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X. Miscellaneous

and only be liable for the amount of the premium paid.[184] The *Parker* decision is in accord with these holdings.

MISCELLANEOUS

Section 4(f) of the Department of Transportation Act of 1976 (the Act), 49 U.S.C. section 303 (1990), prohibits the Secretary of Transportation (the Secretary) from approving a highway project that requires the use of a public park, recreation area, wildlife and waterfowl refuge, or land of national, state, or local historical significance unless the Secretary makes several findings. First, the Secretary must find that no prudent and feasible alternatives to the proposed use of the protected land exist. If no prudent and feasible alternatives exist, the Secretary must find that the project includes all possible planning to minimize harm to the park, recreation area, refuge, or historic site.

The Supreme Court addressed the scope of review of the Secretary's action under section 4(f) of the Act in *Citizens to Preserve Overton Park v. Volpe*.[185] The Court held that the reviewing court should consider three factors in reviewing the Secretary's action. First, the court must determine whether the Secretary acted within the scope of the secretary's authority, which includes a determination of whether the Secretary could reasonably have believed that no feasible and prudent alternatives existed.[186] Second, the court must determine whether the Secretary's decision was arbitrary, capricious, or an abuse of discretion. In making this determination, the reviewing court must consider whether the Secretary's decision was based on a consideration of the relevant factors or whether the decision involved a clear error of judgment.[187] Finally, the reviewing court must consider whether the Secretary followed all procedural requirements.[188] In applying these three factors to reach its decision in *Overton Park*, the Supreme Court indicated that a proposed highway route that would require the use of protected land could not be used unless the alternatives to the proposed

184. *See* New York Life Ins. Co. v. Johnson, 923 F.2d 279, (3d Cir. 1991) (holding that insured's misrepresentation regarding history as cigarette smoker constituted material misrepresentation justifying insurer's rescission of policy); Peters v. Woodmen of the World Life Ins. Co., ___ F.2d ___, No. 89-6220 (6th Cir. 1991) (text in WESTLAW) (holding that material misrepresentation justifies rescission of insurance contract); William Penn Life Ins. Co. v. Sands, 912 F.2d 1358 (11th Cir. 1990) (interpreting Florida law as allowing rescission of insurance contract when insured knowingly makes misstatement in response to unambiguous question on insurance application to obtain coverage or lower premium); Hawaiian Life Ins. Co., Ltd. v. Laygo, 884 F.2d 1300 (9th Cir. 1989) (holding that material misrepresentation justified insurer's rescission of insurance coverage); Reed v. Prudential Ins. Co., 849 F.2d 1473 (6th Cir. 1988) (same); Garde v. Inter-Ocean Ins. Co., 842 F.2d 175 (7th Cir. 1988)(same); Verex Assurance, Inc. v. John Hanson Savings & Loan, 816 F.2d 1296 (9th Cir. 1987) (same).

185. 401 U.S. 402, 415 (1971).

186. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 416 (1971).

187. *Id.* at 406.

188. *Id.* at 417.

route involved extraordinary cost or community disruption or unless the alternatives presented unique problems.[189]

Following the Supreme Court's decision in *Overton Park*, the United States Court of Appeals for the Fourth Circuit considered whether the Secretary properly rejected as imprudent the alternatives to a proposed highway project that included the use of an area of historical significance. In *Hickory Neighborhood Defense League v. Skinner*, 910 F.2d 159 (4th Cir. 1990), the plaintiffs alleged that the Secretary had not complied with section 4(f) in determining that the alternatives to a proposed highway project were imprudent and unfeasible.

The dispute in *Hickory Neighborhood Defense League* began when the North Carolina Department of Transportation (NCDOT) proposed to widen a North Carolina highway. Approximately three blocks of the proposed widening would have occurred in the Claremont Historic District. Because the proposed project would pass through a historic site, NCDOT prepared an evaluation of the project and proposed alternatives as required by section 4(f) of the Act. The evaluation concluded that no feasible and prudent alternatives existed and that NCDOT had considered all means to minimize harm to the historic site. The United States Department of the Interior agreed with NCDOT's conclusions. The Secretary approved the findings of NCDOT's section 4(f) evaluation and the Federal Highway Administration (FHWA) authorized right-of-way acquisitions. The Hickory Neighborhood Defense League filed suit in the United States District Court for the Western District of North Carolina, seeking an injunction against the widening of the North Carolina highway. The district court determined that the Secretary had complied with the requirements of section 4(f) and with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. section 4332 (1977) and, therefore, denied plaintiffs' motion for injunctive relief and dismissed the action.

Hickory Neighborhood Defense League appealed to the United States Court of Appeals for the Fourth Circuit. On appeal, the Fourth Circuit affirmed the decision of the district court regarding the Secretary's compliance with requirements of NEPA. However, the Fourth Circuit vacated the district court's holding that the Secretary had complied with the requirements of section 4(f) of the Act and remanded the case back to the district court to determine whether the Secretary had properly determined that no prudent and feasible alternatives to the proposed project existed. On remand, the district court determined that the Secretary properly determined that no prudent and feasible alternatives to the proposed project existed and that the facts before the Secretary supported his decision to reject the alternatives.

The district court's determination that the Secretary's decision was proper and supported by the record resulted in the instant action. Plaintiffs appealed the district court's decision, arguing that the Secretary failed to comply with section 4(f) in determining that no feasible and prudent

189. *Id.* at 418.

alternatives existed. Specifically, the plaintiffs argued that the Secretary failed to make the finding required by *Overton Park* that the alternatives to the proposed highway project would result in extraordinary costs or community disruption or presented unique problems. To resolve the issue, the Fourth Circuit began by emphasizing that the mere fact that the Secretary did not use the terms "unique" and "extraordinary" when considering the alternatives did not compel a finding that the Secretary failed to comply with the requirements of section 4(f) of the Act and *Overton Park*. The Fourth Circuit clarified its holding in the first *Hickory Defense League* appeal by stating that its decision did not hold that the Secretary failed to comply with statutory requirements. Instead, the court stated that its first holding merely meant that, in the absence of specific findings of unique problems, the record was unclear with respect to whether the Secretary had determined that such problems existed. According to the Fourth Circuit, this deficiency in the record required that the court remand the case to the district court for a specific finding as to whether the Secretary complied with section 4(f) in the aftermath of *Overton Park*.

After clarifying its previous holding, the Fourth Circuit went on to discuss the proper application of the Supreme Court's decision in *Overton Park*. The Fourth Circuit agreed with another circuit court that when the *Overton Park* Court said that alternative routes must present unique problems in order to use a highway route that would use protected land, the Supreme Court used the word "unique" only for emphasis. Therefore, in order for the Secretary to find that no feasible or prudent alternatives exist, the Secretary need not find that all the alternatives present unique problems. Instead, the Secretary need only ensure that the reasons for using protected land as opposed to alternative routes are compelling and carefully evaluated. According to the Fourth Circuit, the Secretary should begin with a presumption against using the protected land, but this presumption may be overcome if the Secretary determines that no prudent and feasible alternatives to the proposed route through protected land exist. Consequently, the Fourth Circuit held that the Secretary's determination that compelling reasons existed for rejecting the proposed alternatives as imprudent was consistent with the Supreme Court's analysis in *Overton Park*.

Next, the Fourth Circuit considered whether relevant facts in the record supported the Secretary's decision. The Fourth Circuit noted various factors in the record which tended to indicate that the proposed alternatives to the highway project were imprudent. In its review of the factors relevant to the Secretary's decision, the Fourth Circuit indicated that the Secretary's decision took into account all important factors, such as access to hospitals, disturbance of residential neighborhoods, possible operational problems with traffic patterns, and highway design difficulties. The Fourth Circuit also determined that a cumulation of small problems may be a sufficient reason for the Secretary to discard the proposed alternatives and to use protected land. Although the Fourth Circuit conceded that the Secretary's determination in this case was not a model section 4(f) evaluation, the Fourth Circuit concluded that the facts in the record supported the Secretary's

determination that strong and compelling reasons existed for rejecting the proposed highway alternatives as not prudent.

The Fourth Circuit's decision in *Hickory Neighborhood Defense League* is in accord with the holdings of other circuits that have reviewed a section 4(f) determination in the aftermath of *Overton Park*.[190] The Fourth Circuit and other circuits have followed the *Overton Park* mandate that reviewing courts take a hard look at agency action.[191] However, the circuit courts have recognized that review of section 4(f) determinations requires a consideration of the special facts in each particular case, and that the Secretary need not recite any particular words or phrases to support his determination. With the decision in *Hickory Neighborhood Defense League*, the Fourth Circuit indicated its agreement with this analysis.

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Public participation in land use regulation has been a source of controversy in the past and continues to be an important issue, especially in the context of controversial or locally unwanted land uses. The United States Supreme Court has held that allowing one set of property owners to determine the extent or kind of use that another property owner may make of his property violates the due process rights of the property owner under the Fifth and Fourteenth Amendments of the United States Constitution.[192] The Court has noted that ordinances granting this type of power to the public without any type of standard or guideline is an impermissible delegation of legislative authority that violates due process rights of the affected property owner.[193] Against this background the United States Court of

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190. *See* Eagle Found, Inc. V. Dole, 813 F.2d 798, 805 (7th Cir. 1987) (concluding that *Overton Park* does not require use of work "unique" for rejection of alternatives in section 4(f) analysis, and stating that reasons for rejection of alternatives need only be pressing and well thought out); Town of Fenton v. Dole, 636 F. 2d 44 (2d Cir. 1986) (affirming district court's determination that cumulation of small problems was enough to support rejection of alternatives in section 4(f) determination); Adler v. Lewis, 675 F.2d 1085, 1095 (9th Cir. 1982) (noting that Secretary need not use "magic" terminology in section 4(f) analysis).

191. *See Overton Park*, 401 U.S. 402, 415 (1971) (noting that, under Administrative Procedure Act, reviewing court is to engage in "substantial inquiry" of agency action).

192. *See* Eubank v. City of Richmond, 226 U.S. 140, 143-44 (1912) (holding that Richmond ordinance requiring building committee to establish set-back lines for given piece of property in accordance with requests by two-thirds of adjacent property owners violated due process rights of affected property owner). *See also* Washington Ex Rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121-22 (1928) (striking down Seattle ordinance that conditioned building permit for charitable home on obtaining consent of two-thirds of owners located within four hundred feet of proposed building and declaring ordinance repugnant to due process clause of Fourteenth Amendment).

193. *See Eubank*, 226 U.S. at 143-44 (noting unbridled and standardless discretion given to property owners by ordinance requiring building committee to adopt set-back lines requested by two-thirds of adjacent property owners); *Roberge*, 278 U.S. at 121-22 (noting that ordinance requiring consent of two-thirds of surrounding property owners for issuance of building permit for charitable home allows surrounding owners to withhold consent for selfish or arbitrary reasons, subjecting affected property owner to their will or caprice). *But see* Silverman v. Barry, 851 F.2d 434 (D.C. Cir. 1988) (suggesting that delegation of authority to private citizens was not Supreme Court's real concern in *Eubank* and *Roberge*, but only cover for more controversial concerns).

Appeals for the Fourth Circuit considered the constitutional validity of a West Virginia statute that allowed a public official to deny a solid waste disposal facility permit based on adverse public sentiment in *Geo-Tech Reclamation Industries, Inc. v. Hamrick*, 886 F.2d 662 (4th Cir. 1989).

In 1986, Geo-Tech Reclamation Industries, Inc. (GRI) obtained an option to purchase a potential landfill site and subsequently filed an application with the West Virginia Department of Natural Resources (DNR) for a landfill operating permit. The DNR director denied the application on the ground that the proposed landfill generated adverse public sentiment, even though the director determined that no insurmountable technical difficulties with the site plan existed. The director based his denial on W.VA. CODE section 20-5F-4(b) (the statute), which allowed, but did not require, the director to deny solid waste disposal facility permit applications upon a finding of adverse public sentiment concerning the proposed facility. After the denial of the GRI permit application, LCS Services, Inc. (LCS) acquired an option to purchase the same site. The DNR director also denied the LCS application for a permit to operate a solid waste disposal facility based on adverse public sentiment as well as the destruction of aesthetic values and the endangerment of the property of others. The West Virginia Water Resources Board (the Board) affirmed the denial of the LCS permit application based on adverse public sentiment even though testimony before the Board had revealed that the LCS site development plan had no significant technical failings. After the Board upheld the director's permit denial, LCS and GRI brought declaratory judgment actions in the United States District Court for the Southern District of West Virginia. The plaintiffs, GRI and LCS, claimed that the DNR's denial of their permit applications for development of a solid waste disposal facility based on adverse public sentiment violated their due process rights by impermissibly delegating legislative authority to local citizens. The plaintiffs also argued that the DNR director's reliance on the statute to deny their permits exceeded the state's police power because the statute allowed the director to deny a solid waste disposal facility permit based upon significant adverse public sentiment. The district court held that the statutory provision allowing permit denial upon the basis of adverse public sentiment was an unconstitutional delegation of legislative power and, therefore, violated the due process rights of the owner of the proposed disposal facility.

On appeal to the Fourth Circuit, the state argued that the statute did not impermissibly delegate legislative authority to private citizens because the statute did not give local residents any legal power to block approval of an otherwise qualified permit applicant. The state attempted to distinguish the West Virginia statute from land use regulations that the Supreme Court previously had invalidated as violating due process. In attempting to distinguish the West Virginia statute from the invalidated laws, the state pointed out that the West Virginia statute merely gave the director authority to include local public sentiment as one of many factors to be considered in the exercise of his discretion to deny or approve a permit application. In

contrast, the invalidated laws required government officials to react according to the request of surrounding property owners.

In response to the state's argument that the West Virginia statute did not involve an unconstitutional delegation of legislative power, the Fourth Circuit initially stated that it need not decide this issue because the statute suffered from a greater constitutional flaw. The Fourth Circuit stated that land use regulations must be based on the police power and asserted for the public welfare. The Fourth Circuit found that West Virginia could properly protect the values of community spirit, pride, and quality of life as part of its police power. Consequently, the Fourth Circuit found that the state had acted within the broad confines of its police power by attempting to regulate solid waste disposal facilities. The court also conceded that the statute promoted its stated purpose of protecting community property values and pride by allowing citizens to comment on a proposed landfill's impact on the community. The Fourth Circuit noted, however, that many who oppose a landfill do so out of self-interest, bias, ignorance, or other unacceptable motivations. The Fourth Circuit determined that, despite the possibility of these unacceptable motivations, the statute contained no meaningful standard by which the Director could measure adverse sentiment to determine if significant adverse public sentiment existed or whether the sentiment was informed and rational rather than selfish and arbitrary. Consequently, the Fourth Circuit determined that the provision of the statute allowing landfill permit denial based solely on a finding of adverse public sentiment was unconstitutional because the provision was not rationally related to the statute's legitimate goal of protecting community spirit, pride, and aesthetics.

In holding the West Virginia statute unconstitutional, the Fourth Circuit in *Geo-Tech* addressed a very controversial issue. The *Geo-Tech* court took a new approach to the problem by applying principles from the Supreme Court's line of zoning and land use cases to a dispute over a landfill permit denial. In so doing, the Fourth Circuit embarked upon a path for resolving disputes over landfills and other permitted facilities that would settle the dispute by eliminating the public sentiment element and leaving the polls as the only method for the public to express its disapproval of landfill siting.

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The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. sections 1961-1968 (1984 & Supp. 1990) (RICO), prevents and punishes certain corrupt practices in business operations. RICO provides a remedy of treble damages in private actions for business operations in interstate or foreign commerce that constitute a pattern of racketeering activity. The pattern of racketeering requirement is necessary to justify the heavy penalties that RICO provides and to prevent abuse of the RICO provisions. Courts, however, have offered varying definitions of pattern of racketeering activity. Prior to the Supreme Court's decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), the Fourth Circuit had developed a multi-factor test for determining a pattern of racketeering activity. The multi-factor test weighed the number and variety of predicate acts, the

length of time involved, the number of victims, the presence of separate schemes, and the potential for multiple distinct injuries.[194] In 1989, however, the Supreme Court in *H.J. Inc.* enunciated a "continuity plus relationship" test for determining the pattern requirement.[195] The continuity plus relationship test requires that a plaintiff demonstrate both that the racketeering predicates are related and that those activities amount to a threat of continued criminal activity. Predicate acts are related if the acts have the same or similar purposes, results, participants, victims, or methods of commission, or have related characteristics and are not isolated events.[196] In deciding what constitutes continuity, the *H.J. Inc.* Court held that either a close period of repeated conduct or past conduct that threatens future repetition satisfies the continuity requirement. Thus, continuity requires that the predicate acts amount to a threat of continuing racketeering activity. In light of *H.J. Inc.*, the United States Court of Appeals for the Fourth Circuit, in *Menasco, Inc. v. Wasserman*, 886 F. 2d 681 (4th Cir. 1989), considered the criteria that courts should apply in deciding whether a pattern of racketeering activity exists.

In *Menasco* the Fourth Circuit focused on the continuity requirement outlined in *H.J. Inc.* Menasco, Inc. (Menasco) and Lucky Two, Inc. (Lucky Two), the plaintiffs in *Menasco*, became partners in an oil and gas field investment venture with defendant Wasserman, a principal of defendant Sounion Petroleum (Sounion). The plaintiffs alleged that Wasserman misrepresented that each partner would pay the same price for some additional acreage offered to them by another partner. According to the plaintiffs, Sounion inflated the price to two to five times the amount that Sounion paid. The plaintiffs also alleged that Wasserman made various other misrepresentations designed to benefit Sounion. Further, the plaintiffs alleged that Wasserman had solicited assignments of rights of action used to benefit Sounion, that Wasserman had conspired with the lessor to terminate a well lease for his own benefit and to the detriment of the plaintiffs, and that Wasserman had transferred a substantial interest in some oil wells in which Sounion was involved to other defendant companies in an attempt to shelter Wasserman from liability. The plaintiffs claimed that as a result of Wasserman's activities, the plaintiffs lost $177,347.79.

The United States District Court for the District of Maryland found that, as to Wasserman and Sounion, the complaint failed to allege the

194. *See* Brandenburg v. Seidel, 859 F.2d 1179, 1185 (4th Cir. 1988) (applying multifactor analysis to civil RICO pattern inquiry on case-by-case basis); Walk v. Baltimore & O.R.R., 847 F.2d 1100, 1105 (4th Cir. 1988) (requiring analysis of pattern requirement on case-by-case basis and weighing particular facts of each case).

195. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2900 (1989) (describing continuity plus relationship test). The Supreme Court derived the continuity plus relationship test from the legislative history of RICO. *See* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 n.14 (1985) (citing S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)) (applying continuity plus relationship language for first time).

196. *See H.J. Inc.*, 109 S. Ct. at 2901 (quoting 18 U.S.C. § 3575(e) (1985)) (defining pattern of criminal conduct).

pattern of racketeering activity that RICO requires. The district court, therefore, dismissed the RICO claims. Because RICO had formed the basis for federal jurisdiction, the district court dismissed the state law claims.

The plaintiffs appealed, arguing that the district court erred in holding that the plaintiffs had failed to allege a pattern of racketeering activity. In determining whether the plaintiffs alleged a pattern of racketeering activity, the Fourth Circuit applied the Supreme Court's continuity plus relationship test of *H.J. Inc.* In particular, the Fourth Circuit reiterated the Supreme Court's holding that the continuity prong requires a threat of long-term criminal conduct, either through a closed period of repeated conduct or past conduct that indicates that the activity is likely to continue in the future. According to the Fourth Circuit, the plaintiff must show that the predicate acts amount to a threat of continuing racketeering activity. However, the Fourth Circuit emphasized that multiple illegal schemes were not necessary to satisfy the pattern requirement. Although the existence of a single scheme can be relevant to the continuity prong, the court noted that the continuity plus relationship test emphasized a commonsensical approach, allowing the possibility that multiple predicates within a single scheme would satisfy the pattern requirement.

In evaluating the continuity plus relationship standard, the *Menasco* court found that the defendants' fraudulent activities were limited in purpose, that Wasserman was the sole perpetrator, that Menasco and Lucky Two were the sole victims, and that the activities took place within one year. The court held that the plaintiffs' allegations that Wasserman used dummy corporations as a shelter from liability were insufficient to show a threat of continuing racketeering activity. Additionally, the plaintiffs failed to identify the persons against whom Wasserman allegedly perpetrated fraudulent activities or the type of activities involved. The Fourth Circuit used *H.J. Inc.* as a standard, finding that the time period of six years, the variety of schemes, and the thousands of victims in the Supreme Court case demonstrated the relative lack of a pattern of activity in the instant case. Thus, the Fourth Circuit found that the defendants' actions failed to satisfy the continuity prong.

The plaintiffs also argued that the district court should have allowed the plaintiffs to amend their complaint. The Fourth Circuit reasoned that *H.J. Inc.*'s emphasis on the continuity requirement was sufficient reason to allow the plaintiffs an attempt to comply with the RICO pattern requirement. Noting that the Supreme Court decided *H.J. Inc.* after the initiation of the plaintiffs' suit, and despite the insufficiency of the plaintiffs' allegations, the Fourth Circuit remanded the case with instructions to allow the plaintiffs to amend the complaint.

Although the Fourth Circuit's rationale is superficially consistent with the Supreme Court's decision in *H.J. Inc.*, the factors that the Fourth Circuit applied may be inappropriate in light of *H.J. Inc.*'s analysis.[197]

197. *See* Swistock v. Jones, 884 F.2d 755, 757-58 (3d Cir. 1989) (noting Supreme Court's

Specifically, the Fourth Circuit held that the scope of the activity, the number of perpetrators, the number of victims, and the length of time involved were, taken together, dispositive of the failure to satisfy the continuity prong. However, *H.J. Inc.* made no mention of either the number of victims or the number of perpetrators as relevant to the continuity prong of the test, despite the fact that thousands of Northwestern Bell customers suffered injuries. The *Menasco* court cited the number of victims as the major distinguishing characteristic between *Menasco* and *H.J. Inc.* A few courts, however, have discussed the possibility that *H.J. Inc.* suggests duration as the sole determinative factor.[198] Conversely, several circuits have rejected the durational approach in favor of the multi-factor approach typified by *Menasco*.[199] Still other courts have applied the *H.J Inc.* reasoning but have resisted the adoption of any general test for guidance in evaluating continuity.[200]At the very least, *Menasco* places the Fourth Circuit in accord with several circuits that have adopted an approach which has the advantage of a more clearly defined perspective on the difficult interpretation of *H.J Inc.*'s continuity prong.

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lack of reference to either number of victims or number of perpetrators as relevant factors in continuity analysis).

198. *See* Marshall-Silver Const. Co. v. Mendel, 894 F.2d 593, 596-97 (3d Cir. 1990) (recognizing but rejecting view that *H.J. Inc.* suggests durational approach to continuity); Hindes v. Castle, 740 F. Supp. 327, 333 (D. Del. 1990) (recognizing durational approach and possibility that Third Circuit adopted durational approach). Duration may be determinative if the duration is too short to meet the threshold requirements for a RICO violation. *See H.J. Inc.*, 109 S.Ct. at 2902 (noting that acts occurring over few months do not satisfy continuity requirement); American Eagle Credit Corp. v. Gaskins, 920 F.2d 352, 354-55 (6th Cir. 1990) (holding that short duration of criminal activity is determinative).

199. *See* Banks v. Wolk, 918 F.2d 418, 423 (3d Cir. 1990) (adopting multi-factor approach on basis that *H.J. Inc.* does not negate multi-factor analysis); United States Textiles, Inc. v. Anheuser-Busch Cos., 911 F.2d 1261, 1267-68 (7th Cir. 1990) (applying four factors of number and variety of predicate acts, number of victims, presence of separate schemes, and presence of distinct injuries to determine whether pattern exists); *Marshall-Silver*, 894 F.2d at 596-97 (rejecting durational approach); U.S. v. Kaplan, 886 F.2d 536, 542-43 (2d Cir. 1989) (requiring reference to external facts to demonstrate continuity); Sutherland v. O'Malley, 882 F.2d 1196, 1204 (7th Cir. 1989) (considering time, number of victims, presence of separate schemes, and occurrence of distinct injuries); Interwest Med. Corp. v. Longterm Care Found., 748 F. Supp. 467, 468-69 (N.D. Tex. 1990) (considering sole victim, single scheme, and single injury as relevant factors); Aldridge v. Lily-Tulip, Inc., 741 F. Supp. 906, 913 (S.D. Ga. 1990) (considering duration of scheme, number of victims, and occurrence of distinct injuries).

200. *See* Ikuno v. Yip, 912 F.2d 306, 309 (9th Cir. 1990) (adopting test for pattern inquiring whether acts are sporadic or isolated, but failing to adopt particular continuity test); Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 432-33 (5th Cir. 1990) (recognizing Supreme Court's flexible continuity definition and requiring continuing threat to satisfy pattern requirement).