SEEING THE FOREST: A HOLISTIC VIEW OF THE RICO STATUTE OF LIMITATIONS

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INTRODUCTION

"Though rarely the subject of sustained scholarly attention, the law concerning statutes of limitations fairly bristles with subtle, intricate, often misunderstood issues . . . ."[1] Admittedly, the statute of limitations for the Racketeer Influenced and Corrupt Organizations Act[2] (RICO) is not one of the hottest topics among legal commentators; yet, the importance of the statute of limitations in civil RICO cases can hardly be overstated. Even a defendant who has admittedly (even criminally) violated RICO cannot be held civilly liable if the injured party does not file a timely complaint. This is true of all civil causes of action, but the consequences are three times as great for plaintiffs in civil RICO cases because triple damages are at stake. Simply put, in a civil RICO case, the difference between a timely and an untimely complaint can be the difference between recovering nothing and recovering triple damages. Thus, determining whether the plaintiff has brought suit within the limitations period is critical for both plaintiffs and defendants.

Statutes of limitations contain three discrete aspects: (1) length of the limitations period, (2) accrual, and (3) tolling. These three aspects work in concert. It simply does not make sense to view them in isolation.[3] This certainly is not a new revelation, but it is too often

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1 Wolin v. Smith Barney Inc., 83 F.3d 847, 849 (1996) (Posner, J.).

2 18 U.S.C. §§ 1961–1968 (2006).

3 *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463 (1975) ("Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action."); *cf.* Klehr v. A.O. Smith Corp., 521 U.S. 179, 199 (1997) (Scalia, J., concurring) ("[A]ny period of limitation is utterly meaningless without specification of the event that starts it running.

ignored. Indeed, forty years after the passage of RICO, courts have still not developed a coherent and comprehensive view of the RICO statute of limitations that includes all three aspects. Commentators, too, have failed to propose a complete and coherent view of the RICO statute of limitations. This is not to say that commentators have ignored the RICO statute of limitations. Rather, they have tended to focus on single, discrete aspects of the RICO statute of limitations; specifically, commentators have generally focused on which limitations period courts should adopt[4] (the RICO statute does not contain its own statute of limitations) and when the RICO statute of limitations should accrue.[5]

Now that both of these issues have (for all practical purposes) been settled,[6] this Note takes up the last statute of limitations issue, tolling, and examines it in conjunction with the other two aspects of the RICO statute of limitations. By so doing, this Note will offer a comprehensive view of the RICO statute of limitations that is consistent not only with the current state of the law but also with the purposes of statutes of limitations generally. Part I of this Note discusses the purposes of statutes of limitations. Part II discusses how the law has developed regarding the length of the RICO limitations period and when it accrues as well as the problems that arise when the discovery accrual rule is applied to civil RICO claims. Part III identifies tolling doctrines that courts can use to solve the problems associated with the discovery accrual rule and proposes a new tolling rule for RICO taken from the Clayton Antitrust Act. The Conclusion summarizes how taking into account all three aspects of the RICO statute of limitations leads to a complete and coherent timeliness rule that is fair to plaintiffs and defendants alike.

I. THE PURPOSES OF CIVIL STATUTES OF LIMITATIONS

The overarching aim of statutes of limitations is to balance the needs of plaintiffs against those of defendants and of society. As a general matter, plaintiffs should be able to sue for compensation when injured, but at some point the defendant's "right to be free of stale claims . . . prevail[s] over the [victim's] right to prosecute

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As a practical matter, a 4-year statute of limitations means nothing at all unless one knows when the four years start running.").

4 *See, e.g.*, Elizabeth D. De Armond, Note, *A Uniform Limitations Period for Civil RICO*, 61 NOTRE DAME L. REV. 495 (1986).

5 *See, e.g.*, Mary S. Humes, Note, *RICO and a Uniform Rule of Accrual*, 99 YALE L.J. 1399 (1990).

6 *See infra* Parts II.A.2 & II.B.3.

them."[7] Thus, the primary purpose of statutes of limitations is to give plaintiffs an incentive to litigate claims without unreasonable delay.[8] In so doing, statutes of limitations benefit defendants by providing repose when the plaintiff has slept on his claim.[9] Furthermore, statutes of limitations protect defendants from having to defend themselves against stale (and perhaps even fraudulent) charges when so much time has passed that evidence has been lost.[10] Statutes of limitations also provide certainty to potential defendants, notifying them of the length of their exposure to liability.[11] The certainty and finality provided by statutes of limitations benefits society as well by letting bygones be bygones and allowing everyone to move on.[12] More specifically, society is benefitted when courts are relieved of the burden of trying stale cases.[13]

How can legislatures and courts appropriately balance the interests of plaintiffs, defendants, and society when dealing with a statute of limitations issue? The most important thing legislatures and courts can do is keep in mind that a statute of limitations is not just a number. There are three aspects to every statute of limitations: (1) the length of the limitations period, (2) the point at which the limitations period begins to run (accrual), and (3) circumstances that toll the limitations period. When a legislature or court faces a decision that affects any of these three aspects, it must consider the purposes

7 Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349 (1944).

8 *See* Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1869) (7 Wall.) ("[Statutes of limitations] are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. . . . The policy of these statutes is to encourage promptitude in the prosecution of remedies."); *see also* Wood v. Carpenter, 101 U.S. 135, 139 (1879) ("[Statutes of limitations] stimulate to activity and punish negligence.").

9 *See* United States v. Kubrick, 444 U.S. 111, 117 (1979); *see also Wood*, 101 U.S. at 139 ("[Statutes of limitations] promote repose by giving security and stability to human affairs.").

10 *See R.R. Telegraphers*, 321 U.S. at 348–49; *see also* Mo., Kan. & Tex. Ry. Co. v. Harriman, 227 U.S. 657, 672 (1913) ("The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory.").

11 *See* Guar. Trust Co. of N.Y. v. United States, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time.").

12 *See* Gates Rubber Co. v. USM Corp., 508 F.2d 603, 611 (7th Cir. 1975).

13 *See* Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965); *see also* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) ("[Statutes of limitations] are practical and pragmatic devices to spare the courts from litigation of stale claims . . . .").

behind statutes of limitations because decisions about accrual and tolling implicate the purposes of statutes of limitations just as much as the determination of the length of the limitations period. Furthermore, legislatures and courts must be aware of how the three aspects of statutes of limitations work together. For example, when a legislature is determining what the length of the limitations period should be, it cannot appropriately balance the interests of plaintiffs, defendants, and society without also considering when the limitations period should accrue because "any period of limitation is utterly meaningless without specification of the event that starts it running."[14] Perhaps this seems like an obvious point, but legislatures continually enact statutes of limitations without any reference to when the limitations period should accrue or be tolled.[15]

II. WHERE ARE WE NOW? (AND HOW DID WE GET HERE?)

When Congress passed the RICO Act in 1970, it included a civil cause of action but no statute of limitations. As a result, for forty years, courts have struggled with RICO statute of limitations issues. The first major problem courts confronted was determining what limitations period to apply to RICO. The second problem was determining when that limitations period begins to run (accrue). This Part traces how the courts have dealt with these two problems.

A. Length of the Limitations Period

1. Before *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*

Before 1987, when the Supreme Court decided *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*,[16] civil RICO cases did not have a clearly applicable limitations period.[17] One might assume that by passing RICO without a statute of limitations Congress intended that no statute of limitations should govern civil RICO claims; however, courts have not taken this approach. Except in rare circumstances, when a federal cause of action lacks an express limitations period, courts assume that a limitations period should apply and adopt the

14 Klehr v. A.O. Smith Corp., 521 U.S. 179, 199 (1997) (Scalia, J., concurring).

15 *See, e.g.*, 15 U.S.C. § 15b (2006) ("Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued.").

16 483 U.S. 143 (1987).

17 See *infra* text accompanying notes 25–42 for a discussion of the *Malley-Duff* case.

most closely analogous limitations period provided by state law.[18] In theory, at least, adopting state limitations periods ensures that some limitations period will apply to bar stale federal claims and thus vindicate the rationales in favor of statutes of limitations.[19] In practice, though, the adoption of state limitations periods tends to undermine the purposes of statutes of limitations and lead to forum shopping and unfairness.

As a general matter, applying state statutes of limitations to federal causes of action promotes uncertainty and a lack of uniformity.[20] This is because limitations periods vary from state to state so the application of state statutes of limitations to a federal cause of action will necessarily lead to diverse limitations periods applying to the same federal cause of action. This, however, is the least of the complications. The statute of limitations for a given federal cause of action may also vary among different districts within states and even case to case depending on how the federal district courts characterize the cause of action and apply state borrowing statutes.[21] This lack of uniformity and certainty can make it almost impossible for plaintiffs to determine when they are required to file their claims and for defendants and society to benefit from the repose that statutes of limitations

18 What limitations period, if any, to apply to federal causes of action when Congress has not specified a limitations period is a problem that has plagued courts for over 175 years. *See generally* Mitchell A. Lowenthal et al., *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1025–42 (1980) (describing the development of the practice of adopting state statutes of limitations for federal causes of action). When Congress does not explicitly designate a limitations period, courts have numerous options. In most cases, courts analogize the federal cause of action to a state cause of action for which there is a limitations period and then adopt that limitations period for the federal cause of action. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 181 (1976) (applying a two-year Virginia state statute of limitations to a civil rights claim under 42 U.S.C. § 1981). If a court decides that adopting a state limitations period is inappropriate, it can adopt a federal limitations period by analogy, *see Malley-Duff*, 483 U.S. at 156; it can apply the doctrine of laches, *see* Holmburg v. Armbrecht, 327 U.S. 392, 396–97 (1946); it can judicially create a limitations period (something courts are reluctant to do), *see* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 703–04 (1966); or it can opt to apply no limitations period, *see* Occidental Life Ins. Co. v. Equal Employment Opportunity Comm'n, 432 U.S. 355, 368–72 (1977).

19 Furthermore, because courts have consistently applied state statutes of limitations to federal actions that lack limitations periods, it is a fair inference that "Congress intends by its silence that [courts] borrow state law." *Malley-Duff*, 483 U.S. at 147.

20 *See* Wilson v. Garcia, 471 U.S. 261, 272 n.25 (1985).

21 *See* Neil Sobol, Comment, *Determining Limitation Periods for Actions Arising Under Federal Statutes*, 41 SW. L.J. 895, 904–11 (1987); Lowenthal et al., *supra* note 18, at 1057–84, 1095–1104.

are supposed to provide.[22] Furthermore, this complicated area of law increases litigation, thereby delaying a final decision on the merits of the case—a problem that statutes of limitations, as bright-line rules, are supposed to prevent.[23] The lack of uniformity can also lead to forum shopping and unfairness. Finally, adopting state limitations periods for federal causes of action is inherently problematic because state legislatures design state limitations periods with state interests and particular state causes of action in mind. Thus, applying a state limitations period to a federal cause of action may frustrate the purposes of the federal cause of action. These problems associated with applying state limitations periods to federal causes of action were all on display when, before *Malley-Duff*, courts tried to apply state statutes of limitations to civil RICO cases.[24]

2. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*

In light of all the problems associated with applying state statutes of limitations to civil RICO claims, the Supreme Court, in 1987, finally undertook to provide a uniform limitations period for civil RICO.

The facts of *Malley-Duff* are nondescript. Malley-Duff & Associates, Inc. ("Malley-Duff") was an agent of Crown Life Insurance Company ("Crown Life") engaged in selling insurance in the Pittsburgh area.[25] When Malley-Duff failed to meet its annual production quota, Crown Life terminated its agency.[26] Malley-Duff then filed suit alleging, among other things, violations of RICO.[27] The district court granted summary judgment for Crown Life on the RICO claims "on the ground that they were barred by Pennsylvania's 2-year statute of limitations period for fraud."[28] The court of appeals reversed, holding instead that the appropriate statute of limitations was Pennsylvania's six-year "catchall" statute of limitations.[29] The Supreme Court then granted certiorari "to resolve the important question of

22 *Wilson*, 471 U.S. at 275 n.34 ("On a human level, uncertainty is costly to all parties. Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.").

23 *See id.* at 275.

24 *See* Robert E. Wood, *Civil RICO—Limitations in Limbo*, 21 WILLAMETTE L. REV. 683, 696–702 (1985).

25 Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 145 (1987).

26 *Id.*

27 *Id.*

28 *Id.* at 146.

29 *Id.*

the appropriate statute of limitations for civil enforcement actions brought under RICO."[30]

Justice O'Connor, writing for the majority,[31] began the Court's analysis by asserting that borrowing a statute of limitations from state law was not the only option open to courts:

> "[A]s the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods. Nevertheless, when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law."[32]

After discussing the problems associated with applying state limitations periods to civil RICO, including inconsistency and resultant uncertainty, the Court concluded that this was just such an instance where federal policies and the practicalities of litigation required the Court to adopt a uniform limitations period provided by federal law.[33]

The limitations period the court decided on was the four-year limitations period from the Clayton Antitrust Act.[34] The Court chose this particular limitations period because RICO was in large part modeled on the Clayton Act,[35] and therefore the Clayton Act provided a far better analogy to RICO than any other federal or state alternative.[36] Not only was the Clayton Act the best analogy for civil RICO, but adopting the Clayton Act's nationally uniform four-year limitations period for all civil RICO claims would also prevent forum shopping,[37] promote RICO's remedial purposes by avoiding the appli-

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30 *Id.*

31 *Malley-Duff* was an eight-to-one decision. Justice Scalia concurred in the judgment.

32 *Malley-Duff*, 483 U.S. at 148 (alteration in original) (quoting DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 171–72 (1983)).

33 *Id.* at 148–50.

34 *Id.* at 152. The statute of limitations for the Clayton Antitrust Act is found at 15 U.S.C. § 15b (2006):

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

35 *See Malley-Duff*, 483 U.S. at 151.

36 *See id.* at 150–51.

37 *See id.* at 153–54.

cation of "unduly short state statutes of limitation[s],"[38] and lead to certainty, consistency, and less litigation.[39] Accordingly, the Court held that the Clayton Act's four-year statute of limitations was "the most appropriate limitations period for RICO actions."[40] Because Malley-Duff had filed its RICO claims less than four years after the earliest possible time that the claims could have accrued, the Court concluded that the claims were timely and affirmed the judgment of the court of appeals.[41] In so doing, the Court specifically reserved the question of when exactly RICO's new four-year limitations period accrues.[42]

B. Accrual

The traditional accrual rule is that a statute of limitations begins to run as soon as all the events have occurred that enable the plaintiff to maintain a suit under the cause of action at issue.[43] This rule gives plaintiffs the full limitations period to file their claim after it arises but no longer. Although this accrual rule has the advantage of certainty, it can lead to unfairness. For instance, a plaintiff may be able to bring suit *in theory* because all of the events comprising the cause of action have occurred, but *realistically* the plaintiff may be unable to bring suit because (through no fault of his own) he is unaware that he has suffered an actionable injury. The classic example is medical malpractice:

> In the usual case, the fact of injury provides adequate notice of the cause of the injury and of the possibility that one's legal rights have been invaded. This general rule, however, is often inapplicable to medical malpractice claims. The reason for the exception is essen-

38 *See id.* at 154.

39 *See id.* at 150.

40 *Id.* at 156.

41 *Id.* at 156–57.

42 *Id.*

43 *See* Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 511–12 (2004). Certainly, the statute of limitations should not begin to run *before* the plaintiff can legally bring suit. *See* Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 56 n.3 (D.C. Cir. 1987) ("That a statute of limitations cannot begin to run against a plaintiff before the plaintiff can maintain a suit in court seems virtually axiomatic."). In *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192 (1997), the Supreme Court stated that "[a] limitations period ordinarily does not begin to run until the plaintiff has a 'complete and present cause of action.'" *Id.* at 195 (quoting Rawlings v. Ray, 312 U.S. 96, 98 (1941)). According to the Court, "Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Id.* at 201.

> tially the same as for the general rule, *i.e.*, a patient often has little or no reason to believe his legal rights have been invaded simply because some misfortune followed medical treatment. Sometimes a patient may remain unaware for many years that he has suffered injury or he may recognize his injury but not its cause. Indeed, the facts necessary to discover the causal relation between treatment and injury may be within the exclusive control of the physician or at least very difficult to obtain.[44]

Because of the fairness issue, courts began to replace the traditional rule with the discovery rule of accrual.[45] Now, the discovery rule is the default accrual rule for federal causes of action.[46]

Of course, had Congress specified in the RICO statute when a civil action accrues then, fair or unfair, courts would have to abide by Congress's determination. As with the limitations period, however, Congress remained silent.[47] Thus, federal courts have had to decide the appropriate point of accrual for civil RICO claims, and different federal courts developed different accrual rules including the last predicate act rule, the injury and pattern discovery rule, the discovery rule, and the Clayton Act accrual rule. This split among the federal courts undermined the uniformity and certainty that the Supreme Court sought when it borrowed the four-year limitations period from the Clayton Act. As a result, the Supreme Court had to address for a second time a RICO statute of limitations issue.

1. The Last Predicate Act Rule and *Klehr v. A.O. Smith Corp.*

Initially, some district courts adopted the last predicate act rule—a rule unique to RICO that takes into account the continuing nature

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44 Stoleson v. United States, 629 F.2d 1265, 1268 (7th Cir. 1980) (citations omitted).

45 According to Adam Bain and Ugo Colella, "The genesis of the discovery rule of accrual for federal statutes of limitations was the Supreme Court's decision in *Urie v. Thompson*." Bain & Colella, *supra* note 43, at 553 (citing Urie v. Thompson, 337 U.S. 163 (1949)).

46 *See* Rotella v. Wood, 528 U.S. 549, 555 (2000).

47 Congress remained silent regarding accrual until 1995 when it amended § 1964(c) to disallow plaintiffs from using securities fraud as a predicate act in civil actions unless the defendant had been criminally convicted "in connection with the fraud." Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 107, 109 Stat. 737, 758 (codified at 18 U.S.C. § 1964(c) (2006)). If the defendant had been criminally convicted, the plaintiff could use securities fraud as a predicate act in a civil action, "in which case the statute of limitations [would] start to run on the date on which the conviction becomes final." *Id.* This rule of accrual, however, only applies in this limited context.

of a RICO violation. This rule was borrowed from criminal RICO[48] and under it a claim accrues when the last predicate act of racketeering occurs.[49] Thus, so long as the defendant commits a predicate act within the four-year limitations period, the plaintiff can recover for all injuries he sustained due to the defendant's pattern of racketeering regardless of when the injuries occurred or when the plaintiff discovered his injuries.[50]

No circuit court has ever adopted the above version of the last predicate act rule, but the Third Circuit in *Keystone Insurance Co. v. Houghton*[51] adopted a variation of the last predicate act rule that included a discovery element. In *Keystone*, the court sought an accrual rule that took into account the continuing nature of a RICO offense (i.e., its pattern element)[52] and that would not start the statute of limitations running until all of the elements of the cause of action existed.[53] Under the rule the court developed, the limitations period would start to run

> 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.[54]

The court explained that "[t]he last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern" in order to extend the limitations period.[55] Like the simpler version of the last predicate act rule used by some district courts, under the *Keystone* accrual rule, the plaintiff can recover for all injuries caused by the same pattern of racketeering even if the injuries occurred or were

48 A criminal violation of 18 U.S.C. § 1962(c) (operating an enterprise through a pattern of racketeering activity) is a continuing offense, so the statute of limitations runs from the last act of racketeering in the pattern. 18 U.S.C. § 1962(c); *see* United States v. Yashar, 166 F.3d 873, 879 (7th Cir. 1999).

49 *See* County of Cook v. Berger, 648 F. Supp. 433, 435 (N.D. Ill. 1986).

50 *See id.* Thus, the last predicate act rule is not a rule of separate accrual. *See infra* text accompanying note 92.

51 863 F.2d 1125 (3d Cir. 1988), *abrogated by* Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997).

52 *Id.* at 1129–30.

53 *Id.* at 1130 ("It would appear fundamental that the four-year statute of limitations for civil RICO may not begin to run until each of the elements of the cause of action exist.").

54 *Id.* at 1130.

55 *Id.*

discovered more than four years before the claim was filed so long as the last predicate act occurred within the limitations period.[56]

The advantage of the last predicate act rule is that it recognizes the continuous nature of a RICO offense and, as a result, it does not start the limitations period running until either the pattern of racketeering ends or until the plaintiff discovers the last predicate act that marks the end of the pattern. Furthermore, with either iteration of the last predicate act rule there is no danger that the limitations period will start running before a RICO violation has actually occurred.[57] Thus, plaintiffs will be able to recover for all injuries caused by the same pattern of racketeering. Accordingly, the *Keystone* court argued that this plaintiff-friendly accrual rule is consistent with the text of RICO and is necessary to effectuate its broad remedial purposes.[58]

Though the last predicate act rule offers several advantages, it has its flaws—at least according to the Supreme Court, which rejected the last predicate act rule in *Klehr v. A.O. Smith Corp.*[59] In *Klehr*, the Supreme Court granted certiorari to address the aforementioned circuit split that had developed regarding the appropriate accrual rule for civil RICO.[60] *Klehr* involved a suit by dairy farmers against A.O. Smith Corporation for selling faulty silos.[61] The farmers' RICO claim was filed so late, however, that the only accrual rule that could have saved it was the rule from *Keystone*.[62] The Court held that this accrual rule was "not a proper interpretation of the law" for "two basic reasons."[63] First, the separate accrual rule "lengthens the limitations period dramatically" because a pattern of racketeering "can continue indefinitely."[64] The Court concluded that Congress did not contemplate this dramatic extension of the limitations period.[65] Furthermore, the Court found that such a long limitations period undermines the repose that statutes of limitations are supposed to

56 *Id.* at 1130–31.

57 This is one of the major flaws of the discovery accrual rule. *See infra* text accompanying notes 94–102.

58 *Keystone*, 863 F.2d at 1131–33.

59 521 U.S. 179 (1997).

60 At the time, some circuit courts applied the injury and pattern discovery rule, others applied the discovery rule, and the Third Circuit applied the last predicate act rule from *Keystone*. *See id.* at 185–86; Klehr v. A.O. Smith Corp., 87 F.3d 231, 239 (8th Cir. 1996).

61 *Klehr*, 521 U.S. at 183–84.

62 *Id.* at 186.

63 *Id.* at 187.

64 *Id.*

65 *Id.*

provide and allows plaintiffs to sit on their rights while memories fade and evidence erodes.[66]

The second reason why the court rejected the last predicate act rule of accrual is because it "is inconsistent with the ordinary Clayton Act rule, applicable in private antitrust treble damages actions,"[67] under which the statute of limitations begins to run from the occurrence of the injury.[68] The Court then used the Clayton Act rule to illustrate what it saw as the flaws in the last predicate act rule. Specifically, the Court disapproved of how the last predicate act rule, unlike the Clayton Act rule, allowed plaintiffs to "use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period."[69] Though the *Klehr* Court relied on the Clayton Act analogy to reject the last predicate act rule, it did not select the Clayton Act rule[70] or any other accrual rule to govern civil RICO claims.[71] Thus, the circuit courts remained split between the discovery rule and the injury and pattern discovery rule.[72]

2. The Injury and Pattern Discovery Rule and *Rotella v. Wood*

Under the injury and pattern discovery rule, "a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern."[73] Before *Rotella v. Wood*,[74] three circuit courts used this rule of accrual for civil RICO.[75] Like the last predicate act rule, the injury and pattern discovery rule takes into account the pattern element of a RICO cause of action; thus, the statute of limitations will never start to run before a RICO violation has actually occurred. However, unlike the last predicate act rule, the injury and pattern discovery rule is a separate accrual rule, so

66 *Id.*

67 *Id.* at 188.

68 *See infra* note 121 and accompanying text.

69 *Klehr*, 521 U.S. at 189–90.

70 *See id.* at 188.

71 *See id.* at 192–93 (declining to choose a single accrual rule for civil RICO).

72 *See supra* note 60.

73 Bivens Gardens Office Bldg., Inc. v. Barnett Bank, 906 F.2d 1546, 1554–55 (11th Cir. 1990), *abrogated by* Rotella v. Wood, 528 U.S. 549 (2000). Like the Clayton Act rule and the discovery rule, this rule is a separate accrual rule. *See infra* notes 91–92 and accompanying text.

74 528 U.S. 549 (2000).

75 *See* Klehr v. A.O. Smith Corp., 87 F.3d 231, 238 (8th Cir. 1996), *aff'd*, 521 U.S. 179 (1997); Caproni v. Prudential Sec., Inc., 15 F.3d 614, 619–20 (6th Cir. 1994); Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817, 820–21 (10th Cir. 1990).

it does not permit plaintiffs to sleep on their rights. Once the plaintiff is aware, or should be aware, that he has suffered an injury due to a pattern of racketeering activity, he has the four-year limitations period (and no longer) within which to commence suit. If a plaintiff's cause of action is time-barred under the injury and pattern discovery rule, it will be because he did not exercise reasonable diligence to discover his claim or because he was aware of the claim but slept on his rights.

Even though the injury and pattern discovery rule does not lengthen the limitations period as dramatically as the last predicate act rule, the Supreme Court still rejected it in *Rotella v. Wood*. In *Rotella*, the plaintiff sued "a group of doctors and related business entities" for a violation of RICO in connection with his stay in a psychiatric hospital.[76] Because the Court had left the circuit split unresolved in *Klehr*, it was hearing its second case in three years on the accrual of the RICO statute of limitations. Like the situation in *Klehr*, only one accrual rule could save Rotella's claim (this time the injury and pattern discovery rule),[77] and again, like in *Klehr*, the Supreme Court rejected that one accrual rule but did not finally decide on an accrual rule for civil RICO.[78]

The Supreme Court rejected the injury and pattern discovery rule for three reasons. First, the Court found that the rule violated the policies behind statutes of limitations including repose by, in many circumstances, extending the limitations period "well beyond the time when a plaintiff's cause of action is complete."[79] Second, the Court found that the injury and pattern discovery rule was an unjustified extension of the traditional discovery rule.[80] Under the traditional rule, the "discovery of the injury, not [the] discovery of the other elements of a claim, is what starts the clock."[81] The Court reasoned that the traditional discovery rule governs other causes of action where the elements of the claim may be difficult to ascertain (like medical malpractice), so that a RICO pattern can be difficult to

76 *See Rotella*, 528 U.S. at 551.

77 *Id.*

78 *See id.* at 554 & n.2. After the Supreme Court rejected the last predicate act rule in *Klehr* and the injury and pattern discovery rule in *Rotella*, the discovery rule was the only accrual rule used in the circuit courts that the Supreme Court had not rejected. *See id.* at 554. Nonetheless, the Court in *Rotella* refused to "settle upon a final rule," *id.* at 554 n.2, leaving open for itself the possibility of applying the Clayton Act rule in a future case.

79 *Id.* at 558. The Court also argued that the rule would result in uncertainty because it would be difficult to pinpoint when the plaintiff discovered, or should have discovered, a complex racketeering pattern. *Id.* at 559.

80 *Id.* at 555–57.

81 *Id.* at 555.

identify is not enough to justify departing from the traditional rule.[82] Third, the Court—again stressing the Clayton Act analogy—found that the injury and pattern discovery rule is inconsistent with the Clayton Act's injury accrual rule.[83] In particular, the Court argued that one of the purposes behind the civil provisions in RICO and the Clayton Act is "to supplement Government efforts to deter and penalize the respectively prohibited practices."[84] The Court reasoned that the Clayton Act's accrual rule better accomplishes this purpose by forcing plaintiffs to file their claims earlier, thereby allowing the public benefit to accrue sooner.[85]

3. The Discovery Rule

After *Rotella*, two potential accrual rules remained—the discovery rule and the Clayton Act rule. The discovery rule is the default federal accrual rule and is usually applied when a statute does not specify when a cause of action accrues.[86] Under this rule a civil RICO claim accrues when the plaintiff knows, or should have known, of the injury on which his cause of action is based.[87] The first circuit court to adopt the discovery accrual rule for RICO was the Ninth Circuit in *Compton v. Ide*.[88] This court, having found no authority that stated when a civil RICO action accrues, imposed the default federal accrual rule.[89] In *Bankers Trust Co. v. Rhoades*,[90] the Second Circuit clarified that the discovery rule (as applied to RICO) is a rule of separate accrual[91]—meaning that, for each "new and independent" injury that the plaintiff suffers, a separate cause of action with a separate statute of limitations accrues.[92]

As we have seen, even though the RICO statute says nothing about when a cause of action accrues[93] and even though the discovery rule is the default federal accrual rule, some courts were reluctant to apply the discovery rule to civil RICO claims. Instead, these courts

82 *Id.* at 555–57.
83 *Id.* at 557.
84 *Id.*
85 *Id.* at 557–58.
86 *See supra* text accompanying note 46.
87 *See* Grimmett v. Brown, 75 F.3d 506, 510 (9th Cir. 1996).
88 732 F.2d 1429 (9th Cir. 1984).
89 *Id.* at 1433.
90 859 F.2d 1096 (2d Cir. 1988).
91 *See id.* at 1103.
92 *See Grimmett*, 75 F.3d at 510.
93 *But see supra* note 47 and accompanying text.

developed unique accrual rules specially designed for RICO. There are two general reasons for this practice.

First, courts and commentators have argued that the discovery rule does not properly take into account the pattern element of a RICO cause of action, i.e., its continuous nature.[94] To explain, a prerequisite for a civil RICO claim is a "pattern" of racketeering activity.[95] Under RICO, a pattern of racketeering requires *at least* two predicate acts committed within a ten-year period.[96] In *Sedima, S.P.R.L. v. Imrex Co.*,[97] the Supreme Court indicated that although two acts are "necessary" to form a pattern, they are not necessarily "sufficient" to establish a RICO pattern.[98] The *Sedima* Court held that, in order to form a pattern, the alleged predicate acts could not be isolated incidents, rather there had to be some relationship between the alleged acts.[99]

The discovery rule, by starting the statute of limitations running as soon as the plaintiff discovers (or should have discovered) his injury, disregards RICO's pattern requirement. Under the discovery rule, if the plaintiff discovers his injury before the defendant has committed the right combination of predicate acts to constitute a pattern, the statute of limitations begins running before the plaintiff can actually bring a civil RICO claim.[100] For example, if the defendant commits the predicate acts more than four years apart, a victim who is only injured by the first predicate act may (depending on when he discovers or should have discovered his injury) be barred from bringing a civil RICO claim by the statute of limitations even when the language of the RICO statute creates no such barrier.[101] Even if our hypothetical victim is also injured by the subsequent, pattern-forming predicate acts, he may be unable to recover under RICO for his initial injury despite the fact that it is part of the same pattern. In sum, under the discovery rule, victims may not be able to recover for all their RICO injuries even though they are part of the same pattern, some victims

94 *See e.g.*, Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1133 (3d Cir. 1988), *abrogated by* Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997); Paul B. O'Neill, *"Mother of Mercy, Is This the Beginning of RICO?": The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. Rev. 172, 205 (1990).

95 18 U.S.C. § 1962(a) (2006).

96 *Id.* § 1961(5).

97 473 U.S. 479 (1985).

98 *Id.* at 496 n.14.

99 *See id.*

100 Thus violating the principle that the statute of limitations should not begin to run until all the events have occurred that enable the plaintiff to maintain a cause of action. *See supra* note 43 and accompanying text.

101 Under the express language of the statue, predicate acts can form a pattern even if they are as many as ten years apart. *See* 18 U.S.C. § 1961(5).

with RICO injuries will not be able to recover under RICO at all, and other victims may be given an artificially short limitations period in which to file their RICO claim—all this because the discovery rule allows the statute of limitations to start running before all the elements of a RICO cause of action exist.[102]

The second reason why courts developed unique accrual rules for RICO is because a RICO claim is complex and it may be difficult for plaintiffs to discover the pattern of activity that enables them to bring a RICO claim or the person(s) responsible for that pattern.[103] The discovery rule does not take these difficulties into account either. Under the discovery rule, the clock starts running as soon as the plaintiff discovers his injury, even if he is completely unaware of who is responsible for his injury or that he was injured by an act that is part of a larger pattern.

In spite of the problems that can occur when courts apply the discovery rule to civil RICO, almost every circuit court has adopted this accrual rule in the wake of the Supreme Court's rejection of the more plaintiff friendly accrual rules in *Klehr* and *Rotella*.[104] Thus, even though the *Rotella* Court refused to designate the discovery rule as the governing accrual rule for civil RICO, it has become just that.

4. The Clayton Act Rule

In spite of the widespread adoption of the discovery rule, the Clayton Act accrual rule lives on as a potential alternative. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[105] the Supreme Court set out the accrual rule for claims under the Clayton Act:

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102 *See* O'Neill, *supra* note 94, at 205–06.

103 *See* Marcus R. Mumford, *Completing* Klehr v. A.O. Smith Corp.*, and Resolving the Oddity and Lingering Questions of Civil RICO Statute of Limitations Accrual*, 1998 BYU L. REV. 1273, 1296–99.

104 *See* Cetel v. Kirwan Fin. Group, Inc., 460 F.3d 494, 507 (3d Cir. 2006); Living Designs, Inc. v. E.I. Dupont De Nemours & Co., 431 F.3d 353, 365 (9th Cir. 2005); Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 688 (7th Cir. 2004); Taylor Group v. ANR Storage Co., 24 F. App'x 319, 325 (6th Cir. 2001); Pac. Harbor Capital, Inc. v. Barnett Bank, 252 F.3d 1246, 1251 (11th Cir. 2001) (assuming that the discovery rule applies without deciding); Love v. Nat'l Med. Enters., 230 F.3d 765, 774 (5th Cir. 2000); Lares Group, II v. Tobin, 221 F.3d 41, 44 (1st Cir. 2000); *In re* Merrill Lynch Ltd. P'ships Litig., 154 F.3d 56, 58 (2d Cir. 1998); Detrick v. Panalpina, Inc., 108 F.3d 529, 537 (4th Cir. 1997); Chalabi v. Hashemite Kingdom of Jordan, 503 F. Supp. 2d 267, 273 (D.D.C. 2007); Wal-Mart Stores, Inc. v. Watson, 94 F. Supp. 2d 1027, 1033 (W.D. Ark. 2000). *But see* Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1234 (10th Cir. 2006) (declining to decide between the discovery rule and the injury occurrence rule).

105 401 U.S. 321 (1971).

> [A] cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . In the context of a continuing conspiracy to violate the antitrust laws . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. However, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial.[106]

The *Zenith* Court made one exception to this accrual rule. If a plaintiff cannot recover future damages because they are too speculative, "the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted."[107] The Court reasoned that without this exception, future damages that could not be proved within the limitations period would be unrecoverable and this would be contrary to congressional intent.[108] So, unless the exception applies, under the Clayton Act rule, the statute of limitations begins to run from the date of the unlawful act that injures the plaintiff's business.[109] The Clayton Act accrual rule as declared in *Zenith* is a separate accrual rule. In other words, each time the plaintiff is injured by a violation of the statute, he has a new cause of action with a separate limitations period.

While the majority of the Supreme Court in *Klehr* refused to decide on an accrual rule for civil RICO, Justice Scalia wrote a concurring opinion in which he argued for the adoption of the Clayton Act accrual rule.[110] Justice Scalia began his concurrence by criticizing the majority for its refusal to resolve the circuit split by adopting a single accrual rule for RICO.[111] To Justice Scalia, deciding what accrual rule

106 *Id.* at 338–39 (citations omitted).

107 *Id.* at 339.

108 *Id.* at 340.

109 *But see infra* note 121.

110 Klehr v. A.O. Smith Corp., 521 U.S. 179, 198 (1997) (Scalia, J., concurring).

111 *Id.* at 196–97. The majority justified its refusal to choose an accrual rule for RICO by pointing out the complex interaction between accrual rules and tolling rules and arguing that because of that complex interaction and the significant legal consequences of that interaction (either a claim will be barred or not) it was not yet ready to decide on an accrual rule for RICO. *See id.* at 192–93 (majority opinion). In Part III, I discuss how the discovery rule and the Clayton Act accrual rule ought to interact with federal tolling principles to best achieve the purposes of statutes of limitations.

to apply to RICO was not as agonizingly difficult as the majority seemed to think; rather, the answer was self-evident.[112] Because the Court had previously adopted the Clayton Act's four-year limitations period for RICO, it was now bound to adopt the Clayton Act accrual rule:

> We have said that "[a]ny period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." It is just as true, I think, that any period of limitation is utterly meaningless without specification of the event that starts it running. As a practical matter, a 4-year statute of limitations means nothing at all unless one knows when the four years start running. If they start, for example, on the 10th anniversary of the injury, the 4-year statute is more akin to a 14-year statute than to the Clayton Act. We would thus have been foolish, in *Malley-Duff*, to speak of "adopting" the Clayton Act statute, and of "patterning" the RICO limitations period after the Clayton Act, if all we meant was using the Clayton Act number of years.[113]

Justice Scalia then suggested that by refusing to adopt the Clayton Act accrual rule the majority was engaging in judicial lawmaking.[114] This, according to Justice Scalia, is why the Court was having such a difficult time deciding on an accrual rule: "It is . . . no wonder that the Court finds the question it has posed for itself today 'subtle and difficult'; judicial policywonking is endlessly demanding, and constructing a statute of limitations is much more complicated than adopting one."[115] In sum, Justice Scalia argued that "[w]hen [the Court] adopt[s] a statute of limitations from an analogous federal cause of action [it ought to] adopt it in whole, with all its accoutrements."[116]

In spite of Justice Scalia's strong argument for adopting the Clayton Act accrual rule, no circuit court has since applied the Clayton Act accrual rule to civil RICO.[117] This is not particularly surprising given that by the time of *Klehr* the discovery rule had become the default accrual rule.[118] Furthermore, leaving aside for now the arguments

112 *See id.* at 198–99 (Scalia, J., concurring).

113 *Id.* at 199 (citation omitted) (quoting Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463 (1975)).

114 *See id.* at 200.

115 *Id.*

116 *Id.* at 201.

117 In fact, no circuit court has ever applied the Clayton Act rule to civil RICO. However, a few district courts have. *See, e.g.*, Gilbert Family P'ship v. Nido Corp., 679 F. Supp. 679, 686 (E.D. Mich. 1988); Wabash Publ'g Co. v. Dermer, 650 F. Supp. 212, 216–17 (N.D. Ill. 1986).

118 *See Klehr*, 521 U.S. at 191.

put forward by Justice Scalia, the Clayton Act rule does not seem like a particularly good fit for RICO. The Clayton Act accrual rule suffers from the same problems as the discovery rule[119]: (1) it ignores RICO's pattern element,[120] and thus may start the limitations period running before the plaintiff can legally bring a RICO claim; and (2) it ignores the complexity of a RICO claim and starts the limitations period running regardless of when the plaintiff discovers the pattern of illegal acts and who is responsible for that pattern. These problems are compounded under the Clayton Act rule because, unlike the discovery rule, it starts the limitations period running when the injury occurs. Thus, the limitations period may begin to run even before the plaintiff is aware of his injury.[121]

The Clayton Act accrual rule does have a few positive attributes that might benefit RICO plaintiffs. For instance, under the Clayton

119 *See supra* text accompanying notes 93–103.

120 This is not surprising because the Clayton Act accrual rule was created with reference to the Clayton Act, which does not require a pattern.

121 In *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), the Second Circuit suggested that the Clayton Act accrual rule includes a discovery principle. *Id.* at 1103–04. Since then, however, the Second Circuit has applied the rule from *Zenith*, which has no discovery element. *See* Higgins v. N.Y. Stock Exch., Inc. 942 F.2d 829, 832 (2d Cir. 1991). The Second Circuit can hardly be faulted for the mix-up given *Zenith*'s imprecise iteration of the rule. In fact, there has been much confusion among federal courts as to when exactly the Clayton Act's statute of limitations accrues. In *Zenith*, the Supreme Court attempted to set out an accrual rule for the Clayton Act, but the Court used imprecise and confusing language that suggested that the statute of limitations accrues when the defendant commits the unlawful act and not when the plaintiff suffers injury. *See supra* text accompanying note 106. This interpretation of the Clayton Act accrual rule does not make sense, however, unless one assumes that the injury occurs simultaneously with the wrongful act. Otherwise, this accrual rule would violate the fundamental principle that a cause of action should not accrue until all the events have occurred that enable the plaintiff to maintain a suit under the cause of action at issue. After all, a plaintiff cannot sue under the Clayton Act until he has actually suffered injury. Nonetheless, circuit courts have generally adopted this imprecise iteration of the Clayton Act accrual rule. *See, e.g.*, Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987) ("A cause of action in antitrust accrues each time a plaintiff is injured by an act of the defendant and the statute of limitations runs from the commission of the act."). Of course, it is hard to blame these circuit courts because they are bound to follow *Zenith*. Still, the better interpretation of the Clayton Act accrual rule is that the Clayton Act's limitations period begins to run upon the occurrence of the injury. It is this version of the Clayton Act accrual rule that the Supreme Court seemed to endorse in *Rotella*. *See* Rotella v. Wood, 528 U.S. 549, 554 n.2, 557 (2000) (referring to the Clayton Act accrual rule as an "injury occurrence rule" and an "injury-focused accrual rule"). However, at least one circuit court has gone completely off the tracks and applied the discovery rule to claims under the Clayton Act. *See In re* Copper Antitrust Litig., 436 F.3d 782, 789 (7th Cir. 2006).

Act rule, for each separate injury the plaintiff can recover future damages, and when those future damages are too speculative, the cause of action does not accrue until the date they are suffered. Thus, if five years after a RICO violation a plaintiff suffers injuries to his business or property that were previously too speculative to prove, under the Clayton Act rule, he would still be able to recover for those injuries.[122]

III. TOLLING THE RICO STATUTE OF LIMITATIONS

The length of the RICO limitations period is well settled and though the Supreme Court has not definitively spoken on when a RICO claim accrues the circuit courts have coalesced around the discovery rule. This leaves the last aspect of the RICO statute of limitation—tolling.

One of the most misleading aspects of statutes of limitations is that they involve more than a simple mathematical calculation. Just because a civil RICO plaintiff files his claim more than four years after the date of accrual does not mean that the claim is barred. This is because courts (and legislatures) have determined that in some cases the purposes that statutes of limitations serve are outweighed by the plaintiff's interest in bringing a legitimate claim.[123] Thus, courts (and legislatures) have developed rules that toll the statute of limitations.

A tolling rule can affect a statute of limitations in one of three ways—it can suspend the running of the limitations period; it can extend the limitations period; or it can renew or revive the limitations period.[124] When a tolling rule suspends the limitations period, the limitations period stops running until the circumstances that tolled the limitations period no longer exist; at that point, the clock starts again and the plaintiff has the remainder of the limitations period to file his claim.[125] When a tolling rule extends the limitations period, the original length of the limitations period and the time remaining on it when the tolling condition arose are irrelevant.[126] Instead, the extension rule establishes a new (usually relatively short) limitations

122 *See supra* text accompanying note 107.

123 *See* Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965) ("This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights."). Of course, when creating and applying tolling provisions, courts (and legislatures) must make sure that the exception does not swallow the rule and vitiate the statute of limitations.

124 *See* Kathleen L. Cerveny, Note, *Limitation Tolling When Class Status Denied:* Chardon v. Fumero Soto *and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686, 689 (1985).

125 *See id.*

126 *See id.* at 689–90.

period within which the plaintiff must file his claim.[127] Finally, when a tolling rule renews or revives the limitations period, the clock is reset and starts running all over again as if the cause of action has just accrued.[128]

Federal tolling rules[129] can be complex and confusing. This is partly because federal courts use inconsistent terminology to refer to the same tolling concepts and/or classify the same tolling concepts in different categories. Fortunately, this imprecision has not generally affected the scope and application of tolling rules. For the purposes of this Part, it will be sufficient to classify federal tolling rules into two broad categories: common law tolling rules (those made by judges) and statutory tolling rules (those enacted by Congress). This Part will introduce those federal tolling rules that can most profitably be applied to civil RICO claims and explain how and why each tolling rule ought to apply to RICO claims. The overall goal of this Part is to show how currently available federal tolling rules can be applied to individual RICO cases to achieve a complete and coherent statute of limitations for civil RICO claims that balances the purposes of statutes of limitations with fairness to injured plaintiffs.

A. Common Law Tolling Rules

Given that the discovery rule, for all practical purposes, governs the accrual of all civil RICO claims brought in federal courts, what can courts do to address the unfairness that can result when the discovery rule is applied to civil RICO? After *Klehr* and *Rotella*, are we now stuck with an accrual rule that will prevent some plaintiffs from vindicating legitimate RICO claims even when they have not slept on their rights? I think not. Courts and commentators were quick to point out the flaws in the discovery rule, but they tended to try to solve these problems by coming up with complex accrual rules.[130] The Supreme Court twice rejected this approach, pointing out that, even though the

127 *See id.*

128 *See id.* at 690.

129 When discussing tolling of the RICO statute of limitations, the relevant tolling rules are federal rules not state rules. *See* Emrich v. Touche Ross & Co., 846 F.2d 1190, 1199 (9th Cir. 1988). This is because the statute of limitations that governs RICO actions derives from federal law. *See id.* In contrast, when federal courts apply state statutes of limitations to federal causes of action, as with § 1983 claims, state tolling rules apply unless they are inconsistent with federal law. *See* Bd. of Regents v. Tomanio, 446 U.S. 478, 483–86 (1980).

130 *See, e.g.*, Bivens Gardens Office Bldg., Inc. v. Barnett Bank, 906 F.2d 1546, 1554–55 (11th Cir. 1990); Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1130–31 (3d Cir. 1988); Mumford, *supra* note 103, at 1302–03; O'Neill, *supra* note 94, at 235.

discovery rule was not perfect, the problems associated with the discovery rule did not affect every case.[131] The Court suggested that the best way to deal with these problems is not to come up with universal, difficult to administer accrual rules that unduly extend the limitations period, but to apply tolling rules in individual cases to prevent injustice.[132] For the remainder of this Note, I will take up the Court's suggestion and show how lower courts can apply federal tolling rules to individual cases to ameliorate the problems associated with the discovery rule (and the Clayton Act accrual rule) and to develop a complete, coherent, and balanced body of law on the RICO statute of limitations.

1. The Continuing Violation Doctrine

The biggest problem associated with the discovery rule is that it can start the RICO statute of limitations running even before a plaintiff can legally bring a RICO claim.[133] In *Limestone Development Corp. v. Village of Lemont*,[134] Judge Posner suggested a solution to this problem. In *Limestone*, the court was *not* confronted with a situation where the plaintiff discovered his injury more than four years before the defendant committed enough predicate acts to constitute a pattern.[135] But, Judge Posner suggested that if this were the case, the plaintiff would still be able to recover for his initial injury under RICO due to the continuing violation doctrine.[136] Judge Posner stated that the continuing violation doctrine is misnamed: "The office of the misnamed doctrine is to allow suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought. It is thus a doctrine not about a continuing, but about a cumulative, violation."[137] To explain the continuing violation doctrine, Judge Posner used a sexual harassment claim as an example: "The first instance of a coworker's offensive words or actions may be too trivial to count as actionable harassment, but if they continue they may eventually reach that level and then the entire series is actionable."[138] Once the series becomes actionable, the victim can sue and recover for all the instances of harassment that make up the cause of action regardless of

131 *See* Rotella v. Wood, 528 U.S. 549, 558 n.4, 560–61 (2000).

132 *See id.* at 560–61 ("The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule.").

133 *See supra* text accompanying notes 93–103.

134 520 F.3d 797 (7th Cir. 2008) (Posner, J.).

135 *Id.* at 802.

136 *Id.* at 801–02.

137 *Id.* at 801 (citation omitted).

138 *Id.*

when they occurred.[139] According to Judge Posner, this principle could be applied to RICO.[140] By relying on the continuing violation doctrine, a RICO plaintiff would not have to bring suit until enough predicate acts accumulate to form an actionable pattern.[141] When this happens, the plaintiff could recover for all the injuries that resulted from that pattern even if they were discovered more than four years before the claim was filed.[142] The solution Judge Posner suggested in *Limestone* would essentially delay the accrual of a RICO cause of action until an actionable pattern of racketeering has actually occurred. Thus, in those cases where the discovery rule would start the RICO limitations period running before the plaintiff could legally file a RICO claim, courts can apply the continuing violation doctrine to prevent this injustice.

The continuing violation doctrine, however, will have to be somewhat modified when applied to RICO. Generally, the continuing violation doctrine is said to delay accrual until the course of conduct that constitutes the continuing violation ceases.[143] If this iteration of the continuing violation doctrine were to govern RICO, then courts would simply be applying the last predicate act rule[144] under a different name. Even though the continuing violation rule, unlike the last predicate act rule, would only apply in special circumstances, it would probably still be inappropriate for lower courts to adopt this version of the continuing violation rule after the Supreme Court in *Klehr* so resoundingly rejected the last predicate act rule.[145] Thus, when courts find it appropriate to apply the continuing violation rule to RICO claims to prevent unfairness to plaintiffs, they should take care not to grant plaintiffs a windfall by unduly extending the limitations period. The best way for courts to balance these concerns is to apply a more restrained version of the continuing violation rule—one where a RICO claim accrues not upon the occurrence of the last predicate act but as soon as enough related predicate acts have occurred to constitute a pattern. Under this application of the continuing violation

139 *See id.*

140 *Id.*

141 *See id.* at 801–02.

142 *See id.*

143 Page v. United States, 729 F.2d 818, 821 (D.C. Cir. 1984) ("It is well-settled that '[w]hen a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases.'" (alteration in original) (quoting Donaldson v. O'Connor, 493 F.2d 507, 529 (5th Cir. 1974))).

144 *See supra* text accompanying notes 48–49.

145 *See supra* text accompanying notes 59–71.

rule, the RICO statute of limitations accrues when the plaintiff is legally able to bring a civil RICO claim, not before and not after.

Though I have placed this discussion of the continuing violation doctrine in this subpart on judge-made tolling rules, it is actually better characterized as "a doctrine governing accrual."[146] Nonetheless, I have chosen to place the continuing violation rule here because it is not a general accrual rule and therefore it operates more like a common law tolling rule in that courts can apply it to individual cases to prevent injustice. Furthermore, whether the continuing violation rule is called a tolling doctrine or an accrual doctrine does not much matter in the context of RICO because federal law governs both aspects of the RICO statute of limitations.[147] For the rest of this subpart, I will discuss more traditional common law tolling rules and how they may be applied to civil RICO claims, in conjunction with the continuing violation doctrine, to ameliorate the problems associated with the discovery rule.

2. Equitable Estoppel

Equitable estoppel and equitable tolling are two distinct tolling doctrines that also encompass more specific tolling rules. Though these doctrines are different, "[m]any cases . . . fuse the two doctrines, presumably inadvertently."[148] The best explanation of the distinction between the two doctrines can be found in *Cada v. Baxter Healthcare Corp.*[149] In *Cada*, Judge Posner defined equitable estoppel as "a general equity principle not limited to the statute of limitations context . . . which comes into play if the defendant takes active steps to prevent the plaintiff from suing in time[ ]."[150] While equitable estoppel focuses on the wrongful actions of the defendant, equitable tolling focuses on the plaintiff—it "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain

146 Heard v. Sheahan, 253 F.3d 316, 319 (7th Cir. 2001) (Posner, J.). There are some circuit court cases, however, that refer to it as a tolling rule. *See id.* (listing cases).

147 When federal courts have to borrow state limitations periods for federal causes of action, *federal* law governs the point at which the state limitations period accrues whereas *state* law governs when the state limitations period is tolled. *See* Lowenthal et al., *supra* note 18, at 1086, 1092–93. In situations like this, it will make a difference whether the continuing violation doctrine is classified as an accrual rule or a tolling rule.

148 Cada v. Baxter Healthcare Corp., 920 F.2d 446, 452 (7th Cir. 1990) (Posner, J.).

149 *Id.*

150 *Id.* at 450.

vital information bearing on the existence of his claim."[151] Equitable estoppel and equitable tolling principles are both generally applicable to all federal statutes of limitations.[152]

Equitable estoppel encompasses a tolling doctrine called fraudulent concealment.[153] It is important, however, to recognize that equitable estoppel and fraudulent concealment are not one and the same.[154] For example, if a defendant promises not to plead the statute of limitations and thereby induces the plaintiff to delay filing his claim, then the doctrine of equitable estoppel may save the plaintiff's claim whereas the doctrine of fraudulent concealment is simply not applicable.[155] In this subpart, I focus on the doctrine of fraudulent concealment because other applications of the equitable estoppel doctrine are narrow and involve rather rare circumstances whereas fraudulent concealment is often pled to toll federal statutes of limitations governing all types of claims.[156]

The doctrine of fraudulent concealment is one of the oldest equitable exceptions to statutes of limitations. The Supreme Court first recognized it in 1874 in *Bailey v. Glover*[157]:

> [W]here the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.[158]

The Court justified this equitable exception on the grounds that without it statutes of limitations, which were designed to prevent frauds, would actually end up encouraging potential defendants to engage in fraud to cover up their misdeeds until they could plead the statute of limitations.[159]

Though the language the Court used in *Bailey* suggests that the doctrine of fraudulent concealment only applies in fraud cases, the Supreme Court later held that this doctrine "is read into every federal

151 *Id.* at 451.

152 *See id.*

153 *Id.* Some courts have referred to it as an equitable tolling rule. *See, e.g.*, Grimmett v. Brown, 75 F.3d 506, 514 (9th Cir. 1996).

154 Wolin v. Smith Barney Inc., 83 F.3d 847, 855 (7th Cir. 1996) (Posner, J.).

155 *See Cada*, 920 F.2d at 451.

156 *See, e.g.*, Texas v. Allan Constr. Co., 851 F.2d 1526, 1527 (5th Cir. 1988) (pleading fraudulent concealment in an antitrust action).

157 88 U.S. 342 (1874).

158 *Id.* at 348.

159 *See id.* at 349.

statute of limitation."[160] Roughly stated, under fraudulent concealment as the doctrine exists today, if the defendant fraudulently conceals from the plaintiff the facts that make up his cause of action, the statute is tolled for the length of that concealment.[161] Exactly what conduct on the defendant's part is required under fraudulent concealment is a problem that has plagued the courts.[162] Generally courts agree that the defendant has to make some effort to conceal his wrongdoing.[163] The easiest case is when the defendant engages in "active concealment" by actively taking steps that are distinct from the original wrongful act and that are intended to conceal that original wrongful act.[164] Many courts, however, have used a lesser standard. These courts have held that even if a defendant has not engaged in active concealment, he has done enough to satisfy the fraudulent concealment standard simply by committing a so-called "self-concealing act"—"an act committed during the course of the original [wrong] that has the effect of concealing the [wrong] from its victims."[165]

Because RICO is governed by a federal statute of limitations, the doctrine of fraudulent concealment ought to apply to RICO claims. In *Klehr*, the Supreme Court held that fraudulent concealment could toll the RICO statute of limitations.[166] The issue in *Klehr* was whether a plaintiff pleading fraudulent concealment had to have exercised reasonable diligence in order to benefit from the doctrine.[167] There was a split in the circuits over this issue. Some circuits held that because fraudulent concealment focuses on the defendant's actions, it does not matter whether or not the plaintiff was reasonably diligent, while other circuits held that a plaintiff had to be reasonably diligent in order to benefit from the doctrine.[168] Limiting its holding to the context of a civil RICO claim, the Supreme Court held that "a plaintiff who is not reasonably diligent may not assert 'fraudulent concealment.'"[169] The Court so held because in the antitrust context the

160 Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946).

161 *See* Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 122 (4th Cir. 1995).

162 *See* Wolin v. Smith Barney Inc., 83 F.3d 847, 851 (7th Cir. 1996) (Posner, J.). This is practically an understatement. *See Supermarket of Marlinton*, 71 F.3d at 122–26 (distinguishing between three standards for fraudulent concealment just in the antitrust context).

163 *See Wolin*, 83 F.3d at 851.

164 *See id.* at 852.

165 *Id.*

166 *See* Klehr v. A.O. Smith Corp., 521 U.S. 179, 194 (1997).

167 *See id.*

168 *See id.*

169 *Id.*

lower federal courts had consistently required the plaintiff to exercise reasonable diligence in order to invoke the fraudulent concealment doctrine.[170] Thus, once again, the Court relied on the RICO/antitrust parallel to rule on a RICO statute of limitations issue.

It is beyond the scope of this Note to describe the exact contours of the fraudulent concealment doctrine as it is applied to RICO. Even without a detailed examination, though, it is clear that the fraudulent concealment doctrine, just like the continuing violation doctrine, may be beneficially applied to civil RICO claims to prevent injustices to plaintiffs. There is much overlap between the fraudulent concealment doctrine and the discovery rule (especially if due diligence is required for fraudulent concealment).[171] For example, a plaintiff who does not have the benefit of the discovery rule can achieve the same result by showing that the defendant fraudulently concealed the plaintiff's injury; in this case, the statute of limitations would be "tolled until the injured party discovers, or with due diligence could have discovered, the injury."[172] Of course, the discovery rule delays the accrual of the statute of limitations automatically, whereas under fraudulent concealment the plaintiff must show that the defendant acted in some way to conceal his wrongdoing. Because of the overlap between the discovery rule and the fraudulent concealment doctrine and the additional difficulty of proving fraudulent concealment, the fraudulent concealment doctrine would be most useful in the RICO context if in the future some circuit court decides to adopt the Clayton Act accrual rule.

Even if the circuit courts continue to apply the discovery rule, however, the doctrine of fraudulent concealment may still be of some use to RICO plaintiffs. For example, imagine a situation where a plaintiff is aware that he has been injured, but is unaware that his injury is the result of wrongdoing because the perpetrator has concealed his wrongful actions. If this sort of situation were to happen in a RICO case, the plaintiff would be in trouble because the four-year statute of limitations would start to run right when he discovered his injury; yet, because of the concealment, it could be years before the diligent plaintiff discovers that his injury was caused by wrongful acts—by a pattern of racketeering. If, in a case like this, the discovery rule was not tempered by the doctrine of fraudulent concealment, the plaintiff's claim could be barred in spite of his diligence while the

170 *Id.* at 194–95.

171 *See* O'Neill, *supra* note 94, at 215–16.

172 Ashland Oil Co. of Cal. v. Union Oil Co. of Cal., 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977).

defendant could be rewarded for his wrongful concealment. In the past, courts may have avoided this unjust outcome by applying the injury and pattern discovery rule, but, as the Supreme Court noted in *Rotella*, this general accrual rule is too broad in that it unduly extends the limitations period where it is unnecessary to do so.[173] The better approach to curing this defect in the discovery rule is to recognize an equitable exception.[174]

3. Equitable Tolling

As noted above, equitable tolling operates to toll the statute of limitations when the plaintiff, despite all due diligence, "is unable to obtain vital information bearing on the existence of his claim" such as whether his injury is due to wrongdoing or who is responsible for that wrongdoing.[175] The distinction between equitable estoppel and equitable tolling is important, because when the plaintiff pleads equitable tolling, he does not have to show wrongdoing on the part of the defendant.[176] The corollary of this principle is that under equitable tolling, the court has more discretion as to whether to toll the limitations period and if so for how long.[177] As Judge Posner explained in *Cada*, "if fraudulent concealment is shown the court must subtract from the period of limitations the entire period in which the tolling condition is in effect, for otherwise the defendant would obtain a benefit from his inequitable conduct."[178] However, because equitable tolling "adjusts the rights of two innocent parties," Judge Posner concluded that "equitable tolling should [not] bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term."[179] Instead, Judge Posner asserted that equitable tolling should be applied flexibly but somewhat reluctantly—the plaintiff should be given some extra time if he has been diligent[180] and if he needs it, but statutes of limitations serve important purposes so courts should be careful not to "trivialize [them] by promiscuous application of tolling doctrines."[181] With these concerns in mind, the Seventh Circuit held "that a plaintiff who invokes equita-

173 *See* Rotella v. Wood, 528 U.S. 549, 555 (2000).
174 *See id.* at 560–61.
175 Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990) (Posner, J.).
176 *See id.*
177 *See id.* at 452.
178 *Id.* (citation omitted).
179 *Id.*
180 *See, e.g.*, Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984).
181 *See Cada*, 920 F.2d at 453.

ble tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information."[182]

Many commentators have complained that statutes of limitations are arbitrary because they apply rigidly and uniformly to every case, sometimes barring claims where evidence is plentiful and a careful balancing of the interests at stake weighs in favor of the plaintiff, and other times allowing claims to go forward when much evidence has been lost and equities weigh in favor of repose for the defendant and society.[183] The doctrine of equitable tolling responds to this criticism, at least in part, because it allows federal courts to (in effect) extend the limitations period when the equities weigh in favor of the plaintiff. In so doing, courts are able to add some flexibility to federal statutes of limitations.

This is just the sort of flexible case-by-case approach that federal courts should use when dealing with civil RICO claims. One of the criticisms of the discovery accrual rule was that it ignored the complexity of the RICO cause of action and started the statute of limitations running before the plaintiff knew of the acts that constituted the pattern of racketeering and who was responsible for those acts.[184] When courts tried to address this problem with complex accrual rules, however, they did not adequately take into account the interests of the defendant and society in "repose, [the] elimination of stale claims, and certainty."[185] In other words, the proposed solution was overbroad. In an attempt to ensure fairness to plaintiffs, the lower courts had unnecessarily undercut the purposes of statutes of limitations. As the Supreme Court recognized, the better way to deal with this problem is not to try to devise the perfect accrual rule, but rather to look towards the third aspect of statutes of limitations—tolling. Equitable tolling is perfect for mitigating any unfairness that might result from the application of the discovery rule to civil RICO claims because it can be applied even if the defendant has not engaged in any wrongdoing and courts have great flexibility to weigh the equities in each case in order to reach the appropriate balance between the plaintiff's interests and those of defendants and society.

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182 *Id.*

183 *See* Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 117–18 (2008).

184 *See supra* text accompanying note 103.

185 Rotella v. Wood, 528 U.S. 549, 555 (2000).

B. Statutory Tolling Rules

In this subpart, the focus shifts from judge-made tolling rules to those tolling rules that have been enacted by Congress. For the purposes of this Note, there is only one relevant statutory tolling rule, that from the Clayton Act that tolls the running of the statute of limitations for private civil actions during the pendency of a civil or criminal proceeding instituted by the United States that is based on the same facts. This tolling rule was enacted in 1955 as an amendment to the Clayton Act.[186] It provides:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.[187]

The purpose of this statutory tolling rule is "to ensure that private litigants . . . have the benefit of prior Government antitrust enforcement efforts."[188] The federal courts have generally interpreted this tolling rule broadly in order to effectuate this purpose. For example: "Once the filing of a government complaint or indictment starts the tolling period, '[g]overnment litigation continues to pend against each of the defendants until concluded as to all' and thus continues to toll the limitation period against settled defendants until the litigation against all the other defendants is terminated."[189]

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186 *See* Act of July 7, 1955, Pub. L. No. 84-137, § 5(b), 69 Stat. 282, 283 (codified at 15 U.S.C. § 16(i) (2006)).

187 15 U.S.C. § 16(i) (2006). Originally, the Clayton Act did not contain a statute of limitations for civil actions. *See* Clayton Act, ch. 323, 28 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12–27 (2006)). It did, however, contain a tolling provision that suspended the applicable state statute of limitations during the pendency of a suit or criminal prosecution by the United States. *See* 15 U.S.C. § 5 (2006). Thus, before the Clayton Act even had a federal statute of limitations it had a federal tolling rule.

188 Greyhound Corp., v. Mt. Hood Stages, Inc., 437 U.S. 322, 334 (1978).

189 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 321a (3d ed. 2007).

In the previous subpart, I showed how courts could apply equitable tolling principles to RICO claims in order to temper any unfairness that results when the discovery accrual rule governs. The application of these tolling rules leads to a less disjointed, more balanced RICO statute of limitations. But, even after taking these tolling rules into consideration, the RICO statute of limitations is still incomplete. As Justice Scalia persuasively argued in *Klehr*, when the Supreme Court "adopt[s] a statute of limitations from an analogous federal cause of action [it ought to] adopt it in whole, with all its accoutrements."[190] After all, when the Supreme Court adopted the Clayton Act's four-year statute of limitations to govern civil RICO claims it was not just adopting a number. The Court specifically chose the Clayton Act's limitations period because that statute was the most analogous to RICO.[191] Based on these principles, federal courts ought to adopt for civil RICO claims the Clayton Act's statutory tolling rule, § 16(i).

This perhaps seems like an obvious point, but it is not for two reasons. First, the lower federal courts and the Supreme Court itself have resisted Justice Scalia's argument in the accrual context. Second, even if courts would be willing to follow Justice Scalia's logic in the tolling context, it seems that practitioners are unaware of this possibility. In over twenty years since the Supreme Court first adopted the Clayton Act's statute of limitations for civil RICO, only two reported cases have even mentioned the possibility of applying § 16(i) to civil RICO.[192] It seems improbable that plaintiffs are taking advantage of this tolling rule without generating any reported cases especially given the uniqueness of the issue and the sheer volume of RICO litigation.

The argument Justice Scalia put forward in *Klehr* enables lower federal courts to justifiably apply § 16(i) to civil RICO claims without being accused of legislating from the bench for, according to Justice Scalia, once a court adopts a statute of limitations by analogy, it ought to adopt it in its entirety, not just pick and choose the parts of it that the court prefers.[193] However, if it were a matter of preference, there are strong policy reasons why § 16(i) ought to be applied to RICO. First of all, this tolling rule would be good for RICO plaintiffs in the same way that it is good for antitrust plaintiffs in that it allows plaintiffs to benefit from the government's investigative work. RICO claims

190 Klehr v. A.O. Smith Corp., 521 U.S. 179, 201 (1997).

191 *See supra* notes 34–36 and accompanying text.

192 *See* Coal-Mac, Inc. v. JRM Coal Co., 743 F. Supp. 499, 501–02 (E.D. Ky. 1990); Pension Fund-Mid-Jersey Trucking Indus. v. Omni Funding Group, 687 F. Supp. 962, 963 (D.N.J. 1988).

193 *See Klehr*, 521 U.S. at 200–01.

are complex and a plaintiff may not even be aware that he has a RICO claim until the government comes out with indictments or files its own claim. Even if a plaintiff is aware that he may have a claim under RICO, he may lack the necessary resources to properly investigate his claim. Adopting this tolling rule would also be consistent with the purposes behind statutes of limitations. Once the government indicts or files its claim, the defendant is on notice and will certainly work to preserve evidence relating to the factual matter at issue. Furthermore, this tolling rule benefits society by allowing courts to avoid duplicitous litigation.

CONCLUSION

Forty years after Congress enacted RICO, courts are still struggling with statute of limitations issues. This is because courts and commentators alike have taken a piecemeal, disjointed approach to the statute of limitations instead of examining how the three aspects of the statute of limitations (length of limitations period, accrual, and tolling) work in concert. In particular, courts and commentators have been guilty of trying to solve the problems associated with the RICO statute of limitations (problems which resulted in unfairness to plaintiffs) by coming up with complex accrual rules (rules which resulted in unfairness to defendants). In this Note, I have shown how all the problems that courts and commentators have identified can be solved through the application of federal tolling rules to individual cases. This is the best solution because it is consistent with the current state of the law, and it balances the purposes of statutes of limitations with fairness to plaintiffs. I have concluded my comprehensive analysis of the RICO statute of limitations by suggesting that courts apply the Clayton Act tolling rule, § 16(i), to civil RICO claims when the United States has previously brought a RICO case based on the same facts. This is both appropriate and necessary because when a court adopts a statute of limitations it ought to adopt it in its entirety, for a statute of limitations can only be fully understood in light of when it accrues and the circumstances that toll it.