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RICO-Claim Accrual for Statute of Limitations Purposes in Civil RICO Causes of Action: The Third Circuit Strikes Out When Redefinig Its Accrual Rule in Annulli v. Panikkar

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RICO-CLAIM ACCRUAL FOR STATUTE OF LIMITATIONS PURPOSES IN CIVIL RICO CAUSES OF ACTION: THE THIRD CIRCUIT STRIKES OUT WHEN REDEFINING ITS ACCRUAL RULE IN *ANNULLI v. PANIKKAR*

I. INTRODUCTION

Enacted on October 15, 1970 to halt the infiltration of organized crime into the American economy, the Racketeer Influenced and Corrupt Organizations Act ("RICO") is being used in new and ingenious ways to combat much more than organized crime.[1] RICO provides criminal penalties and civil remedies for violations of its provisions and is applicable to a wide range of scenarios beyond those traditionally associated with organized crime.[2] Given this range of uses, RICO has become a formidable

1. *See* Bob Van Voris, *DOJ Tobacco Suit a Long Shot: Government Using RICO and Other Laws in Untried Ways*, 22 NAT'L L.J., Oct. 11, 1999, at A1 (explaining history of RICO and discussing drafting by Notre Dame University Law School Professor G. Robert Blakey). RICO was enacted in response to hearings performed by Arkansas Senator John L. McClellan, which demonstrated that federal law was ineffective at combating organized crime. *See id.*

RICO formed Title IX of the Organized Crime Control Act of 1970. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.); *see also* Sedima v. Imrex Co., 473 U.S. 479, 486-87 (1985) (discussing legislative history of RICO); SKADDEN, ARPS, SLATE, MEAGHER & FLOM, GUIDE TO RICO: A PRACTICAL GUIDE FOR THE CORPORATE COUNSELOR 3 (John C. Fricano ed., 1986) (discussing origins and purposes of RICO); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1101 (1982) (discussing legislative intent and purpose of RICO). Since its enactment, RICO has been used to combat much more than organized crime. *See* Van Voris, *supra*, at A1 (discussing use of RICO in traditional way to clean up Mafia and mob-controlled businesses and in unique ways, including lawsuit against tobacco industry, commercial cases, landlord-tenant disputes, divorces and case against anti-abortion protesters); *see also* Frederick B. Lacey, *Civil Practice and Litigation Techniques in Federal and State Courts: Civil RICO Update*, SE28 A.L.I.-A.B.A. 547, 561-67 (1999) (discussing well-publicized civil RICO cases including tobacco litigation, protests and animal rights activism).

2. *See* 18 U.S.C. §§ 1961-68 (1994) (illustrating broad definition of racketeering activity); *see also* Gregory P. Joseph, *Federal Practice Civil RICO Conspiracy*, 21 NAT'L L.J., June 28, 1999, at B16 (providing explanation of differences between criminal and civil RICO, including key difference that there is injury requirement imposed on civil plaintiffs by § 1964(c)). In addition to enhanced criminal penalties, RICO provides a private civil cause of action for damages arising from a broad range of "racketeering activities." *See* 18 U.S.C. § 1964(c) (1994) (providing that any person injured in business or property may sue to recover treble damages, costs and attorneys' fees).

RICO explicitly prohibits four types of conduct. *See* 18 U.S.C. § 1962 (1994) (listing prohibited activities under RICO). First, section 1962(a) prohibits the use of income derived from a "pattern of racketeering activity" to acquire a financial interest in an enterprise. 18 U.S.C. § 1962(a). This subdivision prohibits taking money earned elsewhere, by virtue of the illegal activities specified in § 1961, and

making an otherwise lawful investment of that money in an enterprise. *See id.* (discussing prohibited conduct concerning investment in business). Other individuals or entities assisting the individual making such an investment can also be prosecuted and held accountable. *See* United States v. Loften, 518 F. Supp. 839, 857 (S.D.N.Y. 1981) (indicting lawyer for RICO conspiracy when he knew illegal source of money invested). Second, § 1962(b) prohibits the acquisition or maintenance of an interest in an enterprise through a "pattern of racketeering activity." 18 U.S.C. § 1962(b). Although subsection (a) prohibits the otherwise legal acquisition of an interest because of "dirty money," subsection (b) prohibits the utilization of unlawful activities to actually acquire an interest in or control of a legitimate enterprise. *Compare* 18 U.S.C.§ 1962(a) (prohibiting acquisition of businesses with money earned from racketeering activity), *with* 18 U.S.C § 1962(b) (prohibiting use of racketeering activity to acquire interest in enterprise). Courts take an expansive view of what constitutes interest in or control of an enterprise. *See* United States v. Jacobson, 691 F.2d 110, 112 (2d Cir. 1982) (noting that "all permissible factual inferences must be resolved in the government's favor"). Third, § 1962(c) prohibits conducting the affairs of an enterprise through a "pattern of racketeering activity." 18 U.S.C. § 1962(c) (1994). This subsection prohibits utilizing an enterprise to cause harm to another person or entity through certain specified illegal acts. *See id.* (discussing unlawful activities of persons employed in or associated with racketeering activities). Finally, § 1962(d) prohibits conspiracy to commit any of the substantive provisions set forth above. *See* 18 U.S.C. § 1962(d). This subsection, in conjunction with subsection 1964(c), grants a private right of action for civil remedies; § 1964(c) provides that:

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

18 U.S.C. § 1964(c). Nearly all civil RICO complaints allege the third prohibition as their predicate act. *See* A.B.A. SEC. CORP. BANKING AND BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 57 (1985) [hereinafter TASK FORCE REPORT] (finding that 97% of civil RICO actions are brought under 18 U.S.C. § 1962(c)). The elements of such a claim consist of: (1) an injury; (2) resulting from the conduct of an enterprise; (3) through a pattern; (4) of racketeering activity. *See* 18 U.S.C. § 1962(c).

A solid understanding of several key terms is essential to understand RICO. "Person" is defined in § 1961(3) as "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1994). "Enterprise" is defined in § 1961(4) as including "any individual, partnership, corporation, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). "[R]acketeering activity," as defined in § 1961(1), lists numerous specific criminal offenses. *See* 18 U.S.C. § 1961(1). There are four categories of "predicate acts" set forth under RICO: crimes of violence (murder, kidnapping, arson, robbery, extortion and obstruction of justice); crimes involving illicit goods and services (gambling, pornography, narcotics, counterfeiting, theft and trafficking in restricted foods); crimes involving breach of fiduciary obligations in a labor context (restrictions on payments and loans to labor organizations); and crimes of commercial fraud (embezzlement, securities fraud, mail fraud and wire fraud). *See* 18 U.S.C. § 1961(1). A "pattern of racketeering activity," as defined in § 1961(5), requires at least two acts of racketeering activity within 10 years of each other. *See* 18 U.S.C. § 1961(5).

It is the interaction between the injury requirement and the pattern requirement, which requires two acts of racketeering activity (one within 10 years of the commission of the prior act) that makes accrual under RICO so problematic. *See Sedima*, 473 U.S. at 484 (discussing district court's struggle with requirement that injuries result from predicate acts of racketeering activity).

weapon for plaintiffs in civil litigation.[3] Consequently, America is witnessing the "RICO explosion."[4]

RICO provides in detail what actions constitute RICO violations and what penalties may be imposed upon violation.[5] Nonetheless, it is silent as

3. *See* Ethan M. Posner, *Common Purpose Test Under RICO Can Be Effective Dismissal Tool*, N.Y.L.J., May 24, 1999, at S7 (referring to RICO's penalties as "draconian"). In addition to the federal RICO statute, many American jurisdictions have enacted "little RICO" or RICO-like statutes that closely track the federal RICO statute. Twenty-nine of these statutes are directed at activities similar to that which is targeted by the federal RICO statute. *See* ARIZ. REV. STAT. ANN. §§ 13-2312 to -2315 (West 1989 & Supp. 1997); COLO. REV. STAT. §§ 18-17-101 to -109 (1997); CONN. GEN. STAT. ANN. §§ 53.393-.403 (West 1994 & Supp. 1998); DEL. CODE ANN. tit. 11, §§ 1501-1511 (1995 & Supp. 1996); FLA. STAT. ANN. §§ 895.01-.09 (West 1994 & Supp. 1998); GA. CODE ANN. §§ 16-14-1 to -15 (1996 & Supp. 1998); HAW. REV. STAT. §§ 842-1 to -12 (1994 & Supp. 1997); IDAHO CODE §§ 18-7801 to -7805 (1997 & Supp. 1998); IND. CODE §§ 35-45-6-1 to -2 (1993); MICH. COMP. LAWS §§ 750.159f-.459x (Supp. 1998); MINN. STAT. §§ 609.901-.912 (1996); MISS. CODE ANN. §§ 97-43-1 to -11 (1994 & Supp. 1998); NEV. REV. STAT. ANN. §§ 207.350-.520 (Michie 1997 & Supp. 1997); N.J. STAT. ANN. §§ 2C:41-1 to -6.2 (West 1995 & Supp. 1998); N.M. STAT. ANN. §§ 30-42-1 to -6 (Michie 1997); N.Y. PENAL §§ 460.00-.80 (McKinney 1989 & Supp. 1998); N.C. GEN. STAT. §§ 75D-1 to -14 (1997); N.D. CENT. CODE §§ 12.1-06.1-01 to 12.1-06.1-08 (1997); OHIO REV. CODE ANN. §§ 2923.31-.36 (Anderson 1997 & Supp. 1998); OKLA. STAT. ANN. tit. 22, §§ 1401-1419 (West Supp. 1998); OR. REV. STAT. §§ 166.715 to -.735 (1997); 18 PA. CONS. STAT. ANN. §§ 911-911s (West 1998); P.R. LAWS ANN. tit. 25, § 971 (1980 & Supp. 1992); R.I. GEN. LAWS §§ 7-15-1 to -11 (1992 & Supp. 1997); TENN. CODE ANN. §§ 39-12-201 to -210 (1997); UTAH CODE ANN. §§ 76-10-1601 to -1609 (1995 & Supp. 1998); V.I. CODE ANN. tit. 14, §§ 600-614 (1993 & Supp. 1998); WASH. REV. CODE §§ 9A.82.001-.904 (1996); WIS. STAT. ANN. §§ 946.80-.88 (West 1996 & Supp. 1998).

Some states have RICO statutes that are narrower than the federal statute. *See generally* JOHN E. FLOYD, RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES (1998) (discussing state RICO statutes). For example, Illinois has enacted a racketeering statute that applies solely to "narcotics racketeering" involving a "pattern of narcotics activity." *See* 725 ILL. COMP. STAT. §§ 175/1 to 175/9 (West 1992 & Supp. 1998). Similarly, Louisiana's racketeering statute applies only to "drug racketeering activity." *See* LA. REV. STAT. ANN. §§ 15:1351-:1356 (West 1992 & Supp. 1998). A detailed discussion of these state RICO statutes is beyond the scope of this Casebrief.

4. *See* Robert E. Wood, *Civil RICO–Limitations in Limbo*, 21 WILLAMETTE L. REV. 683, 684 & n.6 (1985) (noting only two civil RICO cases appearing before 1979). The dramatic increase in the use of the civil RICO statute is illustrated by the fact that in 1988 alone, 1000 complaints were filed in federal court. *See* William H. Rehnquist, *Get RICO Cases Out of My Courtroom*, WALL ST. J., May 19, 1989, at A14 (discussing large number of RICO cases); *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, 1018-19, app. C, tbl. 1 (1990) (graphing number of RICO complaints filed during 48-month period and showing that filings average 80 per month); TASK FORCE REPORT, *supra* note 2, at 55-59 (discussing numerous uses of RICO and stating that although virtually unused for first decade, civil RICO has become valuable weapon in business civil suits). *But see* Harvey Berkman, *High Court to Hear RICO Cases*, 22 NAT'L L.J., Nov. 8, 1999, at B1 (reporting that after explosive growth in 1980s, civil RICO claims have decreased by more than 30% since 1990).

5. *See* 18 U.S.C. § 1962 (listing prohibited activities in great amount of detail); *see also* 18 U.S.C. §§ 1963-1964 (detailing criminal and civil penalties respectively for violations of provisions of § 1962). *See generally* Stephen D. Brown & Alan M.

to the statute of limitations applicable to civil RICO actions and the point at which the statute of limitations begins to accrue.[6] In 1987, the United States Supreme Court resolved the statute of limitations question when it ruled that civil RICO actions are governed by a four year limitations period.[7] The Court did not, however, address the accrual issue until February 2000.[8] Consequently, courts of appeals were forced, or allowed, to set the accrual rule that applied in their jurisdiction.[9] The United States Court of Appeals for the Third Circuit created a unique accrual rule, holding that the statute of limitations in a civil RICO action begins to run when the plaintiff knows or should have known of the last injury or last predicate act that is part of the pattern of racketeering activity.[10] No other circuit adopted the rule and, in 1997, the Supreme Court rejected the rule.[11] Consequently, the Third Circuit was forced to reconsider its position on when a cause of action begins to accrue.[12]

This Casebrief explains the Third Circuit's approach to the accrual of civil RICO claims in light of its decision in *Annulli v. Panikkar*,[13] in which

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Lieberman, *RICO Basics: A Primer*, 35 VILL. L. REV. 865 (1990) (discussing major features of, and requirements under RICO, including key definitions, elements of causes of action, jurisdiction, statute of limitations, pleading requirements, standard of proof, pattern requirement, attorney's fees and benefits and drawbacks of alleging RICO violation).

6. *See* 18 U.S.C. §§ 1961-1965 (providing no statute of limitations or explanation as to at what point cause of action begins to accrue).

7. *See* Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 156-57 (1987) (concluding that there was need for uniform statute of limitations for civil RICO and modeling limitations period after Clayton Act).

8. *See id.* 483 U.S. at 143 (declining to address accrual issue); *see also* Klehr v. A.O. Smith Corp., 521 U.S. 179, 191-92 (1997) (declining to resolve split among circuits regarding accrual rules). *See generally* Mary S. Humes, Note, *RICO and a Uniform Rule of Accrual*, 99 YALE L.J. 1399, 1399 (1990) (discussing how Supreme Court has heard several cases involving civil remedy provisions of RICO yet has not answered claim accrual question).

9. For a discussion of the various United States Courts of Appeals and the accrual rules they employ, see *infra* notes 45-68 and accompanying text.

10. *See* Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1130 (3d Cir. 1988) (adopting last predicate act rule), *overruled by* Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997). The last predicate act rule dictates that:

> the limitations period for a civil RICO claim runs from the date 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.

Id. at 1130.

11. *See Klehr*, 521 U.S. at 187 (holding that Third Circuit's last predicate act rule is inappropriate interpretation of RICO and, as such, is overruled).

12. *See* Annulli v. Panikkar, 200 F.3d 189, 195 (3d Cir. 1999) (clarifying that rule in Third Circuit is "injury and pattern discovery" rule). The Third Circuit revisited the issue of when causes of action begin to accrue under civil RICO and redefined the rule that governs the Circuit. *See id.* (same).

13. *See id.*

the court clarified that the injury and pattern discovery rule is the rule of accrual in the Third Circuit.[14] In addition, this Casebrief analyzes the effects of, and changes required by, the Supreme Court's February 2000 decision in *Rotella v. Wood*,[15] in which the Court held that the injury and pattern discovery rule is not an appropriate accrual rule for civil RICO actions.[16] Part II discusses the purpose of statutes of limitations and accrual points, highlights the Supreme Court's minimal clarification of these issues and elaborates on the rules of accrual adopted by other courts of appeals.[17] Part III chronicles the Third Circuit's approach to the accrual issue leading up to *Annulli* and discusses the Circuit's limitation of recovery under civil RICO.[18] Part IV discusses *Rotella*, the long-awaited Supreme Court decision regarding the appropriate rule of accrual for civil RICO causes of action.[19] Part V highlights the significance of *Annulli* and the effect and practical consequences of *Rotella*.[20]

II. BACKGROUND

A. *Statutes of Limitations and Accrual Under RICO*

A statute of limitations is an act limiting the time within which legal action may be brought on a claim.[21] These statutes are considered fundamental to a well-ordered judicial system.[22] The purpose of statutes of limitations is to suppress fraudulent and stale claims from being brought long

14. For further discussion of the *Annulli* decision, see *infra* notes 82-102 and accompanying text.

15. 120 S. Ct. 1075 (2000).

16. *See id.* at 1080 (rejecting injury and pattern discovery rule as RICO accrual rule). Although the Supreme Court did not settle the issue of what is the proper rule of accrual in civil RICO actions, it did eliminate the injury and pattern discovery rule as an option. *See id.*

17. For further discussion of these issues, see *infra* notes 21-68 and accompanying text.

18. For further discussion of the Third Circuit's approach to civil RICO claim accrual, see *infra* notes 69-102 and accompanying text.

19. For further discussion of the Supreme Court's decision in *Rotella*, see *infra* 103-07 and accompanying text.

20. For further discussion of the issues remaining after the *Annulli* and *Rotella* decisions, see *infra* notes 108-21 and accompanying text.

21. *See* Industrial Comm'n v. Weaver, 254 P. 444, 445 (Colo. 1927) (defining statute of limitations as pertaining to remedies). Statutes of limitations are also defined as:

> statutes of the federal government and various states setting maximum time periods during which certain actions can be brought or rights enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed.

BLACK'S LAW DICTIONARY 927 (6th ed. 1990).

22. *See* Board of Regents v. Tomanio, 446 U.S. 478, 487-88 (1980) (discussing importance of statutes of limitations); *see also* Hart v. Deshong, 8 A.2d 85, 86 (Del. Super. Ct. 1939) (explaining that at common law there was no fixed time for bringing of actions).

after the event and, thus, surprising defendants when all evidence is lost or has become obscure from lapse of time, defective memory, death or removal of witnesses.[23] Consequently, a statute of limitations exists for every cause of action, whether legal or equitable.[24]

A plaintiff's claim accrues "when the plaintiff is entitled to maintain an action based upon the events she complains of."[25] The point at which a claim accrues "differs from state-to-state and by nature of action."[26] Generally, the point at which a plaintiff's cause of action begins to accrue is the point at which the statute of limitations begins to run.[27] As such, the accrual period and the statute of limitations set the outer-limits of the time period in which a suit may be brought.[28] The rules of accrual complement statutes of limitations by triggering the statute of limitations period.[29] RICO does not contain a statute of limitations for civil actions nor does it provide a rule for when a cause of action begins to accrue.[30]

B. *Supreme Court Guidance Prior to* Rotella

1. *Statute of Limitations*

In *Agency Holding Corp. v. Malley-Duff & Associates*,[31] the United States Supreme Court ruled that the statute of limitations for civil RICO actions was four years.[32] The Court settled on a four year period because the Clayton Act-the act after which RICO was modeled-has the same limitations period.[33]

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23. *See* Crown, Cork & Seal, Co., v. Parker, 462 U.S. 345, 346 (1983) (discussing purpose of statute of limitations); United States v. Kubrick, 444 U.S. 111, 117 (1979) (same); American Pipe & Const. Co. v. Utah, 414 U.S. 538, 550-51 (1974) (same). *See generally* Paul B. O'Neill, Note, *'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, 190-91 (1990) (discussing policies underlying statutes of limitations).

24. *See* Glover v. National Bank of Commerce, 141 N.Y.S. 409, 412 (N.Y. App. Div. 1913) (explaining that there is limitations period for all legal and equitable causes of action).

25. *See* O'Neill, *supra* note 23, at 191 (defining accrual of cause of action).

26. BLACK'S LAW DICTIONARY 21 (6th ed. 1990) (defining "accrual").

27. *See* O'Neill, *supra* note 23, at 191-92 (discussing interplay between statute of limitations and claim accrual).

28. For further discussion of statutes of limitations and accrual, see *supra* notes 22-28 and *infra* notes 29-30 and accompanying text.

29. *See* O'Neill, *supra* note 23, at 192 (discussing policies behind accrual rules).

30. *See* 18 U.S.C. §§ 1961-1965 (1994) (providing no statute of limitations or directions for accrual).

31. 483 U.S. 143 (1987).

32. *See id.* at 156 (concluding that there is need for uniform statute of limitations for civil RICO and adopting four year limitation period).

33. *See id.* at 151 (noting that RICO legislative history clearly demonstrates "the reliance on the Clayton Act model"). The Clayton Act is:

> A Federal law enacted in 1914 as [an] amendment to the Sherman Antitrust Act dealing with antitrust regulations and unfair trade practices. 15 U.S.C.A. §§ 12-27. The Act prohibits price discrimination, tying and ex-

In *Agency Holding*, Malley-Duff & Associates ("Malley-Duff") was an agent of Crown Life Insurance Company ("Crown Life") and sold the company's insurance in the Pittsburgh area.[34] When Crown Life terminated Malley-Duff's agency, Malley-Duff instituted a civil RICO action alleging that Crown Life, together with several Crown Life employees, had formed an enterprise to fraudulently acquire various lucrative Crown Life agencies.[35] The United States District Court for the Western District of Pennsylvania and the Court of Appeals for the Third Circuit applied inconsistent statutes of limitations.[36] The Supreme Court held that, in this circumstance, it was more appropriate to borrow a limitations period from a federal statute, rather than a state statute, and looked to the Clayton Act for that information.[37] The Court held that because the Clayton Act was so similar to RICO in purpose and structure, it was appropriate to adopt its four year statute of limitations.[38] *Agency Holding* resolved the statute of

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> clusive dealing contracts, mergers, and interlocking directorates, where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

BLACK'S LAW DICTIONARY 250 (6th ed. 1990).

In many situations, where a federal statute is silent as to a specific provision, the court looks to the most suitable statute or rule from some other source for guidance. *See Agency Holding*, 483 U.S. at 146 (discussing propriety of looking to most closely analogous statute for determining appropriate statute of limitations). With RICO, the most closely analogous statute is the Clayton Act, which was the model for RICO's civil action provision and which is, like RICO, designed to provide a remedy for economic injury by providing treble damages. *See id.* at 150-51.

34. *See Agency Holding*, 483 U.S. at 145.

35. *See id.* at 145-46. Malley-Duff & Associates ("Malley-Duff") filed two lawsuits, one alleging violations of the federal antitrust laws and tortious interference with contract and a second suit alleging civil RICO violations. *See id.* The United States Supreme Court reviewed only the lawsuit alleging civil RICO violations, specifically the question of the appropriate statute of limitations. *See id.* at 146.

36. *See id.* at 146 (stating procedural history). The district court applied Pennsylvania's two year statute of limitations period for fraud, concluding that it was the best state law analogy for plaintiff's claims. *See id.* The Third Circuit reversed, applying Pennsylvania's "catchall" six year residual statute of limitations. *See id.*

37. *See id.* at 147-48 (discussing common practice of borrowing state law to fill in gaps in statutes where Congress was silent and rejecting this practice in cases where it is inappropriate).

38. *See id.* at 150-54 (noting that RICO civil provision was patterned after Clayton Act, that both provide for treble damages and that RICO legislative history clearly relies on Clayton Act as model). The Clayton Act provides:

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

15 U.S.C. § 15(a) (1994). RICO's civil enforcement provision provides:

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

18 U.S.C. § 1964(c) (1994).

limitations issue, but failed to provide any guidance as to when the limitations period begins to accrue.[39]

2. *Accrual of Causes of Action*

Since the Supreme Court's ruling in *Agency Holding* and prior to its decision in *Rotella*, the major question in civil RICO cases has been at what point the statute of limitations period begins to accrue.[40] Between 1985 and 1999, the Supreme Court heard and decided at least twelve cases dealing with the ambiguities and complexities of RICO, yet the Court had not answered the accrual question.[41] Consequently, the courts of appeals were forced to interpret RICO and adopt their own rules for when civil RICO causes of action accrue.[42]

C. *The Claim Accrual Rules Adopted by the Courts of Appeals*

Neither RICO nor the United States Supreme Court had answered the question of when claims begin to accrue in civil RICO cases.[43] The courts of appeals were forced to decide what accrual rule provides the most accurate interpretation of RICO and to adopt one of the various ac-

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39. *See Agency Holding*, 483 U.S. at 156 (mandating four year statute of limitations for civil RICO). The *Agency Holding* decision abrogated many decisions. *See, e.g.*, Tellis v. United States Fidelity & Guar. Co., 805 F.2d 741 (7th Cir. 1986) (mandating two year statute of limitations); Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984) (mandating three year statute of limitations); Burns v. Ersek, 591 F. Supp. 837 (D. Minn. 1984) (mandating three year statute of limitations); Teltronics Serv., Inc. v. Anaconda-Ericsson, Inc., 587 F. Supp. 724 (E.D.N.Y. 1984) (mandating one year statute of limitations).

40. For an illustration of how the courts of appeals are left to develop their own accrual rules and have thus created a battery of inconsistent accrual tests, see *infra* notes 45-68 and accompanying text.

41. *See* Salinas v. United States, 522 U.S. 52, 53 (1997) (ruling on when RICO conspiracy provision applies but not on accrual issue); Klehr v. A.O. Smith Corp., 521 U.S. 179, 191 (1997) ("We recognize that our holding . . . does not resolve other conflicts among the Circuits."). *See generally* Grimmett v. Brown, 519 U.S. 233 (1997) (failing to reach accrual issue); NOW v. Scheidler, 510 U.S. 249 (1994) (same); Alexander v. United States, 509 U.S. 544 (1993) (same); Reves v. Ernst & Young, 507 U.S. 170 (1993) (same); Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) (same); Tafflin v. Levitt, 493 U.S. 455 (1990) (same); H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) (same); Agency Holding Corp., 483 U.S. at 143 (same); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (same); Sedima v. Imrex Co., 473 U.S. 479 (1985) (same); American Nat'l Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606 (1985) (same).

42. *See* Detrick v. Panalpina, Inc., 108 F.3d 529, 537 (4th Cir. 1997) ("The Supreme Court's lack of guidance on the accrual issue has generated a split amongst the federal courts of appeals and district courts."). For further discussion of the accrual rules adopted by the courts of appeals, see *infra* notes 46-68 and accompanying text.

43. *See* 18 U.S.C. §§ 1961-1965 (providing no direction as to when claims begin to accrue).

crual rules as the rule in their jurisdiction.[44] Each court of appeals adopted one of the following rules: the injury discovery rule; the injury and pattern discovery rule; the last predicate act rule; or the injury occurrence rule.[45]

1. *The Injury Discovery Rule*

Also known as the discovery rule, the injury discovery rule is the general federal accrual rule and, as such, it governs causes of action where Congress has not designated a specific accrual method.[46] Under this rule, a claim accrues when the plaintiff knows or, in the exercise of reasonable diligence, should know of the injury that is the basis for the action.[47]

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44. *See Civil RICO Actions–Limitations Period–Accrual*, 12 FED. LITIGATOR 218, 219 (1997) (discussing when civil RICO cause of action accrues depends on rule in circuit where suit is commenced).

45. *See* Lacey, *supra* note 1, at 553-55 (discussing various accrual rules and which circuits adopt which rules). For a discussion of the various rules of accrual adopted by the circuit courts, see *supra* note 41 and *infra* notes 46-68 and accompanying text.

46. *See* Humes, *supra* note 8, at 1409-10 (stating that injury discovery rule is general federal accrual rule). Federal courts have applied the rule in a variety of cases. *See, e.g.*, United States v. Kubrick, 444 U.S. 111, 115 (1979) (applying rule in Federal Tort Claims Act case); Mullinax v. McElhenney, 817 F.2d 711, 717 (11th Cir. 1987) (stating that 42 U.S.C. § 1983 claim accrues when plaintiff knows or has reason to know of both injury and identity of perpetrator); Corwin v. Marney, Orton Invs., 788 F.2d 1063, 1066-68 (5th Cir. 1986) (deciding securities fraud actions arising under § 10(b) of Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982)); Tate v. Eli Lilly & Co., 522 F. Supp. 1048, 1049 (M.D. Tenn. 1981) (deciding personal injury case). *But cf.* Curran v. Time Ins. Co., 644 F. Supp. 967, 971-72 (D. Del. 1986) (stating that with exception of inherently unknowable injuries, cause of action accrues at first date action could be brought, and ignorance of injury does not delay running of statute (citing DEL CODE ANN. tit.10, §§ 8106, 8119 (1974 & Supp. 1984))).

47. *See* Isaak v. Trumbull Savs. & Loan Co., 169 F.3d 390, 399 (6th Cir. 1999) (explaining point where plaintiff knew or should have known of injury, stating, "the clock begins to tick when a plaintiff senses 'storm warnings,' not when he hears thunder and sees lightning" (quoting *Harner v. Prudential-Bache Sec., Inc.*, Nos. 92-1353, 92-1910, 1994 WL 494871, at *4 (6th Cir. Sept. 8, 1994))); La Porte Constr. Co. v. Bayshore Nat'l Bank, 805 F.2d 1254, 1256 (5th Cir. 1986) (using discovery rule); *see also* Lisa Pritchard Bailey et al., *Racketeer Influenced and Corrupt Organizations*, 36 AM. CRIM. L. REV. 1035, 1087-88 (1999) (discussing components of injury discovery rule); Ann K. Wooster, *Statute of Limitations in Civil Actions for Damages Under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1961-1968*, 156 A.L.R. FED. 361, 401-09 (1999) (providing annotation of cases in which courts have applied injury discovery 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, 1413-16 (1988) (discussing injury discovery rule); Humes, *supra* note 8, at 1409-10 (same); Marcus R. Mumford, Note, *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, 1281-83 (explaining and analyzing injury discovery rule); O'Neill, *supra* note 23, at 197-207 (providing detailed explanation of injury discovery rule including development and application of rule).

For several reasons, the United States Courts of Appeals for the First, Second, Fourth, Fifth, Seventh and Ninth Circuits follow the injury discovery rule.[48] Some courts apply the injury discovery rule because, as the general federal rule of accrual, it has the most authority and is, therefore, the easiest to adopt when Congress does not designate another rule.[49] Other courts invoke the rationale that the injury discovery rule works well when a RICO action is brought in conjunction with another federal cause of action that will likely require application of the injury discovery accrual rule.[50]

Although the injury discovery rule does have positive qualities, it has one serious shortcoming: this method may clash with the civil RICO "pattern" requirement.[51] The injury discovery rule states that a claim accrues after the first injury, but this is before the plaintiff has experienced the second injury that creates the pattern of activity.[52] As a result, the plaintiff

48. *See* Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332, 1338-39 (7th Cir. 1997) (applying injury discovery rule); Detrick v. Panalpina, Inc., 108 F.3d 529, 536-37 (4th Cir. 1997); Grimmett v. Brown, 75 F.3d 506, 511-12 (9th Cir. 1996); Long Island Lighting Co. v. Imo Indus., Inc., 6 F.3d 876, 887 (2d Cir. 1993); Bontkowski v. First Nat'l Bank, 998 F.2d 459, 461 (7th Cir. 1993); McCool v. Strata Oil Co., 972 F.2d 1452, 1464-65 (7th Cir. 1992); Granite Falls Bank v. Henrikson, 924 F.2d 150, 152-54 (8th Cir. 1991); Stitt v. Williams, 919 F.2d 516, 525 (9th Cir. 1990); Rodriguez v. Banco Cent., 917 F.2d 664, 665-68 (1st Cir. 1990); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102-05 (2d Cir. 1988); Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1489-91 (D.C. Cir. 1989) (assuming, without deciding, that injury discovery rule applies to civil RICO claims); Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 275 (9th Cir. 1988) (applying injury discovery rule); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987); State Farm Mut. Auto. Ins. Co. v. Ammann, 828 F.2d 4, 4-5 (9th Cir. 1987); Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1415 (9th Cir. 1987); La Porte Constr. Co., 805 F.2d at 1256; Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985) (same); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984); *see also* Lacey, *supra* note 1, at 553 (explaining rule and noting which circuits have adopted it).

49. *See Compton*, 732 F.2d at 1433 (applying normal federal rule of accrual); *see also Supreme Court Will Determine When RICO Cause of Action Accrues*, 9 ANDREWS PROF'L LIAB. LITIG. REP. 10, 10 (1999) (summarizing respondents' argument that injury discovery rule is sound because it is consistent with traditional federal accrual rule).

50. *Cf. Bowling*, 773 F.2d at 1178 (applying federal rule of accrual).

51. *See* Dana P. Babb, *Asked But Not Answered–Accrual of Private Civil RICO Claims Following* Klehr v. A.O. Smith Corp., 76 WASH. U. L.Q. 1149, 1157 (1998) (discussing how major problem with "injury discovery" rule is that it conflicts with RICO pattern requirement). A civil RICO claim might be barred even before it accrues. *See Granite Falls Bank*, 924 F.2d at 154 ("For example, 'if a plaintiff suffers a single injury as a result of a predicate act but the second predicate act which establishes the necessary "pattern" occurs five years after the injury to the plaintiff, that plaintiff's claim is barred.'").

52. *See Granite Falls Bank*, 924 F.2d at 154 (discussing shortcomings of injury discovery rule); *see also* Babb, *supra* note 51, at 1157 (discussing how, under injury discovery rule, plaintiff may suffer injury yet be denied relief if second injury occurs outside statute of limitations period); Lacey, *supra* note 1, at 554 (explaining that injury discovery rule can be harsh because it starts time running before victim knows they have claim).

is time barred from bringing a civil RICO claim if the second injury, which is required to create the "pattern," occurs more than four years after the first injury.[53]

2. *The Injury and Pattern Discovery Rule*

The United States Courts of Appeals for the Sixth, Eighth, Tenth and Eleventh Circuits have adopted a different accrual approach—the injury and pattern discovery rule.[54] Under this rule, a civil RICO cause of action accrues as soon as the plaintiff discovers or, in the exercise of reasonable diligence, should have discovered both the existence and source of an injury, and that the injury is part of a pattern of racketeering activity.[55]

The injury and pattern discovery rule attempts to account for the unique elements of civil RICO, specifically the requirement that the plaintiff identify and prove a pattern of racketeering activity.[56] Although the rule accounts for the pattern requirement, some criticize it for being more expansive than is appropriate.[57] Under the rule, a plaintiff's claim is timely if the plaintiff discovered an injury in year one, was unable to discover the pattern until year six and did not bring the claim until just before year ten.[58] The injury and pattern discovery rule gives the civil RICO plaintiff an additional four years to file after the plaintiff discovers

53. *See Granite Falls Bank*, 924 F.2d at 154 (explaining that injury discovery rule can bar plaintiff's claim before plaintiff knows of claim).

54. *See* Pilkington v. United Airlines, 112 F.3d 1532, 1534-36 (11th Cir. 1997) (applying injury and pattern discovery rule); Association of Commonwealth Claimants v. Moylan, 71 F.3d 1398, 1402-03 (8th Cir. 1995); Caproni v. Prudential Sec., Inc., 15 F.3d 614, 619-20 (6th Cir. 1994) (endorsing but not expressly adopting injury and pattern discovery rule); *Granite Falls Bank*, 924 F.2d at 154 (adopting injury and pattern discovery rule); Bath v. Bushkin, 913 F.2d 817, 820-21 (10th Cir. 1990); Bivens Gardens Office Bldg., Inc., v. Barnett Bank, 906 F.2d 1546, 1554-55 (11th Cir. 1990); *see also* Lacey, *supra* note 1, at 554 (explaining rule and which circuits have adopted it).

55. *See Bivens*, 906 F.2d at 1554 (noting that plaintiff injured by predicate act can discover racketeering pattern when he is injured by related predicate act or when he discovers that another person has been injured by related predicate act); *see also* Babb, *supra* note 51, at 1157-59 (discussing injury and pattern discovery rule); Bailey, *supra* note 47, at 1088-89 (discussing injury and pattern discovery rule); Wooster, *supra* note 47, at 413-17 (providing annotation of cases in which courts have applied injury and pattern discovery rule); Mumford, *supra* note 47, at 1279-81 (explaining and analyzing injury and pattern discovery rule). For further explanation of the injury and pattern discovery rule, see *supra* note 53 and *infra* notes 56-59 and accompanying text.

56. *See Supreme Court Will Determine When RICO Cause of Action Accrues*, *supra* note 49, at 10 (summarizing petitioner's argument that injury and pattern discovery rule substantiates importance of "pattern" requirement).

57. *See* Respondents' Brief on the Merits at *20-21, Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997), 1997 WL 126146 (No. 96-663) (discussing how injury and pattern discovery rule is more open-ended than appropriate under RICO).

58. *See* 18 U.S.C. § 1961(5) (1994) (stating that pattern of racketeering activity requires occurrence of two predicate acts within ten years of each other). Because under the injury and pattern discovery rule the cause of action does not accrue until the pattern is discovered, the main restriction in the hypothetical is

the injury, the injury's source and that the injury is part of a pattern of racketeering activity.[59]

3. *The Last Predicate Act Rule*

Prior to 1997, the Third Circuit adhered to the last predicate act rule.[60] This rule is based on the injury and pattern discovery rule because the limitations period begins to run when a plaintiff knows or should have known that the elements of a RICO claim exist.[61] The Third Circuit then added a unique exception: if, as a result of the same pattern of racketeering activity, the plaintiff suffers further injury or another predicate act occurs, then the cause of action accrues "from the time when the plaintiff knew or should have known of the last injury or the last predicate act."[62] The Third Circuit applied the last predicate act rule for nearly nine years until the United States Supreme Court rejected the rule, holding that it was an improper interpretation of RICO.[63]

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the ten year "pattern" restriction. *See id.* (establishing 10 year window for discovery of pattern).

59. *See* Respondents' Brief at *21, *Klehr* (No. 96-663) ("[T]he injury and pattern discovery rule requires plaintiffs to be diligent up until the time they learn all they need to learn to file suit, but then inexplicably removes the pressure entirely for an additional four years."); *see also Supreme Court Will Determine When RICO Cause of Action Accrues*, *supra* note 49, at 10 (summarizing respondent's argument that injury and pattern discovery rule allows plaintiffs to sit on their rights, thus extending statute of limitations period from four to fourteen years).

60. *See* Glessner v. Kenny, 952 F.2d 702, 706 (3d Cir. 1991) (discussing injury and pattern discovery element); Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1132-33 (3d Cir. 1988) (same). The last predicate act rule is generally used for criminal RICO actions to determine the time when the statute of limitations begins to run. *See* Bailey, *supra* note 47, at 1064-65 (discussing rule applicable in criminal RICO cases). For a discussion of the Third Circuit's utilization of this test and its response after the Supreme Court found the last predicate act rule unconstitutional, see *infra* notes 69-102 and accompanying text.

61. *See Keystone*, 863 F.2d at 1130-31 (stating rule).

62. *Id.* The last predicate act does not have to cause the injury; it must only be part of the same pattern of racketeering activity. *See id.* (clarifying scope of rule). This rule is sensible for determining RICO accrual because it "recognizes the competing characterizations of RICO as an action to recover for a continuing violation and as an action to recover for injury caused by fraud." *See* Humes, *supra* note 8, at 1418 (discussing merits of last predicate act rule). In addition, the last predicate act rule balances plaintiff's and defendant's rights because it limits recovery to those acts falling within the pattern of racketeering activity, a circumstance which cannot occur more than ten years prior to the last predicate act. *See id.* (stating why last predicate act rule is best solution to accrual question); *see also* Babb, *supra* note 51, at 1161-65 (discussing Third Circuit's application of last predicate act rule); Hackenberg, *supra* note 47, at 1416-17 (discussing last predicate act rule); Mumford, *supra* note 47, at 1283-85 (same); O'Neill, *supra* note 23, at 216-34 (distinguishing between last-act rule and last-injury discovery rule).

63. *See* Klehr v. A.O. Smith Corp., 521 U.S. 179, 187 (1997) (dismissing Third Circuit's last predicate act rule as improper interpretation of law); *see also Civil RICO Actions—Limitations Period—Accrual*, *supra* note 44, at 219 (discussing reasons why Supreme Court rejected last predicate act rule, including that rule results in longer limitations period than Congress intended and that rule is inconsistent with

4. *The Injury Occurrence Rule*

Also known as the anti-trust or Clayton Act rule, the injury occurrence rule had its birth in the Supreme Court's analogy between RICO and the Clayton Act in *Agency Holding*.[64] This rule, as created in the Clayton Act, provides that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business" or property, despite the plaintiff's failure to discover the existence of the cause of action.[65] Although not applied by any circuit, Justice Scalia, joined by Justice Thomas, advocated this rule.[66] Justice Scalia argued that because the Court had previously adopted the Clayton Act's statute of limitations, it would be foolish not to adopt the Clayton Act's accrual rule.[67] Because the Supreme Court had not decided which rule was the most appropriate in the civil RICO context, the courts of appeals applied the above rules as they saw fit.[68]

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ordinary Clayton Act rule). For a discussion of the Court's holding in *Klehr* and its repercussions, see *infra* notes 77-81 and accompanying text.

64. *See* Rotella v. Wood, 120 S. Ct. 1075, 1080 n.2 (2000) (noting that Court did not eliminate Justice Scalia's injury occurrence rule); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150-53 (1987) (highlighting that RICO was patterned after Clayton Act as obvious in civil action provisions, goals of remedying economic injury and structure of Acts).

65. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971) (stating that limitations period begins "when a defendant commits an act that injures a plaintiff's business"); Granite Falls Bank v. Henrikson, 924 F.2d 150, 153-54 (8th Cir. 1991) (discussing injury occurrence rule); *see also* Babb, *supra* note 51, at 1160-61 (discussing how, under injury occurrence rule, statute of limitations might begin to run despite victim's failure to discover injury). The injury occurrence rule has not been adopted by any circuit. *See Granite Falls Bank*, 924 F.2d at 153 (declining to adopt injury occurrence rule). Several federal district courts have applied this rule based on the rationale in *Agency Holding*. *See, e.g.*, Gilbert Family Partnership v. Nido Corp., 679 F. Supp. 679, 686 (E.D. Mich. 1988) (stating that "the rationale of the *Agency Holding* decision requires an application of the limitations accrual principles of the Clayton Act").

66. *See Klehr*, 521 U.S. at 198-99 (Scalia, J., concurring) (stating that he would resolve circuit split on accrual rule by adopting Clayton Act rule); *see also* Lacey, *supra* note 1, at 552-56 (discussing policy rationale and support for various accrual rules).

67. *See Klehr*, 521 U.S. at 198-201 (Scalia, J., concurring) (focusing on fact that RICO was patterned after Clayton Act and that both have similar purpose, structure and aims). *But see* National Asbestos Workers Med. Fund v. Philip Morris, Inc., 74 F. Supp. 2d 221, 229-37 (E.D.N.Y. 1999) (stating many reasons why Clayton Act is not good guide for interpreting RICO, including different purposes, different concerns, legislative history of RICO and past expansive interpretation of RICO).

68. *But see Klehr*, 521 U.S. at 187 (concluding that last predicate act rule is improper interpretation of RICO).

III. *ANNULLI V. PANIKKAR*: THE THIRD CIRCUIT REDEFINES ITS RULE OF CLAIM ACCRUAL AND CLARIFIES ITS ADOPTION OF THE INJURY AND PATTERN DISCOVERY RULE

A. *The Third Circuit's Approach to Claim Accrual Prior to* Annulli

Over the past fifteen years, the courts within the Third Circuit's jurisdiction have employed numerous rules for determining when civil RICO claims accrue.[69] The use of these rules has changed as the Third Circuit and the United States Supreme Court provided guidance regarding which rule is appropriate.[70]

1. *The Rule Prior to 1988*

Prior to 1988, Third Circuit courts looked to other circuits for guidance because the Third Circuit had not adopted an accrual rule.[71] As a result, Third Circuit courts floundered and applied several different rules.[72] In the majority of cases decided prior to 1988, these courts applied the injury discovery rule, reasoning that the rationale behind the rule seemed sound.[73]

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69. *See* Annulli v. Panikkar, 200 F.3d 189, 192 (3d Cir. 1999) (stating that injury and pattern discovery rule is law of Third Circuit); Davis v. Grusemeyer, 996 F.2d 617, 623 (3d Cir. 1993) (applying last predicate act rule); Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988) (creating and applying last predicate act rule); *see also* Cohen v. Daddona, 76 F. Supp. 2d 587, 593 (E.D. Pa. 1999) (applying injury and pattern discovery rule); Perlberger v. Perlberger, No. CIV.A.97-4105, 1999 WL 79503, at *3 (E.D. Pa. Feb. 12, 1999); Gunter v. Ridgewood Energy Corp., 32 F. Supp. 2d 166, 173 (D.N.J. 1998); Forbes v. Eagleson, 19 F. Supp. 2d 352, 357 (E.D. Pa. 1998) (applying injury and pattern discovery rule); Andrews v. Holloway, No. CIV.A.95-1047, 1995 WL 875883, at *14 (D.N.J. Nov. 9, 1995) (stating last predicate act rule); Kates v. Mazzocone, No. CIV.A.94-5653, 1995 WL 44531, at *3 (E.D. Pa. Feb. 2, 1995) (stating last predicate act rule); United Food & Commercial Workers Union v. Fincke, No. CIV.A.94-1947, 1994 WL 527505, at *4 (E.D. Pa. Sept. 23, 1994) (applying last predicate act rule); Morelli v. Morelli, No. CIV.A.93-5619, 1994 WL 327640, at *2 (E.D. Pa. July 7, 1994); Rolo v. City Investing Co. Liquidating Trust, 845 F. Supp. 182, 234 (D.N.J. 1993) (applying last predicate act and separate accrual rules); 5 Penn & Co. II, v. Shearson Lehman Bros., Inc., No. CIV.A.87-1357, 1987 WL 19591, at *3-5 (E.D. Pa. Nov. 3, 1987) (analyzing claim under injury discovery rule and Clayton Act rule but not choosing one because claim was time-barred under both); Waldo v. North Am. Van Lines, Inc., 669 F. Supp. 722, 737 (W.D. Pa. 1987) (applying injury discovery rule); Gonzalez v. Katz, No. CIV.A.86-7254, 1987 WL 15677, at *5-6 (E.D. Pa. Aug. 13, 1987) (applying injury discovery rule); Kirschner v. Cable/Tel Corp., 576 F. Supp. 234, 241 (E.D. Pa. 1983) (applying injury discovery rule).

70. For further discussion of the change in the Third Circuit's accrual rule, see *infra* notes 71-102 and accompanying text.

71. *See Gonzalez*, 1987 WL 15677, at *5 (noting that there is no precedent on RICO accrual rule in Third Circuit and looking to other courts of appeals).

72. For an illustration of cases in which district courts applied different accrual rules, see *supra* notes 42-69 and accompanying text.

73. *See, e.g., Gonzalez*, 1987 WL 15677, at *5 (looking to other courts for guidance and deciding that reasoning of those courts for applying injury discovery rule was sound).

2. *The* Keystone *Era*

During 1988, in *Keystone Insurance Co. v. Houghton,*[74] the United States Court of Appeals for the Third Circuit finally addressed and resolved the accrual issue by holding that, in civil RICO claims, the limitation period runs:

> from the date the plaintiff knew or should have known that the elements of a 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 which are part of the same pattern. In that 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.[75]

This rule, known as the last predicate act rule, governed the Third Circuit's appellate and district courts for nearly nine years.[76]

In 1997, the United States Supreme Court decided *Klehr v. A.O. Smith Corp.*[77] In that case, the Court addressed the civil RICO accrual issue and, although it did not determine which accrual rule is most appropriate, held that the Third Circuit's last predicate act rule was an improper interpretation of RICO.[78] The Court concluded that the last predicate act rule provided a limitations period exceeding that which Congress contemplated, allowed plaintiffs to "sleep on their rights" and discouraged diligent investigation of potential claims.[79] In addition, the Court looked to the Clayton Act, the act after which RICO was modeled, and determined that the last predicate act rule went too far by permitting plaintiffs to recover for separate acts committed outside of the limitations period—something that

74. 863 F.2d 1125 (3d Cir. 1988).

75. *Id.* at 1126 (announcing rule for accrual of civil RICO actions).

76. *See* Davis v. Grusemeyer, 996 F.2d 617, 626 (3d Cir. 1993) (applying last predicate act rule); *see also* Andrews v. Holloway, No. CIV.A.95-1047, 1995 WL 875883, at *14 (D.N.J. Nov. 9, 1995) (applying last predicate act rule); Kates v. Mazzocone, No. CIV.A.94-5653, 1995 WL 44531, at *3 (E.D. Pa. Feb. 2, 1995); United Food & Commercial Workers Union v. Fincke, No. CIV.A.94-1947, 1994 WL 527505, at *4 (E.D. Pa. Sept. 23, 1994); Morelli v. Morelli, No. CIV.A.93-5619, 1994 WL 327640, at *2 (E.D. Pa. July 7, 1994); Rolo v. City Investing Co. Liquidating Trust, 845 F. Supp. 182, 234 (D.N.J. 1993) (applying last predicate act and separate accrual rules).

77. 521 U.S. 179 (1997).

78. *See id.* at 187 (concluding that last predicate act rule is improper interpretation of RICO). *See generally* Thomas H. Harris, D. Klehr v. A.O. Smith Corporation: *The Supreme Court Attempts to Define the Statute of Limitations and the Application of the Fraudulent Concealment Doctrines in Civil RICO Actions,* 24 J. CONTEMP. L. 131 (1998) (explaining case and analyzing Court's decision in *Klehr*).

79. *See Klehr,* 521 U.S. at 187 (explaining reasoning behind Court's rejection of last predicate act rule).

the Clayton Act does not allow.[80] Following this ruling, the Third Circuit was forced to reinvent or redefine its civil RICO accrual rule, and it did so in *Annulli v. Panikkar*.[81]

B. *Facts and Procedural Background of* Annulli

In 1989, William Wright and Ananda Panikkar contracted with Dominick Annulli, a man with considerable experience in the Christmas tree business, to manage, maintain and sell trees on their Christmas tree farm.[82] Annulli successfully managed the farm for two years, holding profitable Christmas tree sales and expanding the business beyond the holiday season by developing a nursery tree business.[83] Nonetheless, Annulli became frustrated with the business relationship between himself and the Wrights and, on April 6, 1991, requested termination of the agreement; the Wrights initially rejected this request but four months later agreed to terminate the relationship.[84] This final agreement occurred after Annulli had invested significant time and money providing additional maintenance on the trees.[85] Two years later, in the spring of 1993, Panikkar terminated his agreement with Annulli, claiming that Annulli had neglected his trees and, therefore, was not meeting his contractual obligations.[86]

On June 24, 1996, Annulli filed suit against the Wrights, Panikkars and the Wrights' corporation, Evergreen Express, Inc. ("Evergreen"), alleging civil RICO violations.[87] Annulli alleged that the Wrights and Panik-

80. *See id.* at 189 (looking to Clayton Act to determine whether last predicate act rule is proper interpretation of RICO).

81. 200 F.3d 189 (3d Cir. 1999). For further discussion of the Third Circuit's decision, see *infra* notes 82-114 and accompanying text.

82. *See id.* at 192-93 (stating facts of case). The Wright family had formed a corporation, Evergreen Express, Inc., through which to sell trees. *See id.* at 192. The parties agreed that Annulli would maintain and sell trees for Evergreen and Panikkar and would retain any profits he made in the sale of those trees. *See id.* at 193.

83. *See id.* at 193 (discussing improvements in business including increased profits to Wrights and Panikkars).

84. *See id.* at 193 (explaining that Annulli became frustrated with interference by Wrights' son). When the Wrights rejected Annulli's offer to terminate the agreement, Annulli was told that he was expected to continue performing the contract for the next two years. *See id.* (noting Wrights' refusal to release Annulli from his obligations).

85. *See id.* (discussing Annulli's maintenance of Wrights' trees).

86. *See id.* After the termination of his contract with the Wrights, Annulli continued to work with the Panikkars. *See id.* Panikkar terminated that relationship after the Wrights began telling Panikkar that Annulli was not properly maintaining Panikkar's trees. *See id.*

87. *See id.* at 194 (discussing civil RICO claim). In November 1991, Annulli had filed suit against Evergreen in state court alleging breach of contract. *See id.* at 193 (discussing Annulli's suit in Pennsylvania state court). That suit was later purged from the docket for lack of prosecution. *See id.* (noting purging of Annulli's state court suit). In November of 1994, Annulli filed suit against Panikkar in state court alleging breach of contract and, on July 15, 1996, amended that

kars had engaged in a conspiracy to steal his assistance and expertise—a conspiracy that occurred between 1983 and 1993 and which he first discovered in 1996.[88]

The United States District Court for the Middle District of Pennsylvania granted the defendants' motion for summary judgment, holding that the statute of limitations had run on the RICO claims.[89] The district court determined that Annulli's civil RICO action accrued in 1991, when the Wrights terminated their contract, because that was when Annulli "knew or should have known the Defendants had engaged in acts forming the predicate acts of racketeering, on which a civil RICO claim could be based."[90]

C. *The Third Circuit's Decision*

Chief Judge Becker, writing for the Third Circuit, acknowledged the need for clarification of the accrual rule governing civil RICO causes of action.[91] In *Annulli*, the court treated the *Keystone* decision, not as creating a new rule (the last predicate act rule), but as adopting the injury and pattern discovery rule as well as a unique exception to that rule.[92] As such, the court stated that the injury and pattern discovery rule—the general rule in *Keystone*—was the law in the Third Circuit.[93] The court acknowledged the Supreme Court's decision in *Klehr* and stated that even though the "exception" created in *Keystone* had been rejected, the general rule of *Keystone* remained good law.[94]

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complaint to include the Wrights and Evergreen. *See id.* at 193-94 (noting basis of Annulli's second state suit). Annulli alleged breach of contract against the Panikkars, tortious interference with the Panikkar-Annulli contract against Evergreen and the Wrights, and also alleged that the Panikkars and Wrights had engaged in a conspiracy and defrauded him. *See id.*

88. *See id.* at 194 (discussing RICO claim). Annulli claimed that he had discovered the conspiracy during depositions of Panikkar, taken on June 4, 1996, in connection with the state court breach of contract lawsuit. *See id.* (noting Annulli's claims concerning when he discovered alleged conspiracy).

89. *See id.* (holding that "Annulli's civil RICO action against the Defendants accrued in 1991 when the Wrights terminated their contract with Annulli"). The statute of limitations had run on Annulli's cause of action because he waited until 1996 to sue. *See id.* (noting RICO's four year statute of limitations).

90. *See id.* (reporting reasoning of district court).

91. *See id.* at 192 (stating that clarification of accrual rule was necessary for resolution of case).

92. *See id.* (stating that injury and pattern discovery rule announced in *Keystone* is rule in Third Circuit). For further discussion of the *Keystone* decision, see *supra* notes 74-76 and accompanying text.

93. *See Annulli*, 200 F.3d at 192 (noting that general rule of *Keystone* was still binding).

94. *See id.* at 192, 195-96 (clarifying significance of Supreme Court's decision in *Klehr* and that *Keystone* injury and pattern discovery rule remains law of Third Circuit). For further discussion of the *Klehr* decision, see *supra* notes 77-80 and accompanying text.

The circuit court applied the injury and pattern discovery rule and concluded that two of Annulli's three claims were not barred by the statute of limitations.[95] In reaching this conclusion, the Third Circuit clarified the elements of the injury and pattern discovery rule.[96] To make a determination under this rule, a court must decide: (1) when the plaintiff was injured; (2) when the plaintiff knew or should have known about the injuries; and (3) when the plaintiff knew or should have known about the source and pattern of racketeering that caused the injuries.[97] The court determined that Annulli's first-claimed injury, harm from the Wright's termination of the contract in 1991, was time-barred by the four year statute of limitations because Annulli was injured, knew of the injury and knew of the pattern of racketeering activity (if any) during or before 1991.[98]

The court determined that Annulli's second two claims, injury from fraudulent representations that the defendants would be in the tree business for a long time and injury from the lost opportunity to sell the trees he planted, were timely as long as the claims were based on valid RICO predicate acts.[99] The court acknowledged that, given the Supreme Court's decision in *Klehr*, Annulli could not rely on new injuries to recover for older injuries that had occurred outside the statute of limitations period.[100] The court did, however, approve and apply a separate accrual rule, which allows plaintiffs to state claims "for *new* injuries arising out of *new* predicate acts that occur within the statutory period, even if those new predicate acts and resulting injuries arise out of the same pattern of racketeering behavior that began outside the four year statutory period."[101]

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95. *See Annulli*, 200 F.3d at 197 (holding that two of Annulli's claims were timely and stating that district court erred in granting summary judgment for defendant on those claims based on statute of limitations grounds).

96. *See id.* at 196 (stating what court must discern before determining whether plaintiff's claims are barred by statute of limitations).

97. *See id.* (stating elements of injury and pattern discovery rule). The court went on to discuss Annulli's conspiracy theory and the purported injuries arising out of that alleged conspiracy. *See id.* (reviewing Annulli's claim to determine whether it was time-barred).

98. *See id.* at 197 (affirming dismissal of Annulli's first claim on statute of limitations grounds).

99. *See id.* (discussing timeliness of claims under injury and pattern discovery rule). The court noted that the claims must be based on "valid predicate acts of racketeering." *Id.* (explaining that finding of timeliness for second and third claims was based on assumption that acts qualified as racketeering under RICO). These acts are provided in RICO. *See* 18 U.S.C. § 1961 (1994) (defining "racketeering activity" by listing numerous examples of acts constituting predicate acts).

100. *See Annulli*, 200 F.3d at 197 (noting that *Klehr* precludes reliance on injuries from more recent predicate acts to establish timeliness of claims based on predicate acts occurring outside limitations period).

101. *See id.* (applying and approving separate accrual rule). A separate accrual rule provides that a new claim accrues, and a new four year statute of limitations period begins to run, each time the plaintiff becomes aware of a new injury. *See* State Farm Mut. Auto Ins. Co. v. Ammann, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring) (stating that new cause of action accrues each time plaintiff discovers new injury in pattern); *see also* Wooster, *supra* note 47, at 396-401 (anno-

The court stated that the separate accrual rule was consistent with the injury and pattern discovery rule, and applying them both, held that two of Annulli's civil RICO claims were not time-barred.[102]

IV. *ROTELLA V. WOOD*: THE SUPREME COURT REJECTS THE INJURY AND PATTERN DISCOVERY RULE

Only months after the Third Circuit had clarified its position by adopting the injury and pattern discovery rule of accrual for civil RICO causes of action, a unanimous United States Supreme Court eliminated the injury and pattern discovery rule from the list of appropriate accrual rules.[103] Although the Justices did not settle on a final rule, they did hold that the injury and pattern discovery rule was unsound for several reasons.[104] First, and most important, the injury and pattern discovery rule extended the potential limitations period well beyond the time when it would be reasonable to make defendants defend against a claim.[105] In addition, because the injury and pattern discovery rule was generous in allowing claims, it clashed with the Clayton Act's limitations period, which was adopted by the Supreme Court for civil RICO claims.[106] For these reasons, the Supreme Court eliminated the injury and pattern discovery

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tating cases in which court applied separate accrual rule). Some commentators treat the separate accrual rule not as a distinct rule of accrual, but as a condition of certain other rules. *See* O'Neill, *supra* note 23, at 208 (discussing Clayton Act rule, which he calls "Antitrust Rule," and noting that it is "an act-based rule of separate accrual"). These commentators opine that the Clayton Act rule affords a new accrual date for each injury-causing act. *See id.* (discussing act-based separate accrual rule). Similarly, the injury discovery rule is a rule of separate accrual. *See id.* at 197 (discussing injury discovery rule). *But see id.* at 225 (noting that last-injury discovery rule and last-act rule are not rules of separate accrual because new cause of action accrues with defendant's commission of final predicate act and plaintiff's discovery of last injury respectively, rather than with each new injury).

102. *See Annulli*, 200 F.3d at 197-98 (finding error in district court's reasoning and explaining that Annulli has two potentially timely claims, as long as he can prove that his injuries are based on valid predicate acts of racketeering).

103. *See* Rotella v. Wood, 120 S. Ct. 1075, 1080 (2000) (eliminating injury and pattern discovery rule from list of candidates for appropriate civil RICO accrual rule).

104. *See id.* at 1080-83 (discussing shortcomings of injury and pattern discovery rule).

105. *See id.* at 1081 (discussing how injury and pattern discovery rule is "at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities").

106. *See id.* at 1082 (stating that injury and pattern discovery rule does not promote objectives of RICO because, like Clayton Act, RICO was designed to encourage prompt civil litigation, while injury and pattern discovery rule thwarts this purpose by allowing citizens to sleep on their rights, thus postponing realization of public benefit).

rule from the mix of possible discovery rules, thus leaving the Third, Sixth, Tenth and Eleventh Circuits without a civil RICO accrual rule.[107]

V. PRACTICAL CONSEQUENCES

A. *Significance of* Annulli

The Third Circuit's decision in *Annulli* effectively constricted the scope of civil RICO in the Third Circuit by limiting the breadth of situations in which plaintiffs could recover for their injuries.[108] Although the point of accrual in simple cases remained the same—the statute of limitations begins to accrue when the plaintiff knows or should know of the injury and the pattern of racketeering activity—*Annulli* significantly limited recovery based on late-occurring injuries.[109] Under *Keystone*'s last predicate act rule, a plaintiff could rely on new predicate acts occurring within the limitations period to recover for injuries caused by predicate acts that occurred outside the limitations period.[110] After *Annulli*, a plaintiff could not recover for those earlier injuries, but only for injuries arising from predicate acts that occurred within the limitations period.[111] This change limited the availability of recovery for injuries sustained as part of a pattern of racketeering activity.[112]

The following hypothetical demonstrates the significance of this rule change.[113] Suppose that a defendant were involved in a conspiracy to commit mail fraud from 1980 to 1999. Plaintiff was injured by one of de-

107. For a discussion of the courts that had enacted the injury and pattern discovery rule, see *supra* notes 54-59 and accompanying text.

108. For further discussion of how *Annulli* limits recovery under RICO, see *supra* notes 92-102 and accompanying text.

109. *See* Annulli v. Panikkar, 200 F.3d 189, 197 (3d Cir. 1999) (stating that unlike *Keystone*, plaintiffs "cannot rely on new injuries arising out of predicate acts of racketeering within the four years preceding [filing of lawsuit] to recover for any injuries caused by these 'earlier predicate acts that took place outside the limitations period'" (quoting *Klehr v. A.O. Smith Co.*, 521 U.S. 179, 190 (1997))).

110. *See* Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1130-31 (3d Cir. 1988) (stating that under last predicate act rule, "[i]f the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by other predicate acts which occurred outside an earlier limitations period but which are part of the same 'pattern'"); *see also Annulli*, 200 F.3d at 197 (clarifying that plaintiff cannot recover for injuries that occurred outside statute of limitations period).

111. *See Annulli*, 200 F.3d at 197 (allowing recovery only for injuries "arising out of new predicate acts that occur within the statutory period"). The court limited its rule by noting that "these new acts cannot be used 'as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the statutory [sic] period.'" *Id.* (quoting *Klehr*, 521 U.S. at 190 (1997)).

112. *See Klehr*, 521 U.S. at 187 (1997) (rejecting Third Circuit's last predicate act rule because its extension of limitations period, based on defendant's pattern of activity, was unwarranted given purposes of civil RICO).

113. For a discussion of how other commentators have created different hypotheticals to illustrate how a plaintiff's results will vary with the application of the various accrual rules, see O'Neill, *supra* note 23, at 196-97.

fendant's predicate acts in 1980. Plaintiff learned of the injury and that it was part of a pattern of racketeering activity in 1980. Another of defendant's predicate acts, one that was part of the same pattern, injured plaintiff in 1990. Plaintiff learned of her injuries resulting from this second predicate act and that the act was part of a pattern of racketeering activity in 1992.

Plaintiff brings a lawsuit against defendant in 1993, claiming that she incurred two injuries from defendant's pattern of racketeering activity. It is clear that the suit against the defendant for the first injury is time-barred because, under both the *Keystone* and *Annulli* rules, the claim began to accrue when plaintiff knew of both the injury and the pattern of activity—in 1980.[114] Under the *Keystone* rule, however, plaintiff could bring a claim against defendant for the second injury and could recover damages for both the first and second injuries, because they were part of the same pattern of racketeering activity.[115] Under *Annulli*, plaintiff could bring a cause of action against defendant, but could only recover damages for the second injury—not for the first.[116] This rule change clearly limits an injured party's ability to recover damages for injuries sustained as a result of racketeering activities.

In addition to making it more difficult for plaintiffs to recover damages, the *Annulli* decision was significant because it created a rule that, in order to state a claim under the injury and pattern discovery rule, plaintiffs must identify: (1) when they were injured; (2) when they knew or should have known about the injury; and (3) when they knew or should have known about the source and pattern of racketeering that caused the injury.[117] Under *Annulli*, counsel bringing civil RICO claims had to be prepared to prove each of these elements and that the second two elements occurred within four years of the filing of the lawsuit.[118]

B. *Significance of* Rotella *and Unanswered Questions*

By eliminating the injury and pattern discovery rule, the Supreme Court has forced the Third, Sixth, Tenth and Eleventh Circuits to revisit the accrual issue and to choose between the two remaining possibilities: 1)

114. For further discussion of how both the *Keystone* and *Annulli* rules are based on the injury and pattern discovery rule, see *supra* notes 92-93 and accompanying text.

115. *See Keystone*, 863 F.2d at 1130-31 ("If the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by other predicate acts which occurred outside an earlier limitations period but which are part of the same 'pattern.'").

116. *See Annulli*, 200 F.3d at 197 (clarifying that plaintiff cannot recover for injuries that occurred outside statute of limitations period).

117. *See id.* at 196 (clarifying what court must discern before determining whether claim is time-barred).

118. *See* PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL 186 (1987) ("As with any other trial on the merits of a claim, a plaintiff in a civil racketeering case must prove his contentions.").

the injury discovery rule and 2) the injury occurrence rule.[119] Although the Third Circuit thought it clarified which accrual rule would apply in its jurisdiction, the Supreme Court ended the reign of *Annulli.* When the Third Circuit revisits the issue, it must determine whether the injury discovery rule or the injury occurrence rule will govern the jurisdiction.

Although it is unclear which rule the Supreme Court will ultimately support, several points of guidance exist. First, the injury discovery rule is the majority rule throughout the circuits and is also the general federal rule of accrual.[120] In addition, although Justices Scalia and Thomas have expressed their support for the injury occurrence rule, no circuit courts have adopted that rule and it has been strongly criticized for being incongruous with the RICO "pattern" requirement.[121] The Third Circuit should consider these factors when determining which accrual rule it will adopt.

VI. CONCLUSION

As "one of the most efficient antifraud and anticorporate crime laws on the books," civil RICO is a statute with which all practicing attorneys must be familiar.[122] Not only must attorneys be familiar with the statute itself, they must pay careful attention to judicial decisions interpreting RICO.[123] Counsel practicing in the Third Circuit must be aware that although the circuit recently adopted the injury and pattern discovery rule, that rule has since been eliminated by the Supreme Court and the Third Circuit must now choose between the injury discovery and injury occurrence rules.

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119. For a discussion of the *Rotella* court's rejection of the injury and pattern discovery rule, see *supra* notes 103-06 and accompanying text. For further discussion of the injury discovery rule, see *supra* notes 46-53 and accompanying text. For further discussion of the Clayton Act rule, see *supra* notes 64-67 and accompanying text.

120. For further discussion of the injury discovery rule, see *supra* notes 46-53 and accompanying text.

121. *Compare* Klehr v. A.O. Smith Corp., 521 U.S. 179, 198 (1997) (Scalia, J., concurring) (advocating adoption of Clayton Act rule), *with Klehr,* 521 U.S. at 192-93 (providing reasons why application of Clayton Act rule may not be appropriate).

122. *See* Russel Mokhiber, *Dealing with Racketeers in Executive Suites: Triple Damages,* N.Y. TIMES, Sept. 14, 1985, at 23 (discussing importance of RICO in corporate as well as organized crime context).

123. *See* DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO 11-13 (1991) (discussing judicial hostility to "explosion" of RICO-based litigation and negative reaction by courts to plaintiffs who attempt to use RICO as "all-purpose federal antifraud remedy").