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In The
Supreme Court of the United States

October Term, 1996

MARVIN KLEHR and MARY KLEHR,
Petitioners,

vs.

A.O. SMITH CORPORATION and A.O. SMITH
HARVESTORE PRODUCTS, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF SECURITIES AND
COMMERCIAL LAW ATTORNEYS (NASCAT)
IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When does Petitioners' civil RICO claim accrue for purposes of the statute of limitations where Respondents continue to commit predicate acts which cause Petitioners additional, continuous, or accumulating injuries to their business or property within four years of bringing suit?
2. Did Respondents engage in fraudulent conduct that was self-concealing and/or subsequent acts of active concealment so as to suspend the running of the statute of limitations for Petitioners' civil RICO action under the doctrines of equitable tolling and/or fraudulent concealment?

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**BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF SECURITIES AND
COMMERCIAL LAW ATTORNEYS (NASCAT) IN
SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE

NASCAT is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee benefit, environmental, pension and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud and so-called "white collar" criminal activity. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful, fraudulent, deceptive and manipulative business practices.

NASCAT and its members have a profound interest in the scope and bases of civil liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968. NASCAT's members have represented the victims of fraudulent schemes and so-called "white collar" crime in many significant civil RICO actions filed, litigated, tried and/or settled in recent years, including *In re American Continental Corp./ Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992); *In re Crazy Eddie Sec. Litig.*, 812 F. Supp. 338 (E.D.N.Y. 1993); *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960 (C.D. Cal. 1994); and *In re Prudential Sec., Inc. Sec. Litig.*, 930 F. Supp. 68 (S.D.N.Y. 1996). Because of their years of experience representing the victims of fraudulent schemes in civil RICO actions, NASCAT's members can offer a helpful perspective to this Court in evaluating the arguments made by Petitioners and Respondents in this case, which concerns the appropriate accrual rule for the four-year statute of limitations governing civil RICO

actions, as well as the application of the fraudulent concealment and equitable tolling doctrines in such cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since this Court's decision in *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) ("*Malley-Duff*"), which held that a four-year limitations period borrowed from federal antitrust law governs civil actions brought under § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("*RICO*"), the courts have adopted conflicting rules governing *when* civil RICO actions *accrue*. This Court should adopt a uniform rule of accrual and NASCAT submits that the "last predicate act" rule elucidated in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-31 (3d Cir. 1988) should be followed.

In *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946), Justice Frankfurter stated that the equitable doctrine of fraudulent concealment "is read into every federal statute of limitations." While courts have found this doctrine applicable in antitrust cases, *see Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978), securities fraud cases, *see Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000, 1002 (7th Cir. 1984), as well as in civil RICO cases, *see McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992), the decisions of the courts below (as well as decisions rendered in other circuits) demonstrate that the parameters of applicable tolling doctrine(s) in civil RICO cases require elucidation by this Court.¹

¹ *See Klehr v. A.O. Smith Corp.*, 875 F. Supp. 1342, 1352 n.6 (D. Minn. 1995) (entering summary judgment for defendant because they "did not conceal the facts constituting the cause of action"), *aff'd*, 87 F.3d 231, 239 n.11 (8th Cir. 1996) ("We reject the Klehrs' argument that federal equitable tolling principles save their claim from being barred by the statute of limitations."), *cert. granted*, 117 S. Ct. 725 (1997).

I. ARGUMENT

A. Given The Conflicting Rules Adopted By The Circuit Courts Following This Court's Decision In *Malley-Duff*, It Is Appropriate For This Court To Elucidate A Uniform Rule Of Accrual For Civil RICO Actions

When Congress enacted RICO in 1970, it failed to institute a specific limitations period for civil actions, notwithstanding the well-recognized need for a statute of limitations. See *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting) ("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations."). In *civil* RICO cases, the applicable limitations period remained unsettled until *Malley-Duff*, which held that a uniform four-year period borrowed from the Clayton Act would be the applicable period for civil RICO claims. 483 U.S. at 156.² This Court, however, expressly refused to reach the question of *when* civil RICO claims accrue. *Id.* at 156-57.³

² See generally Donna A. Boswell, Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. Pa. L. Rev. 1447 (1987) (discussing *Malley-Duff* in the context of federal jurisprudence on statutes of limitations); see also *Special Project - Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1084-94 (1980) (discussing qualifications to time bars, including accrual and tolling doctrines).

³ "Accrual" refers to the point at which a cause of action may be maintained. Black's Law Dictionary 20-21 (6th ed. 1990). The start of a limitations period and the accrual of a cause of action are terms that are often used synonymously by many courts. See *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 338 (1971) ("Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."); *United States v. Kubrick*, 444 U.S. 111, 122

In the wake of *Malley-Duff*, the circuits have split on the question of *when* the four-year limitations period begins to run in a civil RICO action and, several differing theories of accrual have been elucidated. See *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.) (collecting cases), *cert. granted*, 116 S. Ct. 2521 (1996), *cert. dismissed*, No. 95-1722 (Jan. 14, 1997); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 152 (8th Cir. 1991) (describing “smorgasbord of civil RICO accrual rules” from which to select most appropriate rule).⁴ While there is some common ground because each circuit has “incorporated the principle of discovery into the accrual rule governing civil RICO actions in the particular circuit,” *id.* at 153, the circuits disagree about “what the plaintiff must actually or constructively know before the limitations period will start to run.” *Id.* The existing rules provide widely varying periods of time

(1979) (under Federal Tort Claims Act, cause of action has accrued if “a plaintiff [is] in possession of the critical facts *that he has been hurt and [knows] who has inflicted the injury*”) (emphasis added); *id.* at 126 (Stevens, Brennan & Marshall, JJ., dissenting); but see *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987) (in cases where *fraud* is alleged, claim accrues when plaintiff suffers injury, but statute of limitations does not run until claim is *discovered*). Federal law governs when civil RICO claims accrue. See *Cope v. Anderson*, 331 U.S. 461, 464 (1947).

⁴ For commentary on the various accrual rules and their ramifications in civil RICO litigation, see G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability*, 33 Am. Crim. L. Rev. 1345 (1996); Douglas E. Abrams, *The Law of Civil RICO* § 2.4 (Little Brown & Co. 1991 & Cum. Supp. 1996) (“Civil RICO”); 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 (1990) (“Proper Point of Accrual”); Mary S. Humes, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990) (“Uniform Rule of Accrual”); Edwin Scott Hackenberg, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 La. L. Rev. 1411 (1988) (“Accrual of Civil RICO Claims”).

within which an injured person may investigate and bring a civil RICO action. NASCAT submits that this Court should adopt a uniform rule governing such actions. Although the majority of the courts have adopted "injury discovery" and "injury and pattern discovery" rules, *see* Part III.B, *infra*, given their inherent limitations this Court should follow the "last predicate act" accrual rule announced by the Third Circuit in *Keystone*, 863 F.2d at 1130-33, because it fulfills the public policies underlying RICO and correctly characterizes a civil RICO action as a remedy designed to compensate victims and punish perpetrators of a *continuing* violation of federal and/or state law. *See* Part III.C, *infra*.

B. While The Majority Of The Circuit Courts Have Adopted The So-Called "Injury Discovery" And "Injury And Pattern Discovery" Rules, Their Inherent Limitations Weigh Against Their Adoption By This Court

The First, Second, Fourth, Fifth, Seventh, Ninth and D.C. Circuits employ an *injury*-based accrual rule, holding that a civil RICO action accrues at the time plaintiff *discovered* or should have discovered his, her, or its *injury*. *See Grimmatt*, 75 F.3d at 511 ("The limitations period [for civil RICO actions] begins to run when a plaintiff knows or should know of the injury which is the basis for the action.") (citation omitted).⁵ Under this rule, however, a

⁵ *Accord Rodriguez v. Banco Cent.*, 917 F.2d 664, 665 (1st Cir. 1990) (Breyer, Ch.J.) ("[T]he statute begins to run when a plaintiff discovered, or should have discovered, his injury."); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988) (same); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (RICO's limitations period "begins to run when a plaintiff knows or should know of the injury that underlies his cause of action."); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool*, 972 F.2d at 1464-65; *Volk*, 816 F.2d at 1415; *Riddell v. Riddell Washington*

RICO plaintiff "need not discover that the injury is part of a 'pattern of racketeering' for the period to begin to run." *Grimmett*, 75 F.3d at 510 (quoting *McCool*, 972 F.2d at 1465).

The potential injustice of the "injury discovery" rule may be illustrated by a simple hypothetical: Suppose plaintiff suffers an injury to his business or property in 1990 when defendant commits an illegal act which constitutes a predicate act of "racketeering activity."⁶ Assume that plaintiff *discovers* that injury to his business or property in 1994. Although injured, where the "injury discovery" rule is followed, plaintiff cannot bring a civil RICO action at this point because there is as yet no "pattern of racketeering activity" that can be properly alleged; even under the most liberal interpretation of the pattern requirement, *two* predicate acts are necessary.⁷ Assume

Corp., 866 F.2d 1480, 1489-90 (D.C. Cir. 1989); *see also* *Abrams*, *Civil RICO* § 2.4, at 61 ("A civil RICO claim accrues when the plaintiff discovered or had reason to discover the proprietary injury that is the basis of the claim.") (footnotes and citations omitted).

⁶ *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to include such offenses as bribery, arson, extortion, and threats to commit any of the above, as well as other activities already criminalized elsewhere in the U.S. Code, such as mail fraud, wire fraud, interstate transportation of stolen property, embezzlement and bankruptcy fraud).

⁷ *See* 18 U.S.C. § 1961(5) (defining "pattern of racketeering activity"); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) ("[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity."); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) ("It is the factor of *continuity plus relationship* which combines to produce a pattern. . . . '[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing

further that plaintiff sustains *another injury* to his business or property caused by another predicate act committed by defendant; plaintiff discovers the *second* injury in 2000 and then files a civil RICO action. Under the "injury discovery" accrual rule, plaintiff would be unable to recover in that action for the 1994 injury, even though he sustained two injuries caused by predicate acts of racketeering occurring within ten years of each other, the baseline requirement for a civil RICO claim. Courts applying this accrual rule would hold that the 1994 discovery triggered the four-year limitations period, so plaintiff's civil RICO claim became time-barred in 1998, before he could even allege a pattern of racketeering activity that included the second predicate act and resulting injury. *See State Farm Mut. Auto Ins. Co. v. Ammann*, 828 F.2d 4, 4-5 (9th Cir. 1987). As a result, the "injury discovery" rule has been subject to well-justified criticism,⁸ and there is no compelling reason why such a restrictive accrual rule should be adopted by this Court.

characteristics and are not isolated events.'") (emphasis in original, citation omitted).

⁸ *See* O'Neill, *Proper Point of Accrual*, 65 N.Y.U. L. Rev. at 205-06 ("[U]nder the discovery rule it is possible that a plaintiff could discover an injury caused by a defendant's racketeering act and have the statute of limitations run on that injury prior to the time of the commission of the second predicate act necessary to perfect plaintiff's right to relief under the statute. The RICO plaintiff might have part of his cause of action barred before he ever has the opportunity to sue.") (footnote omitted); Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1410 (noting that the "injury discovery" accrual rule "may clash with the pattern [of racketeering activity] requirement" because "[i]f the claim accrues after the first injury but before the plaintiff can state a pattern, plaintiff may be time barred before he can state a claim. . . . Because of this defect, the discovery rule cannot be reconciled completely with the pattern requirement of RICO and is therefore not the best accrual rule for RICO actions.") (footnote omitted).

The rule followed in the Third, Eighth, Tenth and Eleventh Circuits applies the general discovery rule to both the "pattern" and "injury" elements of the civil RICO cause of action. As the court below stated: "This circuit employs a discovery accrual standard to civil RICO claims; under this standard, such an 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.'" 87 F.3d at 238 (emphasis added, citation omitted). In the words of the Eleventh Circuit:

[W]ith respect to each independent injury to the plaintiff, 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. . . . Because a civil RICO plaintiff must prove that his injury is part of a pattern of racketeering activity, an injured party must know, or have reason to know, that his injury is part of a pattern before he can be expected to file a civil RICO cause of action.

Bivens Gardens Office Bldg. v. Barnett Bank, 906 F.2d 1546, 1554-55 (11th Cir. 1990) (emphasis added).

Muddying the rough distinction between these accrual rules (*i.e.*, injury-based accrual *versus* injury-and-pattern-based accrual) is the fact that courts in both groups utilize a "separate accrual" rule.⁹ Application of

⁹ In his concurrence in *State Farm*, 828 F.2d at 5, then-Judge Kennedy first applied the "separate accrual" rule in the RICO context:

The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and the other acts were committed outside the limitations period. A corollary rule is that damages may not be recovered for injuries

this doctrine was illustrated in *Bankers Trust*, where the plaintiff bank alleged that the defendant officers of a bankrupt corporation: (1) wrongfully concealed assets during a 1974-76 bankruptcy proceeding; (2) conducted harassing lawsuits in 1978-79 to prevent plaintiff from vacating the fraudulently obtained bankruptcy plan; and (3) fraudulently conveyed property in 1981. 859 F.2d at 1098-99. The bank incurred various legal fees and expenses over time, besides the loss of the underlying debt.¹⁰ Observing that in enacting RICO, Congress had in mind the possibility of "multiple and independent [injuries] that occur over a broad span of time," the Second Circuit held that a rule permitting a new cause of action to accrue with each such injury was "[t]he logical end result." *Id.* at 1103. The court adopted the separate accrual rule and found that the final two injuries were

sustained as a result of acts committed outside the limitations period.

Id. (citations omitted). To date, some form of the "separate accrual" rule has been adopted by the First, Second, Seventh, Eighth, Tenth and Eleventh Circuits. *See, e.g., Rodriguez*, 917 F.2d at 666; *Bankers Trust*, 859 F.2d at 1102; *McCool*, 972 F.2d at 1464-66; *Granite Falls*, 924 F.2d at 154; *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990); *Bivens Gardens*, 906 F.2d at 1554-55; *see also Grimmett*, 75 F.3d at 510-11 (collecting cases); Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1411-13.

¹⁰ In *Bankers Trust*, the court held that the bank's claim for some of the damages caused by defendants' fraud was too speculative and, therefore, unrecoverable. Because the bankruptcy proceeding was not yet concluded, it was not clear what proportion of its loss the bank would ultimately recover. Its injury, therefore, could not yet be determined. As a result, the nature and amount of its damages was unprovable and, even though the fraud had occurred in 1974, the bank's cause of action for these damages had yet to accrue in 1988. 859 F.2d at 1106.

"independent" of the first and, therefore, not time-barred. *Id.* at 1102-05.¹¹

Another version of the "separate accrual" rule was recognized in *Bivens Gardens*, where defendants were accused of committing three sets of predicate *acts*: (1) a wrongful takeover of a limited partnership in 1975; (2) mismanagement and diversion of the partnership's assets from 1975 to 1981; and (3) sale of a hotel, the partnership's primary asset, at below fair market value in 1981. 906 F.2d at 1549-51. The Eleventh Circuit held that the mismanagement and subsequent sale of the hotel were "new and independent" *acts* because they "[were] not included among the injuries that naturally flow from the wrongful takeover [in 1975]." 906 F.2d at 1551. Therefore, the "separate accrual" rule includes *both* further *predicate acts* committed by defendant and further *injuries* sustained by plaintiff:

if further predicate acts occur that are part of the same pattern of racketeering, regardless of whether they injure the plaintiff, or if the plaintiff suffers further injury from a predicate act that is part of the same pattern of racketeering, even if that predicate act occurred outside the limitations period, the statute of limitations begins to run

¹¹ A necessary corollary of the separate accrual rule is that plaintiff may only recover for injuries discovered (or discoverable) within four years of the time when suit is brought. See *Bankers Trust*, 859 F.2d at 1104-05. "As long as separate and independent injuries continue to flow from the underlying RICO violations – regardless of when those violations occurred – plaintiff may wait indefinitely to sue, but may then win compensation only for injuries discovered or discoverable within the four-year 'window' before suit was filed, together, of course, with any provable future damages." *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1418 (1996) (citing *Bankers Trust*, 859 F.2d at 1103). See also *Cruden v. Bank of New York*, 957 F.2d 961, 977 (2d Cir. 1992); *In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105, 1116-19 (S.D.N.Y. 1993).

from the date that the plaintiff knew or should have known of the last such act or the last such injury.

Davis v. Grusemeyer, 996 F.2d 617, 623 (3d Cir. 1993) (emphasis added) (citing *Keystone*, 863 F.2d at 1126).¹² In application, however, courts have required RICO plaintiffs to allege and prove "new," "independent," or "distinct" injuries, rather than recognize that further predicate acts committed by defendant revive a RICO cause of action, if they are part of the same pattern. The court below ignored Petitioners' allegations of a continuing pattern of racketeering activity committed by defendants, holding that "continuing damage" sustained by Petitioners "into the limitations period through the continued use, operation, and repair of the Harvestore silo" did not revive their civil RICO claims, and stating that "these separate, discrete 'injuries' that the Klehrs identify are more appropriately categorized as one single, continuous injury that was sustained sometime in the 1970s and for which the limitations period commenced long before August 27, 1989." 87 F.3d at 239 (citing *Glessner v. Kenny*,

¹² In *McCool*, the Seventh Circuit misstated this doctrine, emphasizing that "[u]nder a separate accrual rule, a new cause of action accrues only when there is a new instance of wrongful conduct and a new injury." 972 F.2d at 1465 n.10 (emphasis in original). In *Malley-Duff*, 483 U.S. at 150, this Court stated that the Clayton Act provides the closest analogy to RICO and, while actions brought under the Clayton or Sherman Acts do not require a "pattern," antitrust law recognizes the ongoing nature of antitrust violations. While an antitrust violation normally accrues when defendant commits an act that injures plaintiff's business, see *Zenith Radio*, 401 U.S. at 338, courts have carved out an exception to this accrual rule in the case of a continuing violation. See *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 495 (1968). Each violative act triggers a new limitations period and plaintiff may recover damages for those acts that occurred in the four years immediately preceding the filing of the claim. *Zenith Radio*, 401 U.S. at 338; *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300 (9th Cir. 1986).

