

RECENT DEVELOPMENT

ASKED BUT NOT ANSWERED—ACCRUAL OF PRIVATE CIVIL RICO CLAIMS FOLLOWING *KLEHR V. A.O. SMITH CORP.*

I. INTRODUCTION

Since 1985, the United States Supreme Court has addressed the complexities and ambiguities contained in the civil and criminal provisions of the Racketeer Influenced and Corrupt Organizations Act (“RICO”)¹ twelve times.² Yet one question remains unsettled: When does a civil RICO action accrue³ and the statute of limitations begin to run? The Supreme Court has balked on three separate occasions to resolve this issue.⁴ The lack of Supreme Court guidance on the accrual issue has led the federal courts to develop four distinct accrual rules.⁵ Each of these rules can produce profoundly different results. Thus, a civil RICO plaintiff may face substantially different outcomes depending on the forum in which the claim is brought. Because the prevalence of civil RICO claims is continuing to increase,⁶ the issue of accrual is ripe for a Supreme Court decision.⁷

1. 18 U.S.C. §§ 1961-1968 (1994).

2. *See Salinas v. United States*, 118 S. Ct. 469 (1997); *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997); *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994); *Alexander v. United States*, 509 U.S. 544 (1993); *Reves v. Ernst & Young*, 507 U.S. 170 (1993); *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258 (1992); *Tafflin v. Levitt*, 493 U.S. 455 (1990); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *American Nat’l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606 (1985).

3. “A cause of action ‘accrues’ when a suit may be maintained thereon.” BLACK’S LAW DICTIONARY 37 (6th ed. 1990) (citing *Dillon v. Board of Pension Comm’rs*, 116 P.2d 37, 39 (Cal. 1941)).

4. *See Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1992 (1997) (deciding not to consider the different accrual rules because petitioners’ claim did not satisfy the most liberal test); *Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996), *cert. granted*, 116 S. Ct. 2521 (1996), *cert. dismissed as improvidently granted*, 117 S. Ct. 759 (1997); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987) (failing to address accrual because litigation was timely filed less than four years after earliest time RICO action could have accrued).

5. *See infra* Part III.

6. In 1984, approximately one hundred civil RICO claims had been filed. *See Douglas E. Abrams, Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMUL. REV. 33, 63 (1996). By 1986, the number increased to four hundred. *See id.* Approximately one thousand civil RICO claims were filed annually in 1987 and 1988. *See id.* The number of civil RICO filings dropped in the early 1990s to approximately eight hundred annually. *See id.* Because of the judicial time

In *Klehr v. A.O. Smith Corp.*,⁸ the Supreme Court recently eradicated the Third Circuit's "last predicate act" rule of accrual.⁹ In addition, the Court determined that a civil RICO plaintiff may not claim that fraudulent concealment prevented him from discovering his RICO injury unless the plaintiff was reasonably diligent in his investigations.¹⁰ Despite these determinations, the Court once again declined to answer the threshold question of when a civil RICO cause of action accrues.¹¹

In the wake of *Klehr*, this Comment evaluates the four rules of accrual and proposes how the Supreme Court should resolve the conflict. Part II provides a statutory outline of RICO and explores RICO's reliance on the Clayton Act.¹² Part III examines the differences between the four accrual rules articulated by the federal courts in civil RICO actions. Part IV analyzes *Klehr* and the implications this holding has for the conflict. Finally, Part V proposes a potential solution to the rule of accrual for civil RICO actions.

II. THE HISTORY OF RICO

A. A Statutory Outline of RICO

Congress enacted RICO¹³ to prevent criminal organizations from infiltrating legitimate commercial enterprises.¹⁴ RICO criminalizes three

required to resolve the complexities and ambiguities of the civil RICO statute, this number of filings represents an ongoing burden on the federal courts. *See id.*; *see also infra* note 131 and accompanying text.

7. Determining when a federal cause of action accrues is a matter governed by federal common law. *See Bath v. Bushkin, Gains, Gaines and Jonas*, 913 F.2d 817, 820 (10th Cir. 1990); *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1550 (11th Cir. 1990); *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1127 (3d Cir. 1988).

8. 117 S. Ct. 1984 (1997).

9. *See id.* at 1989.

10. *See id.* at 1993.

11. *See id.* at 1992. While the Court struck down the last predicate act rule, the Court expressly opted not to decide among the other rules used by the circuits. *See id.*; *see also infra* note 120 and accompanying text. Instead, the Court noted that the Klehrs failed to timely file under the less restrictive "injury and pattern discovery rule" adopted by the Eighth Circuit, and therefore could not have "squeezed [their case] through the smaller," more restrictive "injury discovery rule." *Klehr*, 117 S. Ct. at 1992.

12. 15 U.S.C. § 15 (1994).

13. 18 U.S.C. §§ 1961-1968 (1994). RICO was enacted as Title IX of the Organized Crime Control Act of 1970. *See* Pub. L. No. 91-452, § 901, 84 Stat. 922, 941 (1970). Thirty-one American jurisdictions have enacted analogous RICO statutes patterned after the federal statute. *See Lance Bremer et al., Racketeer Influenced and Corrupt Organizations*, 34 AM. CRIM. L. REV. 931, 932 n.1 (listing such statutes). For a review of the legislative history of RICO, *see* G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980).

14. RICO was intended to deal with the problem of enterprise criminality concerning patterns of

distinct activities. First, the statute prohibits any person¹⁵ from using or investing income derived “from a pattern of racketeering activity or through collection of an unlawful debt” to acquire an interest in or establish or operate any enterprise engaged in or affecting interstate commerce.¹⁶ Second, the statute prohibits any person from acquiring or maintaining any interest or control of any enterprise engaged in or affecting interstate commerce,¹⁷ or conducting or participating in such enterprise¹⁸ through a pattern of racketeering or collection of unlawful debt.¹⁹ Finally, RICO makes a conspiracy to engage in any such conduct illegal.²⁰ In addition to the criminal

violence, corruption in labor or government, criminal fraud or criminal operations. See Michael S. Rafford, Note, *The Private Securities Litigation Reform Act of 1995: Retroactive Application of the RICO Amendment*, 23 J. LEGIS. 283, 293 n.82 (1997). Congress designed RICO in part to undercut organized crime through elevated criminal sanctions directed at individual members of criminal groups and enhanced civil sanctions created to undermine the economic power of criminal organizations. See Paul B. O’Neill, “*Mother of Mercy, Is This the Beginning of RICO?*”: *The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. REV. 172, 180 (1990). The “Statement of Findings and Purpose” contained in the Organized Crime Control Act of 1970 states:

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Pub. L. No. 91-452, § 901, 84 Stat. 922, 923 (1970).

15. 18 U.S.C. § 1961 (1994) defines “person” as “any individual or entity capable of holding a legal or beneficial interest in property.” *Id.*

16. 18 U.S.C. § 1962(a) provides in part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id.

17. 18 U.S.C. § 1962(b) provides:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id.

18. 18 U.S.C. § 1961(4) defines “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” *Id.*

19. 18 U.S.C. § 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

Id.

20. 18 U.S.C. § 1962(d) provides: “It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.” *Id.*

provisions of RICO,²¹ the statute provides a civil action for those persons who are injured in their business or property.²² A civil RICO plaintiff must prove that he suffered an injury, resulting from the conduct of an enterprise, through a pattern of racketeering activity.²³ If so proven, the plaintiff may collect treble damages.²⁴

The focal point of RICO is the pattern of racketeering activity requirement.²⁵ In order to recover under any subsection of RICO, a plaintiff must prove the occurrence of at least two acts of racketeering activity, the most recent of which must have occurred within ten years of the prior act.²⁶

21. See 18 U.S.C. § 1963 (1994). RICO is a powerful prosecutorial tool because "it broadens the scope of the criminal and civil remedies to include fines, imprisonment, forfeiture, injunctions and treble damages of injured parties." Rafford, *supra* note 14, at 283 n.6.

22. 18 U.S.C. § 1964(e) provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Id. In 1995, Congress passed the Private Securities Litigation Reform Act of 1995, which amended section 1964(c) by creating an exception for securities suits only: "[N]o person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962 . . . [unless the defendant] is criminally convicted in connection with the fraud." Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 107, 109 Stat. 737, 758; see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 492-93 (1985) (holding that a defendant does not have to be criminally convicted of a predicate act or a RICO violation before a treble damage suit may be brought under civil RICO).

23. See *Sedima*, 473 U.S. at 496; see also *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1100 (2d Cir. 1988).

24. Congress closely modeled civil RICO's treble damages provision after that contained in the Clayton Act. See *Epstein v. Epstein*, 966 F. Supp. 260, 262 (S.D.N.Y. 1997). The treble damage provision in the Clayton Act is a remedial provision. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977). Treble damages also play an important role in penalizing wrongdoing. See *id.* Everything in civil RICO's history supports the proposition that RICO's treble damage remedy is similarly remedial to the Clayton Act's provision on which it was so closely patterned. See, e.g., *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997).

25. See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 154 (1987).

26. 18 U.S.C. § 1961(5) (1994) defines "pattern of racketeering activity" as "requir[ing] at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." *Id.* RICO defines "racketeering activity" to include nine state law felonies and violations of over 25 federal statutes, including those prohibiting bribery, counterfeiting, embezzlement of pension funds, gambling offenses, obstruction of justice, interstate transportation of stolen property and labor crimes. See *id.* § 1961(1).

In addition, the Supreme Court has ruled that to establish a pattern, a RICO plaintiff must prove not only the occurrence of the predicate acts, but also that those acts are related and that together they amount to or threaten continuing racketeering activity. In effect, the pattern must have continuity and relationship. See *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 241 (1989) ("What a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, simpliciter."). A plaintiff can establish that acts are related by proof of temporal proximity, common goals, similarity of methods or repetition. See *id.* at 241-43. The element of continuity may be satisfied if the plaintiff alleges a series of related predicate acts that are committed over a substantial period of time. See *id.* at 242; see also *Sedima*, 473 U.S. at 496 n.14 (noting that "proof of two acts of racketeering, without more, does

B. The Clayton Act's Influence on Civil RICO

The most significant contribution to the development of RICO stems from the statutory guide of the Clayton Act.²⁷ In *Agency Holding Corp. v. Malley-Duff & Associates*,²⁸ the Supreme Court found the similarities in purpose and structure between the Clayton Act and RICO so persuasive that the Court borrowed the Clayton Act's four-year statute of limitations²⁹ to govern civil RICO claims.³⁰ However, the Court did not decide the question of when the four-year statute of limitations should begin to run.³¹ Following

not establish a pattern" (citation omitted)).

27. See 15 U.S.C. § 15 (1994); see also *Agency Holding Corp.*, 483 U.S. at 151 ("The 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.'") (citing *Sedima*, 473 U.S. at 489). Both RICO and the Clayton Act were designed to remedy economic injury; both statutes empower private attorneys general; both statutes use the threat of treble damages to achieve their objective; and both RICO and the Clayton Act compensate the same type of injury once a plaintiff shows injury to his business or property resulting from a statutory violation. See *id.* at 151.

The Clayton Act provides:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a).

28. 483 U.S. 143 (1987).

29. When Congress created the civil RICO cause of action, it failed to provide a statute of limitations. See *Agency Holding Corp.*, 483 U.S. at 146. The Court adopted the Clayton Act's section 15b for civil RICO actions. See *id.* at 156. 15 U.S.C. § 15b provides:

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

15 U.S.C. § 15b (1994).

Congress also failed to expressly provide a statute of limitations provision for criminal RICO violations. See *Agency Holding Corp.*, 483 U.S. at 155. As a result, the general five-year "catch all" federal criminal statute of limitations applies to criminal RICO prosecutions because Congress stated that such a criminal limitations period should apply when no other period is specified. See *id.* at 155-56; see also 18 U.S.C. § 3282 (1994). For a discussion of the accrual rules used in criminal RICO actions, see Glenn Beard et al., *Racketeer Influenced and Corrupt Organizations*, 33 AM. CRIM. L. REV. 929, 957 (1996).

30. The characterization of a federal claim for purposes of selecting the appropriate statute of limitations is generally a question of federal law. See *Wilson v. Garcia*, 471 U.S. 261, 269-70 (1985). A court then must determine whether a federal or state statute of limitations must be used. See *Agency Holding Corp.*, 483 U.S. at 147. The Court in *Agency Holding Corp.* concluded that it was more appropriate to borrow a limitations period found in an analogous federal statute rather than adopt a state limitations period. See *id.* at 148-49. The Court recognized the importance of adopting a uniform statute of limitations to avoid "uncertainty and time-consuming litigation." *Id.* at 150 (citing *Wilson*, 471 U.S. at 272).

31. Because the earliest date the cause of action could have accrued in *Agency Holding Corp.* was well within the four-year period adopted, the Supreme Court declined to resolve the issue of accrual. See *Agency Holding Corp.*, 483 U.S. at 156-57. For a discussion of the legislative history and its implications on the statute of limitations and rule of accrual for civil RICO, see generally O'Neill, *supra* note 14.

Agency Holding Corp.'s adoption of a uniform statute of limitations,³² the issue of accrual moved to the forefront.³³ Without a uniform rule of accrual,³⁴ a statute of limitations is virtually meaningless.³⁵

III. THE CURRENT ACCRUAL RULES GOVERNING CIVIL RICO CLAIMS

Prior to *Agency Holding Corp.*, a court addressing a civil RICO action looked to comparable state statutes of limitations.³⁶ Once the Supreme Court adopted the Clayton Act's four-year statute of limitations,³⁷ the statute of limitations analysis based on state law in those cases was superseded. However, the accrual analyses of prior cases remained valid. Currently, federal circuit courts employ four different rules which define when a civil RICO cause of action accrues.³⁸

A. *The Injury Discovery Rule*

The majority of circuits—the First, Second, Fourth, Fifth, Seventh and Ninth—follow the “injury discovery rule.”³⁹ The injury discovery rule

32. A statute of limitations determines the point after which a plaintiff is prevented from using the court system to enforce certain rights. *See* O'Neill, *supra* note 14, at 190. A statute of limitations serves several policy functions. First, a defendant is entitled to repose. *See id.*; *see also* United States v. Kubrick, 444 U.S. 111, 117 (1979). Second, a statute of limitations provides for efficient litigation as it operates to bar stale claims which cannot be fairly adjudicated because evidence is lost and witnesses' memories fade. *See* O'Neill, *supra* note 14, at 190. Third, a statute of limitations provides stability and security to business and commerce by extinguishing claims and encouraging potential plaintiffs to diligently investigate their injuries. *See id.* at 190-92. An exception to the running of a statute of limitations is the traditional tolling doctrine which may extend the statute while a plaintiff investigates acts or events that were undiscoverable during the limitations period. *See id.* at 191-92; *see also infra* note 130.

33. *See, e.g.*, Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1101 (2d Cir. 1988).

34. The statute of limitations begins to run when a plaintiff's claim has accrued. Uniform rules of accrual reinforce the policy concerns that underlie a statute of limitations. *See* O'Neill, *supra* note 14, at 192.

35. *See* Klehr v. A.O. Smith Corp., 117 S. Ct. 1984, 1995 (1997) (Scalia, J., dissenting) (“[A]ny period of limitation is utterly meaningless without specification of the event that starts it running.”).

36. *See* La Porte Constr. Co. v. Bayshore Nat'l Bank, 805 F.2d 1254, 1255 (5th Cir. 1986); Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984). *See generally* Michael J. Lane, *Civil RICO: A Call for a Uniform Statute of Limitations*, 13 FORDHAM URB. L.J. 205, 217-25 (1985) (discussing the inconsistent decisions that preceded *Agency Holding Corp.*).

37. *See supra* notes 29-30 and accompanying text.

38. The Private Securities Litigation Reform Act of 1995 determined the accrual date of civil RICO claims actionable as fraud in the purchase or sale of securities. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 107, 109 Stat. 737, 758. However, such claims cannot be brought unless the defendant is convicted of the fraud. *See id.* If there is a conviction, the four-year statute of limitations begins to run on the date the conviction becomes final. *See id.*

39. *See* Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332, 1338 (7th Cir. 1997); Detrick v.

provides that the civil RICO limitations period begins to run when the "plaintiffs knew or should have known that they were injured."⁴⁰ Under this rule, accrual rests only on the knowledge of the injury to business or property, and the action accrues when the first injury is discovered.⁴¹

In the context of multiple injuries that result in a civil RICO violation, the injury discovery rule contains a separate accrual component.⁴² Under the separate accrual formulation, a new claim governed by a new four-year statute of limitations accrues each time a plaintiff discovers or should have discovered a new and independent injury⁴³ resulting from the same

Panalpina, Inc., 108 F.3d 529, 537 (4th Cir. 1997); Long Island Lighting Co. v. Imo Indus., Inc., 6 F.3d 876, 887 (2d Cir. 1993); Bontkowski v. First Nat'l Bank, 998 F.2d 459, 461 (7th Cir. 1993); McCool v. Strata Oil Co., 972 F.2d 1452, 1464-65 (7th Cir. 1992); Granite Falls Bank v. Henrikson, 924 F.2d 150, 153 (8th Cir. 1991) (citing Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 338 (1971)); Stitt v. Williams, 919 F.2d 516, 525 (9th Cir. 1990); Rodriguez v. Banco Cent., 917 F.2d 664, 666 (1st Cir. 1990); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102 (2d Cir. 1988); Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 275 (9th Cir. 1988) (The Second Circuit in *Banker's Trust* cited the Clayton Act as a source of support for its adoption of the injury discovery rule. However, antitrust actions under the Clayton Act accrue with the commission of the defendant's actions without regard to the "plaintiff's knowledge of act or the resulting injury."). Thus, the Second Circuit's referral to the Clayton Act is not accurate because the Second Circuit injects the plaintiff's knowledge into the accrual issue. See *infra* note 71; Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1489-91 (D.C. Cir. 1989) (assuming, without deciding, that the injury discovery rule applies to civil RICO claims); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987); State Farm Mut. Auto. Ins. Co. v. Ammann, 828 F.2d 4, 5 (9th Cir. 1987); Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1415 (9th Cir. 1987); La Porte Constr. Co. v. Bayshore Nat'l Bank, 805 F.2d 1254, 1256 (5th Cir. 1986); Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984).

40. *McCool*, 972 F.2d at 1464; see also *Rodriguez*, 917 F.2d at 666; *Bankers Trust*, 859 F.2d at 1102; *Pocahontas Supreme Coal Co.*, 828 F.2d at 220; *La Porte Constr. Co.*, 805 F.2d at 1256; *Compton*, 732 F.2d at 1433.

In effect, the injury discovery rule is the general federal rule of accrual applied in federal cases where Congress is silent in designating the method of accrual. See, e.g., *United States v. Mottaz*, 476 U.S. 834, 843 (1986) (applying under Quiet Title Act); *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (applying Federal Employer's Liability Act); *Golden Gage Hotel Ass'n v. San Francisco*, 18 F.3d 1482, 1486 (9th Cir. 1994) (applying 28 U.S.C. § 1983). For a detailed discussion of the origins and policies underlying the discovery rule, see O'Neill, *supra* note 14, at 202-08.

41. See *Bankers Trust*, 859 F.2d at 1103. The statute cannot begin to run until the RICO action is ripe, and a RICO action is ripe when the plaintiff suffers injury. See *id.* at 1102. A plaintiff is not required to know that his injury results from a pattern of racketeering. See, e.g., *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996); *McCool*, 972 F.2d at 1465 ("[A] RICO claim accrues when the plaintiff discovers her injury, even if she has not yet discovered the pattern of racketeering."). For a list of the circuits that require a plaintiff to prove injury and pattern, see *infra* note 56 and accompanying text.

42. See, e.g., *Bankers Trust*, 859 F.2d at 1105 (holding "that civil RICO actions are subject to a rule of separate accrual"); *McCool*, 972 F.2d at 1465; *Rodriguez*, 917 F.2d at 665-66; cf., e.g., *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817, 820 (10th Cir. 1990); *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990).

43. In order for an injury to qualify as "new and independent," the injury must not be a continuation, accumulation or recharacterization of the injury already incurred. See *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995) (finding "non-independent injuries will not cause a new limitations

violation.⁴⁴ The end result is that a plaintiff may sue for any injury he discovers or should have discovered within four years of the commencement of his suit.⁴⁵ Future damages are recoverable where the plaintiff has already

period to accrue"). *See generally* *Pilkington v. United Airlines*, 112 F.3d 1532, 1537-38 (11th Cir. 1997) (finding continuation of initial injury that resulted from harassment); *Grimmett*, 75 F.3d at 514 (holding that the plaintiff's injuries were all part of the same bankruptcy scheme and all lead to the plaintiff's loss; neither the acts nor the injuries were new); *Bingham*, 66 F.3d at 560 (holding that additional financial losses that resulted from a decision to use defective equipment were not independent of original injury of receiving defective generators); *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987) ("[A]n overt act . . . will restart the statute of limitations [if]: (1) it [is] a new and independent act that is not merely a reaffirmation of a previous act; and (2) it . . . inflict[s] new and accumulating injury on the plaintiff.>").

44. *See Bankers Trust*, 859 F.2d at 1103. In *State Farm Mutual Automobile Insurance Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987), then Circuit Judge Kennedy provided a clear statement of the separate accrual formulation:

[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. A corollary rule is that damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period.

Id. (Kennedy, J., concurring) (citations omitted).

Judge Kennedy's formulation of the separate accrual rule is used in cases of continuing conspiracy to violate antitrust law. *See Bankers Trust*, 859 F.2d at 1104-05. The rule of separate accrual adopted in the RICO context differs from the general federal rule of accrual in continuing violation cases. *See id.* The federal rule in continuing injury antitrust cases requires that "the statute of limitations begin running upon the commission of the first overt act causing damage, and does not permit a subsequent injury to start the limitations period running anew." *Id.* Requiring that damages must result from an overt act committed within the limitations period is inconsistent with the discovery rule which focuses on the injury rather than the act that caused it. *See id.* at 1103 ("With these multiple injuries in mind, congress [sic] tied the right to sue for damages under § 1964(c), not to the time of the defendant's RICO violation, but to the time when plaintiff suffers injury to 'his business or property' from the violation."). The statute of limitations under the discovery rule is triggered when the injury is discovered or should have been discovered. *See id.* at 1102. It does not require that the act that caused the injury be within the limitations period. *See id.* at 1103. The separate accrual rule is supported by the plain language of the RICO statute. *See id.* at 1102. The statute provides that a "person injured in his business or property by reason of a violation of section 1962" may bring a civil RICO action. Thus, if a plaintiff suffers a new and independent injury from the same RICO violation at a later date, he is again injured in his business or property and a right to sue for damages accrues at the discovery of the injury. *See id.*; *see also Bingham*, 66 F.3d at 559 (noting that Congress conceived of the possibility of multiple and independent injuries that occur over a broad span of time and that a separate accrual rule is thus a logical result).

45. For example, in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), the defendants owned a large corporation and the plaintiff was their largest creditor. *See id.* at 1098. On September 5, 1974, in an effort to avoid the corporation's liabilities, the defendants declared Chapter 11 bankruptcy and agreed to fraudulently conceal a major asset from the corporation's creditors. *See id.* Relying on the defendants' misrepresentations, the plaintiff agreed to an arrangement in the bankruptcy court in which it would receive only 17.5% of its claim. *See id.* The plaintiff learned of the fraud in September 1976 and attempted to revoke the bankruptcy plan, but the bankruptcy court did not rule until 1982. *See id.* at 1099. The plaintiff commenced suit in federal court on August 24, 1982, alleging that the "continuing actions of [the defendants,] [including] . . . common law fraud and bankruptcy fraud . . . [initiating] frivolous lawsuits [to deceive creditors, bribing a] South Carolina judge, and [making] . . . fraudulent conveyances . . . constituted a 'pattern of racketeering activity' in violation of [the RICO statute]." *Id.* at 1099.

suffered injury and will continue to suffer from the same injury in the future.⁴⁶ Where the plaintiff has yet to suffer from an anticipated future injury⁴⁷ or where the injury is unprovable,⁴⁸ a court cannot award future damages.⁴⁹

While the discovery rule allows a civil RICO plaintiff time to discover his injury,⁵⁰ there is an inherent problem with the rule.⁵¹ The injury discovery rule conflicts with the unique pattern requirement of the RICO statute.⁵² A civil RICO claim is not actionable when a defendant commits only one predicate act.⁵³ The RICO statute requires a pattern of racketeering activity which consists of two or more predicate acts within a ten-year period.⁵⁴

The Second Circuit adopted the injury discovery rule using the separate accrual formulation. *See id.* at 402. The court ruled that Bankers Trust could recover for any injury it discovered or should have discovered on or after August 24, 1978, four years prior to the commencement of the suit. *See id.* at 1105. Thus, Bankers Trust could recover its legal expenses spent litigating the lawsuit which it discovered or should have discovered after August 24, 1978. *See id.* However, any injuries discovered before August 1978 would be time barred. *See id.* As for the plaintiff's claims of loss of legitimate debt and related expenses resulting from the 1976 acceptance of the bankruptcy reorganization plan which was based on the defendants' fraud, the court stated it would "[n]ormally . . . simply instruct the district court to determine what portion of these injuries Bankers discovered or should have discovered after August 24, 1978, and order that Bankers could not recover on any injury which it discovered or should have discovered before that date." *Id.* at 1106. However, in this case, the court delayed this analysis because the proceedings were ongoing in bankruptcy court. *See id.*

46. *See Bankers Trust*, 859 F.2d at 1103. The RICO injury does not have to be precisely calculable in order to be sufficiently definite and nonspeculative for a civil RICO cause of action to accrue. *See id.* at 1106.

47. *See id.* at 1104 (stating that "refus[ing] to award damages as too speculative is equivalent to holding that no cause of action has yet accrued" (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971))).

48. *See Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 240 (9th Cir. 1987) ("[U]ncertain damages, which prevent recovery, are distinguishable from uncertain extent of damage, which does not prevent recovery. . . . The question of whether there is a right to recovery is not to be confused with the difficulty in ascertaining the scope or extent of the injury."); *cf.* *Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398, 1404 (8th Cir. 1995) ("In regard to injury, all that is required to start the running of the clock on a RICO claim is knowledge of the fact of injury, not knowledge of the precise quantum of damages.").

49. *See Pace Indus.*, 813 F.2d at 240; *see also In re Merrill Lynch Ltd. Partnerships Litig.*, 7 F. Supp. 2d 256, 263 (S.D.N.Y. 1997) (holding that where "contractual or other legal remedies remain which hold out a 'real possibility' that the [injury] may be eliminated, RICO injury is speculative, and a RICO claim is not ripe until those remedies are exhausted"); *Bankers Trust*, 859 F.2d at 1105-06 (finding the plaintiff's claimed damages of loss of legitimate debt speculative and unrecoverable because bankruptcy proceeding was still pending to determine damages on that issue).

50. The injury discovery rule follows the federal law rule stating that the statute of limitations on fraud claims commences only after the plaintiff has discovered or should have discovered the fraud. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). For an in-depth analysis of the other benefits of the injury discovery rule, *see O'Neill, supra* note 14, at 197-208.

51. *See* Edwin Scott Hackenburger, Comment, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 LA. L. REV. 1411, 1422-25 (1988).

52. *See supra* notes 25-26 and accompanying text.

53. *See supra* note 26 and accompanying text.

54. *See id.*

Under the injury discovery rule, a plaintiff could suffer injury from the first predicate act and be denied recovery for that injury due to lack of standing if the second predicate act occurs outside the four-year limitation.⁵⁵

B. The Injury and Pattern Discovery Rule

The Sixth, Eighth, Tenth and Eleventh Circuits have adopted a second approach, the "injury and pattern discovery rule."⁵⁶ Under this rule, once a plaintiff is injured by one or more predicate acts, a civil RICO cause of action will accrue as soon as the plaintiff discovers, or should have discovered, both the existence and source of his injury and that the injury is part of a pattern of racketeering activity.⁵⁷ These circuits also adhere to a separate accrual formula under which a civil RICO cause of action accrues each time a plaintiff discovers a new and independent injury,⁵⁸ the source of that injury and the resulting pattern.⁵⁹

For example, in *Bivens Gardens Office Building v. Barnett Bank*,⁶⁰ the plaintiffs brought a civil RICO action in 1983 for injuries suffered as a result of a wrongful takeover in 1975 and a wrongful sale of corporate assets in 1981.⁶¹ Previously, one of the plaintiffs filed a state court action in 1975 following the corporate takeover. In *Bivens*, the Eleventh Circuit noted that the injury discovery rule articulated by the Second Circuit in *Bankers Trust*⁶² "fail[ed] to recognize that an injury to a plaintiff from a single predicate act

55. See *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1129 (3d Cir. 1988) (stating that under the injury discovery rule, a plaintiff's claim might be time barred before all the elements of his claim exist).

56. See *Pilkington v. United Airlines*, 112 F.3d 1532, 1535 (11th Cir. 1997); *Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398, 1402 (8th Cir. 1995); *Caproni v. Prudential Sec., Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994) (endorsing but not expressly adopting the injury and pattern discovery rule); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817, 820 (10th Cir. 1990); *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554 (11th Cir. 1990).

57. See *Bivens*, 906 F.2d at 1554. The *Bivens* court noted that a plaintiff injured by a predicate act can discover the racketeering pattern when he is injured by a related predicate act or when he discovers that another person has been injured by a related predicate act. See *id.*

58. See *supra* notes 43-44 and accompanying text.

59. See *Association of Commonwealth Claimants*, 71 F.3d at 1402; see also *Pilkington*, 112 F.3d at 1535; *Bivens*, 906 F.2d at 1553.

60. 906 F.2d 1546 (11th Cir. 1990).

61. See *id.* at 1549. The plaintiffs alleged that, as a result of a RICO conspiracy and substantive RICO violations, the plaintiffs suffered several independent harms over a period of eight years. See *id.* Specifically, the plaintiffs contended that they were injured by: (1) the wrongful takeover on February 20, 1974, of a company in which they were shareholders; (2) the mismanagement and diversion of corporate assets; and (3) the wrongful sale of a hotel for substantially less than its fair market value in April 1981. See *id.*

62. 859 F.2d 1096 (2d Cir. 1988).

does not evolve into a civil RICO injury until a 'pattern' of racketeering activity has developed."⁶³ The court held that the discovery rule should be applied to the pattern element of a civil RICO cause of action.⁶⁴ Applying the injury and pattern discovery rule, the court determined that, according to the state court complaint, the plaintiff who filed the state complaint knew of his injuries in connection with the wrongful takeover as well as the pattern of fraudulent activity that precipitated them no later than the filing date of the state court action.⁶⁵ Therefore, the plaintiff who filed the state complaint could not recover for damages sustained as a result of the takeover.⁶⁶

The injury and pattern discovery rule attempts to account for the unique elements of civil RICO. However, this test is arguably more expansive than necessary.⁶⁷ A plaintiff may hypothetically discover his injury in year one and be unable to discover the pattern until year six. Thus, a potential plaintiff could bring his claim until year ten.⁶⁸ The injury and pattern discovery rule gives the civil RICO plaintiff an additional four years to file after he discovers his injury and its source.⁶⁹

C. The Clayton Act Rule

The Clayton Act rule has its genesis in the strong analogy drawn by *Agency Holding Corp.*⁷⁰ Courts using this rule apply the Clayton Act's rule

63. *Bivens*, 906 F.2d at 1553. The injury discovery rule "focuses upon the injury sustained by a predicate act rather than upon the RICO injury, thus making it possible for the limitations period to have lapsed before the plaintiff can state a RICO cause of action." *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *see also* *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1134 (3d Cir. 1988).

64. *See Bivens*, 906 F.2d at 1553. *But see* *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992) (recognizing that "an important distinction [exists] between discovery of an *injury* and discovery of a *cause of action*").

65. *See Bivens*, 906 F.2d at 1555. The court stated that the plaintiffs, including *Bivens Gardens Office Building* and its sole shareholder, Mr. Konstand, were unable to recover for the 1975 takeover because of the filing of the state claim. The court, however, declared that Konstand's knowledge could not be "automatically imputed" to the other plaintiffs. *Id.* at 1556. Because no evidence showed that the other plaintiffs knew or should have known of the pattern of racketeering activity at the time of the state filing, the district court erred in dismissing the claims of the other plaintiffs regarding the 1975 takeover. *See id.*

66. *See id.* The plaintiffs' claims regarding the separate injuries in 1981, however, were not time barred. *See id.* at 1556.

67. *See* Respondents' Brief on the Merits, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663), available in 1997 WL 126146, at *20-21.

68. *See supra* note 57.

69. Respondent's Brief, *Klehr* (No. 96-663), 1997 WL 126146, at *21 ("[T]he injury and pattern discovery rule requires plaintiffs to be diligent up until the time they learn all they need to learn to file suit, but then inexplicably removes the pressure entirely for an additional four years.").

70. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987); *see also supra* notes 27-30 and accompanying text.

of accrual to analogous civil RICO claims.⁷¹ Under the Clayton Act rule, “a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff’s business” or property despite the plaintiff’s failure to discover the existence of his cause of action.⁷² The Clayton Act rule also follows a separate accrual rule which generates a separate cause of action for each violation that causes injury.⁷³ Thus, an action for each injury must be brought within four years of the violation, plus any additional period during which the statute of limitations may be tolled.⁷⁴ Moreover, because the plaintiff must bring suit within four years of the violation itself, the plaintiff is entitled to recover all damages suffered at the date of accrual as well as those which he will suffer in the future from the violation.⁷⁵

Although civil RICO is based on the Clayton Act and the Supreme Court has adopted the Clayton Act’s four-year statute of limitations,⁷⁶ the analogy between the two statutes is not perfect. First, unlike antitrust suits, many civil RICO complaints are grounded in fraud which may be undiscoverable at the time of injury.⁷⁷ Under the Clayton Act rule of accrual, the statute of limitations begins to run despite a plaintiff’s failure to discover the injury.⁷⁸ The exception to the strict application of this rule is fraudulent

71. The Clayton Act’s rule of accrual has not been adopted by any circuit. *See Granite Falls Bank v. Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991). Several federal district courts have applied this rule based on the rationale in *Agency Holding Corp.* *See, e.g., Gilbert Family Partnership v. Nido Corp.*, 679 F. Supp. 679, 686 (E.D. Mich. 1988) (stating that “the rationale of the *Agency Holding* decision requires an application of the limitations accrual principles of the Clayton Act”). The Second Circuit in *Bankers Trust* inaccurately stated that the Clayton Act’s rule of accrual supported its adoption of the injury discovery rule. The injury discovery rule takes into account the plaintiff’s knowledge, whereas the Clayton Act’s accrual rule does not. *See id.*; *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1104 (2d Cir. 1988); *see also supra* note 39.

72. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *see also Granite Falls Bank*, 924 F.2d at 153.

73. *See Zenith*, 401 U.S. at 338-39.

74. *See id.* at 338. The doctrine of fraudulent concealment can toll the statute of limitations during the period of concealment. *See infra* note 130 and accompanying text.

75. *See Zenith*, 401 U.S. at 338-39. The Supreme Court also noted that a plaintiff is entitled to recover the damages suffered during and after trial. *See id.*; *see also Pennsylvania Dental Ass’n v. Medical Serv. Ass’n*, 815 F.2d 270, 278 (3d Cir. 1987) (citing *Zenith*, 401 U.S. at 338-39).

76. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987). However, even if a cause of action has accrued as of a certain date, future damages that may arise from the violation are unrecoverable if the damage is speculative or the amount and nature unprovable. *See Zenith*, 401 U.S. at 339. A cause of action for such future damages will accrue on the date they are suffered, and a plaintiff may then recover within four years from that date. *See id.*

77. *See Agency Holding Corp.*, 483 U.S. at 149 (finding that a large majority of civil RICO complaints use fraud as the required predicate offenses).

78. *See Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) (Under the Clayton Act’s accrual rule, “the plaintiff’s knowledge is generally irrelevant to accrual, which is determined according to the date on which the injury occurs.”).

concealment.⁷⁹ Second, the Clayton Act rule ignores the pattern requirement unique to RICO and instead states that the cause of action accrues when the defendant commits the act that causes plaintiff to suffer injury.⁸⁰ The statute of limitations may therefore run before the second predicate act constituting the pattern has occurred.

D. The Last Predicate Act Rule

Prior to *Klehr*, the Third Circuit adhered to the last predicate act rule.⁸¹ Like the circuits that use the injury and pattern discovery rule,⁸² the Third Circuit stated that the limitations period began to run when a plaintiff knew or should have known that the elements of a RICO claim existed.⁸³ The Third Circuit then added a distinguishing exception: if as a result of the same pattern of racketeering activity, the plaintiff suffers further injury or another predicate act occurs, the cause of action accrues “from the time when the plaintiff knew or should have known of the last injury or the last predicate act”⁸⁴ The last predicate act does not have to cause the injury, it must only be part of the same pattern of racketeering activity.⁸⁵

In *Keystone Insurance Co. v. Houghton*,⁸⁶ the Third Circuit announced this most liberal, plaintiff-oriented rule of accrual. In that case, the defendants submitted fraudulent insurance claims to their insurer regarding automobile accidents in which they were involved in 1977⁸⁷ and 1980.⁸⁸ Around 1981, Keystone discovered that the plaintiffs had made similar fraudulent claims against other insurance companies.⁸⁹ Keystone filed its civil RICO claim in

79. The fraudulent concealment doctrine is designed “to prevent a defendant from ‘concealing a fraud, or . . . committing a fraud in a manner that it concealed itself until’ the defendant ‘could plead the statute of limitations to protect it.’” *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874)).

80. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Civil RICO requires a pattern of racketeering activity in order to create a cause of action. *See supra* note 26 and accompanying text.

81. *See Glessner v. Kenny*, 952 F.2d 702, 706 (3d Cir. 1991); *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1132 (3d Cir. 1988).

82. *See supra* note 56 and accompanying text.

83. *See Keystone*, 863 F.2d at 1130.

84. *Id.*

85. *See id.*

86. 863 F.2d 1125 (3d Cir. 1988).

87. Regarding the 1977 accident, Keystone issued the last check to the insureds on July 10, 1980, and made the last mailing regarding the claim on December 28, 1982. *See id.* at 1126.

88. On July 7, 1980, John Cassidy was involved in an accident in which his brother, the defendant, was a witness. He submitted a fraudulent claim based on this accident to Keystone, which made its last payment on March 3, 1981. *See id.*

89. *See id.* The defendants were convicted in June 1986 of criminal mail fraud relating to the November 1977 and July 1980 accidents. *See id.* at 1127.

July 1986.⁹⁰ Under the last predicate act rule, the Third Circuit held that Keystone's civil RICO claim was within the four-year statute of limitations because an unrelated 1983 mailing to another insurance company was the last predicate act in the defendants' ongoing pattern of racketeering.⁹¹

IV. *KLEHR V. A.O. SMITH*'S IMPACT ON THE CIVIL RICO ACCRUAL RULES

The Supreme Court subsequently eradicated the Third Circuit's last predicate act rule.⁹² In *Klehr v. A.O. Smith Corp.*,⁹³ Minnesota dairy farmers brought a civil RICO action against A.O. Smith Harvestore Products, Inc. ("Harvestore"), which sold them a special "oxygen limited" silo for storing cattle feed.⁹⁴ The Klehrs alleged that they purchased the silo in 1974 based on representations made by the dealer that the silo would prevent moldy and fermented feed which would result in higher milk production.⁹⁵ Although the Klehrs noticed that the feed stored in their silo seemed fermented and that their cows' milk production was decreasing, the Klehrs alleged that Harvestore continued to deceive them by fraudulent representations.⁹⁶ In 1991, the Klehrs investigated the silo and discovered extensive mold throughout the feed.⁹⁷

Subsequently, the Klehrs brought a civil suit in 1993, nearly twenty years after they bought the silo, alleging that Harvestore had engaged in

90. *See id.* The district court found the last predicate act was a mailing in December 1982 and held that Keystone's action was time barred because it knew, or should have known, in 1981 that the July 1980 accident involved fraud. *See id.*

91. *See id.* at 1135.

92. In *Klehr*, the Supreme Court granted certiorari January 10, 1997, *see Klehr v. A.O. Smith Corp.*, 117 S. Ct. 725 (1997), only four days before it dismissed *Grimmett v. Brown*, 75 F.3d 506 (9th Cir.), *cert. granted*, 518 U.S. 1003 (1996), *cert. dismissed as improvidently granted*, 519 U.S. 233 (1997), another RICO case in which it had already heard argument. *See* United States Supreme Court Official Transcript, *Grimmett* (No. 95-1723), available in 1997 WL 8587. In *Grimmett*, the Court faced the question of when a civil RICO claim accrues. In that case, an ex-wife and a bankruptcy trustee sued under RICO to recover from an attorney who allegedly masterminded a fraudulent scheme to conceal the bankrupt ex-husband's interest in a medical practice for purposes of defeating the former wife's community property interest in the estate. *See Grimmett*, 75 F.3d at 508-09. The Ninth Circuit ruled that a civil RICO claim accrues when the plaintiff knows or should know of the injury that underlies the cause of action, regardless of whether the plaintiff has yet discovered that the injury is part of a pattern of racketeering. *See id.* at 511. The Ninth Circuit followed the separate accrual rule which allows a cause of action to accrue for each new and independent injury. *See id.* at 512. The Ninth Circuit dismissed the plaintiffs' RICO claim as time barred under both the injury discovery rule and the separate accrual rule. *See id.* at 512, 514.

93. 117 S. Ct. 1984 (1997).

94. *See id.* at 1988. The Klehrs asserted several acts of mail and wire fraud. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

racketeering and fraud in violation of RICO.⁹⁸ The Klehrs asserted that “Harvestore committed other acts—consisting primarily of additional representations made to them and to others . . . over a period of many years after 1974.”⁹⁹ On appeal from the Eighth Circuit, the Klehrs argued that their suit was not time barred because Harvestore committed one predicate act within the statute of limitations period.¹⁰⁰

The Supreme Court dismissed the last predicate act rule of accrual¹⁰¹ as an “[im]proper interpretation of the law.”¹⁰² The Court¹⁰³ concluded that the “last predicate act rule creates a limitations period that is longer than Congress could have contemplated.”¹⁰⁴ Under the last predicate act rule, a plaintiff could discover a pattern of activity and sit idle while the pattern continues¹⁰⁵ and treble damages¹⁰⁶ accumulate, and bring suit years after the

98. *See id.* at 1988.

99. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1988 (1997).

100. *See id.* at 1989. Both the district court and the Eighth Circuit applied the injury and pattern rule. *See Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 238 (8th Cir. 1996). The Eighth Circuit concluded that the Klehrs suffered one continuous injury in the 1970s and that they should have discovered the existence and source of their injury as well as any related pattern well before 1989. *See id.* at 239. The Supreme Court refused to review the Eighth Circuit’s conclusion that the Klehrs should have discovered the source of their injury before 1989. *See Klehr*, 117 S. Ct. at 1992. The Court observed that such a determination is highly fact-based and that the writ of certiorari required the Court to decide only the “legal question of whether or not a claim accrues ‘where the Respondent continues to commit predicate acts’ in the 4-year period immediately preceding suit.” *Id.* (quoting Petition for Certiorari at i, *Klehr* (No. 96-663)).

In the alternative, if the Court rejected the last predicate act rule and adopted a separate accrual rule, the Klehrs urged the Court to reject the Eighth Circuit’s ruling that each new predicate act must also be accompanied by independent injury to avoid the bar imposed by the statute of limitations. *See Klehr*, 117 S. Ct. at 1991. Respondents A.O. Smith Corp. and Harvestore advocated that the Court apply “the same rule that has traditionally been applied to most federal civil claims.” Respondents’ Brief on the Merits, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663), available in 1997 WL 126146, at *8. “Under that rule, the limitations period for civil RICO claims begins to run when (1) all elements of the civil RICO claim exist, and (2) the plaintiff discovers, or reasonably should have discovered, his injury.” *Id.* The separate accrual rule would apply as well as traditional equitable tolling doctrines. *Id.*

101. For a discussion of the last predicate act rule as set forward by the Third Circuit, see *supra* notes 83-84 and accompanying text.

102. *Klehr*, 117 S. Ct. at 1989. The Court discussed the Klehrs’ case under the Third Circuit’s last predicate act rule, because it was the broadest accrual rule among those advocated by the circuits. *See id.*; see also *supra* notes 84-85 and accompanying text. The Court determined that the Third Circuit’s accrual rule was the only rule that could help the Klehrs, and thus, if the claims did not fit under this rule, the validity of the other rules was not an issue. *See Klehr*, 117 S. Ct. at 1989.

103. Justice Breyer delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Stevens, O’Connor, Kennedy, Souter and Ginsburg joined. Justice Scalia filed an opinion, in which Justice Thomas joined, concurring in part and concurring in the judgment. *See Klehr*, 117 S. Ct. at 1987.

104. *Id.* at 1989.

105. A series of predicate acts, including acts occurring up to ten years apart, could continue indefinitely. *See Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1989 (1997).

106. *See supra* note 24.

injury occurred.¹⁰⁷ Such a rule, according to the Court, evades a defendant's expectation of repose, an objective underlying the statute of limitations.¹⁰⁸ In addition, the last predicate act rule discourages potential plaintiffs from diligently investigating a RICO injury and permits inefficient litigation when suit is brought long after evidence is lost.¹⁰⁹

The Supreme Court relied on the Clayton Act accrual rule in rejecting the Third Circuit's last predicate act rule.¹¹⁰ Under the Clayton Act rule of accrual, each overt act that injures the plaintiff starts the statute of limitations running again, despite the plaintiff's knowledge of the violation.¹¹¹ However, the commission of the separate overt act does not permit the plaintiff to use it as a bootstrap to recover for injuries caused by other earlier predicate acts that occurred outside the limitations period.¹¹² The Court noted that Congress consciously patterned civil RICO after the Clayton Act¹¹³ and, when civil RICO was enacted, the Clayton Act's accrual rule was well-established.¹¹⁴

The Court noted that a pure injury accrual rule is not always appropriate without modification in civil RICO.¹¹⁵ Justice Scalia criticized the Court for this distinction.¹¹⁶ According to Scalia, a clear path back out of the "forest of

107. See *Klehr*, 117 S. Ct. at 1989; see also *Rodriguez v. Banco Cent.*, 917 F.2d 664, 667 (1st Cir. 1990) (stating that the last predicate act rule would allow a "fully knowledgeable plaintiff" at least three or four decades to bring suit if the pattern continues).

108. See *Klehr*, 117 S. Ct. at 1989; see also *supra* note 32.

109. See *Klehr*, 117 S. Ct. at 1989-90; see also *supra* note 32.

110. See *Klehr*, 117 S. Ct. at 1990; see also *supra* note 72 and accompanying text.

111. See *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1990 (1997); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Any new overt act must cause a separate injury above the harm suffered from earlier acts. See *supra* note 43 and accompanying text. In rejecting the last predicate act rule, the Court noted that although the Klehrs could point to new predicate acts that took place after August 1989, they did not show any new harm over and above the harm that the earlier acts caused. See *Klehr*, 117 S. Ct. at 1991. Furthermore, because the Court rejected the last predicate act rule, any new act within the limitations period would not help the Klehrs recover any damages prior to 1989. See *id.*

112. See *supra* notes 43-44 and accompanying text. The Supreme Court recognized the separate accrual rule used by several circuits under which the commission of a separate, new predicate act within a four-year limitations period permits a plaintiff to recover for the additional damages caused by the act. See *Klehr*, 117 S. Ct. at 1991. The Court did not disapprove of this rule because like antitrust cases, the plaintiff may not recover for injuries caused by earlier predicate acts that occurred outside of the limitations period. See *id.*; see also *Zenith*, 401 U.S. at 338; *Grimmett v. Brown*, 75 F.3d 506, 512-13 (9th Cir. 1996); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1466 (7th Cir. 1992).

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

114. See *Klehr*, 117 S. Ct. at 1990.

115. See *id.* at 1992 ("[T]he Clayton Act's express statute of limitations does not necessarily provide all the answers."). The Court noted that unlike an antitrust violation, civil RICO requires not just a single act, but rather a pattern of acts. See *id.* at 1990. In addition, the Court acknowledged the debate regarding a plaintiff's awareness of certain RICO elements as required by the injury discovery rule or the injury and pattern discovery rule. See *id.* at 1990-91. However, the Court assumed the plaintiffs were knowledgeable and thus did not address this issue. See *id.* at 90-92.

116. See *Klehr*, 117 S. Ct. at 1994 (Scalia, J., concurring).

confusion" is the proposition that RICO is similar to the Clayton Act.¹¹⁷ In adopting the Clayton Act's statute of limitations, he argued, the Court in *Agency Holding Corp.* specifically rejected the argument that a preponderance of fraud claims under RICO makes the Clayton Act an inappropriate model.¹¹⁸ Scalia chastised the majority for now recognizing this argument in deciding the accrual rule.¹¹⁹

V. ANALYSIS—KLEHR'S SIGNIFICANCE TO THE CIRCUIT SPLIT

Although the Supreme Court limited the circuit split regarding the accrual rule for civil RICO actions, it declined to state which of the other alternative rules it would adopt.¹²⁰ The Court's refusal to solve the federal courts' split leaves the three remaining accrual rules¹²¹ intact in those jurisdictions that have adopted a particular test.¹²² For those jurisdictions that have not, litigants are left to guess which rule applies.

The Court is willing to say "what is good for antitrust is good for RICO"¹²³ on decisive issues such as the statute of limitations, but timidly avoids this position when the specific requirements of the civil RICO statute do not fit easily into the antitrust mold.¹²⁴ The statute of limitations period adopted in *Agency Holding Corp.*¹²⁵ is of limited value without an accrual rule that specifies when the statute of limitations begins to run.¹²⁶ The Court

117. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1994 (1997) (Scalia, J., concurring). It was the similarities between these two statutes that led the Court to adopt the Clayton Act's statute of limitations. *See supra* notes 27-30 and accompanying text.

118. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 149 (1987). When adopting the Clayton Act's statute of limitations for civil RICO, the Court in *Agency Holding Corp.* dismissed the differences between the two Acts: "[A]lthough the large majority of civil RICO claims use [fraud] as the required predicate offenses, a not insignificant number of complaints allege criminal activity of a type generally associated with professional crimes such as arson, bribery, theft and political corruption." *Id.*

119. Scalia advocated the adoption of the Clayton Act's injury rule. *See Klehr*, 117 S. Ct. at 1995 (Scalia, J., concurring).

120. The Supreme Court noted the major difference among the circuits—whether a discovery rule includes knowledge about a pattern—and decided it was not at issue in the present case because the Klehrs did not claim lack of knowledge of a pattern. *See Klehr*, 117 S. Ct. at 1992. Thus, the Court failed to resolve the circuit split because the "legal questions involved may be subtle and difficult." *Id.* Instead, the Court opted to wait and hear argument on the application of the Clayton Act's rule. *See id.*

121. *See supra* Part III.

122. *See, e.g., Aramony v. United Way of America*, 969 F. Supp. 226, 230 (S.D.N.Y. 1997); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 1997 WL 548880, at *2 (D. Kan. Aug. 26, 1997).

123. *See Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1994 (1997) (Scalia, J., concurring).

124. *See id.* ("[W]e do not reach [the accrual issue] today for no particular reason except timidity We thus leave reduced but unresolved the well-known split in authority that prompted us to take this case.")

125. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987).

126. *See Klehr*, 117 S. Ct. at 1995 (Scalia, J., concurring) ("As a practical matter, a four-year

should not use a “mix-and-match” approach.¹²⁷ The Court recognized the unique elements of the civil RICO statute and yet continues to use the Clayton Act model.¹²⁸ To stray from the model on the question of accrual creates an inherent contradiction.¹²⁹

The adoption of the Clayton Act rule would complete the process begun in *Agency Holding Corp.* and provide uniformity throughout the circuits. A civil RICO plaintiff can rely on common-law doctrines such as fraudulent concealment to toll the statute of limitations in which fraud is the alleged predicate act and relieve the harshness of the Clayton Act rule.¹³⁰ In addition, the adoption of the strict Clayton Act rule would serve to limit civil RICO’s

statute of limitations means nothing at all unless one knows when the four years start running.”).

127. *Klehr*, 117 S. Ct. at 1996 (Scalia, J., concurring). Scalia accused the Court of judicial lawmaking by choosing to adopt only part of the Clayton Act’s statute of limitations. *See id.*

128. *See Agency Holding Corp.*, 483 U.S. at 151.

129. The Court in *Agency Holding Corp.* reasoned that civil RICO was patterned after the Clayton Act and was thus similar in purpose and structure. *See Agency Holding Corp.*, 483 U.S. at 151. Based on these grounds, the Court adopted the Clayton Act’s four-year statute of limitations. *See id.* at 156. Thus, it is logical that the Court adopt the accrual rules developed under the Clayton Act. *See Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1995 (1997) (Scalia, J., concurring) (“We would thus have been foolish, in [*Agency Holding Corp.*], to speak of ‘adopting’ the Clayton Act statute, and of ‘patterning’ the RICO limitation period after the Clayton Act, if all we meant was using the Clayton Act number of years.”).

130. The doctrine of fraudulent concealment can toll the statute of limitations in the antitrust context. *See Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir. 1961). Fraudulent concealment could also be applied in civil RICO cases. *See Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946) (“Th[e] equitable doctrine [of fraudulent concealment] is read into every federal statute of limitation.”). For example, if a plaintiff who is injured as a result of a civil RICO violation can show that the injurious act was fraudulently concealed from him, the statute of limitations would be tolled for the period of concealment. *See Mary S. Humes, RICO and a Uniform Rule of Accrual*, 99 YALE L.J. 1399, 1409 (1990); *see also Hackenburg, supra* note 51, at 1430 (stating that application of the fraudulent concealment doctrine in conjunction with the Clayton Act’s rule of accrual would have the same effect as the discovery rule). For a discussion of fraudulent concealment and the Clayton Act, *see* Richard F. Schwed, Note, *Fraudulent Concealment, Self-Concealing Conspiracies, and the Clayton Act*, 91 MICH. L. REV. 2259 (1993). *See also Detrick v. Panalpina Inc.*, 108 F.3d 529, 540-43 (4th Cir. 1997).

The doctrine of fraudulent concealment could potentially preserve undiscovered causes of action when the Clayton Act’s rule is applied. *See* United States Supreme Court Official Transcript, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663), available in 1997 WL 205737, at *32 (attorney Bruce J. Ennis, Jr. for the respondents, A.O. Smith Corporation, suggesting that fraudulent concealment operates to prevent a cause of action from accruing upon the occurrence of the injury even if the plaintiff has no knowledge that he has been injured); *see also Fujisawa Pharm. Co.*, 115 F.3d 1332, 1338-39 (7th Cir. 1997); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992) (“[E]quitable tolling may well delay the running of the RICO limitations period while a victim diligently investigates the possible existence and extent of a pattern of racketeering.”); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 668 (1st Cir. 1990) (suggesting that the tolling doctrine of fraudulent concealment used in antitrust cases could be used in analogous RICO cases in which the Clayton Act’s rule is applied); *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817, 821 (10th Cir. 1990) (noting that “[s]tandard tolling exceptions continue to apply”); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (same); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1491 (D.C. Cir. 1989) (same); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988) (same).

expansive reach.¹³¹

Although the Court did not resolve the circuit split, the *Klehr* decision is significant to the Court's position in adopting an accrual rule for civil RICO. The Court struggled with reconciling the unique pattern requirement contained in RICO.¹³² In addition, the Court is concerned with the strict application of the Clayton Act rule in cases involving fraud.¹³³ It appears that the Supreme Court is partial to adopting the Clayton Act rule, but resolution awaits the appropriate case.¹³⁴

CONCLUSION

Largely because the civil RICO statute requires proof of an injury caused by a pattern of predicate acts, which is a unique RICO element not addressed by congruent elements in the Clayton Act, the accrual question remains unresolved. After the Court's analysis of the last predicate act rule in *Klehr*, it seems clear that the Court does not favor an expansive accrual rule for civil RICO. Instead, it appears the Court favors adopting the Clayton Act's rule of accrual along with equitable tolling doctrines that mitigates the results in RICO fraud cases. Until the Supreme Court resolves the issue, lower courts will continue to wade through the complexities and ambiguities that plague the civil RICO statute. However, the Supreme Court is aware of the problem and should soon answer the question of when a civil RICO claim accrues.

Dana P. Babb

131. Many critics and some courts have publicly urged Congress to amend civil RICO to restrict its application. The Supreme Court first addressed civil RICO in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). In that opinion, Justice White commented that civil RICO's private remedy was "evolving into something quite different from the original conception of its enactors." *Id.* at 500. In reaction to the growing number of civil RICO filings, Chief Justice Rehnquist urged Congress to limit civil RICO's scope to wrongs connected with organized crime. *See Abrams, supra* note 6, at 53; *see also Bremer et al., supra* note 13, at 975-76 (stating that civil RICO's "expansive reach and stiff penalties have led to its frequent invocation and common overuse by plaintiffs"). For an in-depth analysis of the growing expansion of civil RICO claims, *see Abrams, supra* note 6.

132. *See supra* note 115 and accompanying text; *see also* United States Supreme Court Official Transcript, *Klehr*, (No. 96-663), available in 1997 WL 205737, at *3-26.

133. *See supra* note 115 and accompanying text.

134. *See Klehr*, 117 S. Ct. at 1992. Justices Scalia and Thomas expressly approve adopting the Clayton Act's accrual rule. *See id.* at 1995 (Scalia, J., concurring).

