defraud" may be found when a defendant deliberately proceeds with reckless indifference for the truth, making representations that are baseless, and shutting his eyes to their probable falsity); *Blachly v. United States*, 380 F.2d 665 (5th Cir. 1967).

65. *LP&L*, 642 F. Supp. at 803.

66. The court further stated:

However, I find that United's interpretation was not so obviously incorrect as to indicate that it was engaged in a conscious attempt to bilk LP&L; rather I find that United took an arguable position as to the meaning of the contract in order to continue supplying gas to LP&L, when the only other alternative was probably a total breach. *Id.*

67. 760 F.2d 618 (5th Cir. 1985).

68. *LP&L*, 642 F. Supp. at 803. The court stated "[t]he contract between MP&L and United is analogous to that sued on here in every significant respect." *Id.*

69. *MP&L*, 760 F.2d at 623.

70. This contention was supported by the following language from the *MP&L* decision: "We stress that the likelihood of success does not represent a final determination on the merits. It is true that the pricing terms of the contract are complex, and protracted litigation over the interpretation of the contract terms may well ensue." *Id.*

71. *LP&L*, 642 F. Supp. at 804. It is important to note that *MP&L* was only a decision granting a preliminary injunction. What is the mandatory precedential value of such an injunction? The *MP&L* decision may have indicated to United that their interpretation of the LP&L contract was wrong but it seems the purpose in litigating their position in the *LP&L* case was to elicit a ruling as to which interpretation was correct.

72. *Id.*

73. For a thorough analysis of the "racketeering injury" requirement, *see supra* note 31.

RICO plaintiff must "prove some injury flowing to it from the use or investment of racketeering proceeds in addition to the damage caused by the predicate acts."<sup>74</sup> Although the court treated this issue as though it were "relatively novel, and one of first impression,"<sup>75</sup> *Sedima* clearly and unequivocally rejected such a requirement.<sup>76</sup> In spite of this analytical misperception, LP&L's denial of a requirement of injury beyond that suffered from the predicate acts was consistent with *Sedima*.

Upon being satisfied that LP&L had proven the predicate acts and injury flowing therefrom, the court next considered the main issue of the opinion, the "pattern of racketeering" analysis.<sup>77</sup> The court stated that decisions such as *Superior Oil Co. v. Fulmer*<sup>78</sup> and *Northern Trust Bank v. Inryco, Inc.*<sup>79</sup> which require multiple criminal schemes are "clearly wrong."<sup>80</sup> The court, in reliance on *Phillips*,<sup>81</sup> stated that "a single fraud merely furthered by the mails would not be enough; but a fraudulent scheme committed by sending a series of materials that are themselves fraudulent, with each causing independent harm to the plaintiff, would be."<sup>82</sup> In so finding, the court held (1) each of the two invoices mailed after the *MP&L* decision contained fraudulent representations; (2) each invoice had independent harmful significance causing LP&L to pay a higher price than negotiated; and (3) United would have continued this practice had LP&L not refused to take any more gas.<sup>83</sup> As a result, the court ruled that United had engaged in a pattern of racketeering sufficient to be liable under RICO.<sup>84</sup>

#### IV. ANALYSIS

Virtually every well-reasoned post-*Sedima* decision addressing the issue has held the simple definitions of "pattern" from cases like *United States v. Starnes*<sup>85</sup> and *United States v. Weatherspoon*<sup>86</sup> are incorrect. However, the focal point of confusion among the courts, which *LP&L* did little to alleviate, is

74. *LP&L*, 642 F. Supp. at 806.

75. *Id.*

76. *Sedima*, 105 S. Ct. at 3285.

77. *LP&L*, 642 F. Supp. at 807.

78. 785 F.2d 252 (8th Cir. 1986).

79. 615 F. Supp. 828 (N.D. Ill. 1985).

80. *LP&L*, 642 F. Supp. at 808.

81. See *supra* note 55 and accompanying text.

82. *LP&L*, 642 F. Supp. at 809. "The exact meaning of the term 'multiple criminal episodes' is not clear but at a minimum it means that the defendant must harm the plaintiff more than once—it must have committed acts which are ongoing, and which have an independent and repeated harmful significance for the plaintiff." *Id.*

83. *Id.* at 810.

84. "Accordingly, the plaintiff should recover treble damages for the inclusion of costs associated with gas purchased outside the Exhibit A area, and for the inclusion of costs associated with on shore transportation of offshore gas in its WAPPOGs to LP&L after May 17, 1985 [the date of the *MP&L* decision]." *Id.* The parties were then instructed to seek to stipulate to the damages recoverable by virtue of the court's ruling. It is expected that a final, appealable order will be entered sometime in the Spring of 1987. Telephone interview with Murphy Moss Jr., counsel for United Gas Pipe Line Co. (Nov. 1986).

85. 644 F.2d 673, 677 (7th Cir. 1981).

86. 581 F.2d 595, 601 (7th Cir. 1981).

still definitional. If terms such as "criminal schemes" and "criminal episodes" were more clearly defined, so too would be the parameters of civil RICO.

The court in *LP&L* increased this confusion by citing *Frankart*<sup>87</sup> and *Papai*<sup>88</sup> for the proposition that "pattern" requires a showing of "multiple criminal episodes."<sup>89</sup> These two cases could not be further apart in their analysis. In *Papai*, the court held that a single criminal "scheme," followed by a number of criminal "episodes" can be sufficient to constitute a pattern provided, however, that it can be shown that these episodes are a "regular way a defendant does business."<sup>90</sup> On the other hand, *Frankart* held that even though termed as "episodes," multiple "schemes" were necessary.<sup>91</sup>

*LP&L's* reliance on *Frankart* for the proposition that multiple schemes are not required is simply misplaced. The two cases have virtually parallel fact patterns yet reach opposite conclusions. In *Frankart*, the parties entered into a single contract for a period of time whereby the defendant was to charge plaintiff for the advertising spots it played on behalf of the plaintiff. Defendant fraudulently overcharged the plaintiff for "hundreds" of advertising spots.<sup>92</sup> The court, however, held that this was a breach of contract action and simply "a classic example of that type of divergence,"<sup>93</sup> and it would be inappropriate to impose liability in such a case.<sup>94</sup>

In *LP&L* the court held, in a factual situation similar in every respect to *Frankart*, that defendant's conduct reached the level of "organized crime" contemplated by Congress in the creation of civil RICO.<sup>95</sup> The following excerpt from United's Post-Trial Reply Brief<sup>96</sup> is telling in this analysis:

LP&L first contends that its RICO claim is justified because it is a "public utility" and because the "majority" of its damages was eventually borne by LP&L's electric ratepayers. (Br. at 40.) LP&L cites no authority for its contention that RICO claims brought by "public utilities" should somehow be treated more favorably than those brought by other parties. Moreover, LP&L has no monopoly on the public interest. United is a regulated natural gas company whose operations are likewise affected with the public interest.<sup>97</sup>

The point is that *both* of these companies are well respected, legitimate businesses involved in a highly complex contractual dispute.<sup>98</sup> Courts like the

87. 632 F. Supp. 1198 (S.D.N.Y. 1986).

88. 635 F. Supp. 1402 (N.D. Ill. 1986).

89. *LP&L*, 642 F. Supp. at 809.

90. See *supra* note 61 and accompanying text.

91. 632 F. Supp. at 1201.

92. *Id.* at 1199.

93. See *supra* note 6 and accompanying text (the court was referring to the "divergence" of application of RICO noted in *Sedima*).

94. 632 F. Supp. at 1200 (footnote added).

95. Arguably, the conduct in *Frankart* was even more egregious than that of United. It is difficult to understand how United's interpretive position for over 15 years was not fraudulent, yet after a preliminary injunction was entered in *MP&L*, United suddenly became deserving of the stigma of RICO. See *supra* note 70.

96. Post-Trial Reply Brief for Defendant United Gas Pipe Line Company, at 37, *Louisiana Power & Light v. United Gas Pipe Line*, 642 F. Supp. 781 (E.D. La. 1986).

97. *Id.* at 40.

98. Curiously, while arguing for the timeliness of their RICO claim, LP&L's counsel stated, "The entire case before this court is based upon a breach of contract." Post-Trial Reply Memorandum for Plaintiff

*LP&L* court wrestle with the semantics of "pattern," "scheme," "episode," etc., and have created varying definitions of these terms. However, when interpreting these terms, the courts must not lose sight of the actual purposes of the Act and the persons or parties to whom it was directed.

It is beyond dispute that Congress specifically considered the inclusion of commercial frauds into RICO's structure. Commercial frauds and violation of antitrust, securities and other regulatory laws were originally excluded from the list of predicate offenses, but, ultimately, "Congress decided that 'ordinary commercial frauds' should be included in RICO. . . ." <sup>99</sup> Congress determined the inclusion of isolated commercial frauds in the RICO net was a tradeoff necessary to reach the criminals to whom the Act was directed.

However, while RICO's legislative history <sup>100</sup> shows Congress considered the "costs and benefits" of including commercial frauds, current RICO experience strongly suggests that the tradeoffs Congress thought it was making are not the tradeoffs which society is in fact experiencing. <sup>101</sup> In fact, the ABA found that of the 270 known civil RICO cases at the trial level prior to *Sedima*, only 9 % involve "allegations of criminal activity of a type generally associated with professional criminals." <sup>102</sup>

## V. CONCLUSION

The *LP&L* court's interpretation of the pattern requirement and its application to the instant case is a strong blow to the clear trend of post-*Sedima* cases that have given the RICO statute a more conservative reading. Although the *LP&L* court engaged in much deeper analysis than the great majority of pre-*Sedima* cases, the results are the same. Whenever a court grants relief under RICO where only one underlying criminal scheme is present, regardless of the number of fraudulent acts flowing from that single scheme, <sup>103</sup> it virtually opens the floodgates of RICO for wide-eyed treble damage seekers.

As pointed out in *Sedima*, it is up to Congress and the courts to develop a meaningful definition of "pattern." However, when assuming this task, courts should not become so engulfed in semantics that they lose their perspective of what is really happening under RICO. Highly respected, legitimate leaders of the community are being indirectly, if not directly, labelled "mobsters," "gangsters," and "organized criminals," over isolated commercial frauds and contractual disputes often times arising from a single contract. It simply strains all reason to believe these results were envisioned by Congress when civil RICO

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at 38, *Louisiana Power & Light v. United Gas Pipe Line*, 642 F. Supp. 781 (E.D. La. 1986).

99. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 253 nn. 47 & 66 (1982).

100. See *supra* note 27 and accompanying text.

101. *Papai*, 635 F. Supp. 1402 (N.D. Ill. 1986).

102. ABA report, *supra* note 38, at 55-56.

103. See, e.g., *Frankart*, 632 F. Supp. at 1199. In *Frankart*, there were "hundreds" of fraudulent acts flowing from the single criminal scheme yet the court dismissed the RICO claim. See *infra* note 93. This is the only workable solution to the pattern requirement. To hold otherwise, could conceivably allow virtually any business who made a telephone call and sent a letter regarding negotiations that were later found to be fraudulent to be subjected to the harsh financial penalties of RICO.

became law and, even if they were, the time for re-examination is here.<sup>104</sup>

JAMES W. CONNOR, JR.

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104. Since *Sedima*, Congress has considered several bills which would refine the statute to comport more closely with its original intent. However, all attempts to date have failed due to, *inter alia*, disagreements with the Department of Justice on proposed changes. See, e.g., H.R. 2517, 99th Cong., 1st Sess. (1985) (replace the term "racketeering activity" with "predicate criminal activity"; H.R. 2943, 99th Cong., 2d Sess. (1985) (requiring predicates to be subject of prior criminal conviction); S. 1521, 99th Cong., 2d Sess. (1985) (at least one of the two predicates for "pattern" must be for an offense other than mail, wire or securities fraud); H.R. 5445, 99th Cong., 2d Sess. (1986) (eliminate triple-damage awards unless the defendant had a prior criminal fraud conviction).