

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: TOM GRIMMETT, TRUSTEE FOR THE BANKRUPTCY  
ESTATE OF VINCENT SIRAGUSA AND JOANNE  
SIRAGUSA, Petitioners v. PATRICIA L. BROWN, ET AL.

CASE NO: 95-1723

PLACE: Washington, D.C.

DATE: Monday, January 6, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TOM GRIMMETT, TRUSTEE FOR THE :  
4 BANKRUPTCY ESTATE OF VINCENT :  
5 SIRAGUSA AND JOANNE SIRAGUSA, :  
6 Petitioners :

7 v. : No. 95-1723

8 PATRICIA L. BROWN, ET AL. :  
9 - - - - -X

10 Washington, D.C.

11 Monday, January 6, 1997

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 11:06 a.m.

15 APPEARANCES:

16 RICHARD SAUBER, ESQ., Washington, D.C.; on behalf of  
17 the Petitioners.

18 PHILIP A. LACOVARA, ESQ., Washington, D.C.; on behalf of  
19 the Respondents.

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1 PROCEEDINGS

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 95-1723 -- the spectators are admonished  
5 not to talk until you get out of the courtroom. The Court  
6 remains in session.

7 We'll hear argument next in Number 95-1723, Tom  
8 Grimmett v. Patricia Brown.

9 Mr. Sauber.

10 ORAL ARGUMENT OF RICHARD SAUBER

11 ON BEHALF OF THE PETITIONERS

12 MR. SAUBER: Mr. Chief Justice, and may it  
13 please the Court:

14 Our client, Joanne Siragusa, possessed a debt  
15 owed to her by her husband --

16 QUESTION: Are you also representing the trustee  
17 in bankruptcy?

18 MR. SAUBER: Yes, we are, Justice O'Connor.

19 QUESTION: Because the interests seem to diverge  
20 a little bit --

21 MR. SAUBER: I think the application --

22 QUESTION: -- and I was a little curious about  
23 how your argument was going to cover both.

24 MR. SAUBER: The application on the first issue  
25 of the Banker's Trust issue, by definition, since it rests

1 on a conclusion of the bankruptcy, I think only applies to  
2 her definition of injury at this point, and not to the  
3 trustee's interest.

4 The -- her preexisting debt owed to her by her  
5 husband was not part of the racketeering scheme and not  
6 alleged to be so.

7 When he went into bankruptcy owing her somewhere  
8 in the neighborhood of \$1.4 million as a result of a  
9 property settlement, that debt was a preexisting  
10 legitimate debt unrelated to the racketeering activity as  
11 alleged in the racketeering complaint.

12 QUESTION: Well, could you tell us just  
13 preliminarily please whether Vincent Siragusa has -- at  
14 one point the bankruptcy order had discharged Vincent  
15 Siragusa's debts.

16 MR. SAUBER: Yes. He received a statutory  
17 preliminary discharge.

18 QUESTION: Has that ever been -- has an order  
19 come from the bankruptcy court changing that?

20 MR. SAUBER: Yes. Joanne and --

21 QUESTION: I didn't see it.

22 MR. SAUBER: Joanne and the trustee objected  
23 within the 1 year of his statutory discharge, claiming  
24 that the discharge had been obtained by fraud. That was  
25 the adversary complaint.

1           Ultimately in 1994 Vincent settled both with the  
2           estate and with Joanne individually and agreed that his  
3           discharge --

4           QUESTION: But what order issued from the  
5           bankruptcy court reflecting any of that?

6           MR. SAUBER: The -- there is an order. I don't  
7           believe it's in the record, but there is an order from the  
8           bankruptcy court accepting the settlement which includes  
9           giving up his discharge, so as of 1994 his preliminary  
10          discharge was revoked.

11          QUESTION: So you say it is, but we won't find  
12          it anywhere in these papers?

13          MR. SAUBER: I don't believe it's in this  
14          record, no.

15          QUESTION: A preliminary discharge is one  
16          that -- could you explain that just very briefly?

17          MR. SAUBER: Yes, sir. The preliminary  
18          discharge in a Chapter 7 bankruptcy is granted within a  
19          certain number of months as long as no one -- none of the  
20          creditors of the trustee object. Subject to a 1-year  
21          period beyond the automatic granting of that preliminary  
22          discharge the other creditors and the trustee can object  
23          to the discharge on the ground that it was obtained by  
24          fraud.

25          Joanne Siragusa and the trustee did file in May

1 of 1989 --

2 QUESTION: That the discharge was obtained by  
3 fraud?

4 MR. SAUBER: Yes. Joanne and the trustee filed  
5 in May of 1989 an adversary complaint alleging that, among  
6 other things, the discharge granted to Vincent  
7 preliminarily was obtained by fraud. The Ninth Circuit  
8 found that that was the date on which Joanne was injured.

9 Our position is that her debt, her preexisting  
10 debt was the same the day before she filed that complaint  
11 as it was the day after. The focus of the racketeering  
12 scheme in this case is focused on a bankruptcy fraud.  
13 It's a classic attempt to get out from under a legal  
14 obligation to pay a debt.

15 QUESTION: Mr. Sauber, what's left of -- what  
16 injury has now been incurred? I mean, I don't -- once the  
17 bankruptcy -- the source of the injury was the bankruptcy.

18 MR. SAUBER: No, Your Honor.

19 QUESTION: It was a discharge in bankruptcy, was  
20 it not? If that's been undone, what injury is there for  
21 anybody to complain about in this case?

22 MR. SAUBER: The -- there are two ways in which  
23 Joanne can be injured by this bankruptcy fraud. One is if  
24 the debtor obtains a discharge of its -- of his obligation  
25 to pay her. That's now been removed.

1 QUESTION: That's out.

2 MR. SAUBER: Secondly, if she is forced to  
3 accept at the end of the bankruptcy less than 100 percent  
4 of the debt he owed her when he started this scheme, and  
5 that reduction is caused by the racketeering activity,  
6 that is her racketeering injury at that point.

7 QUESTION: Well --

8 QUESTION: Has that occurred?

9 MR. SAUBER: Well, our position is that until  
10 the bankruptcy is complete and over, whether or not she's  
11 been injured, whether or not her preexisting non-RICO debt  
12 has been affected by the racketeering activity cannot be  
13 determined.

14 QUESTION: And she has a cause of action before  
15 that injury occurs?

16 MR. SAUBER: She filed a protective cause of  
17 action.

18 QUESTION: But the very authority that you rely  
19 on, Mr. Sauber, the Banker's Trust, says that such a claim  
20 is not ripe, and the bottom line of that case was  
21 dismissal, so I was frankly surprised that you were urging  
22 to preserve your case, that no injury has yet occurred.

23 Well, if no injury has yet occurred, you have no  
24 lawsuit.

25 MR. SAUBER: Well, it was -- if I may, it was

1 dismissed, Banker's Trust, without prejudice. She was  
2 concerned that she was in a jurisdiction that would not  
3 accept the Banker's Trust line of cases, and she filed a  
4 protective lawsuit on the assumption that -- on the fear  
5 that one of the courts in her jurisdiction would find  
6 differently.

7 QUESTION: I've no objection to dismissing this  
8 without prejudice, but I don't know how it cannot be  
9 dismissed if there has been no injury.

10 MR. SAUBER: Well, there has been no injury to  
11 Joanne if you accept our argument with respect to Banker's  
12 Trust.

13 With respect to the trustee, who the Ninth  
14 Circuit pegged as being injured in May of 1989, his case  
15 is still related to the second question, whether or not  
16 you decide that the proper approval rule in this -- for a  
17 civil RICO case is an injury-in-pattern discovery rule.

18 If you decide that, then his -- the trustee's  
19 injury in May of 1989 doesn't start the statute of  
20 limitations ticking. It won't tick until December of  
21 1990.

22 QUESTION: We can't tell whether the trustee's  
23 been injured either until the end of the bankruptcy, can  
24 we?

25 MR. SAUBER: Well, I think that the Banker's

1 Trust line of cases would only apply to Joanne.

2 QUESTION: When you say Banker's Trust, you're  
3 referring to the Second Circuit case?

4 MR. SAUBER: Yes, Your Honor. That would only  
5 apply to Joanne because by definition it assumes that the  
6 bankruptcy is complete.

7 The record in this case stands that the Ninth  
8 Circuit has concluded that the trustee was injured as of  
9 May of 1989, and since he would be unaffected by --

10 QUESTION: How was he injured in May of 19 --

11 MR. SAUBER: The Ninth Circuit rests its  
12 decision on the assumption that in May of 1989 Joanne and  
13 the trustee recognized, because they filed their adversary  
14 complaint, that her husband has tried to concoct a  
15 bankruptcy scheme to get out from paying her the legal  
16 obligation.

17 QUESTION: How does that injury the trustee in  
18 bankruptcy? Were there two acts in this?

19 I thought what you're claiming in that complaint  
20 is there is a person, and he owes some money to Joanne,  
21 and she has a secured interest in some property, and he  
22 figures out a way that he can get rid of that secured  
23 interest because what he's going to do is go through  
24 bankruptcy and the secured interest will disappear.  
25 That's the whole thing.

1           Now, if that's the whole thing I don't even see  
2 that there are two acts. Where is there a RICO case at  
3 all?

4           MR. SAUBER: Well, the racketeering complaint  
5 which was filed in 19 --

6           QUESTION: Much less the -- the other part of  
7 that is how is the trustee hurt?

8           MR. SAUBER: Well, the racketeering complaint is  
9 different from the adversary complaint. The racketeering  
10 complaint was filed in 1993. The racketeering activity  
11 and the schemes identified are the scheme to defraud her  
12 of her legal debt, the scheme to defraud her husband's  
13 partners --

14           QUESTION: It all is the same thing, isn't it?  
15 It all is the same thing. What he did is, he went through  
16 bankruptcy and he wasn't entitled to.

17           I mean, I take it if I have a fraudulent scheme  
18 to get \$100,000 from the bank, that might hurt the bank,  
19 that might hurt some depositors, that might hurt some  
20 shareholders. How is it two actions, and how is the  
21 trustee -- to go back to Justice Scalia's question, how is  
22 the trustee in bankruptcy hurt by this RICO proceeding?

23           MR. SAUBER: I think that the Ninth Circuit  
24 concluded that in May of 1989 both Joanne and the trustee  
25 were injured by the recognition that Vincent had filed a

1 fraudulent bankruptcy.

2 QUESTION: It hurt their feelings?

3 MR. SAUBER: No. It hurt their interest in the  
4 estate by attempting fraudulently to transfer the assets  
5 to other people.

6 QUESTION: But did it transfer the assets? Did  
7 it do anything? It seems to me it did nothing at all.

8 MR. SAUBER: No. He fraudulently transferred  
9 his interest in his medical practice to other people.  
10 That was the whole basis of the bankruptcy --

11 QUESTION: The assets were transferred, and the  
12 trustee therefore collected less money in the bankruptcy  
13 estate. That happened, is that not correct?

14 MR. SAUBER: Well, the assets were transferred.  
15 He then -- the trustee then did proceed against the  
16 recipients of that property in an attempt to get them  
17 back.

18 A settlement in 1992 was entered into with the  
19 possessors of that fraudulently transferred property. At  
20 the --

21 QUESTION: And the trustee in bankruptcy, a  
22 settlement between the trustee in bankruptcy and the  
23 individuals who got it?

24 MR. SAUBER: Yes, and with Joanne personally,  
25 and as a result --

1 QUESTION: Yes, but and -- we're talking about  
2 the trustee.

3 MR. SAUBER: Yes.

4 QUESTION: Did the trustee get the assets back  
5 into the --

6 MR. SAUBER: He got a --

7 QUESTION: -- bankruptcy estate?

8 MR. SAUBER: I'm sorry. At that point, Justice  
9 O'Connor, the asset, which was the medical practice --

10 QUESTION: Right.

11 MR. SAUBER: -- had diminished in value and they  
12 entered into a settlement of a certain amount of money  
13 which came into the estate, some of which went to Joanne  
14 personally, because she personally settled with the  
15 partners at that point also.

16 The racketeering scheme, the pattern that's  
17 alleged --

18 QUESTION: Could you answer -- sorry. Could  
19 you -- I was -- I -- what was your answer to Justice  
20 O'Connor's question?

21 QUESTION: I never got one.

22 QUESTION: How much money did the trustee lose  
23 as a result of this scheme?

24 MR. SAUBER: Well, the estate of Vincent is --  
25 has not yet paid off its lawful debt to Joanne.

1 QUESTION: How much does it owe? No, not to  
2 Joanne. How much money has the trustee lost as a result  
3 of the scheme that you say involved a fraudulent transfer  
4 of property?

5 MR. SAUBER: If you take into account the  
6 settlement, it's our position that the estate at this  
7 point has lost several hundred thousand dollars and that  
8 Joanne, by definition, has also lost several hundred  
9 thousand dollars.

10 QUESTION: By the fraud, or by the reduction in  
11 value of the business?

12 MR. SAUBER: Well, I think that it clearly is  
13 the reduction in value of the business, but I think the  
14 allegation would be that the business was reduced over the  
15 course of the bankruptcy because of the bankruptcy fraud,  
16 that the proceeding in bankruptcy --

17 QUESTION: Why would he enter into a settlement,  
18 then, accepting less, if he's entitled to more?

19 MR. SAUBER: He's pursuing more. The business  
20 was only worth a certain amount of money when he settled  
21 with the partners, and he is still pursuing more in this  
22 lawsuit. That's the whole point of his attempting to  
23 bring assets back into the estate so that he can pay out  
24 the creditors.

25 QUESTION: When you say the bankruptcy fraud,

1 you mean something different, Mr. Sauber, I take it, than  
2 the fraudulent conveyance?

3 MR. SAUBER: Well --

4 QUESTION: Surely you can answer it yes or no.  
5 Either you do mean something different or you don't.

6 MR. SAUBER: I mean something in addition to  
7 that, his submission of false statements throughout the  
8 bankruptcy as to his assets, and as to his intentions, but  
9 basically, Mr. Chief Justice, yes, his attempt to transfer  
10 his property, claim that he no longer has the assets to  
11 pay off his debt to his wife, and to go through and obtain  
12 a discharge. That was the heart of the bankruptcy fraud.

13 QUESTION: But I still don't understand, is  
14 there a separate claim somewhere that the -- he conveyed  
15 property, perhaps the medical practice, to third parties  
16 in fraud of creditors?

17 MR. SAUBER: Yes. That is --

18 QUESTION: That has nothing to do with the  
19 bankruptcy, I take it.

20 MR. SAUBER: Well, the point of the fraudulent  
21 conveyance does have something to do with the bankruptcy.  
22 He wanted to go into bankruptcy, claim that he no longer  
23 had any of the assets to pay off his debts because he had  
24 now transferred them, obtain a discharge of his legal debt  
25 to his wife, and then emerge from bankruptcy and regain

1 possession of the assets that he possessed in the first  
2 place. That's the classic bankruptcy fraud. That was the  
3 scheme here.

4 Now, it turned out that Joanne and the trustee  
5 discovered in December of 1990 that this scheme also had  
6 other potential victims.

7 QUESTION: Can you tell me, what is the first  
8 predicate act under RICO and what is the second, and what  
9 was the date of each?

10 MR. SAUBER: The earliest predicate acts alleged  
11 in the complaint are the filing of the bankruptcy. There  
12 is a bankruptcy fraud as a predicate act, and there are  
13 mail and wire frauds. The scheme alleged --

14 QUESTION: What are the later predicate acts?  
15 Does that suffice for a RICO violation, or do we need a  
16 second predicate act?

17 MR. SAUBER: No. I think that suffices in that  
18 there are more than two, but the second predicate act that  
19 brings in the pattern is the defrauding of Vincent's  
20 partners.

21 QUESTION: And when did that occur?

22 QUESTION: You say there cannot be a pattern  
23 without a second victim?

24 MR. SAUBER: No, I'm not saying that, Your  
25 Honor. I think that question was answered by this Court.

1 In this --

2 QUESTION: Well then, why couldn't there be a  
3 pattern inferred from the multiple predicate acts before  
4 the second victim even entered the picture?

5 MR. SAUBER: There may have -- there may be such  
6 a pattern, but in this case she alleged --

7 QUESTION: Well, if there is such a pattern, and  
8 I thought your answer a moment ago was that there was,  
9 then I would suppose that so far as the pattern  
10 requirement for your cause of action it was satisfied  
11 before anything was done to damage the medical partner.

12 MR. SAUBER: No, I would disagree. The pattern  
13 that she alleges in the RICO complaint, the second part of  
14 the RICO complaint, is that the scheme which she was a  
15 victim of also served to defraud others.

16 QUESTION: Yes -- yes, but if there are two  
17 predicate acts insofar as she is concerned, the filing of  
18 the bankruptcy petition and, second, the transfer of the  
19 assets of the medical practice, that's enough to establish  
20 a pattern as well.

21 MR. SAUBER: It may or it may not be.

22 QUESTION: Well, let's suppose it is, that we  
23 think it is enough, and this other story about another  
24 doctor, well, fine, but it was complete as of the time the  
25 bankruptcy petition was filed and the transfer then was

1 made, plus mailings and calls and so forth.

2 MR. SAUBER: But Justice O'Connor, you are  
3 redefining her pattern and her RICO case. The Ninth  
4 Circuit accepted as given her RICO complaint, and it  
5 decided that if it's an injury --

6 QUESTION: I'm just looking at what the record  
7 discloses here, and what's being alleged, and enough is  
8 being alleged apparently to establish both a claimed  
9 injury by her and a series of acts that would qualify as a  
10 pattern.

11 MR. SAUBER: I think that that really starts to  
12 sound a little bit to us like overpleading in that  
13 basically she was in a dispute with her husband. He tried  
14 through bankruptcy to get out from having to pay her.

15 Now, are there more than one predicate acts  
16 which you could then allege were a pattern, and that  
17 there's continuity, and relationship? I don't know. But  
18 in this case we chose not to allege that as a racketeering  
19 case. We chose --

20 QUESTION: You included all these facts in the  
21 complaint, and if it's laid out, there it is.

22 MR. SAUBER: Absolutely. We included them --

23 QUESTION: In fact, it's a complaint that went  
24 on for 130-some pages. You've got plenty in there, all  
25 over the place.

1           MR. SAUBER: It is quite a lengthy and quite a  
2 detailed complaint, but the pattern that she does allege  
3 and chooses to proceed with is the pattern that includes  
4 the other --

5           QUESTION: That she now chooses to proceed with.

6           MR. SAUBER: No --

7           QUESTION: She filed this complaint in -- what  
8 year was it?

9           MR. SAUBER: 19 --

10          QUESTION: November '93.

11          MR. SAUBER: Yes.

12          QUESTION: And claimed injury and claimed a RICO  
13 cause of action, and we have to decide among other things,  
14 I guess, when a statute of limitations begins to run, and  
15 is there anything we can agree on at all in this messy  
16 case? Do you agree that at least the elements of the RICO  
17 claim have to exist before the statute can run?

18          MR. SAUBER: Absolutely.

19          QUESTION: That means an injury and a pattern.

20          MR. SAUBER: A pattern, yes. That I think we  
21 can agree on.

22                 The Ninth Circuit in its decision, which on the  
23 second issue I think is why we're, said, if it decided to  
24 accept an injury and pattern discovery rule, then the  
25 complaint was timely. By deciding only on an injury

1 discovery rule, then the complaint was not timely, and the  
2 only thing that you can take from that is that the Ninth  
3 Circuit found that the pattern alleged in the complaint  
4 was not evident to her until December of 1990.

5 QUESTION: But that -- was that not until after  
6 the injury had occurred?

7 MR. SAUBER: After her injury occurred.

8 QUESTION: Well, let's just take it at that  
9 point. I had a problem with your brief, because you were  
10 saying, we have a terrible problem here. We had the first  
11 predicate act, and then the injury, and then the second  
12 predicate act.

13 Well, I kept asking myself, where is there a  
14 RICO injury at all if there's no second predicate act at  
15 the time the injury occurs?

16 MR. SAUBER: There are -- Justice Kennedy, there  
17 are a number of predicate acts alleged in the complaint.  
18 The first injury from several predicate acts is only to  
19 her.

20 In December of 1990, when she discovers that the  
21 same scheme was designed to defraud others, it occurs to  
22 her at that point that there is a pattern. That is her --

23 QUESTION: Yes, but in fact there may well have  
24 been a pattern already. There was the filing of the  
25 bankruptcy petition with the fraudulent intent, as she

1 alleges, and there was the transfer of the assets. That's  
2 the second thing. So we already see a pattern.

3 MR. SAUBER: Well, I don't --

4 QUESTION: And whether she understands the cause  
5 of action correctly is something this Court has said  
6 doesn't matter. You don't have to understand the medical  
7 malpractice law to have the statute start to run. If she  
8 knows the acts, and if those acts add up to a cause of  
9 action, then okay, you can start the statute running.

10 MR. SAUBER: I'm --

11 QUESTION: She doesn't have to understand.

12 MR. SAUBER: I'm sorry.

13 QUESTION: She doesn't have to understand what  
14 all would be considered as part of the pattern.

15 MR. SAUBER: No, but I do think that it was --  
16 it's only fair to suggest that she would have a difficult  
17 time proving continuity and relationship and threat of  
18 continued activity if it was just a dispute between her  
19 and her husband.

20 QUESTION: Then it seems to me that you should  
21 go back and say what I thought you did not say before, and  
22 that is, Justice O'Connor, your suggestion is not well-  
23 taken. There was no pattern, and there was no pattern  
24 until the second victim came into the picture, but that's  
25 not what you said.

1 MR. SAUBER: Well --

2 QUESTION: And I think you've got to choose what  
3 your pattern view is, because if you accept Justice  
4 O'Connor's suggestion and my suggestion, I guess, then it  
5 seems to me you're out, even on the more favorable rule.

6 MR. SAUBER: Well, I don't want to say that  
7 under no circumstances could a single scheme with multiple  
8 predicate acts constitute a pattern. That's what you  
9 decided in H.J.

10 What we are saying is that in this case the  
11 individual predicate acts only resulting in injury to her  
12 did not constitute a pattern, and if I --

13 QUESTION: Why?

14 MR. SAUBER: Because there was only one victim.

15 QUESTION: But that's not dispositive, we agree.

16 MR. SAUBER: I understand. That is not  
17 dispositive, but there was one victim for a short period  
18 of time, and basically what it was was a dispute growing  
19 out of a divorce case in which the husband tried to get  
20 out of his obligations.

21 QUESTION: But what this seems to boil down to  
22 is what Justice O'Connor was suggesting a moment ago. She  
23 simply didn't recognize it fast enough.

24 MR. SAUBER: Well, I --

25 QUESTION: You're saying that it happened in a

1 short time. It just grew out of this domestic dispute.  
2 If the pattern is there, it seems to me the law is -- has  
3 got to require the plaintiff to be nimble enough to see  
4 it.

5 MR. SAUBER: But I think in fairness the way  
6 that this Court has defined pattern and required the  
7 plaintiff to find some sort of continuity and a  
8 relationship, and the threat of continued criminal  
9 activity, in the short period of time when she recognizes  
10 that her husband has tried to defraud her out of her debt,  
11 it would be our position that that is not sufficient for  
12 her to conclude, even if she's omniscient, that there is  
13 in fact a pattern.

14 QUESTION: So if you have -- I think I agree  
15 with you, but if I have a very complicated scheme to sell  
16 you the Brooklyn Bridge -- you'd be too wise. You  
17 wouldn't buy it, but there are five or six others who  
18 might buy it.

19 Now, suppose instead of one person buying it it  
20 turns out five are putting up the money. Is there  
21 suddenly a RICO violation? I mean, is there a RICO  
22 violation because the same activity hurt five people  
23 rather than just one?

24 MR. SAUBER: I think --

25 QUESTION: Why does that create a pattern? I

1 don't understand pattern here, in other words, which is  
2 what's causing me the problem.

3 MR. SAUBER: Well --

4 QUESTION: I don't understand why seven  
5 complicated acts which lead to the sale of the Brooklyn  
6 Bridge comprise two predicates, and I don't understand, if  
7 they don't, why the fact that three people buy the  
8 Brooklyn Bridge rather than one makes a difference for  
9 RICO purposes.

10 MR. SAUBER: Well, I think that it's the issue  
11 that this Court dealt with in H.J., that the -- a single  
12 scheme, even if there are a number of predicate acts  
13 within a short period of time, where really in essence  
14 it's a dispute between a husband and wife, doesn't  
15 constitute the kind of continued criminal activity that  
16 this Court contemplated when it defined a pattern.

17 QUESTION: So you're saying, I think, in answer  
18 to Justice Breyer it's when they sell the bridge twice,  
19 not when they sell it once to five people. That's when it  
20 becomes clear. Is that it?

21 MR. SAUBER: I think in a common sense approach  
22 most plaintiffs and practitioners would start to think of  
23 a pattern when you have different and multiple victims of  
24 the same --

25 QUESTION: Did they sell the bridge here twice?

1 MR. SAUBER: Yes.

2 QUESTION: In the 170 pages, despite its detail,  
3 a complaint longer than any antitrust complaint I've seen,  
4 including the most complex, I still couldn't find in this  
5 detail what the facts were.

6 That is, what are the facts that lead to the  
7 sale of the Brooklyn Bridge twice?

8 MR. SAUBER: The facts, I think, simply stated  
9 are that the attempted fraudulent transfer and the  
10 reorganization of the medical practice was designed to  
11 defraud Joanne, the wife, and one of the partners, and  
12 some of the junior shareholders, so the answer is yes,  
13 there were three intended victims of the same pattern of  
14 using the medical practice as an enterprise.

15 QUESTION: Well, you say pattern, but as I  
16 understand it it is simply a conveyance, was it not, of  
17 property for less than fair value?

18 MR. SAUBER: It was a -- yes, Mr. Chief Justice.

19 QUESTION: I mean, that's one act. I mean, what  
20 more happened?

21 MR. SAUBER: Well --

22 QUESTION: There was a lot more, wasn't there?

23 MR. SAUBER: There was --

24 QUESTION: Vincent was paid a continuing salary  
25 that was as much or more than he had earned before. There

1 was a continued operation of this new enterprise and it  
2 put more money in his pocket than he had had before. This  
3 went on and on.

4 Now, that, under our case law at least, can  
5 establish a pattern.

6 MR. SAUBER: It can establish a pattern if it  
7 goes -- if it goes on and on and if there's a threat --  
8 well, I think, Justice O'Connor, what happened is, at a  
9 point only a year after -- in May of '89 she finds out  
10 about the fraudulent transfer. A year later, in December  
11 of 1990, she finds out that there are other victims of the  
12 fraud. In some circuits that would not be enough time to  
13 allege a pattern. In some circuits the requirement is  
14 that the activity needs to go on for 2 years.

15 I would like to reserve my -- the rest of my  
16 time.

17 QUESTION: Very well, Mr. Sauber.

18 Mr. Lacovara.

19 ORAL ARGUMENT OF PHILIP A. LACOVARA

20 ON BEHALF OF THE RESPONDENTS

21 MR. LACOVARA: Thank you, Mr. Chief Justice, and  
22 may it please the Court:

23 In order to understand why the district court  
24 and the court of appeals properly dismissed this claim on  
25 the basis of the statute of limitations, it may be

1 important both to mention the four possible statute of  
2 limitations rules that the briefs frame, under three of  
3 which I think the colloquy with my learned friend would  
4 show this judgment must be affirmed, but it's also  
5 important to go back and find out what this case is  
6 actually about as it was pled before the district court  
7 and the court of appeals.

8 In this Court, it seems to be transformed into a  
9 lost debt bankruptcy case. That is emphatically not the  
10 reason alleged in the district court or, indeed, in the  
11 bankruptcy court in 1989 that led to the claim that the  
12 petitioner, Ms. Siragusa, had actually incurred  
13 substantial and measurable injury as of 1987.

14 Let me refer if I may to the joint appendix.  
15 Let's start first with the bankruptcy -- with the  
16 adversary complaint, because that is the date -- that's  
17 May 1989 -- by which time both the district court and the  
18 court of appeals found she had adequate notice of any RICO  
19 claim. May 1989, more than 4 years before she filed the  
20 bankruptcy -- the RICO case.

21 Although there's been some discussion here  
22 denying the existence of a pattern, or suggesting there  
23 may have been only one or two predicate acts, in May of  
24 1989 Ms. Siragusa filed the adversary complaint that among  
25 other things lists --

1 QUESTION: This is an adversary complaint in  
2 the --

3 MR. LACOVARA: In the bankruptcy court, yes,  
4 Mr. Chief Justice.

5 QUESTION: And what, strictly speaking, is an  
6 adversary complaint in the bankruptcy --

7 MR. LACOVARA: It's in effect a civil claim that  
8 is in some way related to the jurisdiction of the  
9 bankruptcy court. It's a claim that may be made either by  
10 the trustee against a third party, or it may be made by an  
11 outsider against the debtor and some third parties.

12 QUESTION: And seeking some sort of remedy  
13 against the assets of the bankrupt?

14 MR. LACOVARA: Well, it can also be, as it was  
15 in this case, Mr. Chief Justice, a request for a personal  
16 remedy against individuals and, indeed, the individuals in  
17 the bankruptcy case included the very respondents before  
18 the court today, the lawyer defendants.

19 In May of 1989 Ms. Siragusa claimed that there  
20 had been what she called a fraudulent course of conduct,  
21 and if you look on page -- beginning on page 191 of the  
22 joint appendix, beginning on paragraph 21, she then uses  
23 this as a defined term.

24 The debtor, beginning in 1983, never intended to  
25 make marital payments but undertook a fraudulent and

1 deceptive course of conduct -- that paragraph continues  
2 on -- in which the other defendants ultimately joined.

3 She then goes on, just to refer to Justice  
4 Kennedy and Justice Breyer's question --

5 QUESTION: And what you're reading from is the  
6 adversary complaint in bankruptcy.

7 MR. LACOVARA: Filed in May 1989.

8 QUESTION: Not the complaint in the present  
9 action.

10 MR. LACOVARA: No. I'll get to that in a  
11 moment, Mr. Chief Justice.

12 She then goes on, beginning in paragraph 33, to  
13 allege, beginning in at least 19 -- July 1987,  
14 approximately 2 years before this complaint was filed, a  
15 series of fraudulent misstatements by mail and wire made  
16 by Vincent and made, she alleges, by the counsel for the  
17 Heart Institute entities. That's Patricia Brown, the  
18 respondent, and ultimately the firm with which she was  
19 affiliated, the Beckley Singleton firm.

20 QUESTION: What paragraph? I thought you said  
21 33.

22 MR. LACOVARA: Paragraph 33, and then if you  
23 continue on to subparagraph B --

24 QUESTION: I see.

25 MR. LACOVARA: -- C, D, you'll see references to

1 the Heart Institute's counsel saying this, that and the  
2 next thing. Then go over to page 198 in the joint  
3 appendix.

4 She then says the debtor filed certain schedules  
5 in January 1988 taking an unbelievable position. She  
6 attributes that to the Heart Institute counsel. That's  
7 respondent Patricia Brown. She says in paragraph I on 99  
8 that the schedules prepared by the respondent purportedly  
9 described certain transactions --

10 QUESTION: So what is your point in reading --

11 MR. LACOVARA: The point is that the -- there  
12 are several points, Justice O'Connor. The key point is  
13 there was a pattern that existed as of this point, because  
14 she has alleged by this time several years of allegedly  
15 fraudulent activity, wire fraud, mail fraud, and  
16 fraudulent bankruptcy petition. The bankruptcy petition  
17 had been filed in 1987.

18 QUESTION: Was there an injury?

19 MR. LACOVARA: Yes, and that's the next point to  
20 get to. She alleges in that complaint that she was  
21 specifically injured and incurred financial damage as a  
22 result of the scheme.

23 Now, the scheme that she alleges there -- and  
24 this is important as well -- is exactly the same scheme as  
25 both the district court and the court of appeals here

1 understood that she alleged in the RICO case. It was not  
2 the fraudulent discharge of the debt.

3 She alleged in the bankruptcy complaint in 1989  
4 exactly what she alleged in the RICO complaint in November  
5 1993, that the object of the scheme and the nature of the  
6 injury was the fraudulent transfer out from under her  
7 security interest of her husband's interest in the medical  
8 practice.

9 QUESTION: Mr. Lacovara, may I ask you to  
10 clarify this? As I understood the Ninth Circuit's  
11 opinion, Judge Hall's opinion, she said there's a statute  
12 of limitations question here, and my circuit's position  
13 for 10 years has been injury, whether or not you know it's  
14 a pattern.

15 MR. LACOVARA: Yes.

16 QUESTION: Other circuits have the injury plus  
17 pattern. If the Ninth Circuit had that rule, this  
18 complaint would be timely, but, she said, our rule is  
19 injury, period.

20 Am I wrong in understanding that that's what  
21 Judge Hall said?

22 MR. LACOVARA: I think Judge Hall left open the  
23 question whether or not the petitioner would prevail under  
24 the injury-plus-pattern recognition point.

25 Our argument today, however, is as the colloquy

1 with several of the justices has indicated, even under  
2 that rule -- that's the third of the fourth that the  
3 briefs frame -- this case had to be dismissed, because  
4 petitioner --

5 QUESTION: But that's not something that the  
6 Ninth Circuit dealt with.

7 MR. LACOVARA: That's correct.

8 QUESTION: The Ninth Circuit said, our rule, in  
9 contrast to the rule in other circuits, is simply injury,  
10 and it doesn't matter that you didn't know at that point  
11 there was any pattern.

12 MR. LACOVARA: That's correct, but I do want to  
13 say --

14 QUESTION: And on what you're telling us now, it  
15 seems like this isn't the right case for us to decide that  
16 question.

17 MR. LACOVARA: Well, I can only speak as the  
18 respondent. We opposed certiorari, Justice Ginsburg, and  
19 I can say that the Court appears to have taken certiorari  
20 to decide, in the existence of a real conflict, what the  
21 correct accrual rule is in civil RICO claims.

22 There are three rules that we think clearly bar  
23 this complaint. The fourth one, only the fourth one --  
24 that's the Third Circuit's last predicate act rule -- is  
25 the only one that would save it. The one that we think,

1 as even the petitioner in her brief seems to recognize,  
2 would clearly command affirmance here, and we think is the  
3 correct rule, is the pure Clayton Act accrual rule.

4 QUESTION: But I thought that the debate between  
5 the parties was not about the Third Circuit rule but  
6 between the injury or injury-plus-pattern rules.

7 MR. LACOVARA: Well, in -- up through the Ninth  
8 Circuit, since Ninth Circuit law was quite clear, it was  
9 sufficient to argue that petitioner's RICO complaint was  
10 barred by the Ninth Circuit's injury discovery principle,  
11 but now in this Court I take it that the issue before you  
12 is, what is the right rule to lay down for all civil RICO  
13 claims whether or not it's the one that was adopted --

14 QUESTION: Well, and there's another aspect to  
15 the rule. Do we look at whether the plaintiff knew or  
16 should have known of the injury and/or the pattern, or do  
17 we just look at whether there was actual knowledge?

18 MR. LACOVARA: Well, I think the way the injury  
19 rule has been defined, it's either an actual or imputed or  
20 constructive injury. The first rule -- and I don't want  
21 this to get lost in the discussion. The first rule and  
22 the one that we think is correct is the Clayton Act  
23 accrual rule which petitioner acknowledges has no  
24 injury -- has no knowledge or discovery element.

25 QUESTION: No should-have-known component.

1 MR. LACOVARA: Exactly, or even actual  
2 knowledge.

3 QUESTION: And yet, in circumstances where fraud  
4 is an element, the courts have fairly often applied the  
5 should-have-known thing, and RICO often involves claims  
6 that turn on fraud.

7 MR. LACOVARA: Yes, Justice O'Connor, but that  
8 was an argument that was specifically rejected, or the  
9 implication of that argument was specifically rejected in  
10 Agency Holding v. Malley-Duff, in which the Court said the  
11 proper statute of limitations for civil RICO cases is not  
12 the fraud statute, even if it happens to be a fraud  
13 predicate that's invoked in a particular case.

14 Congress, when it fashioned the civil RICO  
15 section, specifically borrowed the pattern from the --  
16 section 4 of the Clayton Act, and the Court held therefore  
17 we will borrow the section 4 of the Clayton Act statute of  
18 limitations, and the reason I say that that should make  
19 this an easy case to dispose of is that it's been settled  
20 since 1919, including by this Court in Zenith v.  
21 Hazeltine, as the petitioner acknowledges in her brief,  
22 that the -- there is no discovery principle at all under  
23 Clayton Act section 4 civil damage cases.

24 QUESTION: What about a fraudulent concealment?  
25 Is there fraudulent --

1 MR. LACOVARA: That's a tolling doctrine.

2 QUESTION: Yes.

3 MR. LACOVARA: And we concede that under any  
4 principle of accrual there will be a tolling if there's  
5 been active concealment designed to mislead the potential  
6 claimant into believing that she has no claim.

7 QUESTION: Mr. Lacovara, what troubles me about  
8 just applying the Clayton Act rule is that the Clayton Act  
9 does not have a provision like RICO which refers to  
10 predicate acts, the last of which occurred within 10 years  
11 after the commission of a prior act of racketeering  
12 activity.

13 I -- there's some problem, it seems to me, of  
14 reconciling a sudden death knowledge of the -- or injury  
15 rule with the obvious expectation in this statute that  
16 there would be a long lapse of time of 10 years between  
17 predicate acts that are the basis of the suit.

18 MR. LACOVARA: I don't think that that's  
19 necessarily a necessary assumption in the statute. What  
20 Congress has done is to say, it may be possible to look to  
21 predicate acts taking place as far apart as over a 10-  
22 year period to determine whether or not there has been a  
23 pattern of racketeering.

24 But in the H.J. case, in which the Court  
25 unanimously agreed that all the pattern requirement

1 requires is some relationship between or among the  
2 predicate acts and the threat of continuing criminal  
3 activity, it is unlikely that a predicate act in year one  
4 and a predicate act in year 10 would show a sufficient  
5 continuity to give rise to a pattern.

6 But the point is, Justice Scalia, that only  
7 relates to whether or not a civil RICO claim arises. I  
8 don't think it really has any bearing on when the claim  
9 should be viewed as accruing for purposes of a statute of  
10 limitations.

11 QUESTION: But on that point you do tell us that  
12 in this -- this is an academic case, because whether you  
13 apply your rule, which is injury, or injury plus pattern,  
14 this complaint is untimely, and if we take that view, then  
15 we can say, well, we haven't got a real case to deal with  
16 any more, since either rule would lead to the same  
17 judgment.

18 MR. LACOVARA: Well, that's conceivable. I  
19 would not suggest that on this ground a disposition that  
20 applies what we consider the correct rule, which is the  
21 Clayton Act no discovery principle, or even the Ninth  
22 Circuit's discovery of injury principle, would be academic  
23 or moot, even though the plaintiff -- the petitioner would  
24 also lose under the pattern discovery principle because  
25 she knew as of May 1989 that there had been, according to

1 her allegations, yearsworth of mail frauds, wire frauds  
2 leading up to the fraudulent --

3 QUESTION: Under your proposed rule, does there  
4 have to have been the pattern in existence when the injury  
5 occurred in order for the injury to start the statute  
6 running?

7 MR. LACOVARA: That's a debatable question. I  
8 think Justice Breyer raised that question, whether the  
9 injury must take place after the pattern.

10 QUESTION: Well, otherwise it's a very strange  
11 statute you have, because it allows you 10 years between  
12 the -- you know, the two predicate acts. You could have  
13 the first predicate act, the injury occurs immediately,  
14 4 years go by, the statute has run, and then the second  
15 predicate act occurs, which is still within 10 years  
16 but --

17 MR. LACOVARA: I would think --

18 QUESTION: And there would be no cause of action  
19 if it's -- under RICO at the time of the first injury.

20 MR. LACOVARA: That issue isn't squarely framed  
21 here, because she -- the injury that she alleges, and I  
22 would like to cite to the passages where she describes her  
23 injuries as of 1989, indeed, 1987, but I think the correct  
24 interpretation of the statute, Justice Scalia, would be  
25 that for any RICO claim to accrue there must have been a

1 pattern of racketeering and then injury from a predicate  
2 act that occurred, otherwise it would be hard to reconcile  
3 the language of --

4 QUESTION: And the rule would be 4 years from  
5 the time of discovery or from the commission of the second  
6 predicate act, whichever occurs the later.

7 MR. LACOVARA: I would not agree with the

8 QUESTION: No.

9 MR. LACOVARA: -- discovery point.

10 QUESTION: Well, I didn't say --

11 MR. LACOVARA: Under one of the rules.

12 QUESTION: I didn't say discovery. I said the  
13 rule would be, I take it --

14 MR. LACOVARA: Sorry.

15 QUESTION: -- it would be 4 years from the  
16 injury, right, or the commission of the second predicate  
17 act, whichever occurs the later.

18 MR. LACOVARA: No. I think under the discussion  
19 I was having with Justice Scalia there would not be a RICO  
20 injury unless there had been a RICO pattern.

21 QUESTION: I don't see the need for that. That  
22 is to say, why couldn't a person who burns down somebody's  
23 house as part of a plan to burn down three people's  
24 houses, which occur 5 years later, why couldn't the person  
25 whose house is burned down to begin with recover? I mean,

1 it would seem odd that Congress wouldn't want them to  
2 recover.

3 MR. LACOVARA: Well --

4 QUESTION: And a rule that would allow that  
5 person 4 years from the time of injury, or the time the  
6 second house burns down, would I think be a just rule --

7 MR. LACOVARA: There is something --

8 QUESTION: -- and consistent --

9 MR. LACOVARA: There is something to be said for  
10 that, but it may not be the way Congress defined the  
11 statute, because at the time of the injury to the first  
12 person, there was the injury as a result of an arson but  
13 not necessarily the result of RICO, because there may not  
14 yet have been a --

15 QUESTION: Of course, there's a claim here that  
16 there's --

17 MR. LACOVARA: But that's not this case.

18 QUESTION: There's a claim now that there's no  
19 injury at all, that in fact -- and there's some evidence  
20 that petitioner Joanne is better off now than ever before.

21 MR. LACOVARA: Well, we're in an odd position,  
22 Justice O'Connor. For the last 8 or 9 years the  
23 petitioner has been working through several different  
24 court systems claiming that she was injured to a very  
25 sizeable degree by virtue of the fraudulent transfer of

1 her interest in the medical practice and the violation of  
2 her right to foreclose under her lien, and now, after the  
3 complaint has been dismissed by Federal courts and the  
4 State court and bankruptcy court she says, oh, by the way,  
5 I haven't been injured at all yet, so --

6 QUESTION: Right.

7 MR. LACOVARA: -- in fact the injury won't  
8 mature until the bankruptcy case is over, so we'll know in  
9 the next millennium --

10 QUESTION: And the bankruptcy case is not in  
11 fact over.

12 MR. LACOVARA: It's still --

13 QUESTION: There has been no final discharge.

14 MR. LACOVARA: I'm sorry. There has been a  
15 revocation of the discharge.

16 QUESTION: Right.

17 MR. LACOVARA: So that --

18 QUESTION: And it's not over. There's been no  
19 final distribution.

20 MR. LACOVARA: That's correct.

21 QUESTION: And who are creditors remaining?

22 MR. LACOVARA: Joanne is the only creditor.

23 QUESTION: She is the only one now remaining?

24 MR. LACOVARA: Yes, and that is shown --

25 QUESTION: There's no bank, or anything?

1 MR. LACOVARA: No. That is shown in the record.  
2 Attached to the summary -- the dismissal and summary  
3 judgment papers in this case was the opinion from February  
4 1993 of the bankruptcy judge recommending the withdrawal  
5 of the reference over the adversary complaint, and it  
6 recites in recommending that that complaint be dismissed  
7 that Joanne as of that time -- that all of the creditors  
8 had been paid, and Joanne was the only remaining creditor.

9 QUESTION: Well, does it follow -- may I just be  
10 sure to get one little -- does it follow as night follows  
11 the day if she's the only beneficiary, and if she's not  
12 been injured, then neither has the trustee been injured?

13 MR. LACOVARA: That's correct, and the -- again  
14 if I may go outside the record. This is judicially  
15 noticeable -- the bankruptcy court has dismissed the  
16 trustee's claims on that theory, namely that she's the  
17 only creditor. He cannot maintain any pre-petition claim  
18 for fraud because the allegation is Vincent, in whose  
19 shoes the trustee stands, was an active participant in  
20 that fraud, and therefore he is barred from suing anybody  
21 else in Vincent's stead.

22 But if I may just --

23 QUESTION: Mr. Lacovara --

24 MR. LACOVARA: Yes, sir.

25 QUESTION: -- aside from the inconsistency

1 between saying, you know, for 9 years that she's injured  
2 and now she's not injured, when was she right, in those 9  
3 years or now?

4 (Laughter.)

5 MR. LACOVARA: Oh, I'm perfectly prepared to say  
6 she was right in 1989 for purposes of this litigation.

7 QUESTION: Now -- now -- but I'm not prepared to  
8 say for -- I mean, we have an obligation to --

9 MR. LACOVARA: She -- I didn't --

10 QUESTION: Do we have a case or controversy  
11 before us, or is this case not proper for us to entertain,  
12 is what I'm asking you.

13 MR. LACOVARA: On the basis of the complaint  
14 that she filed -- the civil RICO complaint, and let's turn  
15 to that, she alleges as of 1993 various kinds of losses  
16 and injuries, and these are injuries that she said she  
17 incurred in 1987 when the fraudulent transfers defeated  
18 her security interest, her lien, which is property under  
19 Nevada law, and prevented her from foreclosing on the  
20 business and realizing what she later claimed to be  
21 \$6 million worth of profits that she would have been able  
22 to earn if she'd been allowed to foreclose in 1987.

23 The other tangible injury that she alleged in  
24 this complaint, and I refer you to page 47 of the joint  
25 appendix and to page 70 of the joint appendix, in which

1 she itemizes the "losses suffered in the Siragusa medical  
2 practice interest scheme," she says the losses currently  
3 exceeding -- currently as of 1993 exceeding \$6 million,  
4 the failure to receive the marital payment, that's the  
5 \$1.3 million judgment that she had obtained against  
6 Vincent in September of 1987, and the impairment of her  
7 ability to execute and foreclose on Siragusa's medical  
8 practice as a result of the alleged fraudulent transfer in  
9 1987.

10 So as she alleged a civil RICO claim with a  
11 pattern of racketeering, which is detailed, Justice  
12 Breyer, in five exhibits attached to this prolix  
13 complaint, this thing in which she claims dozens or maybe  
14 hundreds of acts of wire fraud and mail fraud, she said  
15 she lost property in a tangible amount in 1987 --

16 QUESTION: And subsequent events rendered those  
17 alleged damages nonexistent.

18 MR. LACOVARA: We have suggested in the  
19 respondents' briefs --

20 QUESTION: Notably the elimination of the  
21 discharge.

22 MR. LACOVARA: The latest theory of the case  
23 presented in this Court is that this is really a  
24 bankruptcy discharge case, not a challenge to a fraudulent  
25 conveyance, not the fraudulent reduction of her --

1 QUESTION: I see --

2 MR. LACOVARA: -- \$1.4 million verdict. But  
3 the -- since the time the original litigation began, as  
4 the record shows, and we have attached as an appendix to  
5 the Beckley Singleton respondent's brief, the petitioner  
6 has received approximately \$1.9 million as the result of  
7 the settlement with Dr. Bowers, as the result of the  
8 redefined alimony award to replace the discharged marital  
9 payment and the \$200,000 or so that Vincent paid in 1994  
10 when he settled the case.

11 Now, petitioner says maybe she's entitled to  
12 more than that because maybe she has a claim of interest.

13 QUESTION: Well, Mr. Sauber said she's entitled  
14 to several thousand more than that, and you're not  
15 disputing -- that maybe right and that may be wrong, but  
16 there's a controversy about it, is there not?

17 MR. LACOVARA: I think it would be hard to say  
18 without knowing whether interest was running on her  
19 original \$1.3 million judgment from 1987, and if so at  
20 what rate, but it does look as if she has been at least  
21 made more than whole.

22 But the other point is --

23 QUESTION: Well, but if the RICO claim were  
24 valid I guess treble damages would be in order.

25 MR. LACOVARA: The case law so far in the lower

1 courts, and this Court has never addressed this, is that  
2 the treble damage, the trebling takes place on the damage  
3 award that the jury renders and therefore, if the victim  
4 in a financial case has been made whole before trial, then  
5 there's nothing to treble, so the trebling doesn't arise  
6 in the air. It only arises as a calculation on a verdict,  
7 and so if she has been made whole the lower court cases  
8 suggest there is no basis for a RICO trebling.

9 But the other point that I would make about the  
10 posture of the case in this Court, and this is the other  
11 basis for possibly treating it either as moot or as  
12 recognizing that there isn't any claim, in her opening  
13 brief, main brief on the merits in this Court, in order to  
14 sidestep the statute of limitations problems with the  
15 injuries about which she is complaining below, the  
16 injuries that took place in 1987, petitioner argues that  
17 no injury has occurred yet, we won't know until the  
18 bankruptcy case is closed, and we have until the next  
19 millennium to bring a RICO case based on this divorce  
20 case.

21 She said if Vincent is eventually denied a  
22 discharge for any of these reasons, Joanne's debt owed by  
23 Vincent will survive in full unaffected by the bankruptcy  
24 proceedings, mainly the alleged bankruptcy fraud. Quote  
25 from page 16 and 17, the moment of injury is by definition

1 the final discharge of the defendant's legal obligation to  
2 pay the debt. The RICO injury may not occur unless or  
3 until a discharge is granted.

4 And my brother and I agree that in 1994 Judge  
5 Riegler, the bankruptcy judge, granted the stipulation to  
6 which Vincents consented revoking the discharge, so on the  
7 basis of petitioner's claim in this Court recharacterizing  
8 this as a bankruptcy fraud lost debt case, not only isn't  
9 there an injury, there never will be.

10 In either event, affirmance or dismissal under  
11 Rule 46 as moot would seem to be appropriate. Now, my  
12 brother said --

13 QUESTION: How about dismissal as improvidently  
14 granted, if we thought this was a case squarely presenting  
15 what is the split in the circuits between on the one hand  
16 the injury rule, on the other the injury-plus-pattern  
17 rule?

18 MR. LACOVARA: Well, I do think, Justice  
19 Ginsburg, that the case is in that perspective alive  
20 enough to decide which is the right accrual rule, because  
21 conceivably I think -- well, I would view it as almost  
22 inconceivable, but there is at least a theoretical  
23 possibility that the Court might decide that the Third  
24 Circuit is correct, in which case the last predicate act  
25 rule would have kept the claim alive for civil RICO

1 purposes, so the Court does have the authority to decide  
2 the issue on which it granted cert, namely which of the  
3 four rules --

4 QUESTION: Well, we'd only have to decide  
5 whether the fourth is not the rule.

6 MR. LACOVARA: That -- I think that's correct.  
7 That's why you'd have to --

8 QUESTION: You'd still leave the other three  
9 rattling around out there.

10 MR. LACOVARA: That is correct.

11 QUESTION: So -- but from your point of view  
12 dismissal is improvidently granted because we couldn't  
13 pick which of the three is something that you have no  
14 objection to, I take it.

15 MR. LACOVARA: Certainly from the respondents'  
16 standpoint we'd be happy with that disposition.

17 QUESTION: But if we do go ahead and decide it,  
18 which of the three do you think is the best?

19 MR. LACOVARA: I think the right one, Justice  
20 Stevens, is the Clayton Act accrual rule. In Malley Duff  
21 the Court held that Congress patterned the civil damage  
22 remedy of RICO on the Clayton Act. It's been clear for  
23 now 80 years that the Clayton Act rule does not have any  
24 discovery principle. It's worked quite well.

25 QUESTION: It hasn't been clear for 80 years

1 because section 4 wasn't enacted till the 1950's.

2 MR. LACOVARA: No, no, section 4 dates back --

3 QUESTION: The statute of limitations part of it  
4 wasn't enacted.

5 MR. LACOVARA: I'm sorry. But the Court in  
6 Zenith cites cases, district court cases going back to  
7 1919, because there had been a civil remedy from 1914  
8 forward, section 4 itself, and --

9 QUESTION: Yes, but they were all construing  
10 State statutes of limitations.

11 MR. LACOVARA: That's right, but they all  
12 construed them as running from the time of injury without  
13 regard to any discovery.

14 QUESTION: I thought you conceded that you would  
15 modify the Clayton Act rule to some degree to say that the  
16 injury has to have occurred after the second predicate  
17 act.

18 MR. LACOVARA: I was saying that it is arguable  
19 that there was no RICO violation or no RICO injury --

20 QUESTION: Until --

21 MR. LACOVARA: Until there is a RICO pattern --

22 QUESTION: Right.

23 MR. LACOVARA: -- and an injury following a  
24 predicate act.

25 QUESTION: Okay.

1 MR. LACOVARA: At that point. But in the  
2 colloquy with Justice Breyer I conceded that that's not  
3 necessarily the correct construction of the statute, but  
4 it's certainly one that's academic here, because by  
5 petitioner's own pleading there were ample predicate acts  
6 well before the fraudulent transfer and the defeat of her  
7 security interest.

8 QUESTION: Depending on what a pattern is.

9 MR. LACOVARA: Well, I'll take H.J. It was  
10 agreed upon unanimously. I know Justice Scalia you had a  
11 characteristically pungent concurrence that it's still  
12 frustrating, but nevertheless you said the Court had done  
13 the best it could with Congress' handiwork. It certainly  
14 doesn't mean that multiple schemes are necessary. It  
15 certainly doesn't mean, as Justice Souter's opinion for  
16 the Court emphasized, that there have to be multiple  
17 victims.

18 So a whole lot of different criminal acts --  
19 mail fraud, wire fraud and bankruptcy fraud directed at  
20 defeating and injuring Joanne Siragusa's property interest  
21 would, I think it's clear, constitute a pattern if ever  
22 there was one, and what she has been alleging for the last  
23 7 or 8 or 9 years was her injury took place as a result of  
24 that, or the culmination of that pattern, even if other  
25 acts continued that affected, may have affected other

1 persons such as Dr. Heeren.

2 If there are no further questions, I'll submit.

3 QUESTION: Thank you, Mr. Lacovara.

4 Mr. Sauber, you have 4 minutes remaining.

5 REBUTTAL ARGUMENT OF RICHARD SAUBER

6 ON BEHALF OF THE PETITIONERS

7 MR. SAUBER: I want to make three points  
8 quickly. Number 1, Joanne still has not received her \$1.4  
9 million that was the debt when Vincent went into  
10 bankruptcy. Some of that money went to the trustee,  
11 others of it went to the estate. She's still not received  
12 her full amount.

13 In answer, Justice Ginsburg, to your question  
14 about Judge Hall's opinion, it's clear that Judge Hall  
15 agreed with our rendition of what the pattern was because  
16 she decided in her opinion that if the Ninth Circuit  
17 decided that the injury-and-pattern discovery rule was  
18 applicable, the cause of action in this case would be  
19 timely.

20 QUESTION: But she could assume that without --  
21 that wasn't what was before her. She could say, even if  
22 the pattern didn't exist until that later date, still this  
23 complaint is not timely because it's when she knew or  
24 should have known she was injured.

25 MR. SAUBER: Yes, but I think in choosing

1 between those two rules the Ninth -- Judge Hall and the  
2 Ninth Circuit clearly decided that had they gone the other  
3 way and chosen the injury-and-pattern discovery rule, her  
4 complaint would have been timely, and it's not an issue in  
5 this case when the second pattern occurred.

6 Our argument is when a plaintiff can reasonably  
7 be said to be on notice that a pattern has occurred, which  
8 is one of the key elements and one of the unique elements  
9 of this statute.

10 In answer, Justice Scalia, to your question and  
11 Justice Breyer's question, an injury discovery rule with a  
12 racketeering statute is completely unworkable for this  
13 reason. A plaintiff may be injured by the first predicate  
14 act. At that point she is now on notice, inquiry notice,  
15 and yet the cause of action doesn't exist. So now instead  
16 of being diligent --

17 QUESTION: Yes, but may I interrupt?

18 MR. SAUBER: Yes.

19 QUESTION: You're assuming the answer to  
20 something your opponent thinks we need not decide. You're  
21 assuming that a person can't have a RICO cause of action  
22 based on an injury before the statute was violated.

23 MR. SAUBER: I'm sorry, say that again.

24 QUESTION: You're assuming that a plaintiff may  
25 have a RICO cause of action based on an injury that

1 occurred before the statute was violated.

2 MR. SAUBER: No, I'm not assuming that at all,  
3 and let me explain. If -- it really is a question of  
4 adopting an injury discovery rule that is completely  
5 unworkable, and that's our point.

6 QUESTION: But if we add a version to that, that  
7 discovery or the second thing occurs, whichever comes  
8 later.

9 MR. SAUBER: Right, and if you take the fact  
10 that the first predicate act is the discovery that you've  
11 been injured by the first predicate act, and the pattern  
12 or the other predicate acts come later, you've in essence  
13 created two classes of plaintiffs.

14 QUESTION: No. You're still saying -- I'm  
15 suggesting to you that you're assuming you can have a RICO  
16 cause of action before the violation occurs.

17 MR. SAUBER: Absolutely. That -- I'm not  
18 assuming that, but that is the problem with the injury  
19 discovery rule.

20 QUESTION: That's not the rule your friend is  
21 arguing, by the way. He's arguing for an injury rule.

22 MR. SAUBER: He's arguing for an injury rule  
23 which in our view is completely inappropriate to the  
24 racketeering statute, which has as many of the predicate  
25 acts fraud claims, which this court has already decided in

1 Holmberg v. Yonquist means that in a fraud claim you must  
2 be able to discover the fraud before the statute of  
3 limitations starts running.

4 When you lay on top of that a requirement to  
5 discover and plead a pattern, and all of the difficulties  
6 and the intricacies in both defining and finding a  
7 pattern, you really have created a cause of action which  
8 by its nature is a fraud case, by its nature is a case  
9 that has as some of its elements concealment and  
10 continuity, and it seems unfair to say that the statute of  
11 limitations, when you're required to plead all of those  
12 elements, starts to tick before --

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sauber.  
14 The case is submitted.

15 (Whereupon, at 12:06 p.m., the case in the  
16 above-entitled matter was submitted.)

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*TOM GRIMMETT, TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA AND JOANNE SIRAGUSA, Petitioners v. PATRICIA L. BROWN, ET AL. CASE NO. 95-1723*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Ann Marie Federico*

(REPORTER)