ANTITRUST LAW—AFFIRMATIVE ACTS AND ANTITRUST—THE NEED FOR A CONSISTENT TOLLING STANDARD IN CASES OF FRAUDULENT CONCEALMENT

I. INTRODUCTION

It is axiomatic that "no man may take advantage of his own wrong."[1] It is also a fundamental principle of the American justice system that an exception should not swallow a rule. The doctrine of fraudulent concealment reflects the first principle: It is intended to ensure that a defendant does not "take advantage of [its] . . . wrong"[2] by permitting the statute of limitation to be tolled when a party has concealed a wrong. Various courts have established standards to determine when a statute of limitations will be tolled by fraudulent concealment in antitrust litigation. The "self-concealing" standard that some courts have adopted threatens to swallow the rule established by the doctrine. The "affirmative-acts" standard is a more moderate approach that avoids the breadth of the self-concealing approach while still ensuring that wrongdoers will be punished for their unlawful acts.

Fraudulent concealment is often a concern in antitrust litigation. The Clayton Act was passed in 1914 to supplement existing antitrust laws by creating a civil cause of action for anticompetitive business practices.[3] Until 1955, federal courts applied state statutes of limitations to Clayton Act claims.[4] Because that approach caused a great deal of confusion, in that year Congress enacted section 4B, which added a four-year statute of limitations to the Clayton Act.[5] According to that provision, all actions brought under the Clayton Act must be commenced within four years of the accrual of the cause of action. Otherwise, the action is time-barred.[6]

It is well established that courts may toll a statute of limitations when the defendant has fraudulently concealed his wrongful conduct.[7] The Supreme Court of the United States has held that this principle applies to all federal statutes of limitations.[8] Section 4B of the Clayton Act obviously is such a statute. The plaintiff must prove three elements for the statute of li-

1. Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232 (1959).

2. *Id.*

3. *See* Jaafar A. Riazi, Note, *Finding Subject Matter Jurisdiction over Antitrust Claims of Extraterritorial Origin: Whether the Seventh Circuit's Approach Properly Balances Policies of International Comity and Deterrence*, 54 DEPAUL L. REV. 1277, 1280 (2005) (discussing the history of the Sherman and Clayton Acts).

4. 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, 73–74 (1985).

5. *Id.* at 74.

6. 15 U.S.C. § 15b (2009).

7. Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829, 830 (1983).

8. Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946); *see also* Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 510 (2004).

mitations to be tolled under the doctrine of fraudulent concealment: (1) that "the defendant concealed the conduct that constitutes the cause of action"; (2) that "the defendant's concealment prevented the plaintiff from discovering the cause of action"; and (3) that "the plaintiff exercised due diligence in attempting to discover the cause of action."[9]

There is a split of authority among the federal courts of appeals concerning the first element of fraudulent concealment when deciding antitrust cases.[10] Some circuits hold that the plaintiff must prove that the defendant committed an affirmative act separate from the antitrust activity for the statue of limitations to be tolled.[11] Other circuits will toll the limitations period when affirmative acts have been committed, but do not require such additional activity when the defendant's underlying wrongful conduct is "self-concealing."[12] At least one federal circuit has explicitly referred to a "separate-and-apart" standard which requires that the defendant's concealing activity be completely separate from the underlying anticompetitive wrongdoing but still be conducted in furtherance of the antitrust activity.[13] In addition to these inter-circuit splits, many other circuits are split internally.[14]

This note argues that in antitrust cases, the affirmative-acts approach to fraudulent concealment is the superior standard because it best balances the principles that an exception should not swallow a rule and that no man should profit from his own wrong. Additionally, sound public policy supports the application of the affirmative-acts standard to determine the first element of fraudulent concealment.

Part II of this note sets forth a brief summary of the Clayton Act, presents the fraudulent concealment doctrine, and surveys the circuit split concerning which standard applies to the first element of fraudulent concealment—the affirmative-acts standard, the self-concealing standard, or the separate-and-apart standard.[15] Part III explains why courts should apply the affirmative-acts standard in fraudulent concealment cases under the Clayton Act.[16]

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9. Richard F. Schwed, Note, *Fraudulent Concealment, Self-Concealing Conspiracies, and the Clayton Act*, 91 MICH. L. REV. 2259, 2259 (1993). In fact, there is a circuit split concerning the first element of fraudulent concealment in many types of cases even outside the context of antitrust law. *See* Hobson v. Wilson, 737 F.2d 1, 34 n.103 (D.C. Cir. 1984) (adopting the self-concealing standard in civil-rights claims, but discussing the circuit split, generally).

10. Schwed, *supra* note 9, at 2264.

11. *Id.* at 2266.

12. *Id.* at 2268.

13. *Id.* at 2268–70.

14. *See infra* note 79.

15. *See infra* Part II.

16. *See infra* Part III.

II. BACKGROUND

A. The Clayton Act

The Sherman Act, passed in 1890, sought to "protect consumers from the high prices and reduced output caused by monopolies and cartels."[17] The legislators who drafted and passed the Sherman Act believed they were codifying "the common law of trade restraints."[18] The Sherman Act provides only that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[19] In 1911, the Supreme Court interpreted section one of the Sherman Act to prohibit only those contracts that unreasonably restrained trade.[20] Because the Court declared that only "unreasonable" restraints were wrongful under the Sherman Act, many lawmakers feared that the courts would soon be "hospitable" to large companies that were engaging in anticompetitive activities.[21] Congress passed the Clayton Act to address the problem.[22] Rather than banning mere "unreasonable" restraints on trade, the Clayton Act is much more specific than the Sherman Act and explicitly prohibits the following activities when they are anticompetitive: price discrimination,[23] tying and exclusive dealing arrangements,[24] mergers by stock acquisition,[25] and interlocking corporate directorates.[26] The Clayton Act proscribes activity "where the effect . . . may be substantially to lessen competition."[27]

In its original form, the Clayton Act did not include a statute of limitations.[28] Private actions brought under the Clayton Act were, therefore, governed by the statute of limitations for the state in which the suit was filed.[29] This was troubling to some members of Congress because awards of treble damages under the Clayton Act come from "a federally accorded right of action."[30] Consequently, it seemed incongruous that private treble-damage actions were governed by *state* statutes of limitations.[31] The Senate felt that this system was not only "unjust" to plaintiffs, but that it was also "unjust" to defendants[32] because "a plaintiff injured in several jurisdictions is permit-

17. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 50 (3d ed. 2005).
18. *Id.* at 52.
19. 15 U.S.C. § 1 (2009).
20. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911).
21. 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 301b, at 7 (3d ed. 2007).
22. *Id.*
23. 15 U.S.C. § 13a (2009).
24. *Id.*
25. 15 U.S.C. § 18 (2009).
26. 15 U.S.C. § 19 (2009).
27. 15 U.S.C. § 13a.
28. Riazi, *supra* note 3, at 1280.
29. Marcus, *supra* note 7, at 834.
30. S. REP. NO. 84-619, at 3 (1955).
31. *Id.*
32. *Id.* at 2.

ted to select as his forum the State with the most favorable statute."[33] The defendant, therefore, "remain[ed] in constant jeopardy until the longest period of limitations ha[d] transpired."[34] The confusion was multiplied by the fact that there was frequently a "problem of a conflict of laws in determining which State statute is controlling, the law of the forum or that of the situs of the injury."[35] Congress began the process of adding a statute of limitations to the Clayton Act in 1949 and passed section 4B in 1955.[36]

Section 4B provides that "[a]ny 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."[37] This language served the purpose of putting "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."[38]

B. Statutes of Limitations and Fraudulent Concealment in General

1. *Why Statutes of Limitations Are Important*

Statutes of limitations serve many purposes. Most significantly, they ensure that courts and parties will not waste resources by trying stale claims for which the best evidence may have been lost or destroyed. As time passes, it becomes more difficult for fact-finders to make accurate judgments because both parties are unable to access unavailable witnesses or lost or destroyed documents.[39] Statutes of limitations also serve to "create incentives for those who believe themselves wronged to investigate and bring their claims promptly."[40] The final role of statutes of limitations, generally, is to bring certainty and finality to transactions. Limitations statutes have this impact because they bar old claims "without regard to the merits."[41]

Statutes of limitations serve additional purposes in antitrust actions. A limitations period is especially important "where tests of legality are often rather vague, where many business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations, where liability doctrines change and expand, where damages are punitively trebled, and where duplicate treble damages for the same offense may be

33. *Id.* at 3.
34. *Id.*
35. *Id.*
36. Atl. City Elec. Co. v. Gen. Elec. Co., 312 F.2d 236 (2d Cir. 1962).
37. 15 U.S.C. § 15b (2006). The period of four years was chosen because the committee found that state limitation periods ranged from one to twenty years, with most of them being between one and four years. Twenty-six states had a limitation period of four years. S. REP. NO. 84-619, at 4 (1955).
38. S. REP. NO. 84-619, at 4 (1955).
39. W. Glenn Opel, Note, *A Reevaluation of Fraudulent Concealment and Section 4B of the Clayton Act*, 68 TEX. L. REV. 649, 651 (1990).
40. 2 AREEDA & HOVENKAMP, *supra* note 21, ¶ 320, at 282.
41. Opel, *supra* note 39, at 651.

threatened."[42] Furthermore, it is especially easy for evidence to disappear in antitrust cases. Most cases dealing with fraudulent concealment in an antitrust context involve price fixing or bid rigging, a narrow type of price fixing. Most violations depend, not only on the defendants' actions, but also on "surrounding circumstances, including the behavior of rival firms and general market conditions."[43] Those types of events and conspiracies are often difficult to reconstruct during litigation because of the number of defendants involved and the nature of the defendants' actions.[44] Although there are some straightforward price-fixing schemes, the very length of many of the opinions in these cases shows the complexity of some of the conspiracies.[45]

The four-year statute of limitations makes a great deal of sense in the antitrust context because having a longer limitations period would be contrary to the policies underlying statutes of limitations in these cases. In cases brought under the Clayton Act, the plaintiff is acting as a "private attorney general," meaning that society as a whole will profit when the crime is brought to light and stopped.[46] The public benefit is greatest where antitrust violations are quickly stopped.[47] Therefore, "it would be strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit [private enforcement] might realize."[48] The United States Supreme Court considers a shorter limitations period to be more effective in maximizing the public benefit of private antitrust suits.[49]

2. *A Brief Overview of Fraudulent Concealment*

Traditionally, the statute of limitations begins to run as soon as a plaintiff can file a cause of action, regardless of whether the plaintiff knows about the underlying facts that give rise to the action.[50] However, there are a number of equitable exceptions to this general rule, including the plaintiff's incompetence, the plaintiff's inability to discover an injury,[51] and the defen-

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42. 2 AREEDA & HOVENKAMP, *supra* note 21, ¶ 320, at 282.

43. *Id.*

44. *Id.*

45. *See, e.g.*, *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188 (E.D.N.Y. 2003) (sixty-eight pages).

46. Rotella v. Wood, 528 U.S. 549, 557 (2000); *see also* 2 AREEDA & HOVENKAMP, *supra* note 21, ¶ 320, at 282.

47. 2 AREEDA & HOVENKAMP, *supra* note 21, ¶ 320, at 283.

48. *Id.* at 282–83 (quoting *Wood*, 528 U.S. at 558).

49. *Id.*

50. Bain & Colella, *supra* note 8, at 502.

51. Although the discovery rule applies to many federal statutes of limitations, the United States Supreme Court has explicitly declined to read the discovery rule into all federal statutes of limitations. Klehr v. A.O. Smith Corp., 521 U.S. 179, 192 (1997) (discussing a RICO action). Courts have also held that the discovery rule does not apply to antitrust cases. One reason that the doctrine of fraudulent concealment is so important is that plaintiffs in Clayton Act actions are not protected by the discovery rule when they do not learn about their injuries within four years of its commencement. *See generally* Mary S. Humes, Note, *RICO and a Uniform Rule of Accural*, 99 YALE L.J. 1399, 1418 (1990).

dant's fraudulent concealment.[52] These circumstances will toll a statute of limitations.[53] The policy underlying these equitable exceptions is the need to prevent defendants from taking advantage of their own wrongs.[54] Barring valid claims because of a time lapse can be unfair to plaintiffs and may "result in hardship to the plaintiff."[55] This is why "[m]ost courts . . . have recognized circumstances justifying a judicial exception to the policy of repose."[56] Those exceptions allow a court to examine the factual circumstances of a claim. Thus, "courts have developed tolling doctrines to alleviate the harshness" of certain applications of the statute of limitations.[57]

The equitable exception at issue in this note is fraudulent concealment. Under that doctrine, the statute of limitations is tolled until the plaintiff discovers the wrong that the defendant has concealed in some way.[58] The Supreme Court first explicitly recognized the concept of fraudulent concealment in the nineteenth century in *Bailey v. Glover*.[59] The Court observed that the idea is derived from an English chancery court rule and that the notion is "founded in a sound and philosophical view of the principles of the statutes of limitation."[60] The purpose of a statute of limitations is to "prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished if they ever did exist."[61] If a party successfully concealed a fraud until the statute of limitations had expired, then "the law which was designed to prevent fraud [would become] the means by which it is made successful and secure."[62] In *Bailey*, the Court held that fraudulent concealment could consist of either affirmative acts or self-concealed actions.[63] However, the underlying cause of action in that case was fraud, and many courts have been reluctant to extend the *Bailey* holding to *non*-fraud claims, such as those under the antitrust laws.[64] Shortly after deciding *Bailey*, the Court decided *Wood v. Carpenter*[65] involving fraudulent concealment in which the underlying action was not fraud.[66] There, the Court held that the acts committed by the defendant to conceal his actions could "precede [the wrong's] perpetration" and that "[t]he length

52. Bain & Colella, *supra* note 8, at 502–04.

53. *Id.* Courts can use discretion to toll the statute of limitations for many other reasons giving rise to a great many equitable exceptions. Courts have used equitable tolling when, for example, the plaintiff was prevented from filing an action due to war or when the plaintiff filed a timely but defective pleading. *Id.* at 504.

54. *Id.* at 503.

55. Opel, *supra* note 39, at 651.

56. *Id.* at 651–52.

57. *Id.* at 652.

58. *Id.*

59. 88 U.S. 342 (1874).

60. *Id.* at 349.

61. *Id.*

62. *Id.*

63. *Id.*

64. Schwed, *supra* note 9, at 2264.

65. 101 U.S. 135 (1879).

66. *Id.*

of time [between the concealment and the wrong] is not material, provided there is the relation of design and its consummation."[67] Most important, for purposes of this note, the Court went on to hold that, "[c]oncealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."[68] This language, albeit dictum, indicates that the Court might reject a self-concealing standard in cases that do not involve fraud as the underlying action.

The Court further solidified the foundation for the fraudulent concealment doctrine in *Glus v. Brooklyn Eastern District Terminal*,[69] when it declared that "'no man may take advantage of his own wrong'"[70] and that such a notion was "'[d]eeply rooted in our jurisprudence.'"[71] Later, to advance this policy, the Court declared that fraudulent concealment should be read into every federal statute of limitations.[72] However, the Court did not specify what type of conduct would satisfy the concealment element of the doctrine.

Although the same three elements must be proved when the plaintiff claims fraudulent concealment—the defendant's concealment, the plaintiff's inability to discover the cause of action, and the plaintiff's due diligence—there is disagreement among the circuits concerning which standard to apply to the concealment element of this test.[73] In antitrust cases specifically, courts have applied three different standards to the concealment element: the affirmative-acts standard, the self-concealing standard, and the separate-and-apart standard.[74]

67. *Id.* at 143.

68. *Id.* This holding from *Wood* has even been cited in antitrust cases. *See, e.g.*, Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1465 (6th Cir. 1988).

69. 359 U.S. 231 (1959).

70. Bain & Colella, *supra* note 8, at 514 (quoting *Glus*, 359 U.S. at 232).

71. *Id.* (quoting *Glus*, 359 U.S. at 232–33).

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

73. Schwed, *supra* note 9, at 2264. Courts also use different standards to determine the due diligence prong of the fraudulent-concealment test. *Id.*

74. *Id.*

C. Disparate Standards for the First Element of Fraudulent Concealment[75]

There are three standards for the concealment element, and the two most commonly used are self-concealing and affirmative acts. The difference between the two standards was aptly explained by Judge Higginbotham in *Texas v. Allan Construction Co.*[76] An example of a self-concealing fraud is "sell[ing] a fake vase as if it were an antique."[77] This is self-concealing because "[d]eception is an essential element of the wrong, and one that is not intended merely to cover up the wrong itself."[78] On the other hand, an affirmative act would be to "steal a vase and to replace it with a worthless replica."[79] This is an affirmative act because "[t]he wrong is the theft of the vase; the replacement is an act separate from the wrong itself and aimed only at concealing the fact that the real vase has been stolen."[80] There is a third standard, the separate-and-apart standard, and it is the most difficult to meet. It requires evidence that "the defendants affirmatively acted to conceal the plaintiff's claim" *and* that conduct must have been "separate and apart from the acts of concealment involved in the defendants' antitrust violation."[81] One of the most obvious factors in deciding whether an action would satisfy the separate-and-apart standard is to look at the timing of the act. If it followed the wrongful conduct, then it is often considered to be separate from the wrongful act.[82] Adding to the vase analogy, if a thief sells a fake vase claiming that it is an antique and then, under threat of prosecution, falsifies records that might indicate the vase's authenticity, the forgeries would probably be considered acts that were separate and apart.

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75. Although some circuits have well-settled case law on the issue, confusion abounds in other circuits, even in very recent cases, further highlighting the need for consistency in this area. *See, e.g., In re* Rubber Chemicals Antitrust Litig., 504 F. Supp. 2d 777, 788 (N.D. Cal. 2007) ("Though Plaintiffs did not use the talismanic words 'reasonable reliance' in their Amended Complaint, Plaintiffs have adequately pleaded that they were misled by (i.e., relied upon) Defendant's affirmative acts of concealment and that it was reasonable to do so insofar as they allege they could not have discovered the existence of the combination and conspiracy alleged herein at an earlier date by the exercise of reasonable due diligence because of the deceptive practices and techniques of secrecy employed by the Defendants and their Co-conspirators." (internal citations and quotations omitted)); *In re* Monosodium Glutamate Antitrust Litig., 2003 WL 297287, *3 (D. Minn 2003) (noting that courts *within the same district* have adopted an affirmative-standard, but instead choosing to adopt a self-concealing standard); *In re* Mercedes-Benz Antitrust Litig., 157 F. Supp. 2d 355, 370–71 (D.N.J. 2001) (noting that "district courts in [the Third Circuit] have diverged" and adopting a self-concealing standard, despite also noting that "secrecy is not integral to either bid-rigging or price-fixing.").

76. 851 F.2d 1526 (5th Cir. 1988).

77. *Id.* at 1529.

78. *Id.*

79. *Id.*

80. *Id.* at 1530.

81. Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 122 (4th Cir. 1995) (citing Colo. v. W. Paving Constr. Co., 630 F. Supp. 206, 210 (D. Colo. 1986)).

82. Marcus, *supra* note 7, at 858.

Circuits that use the self-concealing standard will find that the first element of fraudulent concealment is proved "merely by proving that a self-concealing antitrust violation has occurred."[83] In contrast, circuits requiring affirmative acts will generally require that "a plaintiff must prove that the defendants affirmatively acted to conceal their antitrust violations, but the plaintiff's proof may include acts of concealment involved in the antitrust violation itself."[84]

1. *The Affirmative-Acts Standard*

Participants in a bid-rigging or price-fixing scheme can carry out acts during the course of the conspiracy that tend to conceal the wrongful activity. The Fifth and Sixth Circuits have adopted strict affirmative-action standards and consider any act that is not an element of the Clayton Act violation to be an affirmative act.[85] An affirmative act is "an act separate from the wrong itself and aimed only at concealing the fact that" the wrong has been committed.[86] Both of the circuits have noted further that price-fixing and bid-rigging conspiracies are not inherently self-concealing.[87] These schemes can be successful, at least for a while, when no affirmative steps are taken to conceal the scheme.[88]

Any act intended to keep the improper behavior a secret can satisfy the first element of fraudulent concealment, even if that act was "undertaken at the time of the conspiracy."[89] The smallest act, such as concealing bids in plain envelopes rather than in company stationery, can be considered an affirmative action.[90]

There is some controversy over what can be considered an affirmative act. Some circuits that have not definitively settled what standard should be used have still concluded that certain acts are (or are not) affirmative actions. Acts that have been held to be affirmative actions include holding secret meetings in violation of other regulations.[91] Another court held that "the use of public pay telephones, [and] calls made to residences of company representatives rather than to their offices" constituted affirmative actions.[92] The destruction of records has also been found to be an affirmative

83. *Marlinton*, 71 F.3d at 122 (citing N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065, 1084 (2d Cir.), *cert. denied*, 488 U.S. 848 (1988)).

84. *Id.* (citing Tex. v. Allan Constr. Co., 851 F.2d 1526, 1532 (5th Cir. 1988)).

85. *See Allan Constr. Co.*, 851 F.2d at 1534; Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1472 (6th Cir. 1988).

86. *Allan Constr. Co.*, 851 F.2d at 1530.

87. *Id.* at 1531; *Pinney*, 838 F.2d at 1473.

88. *See, e.g.*, *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 224 (E.D.N.Y. 2003).

89. *Allan Constr. Co.*, 851 F.2d at 1532; *see also Pinney*, 838 F.2d at 1469.

90. Kan. City v. Fed. Pac. Elec. Co., 310 F.2d 271, 284 n.2 (8th Cir. 1962) (stating that using plain envelopes was an "active step" in concealing the defendants' actions, though not holding that affirmative acts are necessary to show fraudulent concealment).

91. *Pinney*, 838 F.2d at 1472.

92. *Fed. Pac. Elec. Co.*, 310 F.2d at 284 n.2.

act.[93] Even sending bids or other pricing information to other members of the cartel in plain envelopes rather than on company stationery has been held to be an affirmative act.[94] A creative group of defendants developed a code based on the phases of the moon so others would not understand their conspiracy-related conversations.[95] That was found to be an affirmative act sufficient to support tolling the statute of limitations.[96]

The authorities are split over whether clandestine meetings constitute affirmative actions.[97] There is also a division over price misrepresentations, with one circuit holding that outright misrepresentations about prices is an affirmative act,[98] while a district court in another circuit held that letters to customers containing misrepresentations about price increases did not constitute affirmative actions.[99]

Although there is a split among the circuits about whether lying about prices and market factors is enough to toll the statute of limitations, all circuits that have discussed affirmative actions have indicated that neither denial of wrongdoing nor silence alone constitutes an affirmative act. For instance, the Fourth Circuit has held that if a mere denial of antitrust activity constitutes fraudulent concealment it "would effectively nullify the statute of limitations in these cases"[100] because "[i]t can hardly be imagined that illegal activities would ever be so gratuitously revealed."[101] The notion of fraudulent concealment itself implies that the defendant takes actions that would "deflect litigation."[102] In most jurisdictions, signing an affidavit of non-collusion, alone, is not sufficient to toll the statute of limitations, but the Fifth Circuit has found that such denial could toll the statute in very narrow circumstances.[103] Additionally, courts have been very clear in holding that "concealment by mere silence is not enough."[104] The notion that mere silence or denial of wrongful activity is not considered to be fraudulent concealment dates back to 1879 when the Supreme Court stated in dic-

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93. *Id.*

94. *Id.*; *In re* Milk Prod. Antitrust Litig., 84 F. Supp. 2d 1016, 1023 (D. Minn. 1997).

95. *Fed. Pac. Elec. Co*., 310 F.2d at 284 n.2.

96. *Id.*

97. *Compare* Ingram Corp. v. J. Ray McDermott & Co., 1980 WL 1819, *4 (E.D. La. 1980), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir.1983) (holding that clandestine meetings in hotel rooms were not affirmative actions), *with* Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1474 (6th Cir. 1988) (holding that leaving price-fixing meetings off of a trade association meeting agenda was an affirmative act).

98. *Pinney*, 838 F.2d at 1476.

99. *In re Milk Prod.*, 84 F. Supp. 2d at 1023. Although the court in that case discussed all of the factors in terms of affirmative actions, it is possible that the district court wanted to apply a higher standard—the separate-and-apart standard—and that is why the court was reluctant to find that the letters were not sufficient to toll the statute.

100. Pochahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 218–19 (4th Cir. 1987).

101. *Id.* at 219.

102. *Id.*

103. *See, e.g.*, Tex. v. Allan Constr. Co., 851 F.2d 1526, 1532–33 (5th Cir. 1988) (holding that a non-collusion affidavit is sufficient only if the parties were in a fiduciary relationship or if the plaintiff reasonably relied on the defendant's affidavit).

104. *Id.* at 1529.

tum "[c]oncealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."[105] Even though courts that have discussed the affirmative-acts standard will accept the most subtle action as sufficient to toll the statute of limitations (as long as it is not an actual element of the wrongful activity), all circuits agree that mere silence is not enough,[106] and almost all would agree that a denial is not sufficient to toll the statute of limitations, unless it is coupled with an affirmative act.

2. *The Self-Concealing Standard*

The self-concealing standard requires only that a defendant's anticompetitive activity is performed in a way that makes it impossible for the plaintiff to discover the activity—no actions outside the antitrust violation itself are required. There is one circuit that has adopted a self-concealing standard in all situations[107] when dealing with fraudulent concealment in antitrust actions.[108] The courts in that circuit base the rule on a conclusion that price-fixing and bid-rigging conspiracies are by their very nature self-concealing.[109] In *Hendrickson*, the Second Circuit came to that conclusion because, the court claimed, in order for such a scheme to be successful, it had to remain secret.[110] If the injured parties knew about the scheme, they would bring suit against the wrongdoers and the conspiracy would be over.[111] This need for secrecy is the entirety of the Second Circuit's reasoning as to why bid-rigging is inherently self-concealing.[112]

3. *The Separate-and-Apart Standard*

The separate-and-apart standard is the most difficult for plaintiffs to meet because it requires "the plaintiff to show that the defendant concealed the antitrust violation through affirmative acts committed wholly apart from

105. Wood v. Carpenter, 101 U.S. 135, 143 (1879).

106. Mere silence can be enough in limited circumstances, including when a defendant had a fiduciary duty to the plaintiff, but that is generally not applicable in bid-rigging cases. *Allan Constr. Co.*, 851 F.2d at 1535 n.3.

107. There are other circuits that have indicated that an affirmative-acts standard is appropriate in certain instances, but they also indicate that cases might arise in which an antitrust violation is self-concealing and that such a standard for the concealment prong might be appropriate. *See, e.g.*, Supermarket of Marlinton v. Meadow Gold Dairies, Inc., 71 F.3d 119, 123 (4th Cir. 1995) ("The self-concealing standard is only even arguably proper when deception or concealment is a necessary element of the antitrust violation, i.e., when the antitrust violation is truly self-concealing.").

108. N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065 (2d Cir. 1988); *see also In re* Nine W. Shoes Antitrust Litig., 80 F. Supp. 2d 181 (S.D.N.Y. 2000).

109. *Hendrickson*, 840 F.2d at 1084; *In re Nine W.*, 80 F. Supp. 2d at 193.

110. *Hendrickson*, 840 F.2d at 1084 (citing Colo. *ex rel.* Woodard v. W. Paving Constr. Co., 833 F.2d 867, 881 (10th Cir. 1987)).

111. *Id.*

112. *Id.*

the underlying illegal activity."[113] The Tenth Circuit is the only one that has adopted such a standard, but it has been inconsistent in its opinions concerning the concealment requirement in antitrust actions.[114] That court adopted a self-concealing standard in one case.[115] However, in a later case, the circuit court adopted a separate-and-apart standard.[116] In the *Western Paving* case, a panel in the Tenth Circuit originally held that bid-rigging schemes are inherently self-concealing[117] and overturned the district court, which had held that a separate-and-apart standard should be used to decide the concealment element of fraudulent concealment.[118] However, the Tenth Circuit elected to rehear the matter en banc. In a per curiam opinion, the Tenth Circuit vacated the panel opinion and affirmed the district court.[119] Therefore, according to the most recent case on the matter, plaintiffs in the Tenth Circuit must show separate acts of concealment in order to toll the statute of limitations under the Clayton Act.[120] One commentator has stated that this case "epitomizes the confusion and diversity of opinion in this area."[121] He observed:

> Although a Tenth Circuit panel reversed the district court's decision, the grounds for the reversal were not unanimous. Two judges chose to reverse the district court's holding because Western Paving's conspiracy to rig construction bids on state projects was, by its nature, a self-concealing conspiracy. Judge Anderson, while concurring in the panel's decision, refused to support the self-concealing conspiracy standard. Instead, he supported adopting the affirmative acts standard, which would allow the plaintiff to prove fraudulent concealment based upon the defendant's acts that are also a part of the plaintiff's cause of action. Upon rehearing the case, the Tenth Circuit, by a four-to-four split vote, vacated the panel decision and affirmed the district court's holding. In sum, the Tenth Circuit grudgingly accepted the . . . [separate-and-apart] standard, which requires a court to distinguish between acts of concealment that are inherent in the wrongful act and those that are separate and apart from the original wrong and thus constitute fraudulent concealment.[122]

So, although the Tenth Circuit has adopted a separate-and-apart standard for now, it is reasonable to think that the issue remains unsettled.

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113. Schwed, *supra* note 9, at 2266.

114. *See* King & King Enter. v. Champlin Petroleum Co., 657 F.2d 1147 (10th Cir. 1981) (adopting a self-concealing standard). *But see* Colo. v. W. Paving Constr. Co., 841 F.2d 1025, 1026 (10th Cir. 1988) (adopting a separate-and-apart standard).

115. *King & King*, 657 F.2d at 1147.

116. *W. Paving Constr. Co.*, 841 F.2d at 1026.

117. *See generally id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Opel, *supra* note 39, at 655.

122. *Id.* at 655–56.

D. Why Statutes of Limitations Need to Be Consistent

Circuit splits concerning statutes of limitations are no more tolerable than circuit splits concerning substantive law.[123] There are several reasons that statutes of limitations need to be consistent, including the following: to provide guidance to courts;[124] to prevent forum shopping;[125] and to prevent inequitable results by some courts.[126] These are the problems Congress sought to address in passing section 4B, which was intended to bring uniformity to antitrust litigation.[127] When courts are inconsistent in their recognition and interpretation of fraudulent concealment, then the problems that Congress sought to remedy with the act will return.

There is also the danger that because antitrust cases involving fraudulent concealment are often "inconsistent and often hypertechnical,"[128] judges may be tempted to rule a certain way on a threshold issues, such as statutes of limitations, because of their opinions concerning the merits of the case. For example, if a court "believes that the antitrust claim is unfounded [, then the court] may avoid the substantive issue by concluding that the statute of limitation has precluded the action."[129] Such a result leads to inconsistencies, and encouraging judges to dispose of claims before hearing evidence on the merits is generally unacceptable.

III. RESOLUTION

Some commentators advocate abolishing fraudulent concealment in antitrust cases. One such author posits that the plain language of the Clayton Act indicates that "Congress enacted an *absolute* limitation on a plaintiff's right to bring suit."[130] The Supreme Court has held that Congress has the power and the right to create an unqualified limitations period that would not allow for tolling in the case of fraudulent concealment.[131] One commenter argues that "[s]ection 4B clearly suggests that it is intended to serve as an absolute limitations period. The statute expressly claims to be applicable

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123. In passing section 4B, Congress stated that its purpose was to add uniformity to antitrust cases. Additionally, the United States Supreme Court recognized the importance of uniformity in antitrust actions when it concluded that federal courts have implied exclusive jurisdiction over antitrust cases. Although Congress has reserved exclusive federal jurisdiction over certain types of actions (e.g. patent actions), the Court has only very rarely found implied federal jurisdiction. *See* MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS 287 (6th ed. 2007).

124. 2 AREEDA & HOVENKAMP, *supra* note 21, ¶ 320, at 282.

125. S. REP. NO. 84-619, at 4 (1955).

126. 2 AREEDA & HOVENKAMP, *supra* note 21, ¶ 320, at 282.

127. S. REP. NO. 84-619, at 4 (1955).

128. 2 AREEDA & HOVENKAMP, *supra* note 21, ¶ 320, at 283.

129. *Id.*

130. Opel, *supra* note 39, at 662 (emphasis added).

131. Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946) ("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive. The rub comes when Congress is silent." (internal citations omitted)).

to '*any* action to enforce *any* claim' and purports to '*forever* bar' any claim not brought within the four-year limitations period."[132]

This claim is easily rebutted. Most important, the Supreme Court has explicitly held that fraudulent concealment is to be read into *all* federal statutes of limitations.[133] Courts have applied equitable tolling exceptions to a variety of statutes of limitations, all of which have wording that is equally as strong as that found in section 4B.[134] Additionally, in passing the Clayton Act, Congress intended that "private treble damage plaintiffs have been characterized as 'allies of the government in enforcing antitrust laws.'"[135] It is often very difficult for potential plaintiffs to discover the deceit within the statutory four years. It can certainly be said that "denying application of the doctrine would greatly reduce potential liability and thus the deterrent effect of the treble damage provisions of the antitrust laws" because price-fixing and bid-rigging schemes are so frequently difficult to detect.[136]

Therefore, rather than simply abolishing the doctrine of fraudulent concealment altogether, the more prudent approach is one that balances the policies underlying both statutes of limitations and fraudulent concealment. The affirmative-acts standard achieves this balance. Courts should apply that approach when plaintiffs are attempting to toll the statute of limitations due to the defendant's fraudulent concealment.

A. Comparing an Affirmative-Acts Standard to Other Standards

The affirmative-acts standard is a middle ground between the separate-and-apart standard, which is overly friendly to defendants, and the self-concealing standard, which is overly friendly to plaintiffs. Additionally, though not dispositive, the fact that a majority of courts have adopted some version of the affirmative-acts standard is strongly suggestive that it is the superior standard.

1. *Self-Concealing Standard*

Anticompetitive conspiracies are not inherently self-concealing. As one district court noted, deception is not an essential element of a Clayton Act violation, and "[i]f [] deception is not an essential element of the wrong, then it follows that fraudulent concealment is not inherent in every price-fixing scheme."[137] The federal district court in the Eastern District of New York recently decided a case in which the price-fixing scheme was *not* inhe-

132. Opel, *supra* note 39, at 662 (emphasis added).

133. *See, e.g.*, Santos *ex rel* Beato v. United States, 559 F.3d 189 (3d Cir. 2009) (applying the discovery rule to the Federal Tort Claims Act, which has a statute of limitations that bars suits not brought within two years).

134. *Id.*

135. Comment, *Clayton Act Statute of Limitations and Tolling by Fraudulent Concealment*, 72 YALE L.J. 600, 611 (1963) (citing 51 Cong. Rec. 16319 (1914) (statement of Congressman Floyd)).

136. *Id.* at 611–12.

137. *In re* Catfish Antitrust Litig., 826 F. Supp. 1019, 1030 (N.D. Miss. 1993).

rently self-concealing.[138] That case involved a settlement agreement between four pharmaceutical companies—Bayer, Barr, HMR, and Rugby—wherein Barr, HMR, and Rugby agreed not to market a generic version of one of Bayer's antibiotics in the United States.[139] In that case, the settlement agreement and supply contracts between the companies "were immediately disclosed to the public."[140] Even more important, "the 'scheme' established by defendants would not, and in fact did not, dissolve once the agreements were made public."[141] The *Ciprofloxacin* case, therefore, shows that Clayton Act violations can be (and are) carried out in full view of the public.

It is important to note that the act of price fixing or bid rigging *is* the substantively improper conduct. While some violations of the Clayton Act—such as monopolization and retail price maintenance—do not involve price fixing, almost all cases involving fraudulent concealment are price-fixing and bid-rigging schemes, because those activities are most often carried out under a cloak of secrecy.[142] The Second Circuit's assertion that price-fixing schemes are inherently self-concealing is simply not borne out by the facts of actual cases. In the seminal self-concealing standard case, the Second Circuit admitted that the defendants had committed affirmative acts to keep the cartel a secret.[143] Since *Hendrickson*, some courts in the Second Circuit have stopped analyzing the concealment element of fraudulent concealment altogether where the plaintiff has alleged that the defendant participated in a bid-rigging or price-fixing conspiracy.[144] This is completely contrary to the doctrine of fraudulent concealment because not requiring a showing of any evidence beyond the price-fixing scheme itself effectively subverts the purpose of the statute of limitations.

The concealment aspect of fraudulent concealment is essentially negated when an affirmative act is not required. By allowing the wrongdoing itself to toll the statute of limitations, "the abandonment of the concealment prong substantially undermines the interest in limiting the period during which a defendant may be sued."[145] Although many bid-rigging and price-fixing schemes are deplorable, the mere fact that defendants have been accused of wrongdoing should not, on its own, toll the statute of limitations. One foundational principle behind statutes of limitations is that, after a certain amount of time, reliable fact-finding cannot be conducted. In situations where evidence has been lost or destroyed or where actions were long ago forgotten, "courts cannot fairly be asked to resolve ancient disputes."[146] For

138. *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 224 (E.D.N.Y. 2003).

139. *Id.* at 199.

140. *Id.* at 224.

141. *Id.*

142. Schwed, *supra* note 9, at 2265.

143. N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1084, 1085 (2d Cir. 1988).

144. *In re* Nine W. Shoes Antitrust Litig., 80 F. Supp. 2d 181, 193 (S.D.N.Y. 2000) (noting that "by alleging a price fixing scheme, the plaintiff sufficiently has alleged the first prong of fraudulent concealment").

145. Marcus, *supra* note 7, at 872.

146. *Id.*

the statute of limitations in Clayton Act claims to be applied as Congress intended, courts must "insist on a showing of some wrongful behavior by the defendant that caused delay in filing suit and therefore outweighs the policies underlying statutes of limitations."[147] Furthermore,

> [t]he fraudulent concealment doctrine is not applicable merely because there is evidence of secrecy, silence, concealment or other clandestine activities by the alleged conspirators. If it were, the 4-year limitation period Congress adopted in 1955 would be of no practical significance for antitrust conspiracies, most of which obviously operate in clandestine fashion, with the participants seeking to keep their covert machinations hidden from public view.[148]

Allowing the concealment element to be met simply by virtue of the fact that there was a conspiracy would, therefore, subvert Congress's intent in passing a statute of limitations for litigating antitrust activity.

Although some might argue that adopting an affirmative-acts standard would reward particularly clever defendants,[149] those fears are misplaced. Under an affirmative-acts standard, fraudulent concealment can still occur even when acts of concealment occur simultaneously with the wrongdoing. All that is needed is "[a]t most, *some* action taken by the defendant independent of the wrongdoing, but tending to conceal it."[150] The conduct can be very subtle; it does not have to be an elaborate scheme to be perpetrated outside the conspiracy. As the Eighth Circuit indicated, the actions that would satisfy this standard need only be slight, such as sending letters in plain envelopes rather than self-addressed ones.[151] The example illustrates how little is needed to show that an affirmative act has taken place. Allowing *any* act to be considered an affirmative action as long as it does not satisfy an element of the actual antitrust violation means that such defendants will not be rewarded because, as many of those courts have pointed out, a price-fixing or bid-rigging scheme must be kept secret in order to be successful.[152] Because those schemes are not inherently self-concealing, the conspirators must have taken some affirmative steps to keep the cartel secret.

If taken to an extreme, this argument may suggest that if an affirmative-acts standard is always met, then the statute of limitations will be rendered meaningless, just as it would be under the self-concealing standard. This is not the case. Courts that use a self-concealing standard do not analyze the first element of fraudulent concealment at all.[153] Using an affirma-

147. *Id.* Wrongful behavior is required because courts have specifically and explicitly refused to extend the discovery rule to antitrust cases and Congress has not amended section 4B to include a discovery rule. *See generally* Stewart, *supra* note 4.

148. Stewart, *supra* note 4, at 88 n.69.

149. Schwed, *supra* note 9, at 2279–80.

150. Marcus, *supra* note 7, at 859 (emphasis added).

151. Kan. City v. Fed. Pac. Elec. Co., 310 F.2d 271, 284 n.2 (8th Cir. 1962).

152. N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065, 1084 (2d Cir. 1988).

153. *In re* Nine W. Shoes Antitrust Litig., 80 F. Supp. 2d 181 (S.D.N.Y. 2000).

tive-acts standard and allowing subtle actions to satisfy the first element would ensure that the defendant actually committed fraudulent concealment. Without such a requirement, it is possible that a court could find an open price-fixing scheme, such as the one presented in the *Ciprofloxacin* case,[154] to be fraudulent concealment even though the actions were carried out in full public view.

Using a self-concealing standard would leave defendants "virtually powerless to assure themselves of the protections of limitations."[155] Those protections extend to plaintiffs and the court system, as well. As discussed above, one of the most important policies underlying statutes of limitations is the desire not to litigate stale claims in which evidence has been lost or destroyed and memories have faded.[156]

Furthermore, considering the crime itself to be an act of concealment is akin to treating silence as an act of wrong-doing. In most legal contexts, silence is not enough to be considered an act of wrongdoing,[157] and many circuits agree that silence alone should not constitute fraudulent concealment in an antitrust action.[158] As one scholar has noted, "'[i]t is in the nature of a conspiracy that there be secrecy; mere nondisclosure or denial of the existence of a conspiracy does not constitute fraud or deceit for tolling purposes.'"[159] "'If it did, the tolling exception to the statute of limitations would eclipse the basic statute itself'" in the violations that include price-fixing and bid-rigging.[160] The doctrine of fraudulent concealment is weakened when silence is treated as an act of concealment because "tolling when the defendant's only act to conceal has been 'mere silence' effectively eliminates concealment as an independent requirement of the fraudulent concealment doctrine."[161]

Another argument against the self-concealing standard is that it directly assaults one of the primary purposes of statutes of limitations—to prevent plaintiffs from dredging up old claims. That is because a self-concealing standard allows "indefinite tolling when a defendant does not need to act affirmatively to conceal the violation."[162] Defendants would be forced to fight claims in which evidence has been irretrievably lost and possibly long past the point at which the transactions became final.

Finally, and most important, using a self-concealing standard does not comport with existing Supreme Court decisions. The doctrine of fraudulent

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154. *See In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 224 (E.D.N.Y. 2003).

155. Marcus, *supra* note 7, at 871.

156. Opel, *supra* note 39, at 651.

157. Silence can be considered an act of wrongdoing when the defendant had some duty to disclose a material fact, such as in a fiduciary relationship. Tex. v. Allan Constr. Co., 851 F.2d 1526, 1533 (5th Cir. 1988).

158. *See* discussion *supra* p. 11.

159. Marcus, *supra* note 7, at 859 (quoting Hall v. E. I. DuPont de Nemours & Co., 312 F. Supp. 358, 362 (E.D.N.Y. 1970)).

160. *Id.* (quoting *Hall*, 312 F. Supp. at 362).

161. *Id.* at 865.

162. Opel, *supra* note 39, at 658.

concealment was first recognized by the Court in *Bailey v. Glover*,[163] a case involving fraud. The Court held that fraudulent concealment could be met through either self-concealing or affirmative actions.[164] Courts and commentators have properly distinguished that case from antitrust cases because the underlying action in *Bailey* was fraud, and anticompetitive activity is not, on its face, fraudulent.[165] This distinction has merit, given that the Court decided a later case involving fraudulent concealment that was not based on an underlying claim of fraud.[166] There, the Court stated that "[c]oncealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."[167] This powerful dictum indicates that the Court would reject a self-concealing standard in cases that do not involve fraud as an underlying action. Such a conclusion would satisfy both stare decisis and the policies underlying statutes of limitations.

2. *Separate-and-Apart Standard*

The primary reason that the separate-and-apart standard is unacceptable is that the Supreme Court has never recognized that standard in its decisions concerning fraudulent concealment. The Court seemed to advocate for an affirmative-acts or self-concealing standard in *Bailey* and in *Holmberg v. Armbrecht*,[168] the two seminal cases concerning fraudulent concealment. Those cases do not indicate that a more difficult standard for plaintiffs would ever be appropriate in fraudulent concealment cases. In *Bailey*, for example, the Court stated that the fraudulent concealment had occurred "'when the fraud has been concealed, or is of such character as to conceal itself.'"[169] *Holmberg* also does not refer to a more difficult standard for plaintiffs to meet beyond the affirmative-acts standard. Likewise, *Wood v. Carpenter* [170] advocates the affirmative-acts standards. Because the Court has not applied the separate-and-apart standard to cases involving fraudulent concealment, the circuits should also refrain from doing so.

Furthermore, whereas the self-concealing standard requires too little of plaintiffs, the separate-and-apart standard goes to the other extreme and asks too much of plaintiffs. Most acts taken in furtherance of a conspiracy are so intertwined with the conspiracy itself that it would be very difficult for plaintiffs to come up with actions that are sufficiently removed from the conspiracy to not be considered in furtherance of the conspiracy. As one author pointed out, "every act of concealment can be characterized as part

163. 88 U.S. 342 (1874).
164. *Id.* at 349.
165. Schwed, *supra* note 9, at 2264.
166. Wood v. Carpenter, 101 U.S. 135 (1879).
167. *Id.* at 143. This holding has been cited by circuit courts in antitrust cases. *See supra* note 68.
168. 327 U.S. 392 (1946).
169. Opel, *supra* note 39, at 656 (quoting *Bailey*, 88 U.S. at 349–50 (1874)).
170. 101 U.S. 135 (1879).

of the base violation in the sense that the success of the defendant's wrongful act depends on its continued concealment."[171] Thus, a separate-and-apart standard effectively eliminates tolling due to fraudulent concealment in many cases.

Scholars have pointed out the extreme difficulty of deciding whether certain conduct was committed in furtherance of a conspiracy or if it was undertaken outside of the conspiracy.[172] Attempting to classify certain acts as separate and apart when the defendants have clearly been acting inappropriately can lead to a great deal of inconsistency because such a classification is "a subjective judicial judgment that does little to promote certainty."[173] The ease of applying a certain standard is a legitimate concern for courts, because a standard that is difficult to apply will invariably lead to inconsistent results. As discussed above, desire for uniformity was a primary reason that Congress passed section 4B. Courts should respect Congress's intent when interpreting a statute,[174] and courts should be hesitant to implement a standard that would give rise to inconsistency under the Clayton Act. Under the affirmative-acts standard, courts do not have to conduct highly technical, but often inconsistent, analyses to determine whether an incident was far enough removed from the wrongdoing to constitute a wholly separate course of events. Instead, the court can focus on "the practical problem of whether the defendant concealed the offense from the plaintiff."[175]

IV. CONCLUSION

The purpose of a statute of limitations is to provide finality and certainty to all parties in litigation. However, the doctrine of fraudulent concealment ensures that defendants cannot profit from their own wrongdoing by concealing their crimes until the statute has passed. Requiring plaintiffs to provide evidence sufficient to meet the affirmative-acts standard for the concealment element of fraudulent concealment provides the correct balance between the policies underlying statutes of limitations and fraudulent concealment.

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171. Opel, *supra* note 39, at 657.
172. 2 AREEDA & HOVENKAMP, *supra* note 21, at 283.
173. Opel, *supra* note 39, at 657.
174. Boumedine v. Bush, 553 U.S. 723 (2008).
175. Opel, *supra* note 39, at 661.

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