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 RESPONDENTS

Filed July 13, 1999

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES & RULES

TABLE OF AUTHORITIES – Continued

STATUTES INVOLVED

The pertinent provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994 and Supp. III 1997) ("RICO"), are reprinted in the attached appendix.

STATEMENT OF THE CASE

Petitioner Mark Rotella correctly states that this case is an appeal from a summary judgment based on the affirmative defense of limitations to his civil RICO claim. The Fifth Circuit Court of Appeals affirmed. *Rotella v. Wood*, 147 F.3d 438 (5th Cir. 1998). Rotella's recitation of the facts, however, is misleading in that it fails to distinguish between "facts" he merely alleged in his complaint and facts that have some support in the summary judgment evidence. Rotella also fails to acknowledge that Respondents denied all of the material allegations of his complaint. Respondents offer this Statement to clarify the summary judgment record.

The undisputed facts

Only a handful of material facts are truly undisputed. Mark Rotella was born on May 18, 1968. J.A. 27, 88, 118. He was admitted to Brookhaven Psychiatric Pavilion in February 1985 at the age of sixteen and diagnosed as suffering from major depression – a diagnosis that Rotella does not dispute. J.A. 6-7, 40, 56, 71, 128 at ¶ 2. Rotella was discharged from Brookhaven on June 16, 1986. J.A. 7,

88, 118. He did not file his complaint in this case until July 9, 1997, over eleven years later. J.A. 1, 2, 88, 118.

The allegations

Almost all of the "facts" supporting Rotella's civil RICO claim against Respondents amount to mere allegations in his complaint, which Respondents have denied in their answers. Given that summary judgment was based solely on limitations, the record is virtually devoid of evidence that would support or refute Rotella's claims. Rotella alleges that, medically speaking, he should never have been committed to Brookhaven or recommended for in-patient treatment in any psychiatric hospital. J.A. 7 at ¶ 6. He alleges that he was admitted to Brookhaven under pressure from at least one of the Respondents, and he alleges a litany of as-yet-unproved instances of inappropriate psychiatric treatment while he was at Brookhaven. J.A. 7-18. Although he sued no fewer than thirteen individuals, he seldom attempts to distinguish among them in his complaint, and frequently resorts to general allegations that "defendants" used this or that inappropriate treatment. *E.g.*, J.A. 12-13 at ¶ 15. Respondents vigorously deny that any inappropriate treatment occurred. J.A. 38, 54, 69.

To support his claim under civil RICO, Rotella alleges that "defendants" arranged for his admission to Brookhaven (although he concedes he applied for voluntary admission, J.A. 16 n.2) and prolonged his stay at Brookhaven in order to maximize their own profits. J.A. 18-19 at ¶ 25. He further alleges that most of the Respondents were parties to an "improper and illegal" arrangement that began in or before 1984 and continued through at least June 1991, the purpose of which was to profit through a scheme of kickbacks for patient referrals and admissions. J.A. 21-24 at ¶ 29. Rotella bases these allegations on criminal guilty pleas entered by Psychiatric Institutes of America ("PIA") and an individual named Peter Alexis – neither of whom is a defendant in this case. J.A. 21-24 at ¶ 29. He claims that there was a "conspiracy" between Respondents and PIA, manifested in part by the execution of a "Services Agreement" between PIA and Respondent Dallas Psychiatric Associates. J.A. 25-26 at ¶ 31. He concedes, however, that this Agreement was entered into in 1990, four years after his discharge. J.A. 25 at ¶ 31. The essence of Rotella's RICO claim is that Respondents "attempted to secure profits by hospitalizing patients, such as [Rotella], who did not require acute inpatient hospitalization, in order to access their insurance benefits," in violation of the Texas commercial bribery statute[1] and an interstate racketeering statute.[2] J.A. 27 at ¶ 36; *see also* Pet. Br. at 5, J.A. 29 at ¶ 40, 31 at ¶ 42, 32 at ¶ 44, 35 at ¶ 47.

Respondents denied and continue to deny all allegations of wrongdoing. J.A. 38, 54, 69. For purposes of their summary judgment based on limitations, however, Respondents did not file evidence controverting Rotella's allegations of wrongdoing because it was irrelevant to their limitations defense. The most that can be said about

[1] TEX. PENAL CODE ANN. § 32.43 (Vernon 1994).

[2] 18 U.S.C. § 1952 (1994).

Rotella's allegations is that, assuming *arguendo* that they are true, they establish that all elements of his civil RICO claim existed before his discharge from Brookhaven on June 16, 1986. *See, e.g.*, J.A. 20 at ¶ 29 (alleging that Respondents entered into the "improper and illegal" arrangement for the medical staffing of Brookhaven no later than 1984, and continued the arrangement through at least June 1991). Rotella does not allege that any acts constituting an element of his civil RICO claim injured him after his discharge on June 16, 1986.

The evidence regarding Rotella's knowledge

Most Respondents filed summary judgment affidavits stating that they did not treat Rotella after June 16, 1986. *E.g.*, J.A. 99 at ¶ 4, 103 at ¶ 4, 105 at ¶ 4, 106 at ¶ 4, 109 at ¶ 4, 111 at ¶ 4, 112 at ¶ 4, 114 at ¶ 4. Rotella filed a counter-affidavit in an effort to create a fact issue about when his claim accrued. J.A. 128-31. Rotella's affidavit asserts that he "was held against his will at Brookhaven" and "knew [he] did not want to be at Brookhaven." J.A. 128 at ¶ 2, 129 at ¶ 4. He also acknowledges that he "knew a lot of money was paid to the doctors," although he denies knowing or suspecting that "fraud [was] involved" until 1994 when he heard about the criminal convictions of PIA and Alexis. J.A. 129 at ¶ 4.

Again assuming *arguendo* the truth of Rotella's allegations, it is plain that he was aware of his alleged injuries at the time of his treatment at Brookhaven. For instance, he alleges that he was "physically restrained intermittently" throughout his stay at Brookhaven, J.A. 10 at ¶ 12, that he was subjected to punitive treatment such as "chair

therapy," J.A. 14 at ¶ 17, and that he was "pressured and intimidated" by some of the Respondents into withdrawing requests that he be allowed to leave the facility, J.A. 17 at ¶ 22. In an obvious attempt to meet the civil RICO requirement of an injury to business or property, Rotella also alleges that Respondents took "[m]any personal items" during his stay at Brookhaven and never returned them. J.A. 20 at ¶ 28.

To avoid the limitations defense, Rotella made the conclusory statement that he "did not learn until the summer of 1994 any facts which would have led [him] to investigate whether or not the Defendants' treatment . . . was part of an organized criminal endeavor or a pattern of racketeering activity." J.A. 128 at ¶ 3. He explained that it was not until he talked to a lawyer in April or May 1994 that he began to "realize for the first time that [he] was not wrong in [his] anger against Brookhaven." J.A. 130 at ¶ 10. Significantly, there is no testimony that he did not discover his alleged injuries or the identities of the alleged perpetrators of those injuries until 1994. As the Fifth Circuit stated in an appeal from Rotella's first suit arising from the same facts, "Rotella knew what happened during his hospitalization, who was involved in his treatment and how it impacted him at the time of his release. Therefore, he was on notice of his injury on the date of his release, at the latest." *Rotella v. Pederson*, 144 F.3d 892, 896 (5th Cir. 1998).

Rotella initially pleaded the tolling doctrines of fraudulent concealment and duress. J.A. 27-28 at ¶ 37. He abandoned these tolling doctrines, however, by not raising them in his response to the summary judgment motions and by failing to brief them in the Court of Appeals and this Court. *See* J.A. 117-25.

Procedural posture of this case

Rotella has accurately stated the procedural posture of this case. Respondents originally sued Rotella in Texas state court for slander in 1994. In response, Rotella asserted federal and state-law counterclaims for tort and civil rights violations. The case was removed after the state-law claims were disposed of on summary judgment. Two years after filing his claims, facing a limitations summary judgment motion on his civil rights allegations, Rotella sought to amend his pleadings to add a civil RICO claim. The district court denied leave. Rotella then filed this separate action asserting a civil RICO claim in July 1997, eleven years after his discharge from Brookhaven.[3]

SUMMARY OF ARGUMENT

This Court should adopt a uniform accrual rule for civil RICO under which the four-year statute of limitations begins to run when a plaintiff discovers or should have discovered that he has been injured. RICO's roots in the Clayton Act and its civil remedy's focus on injury support the adoption of a uniform injury-based accrual rule. The "injury discovery rule" comports with the traditional federal accrual rule because limitations begins to run only when all elements of a civil RICO claim exist

[3] The district court granted summary judgment against Rotella in the original lawsuit, and the Fifth Circuit affirmed. *See Rotella v. Pederson*, 144 F.3d 892 (5th Cir. 1998).

and the plaintiff discovers or should have discovered his injury. The rule is sufficiently flexible to account for the many types of racketeering activity actionable under RICO. The injury discovery accrual rule, combined with equitable tolling principles, provides an appropriate balance between promoting RICO's purpose and advancing the policies of repose and certitude that underlie statutes of limitations.

The "injury and pattern discovery" accrual rule advanced by Rotella, on the other hand, effectively delays accrual of a civil RICO claim until a plaintiff knows each element of his cause of action. An injured plaintiff could sit on his rights, without exercising diligence, and wait until he discovers the existence of a "pattern of racketeering activity" before the four-year limitations period would begin. This could also dramatically extend the statute of limitations from four years to fourteen years, or more, because of the ten-year time period in which a pattern of racketeering activity may develop. Moreover, the rule would be unwieldy in RICO cases because its foundation – a pattern of racketeering activity – is nebulous. The resulting accrual date would be difficult to determine, and might vary depending upon the circuit in which the claim is brought.

Because Rotella's civil RICO claim is barred by limitations under the injury discovery rule, this Court should affirm.

ARGUMENT

The most appropriate accrual rule for civil RICO is the rule traditionally applied to federal civil claims. Under this rule the limitations period accrues when (1) all elements of a civil RICO claim exist and (2) the plaintiff discovers or should have discovered his injury. The traditional federal accrual rule is synonymous with the injury discovery rule and is compelled by the language of civil RICO itself. It is also consistent with the injury-based accrual rule of the Clayton Act and fosters the fundamental principles of fairness by requiring plaintiffs to exercise diligence in discovering their injury while serving the societal interest of repose.

Presently, two civil RICO accrual approaches predominate in the circuit courts. The majority "injury discovery" rule – applied by the First, Second, Fourth, Fifth, Seventh, Ninth, and D.C. Circuits – begins when a plaintiff knows or should have known of the injury that underlies his cause of action.[4] The more expansive "injury and pattern discovery" rule has been used by a minority of the circuits – the Sixth, Eighth, Tenth, and Eleventh Circuits – whereby a plaintiff must discover the existence of

[4] *See Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-666 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *Rotella v. Wood*, 147 F.3d 438 (1998); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-1465 (7th Cir. 1992); *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996), *cert. dismissed as improvidently granted*, 519 U.S. 233 (1997); *see also Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-1490 (D.C. Cir. 1989) (assuming, but not deciding, that injury discovery rule applies).

a pattern of racketeering activity in addition to his injury.[5] The injury discovery rule, as opposed to the injury and pattern discovery rule, should be adopted as the uniform accrual rule for civil RICO claims.

A. THE RICO STATUTE COMPELS AN ACCRUAL RULE THAT FOCUSES ON THE PLAINTIFF'S INJURY, NOT THE PATTERN OF RACKETEERING ACTIVITY.

The plain language of civil RICO's enforcement provision supports the use of the injury discovery rule in determining when a civil RICO claim accrues. Under RICO, a person commits a crime by, among other things, conducting an enterprise through a pattern of racketeering activity. § 1962(c). The phrase "pattern of racketeering activity" is broadly defined to require at least two predicate acts of "racketeering activity," the most recent of which must have occurred within ten years of an earlier predicate act. § 1961(5). Therefore, a violation requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 496-97 (1985). If a person violates section 1962, RICO imposes severe criminal penalties and forfeiture of illegal proceeds. § 1963.

[5] *Caproni v. Prudential Sec., Inc.*, 15 F.3d 614, 619-620 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990); *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546, 1554-1555 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

In addition to its criminal provisions, RICO also provides a unique civil remedy allowing plaintiffs a private right of action to recover treble damages, costs, and attorneys' fees against a defendant who violates section 1962. But a plaintiff alleging a violation of civil RICO must meet an additional requirement: He must show he was "injured in his business or property by reason of a violation of section 1962." § 1964(c). Accordingly, a civil RICO plaintiff must establish "not only that the acts of defendant constitute a RICO violation, but also that plaintiff suffered injury as a result of that violation." *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988); *accord Sedima*, 473 U.S. at 496-497. "Until such injury occurs, there is no right to sue for damages under § 1964(c), and until there is a right to sue under § 1964(c), a civil RICO action cannot be held to have accrued." *Bankers Trust*, 859 F.2d at 1102. Thus, the language of RICO itself compels an accrual rule that focuses on the plaintiff's injury, not on a pattern of racketeering activity.

B. THE TRADITIONAL FEDERAL ACCRUAL RULE REQUIRES THAT ALL ELEMENTS OF A CLAIM EXIST AND INCORPORATES AN INJURY DISCOVERY COMPONENT.

The traditional federal accrual rule combines the injury requirement of civil RICO with the basic requirement that all elements of a claim must exist before limitations can begin. This rule embraces the most frequently used method of determining the starting point for limitations. It is well-settled that statutes of limitation do not begin to run until there is "a complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *see also*

United States v. Lindsay, 346 U.S. 568, 569 (1954) ("a right accrues when it comes into existence"); *Clark v. Iowa City*, 87 U.S. (20 Wall) 583, 589 (1874) ("[a]ll statutes of limitations begin to run when the right of action is complete"); 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS, § 6.1 at 370 (1991) ("CORMAN") ("Frequently, legislation stating that commencement [of limitations] occurs when the plaintiff's cause of action accrues is interpreted by courts to mean that moment when the plaintiff has a complete and present cause of action."). Thus, all elements of civil RICO – conduct, enterprise, pattern, and racketeering activity resulting in injury to business or property – must exist before a civil RICO claim accrues.

In applying this basic rule of accrual, courts have fashioned an equitable discovery component as part of the traditional federal accrual rule. This discovery rule – wherein limitations starts to run from the time the plaintiff discovers or reasonably should have discovered the injury – generally "is read into every federal statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (claim for equitable relief under the Federal Farm Loan Act); *see also United States v. Mottaz*, 476 U.S. 834, 842-43 (1986) (claim under Quiet Title Act); *United States v. Kubrick*, 444 U.S. 111, 120-22 & n.7 (1979) (claim under Federal Tort Claims Act); *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (claim under Federal Employer's Liability Act); *Exploration Co. v. United States*, 247 U.S. 437, 447 (1918) (bankruptcy fraud claim). Courts and commentators have long recognized the prevalence of a discovery accrual rule "when the statute does not call for a different rule." *Klehr v. A.O. Smith*, 521 U.S. 179, 191 (1997) (citing *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342

(D.C.Cir. 1991) and 1 CORMAN § 6.5.5.1 at 449); *see also* Mary S. Humes, *RICO & A Uniform Rule of Accrual*, 99 YALE L.J. 1399, 1406 (1990) (noting "the near universal application of the discovery rule of accrual to any Federal cause of action"). Indeed, every circuit court of appeals has applied some form of discovery rule to civil RICO claims.

The discovery component of the federal accrual rule is tied to discovery of injury, not to discovery of each of the elements of a claim. It is well-settled that existence of the elements of a claim, plus knowledge of the injury, triggers limitations. As this Court recognized in *United States v. Kubrick*, 444 U.S. 111, 123-124 (1979), accrual of a claim does not await a plaintiff's awareness of his legal rights; rather, an injury begins his duty to diligently present his claim.

C. THIS COURT'S RICO DECISIONS HAVE FOCUSED ON INJURY, NOT PATTERN.

The traditional federal accrual rule comports with civil RICO's roots in the antitrust laws under which injury begins the running of limitations. This Court has consistently returned to the Clayton Act in interpreting civil RICO.[6]

[6] Amicus American Council of Life Insurance endorses the pure Clayton Act accrual rule that has no discovery component.

1. *Sedima* recognized the Clayton Act injury model.

This Court first addressed civil RICO in *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479 (1985), deciding that a RICO plaintiff need not demonstrate a "racketeering injury" apart from the injury suffered as a result of a predicate act. In reaching its conclusion, this Court examined RICO's legislative history, noting that the "clearest current in that history was its reliance on the Clayton Act model." *Sedima*, 473 U.S. at 489. Under the Clayton Act, "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). "Where the plaintiff alleges each element of the [RICO] violation, the compensable injury necessarily is the harm caused by the 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. Any recoverable damages "flow from the commission of the predicate acts." *Id.* As *Sedima* recognized, the focus of RICO is the *injury* caused by the predicate acts. The injury discovery rule is consistent with the RICO statute because it is triggered by *injury* caused by the predicate acts, not by the predicate acts standing alone. Notably, the only injury to business or property Rotella alleges is that "many personal items were taken" from him, and he does not connect this allegation to any predicate act. *See* J.A. 20 at ¶ 28.

2. *Malley-Duff* adopted a four-year limitations period consistent with the Clayton Act.

In *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987), this Court adopted a uniform four-year statute of limitations period to resolve what had become "intolerable 'uncertainty and time consuming litigation' " and a "confused, inconsistent and unpredictable" state of the law on limitations. *Id.* at 148-149. It again examined the "similarities in purpose and structure between RICO and the Clayton Act" and the "clear legislative intent to pattern RICO's civil enforcement provisions on the Clayton Act" in holding that a four-year statute of limitations applied to RICO actions. *Id.* at 152. But the RICO accrual issue was left undecided in *Malley-Duff* because the complaint was timely under the four-year limitations period.

3. *Klehr* expressed the desire to resolve RICO accrual based on the Clayton Act and equitable principles.

This Court last grappled with RICO's accrual issues two years ago in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). *Klehr* rejected the "last predicate act" rule used by the Third Circuit which had allowed limitations to run from the time when the plaintiff knew or should have known of the last predicate act which was part of the same pattern of racketeering activity. This Court observed that under the last predicate act approach limitations could have lasted indefinitely, thus conflicting with repose – the basic objective underlying all statutes of limitations:

> We cannot find in civil RICO a compensatory objective that would warrant so significant an extension of the limitations period, and civil RICO's further purpose – encouraging potential private plaintiffs diligently to investigate, *see Malley-Duff*, 483 U.S. at 151, 107 S.Ct. at 2764-2765 – suggests the contrary.

Klehr, 521 U.S. at 187.

This Court rejected the last predicate act rule because it was inconsistent with the Clayton Act, but observed that the analogy between the Clayton Act and RICO is not perfect. "We do not say that a pure injury accrual rule always applies without modification in a civil RICO setting in the same way that it applies in traditional antitrust cases." *Id.* at 188. Although this Court left open the choice of the alternative accrual rules in *Klehr*, it again emphasized that the starting point of any accrual analysis is antitrust law treatment of limitations issues. It also expressed the desire to resolve the accrual issue based on the interplay of the Clayton Act, principles of equitable tolling, and doctrines of equitable estoppel. *Id.* at 192. It eschewed a "mix and match" approach while recognizing that the "Clayton Act's express statute of limitations does not necessarily provide all the answers." *Id.* at 193.

D. THE INJURY DISCOVERY RULE RESOLVES THE CONCERNS RAISED IN *KLEHR* AND IS THE MOST APPROPRIATE ACCRUAL RULE FOR CIVIL RICO.

The traditional federal accrual rule of injury discovery resolves the concerns expressed in *Klehr*. It permits the courts to be guided by an existing body of law rather

than having to create a RICO-specific accrual rule by mixing and matching from different doctrines. By focusing on injury as opposed to pattern, the rule is consistent with the RICO statute and the Clayton Act. It also incorporates a discovery component, perhaps "reflect[ing] the fact that a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims." *Klehr*, 521 U.S. at 191; *see also Sedima*, 473 U.S. 479, 498 n.16 (1985).

1. The circuit courts have demonstrated that injury discovery is a workable rule with separate accrual and equitable tolling features.

The circuit courts that have adopted the injury discovery rule provide guidance in delineating its parameters. Consistent with the Clayton Act, most recognize a separate accrual rule for civil RICO cases under which the commission of a new predicate act causing a new and independent injury restarts the running of limitations. The equitable tolling doctrines, including fraudulent concealment, also apply, as in antitrust cases and other federal claims. Neither the separate accrual rule nor equitable tolling is implicated in this case. Three circuit court decisions, however, demonstrate the interplay of the injury discovery rule and equitable principles:

***Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988).**

In *Bankers Trust*, the Second Circuit pointed to RICO's requirement of injury to business or property as the key factor in adopting the injury discovery rule. It also addressed the issue of a continuing violation of RICO and

held that each time a plaintiff suffers a new and independent injury caused by a predicate act, a cause of action to recover damages based on that injury accrues at the time he discovers or should have discovered the injury. *Bankers Trust*, 859 F.2d at 1102. This separate accrual rule for RICO is analogous to the separate accrual rule in the antitrust context for continuing antitrust violations. *Bankers Trust*, 859 F.2d at 1104.

***State Farm Mut. Auto Ins. Co. v. Ammann*, 828 F.2d 4 (9th Cir. 1987) (Kennedy, J., concurring).**

While sitting on the Ninth Circuit, Justice Kennedy supported the application of the separate accrual rule of the Clayton Act to civil RICO in his concurrence in *Ammann*. "The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period." *Ammann*, 828 F.2d at 5. A corollary rule is that damages cannot be recovered resulting from injuries sustained from acts committed outside the four-year limitations period. *Id.*

***Rodriguez v. Banco Cent.*, 917 F.2d 664 (1st Cir. 1990).**

In *Rodriguez*, then-Chief Judge Breyer restated the accrual rule for the First Circuit, starting limitations running when a plaintiff knows or should have known of his injury, noting it is "at least roughly similar to the Clayton Act's rule." *Id.* at 666. The court stated that this rule is similar to the accrual concepts for fraud. *Id.* Additionally, the court noted that the presence of fraudulent concealment could result in the tolling of limitations just as it

applies to antitrust plaintiffs in analogous circumstances. *Id.* at 667-668.

2. The injury discovery rule furthers the purposes underlying statutes of limitations.

As this Court recognized in *Klehr*, the basic objective that underlies statutes of limitations is repose. The plaintiff should have a reasonable time in which to bring his claim, and a defendant must enjoy the right eventually to be free of stale claims. In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court observed that "a federal cause of action 'brought at any distance of time' would be utterly repugnant to the genius of our laws." *Id.* at 271. Statutes of limitation promote justice by prompting litigants to be diligent. Establishing a certain time bar for stale claims reduces the risk of false claims and reduces the burden on the court system.

By imposing an obligation on an injured plaintiff to act with reasonable diligence, the injury discovery rule encourages civil RICO plaintiffs to act promptly once they know or should know that they have been injured. It affords stability to the business community by terminating potential claims four years after the injury while assuring that diligent plaintiffs have their day in court.

3. Criticisms of the injury discovery rule are unwarranted.

One of the most frequently articulated criticisms of the injury discovery rule is that it could result in the statute of limitations running before a RICO claim exists.

But a RICO violation does not exist until all of its elements are present, including injury. Only then does limitations begin to run. Additionally, accrual of a plaintiff's cause of action has never been based on a plaintiff's knowledge of each of the elements of a claim; rather, knowledge of the injury starts the running of limitations. *United States v. Kubrick*, 444 U.S. 111, 123-124 (1979) (determining that an accrual rule that connects the running of limitations with knowledge of a plaintiff's legal rights is unworkable); *see also McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992) (emphasizing the "important distinction between discovery of an *injury* and discovery of a *cause of action*." (emphasis in original)). As stated earlier, pattern is but one element of a RICO claim. It is not the injury itself. As evident from *Sedima*, RICO injuries flow from the individual predicate acts, and not from the pattern. Therefore, the pattern element should not control accrual.

Rotella complains that the injury discovery rule would prohibit him from filing a RICO claim because he had neither the "wherewithal to believe he was the victim of a fraudulent scheme that needed to be investigated" nor the "resources or the ability to uncover an elaborate nation-wide fraud scheme." Pet. Br. at 19-20. Significantly, Rotella did not pursue any equitable tolling doctrines such as mental incapacity, duress, or fraudulent concealment. Rotella's solution is to apply the injury and pattern discovery rule rather than attempting to utilize these ameliorating equitable principles.

The crucial difference between the traditional federal accrual rule and the injury and pattern discovery rule is the diligence that a plaintiff must use once he discovers

his injury. Under the federal accrual rule, a plaintiff has four years from discovery of his injury to sue. On the other hand, the injury and pattern rule would permit a plaintiff, with full knowledge of his injury, to wait up to fourteen years or more to discover the pattern and sue, because of the ten year time period in which a pattern of racketeering activity may develop. The rule Rotella advocates thus creates "a longer limitations period than Congress could have contemplated." *Klehr*, 521 U.S. at 187. Indeed, the rule would permit plaintiffs who know of the defendant's pattern of activity "simply to wait, 'sleeping on their rights' . . . as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the 'memories of witnesses have faded or evidence is lost.' " *Id.*, citing *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

E. THE DIFFICULTY IN DETERMINING WHETHER A RICO PATTERN EXISTS RENDERS IT IMPRACTICAL AS A BASIS FOR AN ACCRUAL RULE.

Rotella contends that because an allegation of a pattern of racketeering is the "heart" of any RICO complaint, discovery of a pattern must be the heart – or at least be a part of – the RICO accrual rule. Pet. Br. at 12. Rotella wholly fails to address the deficiencies and impracticalities of basing an accrual rule on the nebulous concept of a "pattern of racketeering activity." The vagaries involved in determining whether a RICO pattern exists make knowledge of a pattern an unworkable foundation upon which an accrual rule should be based, and would undermine the policies of repose and certitude of statutes of limitations.

1. Post-*Sedima* and -*H.J. Inc.* decisions demonstrate a wide variance in how courts determine whether a RICO pattern exists.

Congress provided a meager definition of "pattern of racketeering activity" – requiring at least two predicate acts, one of which occurred after the statute's enactments "and the last of which occurred within ten years . . . after the commission of a prior [predicate] act. . . . " § 1961(5). In *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), this Court acknowledged that "developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task," *id.* at 236, and that lower court decisions interpreting "pattern" had presented "the widest split on an issue of federal law in recent memory. . . . " *Id.* at 251 (Scalia, J., concurring). A RICO "pattern" is established by showing related predicate acts that amount to, or constitute a threat of, continuing racketeering activity. *Id.* at 240. Although this Court's holding in *Sedima* and its amplification of the "relationship plus continuity" constituents of the pattern element in *H.J. Inc.* helped eliminate extreme interpretations of the concept, subsequent lower court decisions have revealed that developing a uniform concept of pattern – particularly the "continuity" prong – "[has] proven elusive." *United States v. Aulicino*, 44 F.3d 1102, 1110 (2d Cir. 1995).

This Court acknowledged that a bright-line test for proving relatedness and continuity "cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." *H.J. Inc.*, 492 U.S. at 243. This concern is readily apparent in addressing the

continuity element of pattern. *See id.* at 241. Because the existence of a pattern "depends on the specific facts of each case," *id.* at 242, circuit courts have continued to utilize their own multi-factor tests.[7]

[7] The Third Circuit, for example, still examines the following factors if the duration element is not dispositive: "(1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity." *Tabas v. Tabas*, 47 F.3d 1280, 1292 (3d Cir. 1995) (en banc) (citing *Bartichek v. Fidelity UnionBank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987), *cert. denied*, 515 U.S. 1118 (1995)). The Sixth Circuit test is similar, but contains additional factors: the number of "schemes," "the variety of species of predicate acts," and "the distinct types of injury." *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1110 (6th Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996). Other circuits apply slight variations of these multi-factor tests. *E.g., GICC Capital Corp. v. Technology Fin. Group, Inc.*, 67 F.3d 463, 467 (2d Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996); *Vicom Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 780 (7th Cir. 1994); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543-44 (10th Cir. 1993). Some circuit courts, on the other hand, interpret *H.J. Inc.* as pronouncing a *purely* temporal concept of continuity, by which the other factors are not relevant. *See, e.g., Fleet Credit Corp. v. Sion*, 893 F.2d 441, 446 (1st Cir. 1990) ("[A] plaintiff who alleges a high number of related predicate acts committed over a substantial period of time establishes that those acts amount to continued criminal activity, irrespective of the other *Roeder/Morgan* factors.") (referring to *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987) and *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986)); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397-98 (11th Cir.) (pattern found based solely on the 3½-year length of bribery scheme), *modified on other grounds*, 30 F.3d 1347 (1994), *cert. denied*, 513 U.S. 1110 (1995); *Tabas v. Tabas*, 47 F.3d 1280, 1296 & n.21 (3d Cir. 1995) ("[D]uration is the *sine qua non* of continuity"; the multi-factor test is employed only "where relatedness and continuity are in doubt.").

Predictably, these diverse tests have produced an array of results.[8]

2. Basing the RICO accrual rule on the discovery of both injury and pattern contravenes the policies of repose and certitude of statutes of limitations.

The foregoing demonstrates that the "injury and pattern discovery rule" threatens to dramatically extend the life of many civil RICO claims. Delaying accrual until a plaintiff knows or should know that the two or more predicate acts of which he is aware are related – and that those acts have occurred over a sufficient close-ended period of time or threaten continued racketeering activity – would operate at the expense of the public interest in repose. Moreover, if the courts routinely have difficulty determining whether a RICO pattern existed with the advantage of hindsight, it will be at least as difficult to determine when a plaintiff knew or should have known of the existence of that pattern. Thus, application of the injury and pattern discovery rule is necessarily unwieldy because it is dependent on the idiosyncracies involved in

[8] *See H.J. Inc.*, 492 U.S. at 2898 n.2 (collecting circuit court cases); *Aulicino*, 44 F.3d at 1111-13 (summarizing nine circuit court opinions with contrasting applications of continuity component); JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO – CIVIL AND CRIMINAL LAW AND STRATEGY §§ 1.04[2][c] & nn.57 & 58, 2.03[3] n.21 (1998) (circuit-by-circuit analysis of post-*H.J. Inc.* decisions); DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO ¶¶ 4.03, 4.04 (1999) (same); DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO § 5.7 (1991 & Supp. 1999) (same).

determining when a pattern exists. This accrual rule contravenes "the federal interest in uniformity and the 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)).

F. ROTELLA'S REMAINING ARGUMENTS DO NOT WITHSTAND SCRUTINY.

1. That many RICO claims are based in fraud does not mandate an injury and pattern accrual rule.

Although Rotella did not plead mail or wire fraud as a predicate act, he nevertheless contends that the fraud element of most RICO claims requires an injury and pattern discovery rule. Pet. Br. at 16-17. Assuming that the majority of RICO actions still involve fraud, that point alone does not support Rotella's proposed rule. A uniform accrual rule must take into account that RICO encompasses a larger scope of criminal activity than just fraud. *See* § 1961(1). Many of the predicate acts listed in the statute involve rather overt activity – *e.g.*, murder, kidnapping, and gambling – and a host of others generally contain no fraud element – *e.g.*, unlawful welfare fund payments, misuse of passport, retaliating against a witness, and interstate transportation of stolen motor vehicles. *Id.* This Court in *Malley-Duff* rejected arguments that the RICO accrual rule should adopt state accrual rules that are based on fraudulent predicate acts. *Malley-Duff*, 483 U.S. at 146-150.

Moreover, Congress recently removed securities fraud as an actionable racketeering activity when it amended section 1961 by the Private Securities Litigation Reform Act of 1995. *See* § 1964(c) (barring recovery for injuries resulting from "any conduct that would have been actionable as fraud in the purchase or sale of securities" except where the perpetrator is criminally convicted of securities fraud). Accordingly, allowing the fraudulent nature of some RICO claims to dictate a uniform accrual rule is not warranted. No justification exists to create a special accrual rule for fraud claims while ignoring the multitude of other actionable predicate acts. Rotella's concerns that potential plaintiffs would be precluded from asserting a RICO claim are adequately allayed by the injury discovery rule and any applicable equitable tolling provisions.

2. The injury discovery rule will not result in violation of federal pleading requirements.

Rotella suggests that the injury discovery rule violates federal pleading requirements. Pet. Br. at 21-23. The particularity requirements of Rule 9(b), however, are not invoked here because Rotella has not asserted a predicate act based in fraud. *See* FED. R. CIV. P. 9(b); J.A. 35 at ¶ 47. Moreover, Rule 11 allows parties the flexibility to make allegations or other factual contentions so long as they have "evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(3). This language was added in 1993 "in

recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegations." FED. R. CIV. P. 11 advisory committee's note. Thus, many courts allow civil RICO plaintiffs the opportunity to amend or take limited discovery to satisfy Rule 9(b) requirements, particularly where plaintiff's allegations make it appear likely that the facts may give rise to a RICO claim and where the information is in the exclusive control of the defendant. *See, e.g., Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658 (3d Cir. 1998) (requiring Rule 9(b) be applied with some flexibility where facts allegedly concealed by defendants); *Corley v. Rosewood Care Ctr., Inc. of Peoria*, 142 F.3d 1041, 1050-51 (7th Cir. 1998) (relaxing particularity requirements of Rule 9(b) where RICO plaintiff lacks access to all facts necessary to detail claim).

Additionally, Rule 15 ameliorates the harshness of Rule 9 by permitting liberal amendment of pleadings. Upon discovering an evidentiary basis to support a RICO claim, a party ordinarily may file an amended complaint to add a civil RICO claim under Rule 15(c), provided the RICO allegations arise out of the same transaction or occurrence as the underlying fraudulent acts. FED. R. CIV. P. 15(c); *see, e.g., Benfield v. Mocatta Metals Corp.*, 26 F.3d 19, 23 (2d Cir. 1994) (permitting amended complaint adding RICO claim under either tolling or relation-back doctrine of Rule 15(c)); *Ray v. Karris*, 780 F.2d 636, 645 (7th Cir. 1985) (remanding to allow plaintiffs opportunity to use liberal amendment provisions to plead sufficient civil

RICO allegations); *In Re Olympia Brewing Co. Sec. Litigation*, 612 F. Supp. 1370, 1375 (N.D. Ill. 1985) (amendment adding RICO claim related back to original complaint alleging securities fraud). Accordingly, the adoption of the injury discovery rule will not force plaintiffs to violate federal pleading requirements.

CONCLUSION

Based on the foregoing, this Court should adopt the injury discovery rule as the uniform accrual rule for civil RICO claims. Because Rotella concedes that under the injury discovery rule his cause of action is time barred, Pet. Cert. 7-8, this Court should affirm.

Respectfully submitted,

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APPENDIX