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All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff

Edwin Scott Hackenberg

ALL THE MYRIAD WAYS: ACCRUAL OF CIVIL RICO CLAIMS IN THE WAKE OF *AGENCY HOLDING CORP. v. MALLEY-DUFF*

Although civil RICO claims are governed by a four-year statute of limitations,[1] the time at which the cause of action accrues remains unsettled.[2] This paper addresses the difficulties that have arisen as courts struggle to formulate a rule of accrual for civil RICO. There are currently four approaches to accrual and each will be examined in turn. First, however, a brief introduction to the nature of a RICO claim is necessary. This paper next describes the operation of the available approaches to civil RICO accrual. Finally this paper analyzes the advantages and drawbacks of each of the current approaches.

Congress created the Racketeer Influenced and Corrupt Organizations Act (RICO) as a criminal statute to prevent the infiltration of legitimate business by organized crime. The statute basically prohibits the ownership, operation, or control of any enterprise or association by means of racketeering activity.[3] The statute also provides a civil remedy (commonly referred to as "civil RICO") for persons who are injured in their business or property.[4] The elements that must be met to prove a civil RICO cause of action are: (i) an injury,[5] (ii) resulting from the conduct of an enterprise, (iii) through a pattern of racketeering activity. An "enterprise" is defined as any legal entity or group of individuals

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1. Agency Holding Corp. v. Malley-Duff & Assocs., 107 S. Ct. 2759 (1987). After "borrowing" the four-year Clayton Act limitations period the Court found that the litigation had been filed within four years of the earliest point at which the plaintiff's cause of action could have accrued. Hence, it specifically declined to decide when the RICO claim had accrued or to offer any guidance for determining accrual of RICO claims in light of its Clayton Act analogy.

2. For purposes of this discussion, accrual refers to the point at which a cause of action may be maintained. Black's Law Dictionary, 19 (5th ed. 1987) defining "accrue." A statute of limitations fixes a period of time, running from accrual of a cause of action, within which suit shall be brought. Black's Law Dictionary, 835 (5th ed. 1987) defining "limitation."

3. 18 U.S.C. § 1962(a)-(c) (1982).

4. 18 U.S.C. § 1964 (1982).

5. Id.; Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125 (D. Mass. 1982) (injury must be tangible and economic).

associated in fact.[6] A "pattern of racketeering activity"[7] consists of "at least two" illegal acts, or predicate acts, the last of which occurred within ten years after the commission of a prior act.[8] A predicate act consists of a violation of certain state and federal criminal laws specified in the RICO statute.[9]

To understand the interrelationship of these elements, a simple fact situation is useful. Suppose a plaintiff suffers an injury to his business on January 1, 1980, when defendant, operating through a legitimate business, commits an illegal act. This illegal act may be termed an injurious predicate act. Although injured, plaintiff has no RICO action at this point because there is as yet no pattern; even under the most liberal interpretation of the pattern requirement,[10] two predicate acts are necessary. No matter what accrual standard is applied, in order to recover for the 1980 injury, another predicate act must occur before January 1, 1990, or the ten-year limitation on the cumulation of predicate acts for a pattern will not be satisfied. Thus, if another predicate act occurs in 1984, the ten-year requirement is satisfied and a pattern may exist. If there is a pattern and an injury, the question becomes one of accrual, that is, of when the four-year statute of limitations begins to run.[11]

The issue of when the civil RICO cause of action accrues remains unsettled. Prior to the Supreme Court's decision in *Agency Holding*

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6. 18 U.S.C. § 1961(4) (1982). A RICO enterprise requires an element of continuity. If a legal entity or association of persons ceases to function once it has injured a plaintiff, then it lacks sufficient continuity to constitute a RICO enterprise. Beck v. Manufacturers Hanover Trust Co., 820 F.2d 4649 (2d Cir. 1987); Montesano v. Seafirst Commercial Corp., 818 F.2d 423 (5th Cir. 1987)

7. 18 U.S.C. § 1961(5) (1982).

8. Id.; see Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14, 105 S. Ct. 3275, 3285 n.14 (1985). Unless otherwise noted, discussion of accrual will take place under the assumption that two related predicate acts do constitute a pattern. See infra note 10.

9. 18 U.S.C. § 1961(1) (1982).

10. 18 U.S.C. § 1961(5) (1982) provides that a pattern "requires at least two acts of racketeering activity, one of which occurred after [Oct. 15, 1970] and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." In *Sedima*, 473 U.S. at 496 n.14, 105 S. Ct. at 3285 n.14, the Court disagreed with a broad construction of "pattern" and held that proof of a pattern requires "continuity plus relationship." They did not, however, settle whether two predicate acts alone are sufficient to constitute a pattern, whether predicate acts can be related to a single scheme, or what "continuity" means.

11. The question of when the statute of limitations begins to run must be kept distinct from the question of whether sufficient predicate acts have occurred within a ten-year period. The ten-year period is part of the statutory definition of pattern. See 18 U.S.C. § 1961(5). If there are not the proper quantity and quality of predicate acts in the ten-year period, there will be no accrual question, for an essential element of the RICO violation—the pattern—will not exist. The four-year period and the rules for its running are creations of the court, and it is they that are the focus of this piece.

Corp. v. Malley-Duff & Associates,[12] there were two accrual standards applied by the federal courts. Now there are four, and the development of at least one may be a direct result of that decision and have wide-ranging effects upon the future of civil RICO.[13]

CIVIL RICO METHODS OF ACCRUAL

Subsequent to *Agency Holding*, four lines of authority regarding civil RICO accrual have emerged: the discovery standard, the last predicate act standard, the last injury discovery standard, and the Clayton Act or adverse impact standard. Prior to the borrowing of the Clayton Act's statute of limitations, most of the federal circuits that had expressly addressed the accrual standards had nominally settled upon the discovery standard of accrual.[14] The Supreme Court's silence on the accrual issue in the face of the circuit decisions adopting discovery may prompt the circuits that remain unresolved to adopt that standard as well. However, there seems to be a trend, however, among the lower courts to create new standards, and these courts will likely continue to apply these new standards.

Discovery

The majority of federal courts apply the discovery standard in determining when the four-year statute of limitations begins to run. These courts adhere to the "general federal rule"[15] of accrual, that the limitations period begins to run when a plaintiff knows or should know

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12. *Agency Holding*, 107 S. Ct. 2759 (1987).

13. Three years ago, Judge Shadur asked, "Would any self-respecting plaintiff's lawyer omit a RICO charge these days?" Papagiannis v. Pontikis, 108 F.R.D. 177, 179 n.1 (N.D. Ill. 1985). This writer acknowledges the ubiquitous RICO claim for what it has become and notes criticism that civil RICO has reached beyond the archetypal gangster. See, e.g., Are Prosecutors Going Wild Over RICO, Legal Times of Wash., Oct. 8, 1971, at 32, col. 1, quoting defense counsel William G. Hundley (attorneys are using RICO "against all kinds of defendants. You know as well as I do that Congress never would have passed it if they ever thought they were going to use it against governors and people like that."). All discussion not designated otherwise must be considered in light of a widely perceived need to reign in the availability of a civil RICO cause of action.

14. Those circuits include the eleventh, ninth, eighth, fifth, and fourth. The seventh and third circuits are, as yet, unresolved, with some district courts applying at least two of the four approaches. The litigation on the issue in the 10th, 6th, 2d, and 1st circuits is inconclusive at best. For citations, see supra notes 16 & 23.

15. This approach invokes the general equitable rule that a limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis for his action. Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985), cert. denied sub nom., Zoldessey v. Founders Title Co., 106 S. Ct. 1516 (1986) ("This is consistent with our practice in related fraud and securities cases."). See also United States v. Fields, 432 F. Supp. 55 (S.D.N.Y. 1977).

of the "injury which is the basis for his cause of action."[16] Accrual rests solely upon knowledge of the injury under this rule.

The most common RICO cases in which the general federal discovery rule is applied are claims grounded in fraud. In the usual case, the plaintiff alleges mail fraud, wire fraud, or securities fraud as the requisite predicate acts, and the plaintiff in these cases usually has suffered only a single injury from the defendant's course of illegal conduct. The single-injury actions based on one of these three predicate acts are often referred to as "garden-variety" claims.[17] The plaintiff, injured only once by the alleged pattern, has four years from discovery of the injury to file suit under the general federal rule. The discovery rule provides a clear outcome in the garden-variety cases; the plaintiff can recover all of his damages if he files within four years of discovery, but nothing if he waits any longer.

The existence of multiple injuries resulting from several predicate acts complicates the accrual question. The four-year period begins to run on each of the injuries when that injury is discovered. The application of the discovery rule of accrual to the multiple-injury case results in a divisible cause of action. Thus, unlike the all-or-nothing result in the garden-variety case, it is possible that a plaintiff's claim may be partially barred by the statute of limitations when he has suffered multiple injuries.[18] In *State Farm Mutual Automobile Insurance*

16. La Porte Const. Co., Inc. v. Bayshore Nat'l Bank, 805 F.2d 1254, 1256 (5th Cir. 1986); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984); Alexander v. Perkin Elmer Corp., 729 F.2d 576, 577-78 (8th Cir. 1984); Abernathy v. Erickson, 657 F. Supp. 504, 507 (N.D. Ill, 1987); Long Island Lighting Co. v. IMO Delaval, Inc., 668 F. Supp. 237, 239 (S.D.N.Y. 1987); Beck v. Manufacturers Hanover Trust Co., 645 F. Supp. 675, 679 (S.D.N.Y. 1986); Electronics Relays (India) Pvt., Ltd. v. Pascente, 610 F. Supp. 648, 653 (N.D. Ill. 1985). Other courts had found that the RICO action accrued upon knowledge or constructive knowledge of "the fraud." See, e.g., Davis v. Edwards & Sons, Inc., 635 F. Supp. 707 (W.D. La. 1986) (prescriptive period commences only when plaintiffs have discovered the fraud or, through the exercise of reasonable diligence, should have done so); Kronfeld v. First Jersey Nat'l Bank, 638 F. Supp. 1454, 1474-1478 (D.N.J. 1986). This definition of accrual presupposes that the "fraud" is coterminous with the act that actually injures the plaintiff and is often applied in cases where predicate acts of securities fraud are alleged. See e.g. Morey v. Bravo, No. 85-10091, slip op. (S.D.N.Y. Dec. 2, 1987), 1987 WL 28526, 1987 U.S. Dist. Lexis 11280. In securities fraud, the injury is felt when the loss is suffered, that is, when the plaintiff has entered a contract for the sale or purchase of securities. See, e.g., Rice v. Baron, 456 F. Supp. 1361, 1368 (S.D.N.Y. 1978). The cause of action in such instances accrues upon discovery of the fraud which directly causes the injury; however, the general rule, properly expressed, provides that the limitations period begins to run when a plaintiff knows or has reason to know of the injury upon which his action is based. See *Beck*, 645 F. Supp. at 679.

17. Bankers Trust Co. v. Feldesman, 648 F. Supp. 17, 36 n.8 (S.D.N.Y. 1986).

18. Gutfreund v. Christoph, 658 F. Supp. 1378 (N.D. Ill. 1987). In dicta, the court

Co. v. Ammann,[19] the Ninth Circuit noted that where there are multiple injuries, the civil RICO statute of limitations begins to run when plaintiff knows or should know of the injury which is the basis of his action. Justice (then Judge) Kennedy, to explain how the terse majority opinion should be interpreted, wrote separately, suggesting that a rule of separate accrual should apply to each injury.[20] Thus, separate injuries sustained within the limitations period are actionable "despite the existence of some time-barred causes of action."[21]

Working through the earlier hypothetical illustrates the operation of the discovery rule. If the plaintiff is injured in 1980, and he immediately discovers the injury, suit must be brought in 1984. If the second predicate act does not occur until 1985,[22] the plaintiff may use the 1980 predicate act to prove a pattern, but under the discovery rule he cannot recover damages for the first injury since the four-year limitations period has run. An action could not be brought until the occurrence of at least two predicate acts, the first point at which a RICO cause of action accrues and, thus, in some instances recovery for an initial injurious act would be barred if it antedated a second pattern-establishing act by

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analogized to civil antitrust claims with multiple injuries where the courts have found that the cause of action accrues with each overt act causing damage. See Annotation, When Does Statute of Limitations Begin to Run Against Civil Action or Criminal Prosecution for Conspiracy, 62 A.L.R. 2d 1369, 1386 (1958).

But cf. Citicorp Savings of Illinois v. Streit, No. 84-7471 Slip Op. (N.D. Ill. Apr. 3, 1987), 1987 WL 9318 (defendants argued that the plaintiff, while injured by conduct occurring both before and after the limitations period had begun, was limited to damages that accrued only during the limitations period. The court disagreed and found that the appropriate "damages period" was not analogous to antitrust law). If a RICO plaintiff fails to file timely for his first injury then the statute of limitations bars his claim.

See also HGN Corp. v. Chamberlain, Hrdlika, White, Johnson, and Williams, 642 F. Supp. 1443, 1452 (N.D. Ill. 1986) (rejecting the last overt act of the RICO conspiracy as the point of accrual and finding that when a plaintiff is the target of a continuing conspiracy, its cause of action accrues "when it sustains harm," and the discovery rule then tolls the the statute of limitations until actual or constructive knowledge of the damage).

The *Gutfreund* court found, however, that if subsequent injuries occur, the plaintiff may bring suit for them, with a new limitations period applying, and refer to the act that caused the first time-barred injury as evidence of a pattern to support suit on the second. *Gutfreund*, 658 F. Supp at 1392 n.21. The plaintiff's damages are, thus, divisible and it makes no difference whether the injury is caused by the onset or the conclusion of the pattern, or anything in between. Id.

19. 828 F.2d 4 (9th Cir. 1987).

20. Id.

21. Id.

22. Acts that injure other victims, but not the plaintiff, may constitute predicate acts under some definitions of pattern. See, e.g., United States v. Yonan, 622 F. Supp. 721, 728 (N.D. Ill. 1985); Northern Trust Bank v. Inryco, Inc., 615 F. Supp. 828, 831-33 (N.D. Ill. 1985); Papagiannis v. Pontikis, 108 F.R.D. 177 (N.D. Ill. 1985).

more than four years. Plaintiff could, of course, sue on the 1985 injury through 1989, but could not bring a RICO action unless another pattern-establishing act were committed after 1985.

Last Predicate Act

The second accrual approach focuses on the continuing nature of RICO violations, beginning the running of the statute of limitations for RICO violations on the date of the last predicate act.[23] To decide when a federal cause of action accrues under this approach, one should look to the fundamental purpose behind the statute in question or the essence of the cause of action, the pattern.[24] The running of the limitations period commences either when the pattern of acts that caused the injuries alleged is complete, or, if the violation is an ongoing one, when the most recent predicate act alleged occurs.[25]

RICO plaintiffs can recover for the entirety of their injuries under the last predicate act rule.[26] This approach leads to markedly different results than the discovery standard. The discovery standard ignores the pattern and focuses on the injury. The plaintiff cannot reach back more than four years to recover for an injury, regardless of pattern formation. The last predicate act rule grounds itself on the pattern, and the plaintiff

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23. Moll v. US Life Title Ins., 654 F. Supp. 1012, 1026 (S.D.N.Y. 1987); Newman v. Wanland, 651 F. Supp. 20, 22 (N.D. Ill. 1986); Wabash Publishing Co. v. Dermer, 650 F. Supp. 212, 217 (N.D. Ill. 1986); County of Cook v. Berger, 648 F. Supp. 433, 435 (N.D. Ill. 1986); Bankers Trust Co. v. Feldesman, 648 F. Supp. 17, 35 (S.D.N.Y. 1986); Gonzalez v. Katz, No. 86-7254, slip op. (E.D. Pa. Aug. 13, 1987), 1987 WL 15677; Washburn v. Brown, No. 81-1475, slip op. (N.D. Ill. Jan. 23, 1987); 1987 WL 5942; Carlstead v. Holiday Inns, Inc., No. 86-1927, slip op. (N.D. Ill. Oct. 9, 1986) 1986 WL 11680 (recognizing a distinction between "predicate acts," which are necessarily crimes in themselves, and "overt acts" which, while carrying out a conspiracy, may be innocent activities); Griggs v. Robinson Securities, No. 844679 Slip Op. (N.D. Ill. May 5, 1985).

24. Gonzalez v. Katz, No. 86-7254, slip op. (E.D. Pa. Aug. 13, 1987), 1987 WL 15677.

25. Id; see also, Bankers Trust Co. v. Feldesman, 648 F. Supp. 17, 36 (S.D.N.Y. 1986).

26. This is similar to the approach taken by courts in civil conspiracy claims with multiple injuries where the limitations period runs from the last overt act pursuant to the conspiracy. Annotation, 62 A.L.R. 2d at 1386. Employment discrimination cases provide a good example. See, e.g., Held v. Gulf Oil Co., 684 F.2d 427, 430 (6th Cir. 1982); Smith v. American President Lines, Ltd., 571 F.2d 102, 105 (2d Cir. 1978). Generally, under this civil approach conspiracy comes to an end with the performance of or failure to effect the goals of the conspiracy and later acts of concealment are not overt acts that toll the running of the statute. See People v. Handeman, 244 Cal. App. 1, 53 Cal. Rptr. 168 (1966). The cause of action under such an approach is viewed as encompassing the entire injurious course of events and is, thus, indivisible as to the injury suffered.

can search back as far as necessary to recover for injuries, so long as it is within ten years (under the statutory definition of pattern).

Accrual upon the last predicate act also changes the divisibility of the case of action. There cannot be separate accrual dates under the last predicate act approach. Thus, the recovery is all-or-nothing whether or not a single- or multiple-injury case is involved. So, for example, if there is an injurious predicate act occuring and discovered in 1980, and another injurious predicate act in 1985, the plaintiff may sue through 1989 for the injuries suffered both in 1980 and in 1985.

Last Injury Discovery Standard

The last injury discovery standard is the most recently formulated approach to civil RICO accrual. This rule provides that the statute of limitations begins to run upon discovery of the injury resulting from the most recent injurious predicate act. In *Morey v. Bravo Productions, Inc.*,[27] the district court, in dicta, devised this third accrual standard, based upon dicta from an earlier case, *Bankers Trust v. Feldesman*.[28] The *Morey* court acknowledged that the general federal discovery rule should primarily be utilized in single-injury cases, but should not apply in cases where a RICO plaintiff has suffered multiple injuries. In the latter instance, said the *Morey* court, courts should apply the last predicate act approach.[29] It found, however, that "the general rule is . . . sufficient in the 'garden' variety RICO action based upon a single fraudulent scheme" where there is only a single injury.[30] These are the most common RICO claims alleged and, as discussed above, the type of RICO claim in which the discovery rule is generally applied.

In *Keystone Ins. Co. v. Houghton*, the district court picked up on the *Morey-Bankers Trust* language to coin what it referred to as the "last injury discovery" rule.[31] The RICO statute of limitations, in the court's view, should run from the date that a plaintiff knew or should have known of his most recent injury caused by a predicate act.[32] This

27. No. 85-10091, slip op. (S.D.N.Y. Dec. 2, 1987), 1987 WL 28526, 1987 U.S. Dist. Lexis 11280.

28. *Bankers Trust*, 648 F. Supp. at 17, 36 n. 8; ("Of course, the general Federal rule may suffice in the garden variety RICO claim that arises out of a single fraudulent scheme . . . because in such a case the plaintiff usually suffers only a single injury.").

29. Morey v. Bravo, No. 85-10091, slip op. (S.D.N.Y. Dec. 2, 1987), 1987 WL 28526, 1987 U.S. Dist. Lexis 11280.

30. Id.

31. No. 86-4327, slip op. (E.D. Pa. April 20, 1988), 1988 WL 36342, 1988 U.S. Dist. Lexis 3484.

32. Id. This approach assumes that, like conspiracy actions involving multiple injuries where the limitations period runs from the last overt act causing damage, RICO damages are indivisible. See Annotation, 62 A.L.R. 2d at 1386 for conspiracy cases cited therein.

approach provides full recovery for all injuries so long as suit is brought timely for the most recent *injurious* act. Thus, the new rule produces the discovery rule result when single-injury claims are involved, while giving the last predicate act result in multiple-injury cases.

To return to the hypothetical, if an injurious predicate act occurs in 1980 and another in 1985, then the plaintiff may bring suit for both the injurious predicate acts. If, however, the 1985 act is non-injurious, then the plaintiff may not sue after 1984 for the injurious predicate act of 1980. Thus, so long as suit is brought within four years of the most recent injurious predicate act, the plaintiff may recover for all previous injurious acts.

Clayton Act Rules

The fourth accrual standard primarily rests upon the *Agency Holding* discussion of the analogy between the civil RICO and Clayton Act remedies. This approach applies Clayton Act rules to the "analogous" civil RICO case.[33] In *Armbrister v. Roland International Corp.*,[34] the plaintiffs alleged a scheme to defraud them by misrepresentations regarding the nature and value of land they were buying sight-unseen. The sales had taken place up to ten years prior to the filing of suit, although the plaintiffs continued to make payments on the land "long after the initial contract date."[35] After expressing a lack of sympathy for the plaintiffs,[36] the district court noted that RICO accrual was still an open question and deftly applied the Clayton Act accrual rules to the plaintiffs' RICO claim.[37]

A civil antitrust action accrues, and the statute of limitations begins to run, when the plaintiff feels the impact of the antitrust violation,[38]

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33. Gilbert Family Partnership v. Nido Corp., 679 F. Supp. 679 (E.D. Mich. 1988) ("this court believes that the rationale of the *Agency Holding* decision requires an application of the limitations accrual principles of the Clayton Act . . ."); see Johnson v. Agrisor Credit Corp., No. 84-4421-5, slip op. (D. Kan. Dec. 29, 1987); Snider v. Lone Star Trading Co., Inc., 672 F. Supp. 977 (E.D. Mich. 1987); see also, United States v. Bonanno Organized Crime Family, No. 87-2974, slip op., at 134 n.36 (E.D.N.Y. Mar. 24, 1988), 1988 WL 27786, 1988 U.S. Dist. Lexis 2669 (criminal RICO prosecution suggesting that Clayton Act rules of accrual may be applicable in a criminal RICO context).

34. 667 F. Supp. 802 (M.D. Fla. 1987).

35. Id. at 806.

36. Id. ("[T]he Court cannot insulate individuals from their own stupidity.").

37. Id. citing City of El Paso v. Darbyshire Steel Co., 575 F.2d 521, 523 (5th Cir. 1978), cert. denied, 439 U.S. 1121, 99 S. Ct. 1033 (1979).

38. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795 (1971); 5 Penn & Co. II v. Shearson Lehman Bros., No. 87-1357, slip op. (E.D. Pa. Nov. 3, 1987); Poster Exch., Inc. v. National Screen Serv. Corp., 517 F.2d 117, 124 (5th Cir. 1975), reh'g denied, 570 F.2d 943, cert. denied, 425 U.S. 971, 96 S. Ct. 2166 (1976).

that is, when a defendant commits an overt anticompetitive act that injures the plaintiff's business.[39] The statute of limitations begins to run despite the plaintiff's failure to discover the existence of his cause of action,[40] the only exception to this accrual-upon-injury rule being the case of fraudulent concealment of a cause of action.[41] In a continuing antitrust conspiracy, each overt injurious act gives rise to an independent cause of action.[42] Continuing anticompetitive acts create new causes of action, but continuing damages suffered from a defendant's acts outside the limitations period do not.

If an antitrust violation is "final" at the time of impact, then suit must be brought within four years of the initial act. When a plaintiff's antitrust injury is embodied in a contract, then the courts generally treat the date of execution as the point at which the cause of action accrues.[43] The *Armbrister* court extracted this rule from the body of antitrust injury-on-the-contract cases and applied it in a civil RICO context. Injuries flowing from an illegal contract, although they may occur over an extended period of time, are set in motion by the contract initially fixing the rights and liabilities of the parties.[44] The injury occurs and

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39. Curtis v. Campbell-Taggart, Inc., 687 F.2d 336 (10th Cir. 1982); *Poster Exch.*, 517 F.2d 117 (5th Cir. 1975).

40. Harold Fridman, Inc. v. Thorofare Mkts., 587 F.2d 127 (3d Cir. 1978); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 210 F. Supp. 557 (N.D. Ill. 1962), aff'd, 315 F.2d 558 (7th Cir. 1963).

41. A plaintiff is under a duty to inquire, with reasonable diligence, as to the existence of his cause of action, and a successful claim of fraudulent concealment must prove that discovery was impossible, despite the exercise of due diligence, between the time of the alleged wrong and its detection. See, e.g., Campbell v. Upjohn Co., 498 F. Supp. 722, 726-27 (W.D. Mich. 1980); Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975). See also, King & King Enter. v. Champlin Petroleum Co., 657 F.2d 1147, 1154 (10th Cir. 1981) (statute of limitations is tolled if defendant's conduct, by reason of its fraudulent nature, is inherently self-concealing). But cf. Pennsylvania v. Lake Asphalt & Petroleum Co., 610 F. Supp. 885, 888 (D. Pa. 1985) (fraudulent concealment requires "affirmative acts independent of the underlying conspiracy").

42. *Zenith Radio*, 401 U.S. at 338, 91 S. Ct. at 806.

43. Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045 (5th Cir. 1982), cert. denied, 459 U.S. 1105, 103 S. Ct. 729 (1983); Aurora Enters., Inc. v. National Broadcasting Co., 688 F.2d 689 (9th Cir. 1982). See Baldwin v. Loews, Inc., 312 F.2d 387 (7th Cir. 1963); City of El Paso v. Darbyshire Steel Co., 575 F.2d 521 (5th Cir. 1978), cert. denied, 439 U.S. 1121, 99 S. Ct. 1033 (1979).

44. But cf. City of El Paso, 575 F.2d at 523; National Souvenir Center, Inc. v. Historic Figures, Inc., 728 F.2d 503 (D.C. Cir.), cert. denied, sub nom., C.M. Uberman Enters., Inc. v. Historic Figures, Inc., 469 U.S. 825, 105 S. Ct. 103 (1984) (for "tying arrangements" (which deny the competitors access to a secondary market on the same terms as the defendant) an "overt act" within the limitations period can consist of merely maintaining the original unlawful contractual relationship). Imperial Point Colonnades Condominium, Inc. v. Mangurian, 549 F.2d 1029, 1035 (5th Cir. 1977) ("Where defendant commits an act injurious to plaintiff outside the limitations period, and damages continue

is ascertainable at the date of contract formation, and continued collections of payments under the contract or any other reaping of "continuing benefits" do not, in themselves, create successive causes of action as would independent injurious acts in an ongoing violation.[45]

In light of these rules, the *Armbrister* court found that since the rights and liabilities of the plaintiff and defendant had been fixed by contract, and the plaintiff claimed that he had been injured by payments made under the contract, his claim accrued when he entered into the contract, despite the fact that payments were made by him and received by the defendant "for years later in fulfillment of the alleged conspiracy."[46]

This borrowing of Clayton Act accrual rules was also discussed in *5 Penn & Co. v. Shearson Lehman Brothers*.[47] Particularly important is the court's discussion of the Clayton Act speculative damages revival exception. In a civil antitrust suit, the cause of action entitles a plaintiff to recover not only the damages suffered at the time of accrual, but also those he will suffer in the future from that particular act.[48] This is a limited exception to the overt act requirement and is equivalent to saying that an action for future or speculative damages does not accrue until those damages are suffered. Where damages resulting from an act cannot be proven with requisite certainty until more than four years after its commission, the cause of action does not accrue until damages can be reasonably established.[49] The act is in effect "revived."[50]

The plaintiff in *5 Penn* had argued that damages resulting from the defendant's conduct, outside of the limitations period, had been speculative and that, therefore, its cause of action was revived when they

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to result from that act within the limitations period, no new cause of action accrues for damages occurring within the limitations period because no act committed by the defendant within that period caused them."); see also Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 715 (11th Cir. 1984) (in antitrust action "[w]here rights and liabilities are finalized by a contract or by denial of a contract, and any damages are at that time provable with certainty, the statute of limitations begins to run at that time").

For a criticism of the *City of El Paso* line of jurisprudence, see Comment, Complexities of Accrual: The Antitrust Statute of limitations in a Contractual Context, 31 UCLA L. Rev. 1061, 1078 (1984).

45. *Aurora Enters.*, 688 F.2d at 694.

46. Armbrister v. Roland Int'l Corp., 667 F. Supp. 802, 806 (M.D. Fla. 1987).

47. No. 87-1357, slip op. (E.D. Penn. Nov. 3, 1987), 1987 WL 19591, 1987 U.S. Dist. Lexis 10225. The plaintiff's claim would have been barred under any rule of accrual the court was willing to recognize. Thus, the court did not reach the issue of whether Clayton Act rules applied, but only discussed the problem in dicta.

48. *Zenith Radio*, 401 U.S. at 338, 91 S. Ct. at 806.

49. Id.

50. Id.

became provable with requisite certainty;[51] but the court disagreed and found that the plaintiff's reliance upon the revival exception was misplaced.[52] The RICO claim was based upon the predicate offense of securities fraud and, thus, the plaintiff could have "sued for its entire investment as soon as it could show that it had relied to its detriment on a material misrepresentation."[53] The court implied, however, that the revival exception would be available in some circumstances. A RICO plaintiff could use the revival exception if his damages had not been sufficiently provable for him to have brought suit on any of the underlying predicate offenses.

Applying the Clayton Act rules to the hypothetical, it is seen that a plaintiff signing a contract in 1980 that fixes his obligations so that damages are assessable at that time has through 1984 to bring suit for any initial payments. Collection of payments from the plaintiff in 1985 would not create a new RICO cause of action; nor would collections in 1989, since the extent of damages had been fixed in 1980 under the contract rule. In such a situation, the plaintiff would be forced to sue on the underlying predicate acts with their own respective accrual rules and limitations periods applying. If, however, the 1980 contract, instead of fixing a price, based costs on a fluctuating external source, then the plaintiff's injuries would not be fixed by the contract, and a collection of payments in 1985 would allow him to sue through 1989 for the 1985 injury under the speculative damages rule. However, recovery for any 1980 injuries would be barred after 1984 since the Clayton Act, much like the discovery rule under *State Farm*, provides for separate accrual.[54]

ANALYSIS

The various accrual standards used by the courts have differing impacts upon the degree of a plaintiff's recovery. They rest upon alternative notions of the nature of the civil RICO cause of action and take different approaches to limiting the availability of the action. There is a widespread concern that by overapplication to garden-variety fraud claims, civil RICO will have the ironic effect, considering the concerns that prompted its enactment, of becoming a tool by which legitimate business can be harassed. Some courts have used accrual standards to limit civil RICO. While the concerns over abuse of civil RICO are valid, as many claims stray from the archetypal lets-get-Capone sort and could have as easily been adjudicated at the state level, flexible accrual standards are an inappropriate response.

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51. No. 87-1357, slip op. (E.D. Penn. Nov. 3, 1987).
52. Id.
53. Id.
54. 828 F.2d 4 (9th Cir. 1987). See infra text accompanying note 48.

The discovery rule is the most restrictive approach to accrual. Courts following this standard make an assumption concerning civil RICO. They presuppose that the essence of the cause of action lies in the remedy for each individual injury, not in the pattern.[55] The pattern is viewed as a standing requirement rather than as the essence of the statute; thus, the cause of action accrues upon discovery of an injurious act irrespective of the fact that the plaintiff may not yet have standing to sue for his injury, because he cannot allege a pattern. If this presupposition is true, then the effects of an application of the discovery standard are valid. The problem of over-limiting the availability of the cause of action remains, and the effect of the discovery rule may be inconsistent with the underlying purposes of the cause of action.[56]

Although the application of the discovery rule suggests that the essence of civil RICO lies merely in the treble damages remedy, that is

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55. The discovery rule focuses upon the damage that is suffered from a predicate act. There is no true RICO remedy, or pattern remedy; rather, a distinct remedy exists for each injury suffered by a predicate act. The last predicate act standard finds that the remedy arises from the continuing violation. The remedy is for *all* injuries suffered from the pattern of racketeering activity, not for the injury resulting from individual predicate acts isolated from one another. The last injury discovery rule also finds that the remedy arises from continuing violation; however, injuries must continue to occur in order for a plaintiff to recover. Under this approach, the essence of RICO lies in a pattern of injurious acts, not simply in a pattern of predicate acts. The Clayton Act approach ignores the nature of RICO entirely applying foreign jurisprudence with impunity.

56. Legislative purpose, as can best be determined, supports the use of an accrual standard that permits the largest possible amount of recovery. One of the goals of RICO is that a defendant be deprived of all the fruits of his unlawful enterprise. Indeed, Congress desired to drive the true racketeer out of business. See infra note 40. It can, of course, be argued that treble damages are sufficient to inflict ample damage upon the racketeer. Treble damages may even encourage extortionate claims and result in windfall recoveries. Yet in an antitrust context, it has been observed that treble damages are needed to promote the recovery of actual damages. See, e.g., Vold, Are Threefold Damages Under the Antitrust Act Penal or Compensatory?, 28 Ky. L.J. 117, 128 (1939). For discussion of treble damages in the RICO context, see Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 399 n.16 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985) (adding to the settlement value of valid claims promotes satisfaction of actual damages without facilitating windfall recoveries). Indeed, out of almost three hundred pre-*Sedima* civil RICO suits surveyed by an ABA task force, only nine resulted in treble damage awards, and most of those remaining were dismissed. Note, Congress Responds to Sedima: Is There a Contract Out on Civil RICO?, 19 Loy. L.A.L. Rev. 851, 881 (1986). Also, the deterrent effect of treble damages has been well established in the "analogous" antitrust context. See, e.g., R. Posner, Antitrust Law: An Economic Perspective 223-24 (1976) (treble damages are necessary to alter the violator's cost-benefit calculation where contemplated illegal activity is concealable). Much of the argument for treble damages rests upon the hypothetical cost-benefits analysis that the prospective racketeer undertakes. If he recognizes the effects of the discovery rule upon him if caught, i.e., that he may not be accountable for all his illegal profits, then he is certainly less likely to be deterred.

incomplete. The remedy arises from a pattern of predicate acts, not from each predicate act, for without the pattern there is no RICO remedy. Civil RICO is more than merely federalization of state law claims and an unnecessarily trebled remedy for certain federal claims. While there is no distinct "racketeering injury" requirement under civil RICO,[57] the fact that a divisible injury occurs from one or more predicate acts does not mean that the cause of action is nothing more than a simple remedy for predicate acts.

The obsession with the remedy results in absurd outcomes. A threshold requirement for the cause of action is a pattern and, hence, if courts uniformly apply the discovery standard, a plaintiff may be injured and the statute of limitations may begin to run before he has a right to sue. To return to the hypothetical, if the first racketeering act injures a plaintiff in 1980, then the general federal accrual rule would commence the statute of limitations after the injury caused by that act was felt and discovered. Thus the statute of limitations could run prior to commission of a second predicate act in 1985 and bar recovery for the 1980 injury. The difficulty with such a result is that, until the defendant commits a second predicate act of racketeering activity, there can be no pattern and the plaintiff has no cause of action. Given the legislative purpose of providing relief for individuals injured by a course of continual and related conduct, it seems incongruous to bar recovery for predicate acts taking place outside the limitations period and permit recovery only for those within.[58]

Moreover, the limitation of the discovery rule is duplicated effort, for Congress has already provided a means by which the time between recoverable acts is limited. RICO defines a pattern as "at least two acts of racketeering activity, one of which occurred within ten years . . . after the commission of a prior act of racketeering activity."[59] If at least one of the acts takes place within the new four-year period of limitations, the plaintiff ostensibly should recover for all injuries that result from acts within the ten-year limit. To find otherwise would render the ten-year provision "meaningless."[60]

Aside from legislative restrictions, the strict limitations of the discovery rule are also unnecessary in light of recent judicial limitations on the availability of the cause of action through the narrowing of the

57. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275 (1985).

58. Charter Oak Fire Ins. Co. v. Domberg, No. 83-4522, slip op. (N.D. Ill. Aug. 3, 1987), 1987 WL 15413, 1987 U.S. Dist. Lexis 7153; Flood v. Waste Management, Inc., No. 87-4643, slip op. (N.D. Ill. Jan. 21, 1988).

59. 18 U.S.C. § 1961(5).

60. See Flood v. Waste Management, Inc., No. 87-4643, slip op. (N.D. Ill. Jan 21, 1988).

pattern definition. Since *Sedima*, several federal circuits have settled upon a narrow definition of pattern, that excludes acts preparatory to a discrete objective. Likewise, in some circuits, a plaintiff has no cause of action unless he proves the open-endedness of the scheme that has caused his injury.[61] In other circuits, a plaintiff must prove that the defendants have engaged, or threatened to engage, in other schemes.[62] Thus, for any scheme in which a plaintiff suffers only a single discrete injury, his cause of action does not exist until he can demonstrate continuing injuries to him or to someone else from the defendant's racketeering enterprise that occur subsequent to the act that caused his initial injury.

Under the hypothetical, if a defendant commits a non-injurious predicate act in 1980 and an injurious predicate act in 1985, then there is no pattern under the newer, narrower definitions. The plaintiff has until 1989 to recover for his injury, yet unless another predicate act occurs within those four years, there is no pattern and the limitations period runs before the plaintiff may sue. If acts prior to injury cannot create a pattern, how can it properly be said that a cause of action has accrued at the time a plaintiff discovers his injury but cannot yet successfully file suit?

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61. United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc., 837 F.2d 356 (9th Cir. 1988) (rejects the multiple episode requirement but finds that a threat of continuing activity is not satisfied by a single fraud perpetrated on a single victim); Creative Bath Products, Inc. v. Connecticut General Life Insurance Co., 837 F.2d 561 (2d Cir. 1988) (two related predicate acts suffice to constitute a "pattern" if the scheme is conducted by an "enterprise" whose illicit activities or unlawful goals are continuing ones); Medallion Television Enterprises, Inc., 833 F.2d 1360, 1363 (9th Cir. 1987) (continuity does not require a showing that defendants engaged in more than one "scheme" or "criminal episode," only that the predicate acts are indicative of a threat of continuing activity); Albany Insurance Co. v. Esses, 831 F.2d 41 (2d Cir. 1987) (single scheme is sufficient if the purpose of the "enterprise" has no obvious terminating goal or date); HMK Corp. v. Walsey, 828 F.2d 1071 (4th Cir. 1987) (single scheme may be sufficient if its context, particularly the nature of the predicate offenses alleged, sets its scope and persistence above routine); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987) (finds an ordinary single scheme is not a pattern but that a large and continuous single scheme could be).

62. Condict v. Condict, 815 F.2d 579 (10th Cir. 1987) (RICO plaintiff must demonstrate a threat of ongoing illegal conduct and a single scheme is insufficient, even when it is pursued by multiple illegal acts, because the scheme ends when its purpose is accomplished); Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc., 834 F.2d 148 (8th Cir. 1987) (multiple acts of mail fraud in a single scheme insufficient to indicate that defendants had engaged in similar activities in the past or were engaged in similar activities elsewhere); Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986) (a single fraudulent effort implemented by several fraudulent acts does not constitute a pattern). Torwest DBC, Inc. v. Dick, 628 F. Supp. 163 (D. Colo. 1986), aff'd, 810 F.2d 925 (10th Cir. 1987) (one scheme, one result, one victim, and one method of commission, are insufficient to satisfy the pattern requirement).

If courts wish to bar garden-variety fraud actions,[63] then they may easily do so under the pattern requirement without resorting to the use of incongruous accrual approaches. The question becomes, why are flexible accrual standards a better means of limiting causes of civil RICO than the means already in place? The answer, it should be clear, is that they are not. Courts should follow the Supreme Court's admonition in *Sedima*[64] against the creation of unfounded restrictions on the RICO cause of action, and settle upon a workable and sensible accrual standard, something the discovery rule is not.

If the discovery rule goes too far toward limiting the availability of civil RICO, the last predicate act approach goes to the other extreme in allowing for the recovery of all damages suffered by a ongoing RICO violation. That approach certainly seems the fairest in circuits that have the most restrictive pattern requirements. In the majority of cases, a single scheme resulting in a single injury to a single plaintiff does not satisfy the RICO pattern requirement.[65] Even if the last predicate act

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63. See Bankers Trust Co. v. Feldesman, 648 F. Supp. 17, 36 n.8 (S.D.N.Y. 1986). Recent proposals to curtail civil RICO were directed at the predicate acts of mail fraud, wire fraud, and securities fraud. See e.g. Senate Bill 1521, 99th Cong., 1st Sess. (1985) (requiring at least one predicate act beyond these three). See, e.g., H.R. Rep. No. 1549, 91st Cong., 2d Sess., 58, 187 (1970) (fears of three representatives of the use of civil RICO by "disgruntled and malicious competitors to harass innocent businessmen"). The difficulty with the overuse of garden-variety fraud claims is the subject of RICO reform and not within the purview of the courts outside of limitations on pattern. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 496, 105 S. Ct. at 3285. The Supreme Court expressly rejected two of the most popular antitrust-type standing requirements that had previously been applied by some courts to civil RICO, the "prior criminal conviction" requirement and the "racketeering injury" requirement, and found that a RICO cause of action is comprised of only four statutory elements. See text accompanying notes 7-10. For full discussion of the *Sedima* holding, see, e.g., Note, The "Pattern" Requirement as a Limitation of Civil RICO in Light of Sedima S.P.R.L. v. Imrex Co., Inc., 15 Capital U. L. Rev. 649 (1986).

64. The Supreme Court indicated that federal courts should limit the scope of civil RICO through the "pattern" requirement. *Sedima*, 473 U.S. at 496 n.14, 105 S. Ct. at 3285 n.14.

65. Cf. supra notes 61-62; Bank of America Nat'l Trust & Savings Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986) (nine separate acts of mail and wire fraud, within a single scheme, over the course of three years, satisfy the pattern requirement); Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987) (repeated infliction of economic injury, upon a single victim, within a single scheme, is sufficient to establish a pattern); Lipin Enters. v. Lee, 803 F.2d 322 (7th Cir. 1986) (multiple predicate acts in the fraudulent sale of stock were all required by the nature of the transaction involved and, thus, under the court's fact-specific inquiry did not constitute a pattern); Marshall-Silver Constr. Co. v. Mendel, 835 F.2d 63 (3d Cir. 1987) (continuity calls for an inquiry into the extent of the racketeering activity and temporal open-endedness is only one of many factors relevant to the analysis); Barticheck v. Fidelity Union Bank, 832 F.2d 36 (3d Cir. 1987) ("continuity" does not necessarily require open-endedness, for it is the completed scheme that

standard of accrual were applied in all circuits, the cause of action would fail on pattern at the summary judgment stage in most garden-variety cases. Thus, the discovery rule seems unnecessary to bar such claims when the pattern requirement may more properly be used.

The use of the last predicate act approach is workable in all the circuits, regardless of varying pattern requirements. Depending upon the pattern requirement, the last predicate act is either the culminating act of the RICO scheme or the most recent predicate act alleged. In the circuits that require multiple schemes or ongoing violations, the most recent predicate act alleged cannot be a culminating act of the ongoing RICO violation or the plaintiff will have failed to plead a pattern.[66] Circuits where closed schemes may constitute a pattern have no difficulty

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inflicts the greater harm and more strongly implicates the remedial purposes of RICO); Montesano v. Seafirst Commercial Corp., 818 F.2d 423 (5th Cir. 1987) (Acts preparatory to the discrete objective of bank robbery do not form a pattern. The panel urged the 5th circuit to adopt an open-endedness, or ongoing activity, requirement for all single schemes.); R.A.G.S. Coture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985) (citing Sedima S.P.R.L. v. Imrex Co., 473 U.S. 496 n.14, 105 S. Ct. at 3285 n.14 (two related acts may constitute a pattern if they are not isolated); Roeder v. Alpha Indus., Inc., 814 F.2d 22 (1st Cir. 1987) ("pattern" requires a fact-specific analysis wherein two or more predicate acts must be sufficiently related to constitute more than a solitary and isolated occurrence and not merely be steps in implementing an act involving mail or wire communication).

66. See Charter Oak Fire Ins. Co. v. Domberg, No. 83-4522, slip op. (N.D. Ill.), 1987 WL 15413, 1987 U.S. Dist. Lexis 7153 (it is "most logical to commence the running of the limitations period when the focus of the litigation—the pattern of acts which caused the injuries alleged—has been completed").

While some courts have equated last predicate act with culminating act, this language should not be read without reference to its contextual pattern definition. It should be observed that, in many conspiracy cases, attempts to conceal may not be acts within the scope of the conspiratorial agreement and thus may not constitute overt acts. At some point the conspiracy is completed and subsequent acts become merely efforts to avoid detection and punishment. 62 A.L.R. Fed. 628 § 2a. Activities such as mailings have been found to be in furtherance of a scheme if they are incidental to an essential part of the scheme and do not, instead, occur after the scheme's fruition. See, e.g., United States v. Rauhoff, 525 F.2d 1170, 1176 (7th Cir. 1975). This approach is workable in civil RICO cases, in circuits where courts permit closed conspiracies to satisfy the "pattern" requirement. At some point a "last predicate act" will occur, and further acts will not be acts injurious to any plaintiff but, merely, attempts to conceal. The RICO cause of action thus accrues at the last "racketeering" act in pursuance of maintaining the pattern. The statute of limitations should, however, be tolled until discovery by the plaintiff of his injuries, under the doctrine of fraudulent concealment. See, e.g., Holmberg v. Armbrecht, 327 U.S. 392, 66 S. Ct. 582 (1945); King & King Enters. v. Champlin Petroleum Co., 657 F.2d 1147, 1154 (10th Cir. 1981) (antitrust fraud action was inherently self-concealing); Campbell v. Upjohn Co., 676 F.2d 1122 (6th Cir. 1982) (tolling in self-concealing cases occurs only where the victim has acted with "due diligence"). For discussion of fraudulent concealment in a RICO context, see Snider v. Lone Star Trading Co., Inc., No. 86-72652, slip op. (E.D. Mich. Aug. 25, 1987).

in taking a culminating act approach to accrual. In circuits where schemes must remain open-ended, the "last predicate act" should be the most recent act of the racketeering enterprise alleged. Thus, if the plaintiff can prove that the racketeering activity is ongoing, then the statute of limitations for his claim runs from the last predicate act alleged. There is no injustice in an approach that permits a plaintiff to have a continuous cause of action, for the entirety of his injuries, against a defendant who continues to engage in illegal activity, especially where there is the threat that the illegal activity will continue.

The pattern-accrual interrelationship can be demonstrated by the following example. Suppose a plaintiff is induced into entering a requirements contract by means of rigged bids that favor the defendant's elevated pricing. The plaintiff has not suffered a pecuniary injury that is provable or ascertainable at the time of the initial fraudulent inducement. Subsequent to the plaintiff's first order under the contract, the defendant engages in the second predicate act of mail fraud by posting an invoice. At this point, the plaintiff suffers an injury. After several successive billings, the plaintiff has a cause of action under the less restrictive definitions of pattern. If brought within four years of the occurrence of the most recent mailing, the action is timely under the last predicate act standard, so long as that mailing occurred within ten years of a previous mailing or other predicate act. Each subsequent billing would entitle the plaintiff to maintain a cause of action for all damages.

This is, however, a single scheme harming a single victim and, thus, in the majority of federal circuits, there is no pattern of racketeering activity. If the plaintiff were able to prove similar ongoing schemes against other victims then he could probably satisfy the pattern requirement. The question, then, is when would his cause of action accrue? If one assumes that recovery arises out of an indivisible cause of action for injuries resulting from racketeering activity, then the plaintiff should be allowed recovery for all his injuries. If the plaintiff is required to allege other acts that do not injure him subsequently to those that do, then it seems only fair to say that his cause of action does not accrue until those later acts occur. In such a case, there is no stale claim to be salvaged, nor is there an unfair surprise to members of an enterprise that continue to engage in activity injuring other victims. It must be noted, however, that courts applying the discovery rule or the Clayton Act standard, both of which assume that the RICO cause of action is divisible, have not followed this analysis and, thus, do little to square accrual with the pattern requirement.

While the last injury discovery standard differs only slightly from the last predicate act standard in result, it creates some difficulties as applied when combined with a strict pattern requirement. Not only would

a plaintiff have to prove the open-endedness of the racketeering scheme he alleges, but he would also have to prove either that the scheme continued to injure him, or that he was unable to discover his injuries until the four years prior to filing suit. In *Bankers Trust*, the court made a distinction between multiple injury claims and claims it termed "garden variety."[67] These latter claims are comprised of the most common predicate acts that have become the primary concern of lawmakers and commentators fearing the misuse of civil RICO. The *Keystone Insurance* court, somehow finding *Bankers Trust* and *Morey* to be authority for its approach, apparently shared the general concern that civil RICO can effectively be used to harass and stigmatize respected and legitimate businesses and, thus, chose to make a compromise somewhere between the effects of the discovery rule and those of the last predicate act approach.

Keystone Insurance[68] solved the problem of divisibility of the cause of action by allowing full recovery for all injuries. "To hold otherwise . . . would be to encroach upon and limit a legislatively enacted scheme to provide recovery for racketeering injuries."[69] It did not, however, provide a solution for single-injury cases where noninjurious predicate acts continue to occur over time. Since many circuits have moved away from finding that preparatory acts are pattern-forming,[70] in many cases the pattern of racketeering activity must be formed *after* the first injury. Yet if the ongoing acts are noninjurious, then the limitations period runs from the first injury. It seems incongruous to require that a pattern be ongoing, but at the same time to refuse to allow a plaintiff to sue for damages at any point along the continuing violation. A racketeer could continue his illegal activity indefinitely, so long as he injured an individual only once and that individual failed to file suit within four years of his injury.

Aside from the effect of *Keystone Insurance*, its reasoning may be called into question. The court's only argument against adoption of the last predicate act standard was that the primary determinant of an injury is not the pattern but the specific predicate act or acts that proximately caused it.[71] Its finding was based upon a reading of the statute that it is not the pattern itself which is actionable but, rather, the injury caused by a predicate act or acts. It is difficult to find such a "focus" to language that reads:

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67. Bankers Trust Co. v. Feldesman, 648 F. Supp. 17, 37 (S.D.N.Y. 1986).

68. No. 86-4327, slip op. (E.D. Pa. Apr. 20, 1988), 1987 WL 36342, 1988 U.S. Dist. Lexis 3484.

69. Id.

70. See supra notes 61-62.

71. *Keystone Ins.*, slip op. at 15-16.

> Any person injured in his business or property *by reason of a violation* of . . . this chapter may sue therefor . . . .[72]

The violation of the chapter refers not only to the commission of predicate acts but to the existence of pattern, the use of an enterprise, and all other elements of the cause of action.

Apparently, the court's failure to adopt the last predicate act approach was grounded not so much in statutory interpretation as it was in a desire to limit the garden-variety RICO claim, which is defined as an injury arising from two or more predicate acts committed in the same time frame. Even in a circuit with a less restrictive definition of pattern, like that in which *Keystone Insurance* was decided,[73] such garden-variety claims could be barred by the pattern requirement instead of by specially crafted rules of accrual that have effects reaching beyond single-injury, single-victim schemes.

CLAYTON ACT RULES

The application of Clayton Act rules to civil RICO could seriously curtail civil RICO's effectiveness if those rules are strictly applied. The Clayton Act and civil RICO are not perfectly analogous.[74] If the *Arm-*

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72. 18 U.S.C. § 1964(c).

73. See, e.g., Marshall-Silver Const. Co. v. Mendell, 835 F.2d 63 (3d Cir. 1987); Bartichek v. Fidelity Union Bank, 832 F.2d 36 (3d Cir. 1987).

74. There is little overlap between the types of conduct each statute prohibits. The Clayton Act provides a remedy for injuries suffered by violation of the laws prohibiting unlawful restraints on trade and commerce and monopolies; the statute provides recovery for business injuries resulting from a defendant's anti-competitive conduct. 15 U.S.C.A. § 15 (West 1973). Civil RICO provides a remedy for injuries suffered as a result of the infiltration of organized crime into legitimate businesses; the statute provides recovery for injuries resulting from a defendant's pattern of racketeering activity. Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982), aff'd in part and rev'd in part, 710 F.2d 1361 (8th Cir. 1983) (en banc). See In re Action Indus. Tender Offer, 572 F. Supp. 846, 852 (E.D. Va. 1983) ("RICO is not a part of the antitrust laws" and "[d]ifferent policies underlie the two areas." Rejecting an antitrust-type requirement of commercial or "competitive injury" in a RICO context, the court found that while "RICO borrowed the tools of antitrust law to combat organized criminal activity," it was not "limited to the antitrust goal of preventing interference with free trade" and that "Congress did not see the objectives of RICO and the antitrust laws as coterminous."). Senator McClellan, after noting that RICO drew heavily from antitrust remedies, stated that there was "no intention . . . of importing the great complexity of antitrust law enforcement into this field." 115 Cong. Rec. 9567 (1969). See also, Note, The Conflict Over RICO's Private Treble Damages Action, 70 Cornell L. Rev. 902, 923 (1985) ("[S]trict standing limitations on private antitrust actions are appropriate to prevent a plethora of private suits from driving an antitrust defendant out of business," but one of RICO's purposes is to "put an organized criminal out of business"; therefore, engrafting antitrust type standing requirements onto RICO could "reduce its effectiveness . . . by increasing the possibility that offenders will

brister case had been decided under the discovery rule, the limitations period would not have commenced until actual or constructive knowledge of the fraud.[75] That court instead applied the adverse impact approach borrowed from Clayton Act jurisprudence, which served to commence the period of limitations at the point of final injury.[76] In this instance, the *Armbrister* approach is more stringent than the discovery standard would be. The plaintiff is not merely limited to recovery for injuries within four years of the act discovered; rather, the statute of limitations for all successive injuries runs from the point fixed by contract. Fraudulent concealment might, however, temper some of the harshness of the Clayton Act standard and give it the same effects as the discovery standard. Fraud is inherent in most civil RICO actions; a bona fide racketeering injury surely involves some form of active concealment.[77] Thus, a direct application of Clayton Act accrual rules would have the same effect as the discovery standard, which also, in effect, runs from the injury but uniformly applies a built-in rule of fraudulent concealment.

For purposes of an antitrust suit, the last overt act and the moment of impact are identical; the injury creates the cause of action. Under civil RICO, however, the mere signing of a contract, absent other predicate acts, may cause an injury, but will not alone create the pattern needed to sustain a cause of action.[78] Therefore, as under the discovery standard, this approach may start the limitations period running before the plaintiff can bring suit.

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economically survive . . . ."); Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101, 1112 (1982) (while Congress did not desire to drive Clayton Act defendants out of the marketplace, it "purposely designed RICO to threaten violators with economic ruin").

Pre-*Sedima* analogies to the Clayton Act created a plethora of judicial limitations to the availability of the civil RICO cause of action. See Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983) (analogizing to the Clayton Act for a "competitive injury" requirement for civil RICO suits); Sedima S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), rev'd, 473 U.S. 479, 105 S. Ct. 3275 (1985) analogizing to the Clayton Act to justify a "racketeering enterprise injury" requirement for civil RICO suits). It is interesting that the Supreme Court in *Sedima* overruled the lower court's analogy to the Clayton Act for the purposes of drawing standing requirements from a body of precedent appropriate only in an antitrust context. The Supreme Court thus recognizes that a broad analogy to the Clayton Act is problematic.

75. 667 F. Supp. 802 (M.D. Fla. 1987).

76. Id.

77. The ABA task force report p. 55-56 (March, 1985) noted that of 270 known civil RICO cases at the trial court level, forty percent involved securities fraud, thirty-seven percent involved common-law fraud in a commercial or business setting and only nine percent involved criminal conduct of the sort normally associated with professional criminals.

78. The heart of any RICO complaint is the allegation of a pattern of racketeering. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 3285 (1985). The mere signing of a contract creates no pattern.

As has been suggested, the use of accrual rules to bar actions in lieu of using the pattern requirement is impermissible. Under the least restrictive definition of pattern, the plaintiffs in *Armbrister* most likely had a cause of action. The case involved a single scheme under which multiple victims were injured through an extended course of conduct. Under a fact-specific analysis, the defendants' behavior probably constituted a pattern of racketeering activity in the federal circuit in which the district court sat. The court, however, circumvented the pattern issue by applying Clayton Act accrual rules and denied the plaintiffs their remedy.[79]

The basic conceptual problem with application of Clayton Act jurisprudence to civil RICO rests in the fact that the conduct prescribed by each statute differs markedly. Under the Clayton Act, it is the anticompetitive act injuring the plaintiff that gives rise to a cause of action.[80] The majority of courts hold that anticompetitive conduct based upon a contract occurs when the parties enter into that contract.[81] Further collections or benefits to a defendant cannot be anticompetitive if the rights and liabilities of the parties have been fixed; the essence of anticompetitiveness lies in the finality of the agreement.[82] RICO, by contrast, forbids a pattern of racketeering activity, and each predicate act of a RICO defendant is racketeering activity. Therefore, if each collection on a contract constitutes an underlying criminal violation that would qualify the overt act as a predicate act, then the plaintiff has a cause of action based upon those collections.[83]

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79. In *Armbrister*, the defendants had continued to benefit from the allegedly illegal contracts, and to injure several different victims. Thus, a plaintiff who made a RICO allegation in this case could prove related and continuous acts. The court expressed its lack of sympathy for the plaintiffs, however, and denied their cause of action, not on pattern grounds, but through the use of a foreign accrual rule. Possibly, this is because the defendants had not attacked the "pattern" in their pleadings. The court apparently subscribed to the view that almost any contractual situation, involving communication by mail or telephone, is fair game for a RICO allegation. See, e.g., Eastern Corporate Fed. Credit Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1532, 1535 (D. Mass. 1986) (it is "the rare transaction that does not somehow rely on extensive use of the mails or the telephone"); Frankart Distribs., Inc. v. RMR Advertising, Inc., 632 F. Supp. 1198, 1201 (S.D.N.Y. 1986) (most business transactions involve mails). This view ignores the fact that since *Sedima*, most courts have placed stringent restrictions on the RICO cause of action that do not permit a single isolated episode, involving mail or wire communication, to satisfy the "pattern" requirement. Even courts that have settled upon a case by case approach can bar actions such as that in *Armbrister*.

80. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093, 100 S. Ct. 1061 (1980).

81. See supra note 43.

82. See Comment, supra note 44, at 1080.

83. See, e.g., Vietnam Veterans, Inc. v. Guerdon Indus., Inc., 644 F. Supp. 951 (D.

Rather than analogizing to antitrust final impact cases, the courts, if they must draw upon antitrust jurisprudence, should analogize to cases involving continuing violations, such as monopolization. *Berkey Photo v. Eastman Kodak Co.*[84] is a Clayton Act case substantially more analogous to civil RICO than the injury-on-the-contract cases and provides a better result. Dealing with a monopoly that had been created outside the limitations period, the court found that, while anticompetitive conduct must exist before a cause of action can accrue, it is not necessary that the act itself be perpetrated within the statutory period if the extent of damages is speculative. "The taint of an impure origin does not dissipate after four years if a monopolist continues to extract excessive prices because of it."[85] The court found no unfairness in preventing a monopoly from exercising power and in depriving it of the fruits of its unlawful conduct despite the fact that it originated outside the statutory period. This reasoning is similarly applicable to a RICO cause of action based upon a contract that is entered into outside the limitations period. It cannot be said that, merely because a RICO defendant enters into such a contract, continued enforcement of that contract is not "racketeering activity." Just as damages are speculative at the time a monopoly originates, so too are damages speculative for a RICO plaintiff, until a pattern is established. In any context, it can hardly be said that a party who continues to benefit from an illegal contract is entitled to the benefits of repose.

The implication of *Armbrister*[86] is that the statute of limitations may run before a cause of action is available. This is the selfsame problem that *Bankers Trust*[87] suggested would arise if a last predicate act test were not applied in RICO cases where more than a single injurious act had occurred. The Clayton Act injury-on-the-contract rule is simply too harsh in the RICO context and therefore should not be applied.

CONCLUSION

In the light of *Agency Holding*, two questions remain open: whether the two preexisting standards of accrual, discovery and last predicate act, remain viable and whether the Clayton Act rules of accrual must

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Del. 1986) (Purchasers of mobile homes alleged that manufacturers and dealers had falsely inflated wholesale prices so that purchasers were forced to pay excessive finance charges under V.A. guaranteed loans. Allegations that defendants had transmitted fraudulent invoices through the U.S. mails were sufficient to plead an extended course of conduct constituting a pattern).

84. 603 F.2d 263.

85. Id.

86. 667 F. Supp. 802 (M.D. Fla. 1987).

87. 648 F. Supp. 17, 35 (S.D.N.Y. 1986).

be applied to civil RICO actions. The last predicate act approach seems most appropriate given the unique character of civil RICO. The enactment of RICO is an explicit recognition that illegal conduct of a continuing and organized nature presents a special threat and is more akin to conspiracy than to its typical predicate acts. The essence of the statute would be best reflected by a last overt act approach. The cause of action is indivisible, providing full recovery for injuries sustained from all overt acts committed in pursuance of the conspiracy, and therefore the limitations period should begin to run from the last illegal act.

The last injury discovery approach is a compromise between the discovery approach and the last predicate act approach and is the second best approach. It provides full recovery for multiple injuries while barring garden-variety claims four years from injury.

The question remains whether the *Agency Holding* analogy will spawn further adoptions of Clayton Act accrual rules. If so, the statute of limitations commences when the plaintiff is first injured, and when he feels the "adverse impact" of the racketeering enterprise. An application of Clayton Act rules to civil RICO would produce the same effect as would an application of the discovery rule; each injury would be treated as if it were the basis for a separate cause of action. If a plaintiff is injured only once through a pattern of predicate acts, then he feels the adverse impact at the date of injury and his cause of action accrues at that point. If he is injured, for example, by a predicate act in 1980 and again by another act in 1989, then he may use the earlier act to meet the pattern requirement in order to recover, but only for his second injury.

As applied in *5 Penn*, the revival exception for speculative damages may in some instances be workable within the civil RICO framework. This exception would allow for even more permissive recovery for damages than would the discovery standard. In multiple-injury cases, an initial injury might cause damages that are not provable with the requisite certainty until the occurrence of a second or third act. In such cases, a plaintiff could sue on a later date to recover for all of his injuries when they become "ascertainable." This exception would allow the Clayton Act standard to operate in effect much like the last injury discovery standard. Thus, if a plaintiff is injured through acts undertaken pursuant to a continuing conspiracy, then again in 1985 by another injurious predicate act, he might sue for both injuries in 1989 claiming that, because the conspiracy was ongoing, the extent of his injuries were not ascertainable until 1985. This takes into account the special nature of injury by a pattern of racketeering activity and thus "revives" the action for all earlier injuries. The 1985 predicate act must be injurious, however, in order for the plaintiff to argue that his full injuries were unascertainable in 1984.

The antitrust injury-on-the-contract rule, embodied in cases such as *Armbrister*, where continuing payments to the plaintiff are not equal to the continuing injuries to the plaintiff, should not be adopted. *Berkey Photo* provides a better analogy and produces a result identical to that of the discovery rule. If payments are treated as not being absolutely fixed by contract, courts could take an ongoing violation approach and treat each payment as a new injury. This would cause each injury to have its own limitation period as was suggested in *State Farm*.

The last predicate act standard is the most consistent approach to civil RICO accrual. It applies in all circumstances and is based upon the simple principle that a RICO claim arises from the indivisible injurious "pattern" and not from the injurious acts in isolation. If this approach is now precluded by the *Agency Holding* analogy, then, in the alternative, courts should effect a full-scale adoption of Clayton Act accrual rules that includes speculative damages and fraudulent concealment. If these rules and exceptions are applied uniformly, then the federal courts will have a relatively consistent accrual standard to govern each RICO claim.

Edwin Scott Hackenberg