No. 98-896

IN THE SUPREME COURT OF THE UNITED STATES

MARK ROTELLA,
Petitioner

v.

ANGELA M. WOOD, M.D., et al.,
Respondents

BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Filed July 13, 1999

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INTEREST OF THE *AMICUS CURIAE* [1]

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States. ACLI represents the interests of 493 member life insurance companies. This Court's decision in *Humana, Inc.* v. *Forsyth*, 119 S. Ct. 710, 719 (1999), holding that the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, does not bar civil RICO suits against insurance companies, has left many of ACLI's member life insurance companies susceptible to civil RICO lawsuits, many of which are spurious. Accordingly, the issue of when a civil RICO cause of action accrues — and hence when the statute of limitations begins to run — is of considerable importance to ACLI's members.

In this brief, we provide an overall framework for the consideration of the accrual issue and present the arguments in favor of an accrual rule different from the alternatives on which the parties are concentrating. Specifically, we urge the Court to adopt the "pure" Clayton Act accrual rule, under which the statute of limitations begins to run when a potential plaintiff suffers injury, without requiring some "discovery" of any additional facts. This is the rule followed under the Clayton Act itself and it is, therefore, the rule most consistent with the Court's prior decisions on borrowing a set of limitations principles for civil RICO claims.

ACLI understands that respondents will be focusing their attention on a somewhat laxer version of the Clayton Act rule, because they apparently would prevail even under that modified version of the rule. Thus, they will concentrate on defending the validity of an accrual rule that triggers the running of the

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[1] Neither counsel for petitioner nor counsel for respondents authored any portion of this brief, nor did any person or entity, other than *amicus* American Council of Life Insurance, contribute monetarily to the preparation and submission of this brief.

Counsel for the petitioner and counsel for the respondents have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

statute of limitations once the plaintiff has discovered, or with reasonable diligence should have discovered, the existence of his injury. For his part, petitioner is contending for a rule that would postpone the running of the statute until a potential plaintiff discovers not only his injury but also the potential defendant's "pattern of racketeering acts."

The Court could dispose of this particular lawsuit simply by rejecting petitioner's proposed "injury-and-pattern discovery" rule, without selecting which of the remaining two possible accrual rules — the Clayton Act rule or an "injury discovery" rule — governs civil RICO claims. Nevertheless, considerations of judicial efficiency and the interests of other litigants and courts make it appropriate to answer the question presented once and for all by deciding which is the "right" rule.

SUMMARY OF THE ARGUMENT

In *Agency Holding Corp.* v. *Malley-Duff Associates, Inc.*, 483 U.S. 143 (1987), this Court held that the Clayton Act's four-year statute of limitations applies to civil RICO claims. This decision rested on the Court's conclusion that Congress consciously chose to model RICO's civil treble-damage remedy on the comparable treble-damage remedy long included in the Clayton Act. Because this Court already has determined that the Clayton Act is the relevant source from which to borrow civil RICO's statute of limitations, it follows that the Clayton Act's accrual rule — according to which a claim accrues when the putative plaintiff suffers an injury caused by the putative defendant's violation of the statute — should govern civil RICO claims too. Indeed, just two years ago, in *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 188 (1997), this Court rejected the "last predicate act" accrual rule because it was "inconsistent with the ordinary Clayton Act rule."

In this case, the petitioner is advocating an "injury-and-pattern discovery" rule. However, like the "last predicate act" rule rejected in *Klehr*, an "injury-and-pattern discovery" rule has no antecedents in Clayton Act jurisprudence, which

Congress intended to borrow. In addition, petitioner's proposed approach would defer for years the commencement of the period of limitations and thus gives inadequate weight to the important concerns and policies served by statutes of limitation. Moreover, for this Court to adopt an "injury-and-pattern discovery" rule would mark an unprecedented expansion of the discovery concept. When legislatures or courts have required some kind of discovery to trigger the running of the statute, they have limited the requirement solely to discovery of the injury itself, where the injury may otherwise be latent. There is no general support for a doctrine that the statute remains suspended until a potential plaintiff discovers all elements of a cause of action. Thus, petitioner's argument in favor of such a rule invites the Court, quite inappropriately, to venture into the realm of pure judicial policy-making — and to make policy that would be both novel and ill-conceived.

ARGUMENT

In *Agency Holding Corp.* v. *Malley-Duff Associates, Inc.*, 483 U.S. 143 (1987), the Court rejected the invitation to formulate a statute of limitations for civil RICO claims by drawing upon different state law analogues, including state statutes of limitations governing fraud claims. Instead, the Court concluded that its appropriate function was to discern congressional intent rather than to create a judicial rule to govern these cases. When the Court examined the structure of the civil RICO remedy created in 1970 and examined the legislative history surrounding this feature, it became clear that Congress had specifically intended to model civil RICO's treble-damage remedy on the similar treble-damage remedy that had long been a feature of the antitrust laws under the Clayton Act. Therefore, the Court concluded, Congress intended to borrow the four-year statute of limitations applicable to private civil damage claims under the Clayton Act.

Left undecided was when that four-year period begins to run. That issue turns on the "accrual" of the claim. Over the years, four distinct alternatives have emerged: (1) the "pure"

Clayton Act rule, which is actually applied in claims under that statute and which begins the four-year period as soon as the potential plaintiff suffers injury from the defendant's alleged misconduct; (2) the "injury discovery" approach, which defers the running of the statute if the potential plaintiff reasonably has failed to discover that he has suffered any injury; (3) the "injury and pattern discovery" theory, under which the statute would remain in suspension until the would-be plaintiff discovered not only his own injury but also the potential defendant's commission of a "pattern" of racketeering acts, some of which may have nothing to do with the plaintiff himself; and (4) the "last predicate act" approach, which would indefinitely delay the beginning of the four-year period until the defendant engaged in the last RICO "predicate act," even if utterly unrelated to the potential plaintiff.

Two years ago, this Court unanimously rejected that fourth, and most expansive alternative. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179 (1997). A majority of the Court found it unnecessary to select the appropriate accrual rule from the remaining three candidates. Instead, the majority went no further than to reject the "last predicate act" rule, the only rule under which the petitioner in that case could prevail. *Id.* at 186-190. The majority made clear that it was expressing no view regarding which of the three remaining accrual rules — the Clayton Act rule, the "injury discovery" rule, or the "injury-and-pattern discovery" rule — might be the appropriate rule, leaving that question for another day. *Id.* at 191-193.

In a separate concurrence, Justices Scalia and Thomas announced that they were prepared to adopt the Clayton Act rule. See *id.* at 198-201 (Scalia, J., concurring in part and concurring in the judgment)). It is now time for this Court to resolve the uncertainty and to adopt the Clayton Act rule for civil RICO suits. Indeed, in ACLI's view, adoption of that rule follows inevitably from this Court's decision in *Agency Holding*.

I. THIS COURT'S DECISION IN *AGENCY HOLDING* COMPELS THE ADOPTION OF THE CLAYTON ACT'S ACCRUAL RULE.

A. The Court Has Held That Congress Deliberately Used The Clayton Act As The Model For The Civil RICO Remedy.

In *Agency Holding*, this Court held that the Clayton Act's four-year statute of limitations governs civil RICO claims. As this Court explained, "[e]ven a cursory comparison of the two statutes reveals that the civil action provision of RICO was patterned after the Clayton Act." 483 U.S. at 150. In particular, the Court noted the nearly identical phrasing of the two statutes and the common purpose to remedy the same type of injury, namely an injury "in [the plaintiff's] business or property" caused by the defendant's illegal conduct. *Id.* at 150-151.

Most importantly, this Court canvassed the legislative history of RICO and discovered that "[t]he close similarity of the two provisions [was] no accident." *Agency Holding*, 483 U.S. at 151. To the contrary, Congress expressly modeled the civil RICO remedy on the Clayton Act. The original version of the RICO bill was exclusively a basis for criminal prosecution of organized crime, and it contained no civil remedy at all. Then the House Judiciary Committee adopted a proposal by Representative Steiger to add "a private treble-damages action 'similar to the private damage remedy found in the anti-trust laws.'" *Id.* at 152 (quoting *Hearings on S. 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess., 520 (1970)). During the floor debate in the House of Representatives, both the bill's sponsor and Representative Steiger compared the bill's civil remedy to that of the Clayton Act. See *Agency Holding*, 483 U.S. at 152 (citing 116 Cong. Rec. 27,739, 35,295 (1970)). The Senate then simply adopted the bill as amended in the House. See 116 Cong. Rec. 36,296 (1970). This history led the Court to conclude that it was "the clear legislative intent to pattern

RICO's civil enforcement provision on the Clayton Act." *Agency Holding*, 483 U.S. at 152.

Ten years after *Agency Holding*, this Court again turned to the Clayton Act to resolve the timeliness of a civil RICO claim, this time to reject the "last predicate act" accrual rule, which would have delayed the running of the statute of limitations until the defendant committed the last predicate act in a pattern of racketeering. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 187 (1997). Although this Court went no further than to reject the "last predicate act" rule of accrual and declined to resolve which of the remaining accrual rules governs civil RICO claims (*id.* at 191-193), the Clayton Act again played a decisive role in the Court's decision.

The Court again observed that "Congress consciously patterned civil RICO after the Clayton Act" and that, "by the time civil RICO was enacted, the Clayton Act's accrual rule was well established." *Klehr*, 521 U.S. at 189; see also *id.* at 198-199 (concurring opinion of Scalia, J., noting Congress modeled civil RICO after Clayton Act). Indeed, the Court rejected the "last predicate act" accrual rule as "inconsistent with the ordinary Clayton Act rule * * * [that] a *cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business*." *Id.* at 188 (emphasis added).

Agency Holding and *Klehr* thus clearly point the way to answering the question presented: The Clayton Act provides both the applicable statute of limitations *and* the accrual rule for civil RICO claims. The same reasons that led the Court to borrow the Clayton Act's statute of limitations and to reject the "last predicate act" accrual rule equally compel adoption of the Clayton Act's accrual rule.

First, Congress intended to make the Clayton Act's limitations principles generally applicable to civil RICO. The Court has repeatedly observed that Congress specifically intended to model RICO's civil remedy upon that of the Clayton Act. See *Agency Holding*, 483 U.S. at 152; *Klehr*, 521 U.S. at

189; *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 368 (1991) (Stevens, J., dissenting) (noting that in *Agency Holding*, "the Court found an explicit intent to pattern the RICO private remedy after the Clayton Act's private antitrust remedy"). This congressional intent incorporates the Clayton Act's statute of limitations. Indeed, this Court's decision in *Agency Holding* to borrow the Clayton Act's four-year statute of limitations rested upon civil RICO's legislative pedigree. See *Agency Holding*, 483 U.S. at 152.

Second, in implementing the congressional design to borrow the Clayton Act's limitations period, there is no legitimate reason to disregard the Act's accrual doctrine. The accrual rule is an indispensable corollary of the period of limitations. Moreover, as the Court has recognized, the Clayton Act's accrual rule was a well-settled part of the architecture of the Clayton Act when Congress decided to use that Act as the model for RICO civil damage suits. *Klehr*, 521 U.S. at 189. Just as this Court in *Agency Holding* found it unthinkable that Congress intended a period of limitations other than that of the Clayton Act to govern civil RICO suits, so too it is inconceivable that Congress intended some other accrual rule to apply to civil RICO claims or, to put it another way, that Congress would have intended (without saying) to borrow one component of the Clayton Act statute-of-limitations regime, while rejecting its other component (and providing no clue as to where to look for an alternative).

Especially in the absence of a clear demonstration of contrary legislative intent — and there is none — for this Court to apply some other accrual rule drawn from a different area of law would be nothing less than judicial speculation in disregard of presumed congressional intent. Cf. *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (noting that, when a common law principle is well established at the time Congress acts, "the courts may take it as given that Congress has legislated with an expectation that the principle will apply

except 'when a statutory purpose to the contrary is evident'") (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)).

Third, the Court has recognized in this same context that a decision to "borrow" a statute of limitations does not license the Court selectively to pick-and-choose exactly which parts to "borrow." Addressing the appropriate statute of limitations for the implied right of action under SEC Rule 10b-5, the Court rejected the idea of borrowing one component of the 1934 Act's explicit one-year/three-year statute of limitations, while substituting for the other component a case-by-case laches defense. *Lampf*, 501 U.S. at 362 n.8. The Court commented that "such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid." *Ibid.*

As with the two-pronged statute of limitations borrowed in its entirety in *Lampf*, the Clayton Act's accrual rule is "indivisible" from the Clayton Act's period of limitations. So too, cobbling together the Clayton Act's period of limitations with some alien accrual rule would constitute "the type of judicial policymaking that [this Court's] borrowing doctrine was intended to avoid." *Klehr*, 521 U.S. at 200-201 (concurring opinion of Scalia, J., quoting *Lampf*, 501 U.S. at 362 n.8).

Fourth, both this Court and the lower federal courts repeatedly and appropriately have consulted antitrust law developed under the Clayton Act to determine when a civil RICO cause of action accrues. Thus, there is ample precedent for transposing Clayton Act limitations doctrine into the civil RICO arena. For example, this Court rejected the "last predicate act" accrual rule because it was "inconsistent with the ordinary Clayton Act rule." *Klehr*, 521 U.S. at 188. Moreover, several district courts have adopted the Clayton Act's accrual rule for civil RICO actions. See *Gilbert Family Partnership* v. *Nido Corp.*, 679 F. Supp. 679, 686 (E.D. Mich. 1988); *Armbrister* v. *Roland Int'l Corp.*, 667 F. Supp. 802, 824 (M.D. Fla. 1987).[2] In addition, several circuits have supported applying the Clayton Act's "separate accrual" rule to civil RICO claims. See *Bankers Trust Co.* v. *Rhoades*, 859 F.2d 1096, 1103-1104 (2d Cir. 1988); *State Farm Mut. Auto. Ins. Co.* v. *Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring). The Second Circuit acknowledged civil RICO's legislative history and its similarity to the Clayton Act, concluding:

> "In light of these similarities, we have little trouble in concluding that the same statute which lends its four-year limitation period to civil RICO actions should also lend its rule of accrual in determining when the four-year period begins to run." *Bankers Trust*, 859 F.2d at 1104.[3]

Finally, the leading academic commentator is in accord with this view. See 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 6.5.5, at 447-448 (1991) ("Presumably the accrual standards developed by the lower federal courts in 15 U.S.C. § 15b [Clayton Act] civil antitrust litigation should be equally applicable to civil enforcement RICO actions.").

In short, having concluded that Congress chose to model the civil RICO remedy on the Clayton Act and having already held that the Clayton Act statute of limitations applies to civil RICO cases, this Court ought to take the next step and hold that the Clayton Act accrual rule governs civil RICO cases as well.

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[2] Even though no circuit has adopted the Clayton Act's accrual rule, this situation is no different from the one the Court faced in *Agency Holding*, where the Court borrowed the Clayton Act's statute of limitations for civil RICO causes of action, even though no circuit had done so. See 483 U.S. at 149.

[3] Although purporting to borrow the Clayton Act's accrual rule, the Second Circuit in fact adopted an injury discovery rule that is distinct from the Clayton Act rule. See *Bankers Trust*, 859 F.2d at 1103, 1105.

B. Under The Clayton Act, The Cause Of Action Accrues And The Statute Of Limitations Begins To Run When The Plaintiff Is Injured By The Defendant's Conduct.

This Court has defined the Clayton Act's accrual rule quite succinctly: "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 338b, at 145 (1995). Thus, as a general matter, the statute of limitations for treble-damages claims under the antitrust laws begins to run as soon as the anticompetitive conduct causes "injury," irrespective of the plaintiff's "knowledge" of any of the elements of the accrued claim. See, *e.g.*, *Information Exch. Sys., Inc.* v. *First Bank Nat'l Ass'n*, 994 F.2d 478, 484 (8th Cir. 1993) (noting that, subject to an exception for fraudulent concealment, a "cause of action accrues under the antitrust laws when the defendant commits an act that injures the plaintiff's business").

This rule has proven fair and practical, and there is no compelling reason not to apply it with equal force to RICO claims. While *some* civil RICO cases may be complex or difficult to discover, the typical civil RICO case surely involves acts no more complicated or secretive than the conduct concealed in a typical antitrust conspiracy case. For example, the classic antitrust violation covered by the Clayton Act is a price-fixing conspiracy. This illegal conduct typically is difficult to uncover. Nevertheless, Congress has never found it necessary or appropriate to modify the rule that a plaintiff's four-year period for bringing suit begins to run as soon as he suffers injury — such as paying an inflated price — whether or not he knows or has discovered that the price resulted from an illegal conspiracy. The Clayton Act's statute of limitations and its accompanying accrual rule have existed and worked well for decades. If the combination of a four-year limitations period with an accrual rule focused upon the time of the injury had

worked a substantial hardship on antitrust plaintiffs or undermined the deterrent effect of the civil antitrust remedy, Congress surely would have changed one or the other.

In fact, the Clayton Act's limitations period and accrual rule are manifestly reasonable. To begin with, four years is not an unreasonably short time to "discover" the basis for bringing a lawsuit. Indeed, the four-year limitations period is longer than the limitation periods under many State limitation statutes, which applied to antitrust actions before 1955, see S. Rep. No. 619, 84th Cong., 1st Sess. (1955), *reprinted in* 1955 U.S.C.C.A.N. 2328, 2332, and it is longer than the three-year period of repose Congress has established for securities fraud actions. *Lampf*, 501 U.S. at 362.[4] Moreover, as we now discuss, equitable tolling principles and the "separate accrual" rule are available, in appropriate cases, to mitigate any perceived harshness in applying the Clayton Act's accrual rule.

C. Other Doctrines That Toll Or Restart The Running Of the Statute Of Limitations Under The Clayton Act Mitigate Any Perceived Harshness Associated With Adoption Of The Clayton Act's Accrual-Upon-Injury Rule.

Although, under the Clayton Act accrual rule, civil RICO claims will ordinarily accrue (and the statute of limitations begin to run) when the plaintiff suffers a cognizable injury, a number of doctrines are available to toll or restart the running of the statute of limitations in appropriate cases.

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[4] To put things in perspective, four years is the duration of an entire college education. Four years is the period that the Constitution fixes for the President to accomplish the objectives of that office. In four years, claimants will bring tens of thousands of civil suits in federal courts, including huge numbers of RICO claims. And, during a four-year period, this Court will decide 300 to 400 cases on the merits and fill 16 volumes of the U.S. Reports.

For example, the doctrine of fraudulent concealment protects claimants from a defendant's affirmative attempts to conceal the cause of action until the statute of limitations has elapsed. See *State of Texas* v. *Allan Constr. Co.*, 851 F.2d 1526, 1534 (5th Cir. 1988); *Atlantic City Elec. Co.* v. *General Elec. Co.*, 312 F.2d 236, 238 (2d Cir. 1962). Similarly, equitable tolling and equitable estoppel protect claimants who, through no fault of their own, are prevented from commencing suit in a timely fashion. See *Mt. Hood Stages, Inc.* v. *The Greyhound Corp.*, 616 F.2d 394, 395 (9th Cir. 1980) (pendency of related proceedings); *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 667 F.2d 1045, 1056 (5th Cir. 1982) (duress); *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F3d 339, 346 (2d Cir. 1994) (duress). And, where the alleged price-fixer (or RICO racketeer) commits several predicate acts targeting the same victim, the separate accrual rule resets the clock for each new and independent injury caused by a separate act. *Klehr*, 521 U.S. at 188; *State Farm Mut.*, 828 F.2d at 5 (Kennedy, J., concurring).

These doctrines, developed in the antitrust context, are sufficient to address any perceived harshness that may arise when the Clayton Act's accrual rule is applied in civil RICO cases with unusual facts. Although it will likely be a rare case that would be unfairly barred under the "pure" Clayton Act accrual rule, it is better to address that rare case through judicious use of the foregoing doctrines, which focus on the equities of each case, rather than to use the blunt sword endorsed by the petitioner, which would permit *every* civil RICO plaintiff potentially to wait years before commencing suit.

D. Petitioner's Arguments Against The Clayton Act Accrual Rule Do Not Withstand Scrutiny.

Lastly, refusing to acknowledge the import of this Court's decisions in *Agency Holding* and *Klehr*, petitioner invokes a variety of policy arguments against the adoption of the Clayton Act rule. None of the arguments justifies refusing to borrow the

Clayton Act accrual rule to accompany the Clayton Act statute of limitations.

To begin with, petitioner claims that the Clayton Act accrual rule does not adequately take into account RICO's "pattern" element. Pet. Br. at 24-25. Such criticism, however, ignores the fact that a RICO claimant does not recover for injuries caused by the "pattern" but rather for injuries caused by the predicate acts themselves. See *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 497 (1985) ("Any recoverable damages occurring by reason of a violation of § 1962(c) [of RICO] will flow from the commission of the predicate acts."). There is no conceivable reason — and petitioner certainly provides none — why an accrual rule should be tied to an element of the cause of action that has nothing to do with the harm suffered by the plaintiff. Indeed, in antitrust suits, the plaintiff's cause of action accrues when the plaintiff suffers an injury, not when the plaintiff discovers that the effect of the injurious behavior was to lessen competition, the "heart" of a Clayton Act claim. See 15 U.S.C. § 13; *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (to be actionable, allegedly anticompetitive behavior must lessen competition, not simply harm competitor).

So too, petitioner is simply off base in contending that, since the Court's decision in *Sedima*, "the Clayton Act's focus on 'antitrust injury' is inappropriate for civil RICO." Pet. Br. at 25. *Sedima* addressed an entirely distinct question from that presented here: whether, to have standing to bring a civil RICO action, a plaintiff must demonstrate that he suffered a "racketeering injury" separate and apart from the injury suffered as a result of one of the predicate acts. That the Court refused to impose a "racketeering injury" requirement akin to the "antitrust injury" requirement drawn from the Clayton Act simply has no bearing on whether the Clayton Act provides the applicable accrual rule for civil RICO suits. In fact, since *Sedima*, this Court has twice turned to the Clayton Act to resolve civil RICO statute-of-limitations-related issues. *Agency*

Holding, 483 U.S. at 150-152; *Klehr*, 521 U.S. at 188-190. Petitioner may disagree with this Court's decisions in those cases, but it is too late in the day to argue, as petitioner does, that the Clayton Act is not the appropriate source from which to borrow civil RICO's statute of limitations and related rules.

Indeed, to the extent that *Sedima* bears on the question now before the Court, it undermines petitioner's proposed accrual rule and supports applying the Clayton Act's accrual-upon-injury rule in RICO cases. Under *Sedima*, the essence of the "injury" that gives rise to the right to bring a RICO treble damage claim is the injury that flows from a predicate act. Since it is not the "pattern" that creates the injury, it makes sense to commence the limitations period as soon as the predicate act causes the injury.

II. THE "INJURY-AND-PATTERN DISCOVERY" RULE IS UNSUITABLE BECAUSE IT GIVES INADEQUATE WEIGHT TO THE STRONG FEDERAL INTEREST IN BARRING STALE CLAIMS.

A. Statutes Of Limitations Serve Critical Functions That Cannot Be Overlooked In Determining What Accrual Rule To Adopt.

Not surprisingly, petitioner pushes for the most expansive period for an allegedly injured person to bring a RICO lawsuit. This single-minded focus, however, overlooks the strong, countervailing reasons of public policy that justify statutes of limitations and make them an essential part of a fair system of civil justice.

> "Statutes of limitation * * * are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944).

Indeed, from the earliest days of the Republic to the present, this Court has wisely recognized that "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'" *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams* v. *Wood*, 2 Cranch 336, 342 (1805)). See also *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (noting that statutes of limitations "'are found and approved in all systems of enlightened jurisprudence'") (quoting *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879)).

Despite petitioner's assertions, these principles apply with equal force to civil RICO claims. Indeed, this Court has emphasized the importance of the statute of limitations in civil RICO suits, observing that, without a statute of limitations, "'[d]efendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.'" *Agency Holding*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.34). A statute of limitations is not a mere obstacle to be brushed aside, as petitioner would have it, when a litigant wants to invoke some "remedial" purposes; rather, the statute of limitations is "a 'meritorious defense, in itself serving a public interest'" *Kubrick*, 444 U.S. at 117 (quoting *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938)); see also *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 452-453 (7th Cir. 1990) (Posner, J.) ("Statutes of limitation are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application.").

The "injury-and-pattern discovery" rule flies in the face of this policy against stale claims. Since the second predicate act constituting the pattern may occur as much as ten years after the first predicate act, 18 U.S.C. § 1961(5), the "injury-and-pattern discovery" rule, like the "last predicate act" rule, has the potential to increase the limitations period dramatically. In fact,

the "injury-and-pattern discovery" rule would permit, in some cases, the commencement of civil RICO suits fourteen years after the first predicate act whose injury is the basis for the suit — or more — depending on when the second predicate acts occurs and when the plaintiff "discovers" it.[5]

The possibility of civil RICO suits brought fourteen or more years after the crucial, injurious event(s) renders illusory the promise of repose provided by the four-year statute of limitations. Indeed, the mere possibility of such suits convinced this Court in *Klehr* to reject the "last predicate act" rule. See *Klehr*, 521 U.S. at 187. So too, such possibility should preclude adopting the "injury-and-pattern discovery" rule.

B. The Customary Accrual Rule For Tort-Like Claims, Including Claims In Federal Courts, Focuses On The Occurrence Of Injury, Not On Its Discovery, And A Discovery Requirement Is Only A Limited Exception.

Given the importance of statutes of limitations and the purposes they serve, it was well settled at common law that, as a general rule, causes of action accrued and statutes of limitation began to run as soon as there was a "complete and present cause of action." *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941). See also 54 C.J.S. *Limitations of Actions* § 81, at 116 (1987) ("Unless a statute provides otherwise, the statute of limitations begins to run at the time when a complete cause or right of action accrues

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[5] The concept of a "pattern" is a nebulous one, see *H.J. Inc.* v. *Northwestern Bell Tel Co.*, 492 U.S. 229, 252 (1989) (Scalia, J., concurring in the judgment), and courts are sure to be hesitant in imputing knowledge of it to a plaintiff unschooled in the nuances of civil RICO jurisprudence. Indeed, precisely because of the vagaries involved in determining whether or not a pattern exists, an "injury and pattern discovery" rule will undermine "the federal interest * * * in having 'firmly defined, easily applied rules'" governing statutes of limitations. *Wilson*, 471 U.S. at 270 (quoting *Chardon* v. *Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)).

or arises, which occurs as soon as the right to institute and maintain a suit arises."). In other words, the *existence* of the elements of the cause of action, not the plaintiff's *knowledge* of some or all of those elements, triggered the statute of limitations:

> "Generally, mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations. Except where modified by statute, the rule is that the cause of action accrues when the act upon which the legal action is based took place and not when the damage became known. Difficulty in ascertaining the existence of a cause of action is irrelevant." *Id.* § 87, at 123 (footnotes omitted).

Beginning in the latter part of this century, some courts fashioned a "discovery" requirement as an exception to the general rule in narrow categories of cases. That "discovery" exception — which provides that the statute of limitations begins to run from the date the plaintiff discovered or reasonably should have discovered *the injury* — was developed in medical malpractice cases to address the problems of foreign objects left in patients' bodies during surgery and in occupational disease cases to address the problem of diseases with long latency periods. See 2 CORMAN, *supra*, §§ 11.1.2.1, 11.1.2.3; 54 C.J.S. *Limitations of Actions* § 87, at 124.

Contrary to the suggestion of both petitioner and respondent, therefore, the discovery rule is not the "general" or "presumptive" accrual rule, even in federal cases. Some lower courts have stated, with unwarranted breadth, that, "[u]nder federal principles, a claim accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of the action," *Cullen* v. *Margiotta*, 811 F.2d 698, 725 (2d Cir. 1987) (quoting *Pauk* v. *Board of Trustees of City Univ.*, 654 F.2d 856, 859 (2d Cir. 1981)), or that the discovery rule applies "in the absence of a contrary directive from Congress." *Cada*, 920 F.2d at 450. But petitioner reads too much into these *dicta*. This Court has never endorsed any such sweeping proposition. In fact, most of

the cases in which federal courts have made this assertion arise in just two, distinguishable contexts: suits under 42 U.S.C. § 1983 alleging constitutional violations, and suits involving medical malpractice invoking the Federal Tort Claims Act.

Such broad proclamations, however, run counter to numerous decisions of the federal courts, which recognize that the discovery rule remains an *exception* to be applied only in those limited circumstances in which the injury is self-concealing, and thus the discovery approach does not constitute the normal rule in federal tort claims cases. See, *e.g.*, *Diaz* v. *United States*, 165 F.3d 1337, 1339 (11th Cir. 1999) ("The general rule is that a claim under the FTCA accrues at the time of injury."); *Kronisch* v. *United States*, 150 F.3d 112, 121 (2d Cir. 1998) (same). Indeed, as all parties agree, the discovery rule certainly is not the rule in treble damage cases pressed in federal courts under the Clayton Act.[6]

Nor is it correct to say that the discovery rule is the "default" to be applied unless Congress specifies another rule of accrual. This assertion stands on its head the Court's frequently reiterated rule of statutory construction — that Congress is deemed to know the common law antecedents of general legal doctrines and to adopt them as the premise for legislation unless it clearly signifies its desire to modify the common law doctrine. Thus, as the Court recently observed in dealing with congressional enactments authorizing punitive damages, "[w]e assume that Congress, in legislating on punitive awards, imported common law principles governing this form of relief." *Kolstad* v. *American Dental Ass'n*, __ S.Ct. __, slip op. at 9 (1999). It is equally appropriate to assume (1) that, when Congress enacted the Clayton Act's four-year statute of limitations, it did so with an understanding of the traditional

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[6] In 1991, then-Judge Ruth Bader Ginsburg commented on the scope of the discovery rule and noted that the Clayton Act's injury-accrual rule does not use an "injury discovery" approach. *Connors* v. *Hallmark & Son Coal Co.*, 935 F.2d 336, 342 n.10 (D.C. Cir. 1991).

common law rule of accrual-upon-injury and (2) that, when Congress modeled the RICO damage remedy on the Clayton Act's remedy, Congress was aware also that the courts had consistently interpreted the Clayton Act's four-year statute of limitations in accordance with that common law rule. In sum, it is the common law, pure-injury rule that serves as the "default," unless Congress affirmatively mandates the discovery rule.

Congress is quite capable of modifying the common law rule in plain, unmistakable language, when it wishes to change that rule. See 28 U.S.C. § 2409a(g) ("Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."). Of course, the Clayton Act statute of limitations contains no comparable provision suggesting that Congress intended the Clayton Act statute of limitation to begin running upon the plaintiff's "discovery" of his injury, and the courts have consistently declined to superimpose any discovery requirement on the Clayton Act. Therefore, it is decisive that, when Congress chose to borrow the Clayton Act as the paradigm for RICO, it once again passed up the opportunity to modify the common law accrual principle imputed to the Clayton Act limitations doctrine.

In any event, even in those limited areas in which the discovery rule applies, courts carefully limit its scope. The only fact that the potential plaintiff may have to discover (or be reasonably able to discover) before the statute begins to run is the occurrence of the *injury*. For example, in *Kubrick*, this Court rejected the argument that a cause of action for medical malpractice under the Federal Tort Claims Act ("FTCA") accrued only when the plaintiff discovered that his injury was *the result of medical malpractice*. 444 U.S. at 123. The Court noted that a plaintiff who knows that he has suffered an *injury* has sufficient information to begin investigating the existence

of a cause of action. See *id.* at 122-124.[7] To require that the plaintiff amass more information before triggering the statute of limitations "would undermine the purpose of the limitations statute." *Id.* at 123.

As *Kubrick* illustrates, the discovery principle, when it applies, extends only to the plaintiff's knowledge of his injury, not to his knowledge of other elements of his claim. By analogy, the additional "pattern" element of a RICO claim is as unnecessary a subject of required discovery as was the "malpractice causation" element of the tort claim in *Kubrick*.

There is no reason to adopt any discovery rule in civil RICO lawsuits, much less an accrual rule that delays the

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[7] The Court did not hold that it was *necessary* for the plaintiff to know who or what caused his injury, only that such information was *sufficient* to trigger the statute of limitations. See 444 U.S. at 120 ("[T]he Court of Appeals recognized that the general rule under the Act has been that a tort claim accrues at the time of the plaintiff's injury, although it thought that *in medical malpractice cases* the rule had come to be that the 2-year period did not begin to run until the plaintiff has discovered both his injury and its cause. But even so — and the United States was prepared to concede as much *for present purposes* — the latter rule would not save Kubrick's action since he was aware of these essential facts [more than two years before he filed suit].") (emphasis added).

Even if *Kubrick* could be understood to have left room to create an "injury and cause discovery" rule in medical malpractice cases under the FTCA, it would hardly support the "injury and *pattern* discovery" rule. Quite simply, the cause of injury under RICO is the predicate act, not the pattern. *Sedima*, 473 U.S. at 497 ("Any recoverable damages occurring by reason of a violation of § 1962(c) [of RICO] will flow from the commission of the predicate acts."). Just as the Court refused to allow FTCA suits to be delayed until discovery that the injury resulted from a breach of the duty of care, there is no basis here for allowing delay of RICO suits until discovery that the act causing the plaintiff's injury was part of a "pattern."

running of the statute of limitations until the plaintiff discovers the existence of a pattern of racketeering. The civil RICO plaintiff's injury provides sufficient information and incentive to begin investigating the injury and to commence any appropriate lawsuit. A more expansive discovery rule would permit plaintiffs to bring actions long after their injury, perhaps fourteen years or more afterward. Such a result cannot be squared with statutes of limitations in general or this Court's decisions in *Agency Holding* and *Klehr*. See *Rodriguez* v. *Banco Central*, 917 F.2d 664, 667 (1st Cir. 1990) (Breyer, C.J.).

In short, the discovery rule has not become the general federal rule of accrual. Moreover, the proposed "injury-and-pattern discovery" rule in particular would ignore the settled principle that the discovery rule, in those limited instances where it does apply, extends only to the plaintiff's *injury*. Absent any indication that Congress intended to adopt the "injury-and-pattern discovery" rule — and there is none — this Court should refrain from engaging in pure judicial lawmaking and adopting such an unwise and unprecedented creature.

C. Petitioner's Policy Arguments In Favor Of The "Injury-And-Pattern Discovery" Rule Do Not Withstand Scrutiny.

Stripped of the needless surplusage, the petitioner's argument for the "injury-and-pattern discovery" rule boils down to a simple plea that the accrual rule must take into account the pattern element of the civil RICO claim, which petitioner characterizes as the "heart" of the claim. Pet Br. at 12-14. Of course, to say that the pattern element is the "heart" of the civil RICO claim is not to say that the accrual rule should — much less, must — be tied to that element. Indeed, as noted above, the "heart" of the Clayton Act claim is the requirement that the contested action have the effect of lessening competition but it has not led any court to rule that a Clayton Act claim accrues only after the plaintiff has learned that the action has had the proscribed effect on competition.

In a similar vein, petitioner argues that the "injury-and-pattern discovery" rule is justified because most RICO suits involve fraud. Pet. Br. at 16-17. While this may once have been true, Congress in 1995 amended the statute to bar claimants from using RICO to pursue allegations of fraud involving securities, which had been one of the most fertile areas of RICO "fraud" litigation. See 18 U.S.C. § 1964(c) (barring civil RICO claim based upon "any conduct that would have been actionable as fraud in the purchase or sale of securities" unless defendant is criminally convicted for such fraud).

Even assuming that many claimants still try to use RICO to allege fraud of one sort or another, that "fact" does not lead to the conclusion that the "injury-and-pattern discovery" rule should apply. In *Agency Holding*, the Court rejected efforts to argue that the Court should borrow state statutes of limitations governing fraud claims, because many RICO cases allege fraud. As the Court recognized, RICO covers far more predicate crimes than just fraud. Many of them may give rise to rather obvious claims (*e.g.*, murder, kidnaping, robbery, extortion, arson, *etc.*). See 18 U.S.C. § 1961(1). The Court concluded that Congress expected that there would be a single statute of limitations for all civil RICO claims, regardless of the nature of the predicate acts on which the claims rest.

Thus, petitioner's emphasis on fraud is to turn the exception into the rule. Not all acts of fraud are well concealed, and not all RICO suits involve claims of fraud; rather, RICO suits may be based on a number of "obvious" actions such as, *inter alia*, arson or extortion. There is no more reason to craft an accrual rule tied to the concealed fraud than to any other particular predicate act, which petitioner does not claim requires a special accrual rule. Stated bluntly, in those instances where the putative racketeer has done something affirmative to conceal the injury from the plaintiff, the solution may be to apply equitable tolling principles to that particular case, not to create a special accrual rule for all civil RICO suits.

In addition, even focusing on fraud as a RICO predicate, the argument for a specially generous accrual rule does not hold up. The actions underlying a Clayton Act claim are also difficult to discern — indeed, because an illegal business transaction is separated from a legal one by its effect on competition, rarely will the illegality of the action (as opposed to the fact that a competitor was injured) be immediately apparent. Nevertheless, a Clayton Act claim still arises upon the occurrence of the injury, not the plaintiff's discovery of effect on "competition" in general. Cf. *Brunswick Corp.*, 429 U.S. at 488-489.

Nor is there any merit to the petitioner's argument that an "injury-and-pattern discovery" rule is required to prevent violations of the pleading rules of the Federal Rules of Civil Procedure. Pet. Br. at 21-23. As noted above, four years is plenty of time for the diligent counsel to investigate the cause of the plaintiff's injury. If, after such diligence, plaintiff's counsel cannot ascertain that the plaintiff's injury was the result of a RICO violation, the solution is not to plead such a claim. Where one of the equitable tolling doctrines applies, the plaintiff may subsequently amend his pleading to assert the claim, resulting in no prejudice to the plaintiff. In short, this Court should not choose an accrual rule to excuse the dilatory counsel.

True, in a small subset of RICO suits, the second predicate act may occur more than four years (but less than ten years) after the injury-causing first act. In such case, the plaintiff will not be able to assert a RICO claim, but this result neither undermines deterrence nor undercompensates victims of RICO predicate acts. To begin with, the person injured by the first offense has full recourse to applicable state and federal causes of action, which permit full compensation, *plus* punitive damages in most states, *plus* double or treble damages if the defendant's conduct violated a state deceptive trade practices statute. In addition, the victim of the subsequent acts establishing a RICO "pattern" — whether it be the same or a different person — is entitled to recover treble damages under RICO for any injuries caused by those acts. The prospect of

substantial liability for both the first and subsequent acts should adequately deter defendants from engaging in a pattern of racketeering.

Finally, the petitioner retreats to the argument of last resort for civil RICO plaintiffs: that the civil RICO statute should be "liberally construed" to accomplish the Act's remedial and deterrent purposes. Pet. Br. at 14-15. That by-now tired refrain is not an open invitation to accept whatever argument a RICO plaintiff is currently proffering. See Pet. Br. at 14-15. Indeed, that bromide did not prevent the Court from interpreting RICO to embody a rigorous proximate-cause requirement. See *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 265-274 (1992). It did not prevent the Court from holding that the defendant must have participated in the management or operation of the enterprise to be subject to RICO liability. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-184 (1993). It did not prevent the Court from rejecting broad interpretations of the "pattern" requirement. See *H.J. Inc.*, 492 U.S. at 236, 243 n.4 (rejecting notions that "a pattern is established merely by proving two predicate acts" and that RICO applies to short periods of criminal activity that are unlikely to recur in the future).

Most relevantly, this same argument also did not prevent the Court from borrowing the Clayton Act's statute of limitations. See *Agency Holding*, 483 U.S. at 155-156 (rejecting use of the longer statute of limitations for criminal RICO violations). Nor did it dissuade the Court from rejecting the "last predicate act" rule of accrual. *Klehr*, 521 U.S. at 188. Whatever practical value lies in that interpretive directive, it does not justify renouncing long-settled principles underlying statutes of limitations in order to create an accrual rule that licenses lawsuits long after the illegal act has occurred and witnesses' memories have begun to fade.

CONCLUSION

The Court should conclude that the pure Clayton Act accrual-upon-injury rule applies to civil treble-damage claims under RICO.

Respectfully submitted.

GARY E. HUGHES
Vice President and General Counsel
American Council of Life Insurance
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2120

PHILIP ALLEN LACOVARA
(*Counsel of Record*)
EVAN M. TAGER
NORMAN R. WILLIAMS II
Mayer, Brown & Platt
1675 Broadway
New York, N.Y. 10019
(212) 506-2500

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