

## BYU Law Review

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Volume 1998 | Issue 3

Article 7

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9-1-1998

# Completing *Klehr v. A.O. Smith Corp.*, and Resolving the Oddity and Lingering Questions of Civil RICO Statute of Limitations Accrual

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### Recommended Citation

Marcus R. Mumford, *Completing *Klehr v. A.O. Smith Corp.*, and Resolving the Oddity and Lingering Questions of Civil RICO Statute of Limitations Accrual*, 1998 BYU L. Rev. 1273 (1998).

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## Completing *Klehr v. A.O. Smith Corp.*, and Resolving the Oddity and Lingering Questions of Civil RICO Statute of Limitations Accrual

### I. INTRODUCTION

Civil RICO<sup>1</sup> was left “limitations-naked”<sup>2</sup> when enacted by Congress in 1970, and remained that way until the Supreme Court clothed the statute with a four-year statute of limitations period in a 1987 case, *Agency Holding Corp. v. Malley-Duff & Associates*.<sup>3</sup> But the *Malley-Duff* Court did not determine when that limitations period should begin to run.<sup>4</sup> In the wake of the *Malley-Duff* decision, the federal courts delineated essentially three conflicting rules for civil RICO statute of limitations accrual.<sup>5</sup> Thus, for over ten years, RICO litigants have been asking: When does the civil RICO statute of limitations accrue?

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1. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1994). RICO provides plaintiffs with a civil treble-damage remedy. *See* 18 U.S.C. § 1964. The Supreme Court, in *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 155 (1987), noted that a “general ‘catchall’ federal [five-year] criminal statute of limitations” applies in criminal prosecutions under RICO.

2. *See* *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1996 (1997) (Scalia, J., concurring in part and concurring in the judgment).

3. *See Malley-Duff*, 483 U.S. at 156 (selecting the “4-year statute of limitations for Clayton Act actions, 15 U.S.C. § 15(b), [as] the most appropriate limitations period for RICO actions”). Earlier, the Court noted that “Congress’ failure to enact [a statute of limitations] cannot be read as a rejection of a uniform federal statute of limitations.” *Id.* at 155.

4. *See id.* at 156-57 (explaining that it “[had] no occasion to decide the appropriate time of accrual”).

5. *See A Circuit-by-Circuit Analysis of the Statute’s Most Litigated Issues*, CIVIL RICO REPORT’S COURT WATCH, Aug. 1997, at 21 (providing a table of circuit-by-circuit analysis of RICO’s statute of limitations issue). *See* discussion *infra* Part II.B. A detailed analysis of each circuit’s rule lies beyond the scope of this Note. Other commentators have delineated four or five different rules from the federal court cases. *See Klehr*, 117 S. Ct. at 1994 n.1 (Scalia, J., concurring in part and concurring in the judgment) (“[T]here is a fourth accrual rule—the Clayton Act ‘injury’ rule.”); Edwin Scott Hackenberg, 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, 1413 (1988) (“[F]our lines of authority regarding civil RICO accrual have emerged . . . .”); 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, 195-96 (1990) (recognizing five existing rules). *See also infra* note 13 (suggesting a different rule might be necessary in RICO conspiracy cases).

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Many anticipated the Supreme Court would answer this lingering question in *Klehr v. A.O. Smith Corp.*,<sup>6</sup> a decision handed down a little more than a week before the Court took its 1997 summer recess.<sup>7</sup> But instead of answering the question and resolving the conflict, the Court in *Klehr* merely struck down the Third Circuit's "last predicate act" rule.<sup>8</sup> And so "the question," Justice Scalia pointed out in his concurrence, "remain[ed] unanswered."<sup>9</sup>

The differing accrual rules that have developed since *Malley-Duff* reflect the tensions inherent in the civil RICO limitations period issue. Although the *Klehr* Court gave an indication of how it would resolve these tensions, it left more questions lingering about an acceptable rule than it answered. This Note answers those lingering questions and uses the reasoning of *Klehr* to establish an analytical framework for an acceptable RICO statute of limitations accrual rule. Part II of this Note gives a background to the RICO statute of limitations issue and lays out the competing circuit rules that developed after *Malley-Duff*. Part III examines *Klehr*, specifically the nature of the petitioners' RICO claim and the Court's reasoning in its rejection of the Third Circuit's "last predicate act" rule. Part IV analyzes the *Klehr* decision according to the underlying principles of a statute of limitations, namely "recovery" and "repose,"<sup>10</sup> and uses the Court's reasoning to resolve the questions that the *Malley-Duff* and *Klehr* Courts left lingering. Part V lays out a final accrual rule that completes what the

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6. 117 S. Ct. 1984 (1997).

7. See David F. Pike, *U.S. Supreme Court to Hear Arguments on when Limitation Period Runs on RICO*, L.A. DAILY J., Apr. 21, 1997, at 4 (explaining how the Supreme Court, after it heard arguments in *Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996), dismissed that case because settlement and procedural problems made it moot, but then granted review to *Klehr*, "apparently eager to settle a three-way split in the federal circuits"). Many expected the Court to resolve the conflict. See Michael J. Mueller, *Klehr v. A.O. Smith Corp.: When Will We Learn the Accrual Rule for Civil RICO?*, RICO L. REP., Jul. 1997, at 8, 8.

8. *Klehr*, 117 S. Ct. at 1995 (Scalia, J., concurring in part and concurring in the judgment).

9. *Id.* at 1994 (Scalia, J., concurring in part and concurring in the judgment).

10. See O'Neill, *supra* note 5, at 190; Judge David B. Sentelle, *Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 CAMPBELL L. REV. 145, 167-68 (1990) (citing *United States v. Kubrick*, 444 U.S. 111, 117 (1979)).

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Supreme Court started in *Malley-Duff* in accordance with limitations “first principles,” *Klehr*, and civil RICO.

## II. BACKGROUND

### A. RICO's Development

The substantive provisions of RICO, contained in 18 U.S.C. § 1962(a)-(d), prohibit: (a) investing monies earned through a pattern of racketeering in an enterprise engaged in interstate commerce; (b) acquiring an interest, through a pattern of racketeering, in an enterprise engaged in interstate commerce; (c) conducting the affairs, through a pattern of racketeering, of an enterprise engaged in interstate commerce; or (d) conspiring to violate any of the above prohibitions.<sup>11</sup> The RICO statute provides a private civil action by which plaintiffs may recover treble damages and attorney's fees for injury “by reason of a violation of” these substantive provisions.<sup>12</sup> The elements that a RICO plaintiff needs to allege in a claim are essentially the same under all the provisions, except for the conspiracy prohibition.<sup>13</sup> For an 18 U.S.C. § 1962(c) cause of action, the most commonly used prohibition,<sup>14</sup> a civil RICO plaintiff must

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11. See 18 U.S.C. § 1962(a)-(d) (1994).

12. 18 U.S.C. § 1964(c) (1994); see also 18 U.S.C. § 1961(1) (1994) (defining racketeering activities to include offenses such as murder, kidnaping, gambling, arson, robbery, bribery, extortion, and threats to commit any of the above, as well as other activities already criminalized elsewhere in the U.S. Code, such as mail and wire fraud, embezzlement, and obstructing federal investigations).

13. Under the conspiracy provision, 18 U.S.C. § 1962(d) (1994), a plaintiff may conceivably be injured under RICO before the pattern element is satisfied and therefore recover for her damages. This injury-before-pattern nuance distinguishes some conspiracy claims from the more common RICO claims under 18 U.S.C. § 1962(a)-(c), wherein the plaintiff cannot have suffered a violation of civil RICO until the pattern element has been satisfied. This Note, on statute of limitations accrual, addresses only those more common substantive violations of RICO under 18 U.S.C. § 1962(a)-(c). See discussion *infra* Part IV. An analysis of when the four-year civil RICO statute of limitations should accrue in conspiracy claims lies beyond the scope of this Note, but the topic is treated at length in Ellen Jancko-Baken, Note, *When Will the Idling Statute of Limitations Start Running in RICO Conspiracy Cases?*, 10 CARDOZO L. REV. 2167, 2189 (1989) (arguing that the statute of limitations in RICO conspiracy cases should begin running not, as the Fifth Circuit has held, when the objectives of the conspiracy have been accomplished or realized, but when the defendant's own agreement has terminated, like traditional conspiracy law (refuting *United States v. Elliot*, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978))).

14. See G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526 app. B at

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allege all of the following: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as ‘predicate acts’) (5) causing injury to the plaintiff’s ‘business or property.’”<sup>15</sup>

The purposes of RICO are well documented. RICO provides “enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.”<sup>16</sup> While RICO was primarily conceived as a criminal statute,<sup>17</sup> Congress included the civil remedy provision to hold violators financially responsible to the businesses they harm,<sup>18</sup> to encourage private attorneys general enforcement actions and, ultimately, to curb organized crime’s expansion into the sphere of legitimate commercial enterprise.<sup>19</sup> While prosecutors began using RICO’s enhanced criminal sanctions within a few years after its enactment, the novel civil RICO remedies remained essentially unused until the early 1980s.<sup>20</sup>

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619 (1987) (reporting that in 1985 and 1986, on average 92.5% of civil RICO claims cited to § 1962(c)); *see also* A.B.A. SECTION OF CORPORATE, BANKING & BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55 (1984) (97% of all civil RICO actions were brought under 18 U.S.C. § 1962(c)).

15. *See* *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996), *cert. granted*, 116 S. Ct. 2521 (1996), *cert. dismissed as improvidently granted*, 117 S. Ct. 759 (1997) (citing 18 U.S.C. §§ 1964(c), 1962(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)).

16. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (statement of findings and purpose).

17. *See* Robert E. Wood, *Civil RICO—Limitations in Limbo*, 21 WILLAMETTE L. REV. 683, 684 (1985).

18. *See* O’Neill, *supra* note 5, at 181.

19. *See id.* at 180-182. *But see* Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. REV. 33, 36 (1996) (“If Congress had debated civil RICO dispassionately, the lawmakers might have anticipated that the private remedy would have little or no effect on the fight against organized crime and racketeering. How many ‘private attorneys general’ would have the temerity to sue organized crime members and racketeers in open court for treble damages?”).

20. *See* Abrams, *supra* note 19, at 51 (suggesting that RICO went unnoticed in part because of its placement in Title 18 of the U.S. Code, not a place “lawyers ordinarily . . . consult in search of private remedies”). *See also* Mary S. Humes, Note, *RICO and a Uniform Rule of Accrual*, 99 YALE L.J. 1399, 1399 n.5 (1990).

Criminal RICO threatens defendants with mandatory forfeiture provisions and a threat of imprisonment and/or fines, while civil RICO threatens defendants with treble damages and attorney fees provisions. As one may imagine, both of these remedial and punitive remedies have created controversy. The substantive provisions of the two RICO features remain the same, but they differ in many ways that one might expect a criminal action to differ from a civil action, procedurally and substantively. On the statute of limitations issue, however, an observer may find their differences counterintuitive. For example, criminal RICO prosecutions apply a five-

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In fact, only two civil RICO cases appeared before 1979.<sup>21</sup> But in 1988 alone, 1000 complaints were filed in federal court.<sup>22</sup> The sudden increase in plaintiffs' attorneys' use of civil RICO during the early and mid-1980s led some to refer to the period as the "civil RICO explosion."<sup>23</sup> Some welcomed this "explosion" and RICO's increasingly frequent application against "white collar criminals,"<sup>24</sup> but others believed RICO should be limited to application against traditional "mobster" organizations. Supreme Court Chief Justice William Rehnquist wrote in 1989, "Virtually everyone . . . agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970."<sup>25</sup> Consequently, the Supreme Court has sustained the application of RICO "against white collar

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year statute of limitations, see *supra* note 1, making the criminal statute of limitations longer, and thus harder on defendants, than the civil limitations period. And the criminal limitations uses a "last predicate act" rule to begin the limitations period. This was the same rule that the Supreme Court struck down in *Klehr* because it extended the period longer than the statute intended and worked an undue hardship on civil defendants. For a discussion of criminal and civil RICO, see generally G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 *TEMPLE L.Q.* 1009, 1033-47 (1980) and Pamela H. Bucy & Steven T. Marshall, *An Overview of RICO*, 51 *ALA. LAW.* 283 (1990). For a comparison of criminal and civil RICO limitations accrual rules, see Lance Bremer et al., *Racketeer Influenced and Corrupt Organizations*, 34 *AM. CRIM. L. REV.* 931, 956-58 (1997).

21. See Wood, *supra* note 17, at 684 & n.6 (citing the two decisions).

22. See William H. Rehnquist, *Get RICO Cases Out of My Courtroom*, *WALL ST. J.*, May 19, 1989, at A14. See also Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 *VAND. L. REV.* 851 app. C, tbl. 1 at 1018-19 (1990) (graphing the number of RICO complaints filed during a forty-eight-month period, and showing that filings averaged 80 per month).

23. Abrams, *supra* note 19, at 34. "In early 1985, [a] district judge asked rhetorically: 'Would any self-respecting plaintiffs' lawyer omit a RICO charge these days?'" *Id.* at 52.

24. See Blakey & Gettings, *supra* note 20, at 1013-14 ("As finally enacted, RICO authorized the imposition of enhanced criminal penalties and new civil sanctions to provide new legal remedies for all types of organized criminal behavior, that is, enterprise criminality—from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors."); Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 *MINN. L. REV.* 827, 828-29, 831 (1987) ("Civil RICO has engendered controversy . . . because it has principally been applied against white collar institutions rather than against traditional organized crime . . . [but] Congress purposely drafted RICO to address a wide variety of problems.").

25. Rehnquist, *supra* note 22, at A14. See also Abrams, *supra* note 19, at 53 ("From the vantage afforded by the mid-1990s, it is evident that even civil RICO's 1970 congressional opponents underestimated the private remedy's expansive reach.").

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institutions,”<sup>26</sup> but it has “refrained from conferring complete legitimacy [to this application of civil RICO].”<sup>27</sup> A few commentators have documented how the federal court system has responded to the “explosion,” or the perceived abuse of civil RICO, by consistently “read[ing] limitations into the statute’s plain language.”<sup>28</sup>

Naturally, those federal courts that have read limitations into civil RICO’s plain language have restricted its use and application. This judicial impulse to restrict civil RICO may arise, in part, from a perceived statutory confusion, or “oddity” as Justice Kennedy called it during *Klehr* oral arguments.<sup>29</sup> Because civil RICO compliments traditional notions of injury with its own “injury and pattern” requirement, courts have become confused as to where these different injury requirements fit into a civil RICO cause of action. Justice Kennedy articulated his own confusion in *Klehr*, “It’s just strange to me that a RICO injury happens, and then the RICO pattern is completed later. I just find that very odd.”<sup>30</sup>

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26. Goldsmith, *supra* note 24, at 829 (as opposed to ‘traditional organized crime’).

27. *Id.* (referring to *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985)). In *Sedima*, the Supreme Court held that RICO’s “pattern” element was responsible for its “‘extraordinary’ uses.” *Sedima*, 473 U.S. at 500. In that opinion the Court noted that the correction of any defect “must lie with Congress,” *id.* at 499, but implied that “while two acts are necessary [to form a pattern], they may not be sufficient.” *Id.* at 496 n.14. The Court made the pattern element more difficult, requiring “continuity plus relationship.” *Id.* (quoting S. Rep. No. 91-617, at 158 (1969)). In a later case, the Supreme Court held that the term “conduct” implies a greater deal of participation in the racketeering enterprise than previously thought. *See Reves v. Ernst & Young*, 507 U.S. 170, 172 (1993); *see also H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989) (“[T]here is something to a RICO pattern *beyond* simply the number of predicate acts involved.” (emphasis in original)).

28. Blakey & Perry, *supra* note 22, at 862; *see also* Hackenberg, *supra* note 5, at 1421-22 (suggesting that some courts have applied the “discovery rule” to civil RICO statute of limitations because it is the most restrictive approach). For a discussion of this “discovery rule” and the courts that are applying it, *see infra* Part II.B.2.

29. *See* United States Supreme Court Official Transcript at 44, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663) (argued April 21, 1997, available in 1997 WL 205737). Justice Kennedy observed: “It’s just strange to me that a RICO injury happens, and then the RICO pattern is completed later. I just find that very odd . . . . It’s so odd that I’m inclined, if you really believe that, to think that the 4-year statute of limitations should be interpreted with similar oddity.” *Id.*

30. *Id.* *See also* O’Neill, *supra* note 5, at 172-74 (“Because of the uniqueness and originality of the pattern concept, traditional approaches to accrual cannot adequately serve the interests implicated in a private civil cause of action under RICO.”).

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In *Malley-Duff*, the Court applied the four-year Clayton Act limitations period to civil RICO because “the federal policies that lie behind RICO and the practicalities of RICO litigation [made the four-year period] the most appropriate limitations period for RICO actions”;<sup>31</sup> and because the Clayton Act “offer[ed] the closest analogy to civil RICO.”<sup>32</sup> But the Supreme Court stressed, even then, that RICO was different since it was “designed to remedy *injury caused by a pattern* of racketeering.”<sup>33</sup> RICO’s “pattern” element, the Court wrote, made it “unique.”<sup>34</sup>

Other courts have found the “pattern” and “injury” elements elusive. One federal circuit judge asked rhetorically, “What is a ‘pattern’? The short answer is that nobody knows.”<sup>35</sup> In response to RICO’s uniqueness, evasiveness, and oddity, the circuit courts have developed essentially three conflicting accrual rules since *Malley-Duff*: the “injury plus pattern discovery,” the “injury discovery,” and the “last predicate act” rules. These rules differ from each other primarily in how they juxtapose the RICO elements of “pattern” and “injury.”<sup>36</sup> A brief summary of these rules follows.

#### B. *The Competing Rules—A Circuit Conflict*

##### 1. *The injury plus pattern discovery rule*

Under the “injury plus pattern discovery” rule, the limitations period accrues “as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.”<sup>37</sup>

31. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987).

32. *Id.* at 150. The Clayton Act provides a civil remedy for antitrust injuries. *See* 15 U.S.C. § 15(a) (1994). The Court adopted the Clayton Act limitations period, in part, because Congress consciously patterned civil RICO after the Clayton Act. *See Malley-Duff*, 483 U.S. at 150-51 (comparing 15 U.S.C. § 15(a) with 18 U.S.C. § 1964(c)); *see also* O’Neill, *supra* note 5, at 186.

33. *Malley-Duff*, 483 U.S. at 149-50 (emphasis added).

34. *Id.* at 156. *See also* O’Neill, *supra* note 5, at 186.

35. Sentelle, *supra* note 10, at 157.

36. *See Humes*, *supra* note 20, at 1400-02; O’Neill, *supra* note 5, at 237-38.

37. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1998 (1997) (quoting *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 238 (8th Cir. 1996)).

Note also that elsewhere in *Klehr* the Court refers to the Eighth Circuit’s rule as the “injury plus source plus pattern” discovery rule. *Id.* at 1992. This addition of “source” to the rule formulation creates additional issues. This Note discusses these issues *infra* Part IV.B.3. *See also* Jay Kelly Wright, *Statute of Limitations: Ducking the Hard Issues?*, RICO L. REP., Jul. 1997, at 14, 14-16.



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One commentator explains that “[b]ecause a potential plaintiff has not been injured under RICO until the pattern element has been satisfied, it is inappropriate to start the limitations period before the pattern is fully developed.”<sup>38</sup> Proponents of this rule argue that it is the only rule that preserves the legislative purpose. By delaying statute of limitations accrual until all the elements of a claim are present, the rule preserves a potential plaintiff’s remedy without denying a defendant “repose” by postponing the statute of limitations accrual beyond when the pattern element is satisfied.

However, this rule has its critics. Some argue that this rule imposes a “[c]umbersome [f]act [f]inding” burden on courts because a court must determine, often in preliminary motions, whether and when a pattern exists.<sup>39</sup> In response to this “cumbersome” charge, one commentator has pointed out that “[i]f liability is to be imposed on the basis of defendant’s commission of a pattern, it is not unreasonable to require that a court be able to define just what constitutes such a pattern and . . . determine the point at which such a pattern first exists.”<sup>40</sup> Other critics question whether the rule correctly handles predicate acts that occur after a pattern has been established and a cause of action has accrued.<sup>41</sup> In response to this criticism many courts applying the rule hold that, if the after-pattern injury is an “independent injury”—one that is part of the pattern but discovered after the pattern and all other elements have become cognizable—it generates a

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38. Goldsmith, *supra* note 24, at 879; see Hackenberg, *supra* note 5, at 1424. But note, *supra* note 13, the possibility in conspiracy cases for a plaintiff to have suffered a violation of civil RICO before the pattern has fully developed. This Note also acknowledges that Goldsmith writes his article in support of his compromise “three-year limitations period” proposal which would accrue at the time of “the cause of action or the last act causing injury, whichever is later.” Goldsmith, *supra* note 24, at 878. Because Goldsmith’s proposal included a “last predicate act” accrual rule, the *Klehr* decision can be seen to have rejected his proposal. See *infra* Part II.B.3. However, his observation serves to justify the fundamental characteristic of an injury and pattern discovery rule.

39. Plaintiffs’ Executive Committee Amicus Brief at 24, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663). O’Neill also notes this critique in his article, *supra* note 5, at 237, but see his response *infra* text accompanying note 40.

40. O’Neill, *supra* note 5, at 238.

41. See National Association of Securities and Commercial Law Attorneys (NASCAT) Amicus Brief at 8-10, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663).

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separate cause of action which accrues immediately upon discovery of that “separate” injury.<sup>42</sup> If the after-pattern injury is not “independent,” but rather part of “one single, continuous injury,” no new action or limitations period accrues.<sup>43</sup> In that instance, the action is complete, already actionable, and the clock is running.

## 2. *Injury discovery and injury rules*

Courts that use the “injury discovery” rule<sup>44</sup> argue that because “recoverable damages . . . flow from the commission of the predicate acts” the statute of limitations should begin running when the *injury*<sup>45</sup> caused by those predicate acts is, or should have been, discovered.<sup>46</sup> Under this rule “[a] plaintiff need not discover that the injury is part of a ‘pattern of racketeering’ for the period to begin to run.”<sup>47</sup> Thus a RICO plaintiff who discovered an injury before 1991, but could not establish a pattern of racketeering activity until 1995,<sup>48</sup> would not be able to recover for that pre-1991 injury. In such a case, the plaintiff may use the pre-1991 injuries to establish a pattern, but may not recover for those injuries. That plaintiff may literally have part of her cause of action “barred before [she] ever has the opportunity to sue.”<sup>49</sup>

The criticism of this rule lies in the plain language of the RICO statute. Critics point out there is “no indication that Congress intended to limit recoverable damages . . . in this

42. *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 239 (8th Cir. 1996).

43. *Id.* In *Klehr*, the 8th Circuit determined that the late acts of mail and wire fraud that the Klehrs claimed caused “independent injuries” were not because “they are all of the same type, flow from the same source, and are part of one cognizable pattern of conduct—[Harvestore’s] alleged misrepresentations regarding [its] unit.” *Id.* Thus, “the Klehrs’ civil RICO claims [were] time-barred.” *Id.*

44. Refer to the CIVIL RICO REPORT’S table, *supra* note 5, for a circuit-by-circuit breakdown of those courts that adopt this accrual rule.

45. As opposed to the “pattern.”

46. American Council of Life Insurance and Honda Motor Company, Inc. Amicus Brief at 7 n.5, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663) (using language from *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985), to support the rule).

47. *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996), *cert. granted*, 116 S. Ct. 2521 (1996), *cert. dismissed as improvidently granted*, 117 S. Ct. 759 (1997).

48. Just what satisfies the “pattern” element lies beyond the scope of this Note. See generally *Sedima*, 473 U.S. at 496 n.14; *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989).

49. O’Neill, *supra* note 5, at 206.

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way.”<sup>50</sup> RICO allows recovery for injuries up to ten years apart, provided they are part of the same pattern of racketeering.<sup>51</sup> This ten-year internal limitation on the separation of predicate acts in RICO suggests to some that “Congress contemplated injuries occurring as much as ten years apart and, with that in mind, did not explicitly limit a private plaintiff’s recovery to only the most recent acts.”<sup>52</sup>

Some courts apply this “injury” rule by using the time of “injury” to begin the limitations period instead of “injury discovery.” They start the limitations period from the time the defendant *committed* a predicate act instead of when the plaintiff *discovered*, or should have discovered, her injury.<sup>53</sup> These courts claim that they are simply applying the federal common law “due diligence” requirement, which is also applied in Clayton Act private antitrust actions.<sup>54</sup> At least one Supreme Court justice argues that this antitrust rule is best because it naturally completes the Clayton Act statute of limitations “adoption” that began in *Malley-Duff*.<sup>55</sup>

But critics level the same criticisms against the “injury” rule as against the “injury discovery” rule: it does not account for the “pattern” element.<sup>56</sup> And they argue that Congress could not have intended to create an onerous “due diligence” burden on potential RICO plaintiffs.<sup>57</sup> Congress instructed that RICO be “liberally construed.”<sup>58</sup> Some question, in light of this “liberal construction” provision, whether Congress would allow the

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50. *Id.*

51. See 18 U.S.C. § 1961(5) (1994). See also O’Neill, *supra* note 5, at 177 n.26.

52. O’Neill, *supra* note 5, at 206.

53. See *infra* Part IV.B.2, for a more complete discussion of the intricacies of this difference.

54. See *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984); see also *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1994-95 (1997) (Scalia, J., concurring).

55. *Klehr*, 117 S. Ct. at 1994-95 (Scalia, J., concurring in part and concurring in the judgment) (“Elsewhere in today’s opinion . . . the Court is quite willing to say that what is good for antitrust is good for RICO . . . . We would thus have been foolish, in *Malley-Duff*, 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.”). Note that Justice Thomas joined Justice Scalia’s concurrence.

56. See *supra* text accompanying notes 44-49.

57. See *supra* text accompanying notes 48-52.

58. Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970). See O’Neill, *supra* note 5, at 206, 208-16.

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statute to toll on a RICO plaintiff before she has even discovered her racketeering injury.<sup>59</sup>

Defenders of the “injury discovery” and the Clayton Act “injury” rules point to the rules’ ease in application as their redeeming value.<sup>60</sup> The cause of action still requires a pattern, but a new statute of limitations will run for each injury. The courts that apply these rules do not need to resolve complex pattern issues just to apply the statute of limitations. Both rules provide “separate accrual” provisions for after-pattern injuries. In doing so, they treat after-pattern injuries no differently than those that occurred before a pattern was established. Each injury is only recoverable for four years after it is either committed or discovered.<sup>61</sup>

### 3. *Last predicate act rule*

The “last predicate act” rule begins like the “injury plus pattern discovery” rule, but then continues. The limitations period, according to this rule, accrues at the time

the plaintiff knew or should have known that the elements of

the civil RICO cause of action existed *unless*, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity.<sup>62</sup>

Under this rule, if one predicate act was committed within the four years preceding the suit, the plaintiffs may recover “not just for any added harm caused them by that late-committed act, but for all the harm caused . . . by all the acts that make up the total ‘pattern.’”<sup>63</sup>

Like the courts that apply the “injury” and “injury discovery” rules, the courts applying the “last predicate act” rule in civil RICO cases do not need to determine when a

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59. See O’Neill, *supra* note 5, at 206, 208-16, for a general discussion of the issues raised by these questions.

60. *Cf. id.* at 238-39.

61. *See id.* at 197-208.

62. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988) (emphasis added), *overruled by Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997).

63. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1989 (1997).

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pattern first develops before they can rule on whether its statute of limitations has run or not. But the concern with the “last predicate act” rule is that it may allow the statute to “run forever.”<sup>64</sup> Where the “injury discovery” and “injury” rules were unfair to potential plaintiffs by threatening to limit a RICO plaintiff’s deserved recovery,<sup>65</sup> the “last predicate act” rule imposes an inequitable hardship on defendants, depriving them of the “repose” that statutes of limitations generally provide, even to wrongdoers.<sup>66</sup>

The Supreme Court rejected the “last predicate act” rule in *Klehr*.<sup>67</sup> The Court’s concern was that the rule allowed “a series of predicate acts . . . [to] continue indefinitely” thus “lengthen[ing] the limitations period dramatically.”<sup>68</sup> 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.’”<sup>69</sup>

Robert Blakey,<sup>70</sup> however, in a *Klehr* amicus brief, defended the “last predicate act” rule.<sup>71</sup> He argued that the distinction

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64. U.S. Supreme Court Official Transcript at 15, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663).

65. *See supra* text accompanying notes 50-52 (arguing there is “no indication that Congress intended to limit recoverable damages . . . in this way”).

66. *See Klehr*, 117 S. Ct. at 1989. *See also infra* text accompanying notes 105-11.

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

68. *Id.* at 1989.

69. *Id.* (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)). This Note recognizes, along with the Court in *Klehr*, that “RICO’s criminal statute of limitations runs from the last, *i.e.*, the most recent, predicate act. But there are significant differences between civil and criminal RICO actions, and this Court has held that criminal RICO does not provide an apt analogy.” *Id.* at 1990 (citing *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 155-56 (1987)).

70. Professor G. Robert Blakey was Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-70 when the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970), was drafted and enacted. This Act included RICO. *But see* Blakey & Cessar, *supra* note 14, at 851 n.\* (“[T]he worst person to construe [a statute] is the person who [was] responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed.” (quoting *Hilder v. Dexter* [1902] App. Cas. 474, 477 (Halsbury, Lord, L.C.))).

71. *See* National Association of Securities and Commercial Law Attorneys (NASCAT) Amicus Brief at 14-21, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663).

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between the “injury plus pattern discovery” and “injury discovery” rules becomes muddled because each of those rules requires an additional “separate accrual” provision to deal with after-pattern injuries.<sup>72</sup> According to Blakey, anytime the court needs to apply a “separate accrual” rule for additional after-pattern injuries it means that a “meritorious plaintiff’s RICO claims are unjustifiably time-barred.”<sup>73</sup> The “last predicate act” rule, he writes, is the only possible rule that conserves a complete civil RICO claim for the RICO plaintiff that suffers “multiple injuries arising from multiple predicate acts extending over a period of time.”<sup>74</sup>

Even though the Supreme Court rejected the “last predicate act” rule in *Klehr*, Blakey’s defense of the rule raises issues that the Court will eventually need to resolve. For instance, how should the RICO statute of limitations treat complex patterns and the injuries that occur after the pattern element is initially satisfied? Should the statute of limitations limit a plaintiff’s recovery in ways the statute does not? This Note will return to these issues and to further analysis of all three of the above accrual rules in Part IV, but first it provides a brief summary of the Court’s holding in *Klehr*.

### III. *KLEHR* v. *A.O. SMITH*

#### A. *Facts*

Marvin and Mary Klehr filed suit against a Harvestore silo manufacturer and dealer almost 20 years after they bought their silo from the dealer.<sup>75</sup> The Klehrs, who were dairy farmers, alleged that, contrary to Harvestore’s representations,<sup>76</sup> their silo “did not keep oxygen away from the

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72. *See id.* at 8-9.

73. *Id.* at 12.

74. *Id.* at 14.

75. *See Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1988 (1997). The Court calls respondents A.O. Smith Corp. and A.O. Smith Harvestore Products, Inc., Harvestore collectively. *See id.*

76. The respondent, A.O. Smith Corp. (whom the Court simply calls “Harvestore”) made these alleged misrepresentations through a subsidiary, A.O. Smith Harvestore Products, Inc., and its authorized dealer, MVBA Harvestore Systems. *See Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 233 (8th Cir. 1996). Was there a RICO enterprise problem with this case? The Court does not give enough facts to determine how plaintiffs portrayed the enterprise in their action and any discussion of this issue lies beyond the scope of this article.

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feed, the feed became moldy and fermented, the cows ate the bad feed [making them sick], and milk production and profits went down.<sup>77</sup> The Court noted that this inability to limit the amount of oxygen that could get to the feed was “the source of the [Klehrs’] injury.”<sup>78</sup> The Klehrs alleged that Harvestore had attempted to cover up its fraud—Harvestore concealed: (1) the fact that oxygen got into the feed and spoiled a large part of it, and (2) the fact that the feed was spoiled at all.<sup>79</sup> The Klehrs argued that Harvestore’s actions amounted to several acts of mail and wire fraud, “thereby violating RICO and causing them injury.”<sup>80</sup>

According to the Klehrs, their injury began when they bought the silo in 1974, and because Harvestore continued to cover up its fraud, continued through the years after the purchase.<sup>81</sup> To make their action timely under the four-year limitations period the Klehrs needed to show either (1) that the limitations period accrued after August 25, 1989,<sup>82</sup> or (2) that some special legal doctrine tolled the running of limitations.<sup>83</sup>

The Court disposed of the “tolling doctrine” possibility quite easily. It held that “‘fraudulent concealment’ in the context of civil RICO embodies a ‘due diligence’ requirement.”<sup>84</sup> Although the Klehrs claimed they only became “sufficiently suspicious” to investigate Harvestore’s claims about the silo after 1991,<sup>85</sup> the

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77. *Klehr*, 117 S. Ct. at 1988.

78. *Id.* at 1992. The importance of determining the source of the injury will be discussed *infra* Part IV.B.3.

79. For instance, Harvestore put a sign on the silo reading:

“DANGER  
DO NOT ENTER  
NOT ENOUGH OXYGEN  
TO SUPPORT LIFE”

*Id.* at 1988. Harvestore installed an unloading device that chopped up the feed instantly as it emerged from the silo to hide the mold. *See id.* And through dealer advertisements, Harvestore “tried to convince farmers that warm, brown, molasses-smelling feed was not fermented feed, but good feed.” *Id.*

80. *Id.*

81. *See id.*

82. The Klehrs filed their action August 27, 1993. Thus, the accrual date would need to fall within four years before that date, i.e., after August 25, 1989. *See id.*

83. *See id.*

84. *Id.* at 1993.

85. *Id.* at 1988.

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Eighth Circuit and the district court both found that “the Klehrs should reasonably have discovered the silo’s flaws before 1989 (and that a reasonable factfinder could not conclude to the contrary),”<sup>86</sup> and were thus not duly diligent in discovering their injury and its source. The Supreme Court refused to review this finding of the lower courts. As a result, the Court held that the Klehrs could not resort to a tolling doctrine because “a plaintiff who is not reasonably diligent may not assert ‘fraudulent concealment.’”<sup>87</sup> The rest of the Court’s discussion in *Klehr* focuses only on whether the lower court should have applied a different accrual rule than it did in order to make the Klehrs’ RICO action timely.<sup>88</sup>

*B. The Accrual Rule at Issue in Klehr—The Supreme Court’s Reasoning*

The Supreme Court acknowledged that the “last predicate act” rule was “the only accrual rule [among the competing rules in the circuit courts] that can help the Klehrs.”<sup>89</sup> The Court assumed in its reasoning that the applicable “last predicate act” rule was the rule stated above by the Third Circuit in *Keystone Insurance Co. v. Houghton*,<sup>90</sup> and that the Klehrs could “show at least one such late-committed act.”<sup>91</sup>

However, the Supreme Court ultimately rejected the Third Circuit’s “last predicate act” rule.<sup>92</sup> In oral arguments one justice expressed what seemed to reflect the Court’s general concern, “[I]f it is your view, then, the statute would run

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86. *Id.* at 1992.

87. *Id.* at 1993.

88. *See id.* at 1988 (“We granted certiorari in this case to consider the Klehrs’ claim in light of a split of authority among the Courts of Appeals.”). As noted *supra* note 76, the Court does not address or review the sufficiency of the elements of a RICO action: i.e., conduct, enterprise, pattern, racketeering activity, or injury. *See supra* Part II.A.

89. *Klehr*, 117 S. Ct. at 1989.

90. 863 F.2d 1125 (3d Cir. 1988), *overruled by* *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997); *see also supra* text accompanying notes 62-69.

91. *Klehr*, 117 S. Ct. at 1986. That is, the Court assumed that the Klehrs could show an injury or act which was part of Harvestore’s pattern of racketeering that occurred between August 1989 and August 1993.

92. The Third Circuit is the only court applying this rule. *See* CIVIL RICO REPORT’S table, *supra* note 5. The Court also assumes that the difference between the Third and other circuits “has nothing to do with the plaintiff’s state of mind or knowledge.” *Klehr*, 117 S. Ct. at 1989.



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forever . . . ? I mean, you say the last act. Well, all right, there's an act. . . . [N]ow do I go back for 1,000 years?"<sup>93</sup> Given the Supreme Court's general attitude toward the civil RICO "explosion," and the facts of the case, it is probably safe to say that the Court did not feel overly sympathetic to the Klehrs' cause of action.<sup>94</sup> But even in a case with a more sympathetic plaintiff, the Court probably would not have decided differently because it recognized the importance of a statute of limitations in providing for a defendant's "repose."<sup>95</sup>

According to the "injury plus pattern discovery" rule that was applied by the Eighth Circuit, the Klehrs' civil RICO action should have accrued "as soon as [they] discover[ed], or reasonably should have discovered, both the existence and source of [their] injury and that the injury [was] part of a pattern."<sup>96</sup> The Eighth Circuit found that the Klehrs suffered injury "sometime in the 1970s" and "should have discovered" the pattern "well before August 1989."<sup>97</sup> Therefore, under the "injury and pattern discovery" rule, dismissal of the Klehrs' lawsuit was clearly proper.

Although the Supreme Court ruled that the Eighth Circuit was correct not to have applied the "last predicate act" rule, it refused to review the Eighth Circuit's application of its "injury plus pattern discovery" rule. The Court did not endorse any of the rules described above,<sup>98</sup> and would not settle this "conflict[] among the Circuits"<sup>99</sup> because "[t]he legal questions involved

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93. U.S. Supreme Court Official Transcript at 15, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663).

94. The Klehrs' claim involved fraud, the type that Chief Justice Rehnquist referred to when he pointed out that "civil RICO is now being used in ways that Congress never intended." Rehnquist, *supra* note 22, at A14. Rehnquist continued, "Whether it is a good idea to have a civil counterpart for wire fraud and mail fraud is at least open to question, it seems to me, quite apart from the question whether treble damages should be awarded [for those offenses]." *Id.*

95. *Klehr*, 117 S. Ct. at 1989 ("[The Third Circuit's rule] thereby conflicts with a basic objective—repose—that underlies limitations periods."). For a discussion of the policy underlying the principle of "repose," see *infra* text accompanying notes 105-11.

96. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. at 1988 (quoting *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 238 (8th Cir. 1996)).

97. *Id.*

98. *See id.* at 1992 (pointing out that to review the Eighth Circuit's application would require the Court to "examin[e] an evidentiary record of several thousand pages to determine the validity of the independent conclusion of each of the two lower courts").

99. *Id.* at 1991.

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may be subtle and difficult.”<sup>100</sup> The Court indicated that it would “wait for a case that clearly presents these, or related issues . . . before [it would] attempt to resolve them.”<sup>101</sup> The next Part of this Note analyzes some of these “subtle and difficult” legal questions that the Court will need to address in any future analysis of this issue.

#### IV. ANALYSIS

##### A. *Statutes of Limitations: First Principles*

Before getting into the subtle legal questions surrounding civil RICO statute of limitations accrual, however, this Note will provide an introductory analysis of the general principles underlying statutes of limitations: recovery and repose. In *Malley-Duff*, the Supreme Court adopted RICO’s four-year statute of limitations from the most closely analogous federal statute, the Clayton Act.<sup>102</sup> The Court specifically noted the “private treble-damages” remedy the two statutes share.<sup>103</sup> In *Malley-Duff*, the Court sought to preserve RICO’s statutory remedy by applying the same limitations period that preserved the Clayton Act remedy.<sup>104</sup> As a matter of statute of limitations principle, the Court recognized that a statute’s limitations period should preserve the statutory remedy: recovery.

But, recovery is not the only principle at play here. The *Malley-Duff* Court rejected the suggestion that RICO be left without a limitations period.<sup>105</sup> The Court observed:

A federal cause of action “brought at any distance of time”  
would be “utterly repugnant to the genius of our laws.” . . .  
Just determinations of fact cannot be made when, because of  
the passage of time, the memories of witnesses have faded or

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100. *Id.* at 1992.

101. *Id.*

102. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987).

103. *Id.* at 152.

104. *See id.* at 153 (“The federal policies at stake and the practicalities of litigation strongly suggest that the limitations period of the Clayton Act is a significantly more appropriate statute of limitations . . .”). *But see* O’Neill, *supra* note 5, at 215 & n.267 (“[A]ntitrust laws are, in essence, preservative.”).

105. *See Malley-Duff*, 483 U.S. at 156; *see also supra* note 3.

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evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.<sup>106</sup>

The *Malley-Duff* Court thus recognized another statute of limitations principle: repose for the defendant.<sup>107</sup> The concept of repose acknowledges that our legal system uses limitation periods to compensate for the potential danger of a stale claim and to allow alleged wrongdoers the opportunity to “get on with life.”

In short, a statute of limitations should: (1) preserve a plaintiff’s legislative recovery while (2) providing the defendant with procedural repose. These seem to be statute of limitations’ “first principles.”

It was precisely because the Third Circuit rule (“last predicate act”), at issue in *Klehr*, violated this second principle that the Court struck it down.<sup>108</sup> The “last predicate act” rule, the Court wrote, “lengthens the limitations period dramatically.”<sup>109</sup> Congress could not have intended to allow RICO plaintiffs to “sleep[] on their rights” indefinitely, but intended to “encourage potential private plaintiffs to diligently investigate” their RICO injuries.<sup>110</sup> The “last predicate act” rule violated the repose principle by “creat[ing] a limitations period that [was] longer than Congress could have contemplated.”<sup>111</sup>

### B. Lingerin g Questions

So when should the RICO limitations period accrue? The Supreme Court does not often consider accrual aspects of statute of limitations law,<sup>112</sup> and its “attempt” in *Klehr* did not resolve the pending circuit conflict. But *Klehr* does provide an interesting discussion of what the Court did not resolve.<sup>113</sup> For

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106. *Malley-Duff*, 483 U.S. at 156 (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1984) (citations omitted)).

107. See O’Neill, *supra* note 5, at 190-91 (describing four major concerns “influencing the determination of the statute of limitations”).

108. See *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1989-90 (1997).

109. *Id.* at 1989.

110. *Id.* at 1990.

111. *Id.* at 1989.

112. See Wright, *supra* note 37, at 16; *cf. Klehr*, 117 S. Ct. at 1987.

113. See Wright, *supra* note 37, at 16 (“Perhaps given the hard questions, it is understandable that the Supreme Court’s decision in *Klehr* is simply a holding action.”).

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example, one Justice commented during *Klehr* oral arguments, “I don’t see why the statute wouldn’t begin to run once you can say all the elements of the RICO cause of action are in existence.”<sup>114</sup> Other commentators have noted, along the same lines, that “[a]s a general matter, the statute of limitations begins to run when the plaintiff’s cause of action has accrued.”<sup>115</sup> Congress’ only attempt to address civil RICO limitations seems to sustain that inclination.<sup>116</sup> These observations do “beg the question,” but they provide a useful point of reference. The RICO limitations period should accrue when the RICO cause of action accrues, not before, not after. That being the case, when the Supreme Court considers civil RICO limitations period accrual again<sup>117</sup> it will need to address the following issues: (1) whether the limitations period should run from injury alone or from injury and pattern; (2) whether the limitations period should be a discovery (plaintiff’s knowledge) rule or injury (defendant’s commission) rule; (3) if it is a discovery rule, whether it should run from discovery of injury, discovery of the injury and source of injury, or discovery of the cause of action; and (4) given that the Court struck down the “last predicate act” rule, how an appropriate rule should

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114. U.S. Supreme Court Official Transcript at 7, *Klehr* v. *A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663).

115. O’Neill, *supra* note 5, at 191-92. O’Neill uses *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200 (1950), to support this axiom in his article.

116. In 1995, Congress amended 18 U.S.C. § 1964(c), to create a securities fraud exception to civil RICO actions. “[N]o person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish [civil RICO predicate acts].” 18 U.S.C.A. § 1964(c) (West Supp. 1998). A plaintiff has no cause of action, though she may have injuries, until the defendant has been criminally convicted of securities fraud. If the defendant has been criminally convicted, the claim accrues and “the statute of limitations shall start to run on the date on which the conviction becomes final.” *Id.* The plaintiff has no action before the conviction and the statute does not postpone limitations period accrual past that time. *See Private Securities Litigation Reform Act of 1995*, P.L. 104-67, 1995 U.S.C.C.A.N. (109 Stat. 737) 679, 698.

117. *See Klehr*, 117 S. Ct. at 1992. The Court had the opportunity to address the accrual period during the 1998 term but denied certiorari. *See Blakey & Gettings, supra* note 20, at 1047 (indicating that the statute of limitations issue is “one of the most important and as yet unsettled issues in private civil actions”); Mueller, *supra* note 7, at 10 (recommending at the time that the Supreme Court grant certiorari to *Detrick v. Panalpina, Inc.*, 108 F.3d 529 (4th Cir. 1997), *cert. denied* 65 U.S.L.W. 3783 (U.S. May 16, 1997) (No. 96-1820)).

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treat the after-pattern injuries<sup>118</sup> of a RICO cause of action. This Note will use original analysis and some of the Court's analysis from *Klehr* to answer these questions.

1. *Injury or pattern accrual?*

The *Klehr* Court noted that the "major difference among the Circuits"<sup>119</sup> is over whether the RICO limitations period should accrue for each injury individually or upon the development of a pattern of racketeering. However, given the implications of the Court's comments above—that the RICO statute of limitations should accrue at the same time the RICO cause of action accrues, not before, not after—the question becomes: Does a RICO *cause of action* accrue for each injury or for a pattern of racketeering?<sup>120</sup> With this question in mind, the initial sketches of a solution to this major circuit conflict begin to appear.

The Court explained in *Klehr* that "civil RICO requires not just a single act, but rather a 'pattern' of acts."<sup>121</sup> Though it may be a metaphysical, difficult, and cumbersome determination,<sup>122</sup> it would be inappropriate for a court to start the statute of limitations running on a RICO plaintiff before she has suffered injury by a pattern of racketeering.<sup>123</sup> This does not mean that the injuries resulting from individual predicate acts are irrelevant,<sup>124</sup> but Congress established a remedy for injuries

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118. This Note defines "after-pattern injuries" as those injuries discovered after the pattern has initially developed. For a discussion of initial pattern requirements, see generally *Sedim a, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), and *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1988).

119. *Klehr*, 117 S. Ct. at 1992.

120. This reformulation resembles the deductive logic doctrine of equivalency: (1) if A, then B; (2) if C, then D; (3) B=C; (4) therefore, if A, then D.

121. *Klehr*, 117 S. Ct. at 1990. See also *supra* text accompanying notes 33-34.

122. During *Klehr* oral arguments, one member of the Court noted the metaphysical nature of this distinction asking, "[C]an [there] be a RICO injury before there's a RICO in existence[?]" U.S. Supreme Court Official Transcript at 6, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997) (No. 96-663). *But see supra* note 13 (discussing an exception to this rule in RICO conspiracy cases).

123. See O'Neill, *supra* note 5, at 238 ("If liability is to be imposed on the basis of defendant's commission of a pattern, it is not unreasonable to require that a court . . . define just what constitutes such a pattern and . . . determine the point at which such a pattern first exists."). *But see supra* note 13 and accompanying text (admitting that the rule proposed in this Note may need to provide an exception for RICO conspiracy cases because in those instances it is conceivable for a plaintiff to have suffered injury before a pattern of racketeering has been established).

124. In fact, civil RICO was designed to provide a remedy for a plaintiff who has

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caused by a pattern of predicate acts, and the existence of a RICO claim depends upon the existence of that pattern.<sup>125</sup> Given this, it is not unreasonable to require a court to determine when that pattern first exists.<sup>126</sup> Thus, the appropriate limitations period should accrue when this pattern first develops.

2. *Discovery or injury?*

The *Klehr* Court noted that “there is some debate as to whether the running of the limitations period depends on the plaintiff’s awareness of certain elements of the cause of action.”<sup>127</sup> The Court asked, in other words: Should we start the limitations period from when the defendant committed a pattern of racketeering activity or from when the plaintiff discovered, or should have discovered, the defendant’s pattern?<sup>128</sup>

Jay Kelly Wright,<sup>129</sup> a practitioner who has written extensively on civil RICO, explains the intricacies of this question.<sup>130</sup> “There was a time,” he writes, “when certainty and ease of application were the dominant themes in judicial decisions applying a statute of limitations.”<sup>131</sup> The limitations periods began to run upon commission of the act causing the injury, thus “if you had surgery and were sown up with medical waste still inside, a negligence claim accrued at the time of the operation; if you didn’t learn about the foreign object until after the limitations period had run, that was unfortunate, but the

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been “injured . . . by reason of a violation of [RICO’s substantive provisions].” 18 U.S.C. § 1964(c) (1994); see also *supra* notes 11-15 and accompanying text for a discussion of these substantive provisions. These individual predicate acts are an integral part of the statutory cause of action.

125. Requiring the courts to make this cumbersome metaphysical pattern determination may have other benefits. It may prompt Congress or the Supreme Court to develop a more clear and judicious definition of “pattern.” The current pattern requirements are discussed *supra* notes 27, 48.

126. See discussion *supra* notes 27, 48.

127. *Klehr* v. *A.O. Smith Corp.*, 117 S. Ct. at 1990.

128. This Note assumes that the civil RICO statute of limitations does not accrue until the pattern element has been satisfied, i.e., it will not accrue before a pattern of racketeering first develops. See explanation *supra* Part IV.B.1.

129. Mr. Wright is a partner at Arnold & Porter and is a member of the Advisory Board of the RICO LAW REPORTER. See Wright, *supra* note 37, at 14-16.

130. See *id.*

131. *Id.* at 14.

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claim was time-barred nevertheless.”<sup>132</sup> Wright then notes that, “the seeming harshness of the ‘old’ ways created pressure for greater flexibility; hence, we now have ‘discovery’ principles.”<sup>133</sup> Under discovery principles, the example negligence claim would not accrue until the patient discovered, or should have discovered, his injury, i.e., that he was sown up with medical waste remaining inside. These discovery rules are fact intensive, more difficult and less predictable, prompting Wright to admit, “flexibility has come with a price.”<sup>134</sup>

Policy seems to be the crucial issue in this question: Do we want a harsh, yet predictable and convenient rule for civil RICO or do we want a flexible, yet court-cumbersome rule? The “general federal rule” is a discovery rule—“the limitations period begins to run when a plaintiff knows or should know of the injury which is the basis for his cause of action.”<sup>135</sup> But the answer to this RICO policy question ultimately “depend[s] upon what we expect plaintiffs to do during the limitations period.”<sup>136</sup>

The Court avoided this issue in *Klehr* by assuming that the parties were “knowledgeable.”<sup>137</sup> However, it did cite a 1971 Clayton Act decision<sup>138</sup> in which the Supreme Court held that an antitrust claim accrued “when those [antitrust] injuries occurred” even though such a rule “would have left the plaintiff without relief.”<sup>139</sup> This citation could arguably be interpreted as an argument for adopting an “occurrence” rule for RICO.

The Court’s citation should not be so construed, however. First, the only members of the Court who would adopt the Clayton Act accrual rule want to do so for the sake of consistency, not for any merits of the rule.<sup>140</sup> Second, it is important to remember that the Clayton Act “occurrence” rule

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132. *Id.*

133. *Id.*

134. *Id.*

135. Hackenberg, *supra* note 5, at 1413-14 & nn.15-16 (citations omitted) (“Accrual rests solely upon knowledge of the injury under this rule.”).

136. Wright, *supra* note 37, at 14.

137. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1990 (1997) (emphasis omitted).

138. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 328-29 (1971).

139. *Klehr*, 117 S. Ct. at 1991 (emphasis added).

140. *See id.* at 1994 (Scalia, J., concurring in part and concurring in the judgment) (“[T]he one clear path back out of the current forest of confusion . . . is the proposition that RICO is similar to the Clayton Act.”).

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is supplemented by a “doctrine of fraudulent concealment,” the purpose of which is “to preserve undiscovered causes of action under an act-based rule.”<sup>141</sup> Thus, if a Clayton Act defendant conceals his wrong from a Clayton Act plaintiff, the fraudulent concealment doctrine tolls the statute of limitations.<sup>142</sup> Unlike the typical Clayton Act case, over ninety percent of RICO causes of action involve fraud claims<sup>143</sup>—thus if a rule similar to the Clayton Act rule were adopted in a RICO context, these cases would operate almost exclusively within the “exception.” There are simplicity concerns at play here; it simply does not make sense to adopt a rule when an exception would routinely apply in nine out of ten cases.<sup>144</sup> Indeed, the Court in *Klehr* noted that many circuits have already applied discovery accrual rules to RICO because those courts realize that “most civil RICO claims involve [an] underlying fraud offense.”<sup>145</sup>

Additionally, what little indication Congress and the Court have given as to what we should expect RICO plaintiffs to do during the limitations period should also persuade us to apply a “discovery” accrual rule to civil RICO’s statute of limitations period. Although the Court has indicated that one of civil RICO’s purposes was to encourage “potential private plaintiffs diligently to investigate [their rights],”<sup>146</sup> many commentators

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141. O’Neill, *supra*, note 5, at 215. *See also id.* at 215-16 (“Where the wrong committed is either self-concealing or actively concealed by the defendant, [the fraudulent concealment] doctrine tolls the statute of limitations until the plaintiff discovers or should have discovered his injury.”).

142. *See id.* at 213-215.

143. *See Klehr*, 117 S. Ct. at 1991 (“[A] high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims.”); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 n.16 (1995) (citing A.B.A. SECTION OF CORPORATE, BANKING & BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55-56 (1985)); *Blakey & Cessar, supra* note 14, at 619 app. B (1987) (revealing the results of a study of 222 civil RICO claims in the years 1985 and 1986, which shows, on average, 93.7% of the cases involved fraud “natured” claims).

144. Even if it did make sense to adopt an accrual rule that differentiated between fraudulent and nonfraudulent actions, such a rule would not comport with the Supreme Court’s rejection of that notion in *Malley-Duff*. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 148 (1987) (rejecting the notion that RICO be assigned a statute of limitations according to the underlying nature of the predicate acts alleged in the particular RICO claim).

145. *Klehr*, 117 S. Ct. at 1991 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)). *But see Malley-Duff*, 483 U.S. at 149 (“[A] not insignificant number of complaints allege criminal activity of a type generally associated with professional criminals . . .”).

146. *Klehr*, 117 S. Ct. at 1989-90 (explaining that instead of permitting plaintiffs



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have noted that a civil RICO cause of action “often develops over time.”<sup>147</sup> After discovering her injuries and even a pattern of racketeering activity, a RICO plaintiff may still need time to investigate the conduct of the defendant and the nature of the racketeering enterprise before she can file her claim.<sup>148</sup> An “occurrence” rule would therefore often work an injustice to civil RICO plaintiffs. And Congress affirmatively directed the courts to “liberally construe” RICO instead of limiting its application.<sup>149</sup> A “discovery” rule seems to more fully comply with the policies underlying RICO and should therefore be adopted by the courts.

3. *Knowledge of the injury, of the source of injury, or of the cause of action?*

What kind of “discovery” rule should courts apply? The Court in *Klehr* would not review the Eighth Circuit’s application of its “injury plus source plus pattern” discovery rule even though the Klehrs claimed they “lacked knowledge of the faulty silo—the ‘source’ of their injury.”<sup>150</sup> The Supreme Court pointed out that the Eighth Circuit’s rule provides a “larger hole” than an “injury plus pattern discovery” rule.<sup>151</sup> If the Klehrs “[could not] fit their case through the Eighth Circuit’s larger hole,” the Court wrote, “they [could not] squeeze it through a smaller one.”<sup>152</sup> Its geometric logic is sound, but the Court will eventually need to address these issues directly.

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to “sleep[] on their rights,” the limitations period should reflect the private attorney’s general nature of civil RICO as noted in *Malley-Duff*, 483 U.S. at 151). An argument could be made that, compared to an “occurrence” rule, a “discovery” rule provides a disincentive to engaging in a vigorous investigation. It must be remembered that courts will impute discovery to the time a reasonable plaintiff would have discovered the injury. This imputed discovery practice preserves the plaintiff’s incentive to be diligent, while the discovery rule gives the plaintiff an opportunity to investigate and assemble the elements of a very complex cause of action.

147. O’Neill, *supra* note 5, at 239.

148. Some commentators have noted the heightened risk of rule 11 sanctions in filing RICO claims. See Michael Goldsmith & Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735, 760 (1990) (citing “Professor Goldstock’s survey of 140 recent RICO cases in which rule 11 sanctions were requested show[ing] that judges imposed sanctions in thirty-six [of those] cases”).

149. See Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (“The provisions of this title shall be liberally construed to effectuate its remedial purposes.”).

150. *Klehr*, 117 S. Ct. at 1992.

151. *Id.*

152. *Id.*

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Does the “discovery” rule accrue at discovery of the injury, discovery of the injury and the source of the injury, or discovery of the cause of action?<sup>153</sup>

This Note argues that the RICO statute of limitations period should accrue upon the discovery, or imputed discovery, of the injury and the source of injury, but should not be delayed until the discovery of the cause of action. The statute of limitations should accrue as soon as the plaintiff “discover[ed], or reasonably should have discovered, both the existence and source of [her] injury and that the injury [was] part of a pattern,”<sup>154</sup> but a civil RICO defendant should not have to wait for the plaintiff to discover her injury is actionable before the statute of limitations accrues.

To explain this issue, Jay Kelly Wright refers us to the Supreme Court’s decision in *United States v. Kubrick*,<sup>155</sup> a case in which the plaintiff suffered a hearing loss that was probably caused by an antibiotic that had been administered.<sup>156</sup> Only later was it revealed to the plaintiff that he had a possible negligence claim, because the antibiotic that was administered should not have been given to him.<sup>157</sup> The Court held that the statute of limitations accrued upon knowledge of the injury and the cause of that injury.<sup>158</sup> “[I]t was unnecessary,” Wright summarizes, “for the plaintiff also to know that the cause [of the injury] constituted an actionable wrong.”<sup>159</sup>

The *Kubrick* Court’s decision seems to encourage plaintiffs to engage in the same type of investigation that the Court encouraged for RICO plaintiffs in *Klehr*. The Court in *Kubrick* wrote, “If [the plaintiff] fails to bring suit because he is incompetently or mistakenly told that he does not have a case,

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153. Because this Note argues that a civil RICO cause of action should not run until discovery of injury and pattern, it will not consider the “discovery of individual predicate acts” possibility. See *supra* Part IV.B.1-2.

154. *Klehr*, 117 S. Ct. at 1988 (quoting *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 238 (8th Cir. 1996)).

155. 444 U.S. 111 (1979).

156. See Wright, *supra* note 37, at 16. Later, Wright qualifies his *Kubrick* analogy. *Kubrick* was a personal injury case, Wright explains, where the circumstances for leniency “may be greater than in cases involving financial loss alone.” *Id.*

157. See *id.*

158. See *id.*

159. *Id.*

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we discern no sound reason for . . . delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit . . . .”<sup>160</sup> The *Kubrick* analysis suggests that full knowledge of a RICO cause of action will not be required to start the limitations period running. This, however, only disposes of the “knowledge of the cause of action” possibility from the initial question. The question now becomes whether limitations period accrual should begin with knowledge of injury or with knowledge of the injury and the source of the injury. The *Klehr* Court characterized these two rules as the “smaller” and the “larger hole,” respectively.<sup>161</sup> The point that the Court attempted to make with this orifice analogy was that, if the discovery of the “source of an injury” has any effect on the issue at all, it will be to favor the plaintiff by delaying the accrual of the statute of limitations because discovery of the source of an injury will normally occur after the discovery of the existence of an injury.

What is the source of a RICO injury?<sup>162</sup> The *Klehr* Court made this inquiry because the Klehrs claimed that the source of their injury was the faulty silo, and that the Eighth Circuit started the accrual period earlier than it should have—the Eighth Circuit concluded that the Klehrs “should reasonably have discovered the silo’s flaws before 1989.”<sup>163</sup> The Supreme Court avoided making its own factual determination in *Klehr*, but noted the “highly fact-based” nature of the Eighth Circuit’s conclusion.<sup>164</sup> The lower court’s determination

depend[ed] not only upon how much mold the Klehrs noticed  
in their silage and when, but also upon such matters as the

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160. *Kubrick*, 444 U.S. at 124.

161. See discussion *supra* text accompanying notes 150-53.

162. This Note has tried to avoid using the term “RICO injury” because of its ambiguity. The term may refer to the individual injuries the plaintiff has suffered that were caused by the defendant’s “predicate acts” or the injury the plaintiff has suffered that was caused by the defendant’s “pattern of racketeering activity.” The RICO statute, 18 U.S.C. § 1964(c), offers only minimal help. It allows “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter” to sue for relief. 18 U.S.C. § 1964(c) (1994). See *supra* text accompanying notes 11-15 for a discussion of what constitutes a violation of § 1962. A “RICO injury,” then, refers to the injury resulting from a violation of RICO. This includes the injuries caused by the defendant’s predicate acts, if those predicate acts form that defendant’s pattern of racketeering activity.

163. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1992 (1997).

164. *Id.*

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effect of the Klehrs' failure to consult the herd performance records they were continuously sent, and whether their having done so would have led them . . . to question Harvestore's representatives more fully, or to investigate the silo sooner.<sup>165</sup>

A "source of injury" determination may seem ambiguous,

because it is. The inquiry, as described by the *Klehr* Court, seems to be a fact intensive application of "pattern," "injury," and "predicate acts." As applied by the *Kubrick* Court in a negligence context,<sup>166</sup> the "source of injury" rule would not toll the statute of limitations until the plaintiff "determines to bring suit," but would prevent the statute from running until the plaintiff "discovers . . . the relevant facts about [his] injury."<sup>167</sup> Clearly, there is a way to resolve this ambiguity; the key seems to be discovery of facts that will be relevant to the plaintiff's injury.

Given that most civil RICO causes of action are fraud-based, knowledge of the "source" of an injury will usually provide facts relevant to the existence of an injury and a pattern of racketeering. Furthermore, the length of time it takes a RICO plaintiff to discover the source of her injury may depend on the duration and complexity of the defendant's pattern of fraud. In *Klehr*, the plaintiffs alleged injury was a result of Harvestore's pattern of racketeering activity, i.e., Harvestore's predicate acts of fraud. The source of their injury was the defective silo. The Klehrs would not have discovered their injury and a pattern of fraudulent acts<sup>168</sup> if they had not also discovered the source of their injury—that the silo did not keep oxygen away from the feed. A court must therefore take the "source of the injury" into consideration when deciding at what point in time it should reasonably impute discovery of the existence of an injury and a pattern of racketeering to a civil RICO plaintiff.

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165. *Id.*

166. *See* Wright, *supra* note 37, at 16.

167. *United States v. Kubrick*, 444 U.S. 111, 124 (1979).

168. This Note acknowledges that the Klehrs claim that they only became "sufficiently suspicious" to investigate the silo after 1991. *See Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1988 (1997). But the Eighth Circuit and District Court found that "the Klehrs should reasonably have discovered the silo's flaws before 1989 (and that a reasonable factfinder could not conclude to the contrary)." *Id.* at 1992.

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The fact that most civil RICO claims involve an underlying fraud offense,<sup>169</sup> and the fact that most RICO plaintiffs will find knowledge of the source of the injury relevant to discovering their injury and the defendant's pattern of racketeering, leads this Note to propose that courts should apply to the civil RICO statute of limitations a rule similar to the "injury plus source plus pattern"<sup>170</sup> rule the Court discussed in *Klehr*. Because of the interrelated nature of the "source of injury" inquiry, a court imputing reasonable discovery should start the limitations period from the point in time in which the plaintiff should have reasonably discovered both the existence and the source of that injury and that the injury was part of a pattern.

4. *Postpattern injuries: separate accrual?*

According to the "last predicate act" rule it is inappropriate to start the limitations period before the pattern of racketeering is *fully developed*. The rule proposed above, instead, would run the limitations when the pattern *first develops*.<sup>171</sup> What about injuries discoverable beyond the point of pattern formation? One commentator has suggested that "[t]he statute of limitations on each injury discoverable after [the point of pattern formation should] commence when the plaintiff becomes chargeable with knowledge of [that injury]."<sup>172</sup> This "separate accrual" provision for postpattern injuries would complement the "injury and pattern discovery" rule proposed above.

Robert Blakey argued that a provision like "separate accrual" only muddies the earlier distinction this Note made between "injury discovery" rules and "injury plus pattern discovery" rules.<sup>173</sup> For prepattern RICO injuries, according to

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169. See *supra* note 145 and accompanying text.

170. *Klehr*, 117 S. Ct. at 1992. The Supreme Court also referred to this rule, outside the discussion of "source," as the "injury and pattern discovery rule." See *id.* at 1988. This may suggest that the Court expects the concept of "injury and pattern" discovery to include a concept of "source."

171. See O'Neill, *supra* note 5, at 236 ("To administer [O'Neill's] proposed rule of accrual, the court would have to determine whether, taken together, the predicate acts pled in the complaint form a pattern and, if they do, when they first formed one.").

172. *Id.*

173. See National Association of Securities and Commercial Law Attorneys (NASCAT) Amicus Brief at 8-9, *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984 (1997)

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the above “injury plus pattern discovery” rule, the statute of limitations accrues only when the plaintiff discovers, or should have discovered, the pattern. For postpattern RICO injuries, the statute of limitations accrues when the plaintiff discovers, or should have discovered, the injury. The “injury discovery” rule essentially applies a “separate accrual” rule to both pre- and postpattern RICO injuries. Blakey argues that anytime a court applies a “separate accrual” rule, a “meritorious plaintiff’s RICO claims are unjustifiably time-barred,”<sup>174</sup> as the plaintiff may not be able to recover for the full pattern. But this Note has asserted that a civil RICO claim is actionable when the pattern first develops, not when it fully develops.

In *Klehr* the Court rejected the “last predicate act” rule and dismissed Blakey’s contentions about a meritorious plaintiff because his rule would “create[] a limitations period that is longer than Congress could have contemplated.”<sup>175</sup> The proper accrual rule will not delay the running of the statute of limitations until the pattern is “fully” developed, nor should it.

Civil RICO provides a remedy for any injury that a plaintiff suffers as a result of a pattern of racketeering activity, regardless of whether that injury is discoverable before or after the pattern develops. The “injury discovery” rule<sup>176</sup> treats pre- and postpattern injuries the same, but in doing so, it does not account for the unique RICO pattern element and thus compromises RICO’s statutory remedy.<sup>177</sup> The “last predicate act” rule,<sup>178</sup> treats pre- and postpattern injuries the same, but in doing so it “creates a limitations period that is longer than Congress could have contemplated” and compromises a defendant’s procedural repose.<sup>179</sup> In contrast, the “injury plus pattern discovery” rule that this Note proposes balances

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(No. 96-663).

174. *Id.* at 12.

175. *Klehr*, 117 S. Ct. at 1989.

176. Described *supra* Part II.B.2.

177. The same criticism can be applied to the “injury” rule.

178. Described *supra* Part II.B.3.

179. *Klehr*, 117 S. Ct. at 1989. *See also* *United States v. Kubrick*, 444 U.S. 111, 125 (1979) (“[S]tatutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable.”).

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recovery and repose,<sup>180</sup> by delaying, until the pattern element is first satisfied, the limitations period accrual for prepattern injuries. But an “injury plus pattern discovery” accrual rule does not have to consider post-pattern injuries in light of the same principles; the pattern element has already been satisfied.

After the pattern first develops, there may be additional discoverable injuries. At this point, a court applying the “injury plus pattern discovery” rule should make an inquiry, similar to the Eighth Circuit’s, into the nature of the additional injury. Is the postpattern injury an “independent injury,” i.e., one that is part of the pattern but discovered after the pattern and all other elements have first become cognizable? Or is the postpattern injury part of “one single, continuous injury”?<sup>181</sup> If it is not independent, the court has nothing to consider for limitations accrual purposes.<sup>182</sup> If it is an “independent injury,” it generates a separate cause of action that accrues upon discovery of that injury.<sup>183</sup>

These “independent injury” and “separate accrual” provisions create a hybrid rule for postpattern injuries, using the Clayton Act model. This Note discarded the Clayton Act rule above<sup>184</sup> because that rule would have started the limitations period initially without accounting for civil RICO’s pattern element. But after the pattern element is satisfied and the “injury plus pattern” discovery rule has started the limitations clock, the Clayton Act analogy becomes more pertinent. The Supreme Court did note that “the Clayton Act analogy is helpful.”<sup>185</sup> By adding a “separate accrual” provision to the “injury plus pattern” discovery rule, the Clayton Act analogy helps the civil RICO limitations period harmonize RICO’s unique nature with statute of limitations principles. In this way, the rule proposed in this Note answers the lingering question—when does the RICO statute of limitations

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180. *See supra* Part IV.A.

181. *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 239 (8th Cir. 1996).

182. An additional, non-independent injury may affect other RICO considerations, like recovery, for example, but such considerations lie beyond the scope of this Note.

183. *See Klehr*, 87 F.3d at 239.

184. *See supra* Part IV.B.1.

185. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1990 (1997).

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accrue—and completes the framework set out by the *Malley-Duff* Court.<sup>186</sup>

#### V. CONCLUSION

Congress left civil RICO “limitations-naked” when it enacted the statute in 1970, and, consequently, it also failed to delineate a proper accrual rule. Although the Supreme Court had two opportunities to consider this accrual issue—once, when it gave civil RICO the four-year statute of limitations in *Malley-Duff*, and again, more recently, when it rejected the Third Circuit’s rule in *Klehr*—it has never completely resolved it. This Note has attempted to fully clothe civil RICO with an appropriate statute of limitations accrual rule.

A more appropriate rule would start the limitations period as soon as the plaintiff first discovers, or should have discovered, both the existence and source of her injury and that the injury is part of a pattern of racketeering. The rule includes a separate accrual provision for each injury that is discoverable after the point of pattern formation. The court applying this separate accrual provision, upon finding that the injury is an independent one,<sup>187</sup> should accrue a separate limitations period for each injury from the point that additional injury was discoverable.

The proposed rule preserves civil RICO remedies without making its four-year limitations period impotent and, by “balancing the competing equities unique to civil RICO actions,”<sup>188</sup> it naturally completes the Supreme Court’s *Malley-Duff* and *Klehr* handiwork.

*Marcus R. Mumford*

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186. Justice Scalia refers to the “vice of the ‘mix-and-match’ approach to statutes-of-limitation borrowing.” *Klehr*, 117 S. Ct. at 1996 (Scalia, J., concurring in part and concurring in the judgment). The majority despised the label, noting rather, that they recognized that “the Clayton Act’s express statute of limitations does not necessarily provide all the answers.” *Id.* at 1992. One gets the feeling that Justices Scalia and Thomas, like Cinderella’s wicked step-sisters, would try to force another’s glass slipper to fit civil RICO’s foot.

187. This necessitates an “independent injury” inquiry. *See supra* text accompanying notes 181-83.

188. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987). *See also* the Scalia-and-Thomas-Cinderella’s-wicked-step-sisters analogy *supra* note 186.