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## FRAUDULENT CONCEALMENT AS TOLLING THE ANTITRUST STATUTE OF LIMITATIONS

In 1955 Congress passed the first federal antitrust statute of limitations.<sup>1</sup> Prior to that time, the courts found it necessary to "borrow" the statute of limitations of the state where the court was sitting.<sup>2</sup> This, of course, resulted in widely divergent limitation periods,<sup>3</sup> and it was with the intention of ending this anomalous situation<sup>4</sup> that Congress passed section 4B of the Clayton Act which provides that: "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."<sup>5</sup> A federal statute of limitations having been passed, the question remained whether Congress intended that the doctrine of fraudulent concealment be read into the statute.

### I. ORIGINS OF THE DOCTRINE

The doctrine of fraudulent concealment, as developed at common law, was explicitly recognized in *Bailey v. Glover*,<sup>6</sup> further developed in *Exploration Co. v. United States*,<sup>7</sup> and given universal application in *Holmberg v. Armbrecht*.<sup>8</sup>

In *Bailey v. Glover*, an assignee in bankruptcy brought an action to avoid a fraudulent conveyance.<sup>9</sup> The applicable statute of limitations<sup>10</sup> apparently barred the action. However, the Court, applying the doctrine of fraudulent

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1. 15 U.S.C. § 15b (1964).

2. *Moviecolor, Ltd. v. Eastman Kodak Co.*, 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961) (New York law); *Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F.2d 196 (9th Cir. 1950), cert. denied, 340 U.S. 943 (1951) (California law); *Burnham Chem. Co. v. Borax Consol., Ltd.*, 170 F.2d 569 (9th Cir. 1948), cert. denied, 336 U.S. 924 (1949) (California law); *Zimmerer v. General Elec. Co.*, 126 F. Supp. 690 (D. Conn. 1954) (Connecticut law); see 31 *Fordham L. Rev.* 812, 816 (1963).

3. In *Burnham Chem. Co. v. Borax Consol., Ltd.*, 170 F.2d 569 (9th Cir. 1948), cert. denied, 336 U.S. 924 (1949), the applicable statute of limitations was three years, while in *American Tobacco Co. v. People's Tobacco Co.*, 204 F. 58 (5th Cir. 1913), the applicable Louisiana statute of limitations was only one year. The nightmarish results to be obtained under such a random system are best highlighted by the situation in *Winkler-Koch Eng'r Co. v. Universal Oil Prod. Co.*, 100 F. Supp. 15 (S.D.N.Y. 1951). In that case, involving multiple defendants, the controlling statutes of limitations were the Kansas three year statute as to some injuries, the Kansas two year statute as to others, the New York six year statute as to others, and finally the New York three year statute as to the rest.

4. The prior situation where the state statute would be borrowed led to "forum shopping." Congress attempted to remedy this unfortunate use of state statutes by providing for a uniform statutory period. 31 *Fordham L. Rev.* 812, 816 (1963); see H.R. Rep. No. 422, 84th Cong., 1st Sess. (1955); S. Rep. No. 619, 84th Cong., 1st Sess. (1955).

5. 15 U.S.C. § 15b (1964).

6. 88 U.S. 342 (1874).

7. 247 U.S. 435 (1918).

8. 327 U.S. 392 (1946).

9. 88 U.S. at 342-43.

10. Bankruptcy Act § 2, 14 Stat. 518 (1867), 11 U.S.C. § 29(e) (1964).

concealment, reasoned that "[t]o hold that by concealing a fraud . . . in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."<sup>11</sup> The Court held that the statute will be tolled where the fraud has been concealed or is of such a nature as to be self-concealing and the plaintiff has not been guilty of negligence or laches in failing to discover it.<sup>12</sup> This decision was followed in other bankruptcy cases.<sup>13</sup>

The *Bailey* doctrine was given wider application in *Exploration Co. v. United States*. There the government brought an action to cancel certain land patents. It alleged that the defendant, furthering a design to exploit the lands in question, had employed agents who secretly obtained patents on these lands.<sup>14</sup> A six year statute of limitations, which made no reference to the presence or absence of due diligence, clearly barred any cause of action.<sup>15</sup> The Court felt compelled, nonetheless, to heed the dictates of *Bailey*. It observed that the *Bailey* rule had already been established at the time the statute was passed, and thus the statute was presumably passed with the doctrine in mind.<sup>16</sup>

The action in the *Exploration* case was based on fraud, as was the *Bailey* suit, and for many years it was argued that the fraudulent concealment doctrine applied only to actions grounded in fraud.<sup>17</sup> Such arguments should have been laid to rest in 1946 by *Holmberg v. Armbricht*. *Holmberg* involved a suit in equity to enforce the liability imposed by the Federal Farm Loan Act<sup>18</sup> on shareholders of a joint stock land bank. One of the shareholders had concealed his holdings under another name. The bank closed in 1932, and the petitioners alleged that they had not learned of the concealment until 1942.<sup>19</sup> The Court

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11. 88 U.S. at 349.

12. *Id.* at 349-50.

13. *Avery v. Cleary*, 132 U.S. 604 (1890); *Kirby v. Lake Shore & Mich. S.R.R.*, 120 U.S. 130 (1887); *Traer v. Clews*, 115 U.S. 528 (1885); *Rosenthal v. Walker*, 111 U.S. 185 (1884); *Linn & Lane Timber Co. v. United States*, 196 F. 593 (9th Cir. 1912).

14. 247 U.S. at 436-37.

15. Act of March 3, 1891, ch. 559, § 8, 26 Stat. 1093 (1891) (actions to vacate or annul patents).

16. 247 U.S. at 449. The Court stated that: "We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the Government."

17. In *Brigham City Corp. v. General Elec. Co.*, 210 F. Supp. 574 (D. Utah 1962), rev'd, 315 F.2d 306 (10th Cir.), cert. denied, 374 U.S. 809 (1963), the court observed: "The so-called doctrine of fraudulent concealment can be neither expressed nor applied without reference to the principle of fraud undiscovered in spite of the exercise of reasonable diligence." *Id.* at 579. In *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 210 F. Supp. 557 (N.D. Ill. 1962), aff'd, 315 F.2d 558 (7th Cir. 1963), the court noted that "[d]efendants limit the *Holmberg* doctrine to cases where fraud is the gravamen of the action, and as inapplicable to substantive legislation providing for punitive damages." *Id.* at 570 (footnote omitted).

18. 12 U.S.C. § 812 (1964).

19. 327 U.S. at 393.

made it quite clear that the doctrine of fraudulent concealment applied even to actions not based on fraud.<sup>20</sup> In fact, the Court, in dictum, stated that "[t]his equitable doctrine is read into every federal statute of limitation."<sup>21</sup>

As recently as the "electrical equipment cases,"<sup>22</sup> however, the existence of such a doctrine and its applicability to the antitrust statute of limitations has been contested.<sup>23</sup> In those cases the defendants argued first that the doctrine of fraudulent concealment applied only in fraud cases,<sup>24</sup> and, second, that it was not applicable in antitrust cases since Congress had passed the antitrust statute of limitations without reference to fraudulent concealment.<sup>25</sup> Several lower courts accepted this argument,<sup>26</sup> but such holdings were short-lived<sup>27</sup> and the doctrine is now firmly established in the antitrust field.<sup>28</sup>

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20. *Id.* at 393-94.

21. *Id.* at 397.

22. The "electrical equipment cases" involved manufacturers of heavy electrical equipment, principally Westinghouse Electric Co. and General Electric Co., who conspired to fix prices in that industry. The conspiracy began in 1948 and was not discovered until the Government brought an action in 1960. Subsequently, the consumer-victims of the conspiracy brought over 1700 law suits throughout the country in what has been the most extensive antitrust litigation in history. Ultimately, the plaintiffs recovered over \$600,000,000. See 31 *Fordham L. Rev.* 812, 814 (1963). In the Southern District of New York alone, 418 actions were brought. Note, Clayton Act Statute of Limitations and Tolling by Fraudulent Concealment, 72 *Yale L.J.* 600, 601 (1963).

23. *General Elec. Co. v. City of San Antonio*, 334 F.2d 480 (5th Cir. 1964); *Westinghouse Elec. Corp. v. City of Burlington*, 326 F.2d 691 (D.C. Cir. 1964); *Westinghouse Elec. Corp. v. Pacific Gas and Elec. Co.*, 326 F.2d 575 (9th Cir. 1964).

24. *Public Serv. Co. v. General Elec. Co.*, 315 F.2d 306, 310 (10th Cir.), cert. denied, 374 U.S. 809 (1963); *Brigham City Corp. v. General Elec. Co.*, 210 F. Supp. 574 (D. Utah 1962), rev'd, 315 F.2d 306 (10th Cir.), cert. denied, 374 U.S. 809 (1963).

25. *General Elec. Co. v. City of San Antonio*, 334 F.2d 480 (5th Cir. 1964); *Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236 (2d Cir. 1962), cert. denied, 373 U.S. 909 (1963).

26. *Brigham City Corp. v. General Elec. Co.*, 210 F. Supp. 574 (D. Utah 1962), rev'd, 315 F.2d 306 (10th Cir.), cert. denied, 374 U.S. 809 (1963); *Public Serv. Co. v. A.B. Chance Co.*, 1962 Trade Cas. ¶ 70,551 (D.N.M. 1962), rev'd, 315 F.2d 306 (10th Cir.), cert. denied, 374 U.S. 809 (1963); *City of Kansas City v. Federal Pacific Elec. Co.*, 1962 Trade Cas. ¶ 70,453 (W.D. Mo.), rev'd, 310 F.2d 271 (8th Cir. 1962), cert. denied, 373 U.S. 914 (1963).

27. *General Elec. Co. v. City of San Antonio*, 334 F.2d 480 (5th Cir. 1964); *Westinghouse Elec. Corp. v. City of Burlington*, 326 F.2d 691 (D.C. Cir. 1964); *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964); *Allis-Chalmers Mfg. Co. v. Commonwealth Edison Co.*, 315 F.2d 558 (7th Cir. 1963); *Public Serv. Co. v. General Elec. Co.*, 315 F.2d 306 (10th Cir.), cert. denied, 374 U.S. 809 (1963); *Kansas City v. Federal Pacific Elec. Co.*, 310 F.2d 271 (8th Cir. 1962), cert. denied, 373 U.S. 914 (1963); *Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236 (2d Cir. 1962), cert. denied, 373 U.S. 909 (1963).

28. The Supreme Court denied certiorari in all of the "electrical equipment cases" it considered and in view of the damages involved, it is unlikely they would have done so had they thought there was any possibility of error. See notes 1-21 *supra* and accompanying text.

## II. FRAUDULENT CONCEALMENT AS IT APPLIES TO THE ANTITRUST STATUTE OF LIMITATIONS

There are three distinct elements in the doctrine of fraudulent concealment: (1) concealment by the defendant of plaintiff's cause of action; (2) lack of knowledge by the plaintiff of the existence of his cause of action; and (3) a reasonable probability that due diligence would fail to discover the cause of action.<sup>29</sup>

### A. Acts of Concealment by the Defendant

While it has been said that defendant must be found to have concealed either the plaintiff's injury or the defendant's antitrust violation,<sup>30</sup> it is not precisely clear what conduct on the part of a defendant constitutes concealment. The issue is obscured in most cases by consideration of the other elements of the doctrine.<sup>31</sup> The *Bailey* case suggested that tolling can result from either an affirmative effort to maintain secrecy or from conduct which is unsusceptible of discovery and which the defendant may have taken no particular steps to conceal.<sup>32</sup>

Several other cases have indicated that there must be an affirmative misrepresentation to the plaintiff.<sup>33</sup> This grew out of the idea that some fraud must be practiced on the plaintiff.<sup>34</sup> However, the need for affirmative misrepresentation was questioned in one of the "electrical equipment cases." In *Ohio Valley Electric Corp. v. General Electric Co.*,<sup>35</sup> the defendants falsified expense accounts

29. *Dovberg v. Dow Chem. Co.*, 195 F. Supp. 337 (E.D. Pa. 1961); *Philco Corp. v. Radio Corp. of America*, 186 F. Supp. 155 (E.D. Pa. 1960). All three elements are necessary, and, should any be missing, there is no tolling of the statute of limitations. *Id.* Obviously, if the defendant attempts to conceal the antitrust violation, and in spite of his efforts the plaintiff discovers his cause of action, there is no tolling.

30. *Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F.2d 196 (9th Cir. 1950), cert. denied, 340 U.S. 943 (1951). In this regard it would appear that concealment of the extent of the injury would not result in tolling if the injury itself was not concealed, since the measure of damages, of course, is not a part of the cause of action.

31. Typical of this is *Movietcolor, Ltd. v. Eastman Kodak Co.*, 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961), which discusses only the sufficiency of the allegations in the complaint and ignores the conduct involved. In connection with this, the plaintiff must allege with particularity the fraudulent concealment. Fed. R. Civ. P. 9; see *Wood v. Carpenter*, 101 U.S. 135, 140-41 (1879).

32. 88 U.S. at 349. It is quite clear, however, that simply because a plaintiff was not aware of his cause of action or of facts forming the basis for that cause of action, there has not necessarily been conduct concealing that cause of action. *Movietcolor, Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 87 (2d Cir.), cert. denied, 368 U.S. 821 (1961); see *Dawson, Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875, 916 (1933).

33. *Laundry Equip. Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788, 792 (7th Cir. 1964); *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 197 F. Supp. 333, 338 (N.D. Ala. 1960), aff'd, 295 F.2d 362 (5th Cir. 1961). See also *Burnham Chem. Co. v. Borax Consol., Ltd.*, 170 F.2d 569, 573-74 & n.4 (9th Cir. 1948), cert. denied, 336 U.S. 924 (1949).

34. *American Tobacco Co. v. People's Tobacco Co.*, 204 F. 58, 62-63 (5th Cir. 1913).

35. 244 F. Supp. 914 (S.D.N.Y. 1965). The court held that direct misrepresentations to

to obscure the purpose of their meetings, made telephone calls at night from pay telephones rather than from their offices, destroyed notes taken at their meetings and instructed newcomers to maintain secrecy with regard to the conspiracy.<sup>36</sup> The defendants argued that those acts were not a fraud as to these plaintiffs and were not related to them. Therefore, it was contended that the acts complained of constituted mere silence and were thus not sufficient to toll the statute.<sup>37</sup> The court rejected this contention, reasoning that "such restrictive interpretations of the doctrine of fraudulent concealment are hardly required by the cases, and negate the policy behind the doctrine."<sup>38</sup> In its discussion of this argument, the court raised an interesting issue. "Assuming that plaintiffs must prove more than 'mere silence' by defendants—an assumption which in an anti-trust conspiracy case may not be correct—the acts proved satisfy this requirement."<sup>39</sup> The possibility of tolling by silence was thus left open.

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the plaintiff were not required but rather "acts concealing the conspiracy by the participants therein tolled the statute . . ." *Id.* at 933.

36. So effective were the defendants' evasions that even the president of General Electric was unaware of the conspiracy and it took the Government eighteen months and the testimony of more than five hundred witnesses before four grand juries to uncover the facts. *Id.* at 932. In fact, the claimed ignorance of the president was held to be evidence which could be used to establish that due diligence would not have uncovered the conspiracy. *Philadelphia Elec. Co. v. Westinghouse Elec. Corp.*, 1964 Trade Cas. ¶ 71,123, at 79,444 (E.D. Pa. 1964). In a similar case, *Illinois v. Sperry Rand Corp.*, 237 F. Supp. 520 (N.D. Ill. 1965), the plaintiff charging price fixing, alleged that the conspiracy was fraudulently concealed by various means and methods to avoid detection and that secret meetings were held in hotels and a private residence was set up at which the defendants held meetings and allocated jobs and fixed prices. Then a defendant would be called and informed as to who was to get the job, and the other defendants would submit bids calculated to insure this. In deciding a motion to strike allegations from the complaint, the court held that the allegations were sufficient to raise the issue of fraudulent concealment.

37. The defendants argued neither that the plaintiffs knew or should have known of the conspiracy nor that the acts of concealment alleged occurred, but rather they urged that they did not constitute affirmative acts of misrepresentation. *Ohio Valley Elec. Co. v. General Elec. Co.*, 244 F. Supp. 914, 932. It is interesting to note that the defendants frequently changed their tactics throughout the course of extensive litigation, at one time claiming that the plaintiffs knew of their cause of action, *Philadelphia Elec. Co. v. Westinghouse Elec. Corp.*, 1964 Trade Cas. ¶ 71,123, at 79,443, while at others ignoring this point. The defendants even pleaded alternatively that there was no conspiracy but, even if there were, the plaintiffs had full knowledge of it. 11 *Antitrust Bull.* 729 (1966).

38. 244 F. Supp. at 932-33 (footnotes omitted). The doctrine of fraudulent concealment as announced in *Holmberg v. Armbrrecht* does not require that there be any misrepresentation but merely requires concealment. It certainly makes very little sense to hold that there has been no concealment simply because the defendant has neglected to make misrepresentations to the plaintiff although he has made every other effort to conceal his conduct from the plaintiff. See *American Tobacco Co. v. People's Tobacco Co.*, 204 F. 58, 63 (5th Cir. 1913).

39. 244 F. Supp. at 932 (footnotes omitted). In so saying the court relied on *Movicolor, Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 87, wherein that court, in dictum, indicated that affirmative acts of concealment may not be necessary in cases of conspiracy to restrain trade. In this the court relied on an unfortunate interpretation of *American Tobacco Co. v. People's*

Another case suggests that affirmative acts are not essential to concealment. In *American Tobacco Co. v. People's Tobacco Co.*,<sup>40</sup> the Court of Appeals for the Fifth Circuit approved of a charge by the trial court instructing the jury to consider solely whether plaintiff knew or should have known of his cause of action.<sup>41</sup> This has led many to believe that no affirmative act of concealment is necessary in order to toll the statute of limitations.<sup>42</sup> However, it must be remembered that there had already been a finding of concealment by the defendants and the only issue to be determined was the plaintiff's knowledge.<sup>43</sup> A better justification for the decision was that the activities of the defendants were self-concealing, and thus within another phase of the *Bailey* prohibitions.

The more widely-known element of the *Bailey* doctrine involves affirmative acts of concealment, but there is a second and lesser known element. If the defendant's activities are of such a nature that they conceal themselves, then even though the defendant may have taken no steps to conceal them, there will be a tolling of the statute of limitations. The *American Tobacco* case, among others, elucidates the application of this principle of self-concealment to the antitrust statute of limitations. In *American Tobacco*, the court found the relationship between American and Craft had been concealed in order to avoid labor problems for Craft since American was on labor's unfair list. The defendants argued that the concealment, therefore, only incidentally encompassed the antitrust violation. The court, however, found that "the fact of the concealment of the combination between the American and the Craft Tobacco companies and Craft is nonetheless a concealment, . . . so far as the suspension of the running of the statute against the People's Tobacco Company is concerned."<sup>44</sup>

In *Crummer Co. v. DuPont*,<sup>45</sup> the plaintiffs charged defendants with conspiring to force them out of business. Defendants, *inter alia*, secretly instituted proceedings by making complaints to government agencies. The plaintiffs claimed this conduct, by its nature, amounted to fraudulent concealment, saying the fraudulent use by the appellees of the governmental bodies whose investigations are by law largely kept secret necessarily resulted in the degree of concealment which, if successful, would toll the running of the statute.<sup>46</sup> The court agreed

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*Tobacco Co.*, 204 F. 58 (5th Cir. 1913). Interestingly enough, the court cites a law review article which itself relies on *American Tobacco*. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 880, 907-08 (1933). Cf. *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1221 (1950).

40. 204 F. 58 (5th Cir. 1913).

41. *Id.* at 60.

42. *Moviecolor, Ltd. v. Eastman Kodak Co.*, 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961); *Ohio Valley Elec. Corp. v. General Elec. Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965); McSweeney, *The Statute of Limitations in Treble Damage Actions Under the Federal Antitrust Laws—When the Period Begins and Tolling by Government Actions and Fraudulent Concealment*, 11 Antitrust Bull. 717, 730 (1966).

43. 204 F. 58, 62-63 (5th Cir. 1913).

44. *Id.* at 63.

45. 255 F.2d 425 (5th Cir.), cert. denied, 358 U.S. 884 (1958).

46. *Id.* at 432.

with the plaintiffs, finding that this activity did amount to fraudulent concealment of defendants' scheme.<sup>47</sup>

In *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*,<sup>48</sup> the defendants were charged with conspiracy to drive the plaintiffs from competition in the cracking equipment and process field. The defendants had, by bribing a judge, obtained a ruinous patent infringement judgment against the plaintiff. The court held that the statute of limitations was tolled until the plaintiff first learned of the fraud.<sup>49</sup>

Thus, self-concealing activity seems to be that type of activity which, while obviously damaging, does not reveal the source of the damage. It may have been best described in *Gaetzi v. Carling Brewing Co.*,<sup>50</sup> where it was said the statute of limitations is tolled where the defendant's conduct "necessarily had the effect of thwarting or long delaying discovery that an actionable wrong had occurred. It was not the mere existence of an illegal conspiracy which tolled the statute, but rather the presence of special circumstances which inevitably caused the plaintiff to remain in ignorance that a wrong had been committed."<sup>51</sup> Since it seems clear that the defendant must perform some affirmative act, or at least act in a manner which necessarily has the effect of concealing the defendant's activities, it would also seem clear that mere silence does not toll the statute of limitations. However, several courts have suggested that silence may well toll the statute of limitations.<sup>52</sup>

If silence is to be defined as either saying nothing to anyone<sup>53</sup> or just refusing to answer plaintiff's questions,<sup>54</sup> how is a denial of the conspiracy or injury to be classified? In *Burnham Chemical Co. v. Borax Consolidated Ltd.*,<sup>55</sup> the defendant in conversations with the plaintiff specifically denied that there was any conspiracy. The court held that such denials were only "silence" and did not attain the stature of conduct which amounted to fraudulent concealment.<sup>56</sup> On the

47. *Id.*

48. 100 F. Supp. 15 (S.D.N.Y. 1951).

49. *Id.* at 29.

50. 205 F. Supp. 615 (E.D. Mich. 1962).

51. *Id.* at 620.

52. *Ohio Valley Elec. Corp. v. General Elec. Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965), says this may be the case, relying on *Moviecolor, Ltd. v. Eastman Kodak Co.*, 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961). *Moviecolor* in turn relies on a misinterpretation of *American Tobacco Co. v. People's Tobacco Co.*, 204 F. 58 (5th Cir. 1913), which does not stand for this proposition and did not state it. However, the better-reasoned opinions have found that silence including a refusal to answer the plaintiff's questions is not enough. *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615 (E.D. Mich. 1962); *Philco Corp. v. RCA*, 186 F. Supp. 155 (E.D. Pa. 1960); *Zimmerer v. General Elec. Co.*, 126 F. Supp. 690, 693 (D. Conn. 1954). The danger of the former opinions is that they may lead to a mortal constriction of the statute of limitations.

53. *Zimmerer v. General Elec. Co.*, 126 F. Supp. 690 (D. Conn. 1954).

54. *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615 (E.D. Mich. 1962).

55. 170 F.2d 569 (9th Cir. 1948), cert. denied, 336 U.S. 924 (1949).

56. *Id.* at 577 n.4.



other hand, in *Philco Corp. v. Radio Corporation of America*,<sup>57</sup> the court, by way of dictum, indicated that denials were affirmative acts of fraudulent concealment.<sup>58</sup> If the traditional fraud attitude is maintained here then *Philco* must be deemed correct. It would certainly seem that if there is to be a doctrine of fraudulent concealment, it makes little sense to hold that affirmative denials to the plaintiff are not affirmative acts of concealment.<sup>59</sup>

### B. Knowledge of the Plaintiff

The second aspect of fraudulent concealment is the plaintiff's lack of knowledge of his cause of action. The knowledge necessary to defeat the fraudulent concealment defense is bipartite. Plaintiff must have both knowledge of facts constituting the cause of action and knowledge that they amount to an antitrust violation. There are several examples of this. In *American Tobacco Co. v. People's Tobacco Co.*,<sup>60</sup> the plaintiff had alleged that the defendants had conspired to injure it. With respect to the statute of limitations, the trial court charged the jury that

it begins to run from the moment or the day that the petitioner knows that he has suffered an actionable injury. That does not mean that it would begin to run if he merely knew his profits were falling off, or he knew they were falling off from the competition of the Craft Tobacco Company; but it would begin to run if he knew that the falling off or damage was caused by the competition to effect and in pursuance of an illegal combination and restraint of trade. In other words, from the moment he knew he could bring an action against somebody to recover his damages, although he might not have known who the person was, or he might not have known how he was going to prove his action, prescription would run, and after the lapse of one year his right of action would be barred.<sup>61</sup>

Subsequent cases, in dictum, have indicated the charge was perhaps too favorable to the defendant. For example in *Crummer Co. v. DuPont*,<sup>62</sup> a much higher degree of knowledge was found to be necessary to immunize the defendant from tolling. There the court reasoned that if joint action is a necessary element of the relevant antitrust prohibition, the plaintiff must realize that he is the victim of a conspiracy and not simply that several defendants individually are trying to drive him out of business.<sup>63</sup>

In *Philco Corp. v. Radio Corporation of America*<sup>64</sup> the plaintiffs charged the defendants with conspiracy to restrain trade, eliminate competition and monopolize the electronics field. The conspiracy charges centered around a meeting

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57. 186 F. Supp. 155 (E.D. Pa. 1960).

58. *Id.* at 163.

59. It is interesting to note that if the defendant tells the plaintiff that he has no cause of action, he has made only a misrepresentation of law, which has been held not to be an act of concealment. *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615, 623 (E.D. Mich. 1962).

60. 204 F. 58, 63 (5th Cir. 1913).

61. *Id.* at 60.

62. 255 F.2d 425 (5th Cir.), cert. denied, 358 U.S. 884 (1958).

63. *Id.* at 431.

64. 186 F. Supp. 155 (E.D. Pa. 1960).

between the president of RCA and the president and vice-president of GE. Subsequently, however, the vice-president of GE told the president of Philco of the agreement reached at this meeting. The court found that the plaintiff, therefore, was in possession of facts which "it *then* recognized as constituting an interference . . . [with their] contract negotiations and 'a violation of the anti-trust laws.'"<sup>65</sup> Furthermore, the court said:

We emphasize the point that they were not given facts which might create suspicion or indicate the possibility of a claim for relief based upon the antitrust laws. Rather they were given the essential facts now constituting their claim for relief (minus only the fact of injury to the public and to themselves). *And they recognized them as constituting a cause of action at that time.*<sup>66</sup>

Most cases on this point involve antitrust violations whereby a competitor is forced out of business and therefore is well aware of his injury.<sup>67</sup> In such situations, the only inquiry is whether the plaintiff knew or should have known that he had a cause of action. There are conflicting opinions on this question. In *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*,<sup>68</sup> plaintiffs claimed that there was a "general conspiracy" to injure them. They first learned of this conspiracy when the Government instituted proceedings against defendants in 1944. The defendants introduced evidence that on several occasions the plaintiffs and their attorneys charged the defendant Borax and its subsidiaries with price fixing, attempting to create a monopoly and trying to force Suckow Co. out of business in violation of the antitrust laws.<sup>69</sup> The plaintiffs contended that while this was true, they were not aware that defendants had not been acting alone.<sup>70</sup> The court, rejecting this contention, held that knowledge of the precise elements of a general conspiracy was immaterial since

at all times pertinent to this inquiry appellants knew and believed that they were being grievously damaged by Borax Ltd. and its subsidiaries and agents and were keenly aware that the acts of appellees had caused and were causing damages, and knew, or had reason to believe, and did believe, that these acts were committed in violation of Federal antitrust laws. Thus the ultimate and determinative facts constituting the legal basis of this action were known to appellants.<sup>71</sup>

In *Crummer Co. v. DuPont*<sup>72</sup> the plaintiffs, who were dealers in securities, charged the defendants with a conspiracy to drive them out of business by fraudulently using Government agencies to harass them. There was evidence that the plaintiffs were aware that they were being injured by the defendants and in fact their attorney had made charges to that effect. Furthermore, Crummer

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65. *Id.* at 164.

66. *Id.*

67. *E.g.*, *Laundry Equip. Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788 (7th Cir. 1964).

68. 185 F.2d 196 (9th Cir. 1950), cert. denied, 340 U.S. 943 (1951).

69. *Id.* at 200-02.

70. *Id.* at 204.

71. *Id.* at 209.

72. 255 F.2d 425 (5th Cir.), cert. denied, 358 U.S. 884 (1958).

himself wrote a letter in 1947 to the Justice Department which implied that he was aware of his cause of action in 1946, before the statutory three-year period.<sup>73</sup> The plaintiffs claimed that while they knew they were being injured, they did not realize that they were the victims of a conspiracy of all of the defendants. In fact, the lawyers, hired to investigate the source of the complaints prompting the government action, were unable to uncover the conspiracy.<sup>74</sup> The court decided that, on this evidence, it could not be said as a matter of law that the plaintiffs had knowledge of their cause of action before the statute of limitations ran out.<sup>75</sup>

Similarly, in *Dovberg v. Dow Chemical Co.*,<sup>76</sup> the plaintiffs alleged that defendants conspired to destroy their business in violation of the Sherman,<sup>77</sup> Clayton<sup>78</sup> and Robinson-Patman<sup>79</sup> Acts. There was evidence that on several occasions retailer defendants told the plaintiffs that the plaintiff's chief competitor was attempting to destroy their business. The court held that such evidence goes to a possible knowledge that one of the defendants was attempting to injure the plaintiff, but does not show a knowledge of concerted action by all.<sup>80</sup> Thus the law on this point is somewhat confused and *Suckow* and *Crummer* seem to be in conflict. *Suckow* states that plaintiff need know only that several of defendants' activities are injuring him, while *Crummer* apparently requires an additional realization that the several defendants have actually conspired to injure him. The position of the *Suckow* court is not unreasonable. It seems sound not to require that the plaintiff come to a knowledge of the details of the conspiracy when he is already aware of the defendants' individual activities. Indeed, many antitrust violations, such as those prohibited by section 2 of the Sherman Act, do not require a conspiracy. However, the better rule might be to require that the plaintiff be aware of the violation of the antitrust laws, and if conspiracy is a necessary element of the violation, then only knowledge of the existence of the conspiracy will start the statute of limitations running.

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73. Id. at 430.

74. Id.

75. The court noted that: "It is stipulated that appellants did not learn until December 27, 1946, what caused the Federal agents to 'move in.' If a jury believes that they moved in as a part of a conspiracy between these appellees to ruin appellants' business and run them out of Florida, which, for the purpose of this appeal, is assumed, then it might well find that Crummer did not have knowledge of this conspiracy until he learned that Main and Wheeler started the Federal investigation that, although finally dismissed, did bring about their financial ruin. So, too, could a jury find that the two letters from Ball to the Florida Securities Commission, one indicating knowledge of the presumed secret Fuller report and the other immediately preceding the beginning of quo warranto proceedings by the Commission gave a connecting link to tie the Ball-duPont interests to the Fuller investigation and the effort to deprive Crummer of the benefits of his City of Inverness contract." Id. at 432.

76. 195 F. Supp. 337 (E.D. Pa. 1961).

77. 15 U.S.C. §§ 1-7 (1964).

78. 15 U.S.C. §§ 12-27 (1964).

79. 15 U.S.C. §§ 13-13b, 21a (1964).

80. 195 F. Supp. at 344.

*C. Reasonable Diligence*

Finally, the plaintiffs, if on notice of the antitrust violation, must show either that they exercised reasonable diligence and still could not discover their cause of action or that reasonable diligence would not have led to discovery of the facts. It is quite clear that once put on notice, a plaintiff is required to exercise reasonable diligence to discover his cause of action and once having discovered it to be diligent in bringing suit.<sup>81</sup> There is some question, however, as to what constitutes notice.

*Starview Outdoor Theatre, Inc. v. Paramount Film Distributing Corp.*,<sup>82</sup> gave a not too helpful definition of what is meant by being put on inquiry. There it was said that it is obtaining a certain degree of notice, a certain amount of knowledge and some reasonable suspicion. To complicate this definition further, the court added that its definition was set forth in the context of summary judgment.<sup>83</sup> Even though its language was somewhat lacking in specificity, the holding of the case offers some insight into the nature of reasonable notice. The court found that the attorneys for the plaintiffs had written to the Antitrust Division of the Department of Justice charging the defendants with attempting to monopolize the supply of motion pictures. At that time, the Justice Department informed the plaintiffs that the transaction complained of was not an antitrust violation. The court held, however, that this did not negate the plaintiff's knowledge of the alleged antitrust violations,<sup>84</sup> thus indicating that notice sufficient to excite inquiry need not be unequivocal or uncontradicted.

There is a helpful discussion of reasonable notice in *Tobacco and Allied Stocks, Inc. v. Transamerica Corp.*<sup>85</sup> There the plaintiffs alleged a violation of rule 10b-5 of the Securities and Exchange Commission<sup>86</sup> promulgated under § 10b of the Securities Exchange Act of 1934.<sup>87</sup> The court found the case was based on fraud and in discussing whether the plaintiffs exercised reasonable diligence in discovering the fraud, the court said:

What on the one hand is tantamount to an actual discovery of fraud should not be confused with what on the other carries a duty to investigate. It is impossible to lay down any general rule as to the amount of evidence or number or nature of evidential facts admitting discovery of fraud. But, facts in the sense of indisputable proof or any proof at all, are different from facts calculated to excite inquiry which impose a duty of reasonable diligence and which, if pursued, would disclose the fraud. Facts in the latter sense merely constitute objects of direct experience and, as such, may comprise rumors or vague charges if of sufficient substance to arouse suspicion. Thus, the duty of reasonable diligence is an obligation imposed by law solely under the peculiar circumstances of each case, including existence of a fiduciary relationship, concealment

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81. *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615 (E.D. Mich. 1962).

82. 254 F. Supp. 855 (N.D. Ill. 1966).

83. *Id.* at 857.

84. *Id.*

85. 143 F. Supp. 323 (D. Del. 1956).

86. 17 C.F.R. § 240.10-5 (1967).

87. 15 U.S.C. § 78j(b) (1964).

of the fraud, opportunity to detect it, position in the industry, sophistication and expertise in the financial community, and knowledge of related proceedings.<sup>88</sup>

While this statement was in the context of a failure by a majority shareholder to reveal special facts to the minority in a sale of stock, it nevertheless does shed light on the question at hand.

Other cases have indicated that where the plaintiff had been asked to join a conspiracy which ultimately made him its victim, he had sufficient knowledge to put him on notice of the defendant's activities.<sup>89</sup> Even if there had been contradictory evidence, the plaintiff had to have exercised reasonable diligence.<sup>90</sup>

Under the *Starview* test, seemingly any scintilla of evidence would be sufficient to require reasonable diligence. Thus *Starview* would seem to require potential antitrust plaintiffs to engage in extensive investigations in a never-ending search for antitrust violations. The flexible *Transamerica* test seems more sound.

### III. CONCLUSION

The basic problem presented by the fraudulent concealment doctrine in anti-trust law is its tendency to undermine the effectiveness of the statute of limitations. The antitrust statutes often make conspiracy a required element of their violation, and conspirators are by their nature secretive. Therefore, unless we are prepared to subvert the statute of limitations in its entirety, mere silence by the defendants can not be made the equivalent of fraudulent concealment.

Perhaps the doctrine should be confined to cases, such as *Crummer* and *Winkler-Koch*, where the conspirators utilize outside agencies to effectuate their plans, thereby insuring that their own activities not be suspect. In any event, if no restrictions are placed on the application of the doctrine, almost anything which is not in fact discovered could be termed self-concealing. For example, in a price-fixing conspiracy, the consumer plaintiff rarely realizes that he is being overcharged. Are we to say, therefore, that price-fixing is by its nature self-concealing? Such an interpretation leads to indiscriminate tolling.

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88. 143 F. Supp. at 331.

89. In *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 (9th Cir.), cert. denied, 299 U.S. 613 (1936), decided under California law, the plaintiff sued in a private antitrust action because of an alleged conspiracy by defendant to monopolize the outdoor advertising business. The plaintiff alleged, inter alia, that the statute of limitations was tolled by reason of defendant's fraudulent concealment of the cause of action. The court held to the contrary, finding that the plaintiff was at one time asked to join the conspiracy which indicated knowledge sufficient to put it on notice of the defendant's activities.

90. In *Pan American Petroleum Corp. v. Orr*, 319 F.2d 612 (5th Cir. 1963) (Texas law), the plaintiff sued the defendants to recover the value of oil and gas defendants had produced by using slant-holes. The plaintiff alleged that while there were facts to put it on notice, the defendant's conduct was such as to relieve it of its duty to inquire. There was evidence of an honest report by an independent concern showing that there were no slant-holes. However, this report was somewhat incomplete, and the court found that the plaintiff could not rely blindly on this in the face of a report by one of its own engineers that it was the victim of a slant-hole. The court found that this was sufficient notice to require the exercise of reasonable diligence.

Prior to the "electrical equipment cases," application of the doctrine of fraudulent concealment had been favorable to defendants. Those cases presented a situation of extreme damage to the plaintiffs and involved sufficient acts of affirmative concealment to justify invocation of the doctrine. Thus, they were quite correct on their facts, but future development of their sometimes broad statements of the law could lead to a much wider application of the doctrine. In cases of less social import, this would be clearly undesirable.