

No. 09-2135

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

CSX TRANSPORTATION, INCORPORATED,
Plaintiff-Appellant,

v.

ROBERT V. GILKISON; PIERCE, RAIMON & COULTER, PC,
a/k/a Robert Peirce & Associates, P.C., a Pennsylvania Professional Corporation;
JOHN DOES; ROBERT N. PEIRCE, JR.; LOUIS A. RAIMOND;
MARK T. COULTER; and DR. RAY A. HARRON,
Defendants-Appellees.

and

RICHARD CASSOFF, M.D.,
Party in Interest,
LUMBERMENS MUTUAL CASUALTY COMPANY,
Intervenor.

**On Appeal from the United States District Court
for the Northern District of West Virginia
(Frederick P. Stamp, District Judge; No. 5:05-cv-00202-FPS-JES)**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT
SUPPORTING REVERSAL**

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth more fully in the accompanying motion for leave to file this brief.

In brief, WLF is a public interest law and policy center headquartered in Washington, D.C., with supporters in all 50 states. WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation.

In particular, WLF regularly appears before federal and state courts in cases addressing asbestos liability issues. *See, e.g., Gilbert Heintz & Randolph LLP v. U.S. Trustee*, No. 06-1897 (D.N.J. 2006); *3M v. Johnson*, 895 So. 2d 151 (Miss. 2005); *Owens Corning v. Credit Suisse First Boston*, No. 04-905 (D.Del. 2005); *In re Kensington Int'l Ltd.*, 368 F.3d 289 (3d Cir. 2004). WLF also has been involved in administrative proceedings designed to ensure the absence of fraud in asbestos litigation. For example, WLF filed a petition with NIOSH (the National Institute for Occupational Health and Safety) in April 2006, urging NIOSH to establish a program to receive claims of improper expert testimony by B readers and to censure or suspend the NIOSH-issued credentials of B readers who provide improper testing. NIOSH responded to the petition by establishing just such a program.

WLF supports efforts to ensure that those injured as a result of exposure to asbestos are adequately and promptly compensated for their injuries. WLF is concerned, however, by mounting evidence that much of the money awarded as damages in asbestos liability cases has been paid to uninjured claimants, and that many of those payments were facilitated by the fraudulent conduct of lawyers and doctors who knew full well that their clients had suffered no asbestos-related injuries. WLF believes that the courts will continue to be deluged by spurious asbestos liability claims and similar claims unless and until they permit companies victimized by such claims to seek compensation from the responsible lawyers and doctors. WLF is concerned that the decision below – by adopting an inappropriately narrow understanding of limitations rules governing federal and state causes of action – will prevent meritorious claims against lawyers and doctors from going forward.

WLF takes no position on Appellant’s claims with respect to the district court’s grant of partial summary judgment, and to the district court’s evidentiary rulings at trial.

STATEMENT OF THE CASE

Plaintiff-Appellant CSX Transportation, Inc. (CSXT) appeals, *inter alia*, from the district court’s Fed.R.Civ.P. 12(b)(6) dismissal, as time-barred, of many

of the claims asserted in its amended complaint filed on July 5, 2007. For purposes of this appeal, the factual allegations of the amended complaint (JA 142-179) must be accepted as true.

The amended complaint asserts that the Defendants-Appellees established an enterprise whose purpose was to manufacture fraudulent asbestos-liability lawsuits against CSXT. Participants in the enterprise included a Pittsburgh-based law firm (Pierce, Raimond & Coulter, PC or “the Pierce Firm”), three partners in the law firm (Robert N. Pierce, Jr., Louis A. Raimond, and Mark T. Coulter), and Dr. Ray A. Harron, a West Virginia radiologist who has been stripped of his medical license by several states. The scheme involved a mass screening process designed to produce false positive readings for asbestosis, exclusive use of a B reader (Dr. Harron) who reported finding evidence of asbestosis at rates dramatically higher than other doctors and who did so after examining x-rays for an unprofessionally short period of time, and the filing of lawsuits without any good-faith basis for believing that the claims were meritorious. The Defendants-Appellees inundated CSXT and other employers with a massive number of asbestos liability claims for the purpose of preventing them from adequately defending or even evaluating the merits of each claim on an individual basis. JA 142.

To support its claim, CSXT focused on nine asbestos liability lawsuits filed by the Pierce Firm against CSXT. Amended Complaint (AC) ¶¶ 70-75, JA 155-58. In each of the nine lawsuits, Dr. Harron had initially found the patient to be unimpaired but “later, based on a second x-ray, determined that the patient exhibited signs of asbestosis despite the objectively unchanged condition of the patient’s lungs.” JA 155-56. Of the nine lawsuits, one was filed in 2000, four were filed in 2001, three were filed in May 2003, and one was filed in 2006.

With respect to the scheme set forth above, the Amended Complaint set forth four causes of action (Counts 1 through 4): (1) conducting an enterprise’s affairs through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961 *et seq.*; (2) conspiracy to violate RICO; (3) common law fraud; and (4) conspiracy to defraud CSXT.

The Pierce Firm and the three lawyers thereafter filed a motion, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss Counts 1 through 4 on statute of limitations grounds. In March 2008, the district court granted the motion in substantial part. JA 691-704. The court held that RICO’s four-year statute of limitations is governed by the “injury discovery” rule: “the limitations clock begins to run when a plaintiff knows or should know of his her or injury.” JA 697. It held that

CSXT had access to the medical records of each of the nine litigants as soon as each one filed his lawsuit and thus that with “reasonable diligence” it could have uncovered the fraudulent nature of each lawsuit at or soon after the time of filing. JA 698. Accordingly, the court ruled that the limitations period began to run at or soon after the date on which each lawsuit was filed. *Id.* Because eight of the nine lawsuits were filed more than four years before the amended complaint was filed in July 2007, the court held that the RICO claims were time-barred with respect to the first eight lawsuits. JA 699. The court held that the filing of a single lawsuit within the limitations period (the suit filed in 2006 on behalf of Earl Baylor) was insufficient to sustain the RICO counts because a RICO “pattern of racketeering activity” requires a showing of at least two acts of racketeering activity. JA 699-700.

The court employed a similar analysis in dismissing most of the common law fraud claims (Counts 3 and 4) on statute of limitations grounds. The court held that those claims were governed by a two-year limitations period; and that under West Virginia’s injury discovery rule, the limitations period began to run at or soon after the dates on which CSXT was served with each of the nine lawsuits. The court determined that claims with respect to eight of the nine lawsuits were thus time-barred, and that the common law fraud claims could

survive only with respect to the 2006 lawsuit filed on behalf of Earl Baylor. JA 700-01.

CSXT thereafter filed a motion for leave to file a seconded amended complaint, for the purpose of adding claims regarding 11 additional objectively baseless asbestos lawsuits filed against CSX as part the defendants' fraudulent scheme. On November 3, 2008, the district court denied CSXT's motion as both "dilatatory" and "futile." JA 785-795. In support of its futility finding, the court adopted an accrual rule that differed substantially from the one outlined in its March 28, 2008 order. The court said that under RICO's injury discovery rule, CSX was charged with notice of "its injury" by March 2000 when the first allegedly baseless and fraudulent lawsuit was filed. JA 792-93. CSXT noted that many of the 11 newly pleaded lawsuits were filed within four years of the date of its proposed second amended complaint and argued that its new claims were timely under the "separate accrual" rule. The district court held that this Court does not accept the "separate accrual" rule, but rather holds that any new injuries suffered by a RICO plaintiff are governed by the same accrual date that governs its first injury. JA 794. The court concluded that because all of the new claims would be time-barred, granting the motion for leave to amend would be futile. *Id.*

CSXT has appealed from both the March 28, 2008 dismissal order and the November 3, 2008 order denying its motion for leave to amend.

SUMMARY OF ARGUMENT

The district court's statute-of-limitation rulings were based on a fundamental misunderstanding of the injury discovery rule – a rule that applies both to the RICO claims and the common law fraud claims. Under the injury discovery rule, a cause of action accrues when a plaintiff knew or should have known of his injury.

No one contends that CSXT actually knew that it was being defrauded by Appellees at the time that the Pierce Firm started inundating it with asbestos liability lawsuits. Rather, the district court held that the limitations period began to run at or soon after the filing of each lawsuit, because – in the normal course of investigating each complaint – CSXT could have uncovered the fraud through a reasonably diligent search.

But the district court's analysis proceeded from a faulty premise: the district court assumed that the injury discovery rule requires *everyone* named in a lawsuit to undertake an immediate and thorough investigation of whether the suit is fraudulent and thus actionable under RICO or a civil fraud claim. This Court has never imposed such an obligation on potential plaintiffs. Rather, the duty to

investigate does not arise until one has learned of facts which would cause a *reasonable person* to investigate. Under the facts as alleged by CSXT, a reasonable person would not have begun an investigation into possible fraud based solely on the Peirce Firm having filed one or more lawsuits against CSXT.

In particular, CSXT has alleged that Appellees carried out their scheme in a manner designed to ensure that a reasonable person would decide *not* to investigate. Because of the massive number of lawsuits filed, it would have been extremely expensive for CSXT to carefully investigate each claim. The Peirce Firm was willing to settle many of its suits for less than what it would cost CSXT to defend and investigate the suits. Under those circumstances, there is a substantial basis for concluding that a reasonable person in the early 2000's would not have undertaken the extensive investigation that would have been necessary to uncover Appellees' fraud. Accordingly, the district court erred in deciding the statute of limitations issue as a matter of law under Rule 12(b)(6).

Dr. Harron was not exposed as a fraud until June 30, 2005, when U.S. District Judge Janis Jacks issued her scathing account of his activities. *In re Silica Prod. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005). Among other things, Judge Jack concluded that repeated inconsistencies in Dr. Harron's medical conclusions could "only be explained as a product of bias – that is, of

Dr. Harron finding evidence of the disease [*i.e.*, either asbestosis or silicosis] he was currently being paid to find.” *Id.* at 638. After that decision, a reasonable person could be expected to investigate the possibility that Dr. Harron engaged in fraud in other litigation as well. But in the absence of any information on the face of the complaint indicating that CSXT had reason to suspect fraud prior to June 30, 2005, and in light of the obstacles that stood in the way of any investigation by CSXT, the district judge had no basis for concluding as a matter of law that the statute of limitations had begun to run at a much earlier date.

Nor is there any basis for asserting that merely being named as the defendant in a lawsuit is, by itself, the “injury” that starts the clock ticking. The “injury” that must be “discovered” before the limitations period begins to run is the injury that is caused by the tortious conduct alleged in the complaint. In the case of common law fraud, the cause of action is not complete until the plaintiff has reasonably relied to his detriment on the fraud, and being named in a lawsuit hardly constitutes reliance.¹ Thus, a lawsuit alleging fraud would be premature at the time that one is first named as a defendant. The limitations period cannot

¹ Nor would mounting a defense to the lawsuit constitute reliance. A defendant that incurs the expenses necessary to respond to a lawsuit does so to preclude entry of a judgment against him, not because he is relying on a belief that the plaintiff is acting honestly and in good faith.

possibly be deemed to be running at a time when any lawsuit would be deemed unripe. Similarly, when (as here) a RICO claim is based on alleged mail and wire fraud, there can be no cause of action until all the elements of those predicate offenses are in place – including injury resulting from reliance on the alleged fraud.

The contrary rule adopted by the district court cuts against a long-standing policy that discourages counter-claims filed by defendants who deem themselves to have been unfairly targeted. While many defendants wish to file “malicious prosecution” counter-claims against their courtroom tormenters, the law has wisely required that malicious prosecution claims be delayed until after the initial lawsuit has been decided in favor of the defendant. But if defendants who believe that a lawsuit is fraudulent will risk having their fraud claims deemed time-barred unless they act immediately, one can reasonably anticipate a sharp increase in counter-claims alleging fraud – a costly development that would provide a financial benefit to litigators but virtually no one else.

Finally, the district court’s rejection of the “separate accrual” rule is without support from this Court or any other federal appeals court. Every court that has addressed the issue has determined that a RICO plaintiff may recover for injuries inflicted during the limitations period, even though the defendant’s

tortious conduct may have begun prior to the limitations period and even though some of the plaintiff's injuries may be time-barred.

ARGUMENT

I. THE LIMITATIONS PERIOD ON CSXT'S CLAIMS DID NOT BEGIN TO RUN UNTIL 2005, WHEN CSXT FIRST HAD REASON TO INVESTIGATE APPELLEES FOR FRAUD

The U.S. Supreme Court has had occasion to address several issues regarding the limitations period in a RICO action. It determined in *Agency Holding Corp. v. Mallory-Duff & Assocs., Inc.*, 483 U.S. 143 (1987), that the limitations period applicable to a civil RICO action is the four-year period applicable to the Clayton Act, 15 U.S.C. § 15b. It determined that accrual of the limitations period in a civil RICO action is governed by an “injury discovery” accrual rule rather than an “injury and pattern discovery” rule. *Rotella v. Wood*, 528 U.S. 549 (2000). Under the “injury discovery” rule, the limitations period begins to run when “a plaintiff knew or should have known of his injury.” *Id.* at 553.²

But the Supreme Court has not addressed the issue raised here: what is the

² The “injury and pattern discovery” rule, adopted by several federal appeals court prior to *Rotella*, provided that a RICO claim accrued only when the claimant discovers, or should discover, both an injury and a pattern of RICO activity. *See, e.g., Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994). This Court had adopted the “injury discovery” rule prior to *Rotella*. *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987).

standard for determining when a plaintiff “should have known” of his injury? That issue did not arise in *Rotella* because the plaintiff in that case conceded that he discovered his injury “in 1986 at the latest” – 11 years before he filed his RICO claim. *Id.* at 552. The issue also failed to arise in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), a case that (like *Rotella*) addressed the accrual of the limitations period in a RICO action. In *Klehr*, the appeals court had determined that the plaintiffs should have discovered their injury (they claimed to have been sold a defective silo) many years before filing suit, and the Supreme Court declined to review that determination. 521 U.S. at 192.

A. Under RICO, the Filing of a Lawsuit Did Not Place CSXT on Inquiry Notice That Appellees Had Engaged in Fraud

The district court held that CSXT should have known that it had been injured when the Peirce Firm filed each lawsuit against CSXT (or soon thereafter), because it was on inquiry notice “of the probability of fraud” and a reasonable investigation of the medical evidence available to it would have uncovered the fraud. JA 698. That holding is squarely at odds with decisions from this Court and the West Virginia Supreme Court of Appeals regarding when a plaintiff is under an obligation to investigate the possibility that he has been injured by a hitherto-undetected fraud.

Inquiry notice is, of course, triggered by “evidence of the possibility of fraud,” and is not delayed simply because there has not been a “complete exposure of the alleged scam.” *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993). The cause of action accrues “when the plaintiff should have discovered facts that would provoke a person of ordinary prudence to inquiry.” *Childers Oil Co. v. Exxon Corp.*, 960 F.2d 1265, 1972 (4th Cir. 1992).

Whether a “person of ordinary prudence” would undertake an inquiry depends to a large extent on the facts of each case and thus is virtually never appropriate for adjudication in connection with a Rule 12(b)(6) motion to dismiss:

[W]here a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is *a question of fact to be answered by the jury*.

Id. (emphasis added).

In a RICO case, this Court determined that a RICO plaintiff should not be charged with inquiry notice unless the facts were such that a “reasonable person” would have undertaken an investigation. *Bausch v. Philatelic Leasing, Ltd.*, 1194 U.S. App. LEXIS 22289 (4th Cir. 1994) (unpublished). As the Court explained, in the context of RICO:

“A plaintiff who has learned of facts which would cause a reasonable person to inquire further must proceed with a reasonable and diligent investigation, and is charged with the knowledge of all facts such an investigation would have disclosed.”

Id. (quoting *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988)).

In opposition to the motion to dismiss, CSXT introduced substantial evidence that a reasonable person in CSXT’s shoes would *not* have undertaken an investigation sufficient to uncover Appellees’ fraud. CSXT alleged that Appellees carried out their scheme in a manner designed to ensure that a reasonable person would decide not to investigate – in particular, by overwhelming CSXT with a massive number of lawsuits. CSXT’s amended complaint asserted that the cost of undertaking a detailed investigation of every asbestosis claim arising out of Appellees’ scheme rendered such investigations unreasonable – particularly because the Peirce firm was willing to settle many of its suits for less than what it would cost CSXT to defend and investigate the suits.

WLF’s three decades of experience as a participant in asbestos liability litigation corroborates CSXT’s assertion that the massive number of asbestos liability claims made it unreasonable for CSXT to undertake the extensive investigation that would have been necessary to unmask Appellees’ fraud. And

even if CSXT had been tempted to make the massive investment of time and resources necessary to investigate Appellees' operations, it likely would have encountered resistance from courts, which were just as overwhelmed as were defendants by asbestos litigation and were pressuring defendants to settle quickly as a means of unclogging their dockets. *See, e.g., The Asbestos Litigation Crisis Continues – It's Time for Congress to Act: Hearing Before the Sen. Comm. On the Judiciary* (Mar. 5, 2003) (statement of asbestos plaintiffs' lawyer Steven Kazan), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=617&wit_id=1678 (the massive number of suits filed by asbestos claimants with minimal impairments are choking the courts and preventing them from providing compensation to those genuinely injured by asbestos diseases). A recent report from the RAND Institute for Civil Justice concluded that the economics of mass torts, such as asbestos liability claims, virtually compels defendants to settle without undertaking a thorough review of every claim, even when the claimant exhibits minimal physical impairments:

Plaintiffs can attempt to overwhelm defendants with claims to force defendants to settle with little attention paid to the merits of the claims. It can be extremely costly for defendants to investigate the merits of a substantial proportion of the claims, and some may conclude it is cheaper, at least in the short run, to settle. Judges have an incentive to push for rapid settlements that clear their overloaded dockets.

Stephen J. Carroll, et al., *The Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica* (RAND Inst. For Civil Justice 2009), available at http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf.

Under these circumstances, there is a substantial basis for concluding that a reasonable person in the early 2000's would not have undertaken the extensive investigation that would have been necessary to uncover Appellees' fraud. At the very least, the district court erred in deciding the RICO statute of limitations issue as a matter of law under Rule 12(b)(6).

B. West Virginia's "Injury Discovery" Rule Is Substantially Similar to the RICO "Injury Discovery" Rule and, for Similar Reasons, The Filing of a Lawsuit Against CSXT Did Not Place CSXT on Inquiry Notice of Its Common Law Fraud Claims

All agree that CSXT's common law fraud claims (Counts 3 and 4) are governed by West Virginia's two-year "catch-all" statute of limitations, West Virginia Code § 55-2-12. West Virginia applies an "injury discovery" accrual rule to fraud claims, akin to the "injury discovery" rule applied in RICO cases. *Stemple v. Dobson*, 400 S.E. 2d 561, 565 (W. Va. 1990).

The West Virginia Supreme Court of Appeals has articulated clear rules regarding when a tort plaintiff is on inquiry notice of his injury:

[U]nder the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know,

(1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, (3) that the conduct of that entity had a causal relation to his injury. This rule tolls the statute of limitations until a plaintiff, acting as a reasonable, diligent person, discovers the essential elements of a possible cause of action, that is, discovers duty, breach, causation, and injury.

Gaither v. City Hospital, Inc., 199 W. Va. 706, 714 (1997). The court added that “[i]n the great majority of cases, the question of whether a claim is barred by the statute of limitations is a question of fact for the jury.” *Id.* at 714-15.

The West Virginia Supreme Court reaffirmed its *Gaither* decision just two months ago, in a case alleging common law fraud. *Dunn v. Rockwell*, __ W.V. __, 2009 W. Va. LEXIS 127, at *25 (Nov. 24, 2009).

The district court held that the limitations period on CSXT’s common law fraud claims began to run the day that each of the nine underlying lawsuits was filed. JA 700. It did so without any reference to the rule established by *Gaither* – which appears to be somewhat more plaintiff-friendly than the RICO accrual rule – and without any consideration of whether Appellees had satisfied any of the *Gaither* factors: knowledge of injury, the identity of a party whose conduct may have been tortious, and a causal relationship between that conduct and the injury. Given that, as explained above in connection with the discussion of RICO, a reasonable person in CSXT’s position would not have undertaken the

extensive investigation in 2001-2005 that would have been necessary to uncover Appellees' fraud, there is no basis for asserting that Appellees have met *Gaither's* somewhat stricter test for establishing that the statute of limitations on the common law fraud claims began to run just as soon as the nine underlying lawsuits were filed.

C. CSXT Was on Inquiry Notice Following Judge Jack's 2005 Decision

CSXT has proposed 2005 – when Judge Jacks wrote her devastating indictment of the mass torts bar in general and Dr. Harron in particular – as the date by which it was on inquiry notice that it might have been defrauded and that it might have been injured by racketeering activity. *See In re Silica Prod. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

WLF concurs in that proposal. Following Judge Jack's decision, CSXT had reason to suspect that Dr. Harron, who was the B reader for each of the nine lawsuits that were the subject of the first amended complaint, might have misbehaved as badly in his dealings with CSXT as he had in the cases described by Judge Jack.

The first amended complaint was filed on July 5, 2007. That date was considerably less than four years after Judge Jack's decision, and thus the RICO

claims (Counts 1 and 2) are not time-barred. Whether the common law fraud claims (with the exception of the claim related to the Earl Baylor complaint) are time-barred depends on when CSXT learned of Judge Jack's decision and her scathing criticism of Dr. Harron's integrity. Under West Virginia's two-year statute of limitations, the common law fraud claims are time-barred only if CSXT became aware of the decision before July 5, 2005, a date two years before the first amended complaint was filed. Judge Jack issued her decision on June 30, 2005. Thus, on remand to the district court, resolution of the statute of limitations issue will depend on the fact-finder's determination regarding whether CSXT became aware of the details of the Judge Jack decision (and thus were placed on inquiry notice) during the first four days following issuance of the decision.

II. MERELY BEING NAMED IN A LAWSUIT IS NOT, BY ITSELF, THE "INJURY" THAT MUST BE "DISCOVERED" UNDER THE INJURY DISCOVERY RULE

The district court never fully explained its rationale for determining why it deemed the filing of each of the nine underlying lawsuits as sufficient to start the clock ticking under the "injury discovery" rule. It may be that the district court concluded that being named in a lawsuit was the relevant "injury," on the theory that any expenses one is forced to incur involuntarily (such as the costs of

defending a lawsuit) constitutes the requisite “injury.”

There is no support in either federal or West Virginia case law for such an expansive definition of the “injury” portion of the “injury discovery” rule. To the contrary, this Court explicitly held in *Bausch* that a RICO cause of action based on fraud allegations does not accrue until the plaintiffs have evidence of the possibility that they were the victims of fraud. *Bausch*, 1994 U.S. App. LEXIS 22289 at *10-*11. In determining that the accrual date was the date in 1983 on which the IRS announced that it was challenging the legitimacy of tax shelters purchased by the plaintiffs from the defendants, the Court did not deem it relevant that the plaintiffs had purchased the tax shelters in 1982. Although the plaintiffs clearly knew in 1982 that they had been “injured” in the sense that they had given funds to the defendants (with no guarantee of its return), it was only after they became aware in 1983 of facts suggesting that they had been defrauded that inquiry notice kicked in and the RICO limitations period began to run. *Id.* at *13-*14. Similarly, awareness that one has incurred expenses in connection with defending a lawsuit cannot be deemed “discovery” of the “injury” sufficient to start the clock ticking under the “injury discovery” rule, in the absence of any reason to believe that those expenses were incurred as a result of fraud.

Moreover, it has long been established that a limitations period can never begin running before all the elements of one's cause of action have been satisfied; otherwise, the limitations period might expire before one's lawsuit is sufficiently ripe for judicial review. *See, e.g., United States v. Kubrick*, 444 U.S. 109, 120-22 (1979); *Urie v. Thompson*, 337 U.S. 163, 169-170 (1949). In the case of common law fraud, the cause of action is not complete until the plaintiff has reasonably relied to his detriment on the fraud, and being named in a lawsuit hardly constitutes reliance. Nor would mounting a defense to the lawsuit constitute reliance; a defendant that incurs the expenses necessary to respond to a lawsuit does so to preclude entry of a judgment against him, not because he is relying on a belief that the plaintiff is acting honestly and in good faith.

Similarly, a civil RICO claim that (as here) is based on mail fraud or wire fraud is not complete until the fraud has caused injury that is a direct result of someone's reliance on the alleged fraud. *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131, 2142, 2143 (2008). Accordingly, the filing of asbestos liability suits by the Peirce Firm and CSXT's subsequent payment of fees to defend the suit did not by themselves trigger the limitations period on CSXT's RICO claim, in the absence of anyone's reliance on Appellees' fraud. The district court's decision that the mere filing of the lawsuits triggered the

limitations period was wrong as a matter of law.

Moreover, the district court's decision cuts against a long-standing policy that discourages counter-claims filed by defendants who deem themselves to have been unfairly targeted. While many defendants wish to file "malicious prosecution" counter-claims against their courtroom tormenters, the law has wisely required that malicious prosecution claims be delayed until after the initial lawsuit has been decided in favor of the defendant. *See, e.g., Preiser v. McQueen*, 177 W. Va. 273, 275 (1985) ("the plaintiff in an action for malicious prosecution must show that the proceedings in question were terminated in his or her favor"); RESTATEMENT (SECOND) OF TORTS, *Wrongful Use of Civil Proceedings* § 674 (1977). But if defendants who believe that a lawsuit is fraudulent will risk having their fraud claims deemed time-barred unless they act immediately, one can reasonably anticipate a sharp increase in counter-claims alleging fraud – a costly development that would provide a financial benefit to litigators but virtually no one else.

III. THE DISTRICT COURT'S REJECTION OF THE "SEPARATE ACCRUAL" RULE IS WITHOUT SUPPORT FROM THIS COURT AND EVERY OTHER FEDERAL APPEALS COURT

In denying CSXT's motion for leave to file a second amended complaint, the district court held that the allowing the amendment would be futile because

the new claims that CSXT sought to raise were time-barred. The court said that under RICO's injury discovery rule, CSX was charged with notice of "its injury" by March 2000 when the first allegedly baseless and fraudulent lawsuit was filed. JA 792-93. CSXT noted that many of the 11 newly pleaded lawsuits were filed within four years of the date of its proposed second amended complaint and argued that its new claims were timely under the "separate accrual" rule. The district court held that this Court does not accept the "separate accrual" rule, but rather holds that any new injuries suffered by a RICO plaintiff are governed by the same accrual date that governs its first injury. JA 794.

CSXT's brief thoroughly explains why the district court's legal analysis was incorrect; WLF will not repeat those arguments here. We write separately only to note that no appellate court has ever suggested that there is any tension between the "injury discovery" rule and the "separate accrual" rule. Indeed, we note that the Supreme Court in *Klehr* spoke approvingly both of the "injury discovery" rule and the "separate accrual" rule without ever suggesting that there was any inconsistency between the two. *Klehr*, 521 U.S. at 190-91. Every appeals court that has addressed the issue in the RICO context has adopted the separate accrual rule. Finally, when it adopted the "injury discovery" rule for RICO cases in *Pocahontas Supreme Coal*, this Court did not explicitly address

the “separate accrual” rule in a RICO context. But *Pocahontas Supreme Coal* involved not only a RICO claim but also an antitrust law claim, and the Court adopted the “separate accrual” rule as applied to the antitrust claim. 828 F.2d at 218 (“Even when defendants continue to perform overt acts in furtherance of an antitrust conspiracy within the statutory period, plaintiffs’ injuries also must fall within the limitations period in order not to be time-barred.”).

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court reverse the district court's grant of Appellees' motion to dismiss on statute of limitations grounds, and its denial of CSXT's motion for leave to file a second amended complaint.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 09-2135 *CSX Transportation, Inc. v. Robert V. Gilkison*

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Dated: January 19, 2010

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I hereby certify that on this 19th day of January, 2010, a true copy of the foregoing brief was filed with the Court Clerk through the CM/ECF system, which will send notice of such filing to all registered CM/ECF users. In addition, per Local Rule 31(d), eight bound copies of the foregoing brief were mailed to the Court Clerk and two copies were mailed to the following counsel of record:

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