No. 98-896

In The

Supreme Court of the United States

MARK ROTELLA,

Petitioner,

v.

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

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Does a RICO cause of action accrue upon discovery of the injury alone, or only after the plaintiff has discovered the injury **and** discovered that it results from a pattern of racketeering activity?

LIST OF PARTIES

Petitioner here is Mark Rotella, who was plaintiff in the district court and appellant below.

Respondents, who were defendants in the district court and appellees below, are Angela M. Wood, M.D.; Gary Lee Etter, M.D. P.A.; William M. Pederson, M.D.; Grover Lawlis, M.D.; David R. Baker, M.D.; Larrie W. Arnold, M.D.; Fred L. Griffin, M.D.; Leslie H. Secrest, M.D.; John M. Zimburean, M.D.; Bradford M. Goff, M.D.; Ronald Fleischmann, M.D.; Dallas Psychiatric Associates, a Partnership; David R. Baker, M.D. P.A.; Larrie W. Arnold, M.D. P.A.; Leslie H. Secrest, M.D. P.A.; William M. Pederson, M.D. P.A.; Fred L. Griffin, M.D. P.A.; Ronald Fleischmann, M.D. P.A.; Bradford M. Goff, M.D. P.A.; Grover Lawlis, M.D. P.A.; Angela M. Wood, M.D. P.A.; John M. Zimburean, M.D. P.A.; and Gary Lee Etter, M.D.

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 147 F.3d 438 and reprinted at Pet. App. 1-5. The memorandum opinion and order of the United States District Court for the Northern District of Texas is unreported and reprinted at Pet. App. 6-10.

JURISDICTION

The court of appeals rendered judgment on July 30, 1998, and it denied a timely petition for rehearing on August 28, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

15 U.S.C. § 15b[1] provides in part:

> Any action to enforce any cause of action under . . . this title shall be forever barred unless commenced within four years after the cause of action accrued.

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[1] Although this case involves a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, that statute has no express limitations period. However, this Court has determined that RICO causes of action should be governed by the statute of limitations period found in section 15b of the Clayton Act. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 152-56 (1987).

Federal Rule of Civil Procedure 9(b) provides in part:

In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.

Federal Rule of Civil Procedure 11(b) provides in part:

By presenting to the court . . . a pleading . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, –

* * *

(2) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

STATEMENT

This case arises from a summary judgment ruling that a civil RICO claim was barred by the statute of limitations. Pet. App. 6-10. The court of appeals affirmed. Pet. App. 1-5. The choice of an accrual rule for civil RICO claims determines whether the decisions below are correct.

Mark's hospitalization

In February of 1985, when he was only sixteen years old, Mark Rotella was placed in a psychiatric hospital. J.A. 128. He was confined in the Brookhaven Psychiatric Pavilion for 479 days, against his will, under the mistaken belief that he was admitted for medical reasons. J.A. 128.

During his hospitalization, and even after his eventual release at the age of eighteen, he had no idea that his lengthy in-patient treatment was not attributable to his mental condition, but to an unethical, illegal, and fraudulent money-making scheme between the parent company of the hospital and his treating doctors. J.A. 128-29. The hospital's parent company owners and operators provided financial incentives to doctors who unnecessarily admitted, treated, and retained innocent patients at psychiatric hospitals across the country. J.A. 20-24. This scheme was accomplished, in part, by:

- directly providing "incentive bonuses" to the doctors based on the average daily census of the hospital, J.A. 23;
- entering into personal service contracts with doctors who referred patients to the hospitals, J.A. 21;
- disguising incentive payments to doctors and paying doctors for services they were not expected to perform, J.A. 22; and
- falsifying time and attendance records to disguise inflated compensation based on admissions to the hospital. J.A. 22.

In addition to losing his freedom, Mark was deprived of a number of personal items that were never returned to him, and he was fraudulently billed for hundreds of days in unnecessary treatment. J.A. 20.

Mark first discovers a pattern of racketeering activity

In the spring of 1994, Mark learned, for the first time, that his hospitalization might have been part of an illegal, profit-driven scheme rather than a legitimate response to a supposed mental illness. J.A. 129-30. In April of 1994, Mark was contacted by a former fellow mental patient, who told him that their former doctors were in trouble "for what they had done." J.A. 129-30. Within the next month Mark contacted an attorney who told Mark "that what they had done had not been right." J.A. 130. The suspicions aroused by these conversations were confirmed when Mark learned that, in June of 1994, the parent company of the hospital, Psychiatric Institutes of America (PIA), and Peter Alexis, one of PIA's regional directors for Texas, had pled guilty to federal criminal fraud charges. J.A. 128. The director's factual resume attached to the federal guilty plea of Alexis primarily describes improper relationships and illegal agreements between PIA and doctors at its psychiatric hospitals. *See* J.A. 21-24, 141-44. The factual resume specifically mentions a contract with a professional association of psychiatrists who referred patients to Brookhaven Psychiatric Pavilion. J.A. 24. Mark has alleged that the defendants in this action – Dallas Psychiatric Associates (DPA) and its member doctors – exclusively controlled the medical staff at Brookhaven Psychiatric Pavilion. J.A. 8, 19, 25. The defendant doctors have offered no proof to the contrary.

The doctors sue Mark first; he counter-claims

In August of 1994, shortly after Mark learned that PIA and Alexis had entered guilty pleas implicating his

treating doctors as co-conspirators, the doctors sued Mark. J.A. 129. The suit, filed in Texas state court, accused Mark and his attorney of slandering the doctors by telling people that the doctors had received compensation based on the number of hospital beds filled over the Christmas holidays. *Rotella v. Pederson*, 144 F.3d 892, 894-95 (5th Cir. 1998) ("*Rotella I*"); *see* Resp. App. at 3, 6.

Mark then filed a counter-claim against the doctors, alleging civil rights violations and state-law claims arising out of his unwarranted hospitalization. *See Rotella I*, 144 F.3d at 894-95; *see* Resp. App. at 3-4. After summary judgment was granted on the state-law claims, Mark's counter-claim was severed and removed to federal court. *See* J.A. 86; *see also Rotella I*, 144 F.3d at 894, Resp. App. at 4. Mark then sought leave to amend his complaint to add a civil RICO claim, but in March of 1997, the district court denied leave to amend. *See* J.A. 87. The district court then granted summary judgment for the doctors on all remaining claims. J.A. 87; *see also Rotella I*, 144 F.3d at 894; Resp. App. at 4.

After Mark was denied leave to add a RICO claim to his counter-claim, he filed this suit in July of 1997, J.A. 2, less than four years after he first discovered any facts that would cause him to suspect a pattern of racketeering activity. J.A. 128-29. He alleged that, in furtherance of the doctors' racketeering scheme, he was hospitalized for the sole purpose of exhausting his insurance benefits. J.A. 18-19, 27.

Defendant doctors move for summary judgment on limitations

The defendants all moved for summary judgment based on the statute of limitations. J.A. 88; R. 90-94, 128-32, 238-47. They acknowledged that the discovery rule applies to the accrual of a civil RICO claim, but contended that the discovery of an injury alone triggers accrual. J.A. 89; R. 90-94, 128-32, 238-47. The defendants asserted that Mark's injury was his hospitalization, so that the last date he could have discovered his injury was the last date of his hospitalization. Under this argument, the last date Mark's cause of action could have accrued was upon his release from the hospital in 1986. J.A. 88; R. 90-94, 128-32, 238-47.

Mark's response argued that because the essence of a RICO cause of action is a pattern of racketeering activity, the claim cannot accrue until a plaintiff discovers both an injury and a pattern of RICO activity. J.A. 119-24. Under this theory, Mark's cause of action could not accrue until he first discovered the pattern of activity in 1994. Therefore, because his 1997 lawsuit was filed within four years of accrual, it was timely.

Summary judgment granted and affirmed based on injury discovery rule

The district court granted the defendants' motions for summary judgment based on its application of the injury discovery rule to RICO claims. Pet. App. 1-5. Mark appealed to the Fifth Circuit. After acknowledging a split in the Circuits on this issue, the Fifth Circuit chose to follow the injury discovery rule and affirmed the summary judgment. Pet. App. 6-10.

SUMMARY OF ARGUMENT

A civil RICO claim accrues only when the claimant discovers, or should discover, both an injury and a pattern of RICO activity. By holding that a civil RICO claim accrues solely on discovery of injury, rather than discovery of both injury and pattern, the court of appeals gave insufficient weight to RICO's requirement of a "pattern of racketeering activity."

A. Absent a statutory provision for when a cause of action accrues, this Court should fashion an accrual rule "in the light of the general purposes of the statute," giving "due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967). First, the "heart" of any civil RICO complaint "is the allegation of a pattern of racketeering activity." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987). Only an injury-and-pattern discovery rule vindicates the importance of the "pattern" in RICO jurisprudence. Second, civil RICO violations usually involve fraud. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997). Fraud claims do not accrue when the victim is on notice of a mere injury, but only when the victim is on notice of the fraud. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). The same principle should govern this case.

B. The injury discovery rule applied below is unsound and should be rejected. First, starting the clock upon mere discovery of injury, without discovery of the pattern, would frustrate the remedial purposes of civil RICO by placing an unwarranted barrier in front of RICO victims who seek redress for conduct that is almost always hidden. Second, RICO claimants are required to plead their allegations with particularity. FED. R. CIV. P. 9. A pure injury discovery rule would create a cruel dilemma for claimants who may suspect a pattern, but cannot allege it with the particularity needed to meet this heightened pleading requirement. *See* FED. R. CIV. P. 11 (requiring sanctions for groundless pleadings).

C. Finally, the Clayton Act analogy that this Court used in selecting the four-year limitations period does not work in selecting the proper accrual rule. *See Klehr*, 521 U.S. at 188 ("We do not say that a pure injury accrual rule always applies without modification in the civil RICO setting in the same way that it applies in traditional antitrust cases."). Clayton Act cases do not involve the key element of a "pattern," as required in civil RICO cases. Furthermore, the purposes of the Clayton Act differ from the civil RICO statute, and the Clayton Act's injury-accrual rule is ill-suited to the remedial purposes of civil RICO. Accordingly, the injury-and-pattern rule already followed in several of the circuits should be adopted as a uniform, nationwide rule by this Court.

ARGUMENT

Mark Rotella sued the defendant doctors and health care entities under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). The RICO statute does not include a statute of limitations for private, civil causes of action. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146 (1987). To fill this gap, the Court has borrowed the four-year limitations period from the Clayton Act, 15 U.S.C. § 15b. *Malley-Duff*, 483 U.S. at 152-56.

Yet a statute of limitations itself determines only the length of time in which an action must be commenced; an accrual rule indicates "*when* this period is to commence." 1 C. CORMAN, LIMITATION OF ACTIONS § 6.1 at 369-70 (1991) ("CORMAN"). Although choosing to follow the four-year limitations period contained in the Clayton Act, this Court expressly reserved the question of when the four-year period begins to run. *Malley-Duff*, 483 U.S. at 157. ("[W]e have no occasion to decide the appropriate time of accrual for a RICO claim."). Without an accrual rule, this four-year time period is "limitations-naked." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 201 (1997) (Scalia, J., concurring).

The Courts of Appeals are in conflict on this important question of accrual. Five Circuits – the Third, Sixth, Eighth, Tenth and Eleventh – have held that a RICO claim does not accrue until a plaintiff discovers both an injury and a pattern of RICO activity.[2] Contrary to this "injury-

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[2] *See, e.g., Caproni v. Prudential Sec.*, 15 F.3d 614, 619 (6th Cir. 1994); *Glessner v. Kenny*, 952 F.2d 702, 706 (3rd Cir. 1991); *Granite*

and-pattern discovery" rule, six Circuits – the First, Second, Fourth, Fifth, Seventh, and Ninth – follow "an 'injury discovery' rule, *i.e.*, without the 'pattern.' " *Klehr*, 521 U.S. at 185.[3]

In *Klehr*, this Court expressly left open the question of whether a RICO cause of action accrues upon discovery of an injury alone (the "injury discovery rule"), or only upon discovery of both an injury **and** a pattern of racketeering activity (the "injury-and-pattern discovery rule"). *Id.* at 190-192. This case squarely presents this "major difference among the Circuits," which this Court has characterized as a question "whether a discovery rule includes knowledge about a 'pattern.' " *Id.* at 192.

I. The Accrual of a Civil RICO Action Should Be Governed By the Injury-and-Pattern Discovery Rule.

A. In Choosing An Accrual Rule, The Court Should Focus on the Nature and Purposes of the Cause of Action.

This Court has acknowledged that "accrual" should be "interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to

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Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546, 1553-54 (11th Cir. 1990).

[3] *See Rotella v. Wood*, 147 F.3d 438, 400 (5th Cir. 1998); *Detrick v. Panalpina*, 108 F.3d 529, 540 (4th Cir. 1997); *Grimmett v. Brown*, 75 F.3d 506, 512-13 (9th Cir. 1996); *Bingham v. Zolt*, 66 F.3d 553, 559 (2nd Cir. 1995); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-1465 (7th Cir. 1992); *Rodriguez v. Banco Central*, 917 F.2d 664, 665-66 (1st Cir. 1990).

those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co. v. Koons*, 271 U.S. 58, 62 (1926)). That analysis should be brought to bear on this case, and an appropriate accrual rule should be chosen that is consistent with the purposes and provisions of the RICO statute.

For federal laws without an express statute of limitations, this Court looks for analogies in other laws and picks an appropriate limitations framework. In such a situation, the Court first looks to state law, but it may adopt a federal limitations period as appropriate. *E.g., Malley-Duff*, 483 U.S. at 147-148. When the appropriate analogy is found – either in state law or similar federal statutes – the Court "borrows" it or "absorbs" the most analogous limitations rule for the case at hand. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991); *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985).

However, when an analogous limitations period "would frustrate the policies embraced by the federal enactment," *Lampf, Pleva*, 501 U.S. at 356, or would be "inconsistent with the purposes of the federal act," *id.* at 364 (Scalia, J., concurring), the analogy should be rejected. As shown below, the injury-and-pattern discovery rule is most appropriate for the purpose of civil RICO, because that accrual rule gives effect to the statute's "pattern" element.

B. The Essential Nature of a Civil RICO Cause of Action Is the "Pattern of Racketeering Activity" Consisting of Hidden Predicate Acts.

A RICO violation requires proof of a pattern of racketeering activity. *See* 18 U.S.C. § 1962. This pattern must include at least two acts of racketeering activity, the last of which occurred within ten years after the commission of a prior act of racketeering activity. 18 U.S.C. § 1961(5).

1. A "pattern of racketeering activity" is the heart of any RICO complaint.

This pattern element is what makes RICO unique. Consequently, this Court has said that "the heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Malley-Duff*, 483 U.S. at 154 (emphasis in original); *see also H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (referring to "RICO's key requirement of a pattern of racketeering"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 527 (1985) (Powell, J., dissenting) (referring to a Senate report that "considered the 'concept of pattern [to be] essential to the operation of the statute' ").

Several circuits have relied on this Court's emphasis on the pattern element in choosing an appropriate accrual rule for civil RICO. *See Granite Falls Bank v. Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991) ("The primary source of RICO's unique character is its pattern requirement. . . . The multi-act, pattern requirement distinguishes a RICO action from an antitrust violation."); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546, 1555 (11th Cir. 1990) ("Because a civil RICO plaintiff must prove that his injury is part of a pattern of RICO activity, an injured party must know, or have reason to know, that his injury is part of a pattern before he can be expected to file a civil RICO cause of action."); *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1133 (3rd Cir. 1988) ("Given the Supreme Court's emphasis on the pattern element as the core of the violation, the simple discovery rule's focus on injury is misplaced."). According to these courts, if the pattern element really is the heart of civil RICO, it should be the central consideration in choosing an accrual rule for that cause of action.

2. The pattern consists of predicate acts that are inherently secretive.

The predicate acts for a civil RICO violation are, by definition, criminal offenses.[4] As a result, the pattern of racketeering activity is invariably concealed by complex, secretive schemes that are calculated to hide the criminal enterprise from the persons or businesses they victimize.

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[4] *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to include, *inter alia*, criminal offenses such as bribery, arson, extortion, mail fraud, wire fraud, interstate transportation of stolen property, embezzlement, bankruptcy fraud, and threats to commit such criminal acts); *see also Sedima*, 473 U.S. at 481-82 ("RICO takes aim at 'racketeering activity,' which it defines 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 or securities fraud or drug-related activities that is 'punishable' under federal law."); *id.* at 488 (noting that racketeering activity " 'must be an act in itself subject to criminal sanction' ") (quoting S. Rep. No. 91-617, p. 158 (1969)).

Indeed, this Court has previously acknowledged that fraud is the most common predicate act in civil RICO violations. *See Klehr*, 521 U.S. at 191. As one commentator has explained, "Unlike the Clayton Act, which targets harm to competition induced by force rather than by fraud, racketeering injuries by definition include harms from fraud (securities, wire or mail fraud) and harms resulting from force (e.g., extortion)." MARY S. HUMES, *RICO and a Uniform Rule of Accrual*, 99 YALE L.J. 1399, 1407 (1990). Thus, the defining characteristic of civil RICO violations is that the nature of the illegal conduct – the pattern of racketeering activity – remains hidden.

C. Because the Heart of Civil RICO Is a Hidden Pattern of Racketeering Activity, the Cause of Action Should Not Accrue Until the Plaintiff Discovers the Pattern.

Recognizing an inquiry-and-pattern discovery rule for civil RICO would allow "the cause of action to accrue when the litigant first knows or with due diligence should know facts that will form the basis for an action." 2 CORMAN § 11.1.1 at 134. Here, consistent with the purposes of civil RICO, a plaintiff cannot sue until he knows of the "pattern of racketeering."

1. The remedial purposes of civil RICO are best served by allowing for discovery of the pattern element.

In enacting the RICO statute, Congress directed that the RICO statute "shall be liberally construed to effectuate its remedial purpose." Pub. L. 91-452, § 904(a), 84 Stat. 947. Mindful of that statutory admonition, this Court has declared that "RICO is to be read broadly." *Sedima*, 473 U.S. at 497. Giving RICO broad reading and liberal construction enhances the statute's purpose as an "aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Id.* at 498. One of the primary new methods for fighting crime in the RICO statute was the inclusion of a private cause of action in section 1964(c), which was envisioned as a "major new tool . . . in part designed to fill prosecutorial gaps." *Id.* at 488, 493. For that reason, this Court has concluded, "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* at 498. To be consistent with this purpose, this Court should choose an accrual rule that encourages and enables private efforts to enforce the statutorily prohibited conduct, rather than creating a shield for the racketeer. Any accrual rule chosen should be fashioned to diminish the RICO defendant's powerful incentive to conceal.

The injury-and-pattern discovery rule best accomplishes the remedial purposes of civil RICO. Discovery of the "pattern" is a prerequisite to accrual of a civil RICO claim because it is the only means by which victims of racketeering may discover the nature of their injury. Absent knowledge of the pattern, victims of racketeering cannot distinguish a RICO injury from any other injury. As this Court recognized in *Sedima*, "the compensable injury necessarily is the harm caused by predicate acts *sufficiently related to constitute a pattern*, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Sedima*, 473 U.S.

at 497 (emphasis added). Because it is a "pattern of racketeering activity" that is the distinguishing feature of a civil RICO claim, an innocent victim of a civil RICO violation cannot be held to notice of a civil RICO claim until he discovers, or should discover, the pattern.

2. Because most patterns of racketeering activity involve fraud, the discovery rule for fraud claims should govern accrual of a civil RICO claim.

Fraud is one of the underlying predicate acts in the great majority of RICO actions. *See Klehr*, 521 U.S. at 191 ("a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims.") As of 1985, approximately 90% of civil RICO cases resulting in a published decision involved mail, wire, or securities fraud. *Id.* Therefore, this Court should look to the fraud discovery rule as an analogy for fashioning a civil RICO accrual rule.

For over a century, this Court has followed the rule that a fraud cause of action does not accrue until the victim of the fraud discovers, or in the exercise of reasonable diligence should have discovered, the fraud. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Exploration Co. v. United States*, 247 U.S. 435, 447-49 (1918); *Avery v. Cleary*, 132 U.S. 604, 609-10 (1890); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874).

When fraud is present, courts must be diligent in protecting plaintiffs, as Justice Story said:

> It is certainly true that length of time is no bar to a trust clearly established; and, in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief.

McIntyre v. Pryor, 173 U.S. 38, 55 (1899) (quoting *Prevost v. Gratz*, 19 U.S. (6 Wheat.) 481 (1821)). Because fraud is present in most civil RICO complaints, a mere lapse of time should not "repel relief."

If a fraud action does not accrue until the victim discovers its essence – the fraudulent act – then a civil RICO cause of action should not accrue until the victim discovers, not only the injury, but the essence of the racketeering transaction – the pattern of racketeering activity. Thus, the most comparable accrual rule for fraud-based RICO is the injury-and-pattern discovery rule.

D. The Injury Discovery Accrual Rule Would Frustrate the Purposes of Civil RICO and Ignore the Practicalities of Litigation.

In *Malley-Duff*, this Court examined "the federal policies at stake and the practicalities of litigation" in choosing the four-year Clayton Act statute of limitations. *Id.*, 483 U.S. at 153. Considering civil RICO's purpose "to supplement old remedies and develop new methods for fighting crime," *Sedima*, 473 U.S. at 498, this Court has previously rejected the application of strict antitrust requirements to civil RICO. *Id.* Similarly here, the Court

should examine the remedial purposes of civil RICO, the facts in dispute in this case, and the practicalities of litigation presented by federal pleading requirements.

1. A discovery accrual rule focused on injury alone would frustrate the remedial purposes of civil RICO and produce unjust results.

In a variety of contexts, this Court has adopted rules that prevent unjustly harsh results of strict accrual. In addition to the accrual rule for fraud discussed in *Holmberg*, the Court has endorsed other ameliorative rules. For example, in occupational-disease cases, the plaintiff's "blameless ignorance" of a latent condition will not defeat a claim. *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949). Similarly, federal statutes of limitation are subject to waiver, estoppel, and equitable tolling to prevent unduly harsh outcomes. *See, e.g., Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) (EEOC claims subject to waiver, estoppel and equitable tolling); *Hardin v. Straub*, 490 U.S. 536, 539-540 (1989) (legal disability tolls limitations in a prisoner's § 1983 civil rights claim). The principles underlying those cases also should apply here.

As this case demonstrates, an accrual rule that does not require discovery of a pattern would allow "blameless ignorance" to defeat a claim. If Mark Rotella's mental condition truly justified commitment to a mental hospital for 479 days, then his confinement and its attendant expense – although financially burdensome – would be justifiable. They certainly would not be grounds for RICO liability. Yet that same confinement and same expense

became a RICO violation because, unknown to Mark and other patients at the time, their lengthy confinements related only to the size of their health insurance policies – not to their mental health. Without the underlying pattern of racketeering activity, the same conduct is not grounds for civil RICO liability.

Mere awareness of confinement alone cannot trigger inquiry notice. Such a holding would ignore the practical realities of this case. Mark Rotella had no reason to suspect that he had even suffered a RICO injury. Although he may have been distressed by his confinement, he was an intimidated teen-aged boy, told that he needed to be institutionalized by a chorus of professionals. Mark had confidence that his doctors were in a superior position to objectively evaluate his mental health-care needs.[5]

In fact, if Mark had announced that his doctors were fraudulently conspiring to institutionalize him just to get his parents' money, he undoubtedly would have been told that such a paranoid fantasy was a symptom of his supposed "borderline personality disorder." To charge him with any knowledge that he had suffered a RICO

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[5] As explained by a leading treatise: "It is obviously unreasonable to charge the plaintiff with failure to search for the missing element of the cause of action if such element would not have been revealed by such search. The element is unavailable because either the information is intentionally concealed or it has not reached a level of certainty that will permit the plaintiff to form a true belief as to his or her cause of action. Nor should the plaintiff be faulted for failure to make an earlier investigation when the delay results from justifiable reliance on acts or statements of the defendant, including assurances made by professionals." 2 CORMAN § 11.1.6 at 164-165.

injury – and was therefore on inquiry notice to investigate a claim – simply strains credulity.

Additionally, even if Mark had the wherewithal to believe that he was the victim of a fraudulent scheme that needed to be investigated, it is highly doubtful that he would have had the resources or the ability to uncover an elaborate nation-wide fraud scheme. The federal government was not able to discover enough evidence to obtain a guilty plea to federal criminal charges until 1994. J.A. 128. Ironically, the doctors who are defendants in this case have filed their own RICO action arising out of this same scheme. And though they allege that the RICO scheme began in 1985, they did not have sufficient information to file suit until 1995. *See* J.A. 133. When these sophisticated professionals who appear to have been on the inside of the scheme did not know enough to sue earlier, they can hardly demand a higher standard from Mark.

As a practical matter, the consequence of the injury discovery rule is that people like Mark Rotella will never be able to file timely RICO actions. If this Court adopts that rule, it will send an unmistakable message to would-be RICO violators: If they can conceal their pattern of misconduct for four years, they can avoid civil liability. Such a rule would be antithetical to the statutory mandate that RICO should be "liberally construed to effectuate its remedial purpose," would ignore the importance of the "pattern" element as the distinguishing feature of civil RICO, and would turn a blind eye to the practical reality that the injury discovery rule cuts off most causes of action. Given these considerations, it is difficult to imagine how the injury discovery rule could be consistent

with the "general purposes of the statute and its other provisions, with due regard to those practical ends which are to be served by any limitation of time within which an action must be brought." *Crown Coat Front*, 386 U.S. at 517. The injury discovery rule should be rejected.

2. Under the injury discovery rule, RICO claimants would not be able to comply with federal pleading requirements.

Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." *See* FED. R. CIV. P. 9(b). This language has been interpreted to require the specific pleading of "matters such as time, place, and contents of the false representations, as well as the identity of the person making the representation and what he obtained thereby. . . . A pleading that simply avers the technical elements of fraud does not have sufficient informational content to satisfy the rule's requirement." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1297 (1990).

Although this Court has not addressed the applicability of Rule 9(b) to civil RICO actions, most of the circuit courts of appeal have held that Rule 9(b) applies to civil RICO complaints, particularly when one of the predicate acts establishing the pattern of racketeering activity is a form of fraud. *See Emery v. American Gen. Fin., Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992); *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d

397, 405 (9th Cir. 1991); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989); *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 673 (3rd Cir. 1988); *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 289 (1st Cir. 1987); *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987). In fact, most circuits have been particularly demanding when applying the rule to RICO cases. WRIGHT & MILLER, *supra* at § 1297.

Moreover, when pleading a pattern of racketeering activity with particularity, RICO plaintiffs also must be mindful of this Court's admonition that a pattern of racketeering activity must involve more than just the minimum statutory requirement of two predicate acts within ten years of each other. *See H.J. Inc.*, 492 U.S. at 237. A pattern of racketeering activity must also involve related predicate acts, with a threat of continuity. *Id.* at 239.

Finally, attorneys pleading a RICO claim not only must plead a pattern of racketeering with particularity, relatedness, and continuity, but they also must certify, upon penalty of sanctions, that the pattern of racketeering activity that they are alleging either has evidentiary support, or is likely to have evidentiary support after an opportunity for further investigation or discovery. *See* FED. R. CIV. P. 11(b).

By themselves, these burdens facing a RICO plaintiff are not unfairly onerous. RICO allegations are a serious matter, and the law should not encourage or allow plaintiffs to plead a RICO case on a whim or vague suspicion. However, these burdens would place RICO plaintiffs in an impossible situation if an injury discovery rule were

superimposed over these other requirements. If the plaintiff knows an injury has occurred, but does not, and should not know of a pattern of racketeering activity, that plaintiff faces a cruel dilemma: the plaintiff must either file a frivolous RICO claim, or forego it forever. If the RICO filing deadline is approaching, and a pattern has not been discovered, the plaintiff can file vague, general allegations, and violate Rule 9(b). Or the claimant's attorney can make specific allegations without knowledge of evidence to support them, and violate Rule 11(b). If attorneys choose to scrupulously adhere to Rule 9(b) and Rule 11(b), they cannot file an action at all, and the injury discovery rule will bar the claim. This Court should not adopt a policy that will leave some plaintiffs in a position of having to choose between violating the federal rules or losing their cause of action to the statute of limitations. The RICO accrual rule should be tailored to the pleading requirements of Rule 9(b).

E. The Clayton Act's Injury-Accrual Rule Breaks Down When Analogized to Civil RICO Claims.

In *Malley-Duff*, this Court said "the limitations *period* of the Clayton Act is a significantly more appropriate statute of limitations [for civil RICO] than any state limitations period." 483 U.S. at 153 (emphasis added). But the Clayton Act's statute of limitations contains no express provisions regarding an accrual rule, *see* 15 U.S.C. § 15(a), and the Court did not adopt the accrual rule applied in Clayton Act cases. To the contrary, the Court has since noted that the Clayton Act accrual rule may not be appropriate for civil RICO cases, recognizing "that the

Clayton Act's express statute of limitations does not necessarily provide all the answers." *Klehr*, 521 U.S. at 193.

When the Court looks to an analogous limitations rule in federal law, it does so "only when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983). The Court does not borrow a federal limitations scheme when one element of the scheme "would defeat the goals of the federal statute at issue." *Klehr*, 521 U.S. at 200 (Scalia, J. concurring) (citing *Hardin v. Straub*, 490 U.S. 536, 539 (1989)). Here, adopting an injury accrual rule would be inconsistent with civil RICO.

1. The "pattern" element of civil RICO is not present in the Clayton Act.

The Clayton Act does not provide an appropriate model for a civil RICO accrual rule because the statutes serve different purposes. Although the statutory language of the Clayton Act and the RICO statute are almost identical, *see Malley-Duff*, 483 U.S. at 150-51, the nature of the wrongful acts that create a private cause of action under the two statutes is quite different. They are only alike in their generality and multiplicity. *See Malley-Duff*, 483 U.S. at 131.

The Clayton Act treats each separate act of wrongdoing as a discrete basis for new and separate liability.

Every time a defendant commits an act that injures a plaintiff's business, a new cause of action accrues, and a new statute of limitations starts running with each separate act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *see also Klehr*, 521 U.S. at 188.

In contrast, under civil RICO no single act is sufficient to constitute an actionable event. *Id.* RICO requires a pattern of racketeering, 18 U.S.C. § 1962; a pattern of racketeering requires at least two predicate acts, 18 U.S.C. § 1961(5); and those acts must have the qualities of relatedness and continuity. *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229, 236-237 (1989). As explained previously, the pattern element is the heart of a civil RICO complaint and an appropriate accrual rule must account for discovery of the pattern. *See* pages 1-2 to 1-7, above.

The importance of the "pattern" element in civil RICO points out the fallacy of strictly adhering to the Clayton Act analogy for civil RICO. As *Klehr* presaged, "We do not say that a pure injury accrual rule always applies without modification in the civil RICO setting in the same way it applies in traditional antitrust cases. For example, civil RICO requires not just a single act, but rather a 'pattern' of acts." *Klehr*, 521 U.S. at 188.

2. The Clayton Act's focus on "antitrust injury" is inappropriate for civil RICO.

In previous cases, this Court has considered the substantive policies of civil RICO and the Clayton Act. Its consideration of statutory purposes has led to a rejection of antitrust requirements that are misplaced when applied to the civil RICO context. Although antitrust

requirements may serve the Clayton Act's purposes, they should be rejected if they do not work for civil RICO.

Consider the analogy of "antitrust injury" that was misapplied by the Second Circuit to civil RICO as a "racketeering injury" standing requirement. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (reversing 741 F.2d 482, 496 (2nd Cir. 1984)). The Court determined that the antitrust injury analogy actually interfered with the purposes of civil RICO. To effectuate the broad crime-fighting purposes of civil RICO, Congress was trying to avoid "inappropriate and unnecessary obstacles in the way of . . . a private litigant [who] would have to contend with a body of precedent – appropriate in a purely antitrust context – setting strict requirements. . . . ' " *Id.* at 489 (quoting from 115 CONG. REC. 6995 (1969)). "In borrowing its 'racketeering injury' requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid [in enacting civil RICO]." *Id.* at 489-90.

The *Sedima* Court's rejection of the antitrust injury analogy for civil RICO illustrates how an important feature of one statute cannot be borrowed uncritically for the other. The critical feature of antitrust laws is that they were "enacted for the purpose of protecting competition, not competitors." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). To further this purpose, "Plaintiffs must prove *antitrust* injury, which is to say (1) injury of the type the antitrust laws were intended to prevent and (2) that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977) (emphasis in original); 2 P.A. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 362a at 210

(Rev. ed. 1995) ("Areeda"). In accordance with the purpose of the antitrust laws, the antitrust injury requirement "obligates a plaintiff to demonstrate, as a threshold matter, 'that the challenged action has had an *actual* adverse effect on competition as a whole.' " *Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2nd Cir. 1998) (quoting *Capital Imaging Assocs. v. Mohawk Valley Med. Assoc.*, 996 F.2d 537, 543 (2nd Cir. 1993)). This limitation must be imposed "if the competition-based purposes of the antitrust laws are not to be lost sight of altogether." W. HOLMES, ANTITRUST LAW HANDBOOK § 8.03[1] at 790 (West ed. 1999).

Consistent with this focus on antitrust injury and the preservation of competition, the Clayton Act's accrual rule is injury-based. As a general rule, "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). In surveying the cases, the leading commentators agree that for antitrust purposes, "[t]he point at which injury first occurs is usually fairly clear." 2 AREEDA ¶ 338b at 145. Thus, for antitrust law, injury-focused accrual comports with the purpose of protecting competition.

But for civil RICO, an injury accrual rule would be just another "inappropriate and unnecessary obstacle[ ] in the way of . . . a private litigant." *Sedima*, 473 U.S. at 489. More significantly, because it ignores the pattern element, an injury accrual rule would miss the "heart of any RICO complaint." *Malley-Duff*, 483 U.S. at 154. Unlike the Clayton Act – where injury and competition are the focus – civil RICO concentrates the power of private

litigants against criminals who engage in "a pattern of racketeering activity." *Sedima*, 473 U.S. at 498. Therefore, rather than an injury-oriented rule – appropriate in a purely antitrust context – it makes sense to tie the civil RICO accrual rule to the statute's pattern requirement. Only the injury-and-pattern discovery rule will vindicate RICO's important statutory purposes.

II. If the Injury-and-Pattern Discovery Rule Is Applied to this Case, the Summary Judgment Must Be Reversed.

The defendants' motions for summary judgement do not even assert that Mark Rotella knew or should have known about a pattern of racketeering activity more than four years before he filed suit. Instead, the motions are entirely directed to when Mark knew or should have known of his hospital confinement. *See* J.A. 88-89; R. 92-93, 130-31, 240-41. All of the defendants' summary judgment proof goes to the last date that each of the defendants treated Mark, or the date that he was discharged from Brookhaven Psychiatric Pavilion. *See* J.A. 99, 101, 103, 105, 106, 109, 111, 112, 114. That proof is silent about when Mark knew or should have known about a pattern of racketeering activity.

The only summary judgment evidence that addresses Mark's knowledge about a pattern of racketeering activity is the Declaration of Mark Rotella, which was attached to his response to the summary judgment motions. That declaration establishes the following:

- When Mark was confined at Brookhaven he was a sixteen-, seventeen-, and eighteen-year-old adolescent;

- While at Brookhaven, Mark had no information that would put him on inquiry notice that his treating doctors or the Brookhaven administrators were engaged in a pattern of racketeering activity;

- The first time that Mark learned any information that put him on notice that his treating doctors or the Brookhaven administrators might be engaged in a pattern of racketeering activity was in April, May or June of 1994; and

- In June of 1994, Mark learned that Brookhaven's parent company and one of its officers had pled guilty to fraud charges involving the operation of Brookhaven.

J.A. 128-30.

The defendants have not controverted Mark's testimony establishing that he first became aware of a pattern of racketeering activity in 1994. Suit was filed on July 9, 1997. J.A. 2. Accordingly, Mark filed a RICO complaint within four years of his discovery of a pattern of racketeering activity. If this Court adopts the injury-and-pattern discovery rule and applies it to the summary judgment evidence in this case, summary judgment should not have been granted, and the judgment below should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed, and the cause should be remanded for further proceedings.

Respectfully submitted,

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