2009

Seven Come Eleven: Accrual Formula Under Seventh and Eleventh Circuit "Injury Discovery" Accrual

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Seven Come Eleven: Accrual Formula Under Seventh and Eleventh Circuit “Injury Discovery” Precedent

By
Joseph W. Blackburn*

I. Introduction

“Injury discovery” is the default method of statute of limitations accrual for many federal actions.¹ Under general “injury discovery,” an action accrues on the earlier of the date on which the actionable² “injury” in fact is discovered or should have been discovered by exercise of reasonable diligence.³

Applying relatively well established “injury discovery” accrual principles⁴ has nevertheless left the federal circuits to struggle with many questions. Even the seemingly clear concept

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¹ Rotella v. Wood, 528 U.S. 549, 555-556 (2000) (“Federal courts, to be sure, generally apply a discovery accrual rule when a statute is silent on the issue, as civil RICO is here”.) (citations omitted).
² A “speculative” injury is not an “actionable” injury; only an actual, concrete injury will support filing of a RICO complaint. See generally infra Part III and Part IV.
³ Courts have held this to be an objective test of reasonableness. See, e.g., Law v. Medco Research, Inc., 113 F.3d 781, 786 (7th Cir. 1997); Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1283 (11th Cir. 2005).
⁴ See generally infra Part V.
that there must be an “injury” to be discovered before an action accrues has been confused by some opinions. Furthermore, the concepts of “inquiry notice,” “constructive discovery,” and accrual by “injury discovery” have led the circuits down several errant and unnecessarily confusing paths.

“Injury discovery” accrual applies in Racketeer Influenced and Corrupt Organization actions (RICO), as well as in many securities, antitrust, and other types of actions. Although civil RICO will often be a reference point used in this article, cited precedent cases also involve injury discovery accrual issues in varying contexts.

Many efforts have been made to better establish what constitutes an “injury”, and when an injury “should have been discovered” in these various contexts. Broadly accepted principles of injury for “case or controversy” standing and “injury discovery” are initially discussed below. In the context of actual injury discovery, constructive injury discovery, and

7 Rotella, 528 U.S. 549.
“inquiry notice,” Seventh Circuit precedent has led the way. In particular, the Seventh Circuit has answered the “injury discovery” question, “What is it that must be discovered or discoverable?”

After discussing the Seventh Circuit’s contributions, the Eleventh Circuit’s adoption and further development of these principles are then discussed. The article also considers what constitutes “occurrence” of an injury, but ultimately rejects the efficacy of an unsoftened “injury occurrence” rule, particularly in the RICO context.

It is the view of this author, and the assumption underlying this article, that the Seventh Circuit’s analysis properly focused on multiple “injury discovery” issues. In a series of cases, the Seventh and Eleventh circuits have developed, refined and limited the concept of “inquiry notice.” The Seventh Circuit shifted the focus from an uncertain “inquiry notice” analysis to a better-defined “injury discovery” accrual concept. “Injury” discovery requires the existence and discovery

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10 See Law v. Medco Research, Inc., 113 F.3d 781 (7th Cir. 1997); Marks v. CDW Computer Centers, Inc., 122 F.3d 363 (7th Cir. 1997); Fujisawa Pharmaceutical Co. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997).
11 Law, 113 F.3d at 785.
12 See Law, 113 F.3d 781; Fujisawa, 115 F.3d 1332; Marks, 122 F.3d 363; Tello v. Dean Witter Reynolds, Inc. (“Tello I”), 410 F.3d 1275 (11th Cir. 2005); Tello v. Dean Witter Reynolds, Inc. (“Tello II”), 494 F.3d 956 (11th Cir. 2007); see also infra Part VIII and Part IX.
of a broadly defined actionable injury in fact. The Seventh Circuit has likewise followed Supreme Court precedent in Lampf\(^{13}\) by incorporating de jure equitable tolling principles into, and as a de facto integral part of, the “injury discovery” accrual process.\(^{14}\) Finally, the Seventh Circuit has equitably established that an action has not accrued until a plaintiff has discovered sufficient essential facts, not law, necessary to promptly file a suit.\(^{15}\)

The Eleventh Circuit, in adopting Seventh Circuit precedent,\(^{16}\) has better refined the terminology and segregated separate aspects of the injury discovery accrual process.\(^{17}\) “Inquiry Notice” has been treated by the Eleventh Circuit as being distinct from the “Period of Reasonable Diligence.” This Period of Reasonable Diligence begins upon inquiry notice and ends with constructive discovery of the actionable injury in fact and accrual of the action.\(^{18}\)

Putting together these best efforts of both circuits, one now for the first time has a clear and manageable formula for determining the point in time of “injury discovery.”

\(^{13}\) Lampf, 501 U.S. 350.
\(^{14}\) See Law, 113 F.3d at 786.
\(^{15}\) Id. at 785.
\(^{16}\) This adoption came only after some faltering missteps. See infra Part IX.
\(^{17}\) See Tello II, 494 F.3d at 968; see also supra notes 219-27 and accompanying text.
\(^{18}\) See infra note 220 and accompanying text.
II. Racketeering "Injury Discovery" Statute of Limitations

The Racketeer Influenced and Corrupt Organizations Act\(^{19}\) does not itself provide an applicable statute of limitations.\(^{20}\) Thus, initially the slate was blank as to the statutory period and elements essential to the running of the statutory period for filing civil RICO actions. The Supreme Court and the circuit courts have properly begun filling in the blanks.

The Supreme Court’s first writing on this blank RICO statute-of-limitations slate came with its adoption of the Clayton Act’s\(^{21}\) four-year statutory period of limitations.\(^{22}\) Thereafter, the Court has dealt with the vital issue of “when” a RICO action accrues, i.e., when does the four-year statutory period begin to run?\(^{23}\)

The last statement of the Supreme Court on the question of “when” the statute of limitations begins to run on a civil RICO

\(^{22}\) Malley-Duff, 483 U.S. at 156 (stating that “there is a need for a uniform statute of limitations for civil RICO, that the Clayton Act clearly provides a far closer analogy than any available state statute, and that the federal policies that lie behind RICO and the practicalities of RICO litigation make the selection of the 4-year statute of limitations for Clayton Act actions . . . the most appropriate limitations period for RICO actions”) (emphasis added).
action was made in *Rotella v. Wood*. The Supreme Court in *Rotella* noted that the circuit courts had developed three different rules governing accrual of a RICO action. The diverse circuit court rules were (1) the last “predicate act,” eliminated by the Court in *Klehr v. A.O. Smith Co.*; (2) injury and “pattern” discovery, eliminated by the Court in *Rotella*; and (3) the “injury discovery” rule, which was applied by the Supreme Court in *Rotella*.

A possible fourth consideration was raised by Justice Scalia in *Klehr*—“an injury occurrence rule unsoftened by a discovery feature.” But as the majority of the Court stated in *Rotella*:

*We do not, however, settle upon a final rule. In addition to the possibilities entertained in the Courts of Appeals,*

25 *Rotella*, 528 U.S. at 553-54.
28 A “pattern” requirement for predicate acts is a unique and technical legal requirement of RICO. *Id.* at 556.
29 *Id.* at 555 (“We think the minority injury and pattern discovery rule unsound for a number of reasons.”).
30 *Id.* (“[I]n applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock.”).
31 *Id.* (referring to Scalia’s concurring opinion in *Klehr*, 521 U.S. at 196-202) (emphasis added).
Justice SCALIA has espoused an “injury occurrence” rule, under which discovery would be irrelevant, and our decision in Klehr leaves open the possibility of a possible fourth consideration was raised by Justice Scalia in Klehr—“an injury occurrence rule unsoftened by a discovery feature.” But as the majority of the Court stated in Rotella:

*We do not, however, settle upon a final rule. In addition to the possibilities entertained in the Courts of Appeals, Justice SCALIA has espoused an “injury occurrence” rule, under which discovery would be irrelevant, and our decision in Klehr leaves open the possibility of a straight injury occurrence rule.*

Thus, the Court has clearly applied the “injury discovery” rule while simultaneously leaving open consideration of, and possible future adoption of, the “injury occurrence” rule by the circuit courts.

**III. Injury in Fact: The Constitutional Bedrock of Article III “Case or Controversy” and of RICO Standing**

Under Article III of the United States Constitution, a plaintiff must have sustained some injury in fact in order to have a justiciable “case or controversy,” i.e., in order to have standing and jurisdiction to bring a suit in federal court.

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32 *Id.* (referring to Scalia’s concurring opinion in *Klehr*, 521 U.S. at 196-202) (emphasis added).
33 *Id.* at 554 n.2 (citations omitted) (emphasis added).
34 *Id.* at 555 (citing *Klehr*, 521 U.S. at 191).
The Supreme Court has stated, in defining what is sometimes referred to as a “Lujan injury,” that “[o]ver the years, our cases have established that the irreducible constitutional minimum of standing contains three elements.” A plaintiff must show that (1) he has suffered or is in imminent danger of suffering an actual, concrete injury, (2) proximately caused by the [mis]conduct of the defendant, and (3) that the court has jurisdiction over parties and issues necessary to redress the injury.

For example, an action might be filed challenging an enactment of Congress as being unconstitutional. Such an issue, however, no matter how deeply and sincerely advocated, will not even be considered by federal courts unless the party bringing the action can point to an actual and concrete injury in fact that such party has suffered or will imminently suffer.

Actions for possible future injuries cannot be considered by the courts. The party who invokes judicial power must be

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37 See infra Part IV(B).
38 Lujan, 504 U.S. at 560-61.
39 Id. at 560.
40 Equitable remedies – for example, injunctions or declaratory judgments – require an imminent pending injury. See, e.g., Fed. R. Civ. P. 57(b) (stating that a temporary restraining order may be granted without notice to the adverse party “only if (1) it clearly appears . . . that immediate and irreparable injury, loss, or damage will result . . .”).
able, not only to show that the statute is invalid, but also that such party has sustained, or is in immediate danger of sustaining, direct injury as the result of such statute.\textsuperscript{42}

Unquestionably, in order to file a federal RICO action, injuries must be nonspeculative (actual) and calculable (concrete). The minimum constitutional mandates of Article III "case or controversy" require actual and concrete injury as a prerequisite to federal court jurisdiction.\textsuperscript{43}

Language in some opinions suggests that a RICO claim can accrue before\textsuperscript{44} there is a nonspeculative, calculable (actual and concrete) injury necessary in order to file suit.\textsuperscript{45} Under such a theory, the statute of limitations could clearly both accrue and expire before a putative plaintiff incurred a nonspeculative injury necessary to file suit. Such a theory would leave a putative plaintiff with no remedy whatsoever.

\textsuperscript{41} \textit{Lujan}, 504 U.S. at 560 (stating that the injury must not be "'conjectural' or 'hypothetical'") (citations omitted).
\textsuperscript{42} Id.
\textsuperscript{43} Am. United Life Ins. Co. v. Martinez, 480 F.3d 1043, 1069 (11th Cir. 2007) (citing \textit{Lujan}, 504 U.S. at 560) (To establish that a "controversy" exists, a plaintiff must show that he suffered an "injury in fact"- i.e., an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.)
\textsuperscript{44} For example, it has been argued that the court in \textit{Prudential Insurance Co. of America v. United States Gypsum Co.}, 359 F.3d 226 (3d Cir. 2003) rejected actual concrete injury for accrual of an action. See infra text accompanying notes 102-09.
\textsuperscript{45} That is, the claim accrues upon "inquiry notice" of misconduct and the concept of actual and concrete injury in fact is irrelevant. See infra text accompanying notes 103-10.
Since a concrete, nonspeculative injury is required for filing a RICO claim, such an injury must also be required to trigger the running of the statute of limitations. This was exactly the point that the Second Circuit correctly attributed to the Supreme Court. "Until such injury occurs, there is no right to sue for damages under § 1964(c), and until there is a right to sue under § 1964(c), a civil RICO action cannot be held to have accrued."\(^{47}\)

As also found in *Klehr*, such amorphous harm would be "so speculative or unprovable" at the time of defendant's predicate act and plaintiff's suspicion of misconduct that starting the limitations period at such time would leave plaintiffs without relief. The *Klehr* Court stated that, "in such a case, a claim

\[^{46}\] See McLaughlin v. Am. Tobacco Co., 522 F.3d 215A (2d Cir. 2008) (holding that plaintiff asserting a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim for injury to business or property must allege actual, quantifiable injury); Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002) (stating that legally documented agricultural laborers have standing to bring RICO action since laborers alleged concrete, actual injury in form of lost wages, and award of money damages would redress such injury); Pik-Coal Co. v. Big Rivers Elec. Corp., 200 F.3d 884 (6th Cir. 2000) (stating that plaintiff must plead and prove an actual injury to its business or property by reason of defendant's RICO transgression); Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303 (9th Cir. 1992) (stating that not all RICO injuries are compensable thereunder; showing of "injury" requires proof of concrete financial loss), *cert. denied*, 507 U.S. 1004 (1993).


for the injuries that had been speculative would accrue when
those injuries occurred, even though the act that caused them
had taken place more than four years earlier."49

It appears that rejection of "actual" and "concrete" injury
requirements for "injury discovery" accrual clearly violates
both Supreme Court precedent and the remedial purposes of RICO.

Some opinions, e.g. Theoharous v. Fong,50 improperly hold
the statute of limitations begins to run when there is merely a
suspicion of misconduct triggering "inquiry notice."51 Holding
that the statute of limitations runs from the time plaintiffs
were merely on notice of "storm warnings" as to their possible
injuries52 seems similarly short-sighted. Clearly, "injury
discovery" accrual of an action requires both the existence of
an actual injury as well as its discovery. Potential amorphous
harms do not constitute an injury, and unconfirmed suspicion as
to the possibility of an injury does not constitute its
discovery.

As stated by Judge Posner in Law v. Medco Research, Inc.,53
and as cited with approval in the Eleventh Circuit,54 mere

49 Id. at 190-91 (citing Zenith Radio Corp. v. Hazeltine
50 256 F.3d 1219 (11th 2001).
51 Theoharous, 256 F.3d at 1228.
52 Id.
53 113 F.3d 781, 785 (7th Cir. 1997).
suspicion and the possibility of future injury are inadequate basis for "injury discovery" accrual. A cause of action for some anticipated future injury will not accrue until such future date when the speculative injury is in fact suffered, i.e., only when anticipated future injuries evolve into actual, concrete injuries in fact.\(^{55}\) Thus, at the earliest, an action accrues and the plaintiff may file suit on and after the date an actionable injury in fact occurred.\(^{56}\)

**IV. Elements of RICO Standing**

To have RICO standing, the plaintiff must be a person (1) injured in his "business or property", (2) by "reason of"\(^{57}\) (3) a violation of 18 U.S.C. § 1962, i.e., a predicate act.\(^{58}\)

**A. Actual, Concrete Injury In Fact**

Clearly there must be an actual, concrete injury for a RICO cause of action to accrue.\(^{59}\) Similarly, there must be an actual, concrete injury in fact for a RICO cause of action to accrue.\(^{59}\) Similarly, there must be an actual, concrete injury in fact for a RICO cause of action to accrue.\(^{59}\)

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\(^{55}\) Zenith, 401 U.S. at 339.

\(^{56}\) *Id.* at 338 ("Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.") (citations omitted). *Zenith* involved claims for violation of the Clayton Act, which was the model for RICO's statute of limitations. *Id.* at 323.

\(^{57}\) See infra Part IV(B).


\(^{59}\) See supra notes 45-54 and accompanying text.
concrete injury in order for a person to file a RICO claim.\textsuperscript{60} A plaintiff in a private civil RICO action must allege an actionable RICO injury to "business or property"\textsuperscript{61} that is actual and concrete.\textsuperscript{62} Just as with "case or controversy" standing, possible future damages arising from racketeering activity are "unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable."\textsuperscript{63} A speculative injury, an injury to an intangible property interest, or a future injury is not legally sufficient to support a RICO action, i.e., it is not an actionable RICO injury in fact.\textsuperscript{64} Quoting the Supreme Court, the Second Circuit in \textit{Banker's Trust Co. v. Rhoades} stated that

"Each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those \cite{prerequisites below} which he will suffer in the future from the particular invasion, including what he has suffered during \textit{and will predictably suffer after trial}.

Thus, if a plaintiff discovers or should have discovered injury \cite{violation of a legal right} from an antitrust violation on a specific date, "a cause of action immediately accrues to him to recover all damages incurred by that date \textit{and all provable damages} that will flow in

\begin{footnotes}
\footnote{See supra note 46 and accompanying text.}
\footnote{Id.}
\footnote{See Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 24 (2d Cir. 1990).}
\footnote{See Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1104 (2d Cir. 1988) (quoting \textit{Zenith}, 401 U.S. at 339).}
\footnote{\textit{Zenith}, 401 U.S. at 323.}
\footnote{See Am. United Life Ins. Co. v. Martinez, 480 F.3d 1043 (11th Cir. 2007).}
\end{footnotes}
the future.” To recover those damages, he must sue within four years of the time the action accrued.

Of course, future damages arising from defendants’ conduct are “unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable.”

This language has been interpreted by the Fifth Circuit as establishing a “separate accrual” rule. A “separate accrual” rule is “a variant of the ‘injury discovery rule.’” Under “separate accrual,” like the Clayton Act’s “continuing violation” rule, a claim for each injury accrues independently and separately. The statute’s having expired as to one injury does not mean it has expired as to subsequent injuries which have thereafter become actual and concrete.

Under civil RICO “injury discovery” principles, refusal to award damages for future injuries to “business or property” as being too speculative “is equivalent to holding that no cause of action has yet accrued for any but those damages already

66 Bankers Trust, 859 F.2d at 1104 (quoting Zenith, 401 U.S. at 338-39) (emphasis added).
68 Id.
69 Id. at 773, 774.
70 Id. at 774 (“Our court having adopted the “injury discovery” rule, it would seem illogical to conclude that, under civil RICO, a plaintiff may not recover for injuries incurred within the limitations period, merely because they result from acts that are part of a continuing pattern of similar acts that caused other, similar injuries outside that period.”). Other circuits have also used the “separate accrual” rule. See, e.g., McCool v. Strata Oil Co., 927 F.2d 1452, 1465 (7th Cir. 1992) (citing to other circuits that have discussed the rule).
suffered.”\textsuperscript{71} RICO actions to recover “future injuries” may be filed by a plaintiff only within four years after the date the formerly “future” injuries are inflicted (actual) and become measurable (concrete).\textsuperscript{72}

Even when there has been misconduct through a predicate act, in the absence of actual, concrete injuries, an action cannot be said to have accrued. The RICO statute cannot begin to run unless and until there is an actual, concrete injury which is discovered. If this were not the case, future damages that could not be proven within four years of the RICO misconduct from which they flowed would be forever incapable of recovery.\textsuperscript{73} Such a result is contrary to the congressional purposes underlying RICO and other similar actions.\textsuperscript{74} As stated by the Supreme Court in Klehr,

Petitioners also point to Zenith, a case in which this Court considered antitrust damages that were so “speculative” or “unprovable” at the time of a defendant’s unlawful act (and plaintiff’s initial injury) that to follow the normal accrual rule (starting the limitations period at the point the act first causes injury) would have left the plaintiff without relief. This Court held that, in such a case, a claim for the injuries that had been speculative would accrue when those injuries

\textsuperscript{71} Zenith, 401 U.S. at 339-40 (emphasis added).
\textsuperscript{73} Klehr v. A.O. Smith Co., 521 U.S. 179, 190-91 (1997).
\textsuperscript{74} See Zenith, 401 U.S. at 339-40 (discussing congressional purposes in the context of an antitrust action).
occurred, even though the act that caused them had taken place more than four years earlier.\textsuperscript{75}

It is a factual question whether future injuries are presently measurable as to their nature and amount and thereby sufficiently concrete to constitute a present injury. On the other hand, future injuries may be uncertain as to their actual realization and/or presently unmeasurable in their amount and thereby speculative and presently unrecoverable.\textsuperscript{76} The court’s

task is merely to decide whether the Appellants’ damages could have been calculated at the time of their injury. If an “out of pocket measure” of damages (the difference between the purchase price of a security and its true value) is viable in this case, we must conclude that the Appellants’ injury, at the time of their investment, was sufficiently concrete.\textsuperscript{77}

B. Proximate Causation

An injury in fact must have been suffered “by reason of” a RICO predicate act.\textsuperscript{78} The Supreme Court has held that “by reason

\textsuperscript{75} Klehr, 521 U.S. at 190-91 (citing Zenith, 401 U.S. at 339-40) (emphasis added).
\textsuperscript{76} For “accrual,” i.e., realization, of an expense for federal income tax purposes, the Treasury Regulations require that the obligation be fixed and the amount thereof determined with reasonable accuracy, i.e., actual and concrete. TREAS. REG. § 1.446-1(c)(ii) (as amended in 2006).
\textsuperscript{78} 18 U.S.C. § 1964(c) (2000).
of” invokes the principles of proximate causation. A predicate act is “a proximate cause if it is a substantial factor in the sequence of responsible causation” of an injury. A predicate act need not be the sole nor even the primary cause of an injury in order to have been a substantial factor in causation. The Eleventh Circuit has held that defendants are not absolved of responsibility merely because there are other contributing factors at work.

If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present.

Again, in Maiz v. Virani, the Eleventh Circuit stated that

the inquiry in determining the existence of proximate cause is “whether the conduct has been so significant and important a cause that the defendant should be held responsible.”

In sum, as a prerequisite to fixing a proximate cause for an injury, the injury itself must first be actual and concrete. A speculative injury, or an injury uncertain as to its amount, cannot not be determined to even have had a proximate cause.

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80 Cox v. Admin’r U.S. Steel & Carnegie, 17 F.3d 1386, 1399 (11th Cir. 1994) (emphasis added).
81 Id.
82 253 F.3d 641, 675 (11th Cir. 2001) (quoting Brandenburg v. Seidel, 859 F.2d 1179, 1189 (4th Cir. 1988)).
V. Injury Discovery Rule

The Supreme Court held that RICO claims accrue either when the alleged RICO injury occurs ("injury occurrence rule") or when the alleged injury is discovered or should have been discovered ("injury discovery rule"). The Seventh Circuit subsequently adopted the injury discovery rule for civil RICO.

Under the injury discovery rule, a RICO action accrues on the earlier of the date the actionable "injury" is actually discovered or should have been discovered, i.e., constructive discovery. Reasonable diligence in discovering an actionable injury is clearly a related issue. The first question is, when is or should an actionable "injury" have been discovered? This question incorporates issues of equitable and estoppel

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83 See supra notes 31-33 and accompanying text.
84 Law v. Medco Research, Inc., 113 F.3d 781, 785 (7th Cir. 1997). No circuit has as yet adopted the "injury occurrence" rule. See, e.g., Forbes v. Eagleson, 228 F.3d 471, 484 (3d Cir. 2000); Mathews, 260 F.3d at 245.
85 A "speculative" injury is not an "actionable" injury; only a concrete injury will support filing of a RICO complaint. See supra Part IV(A).
86 "Reasonable diligence," "due diligence," "diligence," and even "reasonable due diligence" are phrases the courts have used interchangeably. See, e.g., Klehr v. A.O. Smith Co., 521 U.S. 179, 194-95 (1997) (using the term "reasonable diligence"); Urland By and Through Urland v. Merrell-Dow Pharm., Inc., 822 F.2d 1268, 1271 (3d Cir. 1987) (using the "reasonable diligence standard"); Mathews, 260 F.3d 239, 256 (citing Forbes, 228 F.3d at 486-88) (using "reasonable due diligence"); Hohri v. United States, 782 F.2d 227, 248 (D.C. Cir. 1986) (using "the due diligence doctrine").
87 See cases cited in note 85, supra.
“tolling”\textsuperscript{88} if the actionable injury is concealed.\textsuperscript{89} Since Seventh Circuit “injury discovery” accrual incorporates de facto tolling principles, equitable tolling will be discussed first.

\textbf{A. De Facto Tolling v. De Jure Tolling}

Whether an action accrues on injury occurrence or on “injury discovery,” essential facts of the actionable injury in fact may be unavailable to the plaintiff. However, equitable and estoppel tolling principles are uniformly applicable in federal cases\textsuperscript{90} to prevent running of the statute when essential facts are concealed from plaintiff, whether or not the concealment is fraudulent. As stated by the Supreme Court in \textit{Lampf},

\begin{quote}
“[t]ime requirements in law-suits . . . are customarily subject to ‘equitable tolling.’” Thus, this Court has said that in the usual case, “where the party injured by the
\end{quote}

\textsuperscript{88} Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 832 (11th Cir. 1999). “Fraudulent concealment also tolls the Clayton Act's statute of limitations. If the Dairies fraudulently concealed their price-fixing activities beginning in the 1970s, then the statute of limitations was tolled during the time of the concealment. If so, plaintiffs may recover damages for all the years during which the conspiracy was fraudulently concealed and the statute was tolled.” \textit{Id.} (citing In re Beef Indust. Antitrust Litig., 600 F.2d 1148, 1169 (5th Cir. 1979).


fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party [i.e. even with no fraudulent concealment]."\(^91\)

Thus, the statute does not run while the plaintiff is unaware of the fact of the fraud upon his rights, i.e., unaware of his "injur[y] by the fraud."\(^92\) Equitable tolling of the statute continues even after "inquiry notice," i.e., even after a "reasonable person’s" suspicion would have been aroused. The statute is tolled until a reasonable person or person of ordinary intelligence would be able to discover essential facts

\(^91\) Lampf, 501 U.S. at 363 (quoting Bailey v. Glover, 21 Wall. 342, 348 (1875); see also Tregenza v. Great Am. Commc’ns Co., 12 F.3d 717, 721 (7th Cir. 1993) ("Equitable tolling just means that without fault by either party the plaintiff does not have enough information to sue within the period of limitations, and in the type [injury discovery] of statute of limitations that we are discussing the period of limitations doesn't start until he has the information, making equitable tolling redundant. But the plaintiff might have the required information—actual knowledge of the violation or inquiry notice, as the case may be—yet be thwarted from suing in time by misrepresentations or other actions by the defendant [estoppel tolling]; for example, the defendant might have promised not to plead the statute of limitations. Schroeder v. Young, 161 U.S. 334, 344, 16 S.Ct. 512, 516, 40 L.Ed. 721 (1896). But we do not understand the plaintiffs to be arguing equitable estoppel. Their argument is that the statute of limitations did not begin to run until they had actual knowledge of the defendants' fraud, whenever exactly that was.") (emphasis added).

\(^92\) Lampf, 501 U.S. at 363.
necessary to file suit.\textsuperscript{93} After the essential facts necessary to file suit are discovered or should have been discovered, equitable tolling ceases and plaintiff has the full statutory period in which to file suit.\textsuperscript{94} Thus, the point in time when equitable tolling ceases – i.e., when the facts needed to file suit are discovered or discoverable – is the same point in time when a statute runs under “injury discovery” accrual principles.

The Seventh Circuit has stated its view that the Supreme Court in \textit{Lampf} had effectively eliminated de jure tolling rules in the context of the “injury discovery” rule of accrual as in RICO actions.\textsuperscript{95} “\textit{Lampf} holds, it is true, that when knowledge or notice is required to start the statute of limitations running, there is no room for equitable tolling.”\textsuperscript{96} However, given uniform acceptance of tolling principles in federal courts, the Seventh

\textsuperscript{93} Id.

\textsuperscript{94} See TRW, Inc. v. Andrews, 534 U.S. 19, 30 (2001) (discussing the “reasonable person” and the triggering of the limitations period in the context of an alleged violation of the Fair Credit Reporting Act); see also infra Part VIII(C).

\textsuperscript{95} Law v. Medco Research, Inc., 113 F.3d 781, 785 (7th Cir. 1997) (“However, the Supreme Court has held that, given the [injury] discovery rule, there is no defense of equitable tolling to the statute of limitations in a Rule 10b-5 case. \textit{Lampf}, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363-64 (1991). This holding makes it extremely important to decide what exactly it is that the investors must discover (or should have discovered) to start the statute of limitations running.”)(emphasis added).

\textsuperscript{96} Tregenza v. Great Am. Commc’ns Co., 12 F.3d 717, 721 (7th Cir. 1993).
Circuit correctly reasoned that equitable tolling principles are *de facto* incorporated within “injury discovery” principles.

[T]he [injury discovery] rule should be so interpreted as to make equitable tolling unnecessary to protect investors' interest in having a reasonable, a practical, time within which to sue. It may not have been an accident, therefore, that the Court [in Lampf] described the [injury] discovery rule as requiring that suit be “commenced within [the applicable statutory period] after the discovery of the facts constituting the violation.”

Under normal injury occurrence, accrual of the action would be postponed (softened) by tolling principles until such time as the plaintiff discovered or should have discovered his injury, i.e., the facts necessary to file suit. Deferring accrual under “injury discovery” accrual until after discovery of plaintiff’s injury gives the plaintiff the same result. Thus, tolling principles are *de facto* wholly incorporated within “injury discovery” accrual.

[T]he Circuits have applied “discovery” accrual rules, which extend accrual periods for plaintiffs who could not reasonably obtain certain key items of information. The use of a discovery rule may reflect the fact that a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims.

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**B. Injury v. Loss**

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97 *Law*, 113 F.3d at 786 (citing Lampf, 501 U.S. at 364).
An actionable “injury” denotes far more than a mere harm or loss. Black’s Law Dictionary defines an “injury” as

The violation of another's legal right, for which the law provides a remedy; a wrong or injustice . . . . [A]uthorities distinguish harm from injury, holding that while harm denotes any personal loss or detriment, injury involves an actionable invasion of a legally protected interest.99

As the Eleventh Circuit Court of Appeals stated in American United Life Insurance Co. v. Martinez, in the context of a RICO action, “[t]o establish that a ‘controversy’ exists, a plaintiff must show that he suffered an ‘injury in fact’— an invasion of a legally protected interest.”100

The fact that a person has knowledge of harm to, or loss of, “property or business” in no way suggests that he or she has discovered an “actionable invasion of a legally protected interest”, i.e., an actionable injury in fact. For example, an investor may clearly have knowledge of a $10,000 investment loss in Company X stock. That does not mean that the investor has discovered that Company X’s financial statements, on which he and other investors relied, were fraudulently prepared. Such knowledge of the nature of the wrong or injustice is necessary to have notice of an actionable injury in fact, i.e., an

100 480 F.3d 1043, 1069 n.16 (11th Cir. 2007); see also Restatement (Second) of Torts § 7 (1965).
invasion of a legally protected interest. Mere discovery of a loss does not constitute discovery of an “injury.”

**C. Injury v. Injurious Misconduct**

Misconduct fraught with the possibility of serious injury is not an actionable injury in fact. Knowledge of another person’s misconduct towards a plaintiff does not equate to the plaintiff’s being on notice of an “injury” which is actual (has been inflicted, not speculative) and concrete (determinable in amount and nature).\(^ {101}\)

Remember that possible future injuries are speculative and nonactionable. Injuries are “unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable.”\(^ {102}\) Again, future injuries or present injuries, the amount or nature of which are presently unprovable, are speculative and nonactionable and do not trigger running of the statute of limitations.\(^ {103}\)

This premise has sometimes proven difficult in application, however. In *Prudential Insurance Co. of America v. United States Gypsum Co.*, the Third Circuit attempted to deal with this issue in the context of a civil RICO action dealing with asbestos

\(^ {101}\) See supra Part IV(A).
\(^ {103}\) See supra notes 45-55 and accompanying text.
contamination.\textsuperscript{104} The district court granted the defendants’ motions for summary judgment on the grounds that the statute of limitations had run and Prudential appealed.\textsuperscript{105}

Prudential filed its RICO action in October, 1987, asserting that

Prudential discovered its injuries from in-place ACM in buildings well after October 1983. Indeed, prior to 1984, there is no evidence that asbestos fibers were being released from the ACM in Prudential’s buildings involved in this litigation, and therefore, no evidence that Prudential had been injured by ACM.\textsuperscript{106}

In the foregoing statement, Prudential was attempting to narrowly define its “actual injury” as being solely “asbestos fibers . . . being released from the ACM [asbestos] in Prudential’s buildings.”\textsuperscript{107} In further attempts to narrowly define its “actual injury,” Prudential stated that “a plaintiff is not injured from asbestos merely because the plaintiff is aware that in-place ACM is present in its commercial properties . . . . Nor is the plaintiff injured because there is a

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\textsuperscript{104} 359 F.3d 226 (3d Cir. 2003).
\textsuperscript{105} Prudential, 359 F.3d at 228-29.
\textsuperscript{107} Id. at 17 (“To have a claim - including a RICO claim - a plaintiff must have been damaged or injured. Injury from in-place ACM only occurs when sufficient asbestos fibers are released from the ACM so as to contaminate the building.”).
\end{flushleft}
potential or risk of injury from in-place ACM."\textsuperscript{108}

However, the Third Circuit disagreed as to what exactly constituted Prudential’s “actual injury.”\textsuperscript{109} In doing so, the Third Circuit pointed out that Prudential itself was suing for both actual, concrete injury, as well as “future injuries” based on Prudential’s own improperly narrow definition of “actual injury.”\textsuperscript{110}

Prudential asserts that ACMs only cause injury when they deteriorate and begin releasing hazardous levels of asbestos fibers that contaminate buildings, and therefore it suffered injury only when actual contamination required it to address or remedy the hazards such contaminations posed.

As we previously noted, Prudential’s amended complaint clearly seeks damages for both past and future injuries. Consequently, Prudential cannot also argue that the statute of limitations for its RICO claims should not have begun to run until those injuries became “actual” injuries [“actual ACM contamination” as defined by Prudential] and it needed to take remedial measures and incurred expenses for remediation.\textsuperscript{111}

Prudential was caught wanting to have its cake and eat it too. Prudential asserted that no “actual injury” had been incurred for purposes of early accrual of the statute of limitations. Simultaneously, its amended complaint sought present damages for such identical [nonactual(?)] injuries.

\textsuperscript{108} Id. at 21.
\textsuperscript{109} Prudential, 359 F.3d at 236-37.
\textsuperscript{110} Id. at 236.
\textsuperscript{111} Id.
The court was correct in rejecting the “actual injury” standard proposed by Prudential. However, the Third Circuit could have (and this author believes it should have) stated its ruling more clearly. References in the opinion to Prudential’s narrowly defined “actual injury” could confuse those who wish to be confused. It could allow opportunistic persons to assert that no “actual injury” was required by the Third Circuit in Prudential.

In Sedima, S.P.R.L. v. Imrex Co., the Supreme Court, on the same “actual injury” issue, cited Seventh Circuit precedent. “[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property . . . . As the Seventh Circuit has stated, ‘[a] defendant who violates section 1962 is not liable . . . to those who have not been injured.’” Furthermore, in Klehr v. A.O. Smith Co., the Supreme Court posited just such an example of misconduct occurring prior to any actual injury: “[I]n such a case, a claim for the injuries that had been speculative would accrue when

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112 473 U.S. 479 (1985)
those injuries occurred, even though the act that caused them had taken place more than four years earlier." 114

Thus, the Supreme Court has clearly stated that an action for misconduct prior to realization or occurrence of an actionable injury in fact does not accrue at the time of misconduct; it can only accrue when the “future injuries” become actual and concrete. 115

VI. Injury Occurrence Rule

In Klehr, Justice Scalia, joined by Justice Thomas, concurred in the judgment, but forcefully argued for adoption of “injury occurrence” as the appropriate RICO accrual rule. 116

Adoption of “injury occurrence,” Scalia argued, would appropriately parallel application of the Clayton Act’s “injury occurrence” accrual rule. 117 The Clayton Act’s four-year statutory period of limitations was adopted for RICO actions. 118 But in doing so, the Court in Agency Holding Corp. v. Malley-Duff & Associates specifically stated that it “ha[d] no occasion to decide the appropriate time of accrual for a RICO claim.” 119

The Circuits were free to adopt either the injury occurrence

115 Id.
116 Id. at 196-202.
117 Id. at 198.
119 Id. at 157.
rule or the injury discovery rule.

In Malley-Duff, Klehr, and Rotella the majority of the Court took the position that the unique elements of civil RICO claims should be considered in determining the appropriate accrual rule.\(^\text{120}\) Clearly, the needs and equities of parties to civil Clayton Act antitrust litigation differ markedly from the needs and equities of parties to civil RICO actions. As noted previously, the Court in Klehr recognized that the circuits had all adopted some form of "'discovery' accrual rule."\(^\text{121}\) Discovery serves to "extend accrual periods for plaintiffs who could not reasonably obtain certain key items of information. The adoption of a discovery rule may reflect the fact that a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims."\(^\text{122}\)

The majority of the Court also clearly wanted this consideration of alternative accrual and tolling rules to be undertaken by the district and circuit courts.\(^\text{123}\) Trial and appellate courts wrestle with RICO issues on a case by case basis. They are able to consider, in a real-world context, the implications of criminal activities and fraud on victims' lives.

\(^{120}\) See id. at 154; Klehr, 521 U.S. at 191; Rotella, 528 U.S. at 556.

\(^{121}\) Klehr, 521 U.S. at 191.

\(^{122}\) Id.

\(^{123}\) See id. at 193, 196 (declining to address such extensively fact-based questions).
abilities to bring timely RICO actions. Finally, trial and appellate courts are also able to determine whether the combination of a discovery rule along with a four-year limitations period results in stale RICO claims being brought to the prejudice of defendants.

The injury occurrence rule has no practical advantages – e.g., clarity or simplicity – over the injury discovery rule. Each rule requires an analysis of whether an “injury” has occurred, i.e., whether there is an actual and concrete, rather than a speculative, injury.

This author agrees with the foregoing approach of having trial and appellate courts “feel out” the most practical and appropriate rule of RICO accrual. Furthermore, it seems the various circuits have now substantially come together on the single best RICO accrual rule. They have all adopted “injury discovery” with no circuit having adopted or applied “injury occurrence.”

VII. The Role of Inquiry Notice in Injury Discovery

Accrual

"[W]hat exactly [is it] that [plaintiffs] must discover (or should have discovered) to start the statute of limitations running?"\(^{125}\) The following discussion regarding “inquiry notice” provides part of the answer to this troublesome question.

When a plaintiff has actual knowledge of relevant facts, the plaintiff is “on notice” of such facts. Additionally, when the plaintiff should have discovered the relevant facts through reasonable diligence, he is on constructive notice of such facts.\(^{126}\) The time of “notice,” whether actual or constructive, is the time of knowledge or awareness of whatever facts are relevant in the context of a particular type of action. Under

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\(^{125}\) Marks v. CDW Computer Centers, Inc., 122 F.3d 363, 367 (7th Cir. 1997).

\(^{126}\) See Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 835 (11th Cir. 1999) (“[T]he plaintiff is not charged with knowledge of his claim until he should have discovered the basis for his claims.”).
the injury discovery rule, the statute of limitations begins to run when a plaintiff discovers or should have discovered his actionable injury in fact.\textsuperscript{127} When a plaintiff is actually or constructively “on notice” as to his actionable injury is a question of fact.\textsuperscript{128}

Prior to the time of “injury discovery,” if a plaintiff received some clues or warnings that would have been sufficient to “suggest to [a person] of ordinary intelligence the probability that she has been injured in fact, a duty of inquiry arises.”\textsuperscript{129} Such clues or warnings are often analogized to “storm warnings.”\textsuperscript{130} The presence and discovery of such “storm warnings” imposes a “duty of inquiry” on the plaintiff.\textsuperscript{131} The test is objective, i.e., given the same facts and circumstances confronting the plaintiff, would a reasonable person of ordinary intelligence have made inquiries in the face of such warnings? If the answer to this objective test is yes, then the plaintiff

\textsuperscript{128} Morton's Market, 198 F.3d at 832 (“[W]e have held, along with a majority of the circuits, that the issue of when a plaintiff is on ‘notice’ of his claim is a question of fact for the jury.”).
\textsuperscript{129} Armstrong v. McAlpin, 699 F.2d 79, 88 (2d Cir. 1983). The court stated further that, “‘if [the plaintiff] omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.’” Id. (quoting Higgins v. Crouse, 42 N.E. 6, 7 (N.Y. 1895)).
\textsuperscript{130} Tello v. Dean Witter, Inc. (“Tello I”), 410 F.3d 1275, 1283 (11th Cir. 2005).
\textsuperscript{131} Id.
is deemed to have had a duty of inquiry beginning at such time. This point in time has been historically referred to as “inquiry notice.”\textsuperscript{132} To have notice of facts reasonably sufficient to prompt inquiries is “inquiry notice.”

Again, the test for determining the time of “inquiry notice” is an objective test. A plaintiff will be deemed to have notice of possible injury (suspicions or storm warnings), triggering the duty to make reasonable inquiries, when a reasonable person of ordinary intelligence would have such notice and make such inquiries.\textsuperscript{133}

The confusing terminology of “inquiry notice,” however, led to confusing analyses and holdings by some courts,\textsuperscript{134} which in turn led to premature accrual of statutes of limitations in the past. “Storm warnings” clearly trigger a duty to make reasonable inquiries, but the question is unresolved as to what else, if anything, may be triggered by such warnings.

As the result of actual reasonable inquiries, plaintiffs may or may not\textsuperscript{135} discover their actionable injury in fact. In

\begin{footnotesize}
\begin{enumerate}
  \item Cook v. Avien, Inc., 573 F.2d 685, 696 (1st Cir. 1978) (stating that “‘inquiry notice’ of possible omissions provided by the above facts had triggered the duty to exercise reasonable diligence”).
  \item Marks, 122 F.3d at 367.
  \item Compare Theoharous v. Fong, 256 F.3d 1219, 1228 (11th Cir. 2001) with Tello I, 410 F.3d at 1284.
  \item There may be no actual notice of injury either because no actual inquiries are made or because actual reasonable inquiries
\end{enumerate}
\end{footnotesize}
such circumstances, the statute of limitations begins to run when plaintiffs reasonably should have discovered their actionable injury in fact.\textsuperscript{136} This is the time of “constructive discovery” as contrasted with actual discovery of an actionable injury in fact. “[T]he statute of limitations for RICO actions does not begin to accrue until the Plaintiff . . . reasonably should have known of the injury.”\textsuperscript{137}

This is the point at which different circuits’ paths to “constructive notice” diverge. Courts, unfortunately, have widely used the identical term “inquiry notice” to trigger wholly different legal consequences. Clearly, the knowledge of factual evidence sufficient to establish the possibility\textsuperscript{138} (suspicion or storm warnings) of injury, whether actual or constructive, is broadly defined among all circuits as “inquiry notice.”\textsuperscript{139} Also, the circuits uniformly state that such “inquiry notice” causes the plaintiff to have a duty to make reasonable investigatory inquiries.

\textsuperscript{136} See Morton’s Market, 198 F.3d at 835.
\textsuperscript{138} See Tello v. Dean Witter Reynolds, Inc. (“Tello II”), 494 F.3d 956, 968 (11th Cir. 2007) (“Inquiry notice in our circuit occurs when there is factual evidence of the possibility of securities fraud. . . .”) (emphasis added).
\textsuperscript{139} Circuits also agree that it is an objective test applying the “reasonable person” or “person of ordinary intelligence” standard. See supra cases cited in note 85.
However, the circuits have established alternative views as to the further significance, if any, of “inquiry notice.”

Alternative #1: In the past, some circuits have flatly stated that “inquiry notice,” actual or constructive, triggered the running of the statute of limitations.\textsuperscript{140} In other words, inquiry notice and the running of the statute of limitations began at the same time.

Alternative #2A: In the past, other circuits have stated that “inquiry notice” triggered running of the statute of limitations only if the plaintiff thereafter failed to make reasonable inquiries.\textsuperscript{141}

Alternative #2B: These same circuits did not trigger running of the statute of limitations if the plaintiff

\textsuperscript{140} See, \textit{e.g.}, Kennedy v. Josephthal, 814 F.2d 798, 802-03, (1st Cir. 1987) (In that case, surely, the order, the Rescission Offer, and The Wall Street Journal article of February 11, 1971, represent “great glowing clouds,” sufficient to put plaintiffs on notice that something was amiss, and the statute began to run upon inquiry notice.); Cook v. Avien, Inc., 573 F.2d 685, 697-98 (1st Cir. 1978) (stating that circumstances constituting “‘inquiry notice’” as “storm warnings” were sufficient to initiate the running of the statute of limitations on this cause of action).

\textsuperscript{141} See, \textit{e.g.}, Domenikos v. Roth, No. 07-0406-cv., 2008 WL 2329315, at *2 (2d Cir. Jan. 5, 2008)(If inquiry notice is established and the investor fails to conduct an inquiry, knowledge of the fraud is imputed as of the date he received inquiry notice.); Cetel v. Kirwan Financial Group, Inc., 460 F.3d 494, 509 n.9 (3d Cir. 2006) (In this case, plaintiffs simply did not exercise enough diligence to either prevent the claim from accruing or to allow the statute of limitations to be tolled, as both “benefits” hinge on the exercise of reasonable diligence.).
thereafter satisfied his duty to make reasonable investigatory inquiries. In this situation, running of the statute was triggered when the plaintiff, as the result of such inquiries, should have discovered his “injury” or claim based on the objective test applying the “reasonable person” or “person of ordinary intelligence” standard to the unique facts of each case.

Alternative #3: Further along this continuum, some circuits, particularly the Seventh Circuit, have flatly held that inquiry notice does not trigger the running of the statute of limitations. In inquiry notice under this alternative merely triggers a duty to inquire and thereby initiates running of a second essential time frame leading to statutory accrual of an action. The statute “does not begin to run unless and until the [plaintiff] is able, with the exercise of reasonable diligence (whether or not actually exercised), to ascertain the

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142 See, e.g., Tello II, 494 F.3d at 968; Law v. Medco Research, Inc., 113 F.3d 781, 785 (7th Cir. 1997).
143 “Able” to discover addresses the ease or difficulty confronting the plaintiff in obtaining further necessary information beyond “suspicion.” For example, when legal process is not available and facts are uniquely in the hands of the perpetrators, no amount of plaintiff’s reasonable efforts will produce the necessary information. See Rotella v. Wood, 528 U.S. 549, 556 (2000) (citing United States v. Kubrick, 444 U.S. 111, 122 (1979)).
144 This distinguishes Alternative #3 from Alternatives #2A and #2B, which condition the running of the statute on whether inquiries are (#2B) or are not (#2A) made.
information needed to file suit."  

Again, the time frame necessary to allow exercise of reasonable diligence is an objective test applying the "reasonable person" or "person of ordinary intelligence" standard to the unique facts of each case.

Under Alternative #2B, the question is whether a reasonable person should have discovered the injury. Here, the ultimate question regarding this post-"inquiry notice" time frame is, given the unique facts of each case, how long a period would it have taken a "reasonable person" to discover the essential facts "needed to file suit." Judge Posner of the Seventh Circuit framed these exact issues in his Law opinion as follows:

[W]hat exactly [is it] that the investors must discover (or should have discovered) to start the statute of limitations running[?] Is mere suspicion [storm warnings and inquiry notice] discovery?

Or, alternatively, Posner queried:

[A]t the other extreme, must the investor have learned (or have been in a position where he should have learned) all the facts he needs in order to file a suit?

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145 Marks v. CDW Computer Ctrs., Inc., 122 F.3d 363, 368 (7th Cir. 1997).
146 Not surprisingly, the essential facts which must be discovered in order to terminate this second time frame will be a question of fact. See infra Part VIII(A).
147 Law, 113 F.3d at 785.
148 Id.
Different answers to this question had been expressed by the various circuit courts. Sometimes these different expressions seem merely to be a lack of clarity in terminology, and at other times, they appear to represent statements of clearly different accrual rules. Judge Posner noted this lack of uniformity and offered an explanation for it in Law:

Language can be found in the case law to support either [of the two preceding] formula[s], and although more cases use the former [accrue on “notice inquiry”] than the latter [accrue only after allotting time to discovery of facts necessary to file suit], none of the cases treats the difference between the two formulas as an issue. Perhaps it made no difference in those cases or the parties had chosen not to make it an issue.

We think it is time to resolve the issue.149

Thus, the Seventh Circuit clearly asserted that prior opinions had not recognized the essential difference between facts necessary to trigger inquiry notice and facts necessary to discover an injury for statutory accrual purposes. Earlier opinions neither resolved nor even addressed the precise question of when an actionable injury in fact is discovered or

149 Id. (citations omitted). The pressure to resolve the issue felt by the Seventh Circuit came from the Supreme Court’s opinion in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991). The injury discovery rule delayed accrual of an action until the violation was discovered or discoverable, even if hidden by fraud. Thus, application of equitable tolling principles to postpone accrual in the context of fraudulent concealment became unnecessary and superfluous. Therefore, time of initial accrual became the sole focus of action accrual. Lampf, 501 U.S. at 363.
discoverable. The Seventh Circuit held that the “most sensible” approach was the principle that an action has accrued after the discovery of the untrue statement\(^{150}\) . . . or after such discovery should have been made by the exercise of reasonable diligence.” In other words, the plaintiff gets [the full statutory period] after he learned or should have learned the facts that he must know to know that he has a claim.\(^{151}\)

For a discussion of the evolution of inquiry notice in the Eleventh Circuit microcosm, see the discussion infra comparing Theoharous and Tello.\(^{152}\)

VIII. Analysis in Support of the Seventh Circuit and the Injury Discovery Accrual Formula

In Rotella v. Wood, the Supreme Court applied the “injury discovery” accrual rule for civil RICO.\(^{153}\) Circuit courts have

\(^{150}\) Law involved alleged securities fraud under the 1933 Act. Law, 113 F.3d at 785. For a plaintiff to know he has a claim under the 1933 Act for a false registration statement he needs to discover only that a material statement was untrue. Id. at 785-86.

\(^{151}\) Id. at 785 (quoting 15 U.S.C. § 77m (YEAR)) (emphasis added). The test applied under section 13 of the Securities Act of 1933 for liability arising as the result of a registration statement or prospectus “which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading.” 15 U.S.C. § 77/(a)(2).

\(^{152}\) Infra Part IX.

uniformly adopted the “injury discovery” rule\textsuperscript{154} for civil RICO.\textsuperscript{155}

A. What Must Be Discovered

Focusing on the letter and spirit of the “injury discovery” rule, the Seventh Circuit’s analysis seems the most appropriate of the available alternative formulas.\textsuperscript{156} The question of “what” must be discovered will be discussed before examining the issue of “when” it must be discovered.

Most simply stated, the “injury” is “what” must be discovered under the “injury discovery rule.” The Seventh Circuit has described “what” must be discovered, in varying terms, as being “the facts that [plaintiff] must know to know that he has a claim,” and “enough facts in hand to enable them to file a complaint that would comply with the requirements of the Federal Rules of Civil Procedure for pleading fraud . . . with particularity.”\textsuperscript{157} “In a fraud case, he needs to know more: that the defendant has made a representation that was knowingly

\textsuperscript{154} See supra cases cited note 123.
\textsuperscript{155} The Second and Fifth circuits each adopted the “separate accrual” rule as a modification to the “injury discovery” rule. See Bankers Trust Co. v. Rhoads, 859 F.2d 1096, 1104 (2d Cir. 1988); Love v. Nat’l Med. Enters., 230 F.3d 765, 773 (5th Cir. 2000); see also supra notes 66-69 and accompanying text.
\textsuperscript{156} Compare Alternatives #1, #2A, #2B, and #3 discussed supra notes 136-45 with supra Part VI, discussing Scalia’s “injury occurrence” option in Klehr v. A.O. Smith Co., 521 U.S. 179, 196-202 (1997).
\textsuperscript{157} Law, 113 F.3d at 785.
false,”158 “the facts on which the suit is based,”159 and “the information needed to file suit... to tie up any loose ends and complete the investigation in time to file a timely suit.”160 Finally, “it needs to be the proof that one would have to have in hand in order to be able to file suit on the spot without running afoul of Rule 9(b), which requires that fraud be pleaded with particularity, and without courting Rule 11 sanctions.”161

As stated previously, an “injury” is defined as

The violation of another's legal right, for which the law provides a remedy... a wrong or injustice... [A]uthorities distinguish harm from injury, holding that while harm denotes any personal loss or detriment, injury involves an actionable invasion of a legally protected interest.”162

Thus, “injury discovery” accrual is knowledge of facts as to the actionable invasion of a plaintiff’s legally protected interest, i.e., knowledge of an “actionable” injury in fact (“actual and concrete injury”). It is not necessary for a plaintiff to have knowledge of the remedy provided under the law.163

158 Id. at 786.
159 Marks v. CDW Computer Ctrs., Inc., 122 F.3d 363, 367 (7th Cir. 1997).
160 Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332, 1337 (7th Cir. 1997).
161 Id. at 1336.
162 BLACK’S LAW DICTIONARY 801 (8th ed. 2004); see supra Part V(B).
A plaintiff does not discover an “injury” as the result of discovering the mere possibility that something is amiss. Having notice of the possibility that something may be amiss constitutes “inquiry notice” and triggers only the plaintiff’s duty to make reasonable inquiries. Neither is discovery of a “loss” the discovery of an injury. A mere loss does not suggest an actionable invasion of a legally protected interest. Further, discovery of misconduct is not the same as discovery of actual, concrete injuries in fact.

Discovery of a loss or discovery of misconduct may or may not trigger inquiry notice, depending on the circumstances. Neither constitutes discovery of an actionable injury in fact, and neither triggers the running of the statute of limitations under “injury discovery.”

To go back to the beginning, legal analysis of “injury discovery” accrual must focus on the “injury.” The clearly

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164 Tello v. Dean Witter Reynolds, Inc. (“Tello II”), 494 F.3d 956, 968 (11th Cir. 2007) (“Inquiry notice in our circuit occurs when there is factual evidence of the possibility of securities fraud. . . .”) (emphasis added).
165 See id.
166 See supra Part V(B).
168 See Law v. Medco Research, Inc., 113 F.3d 781, 785 (7th Cir. 1997) (stating that mere suspicion is not necessarily discovery; the statute of limitations begins to run only when the plaintiff “learned or should have learned the facts that he must know to know that he has a claim”) (emphasis added).
established, broad definition of "injury" incorporates "the facts that [plaintiff] must know to know that he has a claim based on a violation of a legally protected interest."\textsuperscript{169} For "injury discovery" of an actionable injury in fact, one must discover facts necessary to file suit and facts on which the suit is based.\textsuperscript{170} That is, one must acquire notice or knowledge of facts that the invasion was an "actionable invasion", i.e., was an "actual and concrete injury" in fact.

The plaintiff need not be familiar with statutory or common law describing the legal remedy. The plaintiff need not even be aware of his legal rights. As stated by the Supreme Court in \textit{Rotella v. Wood},

\begin{quote}
Federal courts, to be sure, generally apply a discovery accrual rule when a statute is silent on the issue, as civil RICO is here . . . . But \textit{in applying a discovery accrual rule}, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock . . . . "We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation ['proximate cause] may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts [1] that he has been [injured] and [2] who has inflicted the injury. He is no longer at the mercy of the latter. There are
\end{quote}

\textsuperscript{169} \textit{Id}. \\
\textsuperscript{170} \textit{See supra} notes 156-60 and accompanying text.
others [lawyers] who can tell him if he has been wronged, and he need only ask."\(^{171}\)

It is the discovery of injury facts alone that starts the running of the statute of limitations. Knowledge that certain facts constitute violation of a particular legal standard clearly is not required. For a RICO action, accrual has been held not to be delayed until facts technically constituting a “pattern” of racketeering activity under particular legal standards of RICO precedent have been discovered.\(^{172}\) The Rotella opinion analogizes this to a malpractice victim who must know essential facts of his injury, but need not know the “prevailing standards of medical practice” under applicable law.\(^{173}\)

However, (1) facts of injuries resulting from misconduct, and (2) who committed them must be discovered, actually or constructively, before plaintiffs can be aware of their actionable injury and, thereby, of their claim. For mail or wire fraud predicate acts, it is necessary to discover facts sufficient to know that defendants intentionally made material misstatements of fact (or failed to disclose material facts), thereby proximately resulting in actual, concrete injury to


\(^{172}\) Rotella, 528 U.S. at 556.

\(^{173}\) Id. at 556-57.
plaintiffs. Regarding omissions of facts, plaintiffs must discover, actually or constructively, facts that would cause a defendant - e.g., a trustee or a lawyer - to have a duty to disclose such facts and that defendant failed his duty.

In addition, pursuant to the Federal Rules of Civil Procedure’s Rule 9 particularity standards, plaintiffs must have actual or constructive knowledge or notice of facts as to the substance of the misrepresentation, persons making the misstatements, persons to whom they were made, and the dates on which such misstatements were made. “Particularity means that a plaintiff must plead ‘facts as to time, place, and substance of the defendant’s alleged fraud,’ specifically ‘the details of the defendant’s allegedly fraudulent acts, when they occurred, and who engaged in them.’

To take a particular example, violation of the Travel Act is a RICO predicate act. Plaintiffs must discover, actually or

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174 See Law, 113 F.3d at 786; see also supra notes 157-60 and accompanying text.
175 Fed. R. Civ. P. 9(b) (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”)
176 Atkins v. McInteer, 470 F.3d 1350, 1357 (11th Cir. 2006) (emphasis added).
177 Id.
178 18 U.S.C. § 1952(a) (2000). The act applies to travel in interstate commerce to “(1) distribute the proceeds of any unlawful activity; . . . or (3) “otherwise promote, manage, establish, carry on, or facilitate the promotion,
constructively, facts (1) constituting an “unlawful activity,” e.g., bribery, and (2) who committed the unlawful activity.\textsuperscript{179} Plaintiffs must discover facts of their actionable injury proximately caused by any violation of the Travel Act.

“Inquiry notice,” actual or constructive, of storm warnings unquestionably triggers plaintiff’s duty to make reasonable inquiries. The injury must be proximately caused\textsuperscript{180} by the predicate act.\textsuperscript{181} It is actual or constructive discovery of facts of the actionable “injury” in fact and persons responsible that triggers the running of the statute of limitations.

The Seventh Circuit did, of course, provide its own solid rationale and support for the rule it adopted. The Seventh Circuit based its holding in Law v. Medco Research, Inc. in part on Supreme Court precedent.\textsuperscript{182} The Seventh Circuit focused primarily on the varying degrees of the plaintiff’s access to facts necessary to confirm or to allay its initial suspicions of possible misconduct.\textsuperscript{183} That is, given the unique facts of each

\textsuperscript{179} See, e.g., Perrin v. United States, 444 U.S. 37, 42 (1979) (defining the unlawful activity of “bribery”).
\textsuperscript{180} See supra Part IV(B).
\textsuperscript{183} Law, 113 F.3d at 785-86.
case, how long a period would it take a "reasonable person"\textsuperscript{184} to discover the facts essential to filing a timely suit?

If an action were to accrue upon "inquiry notice" suspicions and possibilities, actions whose facts are readily available without legal process could possibly be timely filed. When facts are uniquely in the hands of defendants, however, the plaintiff, acting as a reasonably diligent person, may be wholly unable\textsuperscript{185} to discover essential facts necessary to file suit before the statute of limitations has run. "It is obviously unreasonable to charge the plaintiff with failure to search for the missing element of the cause of action if such element would not have been revealed by such search."\textsuperscript{186}

This is particularly true in light of the heightened pleading standards of Rule 9 for mail fraud, the most common of RICO actions.\textsuperscript{187} Possible Rule 11 sanctions were also viewed by

\footnotesize
\begin{itemize}
    \item \textsuperscript{184}See, e.g., id. at 786; Tello v. Dean Witter Reynolds, Inc. ("Tello I"), 410 F.3d 1275, 1283 (11th Cir. 2005).
    \item \textsuperscript{185}See supra note 142 for a discussion of "able."
    \item \textsuperscript{187}Klehr v. A.O. Smith, 521 U.S. 179, 191 (1997) ("The use of a discovery rule may reflect the fact that a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims.") (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 n.16 (1985) (most civil RICO claims involve underlying fraud offense); 1 A. MATHEWS, A. WEISSMAN, & J. STURC, CIVIL RICO LITIGATION 1-6 (2d ed.1992) (citing Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 243 (1985) (as of 1985, approximately 90% of civil RICO
\end{itemize}
the Seventh Circuit as placing chilling pressures on a plaintiff who is unable, despite reasonable diligence, to access concealed essential facts.¹⁸⁸ That is why the Seventh Circuit held the statute of limitations does not begin to run unless and until a “reasonable person,” “a person of ordinary intelligence,” or the plaintiff in the exercise of “reasonable diligence”¹⁸⁹ would be “able,”¹⁹⁰ to ascertain the information¹⁹¹ needed to file suit.¹⁹²

“Inquiry notice” triggers the duty to make reasonable inquiries. The statute, however, does not run when the plaintiff should have applied reasonable diligence, but did not. This fact is clear from the Seventh Circuit’s parenthetical, “(whether or not actually exercised).”¹⁹³ Time is allowed for the objective “reasonable person,” not the actual plaintiff, to make

¹⁸⁸ Marks v. CDW Computer Ctrs., Inc., 122 F.3d 363, 369 (7th Cir. 1997)(“Would CDW have had Marks risk Rule 11 sanctions or a violation of Rule 9(b) by filing a complaint listing the ‘bad blood’ or ‘storm warnings’ and no other particularized evidence of fraud?”) (emphasis added).
¹⁸⁹ Again, these terms are said to make the test an objective one. See Law, 113 F.3d at 786.
¹⁹⁰ See supra note 142 for a discussion of “able.” “Able” incorporates the unique facts and circumstances of each case as to the ease or difficulty of access to the essential facts of each case. See also Law, 113 F.3d at 786 (stating that the “the ease of discovering” the injury is relevant in determining when the statute of limitations begins to run).
¹⁹¹ The relevant information being the fact of the actionable injury and persons responsible. See In re Copper Antitrust Litigation, 436 F.3d 782, 792 (7th Cir. 2006).
¹⁹² See supra notes 155-59 and accompanying text.
¹⁹³ See Marks, 122 F.3d at 368.
inquiries, and the statute of limitations begins to run only after this period has lapsed.

Thus, the statute runs when the objective “reasonable person” would have discovered [1] the actionable injury in fact, and [2] the persons responsible. That is why that court stated that it does not matter – i.e., does not add to or subtract from the time frame – whether the plaintiff actually engaged in reasonable diligent inquiries – “(whether or not actually exercised).”

B. Injury Discovery Accrual Formula

One purpose of this article is to provide a specific framework, complete with recommended terminology, to better define the time of “injury discovery accrual.” Stated as a formula, the first time period of “injury discovery” accrual incorporates de facto equitable tolling principles per Lampf. The first time period begins upon injury occurrence and ends upon “inquiry notice,” i.e., it ends when the duty to make reasonable inquiries arises as a result of “storm warnings” and suspicion. The second time period begins when the first period

\[\text{Storm warnings + Equitable tolling period = Inquiry Notice}\]

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194 See Copper, 436 F.3d at 792.
195 Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991). Lampf effectively eliminated actual, separate de jure application of tolling principles, recognizing that such tolling was de facto incorporated within the principles of injury discovery—e.g., conduct causing injury occurrence + equitable tolling period = inquiry notice. Id.
ends, i.e., when the duty to make reasonable diligent inquiries arises. This second time frame between the point of “Inquiry Notice” and the point of “Injury Discovery Accrual” was described by the Eleventh Circuit as the “Period of Reasonable Diligence.”\textsuperscript{196} This second time period ends upon “injury discovery accrual,” i.e., when a reasonable person, under similar facts and circumstances regarding the ease or difficulty of accessing essential facts, would have discovered the actionable injury in fact. Thus, the combined Seventh and Eleventh Circuit formula is:

Time Point #1:

\[
\text{Injury occurrence } + \text{ de facto tolling period until “storm warnings”}^{197} = \text{Inquiry Notice}^{198}
\]

Time Point #2:

\[
\text{Inquiry notice } + \text{ Period of Reasonable Diligence } = \text{Injury Discovery Accrual}^{199}
\]

There are two methods of defining “inquiry notice.” First, “inquiry notice” is that point in time when a reasonable person would be on notice of storm warnings or facts creating

\textsuperscript{196} Tello v. Dean Witter Reynolds, Inc. (“Tello II”), 494 F.3d 956, 968 (11th Cir. 2007).
\textsuperscript{197} \textit{De facto} tolling of the claim begins on occurrence and continues until “injury discovery.” “Storm warnings” incite reasonable diligent investigation. See Tello II, 494 F.3d at 968.
\textsuperscript{198} “Inquiry Notice” ends Time Point #1 and starts Time Point #2.
\textsuperscript{199} Tello II, 494 F.3d at 968.
suspicion. Second, “inquiry notice” could be that period of time which begins with suspicion or storm warnings, triggering the duty to inquire, and ends at the point of “injury discovery.” This article recommends the former, i.e., “inquiry notice” is that point in time which triggers only the duty to diligently investigate and does not incorporate or trigger accrual of the statute. The statute accrues and the statute of limitations begins to run upon “injury discovery,” after the “Period of Reasonable Diligence” has lapsed. “Inquiry notice” thus initiates the “Period of Reasonable Diligence,” which itself ends upon “injury discovery accrual.”

“Inquiry notice,” at least under Seventh Circuit “injury discovery” principles, should not describe two entirely different, essential points in time. Neither should it describe a period of time during which diligent inquiries begin, proceed, and eventually should conclude. For the sake of clarity, “inquiry notice” should refer only to the single point in time when the “Period of Reasonable Diligence” begins.\(^\text{200}\) The next relevant point in time is when the statute accrues pursuant to actual or constructive “injury discovery,” i.e., at the end of the “Period of Reasonable Diligence.”\(^\text{201}\) In other words, the statute of limitations begins to run when a reasonable person

\(^{200}\) This is both the end of initial period of de facto tolling and the beginning of the “Period of Reasonable Diligence.”

\(^{201}\) See supra text accompanying note 169.
should have discovered the information necessary to file suit and the “Period of Reasonable Diligence” has culminated in “injury discovery.”

C. Full Statutory Period Following Accrual

Without question, a plaintiff has the full statutory period of limitations (four years in civil RICO) available following “injury discovery accrual.” The Seventh Circuit has held that “the court was not free to shorten the four-year limitations period . . . . Under the discovery rule, the [four-year] statute does not begin running until the plaintiff discovers that he has been injured and who caused the injury.”202 Also, “where the plaintiff has been actively misled ... the equitable tolling doctrine [de facto incorporated into injury discovery principles] provides the plaintiff with the full [four-year] statutory limitations period.”203

In Lampf,204 the then-applicable statute of limitations stated that the statutory period was for “one year after the discovery of the facts constituting the violation.”205 This

202 In re Copper Antitrust Litig., 436 F.3d 782, 792 (7th Cir. 2006) (emphasis added).
205 Id. at 360. “No action shall be maintained to enforce any liability created under this section, unless brought within one
specific statutory accrual rule is a clear distinction between the Supreme Court’s holding in *Lampf* and the Seventh Circuit’s holdings in *Law, Marks, and Fujisawa*. However, considering that discovery of “an actionable injury in fact” is the equivalent of discovery of “the facts constituting the violation,” this is arguably a distinction without a difference.

The Seventh Circuit also emphatically stated that its accrual rule was necessary in order for the victim to have “a reasonable, a practical, time within which to sue.” Indeed, statutory periods of limitations are clearly matters of legislative policy. The longer the statutory period – e.g., four or five years – the more likely a remedial statute is to satisfy its intended purposes. When the legislative desire is to stem litigation, statutes of limitations are not only short – e.g., one or two years – but are often backed up by a fixed period of repose. For example, in *Lampf*, a three-year period of repose prevented any claim from being filed more than three years after

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year after the discovery of the facts constituting the violation . . . .” *Id.* (citing 15 U.S.C. §78i, *repealed by implication by Friedman v. Rayovac Corp.*, 295 F. Supp. 2d 957, 966 (W.D. Wis. 2003) (emphasis added)).

See *supra* notes 144-50 and accompanying text.

See *supra* text accompanying notes 45-46.

the date of violation, and the normal statutory period was only one year following discovery of the violation.\footnote{Lampf, 501 U.S. at 360.}

Courts cannot say that the time of “injury discovery” accrual of an action varies based on consideration of the applicable statutory period of limitations. If a four-year statute is applicable, as in RICO and Clayton Act violations, a court may be tempted to begin running the statute sooner than for a violation with only a one-year statute. Certainly, a longer statutory period of limitations allows a plaintiff a longer time frame in which to discover its injury and still file a timely suit after injury discovery. Nevertheless, using the applicable statutory period to adjust the accrual time for running of the statute results in the courts substituting their judgment for that of the legislatures that set the varying statutory periods.

Assume violation #1 has a three-year statutory period and violation #2 has a two-year statutory period. Each statute accrues under “injury discovery” principles. Assume a court applied a formula to accrue the statute for violation #1 a year sooner than for violation #2 based on the longer period of reasonable diligence available to the plaintiff under violation

\footnote{Lampf, 501 U.S. at 360.}
#1. The court would have effectively reduced the statute of limitations for violation #1 from three years to two years.

Furthermore, at the outset a plaintiff should be able to know the statutory period and accrual rules and to consider them in the timely filing of her suit. A court should not alter those rules after the suit is filed by shortening the statutory period by way of accelerating the time of claim accrual. Such an approach would cause the plaintiff’s suit to be improperly dismissed as time-barred without fault on the part of the plaintiff. Having a known and fixed statutory accrual period is essential. For the above reasons, this author agrees with the Seventh Circuit’s analysis of precedent, which allows the victim a practical time within which to file suit.

IX. The Eleventh Circuit’s Acceptance of Seventh Circuit Precedent

Prior to the Rotella v. Wood ruling in 2000, the Eleventh Circuit had applied the liberal injury and pattern discovery accrual rule to RICO claims. In Rotella, the Supreme Court disallowed use of this accrual rule in favor of the “injury

discovery” rule being applied by the Seventh Circuit. The Eleventh Circuit thereafter looked to Seventh Circuit precedent for rules of accrual under “injury discovery.”

The Eleventh Circuit’s references to Seventh Circuit precedent unfortunately incorporated the same inconsistent definition of “inquiry notice” as other courts had. Eleventh Circuit opinions in Theoharous v. Fong and Tello I and Tello II, for example, define “inquiry notice” in two wholly inconsistent and imprecise ways. These cases serve as a microcosm in which to study evolution from the old and confusing “inquiry notice” accrual rule (as reflected in Theoharous) to the new and improved “injury discovery” accrual rule (as reflected in the Tello decisions).

First, Theoharous holds:

“Discovery occurs [and the statute of limitations begins to run] when a potential plaintiff has inquiry or actual notice of a violation . . . . [i]nquiry notice, in turn, is ‘the term used for knowledge of facts that would lead a reasonable person to begin investigating [the duty of inquiry] the possibility that his legal rights had been infringed.’”

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212 Rotella, 528 U.S. at 553. This case came to the Court from the Fifth Circuit, which had also applied the “injury discovery” accrual rule. Id.
213 See Tello v. Dean Witter Reynolds, Inc. (“Tello I”), 410 F.3d 1275, 1284 (11th Cir. 2005) (citing Theoharous v. Fong, 256 F.3d 1219 (11th Cir. 2001)).
214 Theoharous, 256 F.3d at 1228 (quoting Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 670 (7th Cir. 1998)).
Second, and wholly inconsistently, Tello I holds “that inquiry notice does not begin to run unless and until the investor is able, with the exercise of reasonable diligence (whether or not actually exercised), to ascertain the information needed to file suit.” 215

Inquiry notice cannot be both 1) that single point in time a duty of inquiry arises based on mere suspicion or possibility, as Theoharous held, and also 2) that single point in time the statute of limitations begins to run based on plaintiff’s ascertaining the information needed to file suit, i.e., “injury discovery,” as held in Tello I and II.

The Eleventh Circuit’s holding in Theoharous was inconsistent with its own holding in Tello, and the Sixth Circuit was justified in pointedly disagreeing with the Theoharous holding. The Sixth Circuit stated, consistently with the Eleventh Circuit’s holdings in Tello I and II,

[Defendant] suggests that the limitations period is triggered when the plaintiff learns facts that would cause a reasonable [plaintiff] to investigate the possibility of fraud. Some cases support that suggestion. See, e.g., Theoharous, 256 F.3d at 1228. The majority view, however, is that knowledge of suspicious facts—“storm warnings,” they are frequently called—merely triggers a duty to investigate, and that the limitation period begins to run only when a reasonably diligent investigation would have discovered the fraud. 216

215 Tello I, 410 F.3d at 1284 (quoting Marks v. CDW Computer Ctrs., Inc., 122 F.3d 363, 368 (7th Cir. 1997)).
The Eleventh Circuit in *Theoharous* fell into the confusing terminology trap of “inquiry notice.” Just as the Seventh Circuit noted in *Law v. Medco Research, Inc.*, the circuit courts had not previously addressed this issue of precisely defining “inquiry notice” and its related effects.\(^{217}\)

Since “inquiry notice,” (Time Point #1 in the formula above)\(^{218}\) has historically referenced that point in time when a “duty of inquiry” arises based on the objective “reasonable person” test, it should retain only that moniker. The second essential point in time (Time Point #2 in the formula above)\(^{219}\) is in fact the time, based on the objective “reasonable person” test, an actionable injury in fact should have been discovered under “injury discovery” principles. This latter point in time, when the claim accrues and the statute of limitations begins to run, is the principal focal point. However, to determine the time the claim accrues based on an objective reasonable person test, it is equally essential to pinpoint that time when the “reasonable person” first had a duty to initiate diligent inquiries, i.e., “inquiry notice.”

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\(^{217}\) 113 F.3d 781, 785 (7th Cir. 1997).

\(^{218}\) Supra note 197 and accompanying text.

\(^{219}\) Supra note 198 and accompanying text.
The Eleventh Circuit properly designated the two distinct time points in Tello I and Tello II by citing both Seventh and Eleventh Circuit precedent.

Time Point #1:

“Inquiry notice is “the term used for knowledge of facts that would lead a reasonable person to begin investigating the possibility that his legal rights had been infringed.””

Time Point #2:

“Once inquiry notice occurs, a prospective plaintiff enters a period of reasonable diligence, which is the time necessary, exercising ordinary investigation, to ascertain sufficient facts to file a complaint.”

In discussing Time Point #2, above, the Eleventh Circuit referenced the beginning of a “Period of Reasonable Diligence.” This “Period of Reasonable Diligence” begins upon “Inquiry Notice,” i.e., when a “reasonable person” should have been aware of “storm warnings.” The “Period of Reasonable Diligence” ends upon “Injury Discovery Accrual,” i.e., when a “reasonable

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220 Tello I, 410 F.3d at 1283 (citations omitted). See generally Tello v. Dean Witter Reynolds, Inc. (“Tello II”), 494 F.3d 956, 968 (11th Cir. 2007) (“Inquiry notice in our circuit occurs when there is factual evidence of the possibility of securities fraud that would cause a reasonable person to investigate whether his or her legal rights had been infringed.”) (emphasis added).

221 Tello II, 494 F.3d at 968 (citations omitted) (emphasis added); see also Tello I, 410 F.3d at 1283 (“In turn, inquiry notice triggers reasonable diligence in investigating the fraud for which notice has been received in order to obtain sufficient information to file suit.”)(citation omitted) (emphasis added).
person” should have discovered “sufficient facts to file a complaint.”

In Tello I, the Eleventh Circuit remanded the case to the district court to hold hearings to specifically identify the “what” and the “when” of these two essential time points.222

We remand this case to the district court to determine the essential, preliminary factual issues that we need to proceed with a legal determination of the applicable statute of limitations:

(1) What established inquiry notice223 to the plaintiff class, and when did that occur? [and]

(2) When224 did the plaintiff class have sufficient information to file suit?225

The Eleventh Circuit even coined a new term: “inquiry-notice” analysis.226 By hyphenating the term of “inquiry notice,” the Eleventh Circuit reflected the same two-part analysis shown in the foregoing “Injury Discovery Accrual Formula.”227 The hyphenation separates the (1) duty of inquiry from (2) notice or discovery of information needed to file suit.

We concluded our inquiry-notice analysis by explaining that “the task for the district judge on remand will be to determine the point in time when the plaintiff class had sufficient information of the alleged fraudulent securities conduct by Dean Witter to file this class

222 Tello I, 410 F.3d at 1294.
223 See Tello II, 494 F.3d at 968.
224 See id. at 968.
225 Tello I, 410 F.3d at 1294.
226 Tello II, 494 F.3d at 968 (citing Tello I, 410 F.3d at 1283).
227 Supra Part VIII(B).
action.” We stated the two questions that we wanted answered on limited remand: “(1) What established inquiry notice [storm warnings] to the plaintiff class, and when did that occur?” and “(2) When did the plaintiff class have sufficient information to file suit [injury discovery]?”

X. Conclusion

Tello I and Tello II carry the torch first raised by Judge Posner and the Seventh Circuit in Law, Marks, and Fujisawa. The Tello decisions contributed the phrase “Period of Reasonable Diligence,” which begins upon “Inquiry Notice” and culminates, or should culminate, in “Injury Discovery.” Since the Period of Reasonable Diligence is subject to a “reasonable person” test, it is irrelevant whether a plaintiff did or did not actually exercise reasonable diligence in attempting to discover its injury.

Tello I and Tello II also specified facts which must be determined in the trial court, preferably by a jury. First, the trier of fact must identify the proximate point in time that a reasonable person should have discovered “storm warnings” or should have become suspicious and identified “what” would have caused a reasonable person to make such a discovery. Second, the trier of fact must identify the proximate time a reasonable

\[ \text{228 Tello II, 494 F.3d at 968 (quoting Tello I, 410 F.3d at 1294).} \]
person should have discovered his injury in fact and identified “what” would have caused a reasonable person to make such a discovery.

By combining the terminology and holdings of the Seventh and Eleventh circuits, one can arrive at a clear and manageable formula to determine when a cause of action accrues. “Storm warnings” trigger the “Period of Reasonable Diligence,” during which time a putative plaintiff should investigate his possible injuries. This “Period of Reasonable Diligence” ends when a reasonable person should have discovered (or the plaintiff actually discovers at an earlier date) his injuries, regardless of whether inquiries were actually made. The statute of limitations begins to run only when the “Period of Reasonable Diligence” has lapsed, i.e., upon injury discovery.

This formula helps a plaintiff determine what must be discovered and when it must be discovered. The de facto tolling principles and application of the reasonable person standard also ensure that valid claims will not be time-barred due to circumstances beyond a plaintiff’s control.