OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-497 & 86-531

TITLE AGENCY HOLDING CORPORATION, ET AL., Petitioners V. MALLEY-DUFF ASSOCIATES, INC.; and CROWN LIFE INSURANCE COMPANY, ET AL., Petitioners V. MALLEY-DUFF & ASSOCIATES, INC., ET AL.

PLACE Washington, D. C.

DATE April 21, 1987

PAGES 1 thru 42

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IN THE SUPREME COURT OF THE UNITED STATES

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AGENCY HOLDING CORPORATION, ET AL., :

Petitioners :

v. : No. 86-497

MALLEY-DUFF & ASSCCIATES, INC.; :

and :

CROWN LIFE INSURANCE COMPANY, ET AL., :

Petitioners : No. 86-531

v. :

MALLEY-DUFF & ASSOCIATES, INC., ET AL. :

- -x

Washington, D.C.

April 20, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:44 o'clock a.m.

APPEARANCES:

ROBERT L. FRANTZ, Pittsburgh, Penn.;

on behalf of Petitioner

JOHN H. BINGLER, JR., Pittsburgh, Penn.;

on behalf of Petitioner

HENRY WOODRUFF TURNER, Pittsburgh, Penn.;

on behalf of Respondent

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mr. Frantz, you may proceed whenever you're ready.

ORAL ARGUMENT OF

ROBERT L. FRANTZ

ON BEHALF OF PETITIONER

MR. FRANTZ: Mr. Chief Justice, and may it please the Court:

I will address two of the three questions on which certiorari was granted. First I will argue that choosing the most appropriate statute of limitation for all Rico claims, this Court should follow its analysis in Wilson v. Garcia and should direct that the statute of limitations for injuries to business or property each state should be applied to all civil Rico claims. In Pennsylvania, that statute is Section 5524.

Secondly, I will argue that Rico does not provide a civil remedy to a plaintiff when as respondent admits and even argues there is neither a pattern of racketeering activity, or a conspiracy to violate Rico at the time of its injury.

Mr. Bingler, Co-Counsel will argue that the general federal civil approval should be applied in civil Rico actions. That is that a cause of action accrues when the plaintiff knows, or should of known of his injury.

This Court has inferred.

QUESTION: Mr. Frantz, Mr. Frantz, --

MR. FRANTZ: Yes.

QUESTION: I'm wondering if the Court is going to pick a statute of limitations for these Rico claims? Why it shouldn't turn to a case like Del Costello and try to pick some analogous federal statute of limitations because so many of these offenses cross state lines.

It isn't the kind of case like we had in Wilson and Garcia where you could more properly look to a single state cause of action. Wouldn't we better served if we're going to get into this business at all, in trying to, look to an analogous federal statute such as the one for the Clayton Act?

MR. FRANTZ: Your Honor, we believe that the analogous federal statute should not be looked to unless the state statute is inconsistent with, or frustrates the federal policy, such as the Court found the 30 day statute in Maryland and the 90 day statute in New York frustrated the federal labor policy in Del Costello. Now, it's true --

QUESTION: Well if the goal of Congress is to deal with what is often an interstate problem in this area of making civil remedies available for crimes such as are covered by Rico. Why isn't national policy controlling

here?

MR. FRANTZ: We think that federal policy does control, Your Honor. And it may be that the activities take place in different states, but the injury usually only takes place in one state.

In this case, the injury took place in Pennsylvania. The plaintiff sued in Pennsylvania. So you would look at Pennsylvania law and apply it just as you did in the Section 1983. You didn't deal with Section 1983 cases, but the Court did in 1983 (inaudible), Your Honor.

QUESTION: Of course, Judge Sloviter in her concurrence took precisely the tack that Justice O'Connor is suggesting, didn't she?

MR. FRANTZ: That's correct, Your Honor.

QUESTION: But you don't like that?

MR. FRANTZ: Judge Sloviter, in her concurrence and she was one of three judges. And we think that that specific statute is more, it seems to be more likely that it should be applied and in fact, it is. And I think the reason for that is the legislative history of Rico.

As you may, as you know, when the Congress first started thinking about attacking organized crime they were going to bring it under the anti-trust law. And if they brought it under the anti-trust laws, the four year

Clayton Act statute of limitations would have applied.

They specifically rejected bringing it under the anti-trust laws. They brought it in a separate act apart from the anti-trust laws. Now, I believe it was Representative Steiger from Arizona, stood up when it was going through the Congress and he said, let's put, among other things, a statute of limitations on this act. He was asked to withdraw that because they were moving it through Congress and the statement was made, you can come back another day. He never did come back another day, but --

QUESTION: Well, he was defeated in election, I guess, or he might of. (Laughter).

MR. FRANTZ: On two occasions after that, the Senate of the United States did pass a statute of limitations. But it wasn't the four year Clayton Act, it was a five year statute of limitations. The Senate passed it, but the House Judiciary Committee did not move it out of Committee. So, on two occasions, immediately after it was enacted, the House said no to a five year statute.

Now, more recently, just last October, the House passed a three year statute of limitations. The Senate, by a vote of 47 to 44 failed to attach it to a bill that would have made Rico a three year statute of limitations.

QUESTION: Well, Mr. Frantz, doesn't that

indicate Congress has considered enacting a statute of limitations and has refused to do so. So, maybe there is no statute of limitations?

MR. FRANTZ: Well, --

QUESTION: Where do we get the authority to pick and choose a statute of limitations?

MR. FRANTZ: I think we get the authority from this Court has found for over a century --

QUESTION: Well, maybe we had no authority to do it before. This is a kind of a unique statute.

MR. FRANTZ: Well, the statute may be unique but the principle of supply, looking to the states for a state statute of limitation when Congress fails to include a statute of limitation goes back (inaudible) --

QUESTION: Well, maybe we haven't followed that since Del Costello.

MR. FRANTZ: Pardon me?

QUESTION: In the Del Costello case we didn't follow that.

MR. FRANTZ: We didn't because we said, or this Court said that a 30 day, or even a 90 day statute of limitations that would have been provided by the state was inconsistent with the federal policy of having labor disputes worked out and then giving the plaintiff an adequate time. And in Del Costello, the adequate time was

only six months.

QUESTION: But you don't rely on any specific statutory basis for saying we must look to state law? You just think it's a good idea and we've done it before?

MR. FRANTZ: I don't, it's my understanding that the Rules of Decision Act was originally considered as the basis for applying state law.

QUESTION: I thought that once too, but we rejected that in Del Costello.

MR. FRANTZ: Right.

QUESTION: So, maybe there's nothing. But, it is at least theoretically possible there would be no statute of limitations.

MR. FRANTZ: There was no statute of limitation in the Occidental --

QUESTION: Right.

MR. FRANTZ: -- versus the E.E.O.C. case and for very good reason, because in that case, we were encouraging people to exhaust the E.E.O.C. administrative procedural remedies. And you didn't want someone have to file a case and then sit on it for two, three, four years while it was going through the E.E.O.C. practice. Except in those very unusual cases when there's a very short statute of limitations, or as in the Jones Act, there's such a short, you have the relationship, three year Jones

Act statute of limitations and if you bring an unseaworthiness claim, you have to bring the two together and this Court has said that the states could not have a shorter statute of limitations than is provided in the Jones Act.

But, they are the unusual situations and when Congress does enact a statute that does not have a statute of limitation, this Court has said that it infers that Congress intends that the state statute of limitation, the appropriate state statute of limitation should apply.

QUESTION: What is the criminal statute of limitation?

MR. FRANTZ: Five years.

QUESTION: Five years. Are there any other cases in which the criminal statute of limitations is longer than the civil statute in federal legislation?

MR. FRANTZ: I am not familiar with (inaudible).

QUESTION: See, and the anti-trust law, I think is shorter, isn't it? Four years for civil. I can't remember, is it three years for --

MR. FRANTZ: Four years in civil.

QUESTION: Civil.

MR. FRANTZ: And I haven't addressed the criminal --

QUESTION: But, it's sort of unusual to have a

longer statute of limitations to bar the crime than to bar a civil remedy, isn't it?

MR. FRANTZ: We think so, Your Honor, and that's why we pointed out that over the history of Rico, since its enactment in 1970, there was talk in the respondent's brief and talk in the amicus brief that the civil Rico action was going to be used to eradicate organized crime.

And, so far, in our search which is using this marvelous Lexus tool, we checked every named criminal defendant in a reported criminal Rico case and came up with 1362 names. And then we checked the civil Rico cases and we found that there were only five civil Rico cases that had any of those same individuals named as a defendant in a civil Rico action. And, of those five there was only one case that arguably involved what we would think of as organized crime.

QUESTION: You mean this is not really a crime fighting tool?

MR. FRANTZ: It's not really a crime fighting tool. Most people aren't going to try to sue some Columbian drug runners for some money. Life's too short. It's not like going after General Motors under an anti-trust, or General Electric, or Westinghouse.

Life's too short to go after somebody who's going to, who thinks nothing of killing people and doing

that. So, we don't, for that reason, we think the two year statute that Pennsylvania would apply would be very appropriate. Not too short by any means and since it's not inappropriate and would not frustrate the federal law we believe that that would be the appropriate approach for this Court. And we think the steps that were outlined in Wilson v. Garcia are appropriate to follow in this case. In Wilson v. Garcia, --

QUESTION: Just one --

MR. FRANTZ: -- In each state.

QUESTION: In each state there should be one?

MR. FRANTZ: There should be --

QUESTION: Applicable to all sorts of Rico civil claims?

MR. FRANTZ: Rico, there must be a hundred different types of Rico claims, just as in Wilson-Garcia, this Court said there could be any number of infringements of civil rights. And therefore, you said that you looked at the nature of the injury, not the cause. Not whether he was hit over the head with a bat, not whether he was (inaudible) --

QUESTION: So, you have to go through, you're suggesting then that the, you should look at each particular Rico claim?

MR. FRANTZ: No, not each particular Rico claim.

I'm suggesting that you look at the nature of the right that was given by the Rico statute just as you looked in Wilson at the nature of the right in Section 1983. This nature of the right there was protection of personal rights.

QUESTION: So how do you disagree with the Court of Appeals?

MR. FRANTZ: Well, we think the Court of Appeals, they said in their own opinion, that they were looking for an epiphany. They said they couldn't find the nature (inaudible).

QUESTION: Yeah, but they purported to take the Garcia approach.

MR. FRANTZ: They purported to, but where they went wrong, Your Honor, we submit is they looked at all the different types of injuries. Now, you don't look at the types of injuries, you look at the nature of the injury that the law is protecting. And in Rico, Congress spelled it out in Section 1964(c). It said, you are given a right of action if you are injured in your business or property.

Just like in civil rights, it was a personal right of action, because your personal rights had been injured, so you looked at personal injury in Wilson v. Garcia.

QUESTION: And what is the Pennsylvania two year statute? What is the Pennsylvania two year statute applies to what?

MR. FRANTZ: The Pennsylvania two year statute applies to injury to personal property, injury to real property. And the statute under injury to personal property has been construed by the Pennsylvania Superior Court and adopted by the Pennsylvania, the Third Circuit, as a matter of fact. But it includes injury to business, tortious interference with business. So, that particular statute would cover injury to business or property and we find that in every state there is a provision for a statute of limitation for injury to personal property.

QUESTION: But the statute in other states is longer or shorter (inaudible).

MR. FRANTZ: It may in other states be longer and shorter. In fact, there is only one state in the country where it is less than two years and that's Louisiana, and it's one year in Louisiana. But in every other state it's two years or more.

So we don't think that the shortness of that statute would make it inconsistent with the federal policy. I don't know, Your Honor, --

QUESTION: You may be proceed until the red light goes on, Mr. Frantz, at which time we'll recess for

lunch.

MR. FRANTZ: All right. The question of the appropriateness we think is answered by it being a congressional directive that you are protecting injury to business or property. Not personal injury, just injury to business or property.

So, in each state, the Court should look to the statute in that state. That is, the statute of limitations for injury to business or property. And that way, every state will have the certainty and the avoidance of unnecessary litigation by looking at that particular statute and your question will be answered.

Now, I think I've answered, I hope I've answered your questions on that particular argument. The other argument I was making is that in this particular case we have an unusual circumstance.

The plaintiff, the respondent has admitted, in fact it argued in its brief to the Third Circuit, as it did in this Court, that it had no cause of action at the time its insurance agency was terminated. They have cause of action for later events that took place down the road later, but it said it had no cause of action at the time it was terminated.

So, if it said there was no pattern of racketeering activity at the time it was terminated. It

said that it had no cause of action, it said there's no conspiracy to commit further causes of action at the time it was terminated.

Now, we agree that there was no pattern of racketeering activity and we agree that there was no conspiracy to commit a pattern of racketeering activity at that time. Where we disagree is the respondent's position that something that takes place two, three years down the road, all of a sudden relates back and causes the first act at termination of its agency to ripen into a Rico cause of action.

We find it hard to believe that something that takes place later can be the cause of the respondent's injury and since Section 1964(c) gives a cause of action if you've been injured by reason of a violation of the provisions of the act, and the violations of the provisions of the act all require either a pattern of racketeering activity or a conspiracy to commit a pattern of racketeering activity, we submit that there was no Rico cause of action.

Now, that's not to say that there wouldn't be a cause of action as a matter of civil right. This respondent, in fact, in another case has plead anti-trust violations, breach of contract, tortious interference for the contract.

If there had been a crime, the crime on that first act would have been subject to indictment and conviction, but there is no free first crime. You'll pay the price if you commit a crime.

This Court, or this act, the Congress was not trying to legislate against the dog fight. As the respondent said, we want a free first bite. What Rico was designed to do was to attack the wolf packs of our nation.

CHIEF JUSTICE REHNQUIST: We'll resume there at 1:00.

CHIEF JUSTICE REHNQUIST: Mr. Bingler, we'll hear from you now.

ORAL ARGUMENT OF

JOHN H. BINGLER

ON BEHALF OF PETITIONER

MR. BINGLER: Thank you. Mr. Chief Justice and may it please the Court:

The respondent, Malley-Duff in this case asks this Court to ignore the causation element in the civil Rico statute and abandon the generally applicable, usually applied Federal Civil Accrual Rule in order to first create and then preserve for Malley-Duff a Rico cause of action.

The generally applicable Federal Civil Accrual Rule focuses on the clear and certain event of injury and

works well where a plaintiff can trace his cause of action to a completed violation, whether it's a Rico violation or any other kind of violation.

Abandoning this general rule will minimize the effect of any statute of limitations this Court adopts. There is no reason to abandon it in favor of a plaintiff injured by the first in what turns out to be a series of events that eventually form a pattern.

And the reason is that that plaintiff just hasn't been injured by reason of a Rico violation. That plaintiff cannot casually trace his cause of action to a completed Rico violation. He may have many other causes of action, just not a Rico violation.

The principles of cause and effect suggest that causes have got to proceed effects. The plaintiff injured by the first in a series of predicate Rico offenses just is not injured by a Rico violation. He may be injured by a predicate act, but he's not injured by reason of a Rico violation.

The Court of Appeals, Your Honor, did not address that particular question because they applied a six year statute of limitations which makes the accrual question not come into existence. And they did not address, specifically did not address the question of whether or not plaintiff, and we say plaintiff has

conceded that as of the time it was injured there was no Rico violation.

The Court of Appeals looked back and I think noted in a footnote that since they didn't buy what the plaintiff was saying that events that occurred in Chicago and Cleveland and other places alleged in the plaintiff's complaint did make out a pattern of racketeering activity in advance of the plaintiff's injury.

Plaintiff as we understand it, both in the Circuit Court and before this Court has contended that until a pattern subsequent to its injury took place there was no Rico violation. Our view is that that's an effort to avoid the potential of a two year statute of limitations that this Court might adopt.

Frankly, it has a potential of avoiding any statute of limitations because it makes the statute of limitations and the running of the statute depend on the very uncertain concept and I think just a quick reading of some of the Circuit Court and District Court cases on what it is that makes a pattern will demonstrate to any reader that the concept is very uncertain and it's probably going to stay uncertain in any particular case.

QUESTION: Well, Mr. Bingler, I thought that the Sedima case from this Court specifically contemplated recovery for damage inflicted by a predicate act upon the

showing of a later pattern.

MR. BINGLER: Your Honor, I don't think that Sedima went quite that far. I think Sedima attempted to say, if you can trace your injury to, and using the "by reason of" language, to a Rico violation through a predicate act then you can recover. You don't have to trace it to a confluence. You don't have to trace it to a racketeering injury.

Our point is that Sedima should be limited to defendant's who have completed a Rico violation as of the time --

QUESTION: Well, if the court meant something else there, I think there might be trouble starting the statute of limitations running before the pattern exists, wouldn't it?

MR. BINGLER: That presents a problem, Your Honor, but not an unsolvable one because we would still urge the Court to adopt the General Federal Accrual Rule that starts the statute running at the point of injury.

There are other kinds of causes of action where that does occur and the reason we suggest that the Court do that is that the pattern concept is simply too uncertain. We suggest that the Court --

QUESTION: Well, maybe the Rico injury doesn't occur until there is a pattern.

MR. BINGLER: That's a possible reading of Sedima, Your Honor. My reading of Sedima is that, and my suggestion to the Court is that Sedima should be limited to mean that if you can trace your injury to a completed Rico violation, all of the elements, not only a pattern but an enterprise and so on, through a particular predicate act, tracing backward, our point given the plaintiff's concession that as of the time it was injured there was no pattern is that as of the time it was injured it's physically, causally impossible to trace its violation to an existing Rico violation.

As of the time it was injured, and I'm talking just about the termination injury, as of the time it was injured the defendants could not be prosecuted by a prosecutor for a Rico violation because no Rico violation had occurred.

The problem with the seductive language of pattern is, it's not like conspiracy. A pattern can occur totally unintentionally and our suggestion is that the Court not allow the pattern concept to pull pre-Rico violation injuries into, ripen them into a Rico violation.

The accrual question comes up when not only does the plaintiff want its cause of action ripened, it's non-Rico cause of action ripened into a Rico cause of action, it wants the Accrual Rule, the General Civil Accrual Rule,

which focuses on the definite, clear, certain, easy to ascertain event of injury, or should have known of injury, it wants the Court to preserve that somehow. Preserve the running of the statute of limitations until such time as perhaps, perhaps ten years if the defendants happen to be incarcerated, perhaps twenty years because of the pattern concept, two event in ten years except that the defendants are incarcerated, it's suspended (inaudible).

QUESTION: Well, if you accept the first though, you have to accept the second. I mean, if you assume that there is a Rico violation after the first act and before there is a pattern, if you assume there is injury after the first act and that that's a Rico injury, you obviously can't say that the statute begins to run at that point when the individual would not know to sue under Rico, because he has no cause of action.

MR. BINGLER: First of all, Your Honor, I think the --

QUESTION: You certainly would have to wait until the second predicate act, wouldn't you?

MR. BINGLER: There are situations where that doesn't come up. As a matter of fact, in Pennsylvania for example, under the no-fault action which says you don't have a tort cause of action until such time as you have accumulated a certain level of damages, a certain number

of medical bills and so on, you just don't have a tort cause of action.

The cases in Pennsylvania and other states that have looked at that have said, that's okay, we don't want to have to worry about the uncertain event --

QUESTION: (Inaudible) and can be barred by the statute of limitations before you have any way of knowing you even have it.

MR. BINGLER: In fact, there's a Superior Court case in Pennsylvania, Your Honor, that we did not cite because I came across it yesterday looking at this particular question.

QUESTION: Do you think that's good law?

MR. BINGLER: I think it is, because it's, the important element here is to have a certain determined point. Otherwise you might as well forget whatever statute of limitations the Court adopts.

Because, not only do you get the uncertain event of pattern, but you get the plaintiff in control of when he proves the pattern. And the defendant in the peculiar position of coming in and saying, well though I engaged in a lot more predicate acts than the plaintiff says I did and so the statute ran out long before the plaintiff says it did.

Whatever statute of limitations Accrual Rule

this Court adopts, it shouldn't get schizophrenic proof motives to the plaintiff and the defendant. It should make sure that the plaintiff is not only trying to prove his pattern, but trying to prove it happened in a hurry. Otherwise if you adopt a --

QUESTION: (Inaudible).

MR. BINGLER: Excuse me.

QUESTION: It would be possible to have a cause of action accrue after the statute of limitations has run then?

MR. BINGLER: Unless this Court holds that the plaintiff must trace its injury to an existing, completed Rico violation.

QUESTION: Second or later? Second or later?

MR. BINGLER: Yes, Your Honor. Yes, Your Honor. I'd like to reserve the rest of my time for rebuttal by Mr. Frantz. Thank you.

QUESTION: Thank you, Mr. Bingler. We'll hear now from you, Mr. Turner.

ORAL ARGUMENT OF

HENRY WOODRUFF TURNER

ON BEHALF OF RESPONDENT

MR. TURNER: Mr. Chief Justice, and may it please the Court.

From the litigants viewpoint this case puts in

perspective what it is that's trying to be achieved here I think. Six years into the case, we have only dealt with, thus far, the statute of limitations question.

So our objective is to suggest to the Court that a clear and certain, in so far as possible, statute be chosen and one that is efficient in its application to the various and multiple fact situations that might arise.

QUESTION: But why is that any different from any federal cause of action? I mean, traditionally we've looked to state law whether we're compelled to by rules of decision act, or otherwise. That's what we've done. Why isn't your argument applicable to any federal cause.

MR. TURNER: Well I think, Your Honor, if there is a proper and state analogy that can be drawn, let's continue to look to the state analogies. The difficulty is, when you get into these complicated federal statutes which don't bear easily any analogy to the standard litany of state statutes of limitations, then we are confronted with a real difficult problem which leads to more and more litigation. So, it would be very nice to continue that historic method, but I think Del Costello --

QUESTION: Things used to better than that?

MR. TURNER: I beg your pardon?

QUESTION: You think things used to be better than that in the good old days?

MR. TURNER: No, things used to be simpler, Your Honor. And furthermore, when this pattern developed, the pattern of looking to state law, if we assume that the rules of decision acts did not require that in the 1830s and 1840s there was really no federal statute of limitation law to which reference could be made in order to draw an analogy.

The only body of limitations law of which I'm aware in the early part of the 19th Century was the state body of law and of course, reference was made there. And I think it should continue to be made there unless, as here, there is greater perplexity deriving from reference to state law.

Now mind you, we aren't forced in our particular situation here to look to federal law. We can and we do in our brief suggest a hierarchy of choices that could be made, all of which would result in a timely filing in this particular case, but which we have listed in our brief and what we think to be descending order of utility from the point of view of efficient, clear and certain application of the statute.

Certainly, if the Clayton Act is resorted to as the federal model, there will be no real difficulty in each particular state determining what applies. The Clayton Act will apply across the board. It would also, I

might add, in reference to Mr. Bingler's recent presentation, anything greater than a three year statute of limitations applied in this particular case would enable deferral to be made of the questions of accrual and the inter-relationship of pattern and the ten year period.

QUESTION: That's a very appealing argument.

MR. TURNER: Well, Your Honor, I suggest it is because neither of the courts below dealt with those issues I might add. There has been a good deal of scholarly comment on the question of what statute to borrow, but very little on the questions of accrual and pattern.

And I think it would be much happier result if those issues were dealt with at a time when the lower courts had seen it and when perhaps a trial had taken place rather than as we are here on merely a summary judgment proceeding where the record is not as full as it might be.

QUESTION: Well, we wouldn't have to deal with them anyway even if we came in under three years. We could just leave them for resolution by the lower courts (inaudible).

MR. TURNER: As long as the Court makes clear that they are open questions and the only reason I allude to them at all in our brief is that I don't want to find

it lost in the shuffle somewhere because the lower court indeed, the District Court indeed, started the statute running with the very first event known to my clients. And that leads to very difficult propositions. Now, --

QUESTION: I take it that your preference is the, Judge Sloviter's approach?

MR. TURNER: I am driven to that, Your Honor, primarily by having discarded the notion that there's any positive law that directs this Court how to decide this matter. Any statute of constitutional provision.

QUESTION: But, you couldn't --

MR. TURNER: Given that there is none, then --

QUESTION: But you couldn't sell it to her colleagues on the Third Circuit?

MR. TURNER: Your Honor, I was persuaded of this by Judge Sloviter's opinion. It was in a companion case that this was urged on the court. And I think if Judge Higginbotham's opinion is examined for the majority of the court, they certainly recognized the value of Judge Sloviter's approach.

And it seems from the opinion to have been a very close question as to how they would come down. And perhaps if I had advocated more effectively, I would have carried that group. Plus, Your Honor --

QUESTION: I'm not blaming you at all, I just

was curious as to what the argument --

MR. TURNER: Well, Your Honor, I think to --

QUESTION: -- determined on.

MR. TURNER: -- that this Court is better situated to make a decision of this type to follow say Del Costello rather than the other approach. Because the lower courts, and I can include the parties and the courts in this case, primarily have been fretting about what is the closest predicate act analogy?

If there is an arson, or a illegal charging of interest, let's, in the Rico allegation trying to match those predicate act descriptions up with a characterization for statute of limitations and I think it maybe this Court be the proper one to instruct us all as to the utility of a federal choice here.

QUESTION: No one here is urging that there be a different statute of limitations in a single state.

MR. TURNER: I don't think that's a live issue here, Your Honor.

QUESTION: That's right. That's right.

MR. TURNER: But, it has been very much in evidence.

QUESTION: So, it's a question of if you choose a state statute, it's a question of which one?

MR. TURNER: That's right. That's right. And I

think if we --

QUESTION: And don't you think that if we stick with the rule in this case that we go pick a state statute, why should we differ with the Court of Appeals about what the most, what's the most, the closest state statute?

MR. TURNER: I certainly don't see any reason to, Your Honor. I agree with the Court of Appeals selection assuming one is going to follow the Wilson-Garcia pattern as a model of selecting a state statute. Then I think the Third Circuit did an excellent job of discarding difficult of application statutes in selecting the so-called "catch all" statute in this case.

Now, the statute that is urged by the petitioners here, the so-called Property, Personal Property Statute found in Pennsylvania in Section 5524, was rejected by the Third Circuit.

QUESTION: Why? Why?

MR. TURNER: They felt that it was too narrow and confining. If you read the statute involved it talks about the taking, detaining, or injury of personal property, including actions for specific recovery thereof. Now, that sounds to the common law ear, like conversion, detinue, common law offenses of that sort.

Only last week-end did I discover that when this

Court was struggling to supply a statute of limitations for the anti-trust laws, prior to the 1955 amendments, that in the Chattanooga Foundry Case, this very statute involving the taking, detention of personal property was urged to this Court as a choice for applying, for borrowing to apply to the federal anti-trust laws and the Court, in an interesting opinion through Justice Holmes in 203 U.S. 390, rejected that choice for the same grounds that the Third Circuit rejected it in this situation.

QUESTION: And what did they pick?

MR. TURNER: They picked one, Your Honor, involving statutory causes of action I believe.

QUESTION: That's sort of like, that's almost like a --

MR. TURNER: a "catch all."

QUESTION: -- "catch all." It's the same idea. I noticed some of the commentators equate the "catch all" statutes with those statute of limitations which simply say for statutory causes of action.

QUESTION: Mr. Turner, I'm curious, are all three members of the Third Circuit panel, Pennsylvanians?

MR. TURNER: Let's see. We had Judge Higginbotham, yes; Judge Sloviter, yes; --

QUESTION: Judge Mansmann.

MR. TURNER: -- Judge Mansmann, yes, we had

three Pennsylvanians out of three on that panel. There are other difficulties I might add with that property model that's offered to you because if you examine the Pennsylvania statutory limitations in general, you will see that there are many other statutes which apply to damage to business and property that are not a two year statute as in this detinue type statute to offer.

Fraud, at the time in question here was six years. Securities fraud was three years. Usury had a separate statute. Trespass to real estate, the slander to business, and so on, was one year. So there are a great variety of property type torts and property type injuries which have other statutes that apply to them.

I examined the Ohio statutes and I find that they have, for example, different periods applying to damage to personal property on the one hand, and real property on the other. So that if arson was caused in a Rico circumstance and there be one statute applying to the loss of the building, and another statute applying to the loss of inventory.

Even in the more frequently, even in the Wilson case where this Court chose the personal injury model for the 1983 violations, it started to appear out in the circuits that the personal injury standard is not quite as singularly clear as one might have thought.

Justice White and Justice Marshall in the past year have noted dissents from denials of certiorari in the Pruitan Malden Case. Mr. Justice White and in other cases because of confusion starting to creep in as to which statute of limitations for personal injury in states which have diverse rules involving types of personal injuries which should be applied?

So, I believe that would be more aggravated in this property context than it is in the personal injury context. Or I think on the whole the Wilson personal injury model is probably a successful one.

There are, I suppose, reasons that could be further elaborated as to why the Clayton Act model is a good one but when the Sedima case is examined and when the legislative history is examined, it is clear that the anti-trust model was very much in the mind of Congress. Beyond that, I might add as to the legislative history, I think it's impossible to determine one way or the other what hints there may be in the legislative history as to an appropriate statute of limitations.

QUESTION: The Clayton Act should be borrowed. Isn't the injury, the damages recovery, and the anti-trust laws is for damages to business or property?

MR. TURNER: It's almost the same language, Justice White, as the language of the Rico statute. And,

the concepts are the same.

QUESTION: Well, why shouldn't you look to some state statute then as sort of deals with business or property?

MR. TURNER: I think if there was one.

QUESTION: Well, there are several.

MR. TURNER: That's the problem. There are several in most states that deal with various types --

QUESTION: At least you would be picking one dealing with business and property rather than something that doesn't deal with anything.

MR. TURNER: Oh well, if we're talking again about which one the, I don't think the "catch alls" don't deal with anything.

QUESTION: (Inaudible).

MR. TURNER: I think they deal with something. They deal with the situation that isn't otherwise --

QUESTION: You want, you prefer a statute that deals with business or property, the Clayton Act.

MR. TURNER: Yes, Your Honor.

QUESTION: So, why don't you pick one, why shouldn't one be picked in Pennsylvania that deals with business or property?

MR. TURNER: Well, I think if there was one that clearly dealt with that I would --

QUESTION: There certainly are several clearly dealing with injuries to business or property.

MR. TURNER: That's right. There are several in Pennsylvania, several in Ohio, several in New Jersey --

QUESTION: So, you picked one that doesn't deal with a thing.

MR. TURNER: You pick one which deals with situations not contemplated by the legislature to be involved. And when you pick a statute dealing with detinue, or the taking away of a man's horse, or his watch, and how you get it back, and try to apply that, call that a property damage and try to apply that to something like Rico then I submit that the "catch all" statute is far better because those "catch all" statutes must be designed to do something and what better application to give them than a application like this where there is something unusual and unique.

QUESTION: Mr. Turner, you don't argue that a federal statute borrowing the Clayton Act would have the advantage of uniformity throughout the country?

MR. TURNER: Well, I do, Your Honor. I think that makes great sense. I wouldn't be prepared to trample on all other values in order to achieve national uniformity, but where the value, the other values that are important can be maintained along with national

uniformity, I would be prepared to take that.

I certainly do not stand here to advocate that the historic preference for borrowing from the great body of state statutes be abandoned.

QUESTION: Is it fair to say that, as you see the case, you prefer a six year statute and then you prefer a four year statute and you least prefer a two year statute?

MR. TURNER: Well, that would be reasoning in the wrong direction, I think. We have to approach this from a much more philosophical --

QUESTION: (Inaudible) least prefer a two you (Laughter) (inaudible).

QUESTION: Well, am I wrong? I thought your first preference was for a four year statute?

MR. TURNER: I believe it is, when I say preference I don't mean to intrude myself --

QUESTION: Well, it wouldn't be under certain circumstances?

MR. TURNER: No, and I think, I have tried to arrange it in our brief for the convenience of the Court in what we think is the most logical hierarchy of choice.

QUESTION: (Inaudible).

MR. TURNER: The first being in this situation, a national standard borrowed from the Clayton Act, four

years. If that is not --

QUESTION: Well, I was merely trying to rescue you from these accusations of six, four, two.

MR. TURNER: Oh, I understand that. (Laughter).

QUESTION: (Inaudible) four, six, two.

MR. TURNER: I was, it was giving me another opportunity to pass this over. You know, it's not, Justice Blackman, any particular number of years that should govern.

I think we should divorce apart from any statute that is too short to be fair or appropriate. Apart from that, whether it's two, three, four, or six, shouldn't govern the outcome of a matter like this. Nor should ones views on the wisdom or utility of the underlying statute, here the Rico case.

I mean there was some light being made earlier about whether the Rico statute is meeting its objectives and so on, I suspect that that is quite uninvolved in a consideration, in the quasi-legislative role that this Court finds itself cast in, in selecting a statute of limitations. What I'm saying is it wouldn't be appropriate because one didn't like the concept of the statute, to therefore advocate supplying a short statute of limitations.

QUESTION: I must admit not to be comfortable

with this quasi-legislative role in being, you know, presented a menu of statutes and then sort of said, you know, pick the one that seems good to you.

MR. TURNER: I'm very uncomfortable --

QUESTION: Surely Congress knew about this problem of national uniformity. If it thought it was important enough to have a uniform national statute of limitations, it could have provided for one very easily. In fact, as we've heard, some were proposed and they were not enacted. So I assume Congress doesn't care that much about national uniformity here.

MR. TURNER: Well, I don't know what assumption can be made from the legislative history about whether Congress cares about a national, or doesn't care about a national. It is my impression --

QUESTION: Justice Stevens is right. Maybe they didn't want to have any --

MR. TURNER: Well, Justice Stevens --

QUESTION: -- since they didn't provide it.

MR. TURNER: Yes.

QUESTION: It would be much easier, I gather, for the Congress to resolve this question than ask us to do it, wouldn't it?

MR. TURNER: Yes, but the Court has said on prior occasions that it will not infer from the failure of

Congress to address this issue, that no limitations period is applied.

QUESTION: Well maybe we might change our minds.

MR. TURNER: Well, it's very difficult for me to --

QUESTION: (Laughter).

MR. TURNER: -- to contradict that, although I -- (Laughter).

QUESTION: You can put that on top of six even. (Laughter).

MR. TURNER: On top of six. I don't intend to deal any further with the accrual issues other than to say that logical reasoning is what is required if the Court has to deal with this is quite apparent that a statute of limitations should not begin to run on any offense or any right of action until the statute has ripened into an actionable cause.

Until the events, the facts, have made out sufficient data from which a complaint could be drawn stating a prima facie case. Stating a cause of action under Rule 12(b)6.

It's easy enough to explain how we get to this point in the case, in the Third Circuit in attempting to remind the Court not to foreclose the accrual issue, I pointed out that at the time the District Court started

the clock running as it were, only one predicate act as alleged, had occurred. And that therefore, the statute could scarcely have accrued at that point in time.

And that is what has become known as the concession, or the admission that at the time of an initial point of injury in this case that there was no pattern in effect. And, of course, there wasn't if one assumes the statutory scheme here.

The Congress said that if, that the actionable events are operating through a pattern. The pattern is defined as two events. And so what is, at a minimum two events, and with the element of continuity added to it.

And so the first event, although not starting the statute running, statute of limitations running, still when a pattern does exist and comes into fullness of itself, it surely caught back up in it for damage purposes. That you could recover damages for that earlier act which is part of this greater, greater whole.

And I suspect that in the criminal area it wouldn't be urged that somehow the, no consequences could flow criminally from the first act of a Rico conspiracy.

QUESTION: Well, I don't know. I was thinking, if you were mugged by a criminal before he had committed any other crime and then he later goes onto commit a, goes on to a full life of crime, would you say you had been

mugged by an habitual criminal?

MR. TURNER: It depends on when I said it. If I said it when I was first mugged, no, because I had no reason to know that it was a habitual criminal. But if upon being shown his sheet a year later and saw that he had done this to others, I think so.

I appreciate the effort to find an analogy of the two or more events that are required to trigger liability. I have been unsuccessful in formulating an analogy or some other area of law where this exists to see how it would be treated there.

So I think we're reduced in all probability to contemplating this as a logical and more of a philosophical point to see how it should be viewed and it certainly shouldn't be viewed to allow in a civil context a party to take its heaviest blow as its first one.

QUESTION: Now you're asking us to legislate philosophically. Is that what you're asking us to do?

MR. TURNER: Well, Your Honor, if accrual rules have to be developed --

QUESTION: You said philosophically.

MR. TURNER: Yes, Your Honor.

QUESTION: You just used the word.

MR. TURNER: Yes, I think it has to be approached that way.

QUESTION: It has to be legislated that way.

MR. TURNER: Well, I don't think when we get to accrual we're talking about legislation any longer, because, or interstitial legislation because the accrual rules are clearly federal in nature and to be defined by this Court so that it is not philosophical legislation in that area, Your Honor, it is attempting to formulate rules of accrual for what appears to be a relatively unique and type of --

QUESTION: (Inaudible).

MR. TURNER: Thank you, Your Honor. Unless there are any further questions, I will conclude.

QUESTION: Thank you, Mr. Turner. Mr. Frantz, you have one minute remaining.

REBUTTAL ARGUMENT OF

ROBERT L. FRANTZ

ON BEHALF OF PETITIONER

MR. FRANTZ: Your Honor, one minute, very quickly. Detinue is a red herring. The Court in the Third Circuit adopted the findings of the Superior Court and the lower courts in Pennsylvania that the Personal Property Act, 5524C covers injury, tortious injury to business.

This is 1987, this is not 1906. In 1906, Justice Holmes deferred to a former Supreme Court Justice

of Tennessee who said that the Personal Property Injury Statute in Tennessee only applied to tangible property. Today in Pennsylvania and around the country, personal property statutes apply to intangible, they apply to business.

If somebody burns down your barn, it's your business. Whether it's a barn or whatever it is, it's your business. A cause of action that hasn't been mentioned by anyone is Section 1962(d), the Conspiracy Statute. If the time someone's injured there is in existence a conspiracy to commit a pattern of racketeering activity there is a cause of action at that time. Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Frantz.

The case is submitted.

(Whereupon, at 1:33 p.m., oral argument in the above-entitled case was submitted).

CERTIFICATION

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#86-497 - AGENCY HOLDING CORPORATION, ET AL., Petitioners V. MALLEY-DUFF & ASSOCIATES, IN
86-531 - CROWN LIFE INSURANCE COMPANY, ET AL., Petitioners V. MALLEY-DUFF & ASSOCIATES,
INC., ET AL.

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BY Paul A. Richardson

(REPORTER)