OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MARK ROTELLA, Petitioner, v.

ANGELA M. WOOD, ET AL.

CASE NO.: 98-896 C.2

PLACE: Washington, D.C.

DATE: Wednesday, November 3, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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MARK ROTELLA, :

Petitioner :

v. : No. 98-896

ANGELA M. WOOD, ET AL. :

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Washington, D.C.

Wednesday, November 3, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

RICHARD P. HOGAN, JR., ESQ., Houston, Texas; on behalf of the Petitioner.

CHARLES T. FRAZIER, JR., ESQ., Dallas, Texas; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 98-896, Mark Rotella v. Angela Wood.

Mr. Hogan. You don't have to wait till Justice Scalia sits down.

ORAL ARGUMENT OF RICHARD P. HOGAN, JR.

ON BEHALF OF THE PETITIONER

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

The parties in this case advocate different accrual rules for civil RICO, and that difference is starkly illustrated by the way that the parties view two important dates in the record. The first date is 1986, when the plaintiff was released from a mental institution after 479 days of confinement. The second date is 1994, when the plaintiff learned that the company that was operating that institution had pled guilty to Federal fraud and conspiracy charges for a scheme that included paying kick-backs to doctors for keeping the patient census high.

The Defendants contend that the civil RICO claim in this case had accrued for the statute of limitations purposes and that the statute had begun to run in 1986, when the plaintiff was released from the hospital, and

that therefore the statute of limitations had expired by 1990, 4 years before the Federal Government had even announced the guilty pleas.

The plaintiff, on the other hand, argues that the RICO claim did not accrue until 1994, when he first learned that the hospitalization was related to a pattern of racketeering activity, and the question then presented for the Court is which accrual rule is proper for civil RICO.

QUESTION: Well, there could be a third. I mean, do we have to pick between only those two?

MR. HOGAN: No, Your Honor.

QUESTION: Why couldn't we use the accrual rule that is used for the Clayton Act?

MR. HOGAN: Your Honor --

QUESTION: Namely the time the injury occurs, whether you know about it or not.

MR. HOGAN: The template that the Court would take from the Clayton Act, Your Honor, would not fit for civil RICO and, as this Court recognized in Klehr, the pure injury accrual rule, it suggested, might not work without some modification in the situation of civil RICO, unlike the antitrust laws, because the antitrust laws require only separate and discrete single acts and not a pattern of racketeering activity, and so it's okay for the

antitrust laws to use an injury accrual rule.

We simply suggest to the Court that it does not reach this question, because the pattern of racketeering activity is absent in the antitrust laws when it is present in civil RICO.

QUESTION: Well, perhaps the rule could be the injury plus the existence of a cause of action, which means there has to have been a pattern, and I suppose that principles of equitable estoppel might be available in circumstances where the pattern was undiscoverable due to conduct of the defendants.

MR. HOGAN: But equitable estoppel principles, Your Honor, also will not work, we suggest, for civil RICO. Obviously, the suggestion that we might need some sort of equitable estoppel principles or other equitable tolling principles suggests that there are harsh facts which might require those types of remedies, but we think that the rule ought to address those things up front, as this Court suggested in the Beggerly decision.

QUESTION: Well, but in some cases you're going to have affirmative concealment, and the equitable tolling would address that and let the other things be governed by the normal rule.

MR. HOGAN: But that would be unworkable, because --

QUESTION: Why?

MR. HOGAN: -- the equitable tolling principles that would involve fraudulent concealment require affirmative acts or affirmative conduct on the part of the defendant to conceal the cause of action, so that if the defendant does nothing, as in this case, simply does not speak and remains mute, the plaintiff would be unable to take advantage of any equitable tolling.

QUESTION: Well, you say it won't work. What you mean is, it doesn't help you in this case.

MR. HOGAN: It -- Your Honor, it does not work, and there is not a single case cited in any of the briefs in which equitable tolling has been recognized to apply for civil RICO.

QUESTION: I thought Posner has a long decision in which he explains all this, and he goes into it, and I thought, well, if your complaint is fraudulent concealment versus equitable tolling, we could work that out in some other case.

The basic principle is, the statute of limitation starts to run, and an unfair result is stopped by principles of fraudulent concealment like the antitrust law, or equitable tolling, as in fraud. It isn't a problem.

So you tell me it is a problem. What's the

problem?

MR. HOGAN: Those -- the problem is that it's an indefinite period. An equitable tolling period never informs the parties of how long --

QUESTION: But that's viewed as an advantage, not a problem. The reason it's an advantage is because, if a person discovers the thing after only a year, he gets an extra year. He doesn't get an extra 4 years.

MR. HOGAN: But --

QUESTION: So they certainly argue that that -- what you just called is a problem is the best thing about it.

MR. HOGAN: Well, but it would not -- it would defeat the purposes of predictability and certainty that should be an aspect --

QUESTION: Oh, no, no. All you'd have to say is, stay on your toes. That's all. Stay on your toes. You'd have to be reasonably diligent, and if they're not aware of what that is, well, that's their problem.

MR. HOGAN: It seems that that problem ought to be dealt with on the front end, and instead of closing the courthouse door to plaintiffs and forcing them to take on the additional burden of opening that door after it has been closed with no determination and no information for the circuit courts to apply as to how long that period

ought to last, that it would be better to deal with the harsh results and the equities within the knew or should-have-known standard, and tell everyone that within that standard there is a 4-year limitations period.

QUESTION: Well, there are equities on both sides of a statute of limitations case. You know, memories fade, it's harder to find out what actually happened, you know, 10 years later than 2 years later, so you -- I agree there are equities on the plaintiff's side. There are also equities on the defendant's side.

MR. HOGAN: That's correct, and we suggest that Congress in this case has opted to tip that balance in the favor of the plaintiffs, that the open-endedness that might exist because of the knew or should-have-known standard ought to be resolved because Congress looked at a 10-year window in which predicate acts could happen, and the balance of the equities ought to rest in the favor of the plaintiffs.

QUESTION: I don't understand why we don't just apply the Clayton Act. I mean, you know, we've established that this thing is modeled after that. Why don't we just apply the Clayton Act rule? I'm not sure I understood your response to that.

MR. HOGAN: The Clayton Act is geared to each separate act which produces an injury.

QUESTION: Right.

MR. HOGAN: RICO requires a pattern, and in the Clayton Act context --

QUESTION: So what is -- and therefore?

MR. HOGAN: And therefore the injuries that are remedied by the Clayton Act don't relate to anything that has the nature of a pattern of racketeering activity.

QUESTION: So what?

MR. HOGAN: So Congress --

QUESTION: What follows from that? Why does that prevent you from using the same statute rule?

MR. HOGAN: What follows --

QUESTION: When the injury occurs from a pattern, boom, there's a cause of action.

MR. HOGAN: The injury must tell the plaintiff that there was a pattern.

QUESTION: Why?

MR. HOGAN: Because otherwise --

QUESTION: The injury under the Clayton Act doesn't have to tell the plaintiff that there was an antitrust conspiracy.

MR. HOGAN: Because Congress has used the language that the injury is by reason of a violation of section 1962, which is a pattern of racketeering --

QUESTION: No, but it may simply be that the

RICO injury, that there is no RICO injury for your client. I mean, I think your argument assumes that Congress necessarily intended that the cause, that in effect a plaintiff will have at least a 10-year, I guess 14-year suspension to determine whether there's a cause of action.

There's a simpler answer, and the simpler answer is, maybe what Congress intended was that if you do not have the second predicate act within the 4 years, there is no RICO cause of action.

QUESTION: Or indeed, Congress may even have intended that there is no RICO cause of action when you are harmed by the first predicate act, even if there later is a second one, because at the time the first act occurs, there has been no pattern, and you have not been injured by a pattern.

MR. HOGAN: But that interpretation --

QUESTION: It's only the person harmed by the second predicate act who's injured by a pattern.

MR. HOGAN: Your Honor, that would render the statutory language meaningless. When Congress used the language in section 1964(c) that a person injured in his business or property by reason of a violation of section 1962, Congress meant that that violation was from a pattern of racketeering, and in this case --

QUESTION: No cause of action until there's a

pattern.

MR. HOGAN: That's correct.

QUESTION: No cause of action until the second predicate act.

MR. HOGAN: But for statute of limitations purposes there must be some discovery principle attached to that, because until --

QUESTION: Well, in that connection, let me just ask you this question. Supposing you didn't learn about the guilty plea until 2001, would the statute start to run in 2001?

MR. HOGAN: Yes. It would start to run even though it's open-ended, because Congress meant in this case, we suggest, to have a tipping of the balance in the favor of the plaintiff, so in that case, as this Court has recognized before, simply because the secretive and hidden enterprise is good at concealing the predicate acts and its enterprise from being detected, that ought not to work against the plaintiff.

QUESTION: It does work against the plaintiff in the antitrust area. People all the time buy products, they go to the cash register, and they pay $10. They don't necessarily know that the reason it's $10 instead of $8 is because there was a price-fixing conspiracy.

MR. HOGAN: But for two reasons that antitrust

analogy doesn't work. First of all, in most antitrust cases the people that are injured are market participants in the relevant market. They are somehow informed, or have some sort of commercial expertise --

QUESTION: No, they don't know there was a price fix. They bought the asphalt. They're down there laying the road.

MR. HOGAN: That's right.

QUESTION: They didn't know there was a price fix for years.

MR. HOGAN: But at least -- and the second reason is, but at least, if there is a separate, overt act later on, which also damages them, under the separate accrual rule in antitrust they would get a new cause of action starting from that date forward, whereas in RICO, if the second predicate act falls outside the 4-year period suggested by Justice Scalia's question, then there would be no remedy for the RICO plaintiff.

QUESTION: Are you sure? Suppose there's a pattern that falls outside the period. Isn't it a new pattern?

MR. HOGAN: It is a new pattern which this Court rejected in the accrual -- there is a new pattern, but the statute would not run anew from the last predicate act, as this Court said in Klehr. It doesn't start over, as it

does in the antitrust context, and so for those reasons the antitrust analogy we think, although it fits for the injury, and it fits for the statute of limitations period, does not fit for the purposes of accrual.

QUESTION: Mr. Hogan, do you know of another instance where, Congress being silent on the limit, the Court picks as the closest analogy, as it did here, the Clayton Act, and then takes the starting trigger from some place else?

MR. HOGAN: Yes, Your Honor.

QUESTION: Those two ordinarily would go together, the statute of limitations and its accoutrements. But here you're splitting them. You say, you get the limitation period from the Clayton Act, and then you get the starting trigger from some place else.

MR. HOGAN: Yes. You get the starting trigger that would allow the purposes of the statute to be remedied, and the closest analogy is the fraud analogy.

QUESTION: But then why borrow from the Clayton Act at all?

MR. HOGAN: We borrow from the Clayton Act to inform us what the statutory period is, and tell us how big the hourglass is.

QUESTION: But it isn't the statutory period if you have a different accrual --

QUESTION: Why didn't we --

QUESTION: -- trigger.

QUESTION: -- borrow from fraud analogy for purposes of determining what the statutory period was?

MR. HOGAN: Because in Malley-Duff this Court said that when it looked to those State limitations periods for fraud, they were divergent and not uniform, and this Court therefore said that the closest analogy for the limitations period is the Clayton Act, and so the 4-year limitations period, but the fraud analogy is what works best for the accrual rule.

Just as in the case of fraud, when something is concealed from the plaintiff, the statute doesn't accrue until the plaintiff knows, or reasonably should know --

QUESTION: Well, those are two different things. If you say there's affirmative concealment, that's traditional equitable tolling, but are you going further and saying that even if there isn't affirmative concealment the statute doesn't begin running until the plaintiff knows about it?

MR. HOGAN: That's correct.

QUESTION: Well, that's going a good deal further than saying you're just fighting concealment.

MR. HOGAN: But no further than it takes to recognize the existence of the cause of action. Without

the pattern in RICO, you may have an underlying fraud case, or you may have some sort of common law claim for the underlying predicate act, but you would not have a RICO cause of action.

The only thing that informs the plaintiff of the existence of a RICO case and transforms the injury into a RICO injury is the existence of the pattern, and the conduct of the enterprise through the pattern, otherwise, it's a simple, ordinary tort case.

QUESTION: Well --

MR. HOGAN: It is not a RICO case.

QUESTION: When do you say the pattern came into existence here?

MR. HOGAN: Your Honor, the record is not clear about that, but we can assume for purposes of argument that it existed while Mr. Rotella was in the hospital, before 1986.

There is also another predicate act which the record reveals, was the signing of a contract in 1990, but we can assume that it existed as of 1986.

QUESTION: So we're not talking about a pattern that just came together after the actual injury?

MR. HOGAN: For purposes of the argument, that -- we can assume that. But what did not exist in the plaintiff's mind, nor, shall I say, for the purposes of

the FBI or the Federal Government, was that they did not know that that conduct in paying out insurance benefits that were depleted from the plaintiff's insurance policy, they did not know that that conduct was being engaged in through a pattern of racketeering and was being taken from the plaintiff in violation of RICO.

QUESTION: You'd have a perfectly good State cause of action for this, wouldn't you?

MR. HOGAN: Your Honor, we -- no. We would have certainly ordinary tort remedies --

QUESTION: Yes.

MR. HOGAN: -- maybe under fraud.

QUESTION: Yes, not treble damages or attorney's fees, but a traditional tort action.

MR. HOGAN: Exactly. If it were meaningful to pursue, if he knew that there was a fraud committed, but in the same way that he didn't know that there was a RICO violation committed, Mr. Rotella also did not know that any fraud was being committed against him.

QUESTION: Suppose I'm injured by some -- by someone else, and do I have to -- it could have been by negligence, and it could have been intentional. I only find out, you know, 5 years later that it was intentional. Does the statute on the intentional tort not run until I find out that it was intentional? Of course not.

MR. HOGAN: No, of course not.

QUESTION: On both of them, you don't have to know what the precise nature of the injury is ordinarily. You just have to know you've been injured.

MR. HOGAN: But if we say --

QUESTION: And here you say, I have to know not only if these doctors injured me, but that they injured me by reason of a pattern. Why? I don't -- that just doesn't track normal law as far as I know.

MR. HOGAN: Because in an intentional tort case, Justice Scalia, there is a recognized common law accrual doctrine that would have applied to that. There has never been a recognized common law accrual doctrine that would apply in the context of the language that this Court has been supplied by Congress.

QUESTION: I understand that, but when we supply that doctrine, when we invent that doctrine, why should it be so radically different from the normal common law, which is that you have to know that you're injured? You don't have to know the precise nature of the injury, whether it's negligent or intentional, whether it's the result of a pattern or not the result of a pattern. That's sort of picky-picky.

MR. HOGAN: The tradition --

QUESTION: We usually don't do that for statutes

of limitation.

MR. HOGAN: It is not picky, as this Court recognized in the Holmberg decision in 1946, to say that until the plaintiff actually discovers the fraud he has not discovered the cause of action and cannot sue on it, and the Court ought not to reward the wrong-doer simply because the wrong-doer --

QUESTION: Suppose you did this. Suppose you had three rules, a), statute doesn't start to run until the pattern is there. All the elements have to be there, all right, so you absolutely say that. And then you say, 2), the plaintiff has to know that he's hurt, all right, and then you say, 3), as to the rest of it, there will be what Posner defines as equitable tolling, which permits a plaintiff to avoid the bar of the statute if, despite all due diligence, he is unable to obtain vital information bearing on the existence of his claim.

So those are your rules. Can you give me one instance of any injustice that would work?

MR. HOGAN: It would work an injustice in this case because the plaintiff would not be able to take advantage of any sort of equitable tolling doctrine, because there is no affirmative conduct on the --

QUESTION: I read you what the definition of equitable tolling is right out of that opinion, which had

a fairly thorough survey. On that definition, there is no requirement that the defendant have engaged in affirmative conduct. I'm not saying that would be the law. I'm saying, if it were the law, can you think of a single instance of injustice?

MR. HOGAN: Yes. It would be unjust, and would be impractical, not to have informed the plaintiff that he ought to be looking for something. He might discover 10 years after the last predicate act happened, or 10 years after the injury had occurred he might have learned that he was injured, but until he comes into possession of knowledge that the injury is caused by a pattern of racketeering, he doesn't know of the existence of the cause of action.

And then it is merely a question of whether the courts would allow the plaintiff to undertake some sort of an equitable tolling and start the statute of limitations over again, and again, Congress has resolved that concern in favor of the plaintiff, in favor of the plaintiff who must undertake a diligent discovery within a known 4-year period, rather than saying the courthouse door is closed and the plaintiff, if he gets lucky, might later on be able to reopen that door.

And so as a matter of policy, it seems that the court ought to take that into consideration on the front

end, rather than hoping that on some sort of chance, or on some sort of a possibility that later on the plaintiff will be able to get into court, that the doctrine would work through an equitable tolling principle.

QUESTION: You know, I don't -- I'm not really smitten by the equitable tolling possibility, even. There's certainly no such thing under the Clayton Act, and the fact is that the situation of your client is even less appealing than the situation of someone harmed under the Clayton Act, because your client, even if he doesn't have a cause of action under RICO, will have some other cause of action for the harm.

Now, maybe the damages won't be as much, and the intimidation won't be as much as bringing -- you know, calling somebody a racketeer under RICO, but he'll have a cause of action, whereas the antitrust plaintiff has nothing at all, and he doesn't get equitable tolling. Much less does he get what you want, doesn't have to worry about a cause of action until he finds out about it.

MR. HOGAN: Your Honor, our client would have no cause of action. How would he know that simply by paying the doctors' bills, that they were taking that money out of his insurance policy until it was -- until it was rendered empty, until it was finished, and that he was paying those insurance benefits to the doctors not because

they were treating him for legitimate reasons, but because they wanted to bilk out the insurance policy.

QUESTION: Well, under State law, is there any doctrine that if your injury is not immediately discernible because it's consistent with adequate treatment, that the injury discovery arises only when you find out that there has been maltreatment?

MR. HOGAN: Well, certainly the latent injury cases, or the foreign object cases would encompass that, but in this case what you essentially have is --

QUESTION: Would this case come within that?

MR. HOGAN: No, it wouldn't. In this case, you have a fraud situation where the plaintiff is in the ordinary course of business going along, being treated, paying bills. He does not know, nor could he know, that that is being done fraudulently, or that that is being done to him because --

QUESTION: I understand that.

MR. HOGAN: Yes.

QUESTION: But under common State discovery rules, that there would be no exception to the discovery of injury. The injury was being confined, and that begins the statute under State law?

MR. HOGAN: Not for the nature of the cause of action that the plaintiff would want to undertake. It

would be in the nature of a fraud cause of action.

QUESTION: Well, which he could bring as soon as he discovers the fraud.

MR. HOGAN: As soon as he discovers the fraud.

QUESTION: So he would have a State cause of action.

MR. HOGAN: He would have a State cause of action, yes, for fraud, when he discovers --

QUESTION: That's right.

MR. HOGAN: And then he would have also --

QUESTION: So in that respect he's much better off than the Clayton Act plaintiff.

MR. HOGAN: Well, then --

QUESTION: Who typically has no cause of action at all when he finally discovers --

MR. HOGAN: Well, first, at that point, when he discovers the fraud he'd have a certain 4-year period in which to bring the cause of action.

But secondly, in the Clayton Act example that Your Honor is referring to, the Clayton Act plaintiff, if he were injured again, or if the Clayton Act conspiracy were working to its best efforts and had injured him again, he would get a cause of action upon each injury.

QUESTION: Anyway, I think the Clayton Act plaintiff does have -- he does have a -- he can sue if

it's fraudulently concealed.

MR. HOGAN: That's correct.

QUESTION: All right. Now, you've looked up all these cases, I gather, and I've always wondered this, so I want to ask you, and it is relevant, is there really any difference in practice between fraudulent concealment and equitable tolling?

I know that the language is different, but I never heard of a price fix that they wouldn't try to conceal. I mean, they don't want to advertise it.

MR. HOGAN: Well, I --

QUESTION: I imagine the same is true of fraud defendants. They don't want to advertise these things, and so does it really make -- is your impression, after reading a lot of this, that it matters whether we call it fraudulent concealment and say the defendant has to have acted affirmatively?

MR. HOGAN: Well --

QUESTION: Or do you call it equitable tolling and say it's the plaintiff who has to have been diligent?

MR. HOGAN: It matters to the extent that this Court has always said those sorts of doctrines are very limited, very narrow exceptions to the limitations accrual rules, and they are available, as this Court said in the Irwin case, only very sparingly; only in very limited

circumstances do they apply.

The fraudulent concealment equitable estoppel, equitable tolling distinction in that regard makes no difference. I --

QUESTION: Well, in Holmberg, which you cited, there there was an allegation that there had been affirmative concealment, was there not?

MR. HOGAN: There was some affirmative concealment, yes, Your Honor, there was.

QUESTION: Well, that's what the court is talking about, isn't it?

MR. HOGAN: Well, to the extent that the affirmative concealment kept the plaintiff from discovering it, that could be read as either a fraud case or a fraudulent concealment case.

QUESTION: Would you accept that as a basis for a statute of limitations where there has been concealment, or, you know, that the statute didn't run until it was discovered?

MR. HOGAN: That sort of a doctrine wouldn't work well for RICO.

QUESTION: Well, it wouldn't help you, I think, yes.

MR. HOGAN: That's correct, it wouldn't help us, because certainly in Mr. Rotella's case there was no

affirmative conduct by the defendants in this case to conceal the fact that they were taking money from him. There was an attempt, however, later on to say that they had no --

QUESTION: But it isn't concealing just that they were taking money from him. They have to be concealing the wrongdoing.

MR. HOGAN: Concealing the wrongdoing, which we say cannot be uncoupled in the case of RICO from the pattern of racketeering activity.

This Court has said, in the Malley-Duff opinion, that the pattern of racketeering is the heart of any RICO complaint.

In the H.J. Inc. case this Court said --

QUESTION: I don't understand why you say that an allegation that the pattern was concealed until 2 years ago wouldn't be -- satisfy the fraudulent concealment tolling doctrine.

MR. HOGAN: We say because --

QUESTION: I think it would.

MR. HOGAN: As Judge Posner has analyzed those cases, and as this Court cited in his opinion in the Cada case, which was quoted in Klehr, there has to be, in the case of fraudulent concealment, some sort of affirmative conduct on the part of the defendant.

QUESTION: Correct.

MR. HOGAN: Now, let's take this case and look at the practicalities of how that might work. Let's suppose that for some reason Mr. Rotella had discovered before 1990, or had suspected before 1990 that he might have some sort of a RICO case, and he had walked into a lawyer's office and sat down and said, you know, I think my doctors are taking money from me in furtherance of a criminal enterprise.

If the lawyer didn't at first suggest that he go back to the hospital because of some paranoid fantasy, he might say, well, I'm going to draft a complaint, but what would he allege? How could he allege that fraud with particularity? How would he know any facts that would get him past a Rule 11 sanctions motion, or a 12(b)(6) motion --

QUESTION: Well, the answer is then he's using due diligence and the statute was tolled, so he's no worse off either way, and I can't imagine, if what you allege is true, that the doctors at some point didn't say, don't tell anybody.

MR. HOGAN: But he ought not to be penalized if he did not really know, nor could have known of the existence of the particular acts --

QUESTION: Well, but you're omitting the fact,

supposing the guilty plea had been entered the day before he walked into the office --

MR. HOGAN: If the --

QUESTION: -- and the record of that proceeding gave rise to suspicion about all these facts.

MR. HOGAN: If that happened, then he'd be into a 4-year accrual period which would start with the release of that criminal guilty plea 1 day before he walked into the lawyer's office.

QUESTION: No, I'm supposing -- I'm suggesting that maybe the record or the publicity attending the guilty plea put him on notice that there had been fraudulent concealment for the preceding 10 years. Then he would -- he'd be able to satisfy the fraudulent concealment --

MR. HOGAN: But only if, under fraudulent concealment, he could also show, or somehow find out that the defendants had been affirmatively doing things. If he walked into the --

QUESTION: Right.

MR. HOGAN: -- defendant's office and said, doctor, I think you're stealing money from me, and the doctor said, no I am not, you're really sick, you deserve to be in the hospital. That sort of conduct is what the Cada opinion says is required for fraudulent concealment.

If I may, I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Hogan.

Mr. Frazier, we'll hear from you.

ORAL ARGUMENT OF CHARLES T. FRAZIER, JR.

ON BEHALF OF THE RESPONDENTS

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

The majority of circuits have decided that the most appropriate accrual rule for civil RICO is that same discovery of injury rule that Federal courts apply to civil claims in general. Under that rule, limitations begins to run when all elements of a cause of action exist and the plaintiff discovers, or reasonably should have discovered his injury.

This rule is particularly logical for civil RICO for three reasons. First, it focuses on injury, which is the gravamen of a civil RICO claim. Secondly, it has been used for decades for Federal claims, and works in various circumstances with various facts.

QUESTION: Is that the Clayton Act rule?

MR. FRAZIER: No, Your Honor.

QUESTION: You don't argue in favor of the Clayton Act rule?

MR. FRAZIER: We would accept the Clayton Act

rule, Your Honor, because we would prevail with that rule.

QUESTION: Yes, I understand. That's why --

MR. FRAZIER: And --

QUESTION: And we've said that this statute is modeled after the Clayton Act, but you don't argue that we should use the same statute as the Clayton Act.

MR. FRAZIER: That is correct, Your Honor. Because of the breadth and the variety of the predicate acts in section 1951 --

QUESTION: Like RICO, we should give it more breadth than the Clayton Act.

MR. FRAZIER: Because of the variety of predicate acts, as well as the balancing test. As was mentioned earlier, we are balancing the right, the merits of having valid claims brought to court and adjudicated on one hand, as well as the societal interest of repose, and the interest of defendants as well as the courts to not litigate stale claims.

The injury-in-pattern discovery rule advanced by Mr. Rotella would result in claims being brought far into the future, and what's at issue here is, what should we expect of plaintiffs in their civil justice system?

There are two philosophical differences between the two rules, and that is, what should a plaintiff, a reasonably diligent plaintiff do upon discovery of his

injury? The rule that we advance, the injury discovery rule, would require the plaintiff to exercise diligence, as the Federal courts have applied for a long period of time, that the discovery of injury is sufficient to induce a reasonably diligent plaintiff to investigate, to find the cause, to find the person, the perpetrator, all the elements necessary to --

QUESTION: What was the injury here that should have been discovered, and when should it have been discovered?

MR. FRAZIER: Your Honor, the injury pursuant to the complaint, since we're dealing with the complaint allegation, the injury that was alleged on page 20 of the joint appendix, at paragraph 28, is that Mr. Rotella's personal items were converted, they were withheld at the time of his discharge. That, we submit, is the only allegation of a property injury in the complaint.

He also alleges that he was in the hospital for 479 days when he should not have been. It's a personal liberty deprivation claim. He was treated improperly, allegedly -- he called it even child abuse, in tough restraints --

QUESTION: When should that have been discovered?

MR. FRAZIER: That was discovered, as the Fifth

Circuit found in the first Rotella appeal, during the hospitalization.

At the time of discharge, he was aware of the nature of his treatment, who the actors were, how he felt about that treatment, and certainly that he had left without his personal property, so that would have been, Your Honor, in 1986, in June, when he was discharged from Brookhaven, and under the injury discovery rule we advance the limitations period begins to run at that time, and he had 4 years to investigate, to act with diligence to bring his claim, which he eventually --

QUESTION: But Mr. Frazier --

QUESTION: He didn't know he had a RICO claim at that time. All he knew was that he had some claim. I mean, if we're going to abandon the Clayton Act rule, I think what your opponent offers is a much fairer rule than the one that you offer for the bringing of a RICO action.

MR. FRAZIER: Your Honor, the discovery of a pattern is just discovery of another element, and it would not be fair because it would extend -- it would allow plaintiffs to know their injury, or when they should have known their injury, but not bring a suit until they discover --

QUESTION: But Mr. Frazier, I think that's not quite right, because built into the discovery of the

pattern is, discovered in fact, or should have discovered, so there's a diligence requirement built in there, too.

It isn't from when the pattern was discovered, necessarily. It's from when it should have been discovered, so I don't think that your appeal to diligence is really working, since diligence is essential in the second discovery, in the discovery rule that your opponent is urging.

MR. FRAZIER: Well, there is a diligence requirement in the knew or should have known with diligence. Discovery of a pattern is essentially discovery of all elements of the cause of action, and yet instead of bringing suit within a reasonable time, if the 4 years has expired, the plaintiff has another 4 years when he knows all elements of his claim, when treble damages are accumulating, to bring suit.

QUESTION: But the plaintiff doesn't know. I mean, the assumption is, he knows he's been hurt.

MR. FRAZIER: Yes.

QUESTION: But he doesn't know why and how. As soon as he knows why and how, he can state a claim, but how can he, for example, if he's pleading fraud, plead that with particularity? How can he state a claim for relief under RICO without knowing, or at least without having enough so that he should have known that there was

a pattern and practice of racketeering?

MR. FRAZIER: Your Honor, it deals with what a plaintiff can discover in the 4 years.

If he has discovered his injury, and he exercises diligence to investigate that, and has causes of action to redress that injury, as Mr. Rotella did, and pleads a case, and alleges facts, and through discovery finds out that his injury was caused not only by invasion of privacy or fraud -- or false imprisonment, as he alleges here, he would have a RICO claim, the cases say, as we cited in our brief, allow to relate back and to amend and to assert with particularity, although the rule has been modified since 1993 to allow that there may be facts discovered.

But it's the diligence that we require of plaintiffs once they know that they were injured, and he knew of his injury, all of his injuries at the time of discharge, but waited 8 years to file suit.

QUESTION: What diligence are you talking about? Are you saying, if he diligently tries to find whether there's been a RICO conspiracy but can't discover it, then he will have a cause of action, that the statute will be extended?

MR. FRAZIER: Justice Scalia, if he knows of his injury --

QUESTION: Yes.

MR. FRAZIER: -- and he exercises the diligence that the Federal courts have required to find the cause, and to find other elements of his claim, if he doesn't discover the pattern by virtue of a tolling doctrine of fraudulent concealment, or he simply just cannot, by fault of no one, he must bring suit, as the courts have held, within the limitations of the claims that are available to him, and if it's undetectable by no fault of the defendant, then equitable tolling will allow him to bring a cause of action under RICO within a reasonable time after discovery of the essential information that he may have.

QUESTION: Of the existence of the RICO claim, of the pattern of conspiracy?

MR. FRAZIER: That may be included in the essential information that he would need, yes.

QUESTION: Well, I thought a majority of the circuits -- and I'd like you to discuss what the circuits have done. I thought a majority of them had applied an injury discovery rule. The plaintiff has to know, or should have known of the injury, and there has to in fact have been a pattern sufficient to constitute a RICO violation, whether or not the plaintiff knows or should have known of the pattern.

There has to be -- the acts have to have occurred that would establish a RICO violation, and the plaintiff has to know or should have known of the injury.

Now, is that what most circuits have applied?

MR. FRAZIER: Yes, Justice O'Connor, that is the majority rule.

QUESTION: Have other circuits applied the pure Clayton Act rule, injury whether you know of it or should have known of it?

MR. FRAZIER: No, Your Honor, no circuit has applied --

QUESTION: Isn't that a red herring, or is it? I mean, I thought that it might be a red herring because I never heard of an antitrust injury where you wouldn't know it. I mean, what it amounts to is, you pay more money.

I mean, I can't say somebody couldn't make one up, but I never -- I can't think of a case in which there's an antitrust injury where the person was injured, but he didn't know he was injured, because the injured commonly is writing out a check, or usually cash, so you know that you've written a check, or you know you bought the toothpaste, so is this a real distinction or not?

QUESTION: But you mean you know you're paying more than you should be.

QUESTION: No, no, but -- that's not knowing the

injury. That's knowing the cause.

QUESTION: But the injury is paying more than you should have paid.

You don't have to know -- in other words, you have to know -- that's interesting. What is it?

QUESTION: Let's include counsel in this discussion.

(Laughter.)

MR. FRAZIER: Thank you, Mr. Chief --

QUESTION: As I understand your position, you desire neither the Clayton Act rule nor the rule that Justice O'Connor just described, but rather some third rule.

MR. FRAZIER: No, Justice O'Connor stated the majority rule that --

QUESTION: Which is what you assert.

MR. FRAZIER: Yes, that discovery of the injury --

QUESTION: But I thought in your answer to me you said that if he didn't know of the pattern, and could not with due diligence have discovered the pattern, the statute would not be running.

MR. FRAZIER: No, Justice Scalia, I -- if I said that, I misspoke.

QUESTION: You did indeed say it, and it

perplexed me. That's --

MR. FRAZIER: Well, what I was saying is, is that if all elements exist, and a plaintiff discovers or should discover his injury, that is the majority rule. That is the majority rule, and he has the burden to exercise diligence to bring a claim.

If, Justice Scalia, he does not discover essential information within the 4-year period, which is the equitable tolling doctrine by Chief -- by Justice Posner in Wolin, then equitable tolling allows him to bring the RICO claim within a reasonable time of discovering that essential information, but the cause of action for limitations has already accrued.

QUESTION: All right, let's --

MR. FRAZIER: The statute has begun to run.

QUESTION: Let's assume that the second predicate act does not occur until after 4 years from the date of the injury. Does he have a cause of action, or doesn't he?

MR. FRAZIER: That is a substantive question, Your Honor, that frankly the courts have not grappled with, and --

QUESTION: Oh, come on.

MR. FRAZIER: Yes --

QUESTION: I mean, the statute isn't violated

unless there are at least two predicate acts, isn't that right?

MR. FRAZIER: A pattern is at a minimum two predicate acts, but the Court in McCool indicated that you might have an injury, just because you happen to be the first person injured, that you might not -- that you might still have redress if the pattern arose later, but --

QUESTION: Yes, and another way of construing the statute is that you don't, that there --

MR. FRAZIER: Right.

QUESTION: -- is no RICO violation until the second predicate act, and if you were injured beforehand, whatever your injury is, it's not a RICO injury.

MR. FRAZIER: That is an interpretation of the statute, because it does require a violation of 1962 --

QUESTION: Okay, and --

MR. FRAZIER: -- which is a pattern. That's not the facts of this case.

QUESTION: You don't have to take a position on that in this case?

MR. FRAZIER: That is correct, Your Honor, because the pattern existed at the time of his discharge in 1986 pursuant to his complaint, so all of the elements of Mr. Rotella's RICO claim existed in June of 1986 and, critically, he was aware of his open and obvious injury,

the retention of his personal items, and the Federal courts have determined that notice of injury is sufficient to place a reasonably diligent plaintiff on notice to investigate to find out the other elements to plead the claim, and we have a 4-year limitations period, and that has been held to be --

QUESTION: Is it correct that the issue we have to decide is just when the cause of action accrues for limitations purposes? We don't have to decide what, if anything, would toll the statute of limitations. Aren't they separate questions?

MR. FRAZIER: Yes, Your Honor, but the injury discovery rule that we posit does have the equitable tolling, but in this case they did not stay with equitable tolling pleadings. And they abandoned those, but for this case the only issue is, what is the accrual rule, discovery of the injury, which he discovered in 1986, or waiting until he knew or should have known --

QUESTION: Right, if there --

MR. FRAZIER: -- there was a pattern.

QUESTION: But if we agreed with you that the cause of action accrued on the date you say, there still -- maybe not in this case, but in the typical case would remain open the issue whether there was tolling either because of equitable tolling principles or,

alternatively, because of fraudulent concealment, which may or may not boil down to the same thing.

But one -- I've always thought the burden was on one party and the other burden was on the other party, but that is -- we really aren't -- we don't have to decide what, if any, tolling might be available to a plaintiff in a case like this if we adopt your rule on the date of accrual.

MR. FRAZIER: That is correct on the facts of this case, Your Honor, but the equitable tolling doctrines have been applied in the majority of circuits that have applied the injury --

QUESTION: Just as your rule has been applied, but would you explain to me why it is, other than it makes your argument easier, that having adopted the Clayton Act statute of limitations, we should not adopt the Clayton Act rule that the statute begins to run from the time of injury, but should rather adopt the rule that you're urging that it should run from the time of discovery of the injury.

QUESTION: He's not advocating --

MR. FRAZIER: No.

QUESTION: Yes, you are. You're advocating that it runs from the time of discovery of the injury.

MR. FRAZIER: That is correct. That is the

injury discovery rule that we are advocating.

QUESTION: Why should we adopt that rather than -- why do you think that is a better rule than the Clayton Act rule?

MR. FRAZIER: Because of the -- as I said earlier, the variety, and the broad variety of predicate acts, some 52 criminal statutes in nine State areas -- that are there, as well as we think it's --

QUESTION: Why does that --

MR. FRAZIER: It's a more fair rule.

QUESTION: Why does that make any difference, the wide variety of acts? I don't understand.

MR. FRAZIER: Because --

QUESTION: There are a wide variety of acts that can, you know, restrict trade as well.

MR. FRAZIER: Uh-huh. Well, under the Clayton Act, of course, there are four primary areas, price-fixing, and -- in the directorates, and all those.

Here we have four -- or 52 specifics that have different elements, that have perhaps different injuries, some more overt than others, and to account for that variety, we just believe the more fair rule to balance both sides of the equities --

QUESTION: I frankly think that it is more likely that you would not be aware of your injury in a

Clayton Act situation, these economic injuries that are caused by a conspiracy, than it is that you would not be aware of your injury in the typical RICO case that, you know, that Congress had in mind, which was a case where you're dealing with racketeers.

So as between the two, I would think -- would have thought the Clayton Act rule is a fortiori appropriate here.

MR. FRAZIER: Well, again, we would not be upset, obviously, if the Court were to adopt that rule, because we would prevail.

QUESTION: Well, this is an important issue.

MR. FRAZIER: It is.

QUESTION: And just because you -- it's good enough for your case to adopt the middle rule, we're -- maybe we should have appointed an amicus to argue for the lawyer who's going to be following you in the next case, for whose client it is essential that he establish, not an injury discovery rule, but an injury rule. For you, it doesn't matter. I understand that.

QUESTION: We could appoint still another amicus to argue equitable tolling in the case that comes after that.

(Laughter.)

MR. FRAZIER: Well, these cases, of course, are

so fact-specific, but the injury discovery rule has been applied broadly.

QUESTION: I mean, if this is an important issue, my colleagues having corrected me, and they may be right on that, they've given the answer, haven't they, that if, in fact, the injury in a Clayton Act case is not paying the $2 but, rather, paying the $2 knowing that the true price is $1.50, if that is the injury, then to require knowledge of that injury would often, if not always require knowledge of the cause, namely the price fix.

MR. FRAZIER: Uh-huh.

QUESTION: But you don't want to cause that, and therefore you get to, the injury alone is sufficient. If that's the explanation, the answer is, that isn't the kind of problem involved in a typical RICO case. The kind of problem is fraud.

MR. FRAZIER: Yes.

QUESTION: It's just not that kind of problem in a RICO case, so I put that for your -- for you to comment, or the future lawyer to comment.

MR. FRAZIER: Mm-hmm.

QUESTION: Or whoever.

MR. FRAZIER: Well, the majority or the largest number of RICO claims do have a fraud element, as this

Court has noted, and even though the 1995 Private Securities Litigation Act has taken out securities fraud from RICO, which comprised in the 1985 ABA report, which this Court has cited twice, the largest percentage of RICO claims, there are still some claims based in fraud, and the injury discovery rule we believe is a clearer balancing test, particularly on the fraud-based claims.

But because of the -- in the Clayton Act, if I may comment about that, as Justice O'Connor said in the Shearson case, that the complexity of the Clayton Act is about the same, or certainly not more than civil RICO, so they're both complex statutes, but RICO is unique, obviously, because of the pattern and because of the variety of predicate acts, and that's why the injury discovery rule has been applied.

All circuits applying an accrual rule, by the way, in civil RICO have interjected or have applied a discovery rule of some sort. We know of no circuit decision that has applied the pure injury rule from the Clayton Act, and that's what we argued in the district court and all through this case.

QUESTION: And it's really academic in this case, because there's no adversarial contest on that.

What you have to knock out is the discovery of the pattern rule, and that's enough. I mean, for your

case --

MR. FRAZIER: Yes.

QUESTION: -- if we reject that, that's the end of the case. You really don't have a contest between the strict Clayton Act rule and the discovery of the injury rule.

MR. FRAZIER: That is correct.

QUESTION: We don't have to decide that question, I guess. We just have to decide that the test proposed by your opponent is not the right one.

MR. FRAZIER: The Court could do that, could decide that the discovery of pattern is not appropriate and leave -- once again, now we're down to two rules. If the Court decides to do that, we would prevail.

But I know the Court in -- of course, and your concurrence, Justice Scalia in Klehr indicates it's an important issue that needs to be decided. The --

QUESTION: Of course, your job is just to win the case for your client. You may have some other clients who like the other rule, too. You may be a plaintiff once in a while.

(Laughter.)

MR. FRAZIER: Well, that may be true, and we may have cases where our pure injury rule would certainly inure to the defense side, which we represent, so that --

QUESTION: Well, if we're consulting what's good for you as a lawyer, we probably should leave the state of the law in as much confusion as possible.

(Laughter.)

QUESTION: We did that with our last statute of limitations case.

(Laughter.)

MR. FRAZIER: Well, I don't think the confusion would help all the parties. Because of the variety of opinions, as this Court is well aware, below, that there is such a diverse -- the split is 7-5, 6-6, depends on how you look at it, and it needs to be resolved, because these RICO cases, of course, are still coming into the courthouse.

They're still coming in, and we just believe that the injury discovery rule, which has been applied for such a long period of time, deals with that more effectively.

Let me address briefly the tolling issue, that -- particularly in the reply brief, the petitioner mentions that in U.S. v. Beggerly that somehow this Court held that if a discovery rule is built into the accrual rule, that equitable tolling does not apply, and that is simply overstating the case. It is not true. Equitable tolling applies in all accrual rules, as this Court stated

in Holmberg.

If the plaintiff -- to take care of the concern of the petitioner, if the plaintiff simply cannot discover the essential information with diligence, and that's the key, with diligence, then the courts have applied and can apply equitable tolling to allow that person to bring suit within a reasonable time after he discovers that essential information.

That is available in this rule, and so the fear of not knowing the pattern, and with the definition of pattern, as this Court recognized in a Sedima footnote and of course in H.J., being as nebulous and nefarious as it is as to what that means, delaying accrual until a plaintiff discovers the related acts and that it poses a threat of continuous activity would just delay it way too long.

And we need a firmly defined, easily applied rule of accrual, as the Court in the Garcia case mentioned, and the injury discovery rule is -- runs from a more ascertainable, definite, and certain event, rather than the nebulous pattern event, and so it's more workable, and it has the balance of the parties --

QUESTION: Do you think it's very certain to know when a person discovered -- I mean, that's something very interior, when did I know of it, or even when ought

to I have known, ought I to have known of a document. Do you really think that's certain?

MR. FRAZIER: It's certain --

QUESTION: If you want a certain rule, when the injury occurs, that's pretty certain.

MR. FRAZIER: That is -- yes, that is very certain. Discovery of injury, obviously, made it perhaps less certain than the injury existing, but it's certainly more certain than discovery of pattern and what one must know to --

QUESTION: Well, and I suppose it's analogous to when State fraud causes of action accrue normally, isn't it, injury discovery?

MR. FRAZIER: State causes of action, Justice O'Connor? It's -- I can speak from Texas. It's varied. There are -- particularly in the medical malpractice field it is discovery, or should have discovered, and not existence, and I think it's usually discovery, because as the supreme court in Texas has articulated, if it's inherently discoverable, then we will apply tolling, or the accrual of tolling through injury discovery --

QUESTION: May I, just to satisfy my curiosity, ask just one question about this particular case? Is it correct that in the RICO cause of action there is no relief claim for the principal injury which this person

must have suffered, namely the impairment of his liberty?

MR. FRAZIER: That is correct. Under civil RICO there -- you cannot recover for personal injury.

QUESTION: It's business or property, so he's not claiming damages for the long period of time that he may have unnecessarily been kept in the institution.

MR. FRAZIER: The complaint, the vast majority of the allegations in the complaint, Justice Stevens, allege such an injury, but under RICO that is what he cannot recover, and the prayer is so general it just says actual damages within the court's jurisdiction, which doesn't work either, but it's very vague. But you're correct, he can only recover the value, I would assume after, now, 15 years, the value of the property that was withheld his personal liberty deprivation, which is really the gist of the case, as we said in our brief in opposition to the petition for cert, that is really what he is claiming his injury is from the RICO conspiracy.

They committed commercial robbery to keep patients in for their parents' insurance money, in this instance he was a minor, and that -- so he was there for this long period of time, and that he wouldn't have been there but for this agreement.

So that's his alleged injury as a proximate result of this alleged conspiracy, but it's not

recoverable under RICO, only the injury to property, which is vaguely tied to the predicate act, but that is his injury.

So he doesn't really have, other than just small injury to his personal property, a RICO injury, and the bulk of his complaint is a personal injury complaint, which is not recoverable.

So that Mr. Rotella waited 11 years to bring this cause of action, 11 years after his discharge, 11 years after he knew his injury, all of his injuries, demonstrates why the injury and pattern discovery rule simply is not workable in the civil RICO context.

If the Court has no further questions, we submit.

QUESTION: Thank you, Mr. Frazier.

Mr. Hogan, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF RICHARD P. HOGAN, JR.

ON BEHALF OF THE PETITIONER

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

Let me at the outset put to rest any notion that we brought this claim to recover Mr. Rotella's personal effects, because this case is not about recovering his tennis shoes or his blue jeans that were taken from him when he checked into the hospital.

This case is about whether RICO is a supplemental remedy in addition to State tort causes of action, and it is about whether this Court will adhere to the traditional recovery rule that injury plus its cause must be known before the cause of action accrues, and it is thirdly about whether equitable tolling will apply, and that's the point at which I'd like to begin my remarks.

Because equitable tolling is supposed to be only the exception and not the rule, if, in fact, equitable tolling becomes the doctrine on which plaintiffs rely in every RICO case, then it is no longer the exception, it is the core RICO case. This is a core RICO case, where the plaintiff did not know and could not have known of the existence of a RICO injury until the Federal indictments were announced.

So if you have plaintiffs pleading in every case --

QUESTION: But you have a -- let us suppose that we think the equitable tolling doctrine requires affirmative concealment, as there was in Holmberg, which you rely on. That certainly is going to narrow the class of cases you just described, when you -- if you require affirmative concealment.

MR. HOGAN: No, Your Honor. It would only narrow the plaintiff's ability to take advantage of that

doctrine.

What we submit is that plaintiffs will be pleading this right and left to get into court, because they will not be able to discover the inherently secretive and concealed nature of the RICO enterprises that they claim have been the perpetrators of the pattern of racketeering, and if those things are secretive by nature, and plaintiffs must often plead the equitable tolling doctrine, then it makes much more sense to incorporate the knew-or-should-have-known standard of equity within the accrual rule itself, and then give everybody a predictable 4-year limitations period in which to bring suit.

The defendants have argued in this case that there is no ability, there is no problem of practicality, that plaintiffs would not have a problem simply pleading a RICO claim, going and doing discovery, and finding out the existence of the enterprise, but, of course, what would be the first response of every defendant should a plaintiff plead that sort of a claim?

It would be, Your Honor, the plaintiff is engaging in a fishing expedition. There is no related claim to this, and there is only a fishing expedition to try and find a RICO claim.

We submit that the Court ought to decline the invitation to reconstitute the civil RICO cause of action

in the guise of adopting and defining a limited accrual rule, and that this Court ought to recognize that the distinctive nature of RICO is its pattern requirement, without which there is no RICO claim, and to that extent, should the Court recognize that the pattern element is the core of RICO and that equitable doctrines must be incorporated within the rule itself, we submit that the Court therefore ought to reverse and remand this case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hogan.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the 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:

MARK ROTELLA, Petitioner, v.

ANGELA M. WOOD, ET AL.

CASE NO.: 98-896

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

BY Ann Marie Federico

(REPORTER)