Podcast: *RICO Report*
Episode: 'The Four-Year Clock': Navigating the Civil RICO Statute of Limitations
Host: Cal Stein
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Cal Stein (00:04):
Hello and thank you for joining me on this installment of the *RICO Report*. My name is Cal Stein and I'm a partner in the white collar and litigation practice groups at Troutman Pepper Locke and I represent clients in white collar criminal and government investigation matters as well as in complex civil lawsuits and in RICO litigation. Now today we are going to discuss a fundamental issue that arises in one manner or another in connection with every single RICO case that is brought, but for which despite its importance has not yet been definitively addressed by the United States Supreme Court despite multiple opportunities for it to do so. And what I'm talking about is the statute of limitations, the statute that applies to civil RICO cases. Now, statute of limitations is obviously a very critical issue in any civil RICO case, both for the defendants considering it as a defense, either at the motion to dismiss or more likely at the summary judgment stage, but also for RICO plaintiffs or potential plaintiffs who are trying to evaluate the strength or weakness of a civil RICO claim and their likelihood of success if they pursue it.

(01:25):
But as I noted, despite how important and despite how fundamental this issue is to the RICO statute, the Supreme Court could have but has not yet offered any definitive statement on how a civil RICO statute of limitations must be calculated. The Supreme Court has indicated the statute of limitations period four years, but as we will explore today, that is just the start of the statute of limitations inquiry, not the end of it, even though that is really the only definitive ruling the Supreme Court has given. Okay. So as I just mentioned, let's start with the basic question. How long is the statute of limitations for a civil RICO claim? And I would like to start this discussion where we always start here at the RICO report with the text of the RICO statute. But a last, I cannot, because Congress, in its wisdom, chose not to include any express statute of limitations provision in the RICO statute when it enacted it way back in 1970.

(02:37):
As a result, for the first 17 years of the RICO statute's existence, it was up to lower federal courts to consider and answer this most basic question with no guidance on the page from Congress. Now, look, this was not a huge issue because frankly, there were not many civil RICO cases being filed at the time. Back then in the 70s and into the 80s, RICO was still viewed as an anti-organized crime statute very differently than it is viewed today. But in 1987, the Supreme Court decided the first of three very important

RICO statute of limitations cases, all of which we're gonna talk about today. And the 1987 one was called Agency Holding Corp v. Malley Duff Associate, Inc. And in that case, the Supreme Court decided that even though the RICO statute does not have an explicit statute of limitations in it, it was going to apply the four-year statute of limitations from the Clayton Act.

(03:41):
Now, as we have discussed on this program multiple times, when Congress passed RICO, it made very clear that it modeled the statute on the Clayton Act. So the Supreme Court borrowing that statute of limitations made all the sense in the world. But there was a question and there remains a question. What about the statutes of limitations for the underlying predicate acts in a civil RICO case? That's one of the main differences in the RICO statute. It is in itself a cause of action, but it depends on underlying predicate acts, underlying violations of criminal law. Now, the Supreme Court in Malley-Duff did not address this explicitly, but since then, courts across the country have uniformly held that the statutes of limitations for the underlying predicate acts do not apply in the context of a civil RICO claim. That means if a underlying predicate act has a statute of limitations that is less than four years, the four-year limitations period for the civil RICO claim from the Clayton Act still applies.

(04:47):
Now, this is a little bit confusing, but if you think about it, it actually makes sense because civil RICO is obviously a civil claim and the predicate acts are criminal. They are criminal offenses which have different statute of limitations considerations so it makes sense not to apply those. So that answers the first question related to Civil RICO's statute of limitations. How long is it? It's four years. But as I alluded to earlier, that is just the start of the inquiry, not the end. It begs the very next question, four years starting when? Four years from what? And it would have been nice if the Supreme Court had addressed that question in the Malley Duff case, but it didn't. And as we have seen in other components of the RICO statute, when the Supreme Court leaves a void like that, we know what happens. The lower federal courts, district courts, and circuit courts fill in the gap and they inevitably do so with different often contrary and conflicting rules and that is exactly what happened here.

(06:00):
The Circuit Courts fashioned multiple different rules. For one, we had what is called the injury discovery rule adopted by the first, second, fourth, seventh, and ninth circuits. We also had the injury and pattern discovery rule adopted by the eighth, 10th, and 11th circuits, and we had the last Predicate Act rule adopted by the Third Circuit. There's also a fourth option that was not adopted explicitly by any Circuit Court, but was discussed by multiple lower courts called the injury occurrence rule and that one really focused on when a defendant committed acts that injured the plaintiff's business. It did not depend at all on plaintiff's knowledge or discovery of the injury, which is the critical

issue underlying the other rules that we are going to talk about. Now, the fact that the circuit courts came up with so many different rules is really not all that surprising here.

(07:00):
And that's because as we know, RICO is a complex statute particularly with respect to the underlying wrongful conduct. As we know, RICO not only requires wrongful acts, but it requires that those wrongful acts take place over an extended period of time such that they constitute a pattern. And this is not at all conducive to a straightforward statute of limitations analysis the way a simpler statute or a simpler cause of action would be. So we ended up with all sorts of different rules leading the Supreme Court to have to weigh in again and it did so. It narrowed and even eliminated some of these rules that the Circuit Courts came up with, but what the Supreme Court has not done and did not do is definitively state which rule does apply. So for example, in the second key Supreme Court case that we'll reference here today, a case called Klehr v.

(08:05):
A. O. Smith Corp, the Supreme Court rejected the last predicate act rule. That was the one I mentioned that the Third Circuit had adopted, but in doing so, the Supreme Court declined to adopt the rule that would be the statute of limitations. And in the third case that we're gonna discuss Rotella v. Wood, the Supreme Court again chose to eliminate a rule, the injury and pattern discovery rule adopted by the 8th, 10th, and 11th Circuit, but once again, it declined to prescribe what rule did apply. It didn't even endorse what appeared to be kind of the last remaining rule from the circuit courts, the injury discovery rule I mentioned that had been adopted by the 1st, 2nd, 4th, 7th, and 9th Circuits. What was interesting though is that in the Rotella case, the Supreme Court acknowledged the inherent tension between traditional principles of federal law, including that a statute of limitations really cannot begin to run until the cause of action is complete and the reality that a civil RICO claim requires multiple predicate acts that could be separated by years.

(09:18):
So in short, in these two cases, the Supreme Court stepped up to the plate on civil RICO statute of limitations cases and chose to narrow the issue but not answer it. And as we'll see, that appears to be a deliberate choice. So let's talk about these different rules that I've been referencing and let's start with the injury discovery rule, the 1st, 2nd, 4th, 7th, and 9th Circuit rule, and really the only one that hasn't yet been eliminated by the Supreme Court, though it has not yet been endorsed by it. Under the injury discovery rule, the statute of limitations begins to run when the plaintiff discovers or should have discovered the civil RICO injury, i.e., The monetary injury to the plaintiff's business or property. Now, importantly, under this rule, the statute of limitations may begin to run even if the plaintiff is unaware that his monetary injury to his business or property stems from a pattern of racketeering activity.

(10:29):
This is what the Supreme Court has said about this rule. Discovery of the injury, not discovery of the other elements of a claim is what starts the clock. And in my opinion, the best formulation of this rule actually comes from the Second Circuit, and this is what the Second Circuit had to say. The first step in the statute of limitations analysis is to determine when plaintiffs sustained the alleged injury for which they seek redress. The second step is to determine when plaintiffs discovered or should have discovered that injury. That is, in essence, the injury discovery rule. Now, there is one big exception to the injury discovery rule and it involves a plaintiff who brings a civil RICO claim within four years of discovering the injury, but that claim may still be barred by the statute of limitations if a reasonable person exercising due diligence would have discovered the injury sooner, i.e. More than four years before the suit.

(11:35):
Now, lower courts have varied on how strictly they apply this exception. Some lower courts have gone so far as to say the statute of limitation begins to run when the plaintiff is on what is called inquiry notice of the underlying acts that would arouse the suspicion of a reasonable person. This is sometimes referred to as the storm warnings approach. Now, there are all sorts of issues that have arisen with the application of the injury discovery rule. The main issue is that under the injury discovery rule, a plaintiff who suffers an injury on account of a single predicate act could end up being barred from pursuing a civil RICO claim if the Second Predicate Act, which of course is necessary to form the requisite pattern of racketeering activity. If the second predicate act occurs more than four years later, and this is certainly possible, it's not a hypothetical.

(12:36):
The RICO statute explicitly defines the term pattern to require predicate acts to be occurred within 10 years of each other. So there is an inherent tension, an inherent contradiction even, between the way the RICO statute defines pattern and the four year statute of limitations the Supreme Court has applied pursuant to the Clayton Act and the application of the injury discovery rule. And the Supreme Court actually acknowledged this exact issue in the Rotella case, but it did not find this issue sufficient to adopt the rule that would begin the statute of limitations when the plaintiff knew or should have known not about his injury, but about the pattern, the pattern of racketeering activity. The court could have adopted that rule but did not. Nonetheless, some courts have effectively adopted this rule or effectively applied this rule by holding that a pattern, a pattern of racketeering activity must exist before the statute of limitations can begin running on a civil RICO claim and this is largely based on those federal law principles that we talked about before that a claim must arise before the statute of limitations can begin running.

(13:55):
Okay, let's talk about a different component of these rules, which is sometimes called separate accruals or separate accruals for new injuries. One question that has come up

frequently with respect to the injury discovery rule, which again, let's not forget, is kind of the only rule that the Supreme Court has left standing even if it hasn't explicitly endorsed it. But an issue that keeps coming up including before the Supreme Court is, look, why don't we just use the full Clayton Act statute of limitation rule for civil RICO? It would make sense the Supreme Court did apply the four-year statute of limitations because of the Clayton Act rule. Why don't we just use the full rule, which says that the statute of limitations would begin when a defendant commits an act that injures the plaintiff's business or property. Now in the Klehre case, Justices Scalia and Thomas argued that this rule could apply in the RICO context even where there were multiple acts, because each act, each predicate act would start the statute of limitations anew.

(15:04):
Now, while the Supreme Court did not adopt this continuous accrual approach, it does appear that most courts of appeals were paying attention to what Justices Scalia and Thomas said because most circuits, regardless of what accrual rule they apply, have adopted this separate accrual doctrine that permits a plaintiff to bring a civil RICO claim each time he discovers or should have discovered a new injury stemming from a civil RICO violation. Now, once again, there is a very large exception to this statute of limitations principle, but this time it operates actually differently. Most courts will limit this separate accrual rule to situations where each new injury is from a new wrongful act, a new predicate act. And what that means is that a new injury from the same old predicate act will not restart the statute of limitations under the separate accrual doctrine. Okay, let's turn to our final topic here today, which is that of equitable tolling.

(16:15):
And I would be remiss to not address the concept of tolling in the context of any statute of limitations discussion, but particularly in the context of a civil RICO statute of limitations discussion, because as we know, civil RICO claims almost always involve some sort of fraud, be it mail fraud, wire fraud, or one of the other frauds that can serve as a predicate act for a RICO claim. And anytime you have cases that by their nature involve fraud, that lends itself to arguments about the tolling of the statute of limitations, whether that's based on equitable tolling, estoppel, or fraudulent concealment, all of which are related concepts in the context of statutes of limitations. Now, federal courts have, since the Supreme Court ruling in Malley-Duff, uniformly held that these doctrines do apply to civil RICO claims, but of course, courts have differed on how they apply and we don't have a definitive ruling from the Supreme Court.

(17:22):
Some courts hold that the doctrines only apply to toll the Civil RICO statute of limitations if the plaintiff can demonstrate that he exercised due diligence to discover the claim but was somehow thwarted by the plaintiff's fraud or concealment. Other courts are more liberal though. They hold that equity prohibits a defendant from relying and asserting a statute of limitation defense if that defendant has engaged in fraudulent conduct designed to conceal the violations and this would apply irrespective of whether plaintiff

acted diligently or not. Now, the Supreme Court did weigh in on this particular issue in Klehr. The Supreme Court ruled that reasonable diligence does matter for civil RICO claims. And if a plaintiff is not diligent, he or she may be prohibited from asserting a fraudulent concealment argument to extend the statute of limitations. But since Klehre, in addition to establishing diligence, two other requirements have evolved and have emerged.

(18:32):
A plaintiff seeking to extend a statute of limitations based on equitable tolling or fraudulent concealment must establish two things. First, the plaintiff must establish that the defendant wrongfully concealed material facts related to his wrongdoing and second, the plaintiff must establish that this concealment prevented him or her from discovering the claim within the statute of limitations period. Now, critically, the plaintiff who is relying on tolling in this matter must. They must plead sufficient facts in the RICO complaint to establish these elements. And if that plaintiff is relying on fraudulent concealment, those allegations must satisfy the heightened pleading requirement of rule 9B. I mentioned this because this is a very fertile area for defense counsel to explore and attack even at a motion to dismiss stage. And while it is rare, it can be rare for a court to grant a motion to dismiss based on a statute of limitations defense.

(19:39):
This is still something that defense counsel ought to pay attention to at the motion to dismiss stage and develop throughout discovery and preparation for summary judgment and it's also something that plaintiffs and plaintiff's counsel ought to be paying attention to to make sure they don't plead their way out of a RICO claim in the initial complaint. And with that, we are out of time here today so I wanna bring this discussion about Civil RICO statutes of limitations to a conclusion. I wanna thank everyone for listening as always. If you have any thoughts or any comments about this series or about today's episode on Civil RICO statute of limitations, I invite you to contact me directly at callan.stein@troutman.com. You can subscribe and listen to other Troutman Pepper Locke podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening.

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