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THE TIME-EXPIRED CIVIL RICO CLAIM AND SUBSEQUENT PREDICATE ACTS

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The expansive language and alluring remedies of the Racketeer Influenced and Corrupt Organizations Act (RICO),[1] have made RICO a seductive statute under which to sue. RICO is not, as its name would imply, limited to traditional concepts of racketeering and organized crime.[2] Through the liberal interpretation courts have given RICO,[3] it has made a foray into otherwise common disputes.[4] Although courts have cultivated a generous body of law interpreting RICO,[5] fundamental issues remain unresolved regarding the point at which a civil RICO claim accrues for the purpose of the statute of limitations and the repercussions of continued racketeering activity.

In *Agency Holding Corp. v. Malley-Duff & Associates*,[6] the United States Supreme Court held that a civil RICO claim must be brought within four years after the cause of action accrues. The Court expressly declined, however, to determine when a RICO claim accrues so as to begin the running of the four-year limitation period.[7] Consequently, many questions remain. This Article focuses on one such question: once the four-year statute of limitations on an accrued RICO claim has run, of what significance is a subsequent "predicate act"[8] in the same pattern of racketeering activity?

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1. 18 U.S.C. §§ 1961-1968 (1988).

2. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 241-42 (1987); Melly, *Stretching Civil RICO: Pro-life demonstrators are racketeers*, 56 U.M.K.C. L. REV. 287 (1988); Comment, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 LA. L. REV. 1411, 1413 n.13 (1988).

3. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985).

4. *See* Note, *RICO and a Uniform Rule of Accrual*, 99 YALE L.J. 1399, 1399 n.5 (1990).

5. For a quantitative review of the use of RICO, see *Task Force Report on Civil RICO*, A.B.A. SEC. CORP. BANKING AND BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE (1984).

6. 483 U.S. 143, 156 (1987).

7. *Id.* at 156-57; Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1273 n.12 (10th Cir. 1989).

8. In this Article, I use the term "predicate act," to refer to an instance of conduct which, when coupled with a second "predicate act," constitutes a RICO "pattern of racketeering activity." Under RICO, a pattern comprises two predicate acts committed no more than ten years apart. 28 U.S.C. § 1961(5) (1988). Although injury is not a necessary ingredient under all definitions of predicate act, in this Article, unless otherwise expressed, I assume that for each predicate act there is an accompanying and contemporaneous injury, and that the predicate acts are related and amount to or pose a threat of continued racketeering activity. *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989); *Phelps*, 886 F.2d at 1273. *See also* Enzo Biochem, Inc. v. Johnson & Johnson, No. 87 CIV 6125 (S.D.N.Y. Sept. 13, 1990) (LEXIS Genfed library, Dist file) (addressing causation).

There are many possible answers to that query. At one extreme, for example, a predicate act committed after the statute of limitations has run on prior predicate acts may save an otherwise barred claim and allow a plaintiff to recover for injuries sustained as a result of all previous predicate acts. At the other extreme, a plaintiff may lose all hope of recovering for the injuries incurred as a result of the previous predicate acts. The Tenth Circuit had an opportunity to address this question in *Bath v. Bushkin, Gaims, Gaines & Jonas*.[9] The Tenth Circuit, however, gave only a glimpse of what may be.

This Article looks at the possible rules and concludes that the best approach lies between the extremes of resurrecting the entire cause of action (including expired predicate acts), and banishing the claim altogether. I begin with a brief analysis of the competing RICO claim accrual rules and the Tenth Circuit's selection among them. Although more may be said on the virtues and evils inherent in each of the differing approaches to accrual.[10] I focus on the rule selected by the Tenth Circuit, and the unaddressed issue of the subsequent predicate act and its impact on the time-barred RICO claim.

I. THE COMPETING APPROACHES TO RICO CLAIM ACCRUAL

Since the Supreme Court's decision in *Malley-Duff*, many federal circuit courts have crafted methods to determine when a RICO claim accrues,[11] including the Tenth Circuit in *Bath*. Typically, a cause of action accrues when a plaintiff knows or should know of the existence of the elements of the claim.[12] The elements of a RICO claim[13] are: (1) conduct, (2) of an enterprise, (3) through a pattern of racketeering activity, (4) which injures plaintiff's business or property.[14] The awkward nature

9. 913 F.2d 817 (10th Cir. 1990) (reversed in part on other grounds in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), as stated in Anixter v. Home-stake Prod. Co., Fed. Sec. L. Rep. (CCH) ¶ 96,128 (10th Cir. July 22, 1991)). Before *Bath*, one district court within the Tenth Circuit confronted the RICO accrual question. Indianapolis Hotel Investors, Ltd. v. Aircoa Equity Interests, Inc., 733 F. Supp. 1406, 1408-10 (D. Colo. 1990) (civil RICO claim accrues when plaintiff knows or should know of existence of all elements including pattern).

10. For a more complete comparison of the rules and their variations, see Note, *supra* note 4, at 1409-17; Comment, *supra* note 2, at 1413-21; Note, *"Mother of Mercy, is this the Beginning of RICO:" The Proper Point of a Private Civil RICO Action*, 65 N.Y.U.L. REV. 172 (1990).

11. The First, Second, Third, Fourth, Fifth, Eighth, Ninth and Eleventh Circuits have grappled with the issue. Rodriguez v. Banco Central, 917 F.2d 664, 665-68 (1st Cir. 1990); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102-05 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); Keystone Ins. Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987); La Porte Constr. Co. v. Bayshore Nat'l Bank, 805 F.2d 1254, 1256 (5th Cir. 1986); Granite Falls Bank v. Henrikson, 924 F.2d 150, 152-55 (8th Cir. 1991); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984); Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986).

12. *Indianapolis Hotel*, 733 F. Supp. at 1409. The plaintiff need not comprehend the legal implications, however. *See Keystone*, 863 F.2d at 1128.

13. These are the elements of the vast majority of RICO actions. *See* Note, *supra* note 4 at 1400 & n.8.

14. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985); Bivens Gardens Office

of a RICO claim, specifically the requirements of pattern and injury, is the source of difficulty that courts have had with delineating the point of accrual.[15]

Courts have developed essentially three distinct accrual rules.[16] The first and most common approach among the circuits is the "discovery" rule.[17] This rule provides that a civil RICO claim accrues when a plaintiff knows or should know of the injury resulting from the defendant's conduct. This is the default approach used in federal actions where Congress has not designated an alternative rule.[18]

The second approach is termed the "last injury" rule.[19] This rule provides that each time a plaintiff suffers an injury caused by a predicate act, a new cause of action accrues as to that injury when the plaintiff knows or should have known of that injury. The analysis behind this rule is enticing because it flows from the Clayton Act,[20] which is the source for the four-year statute of limitations.[21] The heart of the last injury rule, like the discovery rule, is in the discovery of injury.

The third approach is called the "last predicate act" rule.[22] Under this rule, a RICO claim accrues upon the commission of the latest predi-

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Bldg., Inc. v. Barnett Bank, 906 F.2d 1546, 1553 n.10 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991); Phelps v. Witchita Eagle-Beacon, 886 F.2d 1262, 1273 (10th Cir. 1989).

15. *See* Note, *supra* note 4, at 1400 ("[o]n the face of [RICO], it is unclear whether plaintiff's cause of action accrues upon injury resulting from one act of such pattern or whether the claim accrues after plaintiff can allege a pattern of racketeering activity.").

16. Some commentators purport to have identified more than three. *See, e.g.*, Note, *supra* note 4, at 1409 (defining 5 approaches); Comment, *supra* note 2, at 1413 (4 approaches). Except for the so-called "Clayton Act" rule, all the approaches identified are variations of the discovery, last injury and last predicate act rules. The Clayton Act rule has found a home in only a few courts, *see, e.g.*, Gilbert Family Partnership v. Nido Corp., 679 F. Supp. 679, 686 (E.D. Mich. 1988); Armbrister v. Roland Int'l Corp., 667 F. Supp. 802 (M.D. Fla. 1987), and has been criticized. Note, *supra* note 4, at 1416-17; Comment, *supra* note 2, at 1427. Furthermore, the Clayton Act rule, in practice, may function the same as the discovery rule. *See* Rodriguez v. Banco Central, 917 F.2d 664, 666 (1st Cir. 1990); Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1134 (3d Cir. 1988); *cf.* Comment, *supra* note 2, at 1421. For a more detailed review of the Clayton Act rule, see *Bivens Gardens*, 906 F.2d at 1551 & n.9 (and cases cited therein).

17. *See, e.g.*, Riddell v. Riddell Wash. Corp., 866 F.2d 1480, 1489-90 (D.C. Cir. 1989); Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 274-76 (9th Cir. 1988); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987); La Porte Constr. Co. v. Bayshore Nat'l Bank, 805 F.2d 1254, 1256 (5th Cir. 1986); Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986); Alexander v. Perkin Elmer Corp., 729 F.2d 576, 577-78 (8th Cir. 1984); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984). *See also* Zablocki v. Huber, 743 F. Supp. 626, 628 (E.D. Wis. 1990); Coal-Mac, Inc. v. JRM Coal, Co., 743 F. Supp. 499, 500 (E.D. Ky. 1990).

18. *See* United States v. Kubrick, 444 U.S. 111, 117-23 (1979).

19. *See, e.g.*, Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102-05 (2d Cir. 1988).

20. 38 Stat. 731, 15 U.S.C. § 15 (1988) (current version at —).

21. In adopting the statute of limitations period applicable to Clayton Act actions, the Supreme Court in *Malley-Duff* concluded that the Clayton Act "offers a far closer analogy to RICO than any state law alternative." Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 150 (1987). *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991) (adopting uniform federal statutory limitations period for actions under section 10(b) of the Federal Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Security Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1990)).

22. *See, e.g.*, Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1130-35 (3d Cir. 1988).

cate act in the pattern of racketeering. The statute of limitations begins to run from the date plaintiff knew or should have known of the facts that comprise the elements of a civil RICO cause of action. The clock is reset, however, if a later predicate act is committed within ten years of a previous predicate act and the later predicate act is part of the same racketeering pattern. [23]

II. THE TENTH CIRCUIT

In *Bath*, the Tenth Circuit reversed the trial court's use of the discovery rule, concluding that the discovery rule and the last injury rules were incomplete. Because both rules emphasize knowledge of injury to the exclusion of pattern,[24] the court adopted the Eleventh Circuit rule "that with 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."[25]

Although *Bath* makes it clear that the plaintiff must have known or should have known of the injury as well as the pattern before the statute of limitations will begin to run on a RICO claim, *Bath* fails to articulate how or when a RICO claim expires when there are three or more predicate acts. The ambiguity of *Bath* is best illustrated by Figures 1 and 2 of the appendix.

Figure 1 provides a time-line scenario of four RICO predicate acts and injuries (PA I through PA IV). Figure 2 provides a matrix summarizing the different results of each rule discussed in this Article. The conclusions drawn in Figure 2 from the time-line scenario in Figure 1 rely on the following postulates:

> (1) at the time of each predicate act and accompanying injury, the plaintiff knew or should have known of the predicate act and accompanying injury;
> (2) at the time of each predicate act and accompanying injury, the plaintiff had not brought a RICO action on any previous predicate act and accompanying injury.

Referring to Figure 1, *Bath* makes it clear that if, in Year 1, the plaintiff knows of Predicate Act I, he still has no RICO claim. This is because there is no pattern, only a single predicate act. If, in Year 9, however, the plaintiff learns or should have learned of Predicate Act II, he has a RICO claim in Year 9 and must bring an action in four years. If, by Year 14, the plaintiff still has not brought the RICO claim based on Predicate Acts I & II, then that claim is barred.

The ambiguity in *Bath* arises if, in Year 15, the plaintiff discovers or

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23. *See* Note, *supra* note 4, at 1413-14.

24. Bath v. Bushkin, 913 F.2d 817, 820-21 (10th Cir. 1989).

25. Bivens Gardens Office Bldg., Inc. v. Barnett Bank, 906 F.2d 1546, 1554-55 (11th Cir. 1990). The last predicate act rule was first adopted within the Tenth Circuit in Indianapolis Hotel Investors, Ltd. v. Aircoa Equity Interests, Inc., 733 F. Supp. 1406, 1408-10 (D. Colo. 1990).

should have discovered Predicate Act III. It may be that the plaintiff has a RICO claim based on all three predicate acts. Alternatively, he may be able to premise the claim on only the second and third predicate acts. Perhaps the plaintiff would have a cause of action, but would be able to recover for the injuries resulting from only certain predicate acts. It may also be that there would be no RICO cause of action for any of the injuries or predicate acts. The number of possible outcomes is limited only by the number of predicate acts and resulting injuries.[26]

Bath provides district courts and the bar little guidance as to which of the myriad of possible outcomes is proper. The decision does not address this important yet subtle RICO claim accrual issue except in a footnote.[27] There, the panel in *Bath* quotes from the Third Circuit's opinion in *Keystone Ins. Co. v. Houghton*.[28] In *Keystone* the Third Circuit held:

> The rule which we announce provides that the limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of the civil RICO cause of action existed unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern. If the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by other predicate acts which occurred outside an earlier limitations period but which are part of the same "pattern."[29]

It is premature to assume, however, that the Tenth Circuit has concluded more than that trial courts within the Circuit are to apply the last predicate act rule. First, the issue of whether a third predicate act may give rise to a RICO claim otherwise barred by the four-year limitations period was not before the court. Second, except for the footnote, the court never discussed the issue. Finally, the court quoted *Keystone* only as a summarization of the holding in *Bivens Garden*, which the Tenth Circuit adopted. Consequently, based solely on *Bath*, it is impossible to draw any conclusion beyond the Tenth Circuit's rejection of the discovery and last injury rules.

To the extent, however, that *Bath* does adopt the *Keystone* approach, the Tenth Circuit should repudiate that decision. By allowing a subsequent predicate act to resurrect recovery for otherwise time-barred predicate acts, *Keystone* protracts the four-year limitations period of *Mal-*

26. For each predicate act, the court is presented with the choice of either allowing or barring recovery for the accompanying injury. In addition, for each predicate act, the court must decide whether that act is within the pattern of racketeering.

27. *Bath*, 913 F.2d at 820 n.2.

28. 863 F.2d 1125 (3d Cir. 1988).

29. *Id.* at 1130-31.

ley-Duff, stretches further the already strained reach of RICO, and distorts the point of accrual, rather than promoting certainty. The better approach is to preclude recovery for the injuries arising from the predicate acts for which the plaintiff failed to sue timely, but allow recovery for the injuries incurred as a result of any subsequent predicate acts.

III. RESOLUTION

The Tenth Circuit's conclusion that a RICO claim will not accrue unless the plaintiff knew or should have known not only of his injury, but also of a pattern of predicate acts, is well reasoned.[30] The conclusion left the accrual puzzle incomplete, however, by failing to determine how a time-barred RICO claim interacts with a subsequent predicate act in the same pattern of racketeering.

I undertake that task by first looking to the possible rules governing the impact of the hypothetical Predicate Acts III & IV. I then conclude that a predicate act should not resurrect a time-barred RICO claim and allow a slothful plaintiff to recover for the injuries arising from the predicate acts that form the otherwise expired RICO claim. The harshness of this result is tempered because a plaintiff may recover under RICO for the injury sustained as a result of the last predicate act.

A. *Managing Predicate Acts Committed after the Statute of Limitations has Run*

Although the number of methods to manage predicate acts committed subsequent to the expiration of the statute of limitations depends on the number of predicate acts involved,[31] there are four fundamental approaches. Under the Third Circuit's analysis in *Keystone*, the plaintiff would be able to bring a RICO claim even after the limitations period has run as to Predicate Acts I & II, so long as he sued no more than four years after he learned or should have learned of Predicate Act III. Furthermore, the plaintiff may recover for his injuries sustained from Predicate Acts I & II, and need not have suffered injury from Predicate Act III. Likewise, he could sue on Predicate Act IV and recover for all predicate acts even though the statutory period ran on a suit relying solely on Predicate Acts I, II & III, so long as he sued within four years of Predicate Act IV. I refer to this as "*Keystone* Resurrection."

A second technique is to divest the predicate acts upon which the plaintiff could have sued, but did not, of any legal significance. The theory is that, because the plaintiff failed to sue on Predicate Acts I & II, they no longer function as predicate acts in the pattern. Thus, the passing of the time limitations for the RICO action based on Predicate Acts I & II not only precludes the plaintiff from recovering under RICO for those acts, but those acts actually lose their status as predicate acts. The

30. *See* Note, *supra* note 4, at 1418 (concluding RICO statute of limitations should run "from the discovery of the last predicate act of the defendant. . . .").

31. *See supra* note 26.

consequence of this approach can be severe. If there is no Predicate Act IV, the plaintiff will have no RICO claim at all. This is because the time-barred predicate acts have lost their status as part of a RICO pattern and, therefore, the plaintiff cannot avail himself of the previous predicate acts to establish a pattern.[32] Under this theory, Predicate Act III is essentially the first predicate act in a new pattern of racketeering activity and a new RICO claim will accrue only if there is a Predicate Act IV. I refer to this as "Complete Expiration."

A third rule is that the plaintiff may recover for Predicate Act III and any predicate acts committed ten or fewer years before Predicate Act III, if suit is brought within four years of Predicate Act III. This approach turns on the fact that Congress has chosen to define "pattern" as two predicate acts committed within ten years of each other. Congress has thus concluded that an act committed more than ten years before other predicate acts is too stale to be considered part of a *pattern*. Likewise, it may be that a predicate act committed more than ten years before the most recent predicate act is too stale for the purposes of *recovery*. If this approach were adopted, the plaintiff could recover not only for the injury incurred as a result of Predicate Act III, but also for the injury arising from Predicate Act II, which would only be five years old at the time of Predicate Act III. He could not, however, recover for the injury incurred as a result of Predicate Act I, which would be thirteen years old at the time of Predicate Act III. Likewise, if suit were brought within four years of Predicate Act IV, the plaintiff could recover for Predicate Acts II & III in addition to Predicate Act IV. I refer to this as the "Ten-Year Radius."

This rule functions exactly the same as the *Keystone* Resurrection rule if one accepts the contention that Congress created a statute of repose by defining "pattern" as two predicate acts committed within ten years of each other. It may be, as one commentator implies,[33] that a plaintiff may never recover for any predicate act and its attendant injury if ten years have passed since it was or should have been discovered. This problem could arise in certain cases. Figure 1 provides an example where:

(1) Predicate Acts I & II are less than ten years apart;
(2) Predicate Acts II & III are less than ten years apart; and
(3) Predicate Acts III & IV are less than ten years apart.

If a pattern comprises only acts committed no more than ten years from *the most recent* predicate act, then:

(1) At the time of Predicate Act III, Predicate Act I has no legal significance for the purposes of RICO (only Predicate Acts II & III comprise a pattern); and
(2) At the time of Predicate Act IV, Predicate Act I has no

32. Plaintiff may, of course, have legal theories other than RICO on which to recover for the predicate acts.

33. Comment, *supra* note 2, at 1423.

> legal significance for the purpose of RICO (only Predicate Acts II, III & IV comprise the pattern).

Predicate Act I is omitted from the pattern because it was committed more than ten years before Predicate Acts III & IV.

This interpretation of the definition of pattern imposes what is essentially a ten-year statute of repose on each predicate act; after ten years, a predicate act of which plaintiff knows or should know loses all RICO significance. This interpretation also converts the *Keystone* Resurrection rule into the Ten-Year Radius rule because, after ten years, a predicate act is not related to the pattern. To fully develop the different possible rules to deal with subsequent predicate acts here, it is assumed that there is no ten-year statute of repose. This assumption is not without basis.

First, the language of RICO does not require the imposition of a ten-year statute of repose. The definition of "pattern of racketeering activity" is two specified acts "the last of which occurred within ten years . . . after the commission of a prior act."[34] This definition, however, in no way ordains that a "pattern" could not comprise three predicate acts, the last of which is more than ten years apart from the first, so long as the second predicate act is no more than ten years from both the first and third predicate acts.[35] Second, even assuming that one could strain to construe RICO to impose a statute of repose, such an interpretation would be inconsistent with the liberal reading mandated by "Congress' self-consciously expansive language and overall approach. . . ."[36]

A fourth rule is that Predicate Act III will not allow the plaintiff to recover for the injuries incurred as a result of Predicate Acts I & II. Predicate Acts I & II will, however, serve as predicate acts for the purpose of establishing that Predicate Act III was part of a pattern. As one district court has concluded:

> The rule I adopt closely follows that of *Keystone Ins. Co.*, except that once the claim accrues, a plaintiff must bring an action in four years. A subsequent violation, beyond the four year time period, will not resurrect a RICO cause of action for the previous violations even if in the same pattern of racketeering activity and even if a plaintiff is thereby injured. The rule is liberal in that a defendant must show that a plaintiff knew or should have known of the existence of each element of the RICO claim, not simply injury. On the other hand, the rule is consistent with the underlying purpose of a statute of limitation because it promotes certainty and does not encourage a plaintiff

34. 18 U.S.C. § 1961(5) (1988).

35. *See* Rodriguez v. Banco Central, 917 F.2d 664, 666-67 (1st Cir. 1990) (hypothesizing that series of predicate acts two years apart may create pattern for "thirty or forty years" under last predicate act accrual rule).

36. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985). *See* Pub. L. No. 91-452 § 904(a), 84 Stat. 942, 947 (1970) (codified at 18 U.S.C. § 1961 (1982)) (congressional instruction to judiciary that RICO "shall be liberally construed to effectuate its remedial purposes."); Bivens Gardens Office Bldg., Inc. v. Barnett Bank, 906 F.2d 1546, 1555 n.11 (11th Cir. 1990).

> to sleep on an accrued right to bring an action. Consequently, under the rule adopted here, a subsequent predicate act after expiration of the statute of limitations will not save a slothful claimant by reviving the claim.[37]

Under this formulation, the plaintiff, injured as a result of Predicate Act III, may recover under RICO for that injury if he brings suit within four years of Predicate Act III. He would not, however, recover for the injuries incurred as a result of Predicate Acts I & II.[38] Furthermore, if he failed to bring an action on Predicate Act III within four years of that act, he would not recover under RICO for the injury incurred as a result of Predicate Act III, even if there is a subsequent Predicate Act IV. The plaintiff would, of course, be able to recover for the injury sustained as a result of Predicate Act IV if he brought suit within four years of that act, although he would not recover for any of the prior acts. Thus, a predicate act on which the limitations period has run retains its utility as an act to define a pattern, but has no value in calculating damages or establishing injury. I refer to this as "Injury Expiration."

B. *Recommendation*

Of the four approaches, the Injury Expiration rule functions consistently with the goals of RICO and the principles of time limitation. The four-year limitations period set forth in *Malley-Duff* is left hollow under the *Keystone* Resurrection rule. As Figures 1 and 2 illustrate, under *Keystone* Resurrection, if a slothful plaintiff knowingly allows the RICO claim based on Predicate Acts I & II to expire, he is still granted a fresh four-year period in which to sue by Predicate Act III, and again by Predicate Act IV. Consequently, he could recover for Predicate Acts I & II even though the statute of limitations ran twice.[39]

Arguably, the expansive language of RICO should save the claim of a delinquent plaintiff. After all, if a defendant maintains a course of racketeering activity, justice may demand payment for the totality of illegal conduct. *Keystone* Resurrection, however, conflicts directly with the objective of *Malley-Duff* to provide a certain and uniform expiration period. By reviving a claim otherwise barred, *Keystone* Resurrection introduces further disarray and speculation.

Complete Expiration, on the other hand, is inconsistent with the remedial purposes of RICO. Its main flaw is that it deprives predicate acts of their function as elements of a pattern. A plaintiff may not wish to bring suit on Predicate Acts I & II, but, upon discovery of Predicate Act III, decide that suit is appropriate. Complete Expiration would deprive him of that option unless a fourth predicate act was committed.

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37. Indianapolis Hotel Investors, Ltd. v. Aircoa Equity Interests, Inc., 733 F. Supp. 1406, 1409 (D. Colo. 1990).

38. *See* Comment, *supra* note 2, at 1415-16.

39. It first ran four years after Predicate Act II and again four years after Predicate Act III.

There is no corresponding benefit to public policy or to the purposes of RICO in refusing the plaintiff this choice.

Indeed, Complete Expiration is a catalyst for law suits. A plaintiff would be well advised to bring an action on Predicate Acts I & II, rather than choose an alternate course, for fear that if the racketeering conduct continues, he would be barred from a later RICO suit until he suffers through two additional predicate acts committed within ten years of each other. In addition, after the limitations period runs on Predicate Acts I & II, under Complete Expiration, a defendant would be free to commit Predicate Act III without fear of RICO liability.[40] Indeed, the defendant could commit a new predicate act each time the four-year limitations period ran on prior predicate acts.

The Ten-Year Radius rule is infected by the same malady as that of *Keystone* Resurrection, but suffers to a lesser degree. As Figures 1 and 2 illustrate, under the Ten-Year Radius rule, a slothful plaintiff may knowingly allow the RICO claim based on Predicate Acts I & II to expire, yet is granted a fresh four-year period in which to sue and recover on Predicate Act II by Predicate Act III, and again by Predicate Act IV. Consequently, he could recover for Predicate Act II even though the statute of limitations ran twice.[41] This renders the four-year limitations period as speculative as does *Keystone* Resurrection and thwarts the aims of *Malley-Duff*.[42]

The Injury Expiration rule strikes a balance between the purposes of RICO and the goals of the statute of limitations. Under this rule, a plaintiff has four years to bring suit on Predicate Acts I & II, or lose the right to recover for the injuries incurred from those predicate acts. Consequently, the rule does not suffer, as does *Keystone* Resurrection and the Ten-Year Radius rule, from the defect that the limitations period is uncertain. Plaintiffs must sue within four years of when they discovered or should have discovered the pattern or forever lose the right to recover for the injuries accompanying the predicate acts comprising the pattern. A subsequent predicate act will not nullify the legal force of an expired limitations period by bestowing a new four-year period to recover for otherwise time-barred predicate acts.

Unlike the Complete Expiration rule, however, the predicate acts upon which a plaintiff could have sued do not lose their status as predicate acts for future suits. Rather, those predicate acts expire only to the extent that a plaintiff may not recover for the accompanying injuries. Thus, a plaintiff who chooses not to sue and recover on Predicate Acts I & II cannot change his mind and sue in Year 14. He may, however, use Predicate Acts I & II to show a pattern and recover for Predicate Act III if suit is brought within four years of that act. He may also use Predicate

40. Like the dog of classic tort law, the defendant would be entitled to one free bite for each time the four-year limitations period ran on prior predicate acts. *See* LAZAR, ANIMAL CONTROL LAW: CIVIL LIABILITY FOR THE MISDEEDS OF ANIMALS 2-3 (Supp. 1988).

41. It first ran four years after Predicate Act II and again four years after Predicate Act III.

42. *See supra* notes 39-40 and accompanying text.

Acts I, II & III to show a pattern and recover for Predicate Act IV if suit is brought within four years of that act. The plaintiff need not fear that, by declining to sue on a pattern of predicate acts, he has surrendered a later RICO claim on a subsequent predicate act in the same pattern. If the plaintiff elects to delay bringing suit, however, he does so knowing that he loses his ability to recover for injuries sustained from the predicate acts on which he did not sue timely.

Furthermore, if the plaintiff chooses to bring an action based on Predicate Acts I & II, the predicate acts do not lose their stature as acts within a pattern if he later attempts to recover for Predicate Act III. He will not, of course, recover for the injuries sustained as a result of Predicate Acts I & II, and may recover only for the injury incurred as a result of Predicate Act III.[43] The plaintiff may still use Predicate Acts I & II to define the pattern of racketeering. Likewise, if after recovering for Predicate Acts I, II & III, he sued on Predicate Act IV, the plaintiff will recover only for the Predicate Act IV injury.

The Injury Expiration rule may create an incentive to pursue what appears at first blush to be a peculiar defense strategy. In some circumstances, Injury Expiration may prompt a defendant to argue that he committed more acts of racketeering than the plaintiff alleged. This curious tactic can be completely rational and is easily explicable on economic grounds.

For example, if the defendant was faced with allegations that he violated RICO through a pattern of racketeering comprising Predicate Acts II & III, on a summary judgment motion[44] he may wish to affirmatively and unilaterally prove that Predicate Act I was also part of the pattern. The defendant may opt to establish the existence of Predicate Act I even if the plaintiff does not seek recovery for Predicate Act I and never alleged the act in the complaint. By doing so, the defendant would show that a RICO claim accrued from Predicate Acts I & II and that the limitations period has run on those acts by the time of Predicate Act III. The defendant would thus reveal that RICO recovery is unavailable on Predicate Act II.[45]

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43. This is because the plaintiff would enjoy duplicative recovery. He would have recovered for the injuries sustained from Predicate Acts I & II both on the initial suit and again when he sued on Predicate Act III.

44. Because of the predictably negative effects such an argument would have on the jury's opinion of the defendant, it is doubtful the defendant would wish to raise this at trial in front of the jury.

45. The prudence of this strategy depends on the ancillary effects of admitting to previous misconduct and requires risk analysis. Assuming the plaintiff did not know of Predicate Act I because of lack of reasonable diligence, upon learning of Predicate Act I he may be able to pursue other legal theories to recover for that act. Accordingly, before affirmatively admitting to Predicate Act I, the litigation-rational defendant should compare the chance of his being found liable on a non-RICO theory for Predicate Act I (multiplied by the damages inflicted on the plaintiff by Predicate Act I), with the risk that he will face RICO liability on Predicate Act II (multiplied by the damages inflicted on the plaintiff by Predicate Act II and trebled). *Cf.* C. Andrew & R. Tavi, Dancing into the Tempting Ocean: Costs of Confessional Offerings 7 (final ed. Feb. 23, 1991) (unpublished manuscript).

CONCLUSION

The Injury Expiration rule provides for both a meaningful statutory limitations period and continued liberal RICO recovery. It supplies much needed certainty,[46] without judicial rewriting or strained interpretation of RICO. At the same time, the rule avoids creating incentives to bring suit rather than seek alternative redress and does not allow defendants to freely commit additional predicate acts each time the four-year period expires on previous predicate acts. In the absence of clarification by Congress, the Injury Expiration rule is the best technique to manage predicate acts committed after the statute of limitations has run.

46. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 154 (1987).

FIGURE 1
IMPACT OF THE SUBSEQUENT PREDICATE ACT: SCENARIO

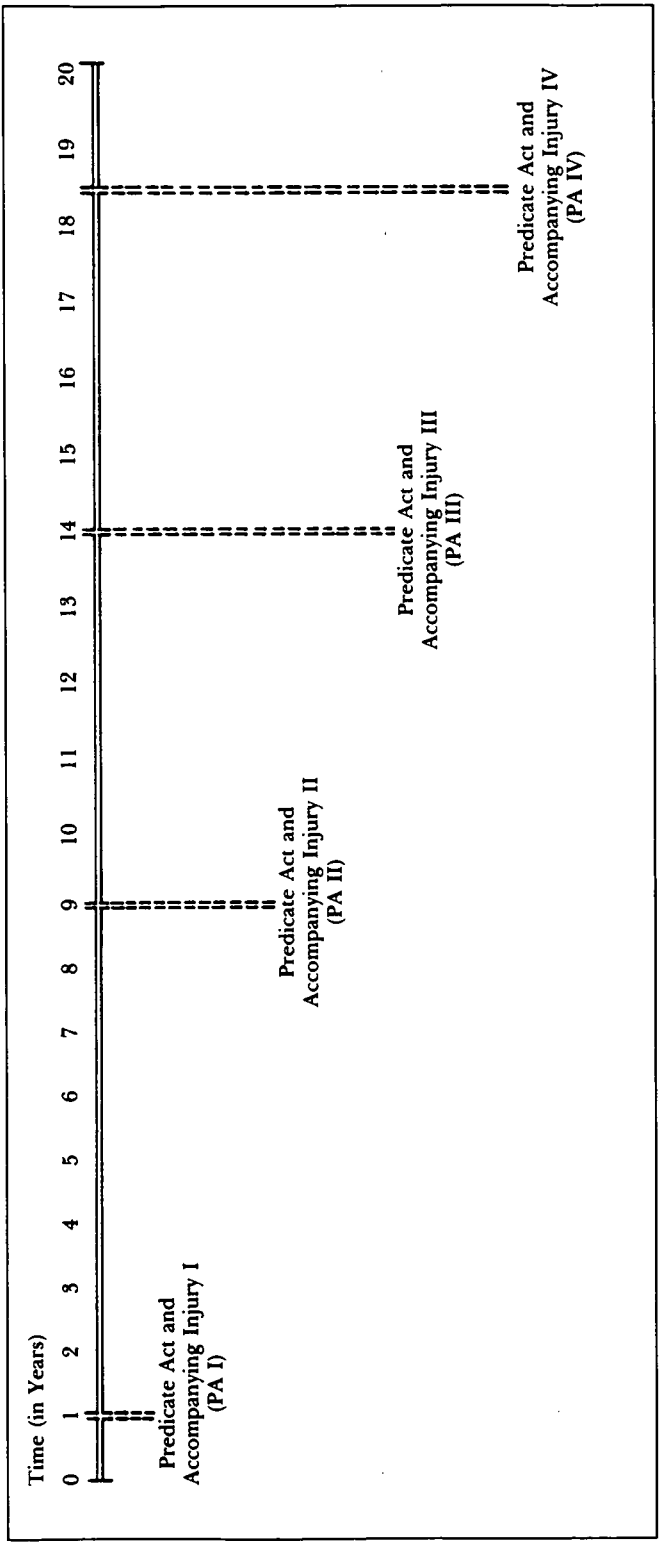

FIGURE 2
IMPACT OF SUBSEQUENT PREDICATE ACT: RESULT MATRIX

	COMPETING RULES			
	Keystone Resurrection	Complete Expiration	Ten-Year Radius	Injury Expiration
YEAR 1				
RICO Claim:	None: no pattern	None: no pattern	None: no pattern	None: no pattern
Predicate Acts of Claim:	NA	NA	NA	NA
Injuries Recoverable:	None	None	None	None
Expiration Date of Claim:	NA	NA	NA	NA
YEAR 9				
RICO Claim:	Yes	Yes	Yes	Yes
Predicate Acts of Claim:	PA I & II	PA I & II	PA I & II	PA I & II
Injuries Recoverable:	PA I & II	PA I & II	PA I & II	PA I & II
Expiration Date of Claim:	Year 13	Year 13	Year 13	Year 13
YEAR 14				
RICO Claim:	Yes	None: no pattern	Yes	Yes
Predicate Acts of Claim:	PA I, II & III	NA	PA I, II & III	PA I, II & III
Injuries Recoverable:	PA I, II & III	None	PA II & III	PA III
Expiration Date of Claim:	Year 18	NA	Year 18	Year 18
YEAR 18½				
RICO Claim:	Yes	Yes	Yes	Yes
Predicate Acts of Claim:	PA I, II, III & IV	PA III & IV	PA I, II, III & IV	PA I, II, III & IV
Injuries Recoverable:	PA I, II, III & IV	PA III & IV	PA III & IV	PA IV
Expiration Date of Claim:	Year 22½	Year 22½	Year 22½	Year 22½