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Fraudulent Concealment, Self-Concealing Conspiracies, and the Clayton Act

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INTRODUCTION

Section 4B of the Clayton Act provides a four-year statute of limitation for all civil antitrust actions brought under the Act.[1] The doctrine of fraudulent concealment, however, allows courts to toll this statute of limitation when the defendant conceals the acts giving rise to the cause of action. This doctrine prevents wrongdoers from unfairly using statutes of limitation to escape sanction.

Although the judiciary originally created this exception for fraud actions,[2] the Supreme Court later expanded the doctrine to be "read into every federal statute of limitation."[3] In antitrust cases, courts have required that the plaintiff plead and prove three elements in order to toll the statute of limitation: (1) the defendant concealed the conduct that constitutes the cause of action; (2) the defendant's concealment prevented the plaintiff from discovering the cause of action; and (3) the plaintiff exercised due diligence in attempting to discover the cause of action.[4] Application of the first element, the concealment requirement, has created uncertainty and division among the courts.[5] Specifically, the courts disagree as to whether the plaintiff must show that the defendant concealed the wrong with affirmative acts beyond those necessary to create an antitrust violation, or whether it is sufficient for the plaintiff to show that the defendant committed a "self-concealing" wrong.[6]

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1. Clayton Act § 4B, 15 U.S.C § 15b (1988). Section 4B states: "Any action to enforce any cause of action under sections 15, 15a or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued." Section 15 provides a private civil cause of action for violations of all federal antitrust laws; section 15a provides the federal government with a civil cause of action; and section 15c provides state attorneys general with a civil cause of action.

Although a part of the Clayton Act, the four-year statute of limitation governs violations of all "antitrust laws," which include the Clayton Act, 15 U.S.C. §§ 12-27 (1988), the Sherman Act, 15 U.S.C. §§ 1-7 (1988), and the Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1988); *see also* Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375-76 (1958); PHILLIP AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES, § 159, at 75 n.82 (3d ed. 1981).

2. Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349-50 (1875).

3. Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946).

4. *See, e.g.*, Pinney Dock & Transp. Co. v. Pennsylvania Cent. Corp., 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988); Guido Saveri & Lisa Saveri, *Pleading Fraudulent Concealment in an Antitrust Price Fixing Case: Rule 9(b) v. Rule 8*, 17 U.S.F. L. REV. 631, 635, 637 (1983).

5. *See infra* section I.C.

6. *See infra* section I.C.

This Note argues that courts should apply a self-concealment standard to section 4B of the Clayton Act rather than require a showing of additional affirmative acts. Part I examines the history of the fraudulent concealment doctrine and its application to antitrust cases. It identifies three different standards used by courts to satisfy the concealment element and finds that courts apply the doctrine inconsistently. Part II analyzes the relationship between the fraudulent concealment doctrine and the self-concealment standard in antitrust cases by examining the judicial development of the doctrine and Congress' intent in enacting section 4B. Part II concludes that the self-concealment standard is an integral part of the fraudulent concealment doctrine and thus should apply to section 4B cases. Part III addresses the policies behind statutes of limitation generally and section 4B specifically, and finds that the self-concealment standard best achieves these policy goals. This Note concludes that courts should toll the antitrust limitation period when the defendant either has affirmatively concealed his wrong or has committed a wrong that inherently conceals itself.

I. FRAUDULENT CONCEALMENT AND THE CLAYTON ACT

This Part reviews the evolution of the fraudulent concealment doctrine, evaluates the courts' application of the doctrine to the antitrust laws, and examines the disagreement among the courts on how to apply the doctrine. Section I.A analyzes the history, language, and purpose of section 4B of the Clayton Act. Section I.B traces the common law origins and development of the fraudulent concealment doctrine, discussing the key Supreme Court cases applying the doctrine over the past 120 years. Section I.C analyzes courts' recent application of the fraudulent concealment doctrine to section 4B actions. In particular, this section sets out three different standards that courts have used for the concealment requirement and discusses the confusion among the courts in choosing among these standards. This Part concludes that the current application of the fraudulent concealment standard in section 4B cases creates uncertainty and confusion in the courts, thereby defeating the underlying goal of section 4B.

A. *Section 4B of the Clayton Act*

Prior to 1955, the Clayton Act did not include a statute of limitation, and federal courts relied on state law to determine limitation periods for private antitrust actions brought under the Clayton Act.[7]

7. *See* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906); S. REP. No. 619, 84th Cong., 1st Sess. 3 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2328, 2330 [hereinafter SENATE REPORT] ("While this is a federally accorded right of action, at the present time private treble-damages cases are governed by State statutes of limitation."); Note, *Clayton Act Statute of Limitations and Tolling by Fraudulent Concealment*, 72 YALE L.J. 600, 601 (1963) [hereinafter

Because limitation periods varied among the states,[8] plaintiffs engaged in forum shopping, creating uncertainty for potential defendants.[9] In addition, within a given state, parties were confused as to which statute of limitation applied to antitrust actions.[10] To establish uniformity and eliminate "confusion and discrimination,"[11] Congress added section 4B to the Clayton Act in 1955.[12] Section 4B states that "[a]ny action to enforce any cause of action under [the antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued."[13] The statutory language includes no provision for extending the period.[14]

Note, *Tolling by Fraudulent Concealment*] ("Prior to January 7, 1956 . . . various state statutes were used to determine the applicable period of limitations.").

8. Courts applied statutes of limitation ranging from one to twenty years. SENATE REPORT, *supra* note 7, at 2331.

9. *See id.* at 2330-31 ("[A] plaintiff injured in several jurisdictions is permitted to select as his forum the State with the most favorable statute. In such cases, the defendant remains in constant jeopardy until the longest period of limitations has transpired."); *id.* at 2333 (letter from Attorney General Herbert Brownell) ("Currently, private antitrust action is needlessly complicated .... [V]arying periods of limitation encourage 'forum shopping' and seem ill-suited for enforcement of a uniform Federal policy.").

10. *Id.* at 2331 ("Even when the State whose statute of limitations is applicable has finally been ascertained, there remains another hurdle to be overcome, namely the selection of the appropriate law of the State .... [C]onfusion as to the correct limitation period abounds."). For an example of the confusion and uneven treatment of defendants before the enactment of section 4B, see Winkler-Koch Engg. Co. v. Universal Oil Prods. Co., 100 F. Supp. 15 (S.D.N.Y. 1951). In that case, which involved multiple defendants, the court applied a New York six-year limit to some claims, a New York three-year limit to others, a Kansas three-year limit to others, and a Kansas two-year limit to the rest. 100 F. Supp. at 27-28.

11. SENATE REPORT, *supra* note 7, at 2331 ("It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our Federal laws.").

12. Clayton Act Amendments, ch. 283, § 1, 69 Stat. 283 (1955) (codified as amended at 15 U.S.C. § 15b (1988)).

13. 15 U.S.C. § 15b (1988).

14. At the same time that Congress enacted section 4B of the Clayton Act, it also enacted section 5(i) (formerly section 5(b)), which provides a limited tolling mechanism for private causes of action when the government brings an antitrust action based on the same conduct. Clayton Act Amendments, ch. 283, § 2, 69 Stat. 283 (1955) (codified as amended at 15 U.S.C. § 16(i) (1988)). Section 5(i) provides:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

15 U.S.C § 16(i) (1988). *See* Charles E. Stewart, *The Government Suspension Provision of the Clayton Act's Statute of Limitations: For Whom Does It Toll?,* 60 ST. JOHN'S L. REV. 70 (1985) (discussing section 5(i)); Grant W. Wiprud, *Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles,* 57 NW. U. L. REV. 29, 41-47 (1962) (same); Note, *Tolling by Fraudulent Concealment, supra* note 7, at 605 (same).

B. *The Fraudulent Concealment Doctrine*

Even without any basis in statutory language, courts have long been willing to toll statutes of limitation. The doctrine of fraudulent concealment has its roots in the much-cited case of *Bailey v. Glover.*[15] In *Bailey,* an assignee in bankruptcy filed a bill to set aside certain conveyances to Glover's relatives.[16] The applicable statute of limitation under the Bankruptcy Act of 1867[17] provided that the assignee could not bring any action more than two years after the cause of action accrued. The Supreme Court tolled the statute of limitation because the defendant's concealment of the fraudulent conveyance prevented the plaintiff from discovering the injury creating the cause of action.[18] The Court stated:

> when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing . . . .[19]

Courts have relied on this statement as the basis for the modern fraudulent concealment doctrine.[20] While the fraudulent concealment doctrine has grown in importance since *Bailey,* neither the Supreme Court nor commentators have given it extensive attention.[21]

In 1921, the Supreme Court extended the *Bailey* doctrine beyond the Bankruptcy Code. In *Exploration Co. v. United States,*[22] the government brought an action to cancel land patents, claiming that the defendant secretly and impermissibly obtained the contested patents. A six-year statute of limitation with no tolling provision appeared to bar the cause of action.[23] The Supreme Court held, however, that the

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15. 88 U.S. (21 Wall.) 342 (1875); *see* Andrew M. Horton, Note, *Intent To Conceal: Tolling the Antitrust Statute of Limitations Under the Fraudulent Concealment Doctrine,* 64 GEO. L.J. 791, 797 (1983) ("Virtually all recent decisions and commentaries analyzing the history and applicability of the fraudulent concealment doctrine advert to *Bailey v. Glover* as the leading federal case on the doctrine.") (footnote omitted).

16. *Bailey,* 88 U.S. (21 Wall.) at 343.

17. Act of Mar. 2, 1867, ch. 176, § 2, 14 Stat. 517 (currently codified as amended at 11 U.S.C. § 108(a)-(b) (1988)).

18. *Bailey,* 88 U.S. (21 Wall.) at 349-50.

19. 88 U.S. (21 Wall.) at 349-50.

20. John P. Dawson, *Fraudulent Concealment and Statutes of Limitation,* 31 MICH. L. REV. 875 (1933); Saul B. Shapiro, *Citizen Trust and Government Cover-up: Refining the Doctrine of Fraudulent Concealment,* 95 YALE L.J. 1477, 1477 n.1 (1986) ("Modern fraudulent concealment doctrine is usually traced back to *Bailey v. Glover* . . . .").

21. *See* Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?,* 71 GEO. L.J. 829, 833 (1983).

22. 247 U.S. 435 (1918).

23. Act of Mar. 3, 1891, ch. 559, § 8, 26 Stat. 1093 (1891) (currently codified at 43 U.S.C. § 1166 (1988)).

fraudulent concealment doctrine tolled the statutory limitation.[24] Although the statute did not expressly provide for tolling, the *Bailey* doctrine was well settled at the time the statute was enacted, and the Court thus presumed it was part of the statute.[25]

Although the Supreme Court explicitly expanded the *Bailey* doctrine beyond the Bankruptcy Act in *Exploration Co.*, the Court failed to define the scope of the doctrine.[26] Twenty-five years later, the Supreme Court addressed this issue in *Holmberg v. Armbrecht.*[27] *Armbrecht* involved a suit in equity to enforce the Federal Farm Loan Act[28] against the shareholders of a joint stock land bank. The Court, without dissent,[29] tolled the relevant limitation period and stated in dictum that the fraudulent concealment doctrine "is read into every federal statute of limitation."[30] In the forty-seven years since *Armbrecht,* the Court has left it to the lower courts to determine how to read the doctrine into section 4B of the Clayton Act.

C. *Fraudulent Concealment Applied to Section 4B of the Clayton Act*

Despite the language in *Armbrecht,* defendants in early section 4B cases often contested the application of the fraudulent concealment doctrine to the Clayton Act.[31] Although several district courts refused to apply the doctrine at first,[32] it is now well settled that courts may use the fraudulent concealment doctrine to toll the Clayton Act's

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24. *Exploration Co.*, 247 U.S. at 449; *see also* Marcus, *supra* note 21, at 840 (noting that the Supreme Court "had no trouble" applying the fraudulent concealment doctrine).

25. 247 U.S. at 449.

26. *See* Marcus, *supra* note 21, at 840 ("There remained, however, the question whether *Bailey v. Glover* should apply to the multitude of federal statutes that did not specify limitations periods."); Note, *Fraudulent Concealment as Tolling the Antitrust Statute of Limitations,* 36 FORDHAM L. REV. 328, 329 (1967) [hereinafter Note, *Tolling the Antitrust Statute*] ("[After *Exploration Co.*] for many years it was argued that the fraudulent concealment doctrine applied only to actions grounded in fraud.").

27. 327 U.S. 392 (1946).

28. Federal Farm Loan Act of 1916, ch. 245, § 16, 39 Stat. 360, 374-75, *repealed by* Farm Credit Act of 1971, § 5.26(a), 85 Stat. 583, 624-24.

29. Justice Jackson took no part in the decision and Justice Rutledge concurred in a brief opinion. *Ambrecht,* 327 U.S. at 398 (Rutledge, J., concurring).

30. 327 U.S. at 397.

31. *E.g.*, Public Serv. Co. v. Allen-Bradley Co., 1962 Trade Cases (CCH) 70,549 (D. Colo. 1962) (mem.) (rejecting defendant's argument that the unambiguous language of section 4B created an absolute tolling provision); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 210 F. Supp. 557 (N.D. Ill. 1962) (same) *affd.*, 315 F.2d 558 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963); United States v. General Elec. Co., 209 F. Supp. 197 (E.D. Pa. 1962) (same).

32. *E.g.*, Brigham City Corp. v. General Elec. Corp., 210 F. Supp. 574, 577 (D. Utah 1962) (refusing to toll the section 4B limitation based on "mere dicta" of *Holmberg v. Armbrecht*), *revd.*, 315 F.2d 306 (10th Cir.), *cert. denied,* 374 U.S. 809 (1963); Kansas City v. Federal Pac. Elec. Co., 210 F. Supp. 545, 549-50 (W.D. Mo. 1962) (holding, with reservation, that Congress did not intend to allow tolling of section 4B by fraudulent concealment), *revd.*, 310 F.2d 271 (8th Cir. 1962), *cert. denied,* 371 U.S. 912 (1962), *and cert. denied,* 373 U.S. 914 (1963).

limitation period.[33] In order to toll section 4B, a plaintiff must plead and prove the three elements common to all fraudulent concealment claims.[34] However, courts disagree as to what actions satisfy the requirement that defendants "conceal" the conduct constituting the cause of action.[35]

In considering the concealment element, courts have identified two types of concealment: (a) concealment by affirmative acts; and (b) self-concealment.[36] The Court of Appeals for the D.C. Circuit pro-

33. Every federal circuit court that has considered the issue has held that the fraudulent concealment doctrine can be used to toll the section 4B limitation period. *See, e.g.*, Texas v. Allan Constr. Co., 851 F.2d 1526 (5th Cir. 1988); Colorado v. Western Paving Constr. Co., 841 F.2d 1025 (10th Cir. 1988) (per curiam, en banc), *affg.* 630 F. Supp. 206 (D. Colo. 1986), *cert. denied*, 488 U.S. 470 (1988); New York v. Hendrickson Bros., Inc., 840 F.2d 1065 (2d Cir.), *cert. denied*, 488 U.S. 848 (1988); Pinney Dock & Transp. Co. v. Pennsylvania Cent. Corp., 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988); Berkson v. Del Monte Corp., 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); Weinberger v. Retail Credit Co., 498 F.2d 552 (4th Cir. 1974); Westinghouse Elec. Corp. v. City of Burlington, 326 F.2d 691 (D.C. Cir. 1964) (per curiam); Allis-Chalmers Mfg. Co. v. Commonwealth Edison Co., 315 F.2d 558 (7th Cir. 1963); Kansas City v. Federal Pac. Elec. Co. 310 F.2d 271 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962), *and cert. denied*, 373 U.S. 914 (1963); *see* Marcus, *supra* note 21, at 831 n.7 (" 'The cases that have applied this [tolling] principle to antitrust cases . . . are too numerous to require citation.' ") (quoting Norton-Children's Hosps., Inc. v. James E. Smith & Sons, Inc., 658 F.2d 440, 445 (6th Cir. 1981)). The doctrine has been applied broadly outside the antitrust arena as well. *See* Note, *Tolling by Fraudulent Concealment*, *supra* note 7, at 601 ("The doctrine applies, however, to all claims, regardless of their nature, as long as the requisite element of concealment is present.").

A few commentators, however, have suggested that courts should not apply the doctrine to toll section 4B because the doctrine creates confusion and is inconsistent with the language and legislative history of section 4B. Francis R. Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 508-12 (1979); W. Glenn Opel, Note, *A Reevaluation of Fraudulent Concealment and Section 4B of the Clayton Act*, 68 TEXAS L. REV. 649 (1990). This view, however, has received no judicial or legislative support.

34. The three elements are: (1) the defendant wrongfully concealed the conduct that constitutes the cause of action; (2) the defendant's concealment prevented the plaintiff from discovering the cause of action; and (3) the plaintiff exercised due diligence in attempting to discover the cause of action. *See, e.g.*, Pinney Dock & Transp. Co. v. Pennsylvania Cent. Corp., 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988); Saveri & Saveri, *supra* note 4, at 635, 637.

Many courts set out the test to include only two elements, implicitly eliminating the second element. *See Allan Constr.*, 851 F.2d at 1528 ("[S]econd, 'that [the plaintiff] failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim.' ") (quoting *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980)). There is no practical difference between the two formulations, however, because this formulation merely combines the second and third elements into a single one.

35. *See* Saveri & Saveri, *supra* note 4, at 637-38. *Compare Allan Constr.*, 851 F.2d at 1528-31 (requiring affirmative acts of concealment to satisfy the concealment requirement in bid-rigging case) *with Hendrickson Bros.*, 840 F.2d at 1083-85 (allowing either self-concealment or affirmative acts of concealment to satisfy the concealment element).

The courts also have disagreed over the application of the third element. *Compare* Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (holding that once the first two elements are proven, the defendant has the burden of proving that the plaintiff failed to exercise due diligence) *with Allan Constr.*, 851 F.2d at 1533 (holding that plaintiff has the burden of proving all three elements). This issue is beyond the scope of this Note, however. For a discussion of this dispute, see Marcus, *supra* note 21, at 874-901.

36. *See Allan Constr.*, 851 F.2d at 1528-33 (discussing the two standards and requiring affirmative acts of concealment); *Hendrickson Bros.*, 840 F.2d at 1083-85 (discussing the two standards and allowing tolling for either self-concealment or affirmative acts of concealment); Note, *Tolling the Antitrust Statute*, *supra* note 26, at 331. The Supreme Court noted the existence of

vided an example to illustrate the difference between these two means of concealment: The theft of an antique vase from its owner's house contains no element of concealment; the thief does not conceal the crime even though the thief is likely to attempt to conceal his involvement in the crime. If the thief steals the antique vase and replaces it with a worthless copy, the thief has taken an affirmative act to conceal the fact that a crime was committed. The wrong is the theft of the vase; the replacement is an act of concealment that is separate from the crime itself since it is not a necessary element of the wrong. On the other hand, if the thief sells an imitation antique vase as a real vase, the thief commits a self-concealing wrong. The thief in this case does not intend merely to hide the wrong; rather, concealment is an essential element of the wrong — without it there can be no crime.[37]

In *Bailey v. Glover,* the Supreme Court held that either concealment by affirmative acts or self-concealment could toll the statute of limitation.[38] However, because *Bailey* involved an underlying action for fraud, some courts have hesitated to apply the holding in the non-fraud context of the antitrust laws. As a result, federal courts have applied three different standards[39] to satisfy the concealment element of the fraudulent concealment doctrine: (1) the separate-and-apart standard;[40] (2) the self-concealment standard;[41] and (3) the affirmative acts standard.[42]

Illegal bid rigging, a violation of the federal antitrust laws' prohibition on price fixing, provides a good example of how the three standards differ. Bid rigging can arise when one party, often a state or local agency, solicits competitive bids for a project.[43] Absent a bid-rigging scheme, each potential supplier interested in the job will independently submit a bid based on the supplier's expected costs and profit margin. If the party seeking the bid receives an adequate

two types of concealment in Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1875) ("when the fraud has been concealed, or is of such character as to conceal itself").

37. *Wilson,* 737 F.2d at 33 n.102.

38. 88 U.S. (21 Wall.) at 349-50; *see* Note, *Tolling the Antitrust Statute, supra* note 26, at 331 ("The *Bailey* case suggested that tolling can result from either an affirmative effort to maintain secrecy or from conduct which is insusceptible of discovery and which the defendant may have taken no particular steps to conceal.").

39. Courts applying the fraudulent concealment doctrine do not necessarily identify the standards by the names that this Note uses. This Note adopts the terminology used by Opel, *supra* note 33, at 654.

40. *See infra* section I.C.1.

41. *See infra* section I.C.2.

42. *See infra* section I.C.3.

43. *See* Texas v. Allan Constr. Co., 851 F.2d 1526, 1530 (5th Cir. 1988) (involving a state agency seeking bids for highway construction project); Note, *The Admissibility and Scope of Guilty Pleas in Antitrust Treble Damage Actions,* 71 YALE L.J. 684, 692-93 (1962) [hereinafter Note, *Admissibility of Guilty Pleas*] (discussing bid-rigging cases in which federal agencies, state agencies, local agencies, and electric utility companies sought bids).

number of bids, it then can choose the best offer, secure that it has received a competitive price.

When suppliers form a bid-rigging conspiracy, however, they do not submit competitive bids. Rather, the potential bidders predetermine which supplier will win the bid.[44] The "winner" submits an inflated bid, and the "losers" submit complementary bids that are higher than the winning bid. In addition, all bidders may have to submit affidavits stating that they did not collude when determining bids. The complementary bids and the noncollusion affidavits give the bidding the appearance of a regular, competitive bidding process. In a successful scheme, the appearance of regularity conceals the antitrust violation from the party seeking the bid. Whether a court will toll section 4B because of this concealment depends largely on what concealment standard the court applies.

1. *The Separate-and-Apart Standard*

Courts that follow the separate-and-apart standard require the plaintiff to show that the defendant concealed the antitrust violation through affirmative acts committed wholly apart from the underlying illegal activity.[45] To date, only the Tenth Circuit has adopted this standard.[46] In *Colorado v. Western Paving Construction Co.*, the State of Colorado filed a civil suit alleging that the defendant conspired to rig bids on state highway projects.[47] Because the alleged antitrust violations occurred thirteen years before the state filed suit, the state argued that the fraudulent concealment doctrine should toll the section 4B statute of limitation.[48] The state argued that the defendant concealed the wrong by submitting a false affidavit denying its involvement in collusive activities; the defendant had submitted a complementary bid to give the bidding an appearance of regularity and maintained a secret list of competitors in the conspiracy.[49]

In considering whether the defendant's actions met the concealment requirement, the district court analyzed the history of the fraudulent concealment doctrine beginning with *Bailey v. Glover.* The court interpreted *Bailey* as providing two different fraudulent concealment

44. The conspirators can select the "winner" formally or informally. For example, in the electrical manufacturers' bid-rigging conspiracies prosecuted in the early 1960s, the conspirators rotated winners based on a predetermined division of the market among the competitors. *See* Note, *Admissibility of Guilty Pleas, supra* note 43, at 692 n.44.

In a less formal arrangement, one bidder may ask competitors to allow him to win a given bid in exchange for the promise to do likewise in the future. *See* Colorado v. Western Paving Constr. Co., 833 F.2d 867, 870 (10th Cir. 1987), *withdrawn,* 841 F.2d 1025 (10th Cir.) (per curiam, en banc), *cert. denied,* 488 U.S. 870 (1988).

45. *See, e.g., Western Paving*, 841 F.2d 1025; *see also* Opel, *supra* note 33, at 654-56.

46. *Western Paving*, 841 F.2d 1025.

47. Colorado v. Western Paving Co., 630 F. Supp. 206 (D. Colo. 1986).

48. *Western Paving,* 630 F. Supp. at 207-08.

49. 630 F. Supp. at 210.

tests: one when the underlying cause of action was grounded in fraud and a separate test when the action was not grounded in fraud.[50] In actions based on fraud, the plaintiff must prove *either* that the plaintiff exercised due diligence in an attempt to discover the crime *or* that the defendant concealed the wrong.[51] Thus, if the plaintiff can prove due diligence, there is absolutely no concealment requirement. On the other hand, the district court held that in actions that are not grounded in fraud, including antitrust actions, the plaintiff must prove *both* due diligence and "affirmative acts of concealment."[52] Consequently, where there is a concealment requirement in nonfraud cases, the plaintiff only can meet it under this standard by showing affirmative acts of concealment, not by showing that the defendant's actions were by their nature self-concealing.

Applying the affirmative acts requirement to the facts of the case, the district court in *Western Paving* held that the defendant's acts did not constitute concealment.[53] The submission of complementary bids and the maintenance of confidential bid lists did not toll the statute of limitation because they were "acts taken in carrying out the conspiracy itself."[54] Therefore, the court found that the plaintiff failed to meet its burden of proving affirmative acts separate-and-apart from the underlying wrong.[55]

Holding that bid-rigging schemes are per se self-concealing, a Tenth Circuit panel overturned the district court.[56] However, upon rehearing, the Tenth Circuit sitting en banc vacated the panel opinion and affirmed the district court.[57] Thus, in the Tenth Circuit, a plaintiff must demonstrate separate affirmative acts of concealment in order to toll section 4B.

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50. 630 F. Supp. at 208.

51. 630 F. Supp. at 208.

52. 630 F. Supp. at 208.

53. 630 F. Supp. at 211.

54. 630 F. Supp. at 210. The state also argued that the defendant affirmatively concealed the antitrust violation by submitting a false affidavit denying involvement in collusive activities. The court held that the plaintiff did not prove that it could impute the actions of the individual submitting the affidavit to the defendant corporation. However, the court went on to say that even if it had imputed the action to the defendant, the submission of such an affidavit would not have been an affirmative act of concealment under the separate-and-apart test. 630 F. Supp. at 209-10.

55. The court noted that the facts of *Western Paving* highlighted the importance of the separate-and-apart standard since it was "a classic case in which the statute of limitations should be given effect" because the facts were so stale and much evidence had been lost. 630 F. Supp. at 210-11.

56. Colorado v. Western Paving Constr. Co., 833 F.2d 867, 881 (10th Cir. 1987) *withdrawn,* 841 F.2d 1025 (10th Cir.) (per curiam, en banc), *cert. denied,* 488 U.S. 870 (1988).

57. Colorado v. Western Paving Constr. Co., 841 F.2d 1025 (10th Cir.) (per curiam, en banc) *withdrawing* 833 F.2d 867 (10th Cir. 1987), *and affg.* 630 F. Supp. 206 (D. Colo 1986), *cert. denied,* 488 U.S. 870 (1988).

2. *The Self-Concealment Standard*

The Second Circuit adopted the self-concealment standard in *New York v. Hendrickson Brothers, Inc.*,[58] another highway construction bid-rigging case. The Second Circuit, relying largely on *Bailey v. Glover,* held that a "plaintiff may prove the concealment element by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury, *or that the wrong itself was of such a nature as to be self-concealing.*"[59] The court considered the self-concealment standard appropriate because the submission of false bids as real bids was analogous to the selling of a sham vase as a genuine antique vase.[60] Turning to the facts of the case, the court held that, because "the defendants' scheme necessarily included concealment of the existence of their conspiracy, proof of the conspiracy itself sufficed to prove concealment by the coconspirators."[61] Thus, in determining that the defendant "concealed" the antitrust violation, the court did not find it necessary to identify specific acts of concealment; rather, the court held that the wrong, *by its nature,* concealed itself.[62]

3. *The Affirmative Acts Standard*

Like the separate-and-apart standard, the affirmative acts standard requires that the plaintiff show affirmative acts of concealment.[63] Under the affirmative acts standard, however, these acts of concealment may include acts committed as part of the conspiracy. *Texas v. Allan Construction Co.*,[64] another highway construction bid-rigging case, highlights the difference between the two standards. In *Allan Construction,* the state attempted to toll the section 4B limitation period because the defendants submitted false competitive bids and false affidavits claiming that their bids were valid. The state argued that these actions constituted inherently self-concealing acts, or, in the alternative, were affirmative acts of concealment. The district court applied *Western Paving*'s separate-and-apart standard and refused to toll the statute of limitation based solely on affirmative acts committed in

58. 840 F.2d 1065 (2d Cir.), *cert. denied,* 488 U.S. 848 (1988).

59. *Hendrickson Bros.,* 840 F.2d at 1083 (emphasis added). This language highlights the fact that under the self-concealment standard the court will toll the statute of limitation if the plaintiff proves either that the defendant committed affirmative acts of concealment or that the wrong was self-concealing.

60. 840 F.2d at 1083 (citing Hobson v. Wilson, 737 F.2d 1, 33 n.102 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985)). See *supra* text accompanying note 37 for the general analogy of the theft of an antique vase.

61. *Hendrickson Bros.,* 840 F.2d at 1084.

62. One court has interpreted the case to mean that "antitrust violations arising from a bid-rigging conspiracy are always self-concealing." Texas v. Allan Constr. Co., 851 F.2d 1526, 1530 (5th Cir. 1988) (discussing and refusing to follow the Second Circuit's position in *Hendrickson Bros.*).

63. *See Allan Constr.,* 851 F.2d at 1531; Opel, *supra* note 33, at 659.

64. 851 F.2d 1526 (5th Cir. 1988).

furtherance of the conspiracy.[65]

On appeal, the Fifth Circuit first rejected the application of the self-concealment standard as inconsistent with Congress' intent in enacting the Clayton Act's four-year statute of limitation.[66] In doing so, however, the court did not explicitly reject the self-concealment standard for all section 4B cases; rather, it limited its discussion to bid rigging.

The court then considered whether the defendants' actions represented affirmative acts of concealment. The Fifth Circuit explicitly rejected the *Western Paving* separate-and-apart approach and held that acts done in furtherance of the conspiracy also could constitute acts of concealment that toll the statute of limitation.[67] Applying this standard to the facts of the case, the court held that the submission of affidavits of denial could constitute affirmative acts of concealment.[68]

The court rejected the *Western Paving* test based on the underlying goal of the fraudulent concealment doctrine — to deny wrongdoers who have concealed their conduct the benefit of statutes of limitation.[69] Therefore, "[t]he fact that such concealment occurs at the time of the wrong itself rather than afterwards does not make the wrongdoer any more deserving of the statute's protection."[70] Moreover, from an administrative point of view, the court saw no principled way to determine what acts were independent of the underlying wrong.[71]

The Sixth Circuit adopted the affirmative acts standard in *Pinney Dock & Transportation Co. v. Pennsylvania Central Corp.*[72] In *Pinney Dock,* the district court tolled the statute of limitation when it found that the defendant committed a self-concealing wrong. The Sixth Circuit reversed, holding that since "the underlying cause of action here is based upon alleged antitrust violations not fraud . . . a plaintiff should be required to prove affirmative acts of concealment, particularly in light of the strong policy in favor of statutes of limitations."[73] Unlike the Fifth Circuit, the Sixth Circuit unequivocally rejected the application of the self-concealment standard in all antitrust actions, limiting it to actions grounded in fraud and breach of fiduciary duty.

Thus, in the Fifth and Sixth Circuits, plaintiffs can meet the concealment requirement by proving affirmative acts of concealment even if the defendant undertakes those acts in furtherance of the antitrust

65. *See Allan Constr.,* 851 F.2d at 1528.

66. 851 F.2d at 1531.

67. 851 F.2d at 1531.

68. 851 F.2d at 1532.

69. 851 F.2d at 1532.

70. 851 F.2d at 1532.

71. 851 F.2d at 1532.

72. 838 F.2d 1445 (6th Cir.), *cert. denied,* 488 U.S. 880 (1988).

73. 838 F.2d at 1472.

violation. In the Tenth Circuit, plaintiffs must prove affirmative acts of concealment that are separate and apart from the underlying violation. Finally, in the Second Circuit, plaintiffs may prove either affirmative acts of concealment or that the defendant's wrong was inherently self-concealing.

These different standards have produced confusion and inconsistent results for similar claims. In *Western Paving,* the district court stated that affidavits of denial would not satisfy the concealment element of the fraudulent concealment doctrine.[74] In contrast, virtually identical conduct satisfied the concealment requirement in *Allan Construction,* in which the court allowed tolling for acts committed as part of the underlying wrong.[75] Finally, in *Hendrickson Bros.,* the court did not find it necessary to discuss any specific acts that the defendant committed and held that the inherently self-concealing nature of the conspiracy served to toll section 4B.[76] Thus, although section 4B would appear to provide a uniform four-year limitation period to all antitrust violations, the *effective* statute of limitation varies greatly. This result directly undermines Congress' explicit goals in adopting section 4B — to create uniformity and certainty and to discourage forum shopping.[77]

The courts can eliminate this confusion and inconsistency by adopting a single concealment standard for all section 4B actions. Part II of this Note concludes that only the self-concealment standard is consistent with fraudulent concealment jurisprudence and with Congress' intent in enacting section 4B.

II. SELF-CONCEALMENT AND THE FRAUDULENT CONCEALMENT DOCTRINE

To promote uniformity and certainty, courts should adopt a uniform standard for all section 4B fraudulent concealment cases. This Part argues that the self-concealment standard is an integral part of the fraudulent concealment doctrine, which Congress implicitly included in section 4B. Section II.A examines the judicial creation and expansion of the fraudulent concealment doctrine and argues that the

74. 630 F. Supp. 206, 209 (D. Colo. 1986), *aff'd.,* 841 F.2d 1025 (10th Cir.), *cert. denied,* 488 U.S. 870 (1988) .

75. 851 F.2d at 1532.

76. New York v. Hendrickson Bros., 840 F.2d at 1085 (2d Cir.), *cert. denied,* 488 U.S. 848 (1988).

77. *See* Marcus, *supra* note 21, at 855 ("[T]he application of these superficially simple concepts has left some courts groping with seemingly contradictory rules and empty concepts."); Stephen D. Susman, *Prosecuting the Antitrust Class Action,* 49 ANTITRUST L.J. 1513, 1520 (1980) (noting problems with proof of fraudulent concealment in antitrust cases); Opel, *supra* note 33, at 650 ("The acceptance of the fraudulent concealment doctrine and its subsequent development in the courts has recreated much of the uncertainty and confusion that Congress sought to eliminate in 1955 [when it enacted section 4B]."); *supra* section I.A.

Supreme Court has implicitly incorporated the self-concealment standard into the fraudulent concealment doctrine. Section II.A concludes by comparing the Clayton Act to the Racketeering Influenced and Corrupt Organizations Act (RICO) and by noting that courts have uniformly applied the self-concealment standard under RICO. Section II.B analyzes the legislative history of section 4B of the Clayton Act and finds that Congress intended to allow courts to toll the limitation period for self-concealing conspiracies. This Part concludes that courts should find self-concealing conduct sufficient to toll section 4B.

A. *From* Bailey *to* Armbrecht: *The Development of the Fraudulent Concealment Doctrine and the Self-Concealment Standard*

Courts should not separate the self-concealment standard from the fraudulent concealment doctrine and apply one without the other. When the Supreme Court set forth the fraudulent concealment doctrine in *Bailey v. Glover,* it outlined the self-concealment standard as well.[78] The Supreme Court paved the path from the Bankruptcy Act, tolled in *Bailey,* to section 4B in *Holmberg v. Armbrecht,*[79] in which the Court stated: "This equitable doctrine is read into every federal statute of limitation."[80]

Today, courts still cite *Bailey* as the authoritative source of the fraudulent concealment doctrine,[81] and they cite *Armbrecht* as the ba-

78. 88 U.S. (21 Wall.) 342, 349-50 (1875); Marcus, *supra* note 21 at 866 ("[*Bailey* volunteered the idea] that concealment would not be required in nonfraud cases when the wrongdoing was 'of such a character as to conceal itself.' " (quoting *Bailey,* 88 U.S. (21 Wall.) at 349-50); Opel, *supra* note 33, at 656 ("[T]he language of *Bailey* alone suggests that a plaintiff need not show affirmative acts if the defendant's wrong is self concealing."); Note, *Tolling the Antitrust Statute, supra* note 26, at 331 ("The *Bailey* case suggested that tolling can result from either an affirmative effort to maintain secrecy or from conduct which is insusceptible of discovery and which the defendant may have taken no particular steps to conceal."); Recent Cases, *Antitrust: Clayton Act Statute of Limitations Tolled by Fraudulent Concealment Doctrine,* 111 U. PA. L. REV. 1214, 1217 (1963) [hereinafter Recent Cases, *Antitrust*] ("[T]he doctrine requires proof of a self-concealing conspiracy or of affirmative acts of concealment.").

79. 327 U.S. 392 (1946).

80. 327 U.S. at 397; *see also supra* notes 27-30 and accompanying text (discussing *Armbrecht*).

81. *See, e.g.,* Texas v. Allan Constr. Co., 851 F.2d 1526, 1529 (5th Cir. 1988) (beginning its fraudulent concealment analysis with a discussion of *Bailey*); New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir.) (same), *cert. denied,* 488 U.S. 848 (1988); Pinney Dock & Transp. Co. v. Pennsylvania Cent. Corp., 838 F.2d 1445, 1466 (6th Cir.) (same), *cert. denied,* 488 U.S. 880 (1988); Public Serv. Co. v. General Elec. Co., 315 F.2d 306, 309 (10th Cir.) (same), *cert. denied,* 374 U.S. 809 (1963); Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236, 239 (2d Cir. 1962) (en banc) (analyzing the "relevant decisions of the Supreme Court starting with Bailey v. Glover"), *cert. denied,* 373 U.S. 909 (1963); Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 275 (8th Cir.) ("The landmark case on fraudulent concealment is *Bailey v. Glover* . . . ."), *cert. denied,* 371 U.S. 912 (1962), *and cert. denied,* 373 U.S. 914 (1963); Horton, *supra* note 15, at 797 ("Virtually all recent decisions and commentaries analyzing the history and applicability of the fraudulent concealment doctrine advert to *Bailey v. Glover* as the leading federal case on the doctrine."); Case Note, *Antitrust — Sherman Act Statute of Limitations Tolled by Fraudulent Concealment of Conspiracy,* 31 FORDHAM L. REV. 812, 814 (1963) [hereinafter Case

sis for applying the *Bailey* doctrine to section 4B.[82] In applying the *Bailey* doctrine, though, many courts have split *Bailey* in half; they apply the fraudulent concealment aspect of *Bailey* to section 4B but limit the self-concealment aspect to actions grounded in fraud and breach of fiduciary duty.[83] Neither *Bailey* nor *Armbrecht*, however, provides an adequate basis for this distinction.

Nothing in *Bailey* or *Armbrecht* implies that only the affirmative acts standard applies to nonfraud cases. *Bailey* in no way suggests any limitation on the scope of the self-concealment element; rather, *Bailey* treats the self-concealment and the affirmative acts aspects identically.[84] A court should limit the application of the *Bailey* doctrine — by excluding the self-concealment standard — only if *Armbrecht* expanded one half of the *Bailey* doctrine. The language of *Armbrecht*, however, directly contradicts such an interpretation. *Armbrecht* expands "[t]his equitable doctrine," which it had set forth in the preceding sentence:

> And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "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 any committing the fraud to conceal it from the knowledge of the other party.*"[85]

This sentence discusses the entire *Bailey* doctrine, including the absence of an affirmative acts requirement. The next sentence[86] mandates that courts read the *entire* doctrine into every federal statute of limitation, including section 4B.[87] To limit the application of the self-concealment standard to actions grounded in fraud lacks support in Supreme Court precedent; *Armbrecht* explicitly recognized its origin

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Note, *Antitrust*] ("The so called 'federal doctrine of fraudulent concealment' can be traced to *Bailey* . . . .").

82. The early cases applying the *Bailey* doctrine to section 4B all cited the key sentence in *Armbrecht* ("This equitable doctrine is read into every federal statute of limitation." 327 U.S. at 397). *See* Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co., 326 F.2d 575, 576 (9th Cir. 1964) (quoting "Justice Frankfurter's now-famous dictum" in *Armbrecht*); *Public Serv. Co.*, 315 F.2d at 310 (quoting *Armbrecht*); *Atlantic City Elec. Co.*, 312 F.2d at 239 (same); Federal Pac. Elec. Co., 310 F.2d at 276 (same); Case Note, *Antitrust*, *supra* note 81, at 816 (noting that *Atlantic City Elec. Co.*, an early case applying the fraudulent concealment doctrine to section 4B, rested principally on a line of cases ending with *Armbrecht*).

83. *See, e.g.*, *Pinney Dock & Transp. Co.*, 838 F.2d at 1471; *see also* Opel, *supra* note 33, at 659 ("Courts that have accepted the affirmative acts standard follow the principle that the self-concealing conspiracy standard applies only to claims based in fraud.").

84. *Bailey*, 88 U.S. (21 Wall.) at 348; Marcus, *supra* note 21, at 866 ("[Under *Bailey*,] concealment would not be required in nonfraud cases when the wrongdoing was 'of such a character as to conceal itself.' ") (quoting *Bailey*, 88 U.S. (21 Wall.) at 349-50).

85. *Armbrecht*, 327 U.S. at 397 (quoting *Bailey*, 88 U.S. (21 Wall.) at 348) (emphasis added).

86. "This equitable doctrine is read into every federal statute of limitation." 327 U.S. at 397.

87. *See* Opel, *supra* note 33, at 657 ("In combination, *Armbrecht* and *Bailey* support a fraudulent concealment standard that allows tolling for self-concealing wrongs regardless of whether the underlying claim is based in fraud.").

in fraud yet unequivocally extended it to all federal statutes of limitation.

Some commentators and courts have argued, however, that this dictum in a forty-seven-year-old case does not justify the expansion of the self-concealment standard to section 4B.[88] Nevertheless, for thirty years, courts have relied on this Supreme Court dictum in applying the fraudulent concealment doctrine to antitrust actions.[89] As one court noted in applying the *Armbrecht* dictum to section 4B, "we must recognize the clear, direct, explicit, and unqualified statement of the Supreme Court."[90]

Courts have also recognized the relationship between fraudulent concealment and the self-concealment standard outside the antitrust context. Cases arising under RICO[91] provide a particularly apt analogy to the Clayton Act. Because Congress enacted RICO without a statute of limitation, the Supreme Court has held that the section 4B four-year limitation applies to civil RICO claims.[92] The Court has thus applied the antitrust time limitation because the Clayton Act offered the closest analogy to RICO.[93]

In 1989, the District of Columbia Circuit considered the relationship between the fraudulent concealment doctrine and the RICO four-year limitation period.[94] Relying on *Bailey* and *Armbrecht,* the court

88. *See* Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236, 242 (2d Cir. 1962) (Moore, J., dissenting) (criticizing courts' reliance on *Armbrecht* and *Bailey* in applying the fraudulent concealment doctrine to section 4B), *cert. denied,* 373 U.S. 909 (1963); Note, *Tolling by Fraudulent Concealment, supra* note 7, at 611 (criticizing reliance on this dictum as "a rather mechanical way to decide an important issue of policy under the antitrust laws.").

89. *See supra* note 82 (citing cases relying on *Armbrecht* as basis for applying the *Bailey* doctrine to toll section 4B).

90. Public Serv. Co. v. General Elec. Co., 315 F.2d 306, 310 n.6 (10th Cir.), *cert. denied,* 374 U.S. 809 (1963).

91. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (1988).

92. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 150-56 (1987).

93. The *Agency Holding* Court stated:

> Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury "in his business or property by reason of" a violation.

483 U.S. at 151; *see also* 113 CONG. REC. 18,007 (1967) (introducing S. 2048, 90th Cong., 1st Sess. (1967), a forerunner to RICO as an addition to the Sherman Act instead of as an independent act); John L. Koenig, Comment, *What They Have Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering,* 35 AM. U. L. REV. 821, 831 (1986) ("[A] recurrent theme in RICO's legislative history is Congress' conscious adoption of antitrust enforcement mechanisms to fight organized criminal activity."). *But see* Paul B. O'Neill, Note, *"Mother of Mercy, Is This the Beginning of RICO?": The Proper Point of Accrual of Private Civil RICO Actions,* 65 N.Y.U. L. REV. 172, 183 (1990) ("[W]hile the Act relies heavily upon antitrust laws, Congress clearly intended RICO to be an original approach to a unique problem . . . ."); *Agency Holding,* 483 U.S. at 149 (noting similarity between RICO and civil rights statute).

94. Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1491-92 (D.C. Cir. 1989).

held that the plaintiff could meet the concealment requirement by showing either affirmative acts of concealment or self-concealment. Moreover, every federal court that has considered the issue has applied the self-concealment standard to the RICO statute of limitation.[95]

In tolling the RICO limitation period, the courts have refused to do what several courts have done in the section 4B context: split the *Bailey* doctrine in two. The RICO courts' application of the *Bailey* doctrine properly follows the Supreme Court's language in *Bailey,* which set out the entire doctrine, and the language of *Armbrecht,* which expanded the entire doctrine, including the self-concealment standard, to all federal statutes of limitation.

B. *Legislative Intent*

The legislative history of the Clayton Act suggests Congress intended to incorporate the fraudulent concealment doctrine, along with the self-concealment standard, into the section 4B statute of limitation. During congressional debate over section 4B, the following discussion occurred on the House floor between Representative Patman and Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the bill:

> Mr. Patman: Does that 4 year [statute of limitation] apply to conspiracy cases? Suppose there is a conspiracy, and it is 10 years before the conspiracy is known.
>
> Mr. Celler: In the case of conspiracy or fraud, the statute only runs from the time of discovery.
>
> Mr. Patman: From the time of the discovery?
>
> Mr. Celler: In conspiracy cases and cases of fraud.[96]

This exchange suggests that, despite the absolute language of section 4B, Congress did not intend to create an absolute limitation period. However, the Congressmen did not define "conspiracy" or indicate exactly what conduct justified tolling until discovery. When read in light of the established law in 1955, this language supports the view that Congress intended to allow tolling under the self-concealment standard.

When Congress enacted section 4B in 1955, *Bailey* and *Armbrecht*

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95. *See, e.g.,* Rodriguez v. Village of Island Park, No. 89-2676, 1991 U.S. Dist. LEXIS 9469, at *26-27 (E.D.N.Y. July 2, 1991) ("Concealment of the cause of action can be accomplished either by the defendant's contrivance to commit a wrong in such a manner as to conceal the very existence of a cause of action, or by actively misleading the plaintiff into the belief that he had no cause of action."); Companhia Sidergurgica Nacional v. D.B. Organ Co., No. 90-5661, 1991 U.S. Dist. LEXIS 6848, at *15 (S.D.N.Y. May 22, 1991) (applying the self-concealment standard); Snider v. Lone Star Art Trading Co., 672 F. Supp. 977, 984-85 (E.D. Mich. 1987) (citing *Armbrecht* and applying the self-concealment standard), *aff'd.,* 838 F.2d 1215 (6th Cir. 1988); *cf.* O'Neill, *supra* note 93 (discussing the complexity of determining when a RICO cause of action accrues).

96. 101 CONG. REC. 5129 (1955).

constituted the established law of fraudulent concealment. These two cases combined to import the fraudulent concealment doctrine — together with the self-concealment standard — into every federal statute of limitation.[97] Courts may assume that Congress knew the law and enacted section 4B with the fraudulent concealment doctrine in mind.[98] Absent an indication to the contrary, courts should presume that "Congress had actual knowledge of and affirmatively evinced a purpose of having the principle read into the statute."[99]

More importantly, Congress appears to have had *actual* knowledge of the existing law and to have demonstrated an intention to continue it. The following exchange occurred immediately after Chairman Celler reassured Representative Patman that, in the case of conspiracy or fraud, the statute runs only from the time of discovery:

> Mr. Patman: And it is not the object or intention to change that at all?
> Mr. Celler: That is correct.[100]

This discussion demonstrates that Congressmen Celler and Patman equated "change" with any provision that did not allow tolling in cases of conspiracy or fraud. Therefore, it must have been clear to Congress that the then-existing law provided such a tolling mechanism, which Congress did not intend to alter.[101]

Opponents of applying the *Bailey* doctrine to section 4B discount these discussions as mere colloquy between two members of Congress who wanted to allow diligent plaintiffs to toll section 4B until they discovered the antitrust violation; as such, the discussions would deserve little weight in construing the statute.[102] However, while a colloquy does not always serve as an accurate indicator of congressional intent,[103] it merits special weight when it represents the statements of

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97. *See supra* section II.A.

98. *Cf.* Exploration Co. v. United States, 247 U.S. 435, 449 (1918) (holding that because the *Bailey* doctrine was the established law at the time, Congress enacted a statute of limitation with *Bailey* in mind); 2B NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 50.01 (5th ed. 1992) ("The antecedent common law pertaining to the subject with which a statute deals comprises part of its legal history.").

99. Kansas City, Mo. v. Federal Pacific Elec. Co., 310 F.2d 271, 277 (8th Cir.), *cert. denied,* 371 U.S. 912 (1962), *and cert. denied,* 373 U.S. 914 (1963); *see* Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236, 241 (2d Cir. 1962) (en banc) ("[W]hen Congress enacted § 4B, it intended that the doctrine of fraudulent concealment continue to apply *as it had under Holmberg and its predecessors* . . . .") (emphasis added), *cert. denied,* 373 U.S. 909 (1963).

100. 101 CONG. REC. 5129 (1955).

101. *See* Recent Cases, *Antitrust, supra* note 78, at 1217 ("Celler merely stated that his Committee had no intention to change existing law . . . .").

102. *See Atlantic City Elec. Co.,* 312 F.2d at 243 (Moore, J., dissenting) ("To say that a colloquy of two Congressmen known to be advocates of the rejected amendment establishes the intent of Congress is an unwarranted speculation . . . ."); Case Note, *Antitrust, supra* note 81, at 820 (criticizing the "questionable use of the eleventh-hour colloquy on the floor of the House as a device for construing legislative intent"); Recent Cases, *Antitrust, supra* note 78, at 1217-18 ("Celler's statement should be given little, if any, weight to show an affirmative congressional intent that the *Bailey* doctrine be applied to section 4B.").

103. 2A SINGER, *supra* note 98, at § 48.13.

a bill's sponsor or a member of the committee that considered the bill.[104]

Opponents also discount these conversations because, in the six years prior to enacting section 4B, Congress considered and rejected several proposals that would have tolled the time period until discovery,[105] and Congress rejected Representative Patman's attempts to add a discovery provision to section 4B in 1955.[106] However, the following colloquy suggests that Congress never intended to eliminate tolling for conspiracy cases and had rejected the "discovery" provision because it was overinclusive:

> Mr. Celler: [If the discovery provision was enacted, we] practically [would] have *no statute of limitations at all.* . . . We provide that the 4-year statute [of limitations] shall start to run from the time of accrual of damages . . . not from the time of discovery.
> Mr. Patman: Even in the case of fraud or conspiracy?
> Mr. Celler: No. *In the case of fraud or conspiracy the statute of limitation only runs from the time of discovery.*[107]

As Chairman Celler emphasized, a general discovery provision differs from a fraudulent concealment provision. Under discovery provisions, plaintiffs can toll the statute of limitation until discovery by proving merely that they exercised due diligence.[108] Under the fraudulent concealment doctrine, in contrast, a plaintiff also must prove that the defendant concealed the acts giving rise to the cause of action, either through affirmative concealment or by committing a wrong that inherently conceals itself.[109] For example, a single firm's attempt to monopolize would not be a conspiracy, self-concealing or otherwise, that would trigger the fraudulent concealment doctrine in the absence of affirmative concealment. Such conduct would toll the cause of action

104. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1950) (plurality opinion) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt."); Kansas City v. Federal Pac. Elec. Co., 310 F.2d 271, 280 (8th Cir.) ("Mr. Celler's remarks are clarifying additions that reflect the careful diligence of a congressman who virtually lived with the problem during the course of several congressional sessions."), *cert. denied,* 317 U.S. 912 (1962) *and cert. denied,* 373 U.S. 914 (1963); 2A SINGER, *supra* note 98, at § 48.13.

105. *See, e.g.,* Kirkham, supra note 33, at 509-10; Opel, *supra* note 33, at 663, 665. Between 1949 and 1955, Congress considered and rejected several bills that would have added a statute of limitation to the antitrust laws. Several of these bills contained provisions tolling the statute of limitation until discovery if the plaintiff exercised due diligence. For a more complete discussion of these bills and their legislative histories, see Note, *Fraudulent Concealment and Section 4(b) of the Clayton Act,* 49 VA. L. REV. 277, 292-98 (1963) [hereinafter Note, *Fraudulent Concealment and Section 4(b)*].

106. 101 CONG. REC. 5129 (1955); Opel, *supra* note 33, at 665.

107. 101 CONG. REC. 5132-33 (1955) (emphasis added).

108. Note, *Tolling by Fraudulent Concealment, supra* note 7, at 607-08.

109. *See* Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236, 240 n.9 (2d Cir. 1962) ("[A] provision tolling the statute of limitations until the time of discovery of a violation is not the same as the doctrine of fraudulent concealment, which involves elements beyond the injured party's failure to discover that a violation has taken place."), *cert. denied,* 373 U.S. 909 (1963); Marcus, *supra* note 21, at 870-74 (discussing the difference between a due diligence requirement and a concealment requirement).

under a discovery provision, however. Consequently, Congress' rejection of a discovery provision does not represent a rejection of the fraudulent concealment doctrine or the self-concealment standard.[110]

The legislative history of section 4B provides some support for including the self-concealment standard in the fraudulent concealment doctrine as applied to section 4B. Although Congress did not expressly include a tolling mechanism, it implicitly incorporated the fraudulent concealment doctrine with the self-concealment standard into section 4B. In doing so, Congress acted consistently with Supreme Court jurisprudence, which has never separated the self-concealment standard from the fraudulent concealment doctrine. Therefore, courts should apply the self-concealment standard to section 4B cases because it is most consistent with Congress' intent in passing section 4B and with the Supreme Court's treatment of the fraudulent concealment doctrine.

III. THE BEST STANDARD

An appropriate concealment standard should not only be consistent with congressional intent and current jurisprudence, but also should help achieve the policy goals of the underlying statute. This Part considers how each of the three standards for the concealment element — separate-and-apart, affirmative acts, and self-concealment — meets these objectives. Section III.A reviews the general policies behind statutes of limitation and argues that the self-concealment standard best furthers these policies. This section also responds to the criticism that mere silence would be sufficient to toll the limitation period under a self-concealment standard. Section III.B examines the specific goals of section 4B — to create uniformity and certainty — and finds that the self-concealment standard best meets these goals.

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110. *See* Kansas City v. Federal Pac. Elec. Co., 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962) *and cert. denied*, 373 U.S. 914 (1963) ("[T]he legislative history of § 4B and particularly the proceedings which occurred on the floor of the House of Representatives prior to its passage, furnish[] convincing proof that Congress itself recognized the difference between failing to discover and fraudulent concealment."); Note, *Fraudulent Concealment and Section 4(b)*, *supra* note 105, at 300 ("[A]t least on a conceptual level, the discovery provision may be regarded as sufficiently distinct from the doctrine of fraudulent concealment to say that the rejection of this provision was not a rejection of the applicability of fraudulent concealment."); Recent Cases, *Antitrust*, *supra* note 78, at 1217:

> To the business interests represented in Congress, the *Bailey* doctrine, placing upon a plaintiff the onerous burden of adducing proof of a self-concealing conspiracy or of affirmative acts of concealment in order to toll the statute of limitations, was less objectionable than a bill which did not clearly require proof of affirmative acts of concealment.

Cf. Note, *Tolling by Fraudulent Concealment*, *supra* note 7, at 607-08 (highlighting the theoretical difference between fraudulent concealment and a discovery provision, but arguing that there is "little practical significance"); *id.* at 609 (acknowledging that even if there is no actual difference, Congress may have perceived one).

A. *Policies Behind Statutes of Limitation*

At first glance, statutes of limitation may seem unfair: they deny a potential plaintiff the right to sue without any consideration of the merits of the claim.[111] Nonetheless, "[s]tatutes of limitation form a part of the legislation of every government, and are necessary to the peace and repose of society."[112] Legislatures enact statutes of limitation in part to protect defendants from a plaintiff's fraudulent claims; the passage of time makes it difficult to distinguish between valid and invalid claims.[113] As time progresses, evidence vanishes, memories fade, and witnesses disappear, impairing the accuracy of factfinding.[114] In short, statutes of limitation provide defendants with repose and protection against false claims.

The policies in favor of protecting defendants must be balanced against plaintiffs' interest in obtaining judicial relief.[115] With this balance in mind, legislatures select an appropriate time limit for a given statute.[116] No matter how carefully legislatures balance these competing interests, any statute of limitation necessarily will cut off some legitimate claims of honest plaintiffs and, at the same time, will allow some fraudulent claims to the detriment of innocent defendants.[117]

In order to minimize these inequities, courts toll statutes of limitation under specific circumstances. Courts have developed several equitable tolling doctrines to account for situations where plaintiffs' rights to pursue meritorious claims outweigh defendants' rights to protection from stale claims.[118] Tolling doctrines exist solely to complement limitation periods. There is no independent basis for evaluating tolling standards; rather, courts must consider standards in light of the underlying goals of statutes of limitation.

The Supreme Court developed the doctrine of fraudulent conceal-

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111. Kirkham, *supra* note 33, at 508.

112. Stearns v. Page, 48 U.S. (7 How.) 819, 828 (1849).

113. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975).

114. *See* Board of Regents of Univ. of N.Y. v. Tomanio, 446 U.S. 478 (1980); United States v. Kubrick, 444 U.S. 111, 117 (1979); Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965).

115. *See Johnson,* 421 U.S. at 454; Kirkham, *supra* note 33, at 508 ("[S]uch statutes seek to strike a balance between compensation to injured parties and the obligation to defend against stale claims . . . ."); O'Neill, *supra* note 93, at 190 (noting that statutes of limitation weigh policies of repose against plaintiffs' interest in judicial relief).

116. O'Neill, *supra* note 93, at 189 ("[T]he legislature or the court considers the interests of potential plaintiffs, potential defendants, and society at large."). In passing section 4B, Congress used the existing statutes of limitation in the states as guidance and determined that four years was a "fair and equitable" period of time. SENATE REPORT, *supra* note 7, at 2332.

117. "Statutes of limitation" are by necessity "practical and pragmatic devices" that are "by definition arbitrary." Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

118. *See* Marcus, *supra* note 21, at 838 ("Tolling should be allowed, therefore, only when a sufficient showing is made to justify disregarding the policies underlying statutes of limitations. . . . [C]ourts should strive to apply the fraudulent concealment doctrine consistently and to give effect to the policies underlying the statute of limitations.").

ment as a ground for tolling statutes of limitation in order to prevent defendants from fraudulently gaining protection from a statute of limitation.[119] Moreover, where the defendant's concealment of the wrong has prevented the plaintiff from discovering it, the plaintiff has not sat on his rights, and the court should therefore not prevent him from pursuing meritorious claims.

In choosing a concealment standard, courts should consider the same objectives that justify the judicially created fraudulent concealment doctrine. Because the self-concealment standard is the broadest of the three standards, it will preclude the fewest honest claims by meritorious plaintiffs.[120] A plaintiff who has not discovered a self-concealed wrong is equally deserving of judicial relief as one who has not discovered an affirmatively concealed wrong.[121]

A stricter concealment standard thus is appropriate only if plaintiffs' interests outweigh the other half of the balance — the defendants' need for protection from false claims supported by stale evidence. It is true that the self-concealment standard will expose defendants to more dishonest claims. However, as noted in *Bailey,* if the defendant conceals his wrong he does not merit protection from these claims.[122] A defendant who commits a self-concealing wrong deserves no more protection from stale claims than a defendant who actively conceals a wrong.[123] Any standard other than the self-concealment standard

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119. Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1875); *see also* Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232 (1959) ("To decide this case we need look no further than the maxim that no man may take advantage of his own wrong."); Marcus, *supra* note 21, at 872 ("It is inequitable to allow a defendant who has concealed his wrong to profit from his concealment.").

120. Under the self-concealment standard, the plaintiff can prove either that the defendant concealed the cause of action or that the defendant's conduct concealed itself. Thus, any cause of action that can be tolled under either of the other standards necessarily can be tolled under the self-concealment standard.

121. *Cf.* Marcus, *supra* note 21, at 866 ("It is certainly odd that the victim of a nationwide price-fixing conspiracy that is inherently self-concealing must prove affirmative concealment to justify his delay in suing when a plaintiff alleging securities fraud against a defendant with whom he dealt personally is relieved of that burden.").

122. *See* 88 U.S. (21 Wall.) at 349. This is the rationale underlying the entire fraudulent concealment doctrine.

123. *See* Horton, *supra* note 15, at 799-800 ("Defendants who engage in widespread conspiracies often do not have to destroy evidence, falsify documents, or utilize other techniques that would constitute affirmative acts of concealment in order to avoid detection of the conspiracy.").

The defendant's need for protection will be the same in either case because the evidence needed to prove the underlying violation will be equally stale for a self-concealing violation as it will be for a violation concealed after the fact. Arguably, the choice of a standard will affect the age of the evidence required to prove the concealment. Under the self-concealing and affirmative acts standards, the evidence of concealment will be as old as the underlying violation; under the separate-and-apart standard, the concealing act necessarily occurred after the underlying violation. However, this problem is trivial because, in most cases, the separate concealing act occurs only shortly after the conspiracy. For a possible solution to this problem, see Colorado v. Western Paving, 833 F.2d 867, 879 (10th Cir. 1987), *withdrawn,* 841 F.2d 1025 (10th Cir.), *cert. denied,* 488 U.S. 870 (1988), which endorses a clear and convincing evidence standard for proving self-concealing conspiracies.

would provide different protection based on the type of concealment. For example, the affirmative acts standard rewards defendants for engineering wrongs that successfully conceal themselves instead of ones requiring affirmative concealment.[124] The policies behind statutes of limitation do not support such a distinction.

Opponents of the self-concealment standard argue that the standard will render the statute of limitation useless because a plaintiff can toll the time limitation by showing that the defendant remained silent or merely denied involvement in the scheme.[125] This criticism demonstrates the existence of some common misconceptions about the self-concealment standard. First, adopting a self-concealment standard is not equivalent to adopting a discovery provision. Under the self-concealment standard, courts will toll undiscovered antitrust causes of action only if the defendant commits affirmative acts of concealment or if concealment represents a necessary part of the wrong. For example, if a plaintiff claims that the defendant violated the Sherman Act by attempting to monopolize, the plaintiff has not alleged that the defendant committed an inherently self-concealing wrong; therefore, such a plaintiff must prove affirmative acts of concealment to toll section 4B.[126]

Second, tolling under the self-concealment standard is not equivalent to tolling because of the defendant's silence. In *Wood v. Carpenter*,[127] a case applying the fraudulent concealment doctrine to a cause of action grounded in fraud, the Supreme Court held that "[c]oncealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."[128] The Sixth Circuit apparently has interpreted this language to mandate an affirmative acts standard. In 1988, the court held: "We have previously indicated that concealment necessitates the commission of affirmative acts. Mere silence, where there is no duty to speak, does not toll the statute."[129] The prohibition against proving concealment by mere silence does not provide support for the affirmative acts

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124. *See* Saveri & Saveri, *supra* note 4, at 644-45 ("Case law has long recognized that a wrongdoer who successfully conceals an antitrust claim should not be permitted to use the shield of the statute of limitations to bar redress by those whom he has victimized.").

125. *See, e.g.*, Pinney Dock & Transp. Co. v. Pennsylvania Cent. Corp., 838 F.2d 1445, 1466-72 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

126. *See supra* notes 108-10 and accompanying text (discussing the difference between the self-concealment standard and a general discovery provision).

127. 101 U.S. 135 (1879).

128. 101 U.S. at 143.

129. *Pinney Dock*, 838 F.2d at 1471. The court reiterated this idea, stating:

> Mere silence, or one's unwillingness to divulge one's allegedly wrongful activities, is not sufficient. As the underlying cause of action here is based upon alleged antitrust violations not fraud, we agree . . . that a plaintiff should be required to prove affirmative acts of concealment, particularly in light of the strong policy in favor of statutes of limitations.

838 F.2d at 1472 (discussing Gaetzi v. Carling Brewing Co., 205 F. Supp 615 (E.D. Mich. 1962)).

standard. No court applying the self-concealment standard has ever stated that silence by itself served to toll the statute of limitation.[130] Moreover, *Wood v. Carpenter* involved an underlying claim of fraud, for which it long has been settled that affirmative acts are not necessary.[131] *Wood v. Carpenter* merely reinforces the fact that courts cannot equate silence with self-concealment.

B. *Uniformity, Administrative Efficiency, and Section 4B*

A concealment standard should not only further the general policies behind statutes of limitation, but also the specific policies of section 4B. In enacting section 4B Congress intended to eliminate confusion, improve fairness, and reduce forum shopping by creating a uniform statute of limitation.[132] Choosing and applying a uniform standard will help achieve these objectives.[133] This section examines the three standards and concludes that the self-concealment standard will further these policies, while the affirmative acts standard and the separate-and-apart standard will continue to create uncertainty and confusion.

1. *The Affirmative Acts Standard*

Under the affirmative acts standard, the plaintiff can meet the concealment requirement by showing that the defendant committed affirmative acts of concealment, even if the defendant did so as part of the underlying violation.[134] While this standard appears simple on its face, it has created confusion as to what conduct satisfies the concealment requirement.

The Tenth Circuit's opinion in *King & King Enterprises v. Champlin Petroleum Corp.*,[135] a private price-fixing suit, illustrates the confusion created by the standard. The court began its discussion of the concealment requirement by quoting with approval a passage stating that the plaintiff need not show affirmative acts of concealment if the defendant's actions were inherently self-concealing.[136] However, the Tenth Circuit then noted that the plaintiff must prove "some af-

130. However, one commentator has noted that, even under the affirmative acts standard, a plaintiff faces a minimal burden. Marcus, *supra* note 21, at 858-61.

131. Even the Sixth Circuit, which equated self-concealment with mere silence, recognized this fact. *Pinney Dock*, 838 F.2d at 1470 (" '[A]ffirmative acts of concealment must be shown except in cases founded on fraud or breach of fiduciary duty.' ") (quoting *Gaetzi*, 205 F. Supp. at 621).

132. SENATE REPORT, *supra* note 7, at 2331.

133. *See* Marcus, *supra* note 21, at 855 ("[T]he application of these superficially simple concepts has left some courts groping with seemingly contradictory rules and empty concepts.").

134. *See supra* section I.C.2.

135. 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982).

136. "[P]laintiff 'would have to establish either that the defendant fraudulently concealed the conduct forming the basis of the claim or that the defendant's conduct by reason of its fraudulent nature was inherently self-concealing.' " *King & King*, 657 F.2d at 1154 (quoting Ashland Oil

firmative act of fraudulent concealment" to meet the concealment requirement.[137] The *King & King* standard created so much confusion that different courts have cited the case for opposite propositions.[138]

Although the *King & King* court adopted the affirmative acts standard, the court's threshold for affirmative acts was so low as to render the requirement virtually meaningless. The plaintiff in *King & King* showed that the defendants committed two affirmative acts in concealing their price-fixing conspiracy: (1) they created a phone list with two columns to separate those people in on the conspiracy from those who were not; and (2) they made their price-fixing-related phone calls after regular business hours. Based on this evidence, the court held that *as a matter of law* the defendants' conduct represented *affirmative acts* of concealment.[139] Although the court applied the affirmative acts standard, it is hard to imagine any acts within a conspiracy that would not meet this low standard.[140]

Such a loose definition of affirmative acts is not unique to the Tenth Circuit. Other courts have found that the submission of a noncollusion affidavit,[141] agreements to give false grand jury testimony,[142] and denial of wrongdoing[143] could constitute affirmative acts of concealment. With such a loose definition of affirmative acts, no defendant could engage in a bid-rigging conspiracy without some "affirmative" act of concealment. Despite the courts' language to the contrary, the affirmative act standard as applied in many cases is virtually indistinguishable from the self-concealment standard.[144]

Co. v. Union Oil Co., 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977), *cert. denied,* 435 U.S. 994 (1978)).

137. *King & King,* 657 F.2d at 1155.

138. *Compare* Snider v. Lone Star Art Trading Co., 672 F. Supp 977, 984 (E.D. Mich. 1987) (citing *King & King,* 657 F.2d at 1154 in support of the self-concealment standard), *affd.,* 838 F.2d 1215 (6th Cir. 1988) *and* Edwin S. Hackenberg, Comment, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of* Agency Holding Corp. v. Malley-Duff, 48 LA. L. REV. 1411, 1419 n.41 (citing *King & King* as an example of a court applying the self-concealment standard) *with* Colorado v. Western Paving Constr. Co., 630 F. Supp. 206, 209 n.3 (D. Colo. 1986) (citing *King & King* in support of the affirmative acts standard) *and with* Colorado v. Western Paving Constr. Co., 833 F.2d 867, 877 (10th Cir. 1987) (saying that *King & King* never explicitly addressed the self-concealing conspiracy argument).

139. *King & King,* 657 F.2d at 1155.

140. *See* Saveri & Saveri, *supra* note 4, at 641-42 ("The very nature of a price fixing conspiracy precludes the victims from being privy to any meetings, telephone calls, correspondence, or other communications between members of the conspiracy.").

141. Texas v. Allan Construction, 851 F.2d 1526, 1532-33 (5th Cir. 1988).

142. New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1084 (2d Cir.), *cert. denied,* 488 U.S. 848 (1988). Although the court held that the self-concealing conspiracy applied to section 4B cases, it also found that the defendants' actions would have met the affirmative acts standard if the court had applied it. However, unlike the Fifth Circuit in *Allan Construction,* the Second Circuit implied that the submission of noncollusion affidavits would not be sufficient to meet the affirmative acts standard. *See Hendrickson Bros.,* 840 F.2d at 1085.

143. *See* Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978); Philco v. Radio Corp. of Am., 186 F. Supp. 155, 163-64 (E.D. Pa. 1960) (dicta).

144. *See* Marcus, *supra* note 21, at 860 ("Even decisions premised on affirmative acts of

Although these criticisms address specific applications of the affirmative acts standard, they reveal an underlying problem with the standard itself. The standard requires courts to draw a line between affirmative concealment and self-concealment, yet no court has demonstrated an ability to do so in a consistent manner.

2. *The Separate-and-Apart Standard*

The separate-and-apart standard avoids this specific line-drawing problem by excluding all acts that are part of the conspiracy.[145] This solution simply changes the nature of the line-drawing problem, however; instead of determining which acts are "affirmative," the court must decide which acts constitute part of the underlying conspiracy.[146]

Courts have distinguished acts as separate and apart by determining whether the acts are "in furtherance" of the underlying conspiracy.[147] Conspirators, however, necessarily must keep the conspiracy secret to be successful; thus, "every act of concealment furthers the success of the offense by stalling its detection."[148] Consequently, "the standard becomes a subjective judicial judgment that does little to promote certainty."[149]

In an alternative approach, judges distinguish acts based not on their role in the scheme, but on whether they occur subsequent in time to the underlying violation.[150] The ongoing nature of the typical antitrust conspiracy renders this distinction inconsequential, however.[151] In addition, this approach will lead to arbitrary results: an act done one day after the end of conspiracy will toll the statute of limitation, while the same act done one day before the conspiracy ends will not.[152]

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concealment suggest that, as a practical matter, the concealment prong is no longer an independent requirement.").

145. *See supra* section I.C.1.

146. *See* Marcus, *supra* note 21, at 860 ("[C]onduct [worthy of tolling the statute of limitation] is not easily separated, chronologically or otherwise, from the conduct that underlies the claim.").

147. Texas v. Allan Constr. Co., 851 F.2d 1526, 1527 (5th Cir. 1988).

148. *Allan Constr.*, 851 F.2d at 1532 (5th Cir. 1988); Marcus, *supra* note 21, at 859 (noting that price-fixing conspiracies must be kept secret to be successful); Opel, *supra* note 33, at 657 ("[I]t is often very hard for a plaintiff to label a defendant's acts of concealment as 'separate and apart' because these acts are often closely intertwined with the conspiracy that constitutes the violation."); *see also* Saveri & Saveri, *supra* note 4, at 641 ("[A]s a practical matter, no conspiracy would proceed uninterrupted for very long if the victims of the conspiracy knew of its existence.").

149. Opel, *supra* note 33, at 657.

150. *See, e.g.*, Stanley v. Stanton, 36 Ind. 445 (1871) (requiring that the concealment occur after the wrong).

151. *See* Marcus, *supra* note 21, at 858.

152. *See Allan Constr.*, 851 F.2d at 1532 (citing this rationale for not applying the separate-and-apart standard).

Both formulations of the separate-and-apart standard shift, but do not resolve, the affirmative acts line-drawing problem. Consequently, even if all the courts adopt this standard, their varying application of the standard will subvert the goals of uniformity and certainty.

3. *The Self-Concealment Standard*

By avoiding awkward line drawing, the self-concealment standard will promote uniform and predictable results. As with any standard, of course, courts must draw some line. In this case, a court must determine whether the wrong — as committed by the defendant — was self-concealing. Unlike the other standards, the self-concealment standard focuses on the nature of the conspiracy, not on specific acts committed by the defendant. This makes line drawing less arbitrary. For example, a single firm attempting to monopolize ordinarily will not commit a self-concealing antitrust violation. As with the theft of an antique vase, the defendant can be successful without concealing the wrong. Thus, in such cases, the plaintiff should have to prove affirmative acts of concealment to meet the concealment requirement.[153] In contrast, a bid-rigging conspiracy is inherently self-concealing. Like the seller of the sham vase, a conspirator must maintain the secrecy of a bid-rigging scheme in order to attempt to rig a bid.[154] Thus, the plaintiff need not prove the existence of an affirmative act.

The self-concealment standard best furthers the underlying objectives of section 4B. Both the separate-and-apart standard and the affirmative acts standard require courts to draw uncertain and wavering lines. This unpredictable line drawing leads to the very results Congress intended to avoid in passing section 4B — confusion and uncertainty. On the other hand, the self-concealment standard allows courts to look consistently at the underlying nature of the wrong without distinguishing between types of acts of concealment.

CONCLUSION

In applying the fraudulent concealment doctrine to section 4B of the Clayton Act, the courts of appeals have adopted three different standards for the concealment requirement — the separate-and-apart standard, the affirmative acts standard, and the self-concealment standard. The proliferation of standards has defeated the primary goal of section 4B — to create a uniform and certain limitation period for all

153. In determining whether affirmative acts are present, a court can avoid the awkward line-drawing problem otherwise present under the affirmative acts standard. Here, the court need not distinguish between self-concealing acts and affirmative acts of concealment.

154. *See* New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir.) (noting the self-concealing nature of a bid-rigging scheme and citing Colorado v. Western Paving Constr. Co., 833 F.2d 867 (10th Cir. 1987), *withdrawn*, 841 F.2d 1025 (10th Cir.), *cert. denied*, 488 U.S. 870 (1988)), *cert. denied*, 488 U.S. 848 (1988).

antitrust violations. To rectify this situation, the courts should adopt a single standard: the self-concealment standard. The self-concealment standard constitutes a vital part of the Supreme Court's fraudulent concealment jurisprudence, and courts err when they apply the fraudulent concealment doctrine without the self-concealment standard. In addition, the self-concealment standard furthers Congress' intentions in passing section 4B and best meets the underlying goals of statutes of limitation. Finally, the self-concealment standard relieves courts from the impossible task of distinguishing between the acts comprising the conspiracy and those intended to prevent its detection. Consequently, courts can apply the standard uniformly and consistently, leading to fair and predictable results.