ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MARVIN KLEHR, ET UX., Petitioners v. A. O. SMITH CORPORATION AND A. O. SMITH HARVESTORE PRODUCTS, INC.

CASE NO: 96-663

PLACE: Washington, D.C.

DATE: Monday, April 21, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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MARVIN KLEHR, ET UX., :

Petitioners :

v. : No. 96-663

A. O. SMITH CORPORATION AND :

A. O. SMITH HARVESTORE :

PRODUCTS, INC. :

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Washington, D.C.

Monday, April 21, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

CHARLES A. BIRD, ESQ., Rochester, Minnesota; on behalf of the Petitioners.

BRUCE J. ENNIS, JR., ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 96-663, Marvin Klehr v. A. O. Smith Corporation.

Mr. Bird.

ORAL ARGUMENT OF CHARLES A. BIRD

ON BEHALF OF THE PETITIONERS

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

The last predicate, criminal last predicate act rule of accrual is the most appropriate rule for civil racketeering claims for three reasons. First, it takes account of the unique elements of this cause of action. Secondly, it is consistent with the congressional objectives and underlying policies of the law. Third, it greatly reduces the administrative and judicial burden and the economic burden upon the parties because of its ease of application.

Selection of a rule of accrual in RICO must first of all take account of the sui generis nature of this cause of action and its unique pattern element. In a garden variety tort case, say a car accident, for example, all of the elements are present at the beginning. This explains the normal, or traditional rule of accrual.

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In a RICO case this is not true, because the injury must arise out of a pattern of racketeering activity, and the pattern itself must also be perpetrated by a RICO enterprise. These --

QUESTION: Well, you're assuming -- when you say that all of the elements don't have to be present at the beginning, you're assuming that if I am injured by the first of three predicate acts I have suffered a RICO injury, aren't you?

I mean, I agree if I'm injured by the second of three predicate acts I have suffered a RICO injury, but we've never held that the person who is injured by the first of what later becomes a series of predicate acts has suffered a RICO injury, have we?

MR. BIRD: Well -- no, this Court has not held that. However, I think an analysis of what a pattern of racketeering is would help in answering that question. If you want me to go on I will, but my understanding of a pattern of racketeering activity is that it is simply a definition that can only be determined in retrospect, such that even two predicate acts, for example, don't necessarily constitute a pattern.

QUESTION: But if the injury precedes the pattern it's rather hard to say that it was a RICO injury.

MR. BIRD: Well, the --

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QUESTION: And I'm not sure that that's necessary in your case.

MR. BIRD: No, it's not necessary in our case, but let me --

QUESTION: It is necessary to the theory of statute of limitations you're pressing upon us, however. The argument you were just making assumes that, assumes that the first injury constitutes a RICO injury even though at that time there's no pattern and you have not been injured, when you're injured, by a pattern of racketeering activity.

MR. BIRD: If I may explain, the way I view the structure of the statute and the definition itself, it assumes already in place, and the only way by definition that we can conclude that a pattern exists is that we have a beginning and that we have an end.

It can only be decided whether or not it exists in retrospect. Once we determine that it exists, then that first predicate act is just as much a part of the pattern as the last predicate act, and that's our contention here, and that's why trying to determine when a RICO pattern along this continuum which Congress has defined somehow is borne or springs to life, if you will, under the H.J. Inc. rule of continuity plus relationship, that's an extremely difficult thing for anybody to follow,

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and certainly difficult for a --

QUESTION: That still leaves the metaphysical question, or maybe the legal question of why there can be a RICO injury before there's a RICO in existence.

MR. BIRD: The -- it is a metaphysical question, I grant you, but the way the Congress has defined pattern of racketeering activity and the way this Court has interpreted it, it can only be decided whether or not it existed in the past, and what the framework of your question is, that somehow we need to be able to identify it in prospect, and it can't be done, and that's the point.

QUESTION: Well, I don't see it that way myself.

The normal default rule for when a statute of limitations begins to run is that it runs from when the cause of action accrues, when it exists, right? That's the normal rule. Once all the elements of the cause of action exists, then the statute of limitations period begins to run. That's the normal rule, right? Will you concede that?

MR. BIRD: Well, I would not concede that, because in Havens Realty this Court has indicated that where we have a continuing tort the proper rule of accrual can be from the last predicate act.

QUESTION: Well, it could be, but the normal

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rule as I understand it is that the statute of limitations will begin to run as of the time the cause of action comes into existence, and under RICO, it doesn't come into existence until all the elements are present, injury, predicate acts, and pattern.

MR. BIRD: In --

QUESTION: And as of that moment, then, it could start to run, the statute of limitations, isn't that right?

MR. BIRD: Well, I have two answers to that. First of all I think the normal rule of accrual, at least in present day law, is a discovery rule, discovery of the elements, or certainly discovery of the injury, and that rule is modified to require --

QUESTION: I think some courts have applied such a rule. I would not say that that is the normal rule for accrual of causes of action and running of statute of limitation.

MR. BIRD: Well, that may be, and -- I guess I've forgotten what the original question was, if you could restate it, please.

QUESTION: Well, as applied to your case I don't see why the statute wouldn't begin to run once you can say all the elements of the RICO cause of action are in existence.

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MR. BIRD: All right, and if I may get to that, I think what this Court has said, for example, in Havens Realty is, if we have a continuing violation the concerns that we typically have for a statute of limitations such as repose and staleness, they fade away.

What we have here is a congressional objective as stated by this Court in Turkette, Russello, and a number of other cases, which recognizes that long-term pattern felonious conduct is a bane on our economy.

QUESTION: Well, this statute is patterned after the antitrust law, the Sherman Act, and that also can involve a continuing stream of conduct by the violator, and what rule have we applied there for statute of limitations?

MR. BIRD: I understand that, but I think applying -- adopting the statute of limitations --

QUESTION: What rule have we applied there, do you think?

MR. BIRD: As I understand it, the antitrust rule is -- runs from the date of injury.

QUESTION: Yes, so -- and if this action, RICO is patterned after that, why shouldn't it be the same?

MR. BIRD: Because the rule of accrual is different than the statute of limitations, and I think that the rule of accrual that the Court selects must take

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account of the elements, and one of the unique elements of RICO is pattern, and that's not -- that doesn't exist in the antitrust laws.

QUESTION: Mr. Bird, as I understand it the principal difference between your case and others is the principal problem that you have is the identification of the source, and in Clayton Act cases generally it's known who it is, but here, it isn't a question of injury or pattern, it's a question of, you didn't know the source, and that's why I found your argument rather puzzling.

It seemed to me the Eighth Circuit test, which was injury and source, discovery of injury and source plus pattern was the rule, and that your disagreement really was about the identification of the source, because if those three elements are there, then on -- as I understand your claim, you would be within the statute.

MR. BIRD: Yes, we would. We are -- we claim that under whatever rule this Court selects we think we're within it, but the fact remains that the Klehrs were not able to identify the source of their injury, and they did everything within their power.

QUESTION: And that's the whole thing of your case is they knew they were hurt, and then they knew that there had been all this advertising, but they didn't connect the pattern with the source of the injuries.

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MR. BIRD: That's correct. They did not connect the pattern with the source of the injury. But there is a larger question here should the Court choose to address it, and that is, why should this Court or Congress be interested at all in granting repose to a criminal enterprise that's engaged in a long-term continuous pattern of felonious activity?

QUESTION: Well, of course, that assumes the question. Part of the statute of limitations design is so that people that are not guilty of being in a criminal activity have the evidence that's fresh to rebut your allegation.

MR. BIRD: And that is true, but if -- if -- let's assume that the RICO plaintiff is able to establish that and meets the pattern element, which is a strict element that this Court has imposed under the H.J. case, two acts are not necessarily enough.

We need continuity plus relationship, and if we assume, for example, a 30-year pattern and somebody suing on the act that takes place in the first year and he can pass that hurdle of identifying a pattern, which under most circuits needs to be pled, then what's happened is we have a 30-year pattern of criminal felonious conduct that nobody's stepped up to the plate to stop, and I think in --

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QUESTION: I wouldn't have that problem if I wouldn't allow the first suit, right? You're back to that issue again, whether the first person has a RICO cause of action.

MR. BIRD: And --

QUESTION: I'll give you 10 years, not 30.

MR. BIRD: Well, of course, the definition --

QUESTION: That is the distance between the first predicate act and the second, so the person who is injured 10 years later after the first one clearly has a RICO cause of action, and the first predicate act occurred 10 years ago. That's the outside time of it, isn't it?

MR. BIRD: What I -- of course, I tried to address that, and what I'm saying is that once we are able to identify the pattern, that is -- and understand what I'm saying here is that being able to identify a pattern is only a matter of perception, and that means that we have a judge or an attorney or a RICO plaintiff saying, I'm looking back in time, and what is -- what can I perceive from what's gone on in the past, and that implies, of course, discovery. You're in possession of facts from which you should conclude --

QUESTION: It seems to me your clients were incredibly obtuse not to have discovered this.

MR. BIRD: Well, I disagree with that. I

disagree with that, and I certainly think a fact question exists, and the mere fact that the silo may not have met their economic expectations does not necessarily cause them to question the underlying concept that -- of oxygen limiting, which was the basis for the sale here.

QUESTION: Mr. Bird, I agree that all of the elements have to have been in existence, as Justice O'Connor suggested, but why do you think all of the elements have to be known, including the existence of the pattern?

Let's take, you know, a garden variety tort action for a physical injury to someone. Suppose the physical injury occurs. Doesn't the statute begins to run immediately? And let's assume the injury was intentional so that the individual could sue for assault, but he didn't know it was intentional at the time. He just thought it was negligent.

Now, he later finds out, 3 years later, that it was in fact intentional. Does he have a longer statute of limitations for assault than he would have had for negligence, assuming the jurisdiction has the same --

MR. BIRD: No. I --

QUESTION: -- the same 2-year statute for both?

MR. BIRD: No.

QUESTION: It's his problem. Indeed, he didn't

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know that it was intentional, and that made it a higher species of tort, just as the -- a series of RICO violations makes this a higher species of tort, but that's too bad, so once he learned of the injury he should have sued.

MR. BIRD: I agree with your hypothetical that that wouldn't extend the statute of limitations, but here it's within his power to make that investigation and to find out.

What we're dealing with here, and this is -- we have a whole new way of attacking a problem, and I'm suggesting that we can't get by with using what's termed the traditional rules.

QUESTION: No, but even on the traditional rule, isn't it your position also that because one of the elements is fraud, and because fraud at least will normally be accorded a discovery rule, that therefore you have until the point of reasonable discovery, even under the traditional rule, or a traditional analysis, without regard to the peculiarity of RICO itself. Isn't that your position?

MR. BIRD: Well, I think part of our position -- that is part of our position, but understand, the rule we're advocating, which is the criminal last predicate act --

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QUESTION: Oh, I quite realize that, but if you take the hypothetical that Justice Scalia gave you, and you substitute for the intentional versus negligent act a fraudulent act, I take it your position would be that even though so far as the element of failure to supply what they offered or any conventional tort, as to that the statute might run immediately. Nonetheless, as to the fraudulent element I thought it was your position that the statute would not run until the moment of reasonable discovery.

MR. BIRD: That is true, as -- and that --

QUESTION: So that you may very well lose the case conceptually by the adoption of a Clayton kind of analysis here, and yet if there were a traditional -- if traditional treatment were given to the discovery aspect of the fraudulent element, you might still be in court.

MR. BIRD: Well --

QUESTION: You might still go back and have something to litigate.

MR. BIRD: Yes. Your answer to that -- the answer to that question is yes.

The RICO plaintiff under our analysis is put into a, sort of a classic catch 22, because all of the circuits are requiring significant pleading not only in terms of pattern but also identification of the underlying

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acts, and if you don't plead enough you're going to be out under Rule 9, and if you wait long enough so that you've got all the knowledge and crystallization that you need to be in order to satisfy this, the motivation of the defendant, RICO defendant is going to be to come in and say, well, we've been doing this for 50 years. All of the elements existed a long time ago, and here's all the proof of it.

QUESTION: Yes, but he wouldn't -- that wouldn't help if the injury was within the statutory period.

MR. BIRD: That's true. It would not help if the injury were in the statutory period, but the problem, or the catch 22 may get him beyond that time before he can understand that -- and plead and prove the pattern element.

QUESTION: What is it -- is it your view, then, the statute would run forever, there's no statute, or is it 13 years, or what is it? I mean, you say the last act. Well, all right, there's an act -- separate out the problem of discovery, which I think is the same for any fraud, so imagine everybody knows everything.

Now, I'm hurt yesterday. All right, now do I go back for 1,000 years? I mean, this was the last act. It turns out that every 5 years they committed one act since 1940. Do I go back to 1940? Is that your idea?

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MR. BIRD: Let's assume -- your hypothetical necessarily assumes that since 1940 the RICO enterprise has been engaged in --

QUESTION: Yes, one act every 5 years. That's what they do. It's a bank, and what they've done is they've told one lie or one fraud in a loan application every 5 years.

MR. BIRD: Right, and --

QUESTION: And it's the same person, and he's done it year after year, so what do we do under your theory? I'm just trying to find out whether there's no statute of limitations in effect, or --

MR. BIRD: Yes.

QUESTION: -- whether it's -- there's none, right?

MR. BIRD: Yes. The answer is that the statute runs from the time of the last predicate act, and the --

QUESTION: All right. Now, why is it the case that in RICO there should be effectively no statute of limitations, but with price-fixing there is a statute of limitation?

MR. BIRD: Well, there is a statute of limitations, and it's 4 years.

QUESTION: No, but I mean -- and if I have a price-fixing case I take it that if they've been engaged

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in fixing the prices of their electrical conduits for 30 years and I've been hurt, I can go back only -- is it 3, or is it -- 3, I think.

All right, so why would it, if we're copying the Clayton Act, where you have a price-fixing case you only can go back 3 years, but if it's RICO you can go back a million years, or let's be honest about it. You go back 15, 20, whatever.

MR. BIRD: Right, and the answer to that question is that the congressional intent, as stated in the preamble and also is recognized by this Court, is in part under Turkette to divest the enterprise of all its ill-gotten gains.

QUESTION: All right. In price-fixing we don't like that particularly. I mean, I take it this Court, when it decided to adopt the Clayton Act as the model, looked at the congressional intent and thought that the congressional intent is best served by copying the Clayton Act.

Now, is there something you could point to specifically that would say in this aspect we shouldn't copy the Clayton Act, though in others we should?

MR. BIRD: Yes, and I think it's the congressional policies and objectives that are contained in the structure of the statute itself, as well as the

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policies underlying the law.

And if -- the structure of the statute shows no concern for the twin issues of repose and staleness and, indeed, a RICO plaintiff is required to prove past injuries well -- that are well in the past, and a RICO defendant is required to defend those, not only the injuries but the predicate acts themselves.

What would be the policy justification for not allowing -- for allowing a RICO defendant to get out of divesting themselves of the older ill-gotten gains? Any other rule would permit the RICO defendant to want to continue, because as long as he --

QUESTION: That argument was raised in Malley-Duff. I mean, I raised it, in fact. You know, I -- in a dissent I said there shouldn't be a statute of limitations for RICO. You either use the State statute or use none at all in this case. That was rejected, however.

MR. BIRD: I understand that.

QUESTION: We have adopted a 4-year statute.

MR. BIRD: You have.

QUESTION: Surely it has to have some meaning.

MR. BIRD: Yes, it does.

QUESTION: And it has no meaning if in Justice Breyer's hypo the thing can be rejuvenated every 5 years, every time there's a new predicate act. Even though the

4-year statute has already passed since the last predicate act, as soon as there's a new predicate act 1 year later the whole thing comes to life again. That's not a statute of limitations of any sort that I ever heard of.

MR. BIRD: What -- the policy advanced there is that if you adopt a rule of accrual, once the defendant makes up his own mind that I'm going to stop this criminal activity he knows that 4 years later his liability's over. If he's foolish enough in year 5 --

QUESTION: Unless he changes his mind 5 years later, right?

MR. BIRD: Then if he's foolish enough to do what you just said, which I think is a little bit unlikely, but let's assume that it takes place, why shouldn't we get him for it? Why should he be able to get away with it?

QUESTION: What other statute of limitations works that way, where the statute has run and then someone does something again and somehow it's all -- the statute has ceased running. I mean, ordinarily you would have, if there's a 4-year statute of limitations and I libel you or I do something, it's -- the 4 years expires. If I libel you again, it's a new cause of action, a new -- but you can't resurrect the old libel.

MR. BIRD: Well, I differ with that. I think

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that again in Havens Realty the Court just -- did just --

QUESTION: Well, Havens was an unusual case. The Court acknowledged as much, didn't it? I suspect it's not likely to be repeated.

MR. BIRD: Well, okay.

QUESTION: Mr. Bird, I continue to be troubled by the abstract quality of your discussion, because here it wasn't every 5 years. It was constant. There was this sales pitch going on constantly.

So let me ask you this question. Suppose a veterinarian had come to the Klehrs' farm in 1978 and said, you know what causing your cattle to sicken? It's that silo. How much time would you have to sue?

MR. BIRD: Under the last predicate act rule we would still be timely, and I think that that's -- there are a myriad of reasons why a person who suffers some type of injury might not sue at the beginning.

QUESTION: What was the last predicate act? You're saying that there is a new predicate act every time the person who has committed a fraud denies that he's committed a fraud --

MR. BIRD: No. That --

QUESTION: -- and tells the seller, that's a perfectly good silo? Is that a new fraud?

MR. BIRD: That's a new predicate act, but --

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QUESTION: Why is it a new predicate act? The seller has the $64 thou. It's in his pocket. He's not getting any more money. Why is there a new fraud?

MR. BIRD: Well, I think he is getting more money from the overall marketing scheme and strategy. There is money being generated not only by the dealer franchise fees but also by way of sales of repairs on the project, sales of collateral --

QUESTION: Sales to other people.

MR. BIRD: And repairs to the Klehrs themselves. There were repairs within the statutory period, for example, to the silo, that they were motivated to continue to use, operate, and maintain the silo.

QUESTION: They charged for these repairs?

MR. BIRD: Certainly. The dealer charged --

QUESTION: They made a profit on it, do you think?

MR. BIRD: Pardon me?

QUESTION: They made a profit on these repairs? Do we know that?

MR. BIRD: I don't think -- I don't think there's anything in the record that says they made a profit.

QUESTION: Well, I'm concerned with -- your brief makes this point both for extending the RICO statute

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and also for asserting that even if we don't adopt your position as to the last predicate act there was in fact a new and separate injury when these later -- when these later --

MR. BIRD: Yes.

QUESTION: -- representations were made, a new accrual, in other words.

MR. BIRD: Okay. Let me address separate accruals.

QUESTION: Yes, I'd like you to do that. That's what I --

MR. BIRD: Of course, the circuits are really in a big state of confusion regarding this rule of accrual, and does it require separate and independent injury, or does it require a new predicate act, does it require both, and if so what is a separate and independent injury and what is a new predicate act?

I mean, the -- if we're dealing with the separate and independent injury question -- if I may, a very short hypothetical of my own. Assume I own a nursing home and I buy a humidifier, and -- the last 2 months of a 6-month period, and I only use it during the winter and the spring. It creates a condition of molds because I don't have the right filter, and it spews toxins out and two of my patients die, and -- who would say that those

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were not separate and independent injuries?

What we have here is a silo that when it's filled is filled with very good feed. As the year goes by, and the silo starts to go down, starts to empty, the defect is such that it begins to create this cauldron, this witches brew underneath the dome which in the last months of operation starts to injure not only the new feed but also the different cattle that eat the feed.

And they don't all get the same disease. They all get different types of diseases every year and different types of conditions and symptoms which are not identifiable. Does that constitute separate and independent injury?

I believe it does, and it would meet the test of and surpass the test of Glessner v. Kenney that was the one case that discussed this, and Bingham v. Zault.

Now, do we have a separate predicate act, and I think we do, because under the RICO predicate acts that we're talking about, which is mail fraud, the mail fraud itself is any mailing in furtherance of a fraud, or any use of the interstate wires, and we certainly have that in the --

QUESTION: They don't have to obtain anything further?

MR. BIRD: Pardon?

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QUESTION: They don't have to obtain anything further? Simply, in effect, an intentionally false statement through the mail, intended to conceal their --

MR. BIRD: In furtherance of a fraud.

QUESTION: Yes.

MR. BIRD: That would meet the requirements.

QUESTION: How is that in furtherance of a fraud? The fraud has already occurred. It's in the past.

MR. BIRD: No, but it's still ongoing, and you have to --

QUESTION: You answered no.

QUESTION: I thought the answer was it was intended to conceal it.

MR. BIRD: Oh, yes. Yes, it is.

QUESTION: Is that enough on the mail fraud?

MR. BIRD: Well, it's a new predicate act that's part of the pattern.

QUESTION: No, I just want the definition of mail fraud for the moment. If they make the fraudulent representation through the mail for the purpose of concealing their prior fraud, does that satisfy all the elements of mail fraud?

MR. BIRD: I believe it does, if the concealment itself is fraudulent.

QUESTION: And is it concealment simply to deny

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that the product sold earlier was defective? That's a pretty lose definition of concealment.

MR. BIRD: I don't --

QUESTION: To keep on insisting no, that's a perfectly good silo, that is concealment?

I can understand if you say well, you know, they doctored reports about whether the cattle were sick or something like that. That is concealment. But just insisting that there's nothing wrong with the silo, that's concealment?

MR. BIRD: I don't think in all circumstances it would, but I -- there are some situations in which it would, and it would depend upon the circumstances under which that statement was made, and I would hate to have a rule that says that it couldn't be under any circumstances, and I agree with you that a construct could be made such that it would not constitute fraudulent concealment, and so -- I don't know what else to say about that.

I would like to reserve, if I may.

QUESTION: Well, because it might not be fraudulent.

MR. BIRD: It might not be fraudulent.

QUESTION: They could make that statement thinking they had a great silo out there, and that

wouldn't be mail fraud.

MR. BIRD: That's true, for the dealer, for example.

QUESTION: But if they knew the silo was bad, and a fortiori, if they knew at the time they sold it that in fact it would not do what they represented, then there would be a fraudulent concealment on your theory.

MR. BIRD: Yes.

QUESTION: And the mail fraud would be the predicate act.

MR. BIRD: That's correct.

QUESTION: Yes.

MR. BIRD: I'd like to reserve, if I may.

QUESTION: Very well, Mr. Bird.

Mr. Ennis, we'll hear from you.

ORAL ARGUMENT OF BRUCE J. ENNIS

ON BEHALF OF THE RESPONDENTS

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

The majority of the circuits have decided that the most appropriate accrual rule for civil RICO claims is the same discovery of injury rule that Federal courts use for civil claims in general. That is a particularly sensible rule for civil RICO for three reasons. First, the rule focuses on injury, which Congress made the

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distinguishing element of a civil RICO claim.

QUESTION: But Mr. Ennis, you have to have a cause of action in existence, don't you, under RICO?

MR. ENNIS: That's correct, Justice O'Connor.

QUESTION: There has to be a pattern, and the predicate acts, and the injury.

MR. ENNIS: Absolutely, Justice O'Connor.

QUESTION: So we're not talking about anything that starts before those things are present.

MR. ENNIS: Not at all. Under the basic rule that we are proposing, the cause of action accrues when all the elements of a civil RICO claim exist, whether the plaintiff knows all the elements or not.

QUESTION: Does that include injury?

MR. ENNIS: And the plaintiff has discovered injury. That's the rule we propose, which is the basic discovery of injury rule.

QUESTION: All right, now what if it involves fraud. Do we apply the reasonably-should-have-discovered-the-fraud rule?

MR. ENNIS: Yes, Your Honor. That's the general rule for the discovery-of-injury rule. All the circuits that have used the discovery-of-injury rule, and that's the majority, have interpreted that rule to mean that the cause of action accrues when all the elements exist and

the plaintiff discovers or should reasonably have discovered his injury.

Discovery of injury is sufficient to induce a reasonably diligent plaintiff to investigate the cause of the injury and to determine all the elements needed to plead the claim within the 4-year period.

QUESTION: What do we do about the situation of additional mailing later on? Is there a new cause of action, possibly?

MR. ENNIS: Justice O'Connor, there are two aspects to your question, if I understand it correctly. First, if you're asking, what if there's one act that injures the plaintiff but there's not a second or third predicate act constituting a pattern yet, I think that's not really a question of accrual. That's a question, a substantive question of what constitutes a RICO claim. The rule we propose would apply equally whichever way the Court resolves that question.

But the other part of your question touches on the doctrine of separate accrual, and there, too, we propose the traditional Federal rule of separate accrual which nine circuits have applied to civil RICO claims, and under that rule, as State Farm recognized and other courts recognized, the separate accrual rule means that when there are new separate and different injuries within the

limitations period, that will start a new claim, a new cause of action.

That rule does not apply to this case, because both lower courts, viewing the facts in the light most favorable to petitioners, concluded that petitioners suffered no new injuries within 4 years of suit, in fact, no injuries within 6 years of suit

QUESTION: Mr. --

MR. ENNIS: -- so the separate accrual rule does not help these petitioners.

QUESTION: Mr. Ennis, correct me if I'm wrong, but I thought that the rule was the discovery rule was injury plus source, not merely injury, and here, as I said to Mr. Bird, it seems to me the whole problem was not injury, was not pattern, but source. These were farmers who knew they had a terrible problem, but they didn't know what caused it.

MR. ENNIS: Justice Ginsburg, to be as candid as I can, I think there's confusion in the lower courts on whether the discovery-of-injury rule means discovery of the injury or, as a few courts have said, discovery of the injury and the source of the injury, meaning who caused it.

The majority of the lower courts say the discovery-of-injury rule means discovery of injury. I

think that's -- your opinion for the D.C. Circuit in Conners noted that point, and that should be sufficient to induce a reasonably diligent person to find out the source and all the other elements of the injury.

QUESTION: You don't need 4 years if you know both the injury and the source. Presumably the 4 years is intended to give you time after you've discovered the injury to find the source.

MR. ENNIS: Justice Scalia --

QUESTION: Otherwise we could have a 1-month statute of limitations.

MR. ENNIS: I think that's completely correct, and is the reason why the other competing rule, the discovery-of-injury and discovery-of-pattern rule is not as appropriate for civil RICO as the rule we propose.

Once you have discovered both that you have been injured and by a pattern of racketeering activity, there's no reason to give you an additional 4 years after you know all that you know, need to know in order to file a claim.

QUESTION: When you speak of the pattern of racketeering activity, are you speaking of a pattern of racketeering activity which includes, to your knowledge, fraud? In other words, is the fraud element included in what you know when you say you have discovered a pattern?

MR. ENNIS: It could be, Justice Souter. Of

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course, not all RICO actions involve fraud.

QUESTION: Right.

MR. ENNIS: They could involve arson, or embezzlement.

QUESTION: Well, when it does. When it does.

MR. ENNIS: When it does.

QUESTION: The discovery of a pattern is simply, as you're using the term, means discovery of the --

MR. ENNIS: It means discovery of the acts, which in law would constitute a fraud.

But there's another -- your question raises another good reason to apply the general discovery-of-injury rule, because that rule has been found to be a fair and workable rule when applied in a very wide variety of circumstances to a wide variety of acts, and that makes real sense in civil RICO, given the enormous variety of acts that can constitute a pattern of racketeering activity.

QUESTION: Mr. -- I'm not -- I've never understood this fully, but I'm not certain that we have to go into -- I'm not certain we have to go into the question of fraudulent -- when you discover it and -- what is it called, fraudulent concealment, but if we do, what is it you have to know?

I received the letter from the fake real estate

company that says, Dear So-and-so, your investment is now worth nothing, because unfortunately there was bad conditions, all right? So I know that. I know the source. Does it start to run?

MR. ENNIS: Your Honor, I believe it would start to run.

QUESTION: Well, how does it work, for example, in price-fixing? I go out and I buy a toothbrush, and the toothbrush cost $2. All right, I'm injured. It should have cost $1. But I don't know anything about -- and I know the source. The source is the toothbrush company, all right. Now, how -- I have no -- I don't investigate that kind of thing. Nobody does.

And if you get a letter from your bank which says, we're very sorry, but your account is overch -- you know, I mean, you don't investigate most frauds. All you know is you're paying more money, or you're -- so how does it work?

MR. ENNIS: Justice Breyer, that is the Clayton Act rule, the basic Clayton Act rule. The cause of action accrues upon the occurrence of the injury even if the plaintiff has no knowledge that he has been injured.

QUESTION: Yes, but there's a thing called fraudulent concealment which operates in order to prevent the very problem that I'm focusing on.

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MR. ENNIS: That's a different doctrine. Now, let me try to address that doctrine.

The doctrine of fraudulent concealment is not applicable in the circumstances of this case for two reasons. All courts agree -- all courts agree that the doctrine only applies when the defendant's acts actually conceal the elements of the claim. There's a distinction between whether they can be self-concealing acts or affirmative acts that conceal, but all courts agree the defendant's acts must conceal the elements of the claim.

Here, both lower courts found, viewing the evidence most favorably to petitioners, defendants did not commit any acts which concealed the elements of the --

QUESTION: So in other words, if I'm thinking conceptually, is this right, in cases like price-fixing or fraud, it starts to run from the moment that you discovery your injury, i.e., you wrote a bigger check.

Some courts say you also have to know the source.

MR. ENNIS: That's correct.

QUESTION: Which isn't hard to know. But then, if there is fraudulent concealment, as there often would be in price-fixing or fraud, that tolls the statute.

MR. ENNIS: If there is actual fraudulent concealment, which has two components, first that the

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defendant's acts actually concealed --

QUESTION: Yes.

MR. ENNIS: -- the elements of the claim.

QUESTION: All right.

MR. ENNIS: That was not this case.

QUESTION: Yes.

MR. ENNIS: Second, that's not this case for a second reason. Both lower courts found, and in fact nine circuits, at least nine circuits agree, that even when the defendant's acts do actually conceal the elements of the claim, the plaintiff must nevertheless be diligent, and if a diligent plaintiff would nevertheless have discovered the elements of the claim despite the defendant's acts of fraudulent concealment, the doctrine of fraudulent concealment does not apply.

QUESTION: Why do you say there's no actual concealment here? Certainly one of the elements of fraud is that you knew that the product you sold was not going to do what you said it did, otherwise it's just negligence, and you're subject to breach of warranty, I suppose, but not to a fraud claim.

Now, didn't the seller here, A. O. Smith, indicate that it did -- it believed that this silo was a properly working silo?

MR. ENNIS: Absolutely, Justice --

QUESTION: So why isn't that concealment of the element of knowledge that it wasn't a properly working silo?

MR. ENNIS: First of all, as Justice Kennedy's question earlier suggested, that question assumes that it is fraud, and that my client, A. O. Smith, knows that the silos won't work.

QUESTION: Well, of course it does. When you get to the issue of whether there's concealment or not, you're assuming there was a fraud.

MR. ENNIS: Well, in this case the reason it doesn't conceal, even if you assume it's a fraud, is that the claims here are based on allegations that my client misrepresented the benefits of this silo. B-2 of the appendix to the cert petition lists the alleged misrepresentations.

The lower courts found that long before, 6 years before they filed, petitioners should have known that all of the representations on which they claim to rely had not materialized, and there was nothing the defendants could do to conceal that reality.

QUESTION: You're retreating to the second item that you raised in your response to Justice Breyer, namely that even where there is concealment --

MR. ENNIS: No.

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QUESTION: -- it does not excuse you if the --

MR. ENNIS: No.

QUESTION: -- or it doesn't work to the plaintiff's advantage if a diligent plaintiff would have discovered it.

MR. ENNIS: No.

QUESTION: You're saying a diligent plaintiff would have discovered it.

MR. ENNIS: No. No. Maybe I didn't express myself as clearly as I --

QUESTION: Well, I didn't understand you.

MR. ENNIS: I'm trying to address the first part of your question.

QUESTION: Whether there's concealment.

MR. ENNIS: There's no concealment at all, because there is nothing the defendant did or could do that could conceal from the petitioners that the representations on which they relied were not materializing.

QUESTION: But that only goes to the contract description. It doesn't go to the misrepresentation which is an element of the cause of action, and the fact that more than 6 years before they brought this suit they realized that the silo was not working as advertised does not support the proposition that they knew that Smith had

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misrepresented the silo's capacity.

MR. ENNIS: Justice Souter, they claim -- if you look at B-2 of the appendix to the cert petition, they claim that the -- the representations which they alleged were fraudulent included representations that this silo would make it possible for them to eliminate protein supplements. They knew that never happened. That -- one of the misrepresentations was that they would be able to increase their milk production 3 to 5 pounds of milk per cow a day.

QUESTION: Right, and when did they --

MR. ENNIS: That never happened.

QUESTION: When did they not merely know that those representations were proving to be untrue, but when did they also know that Smith knew they were untrue when they made them?

MR. ENNIS: Well, Justice Souter, no one ever knows for sure whether a defendant in a fraud case knows that claims are true or untrue until you've brought the trial and win or lose.

QUESTION: Well, it's a question of circumstantial evidence --

MR. ENNIS: Yes.

QUESTION: -- like a great deal else.

MR. ENNIS: Yes.

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QUESTION: And I think the only point that I'm making is, on the fraudulent concealment rule, it does not answer the fraudulent concealment rule issue to say they should have known that the silo was not living up to its description. If the question is, when should they have known that the silo was also the subject of a fraudulent --

MR. ENNIS: Yes.

QUESTION: -- description or representation.

MR. ENNIS: Well, both lower courts, answering that second question, which was the second question in Justice Scalia's question, by concluding that doing the evidence most favorably for the petitioners they knew or should have known all of the elements of their RICO claim, including that this was fraud --

QUESTION: Mr. Ennis --

MR. ENNIS: -- if it was fraud, more than 6 years before --

QUESTION: Explain that to me, because as a matter of fact, and I don't think this is disputed, these farmers consulted a veterinarian. They had a nutritionist. They wanted to know why their cattle were sick, and no one tipped them off to a possible relationship between the sickness of the cattle and the silo. They knew the silo wasn't working, but they didn't

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know that that's what caused the sickness in the animals.

So they knew they had a problem. They consulted people. Why wasn't that diligent?

MR. ENNIS: Your Honor, this case involves a lot of facts not all of which are in the cert petition or the appendix, but after reviewing all those facts, including the facts that the petitioners could simply have taken feed from the silo to be tested, which is a normal, regular thing that most farmers do at least twice a year, which would have showed them that the feed from the silo either was good quality or bad quality -- they didn't do that.

There were many things available to a reasonably diligent plaintiff whose milk production was going down for 19 years, whose protein supplements did not improve for 19 years, that they could have done to investigate and find out all the elements of their claim.

QUESTION: Mr. --

QUESTION: If all that is correct -- let's assume -- I'm not sure that this happened. Let's just assume that within 4 years of the time the action was filed a representative of the company came out and he looked at the feed with the farmer and he said, oh, that's that brown stuff, you want that, that's really good, knowing that that's not true, knowing that this is exactly

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what was hurting the cattle, would that have revived the cause of action?

MR. ENNIS: No. It's the same answer, Your Honor. It's the same thing as if they say this is a great silo.

QUESTION: Because if you should have discovered the fraud earlier, the fact that there are new acts of fraud are -- is irrelevant?

MR. ENNIS: Unless those new acts cause separate injuries within the limitations period. These did not.

QUESTION: Well, suppose this continued to lull them into thinking there's nothing wrong with the silo and he lost 10 more cows?

MR. ENNIS: Well, Your Honor, this case, both courts found -- and those findings I don't think are properly before the Court, because although petitioner in their brief raises a question about whether the lower courts properly applied the summary judgment standard they did not raise that question in the petition for rehearing in the Eighth Circuit, in their cert petition, the questions presented --

QUESTION: But just -- just with reference to my question, let's assume they came out within 4 years, said oh, this is great feed, knowing that it wasn't, and that 10 more cows were sick or died, and that the plaintiff was

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lulled into believing that the silo was okay.

MR. ENNIS: That would simply be a continuation of the damages that flowed from the initial fraudulent act if it was fraudulent, inducing him to buy the silo.

QUESTION: Why isn't that a repeated injury?

MR. ENNIS: Well, it's not a new injury. It's not a new, different, and separate injury, Your Honor. That's the -- that's a critical point in the separate accrual doctrine.

QUESTION: So in Justice Breyer's case, where a bank is defrauding people on credit cards, if you should have found out 15 years ago but they keep doing it you can't sue for the last 4 years, or for the period within the statute of limitations since the new acts have occurred?

MR. ENNIS: That's correct. That's the general

QUESTION: But I thought you said you could recover for the 10 more cows, assuming that it's a new misrepresentation.

MR. ENNIS: If it's a new misrepresentation --

QUESTION: Yes, so --

MR. ENNIS: -- within 4 years --

QUESTION: Right. Yes, you can recover for that.

MR. ENNIS: -- which causes injury --

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QUESTION: Yes.

MR. ENNIS: -- within 4 years you could.

QUESTION: So with the bank, you can -- with the bank --

MR. ENNIS: That's right.

QUESTION: -- if the bank keeps doing it, you recover you just go back 4 years at a time.

MR. ENNIS: That's not this case.

QUESTION: But fraudulent concealment, you don't necessarily need a new injury. That can toll the statute of limitations, can't it?

MR. ENNIS: Fraudulent concealment can toll, if there are affirmative acts that actually conceal, if there are acts that actually conceal.

QUESTION: And the second question presented is whether respondent's fraudulent self-concealing conduct, acts of fraudulent concealment, suspend the statute of limitations, so at least that portion of the fraud claim is presented in the petition for certiorari.

MR. ENNIS: We don't dispute that the fraudulent concealment issue is presented. We do dispute that any question about whether the lower courts properly applied the summary judgment standard is presented.

Let me just make --

QUESTION: May I ask you -- may I ask you

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question kind of going back to the beginning for a minute?

I just want to know what your view is -- it's perhaps a substantive question rather than a tolling question, but assume that they sold three silos, each of which was defective and they knew they were defective within the 5-year period, and the first purchaser is the first predicate act altogether, does he have a cause of action?

MR. ENNIS: Again, Justice Stevens, I think that's a substantive question of RICO --

QUESTION: Right. What's your view of the substantive question?

MR. ENNIS: It's different from the accrual rule.

Personally, I think that the first person injured by an act, the first predicate act which later turns out to be a pattern, would have a civil RICO claim once the pattern emerges.

QUESTION: Even though there had --

MR. ENNIS: But that's my personal belief.

QUESTION: Even though there had been no violation of RICO at the time --

MR. ENNIS: At that point.

QUESTION: -- of his injury. It's retroactively created?

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MR. ENNIS: That's right, and I reach that conclusion because this is a remedial statute, and Congress understood that some of the patterns could take as much as 10 years.

QUESTION: Is there any parallel doctrine for that, or is that unique to RICO? It's just strange to me that a RICO injury happens, and then the RICO pattern is completed later. I just find that very odd.

MR. ENNIS: It is odd, Justice Kennedy, and I don't know of any parallel, and I don't know what lower courts would say in answer to that question.

Let me make --

QUESTION: It's so odd that I'm inclined, if you really believe that, to think that the 4-year statute of limitations should be interpreted with similar oddity.

(Laughter.)

QUESTION: What good is a 4-year statute of limitations if you don't know for even 10 years until --

MR. ENNIS: Let me --

QUESTION: -- whether you have -- before you have a cause of action.

MR. ENNIS: -- let me just -- let me just note --

QUESTION: Extraordinary.

MR. ENNIS: I'm sure it's clear, but that

question is not raised by the facts of this case, because the pattern quite clearly existed well before the purchase of the silo in 1974. They allege there were at least 20 acts of mail fraud on which they relied before 1974.

QUESTION: I understand that, but I'm quite serious that my view of the statute of limitations has to depend to some extent upon my view of what RICO does, and if there is in every case a 10-year, I don't know, limbo period --

MR. ENNIS: No, that wouldn't be true. The fact that the pattern might not emerge for 10 years would not mean you could not have a pattern of acts some of which are every 2 or 3 years apart that go on for 20 or 30 years. That's a separate question.

QUESTION: No, but your view would permit the conclusion that the statute of limitations would run before the statute was violated.

MR. ENNIS: No. No, Justice Stevens. I -- if that's the answer you -- I didn't mean to suggest that at all.

The statute of limitations would only begin to run when there was discovery of injury and all the elements of a RICO claim were in existence.

Now, the Court may answer that in existence question one way or the other. Our rule would apply

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whichever way the Court answered that.

QUESTION: That would mean that if you had a victim of the first predicate act and then three more predicate acts that occur over a 5 or 6-year period, the statute, the cause of action would accrue at the end of the 6 years.

MR. ENNIS: That's correct, Justice Stevens. That's correct.

Now --

QUESTION: Mr. Ennis, there's one more piece of this about the discovery of the source. There was the continuing sales pitch, but there was also, it was alleged, was it not, that the company had done testing on its own, and that testing showed that the silo was not performing as advertised, and yet no one who had purchased this silo was told, your cattle may sicken and even die. Isn't that relevant to the discovery of the source?

MR. ENNIS: Well, there are two things I'd like to say about that, Justice Ginsburg. First, that's not what those internal studies show.

This company has sold 83,000 of these silos. There have been 270 claims. 3/10ths of 1 percent have experienced problems. That's not what the internal studies show.

But even if they did show that, that would not

qualify as fraudulent concealment under the fraudulent concealment doctrine that almost all circuits apply, because those acts would do nothing to prevent the petitioners from discovering the elements of their claim.

The elements of their claim are, the representations on which they relied proved to be false. Their cows were not doing well. They were injured, and there was a pattern of activity.

QUESTION: Known to be false by the seller. You have to add that.

MR. ENNIS: Well, you can add that, Justice Scalia, if you --

QUESTION: You must add that for fraud.

MR. ENNIS: You have to be able to allege that, that's correct. It has to be able to plead --

QUESTION: -- prove it at the time.

MR. ENNIS: Now, let me -- I've not got to the --

QUESTION: Yes, but again if --

MR. ENNIS: -- central point --

QUESTION: Well --

MR. ENNIS: -- I'd like to make, if I could, about why the criminal RICO rule, which is the only rule the petitioners urge, Justice Souter. They do not urge a discovery rule at all. If you look at their motion for a

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divided -- response to the motion for a divided argument that's crystal clear. It's also clear on pages 20 and 21 of their brief. They don't urge a discovery rule.

The critical problem with the criminal last act rule, like the civil last predicate act rule, is that it would enable a fully knowledgeable plaintiff who knows everything to delay filing for many, many years.

It is not tied to the injury component of civil RICO, because the last violation under the criminal rule, or the last predicate act under the civil rule, don't have to have injured the plaintiff at all. They don't have to have injured anyone at all.

Now, that makes no sense to use that rule, which is adrift from concepts of injury, in civil RICO, where Congress itself determined that the gravamen of a civil RICO claim is injury and a specific kind of injury, injury to the business or property of the plaintiff.

The fact that the last act might injure someone else is totally irrelevant to the plaintiff's civil RICO claim. That's why any rule this Court adopts for civil RICO should be tied directly to injury.

Now, there are other reasons that --

QUESTION: Although you acknowledge that it can be tied to an injury to somebody else if the injured plaintiff is the first one in the series of RICO acts. In

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that situation, you don't insist on injury to this plaintiff. You will wait 10 years to see if any other plaintiff is injured.

MR. ENNIS: Actually, the other plaintiff doesn't even have to be injured.

QUESTION: Doesn't even have to be --

MR. ENNIS: There can be a predicate act.

QUESTION: Okay. So to that extent you're willing to buy into the criminal rule.

MR. ENNIS: Well, to that limited extent, Justice Scalia, but in the normal run of these cases, particularly where you're talking about an ongoing pattern of activity, the pattern would exist roughly at the same time as the first injury.

The second reason why the rule we propose makes more sense than later accruing rules is that it is more consistent with the private Attorney General function of civil RICO. The point of the private Attorney General function, since the civil plaintiff can only recover his own damages and cannot punish the defendant for any injuries inflicted on others, is not financial. It's to expose and deter ongoing patterns of racketeering activity --

QUESTION: Mr. Ennis --

MR. ENNIS: -- before they injure others.

QUESTION: You don't ask for the more strict rule of just, once the cause of action exists, that's it. You start the statute running.

MR. ENNIS: The Clayton rule, Justice O'Connor?

QUESTION: Right.

MR. ENNIS: We don't ask for it, but of course we'd be happy with it, since we would win under that rule. This claim would have accrued in 1974, and it would be barred in 1978, but we don't urge the Clayton rule for two reasons.

One, the Clayton rule, although that's the basic Clayton rule, that occurrence-of-injury rule has not proved satisfactory even for all Clayton Act violations, which are much narrower in scope than RICO violations, so many Clayton courts have actually imposed different rules, and we think it makes sense to have a single rule for RICO that is broad enough to encompass all the acts that violate RICO.

Second, frankly, we think that the Clayton rule is a little harsher to plaintiffs than this remedial statute was probably intended to be. We think that what Congress probably presumed, if it presumed anything at all, was that the general Federal accrual rule would apply, and that rule is discovery of injury, and we don't think that in the context of this statute there's anything

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in the text or purpose of RICO that would mean that Congress would have intended a harsher rule for civil RICO than the general Federal rule of accrual.

QUESTION: Of course, if Congress was reading our cases it would not have expected a Federal statute of limitations to apply at all, much --

MR. ENNIS: If they'd read your dissent, Justice Scalia.

QUESTION: We came to that later, didn't we?

MR. ENNIS: Yes.

QUESTION: So I don't think it's very helpful to talk about what Congress intended.

MR. ENNIS: No.

(Laughter.)

MR. ENNIS: No, but putting entirely aside congressional intent, in Federal courts it's judge-made law almost always to adopt accrual rules, but those rules are supposed to be consistent with and tied to the purpose of the underlying statute, regardless of what the congressional intent was, and for that reason we think since civil RICO the distinguishing element is injury, it should be discovery of injury that triggers the accrual.

Let me conclude by saying that the Havens Realty case, which has been mentioned here in argument, actually proves our point. In Havens Realty -- it wasn't a unique

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case, Justice Rehnquist, but in Havens Realty this Court rejected the continuing violations doctrine when applied to a claim that required proof of direct injury to the plaintiff, a misrepresentation claim.

It found the continuing violation doctrine not appropriate in that circumstance, only appropriate in the quite different circumstance of discriminatory practices which have indirect injury to the plaintiff even if they do not directly injure the plaintiff. That is not this case.

Thank you very much.

QUESTION: Thank you, Mr. Ennis.

Mr. Bird, you have about a minute remaining.

REBUTTAL ARGUMENT OF CHARLES A. BIRD

ON BEHALF OF THE PETITIONERS

MR. BIRD: A minute -- oh. Just two brief points. Our case is not based on these misrepresentations of future benefits. You can look at our complaint, which is probably 50, 60 pages long, and you won't find any of those allegations in there. Our case is based upon the fraud relating to the oxygen-limiting nature of the silo.

Secondly, given the variables of farming, there is no way, and we have the expert affidavit in our proof from Dr. Olson. It's on -- if you would care to look at pages 168 through 170 of the joint appendix, it's fully

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explained in there.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bird. The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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CASE NO. 96-663

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

BY Ann Marie Fedrico

(REPORTER)