1983

Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?

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Author: Richard L. Marcus
Source: Georgetown Law Journal
Citation: 71 Geo. L.J. 829 (1983).
Title: Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?

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Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?

RICHARD L. MARCUS*

In recent years federal courts have with increasing frequency considered the fraudulent concealment doctrine as a means of tolling statutes of limitations. Under this federal doctrine, the limitations period does not run until the plaintiff discovers or, through the exercise of due diligence, should have discovered a cause of action concealed by the defendant. In this article, Professor Marcus observes that although the application of the fraudulent concealment doctrine appears disarmingly simple, it has confounded courts and litigants alike. Professor Marcus identifies instances of disparate applications of the fraudulent concealment doctrine, and then suggests how courts can consistently apply the doctrine in a way that comports with the underlying purposes of statutes of limitations.

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INTRODUCTION

Prospective plaintiffs often determine that they have a claim only after the applicable statute of limitations has run. Particularly in this post-Watergate era, such persons are likely to suspect that the wrongdoer concealed the claim. If they are right, they may be able to escape the bar of the statute of limitations by relying on the doctrine of fraudulent concealment, which “tolls” the application of the statute of limitations. When a defendant has concealed his misconduct, the limitations period does not begin to run until after the plaintiff discovers, or with due diligence should have discovered, his claim against the defendant. Watergate itself provided illustrations of the tolling doctrine in operation: Convicted Watergate burglar E. Howard Hunt unsuccessfully raised the fraudulent concealment doctrine in a malpractice suit against his lawyer, who had defended him when he was prosecuted for his role in the Watergate break-in, and columnist Hedrick Smith successfully invoked it in a suit against President Nixon and others for illegal wire-tapping. The doctrine also has been advanced recently in a variety of other newsworthy litigation.

It is in more mundane matters, however, that the fraudulent concealment

1. See Hunt v. Bittman, 482 F. Supp. 1017, 1022 (D.D.C. 1980), aff’d, 652 F.2d 196 (D.C. Cir.), cert. denied, 454 U.S. 860 (1981). Hunt alleged that his lawyer entered into a conspiracy with officials at the White House and the Committee to Reelect the President to protect the White House at the expense of Hunt and the other Watergate defendants. Id. at 1023. Because Hunt’s codefendant James McCord had made similar charges publicly long before Hunt sued, the United States Court of Appeals for the District of Columbia Circuit barred the suit because Hunt should have known of his claim. Id. at 1024-25.

2. Smith v. Nixon, 606 F.2d 1183, 1190 (D.C. Cir. 1979), cert. denied, 453 U.S. 912 (1981). Smith sued former President Nixon, former National Security Adviser Henry Kissinger, former Attorney General John Mitchell, and former presidential aides including H.R. Haldeman and John Erlichman for illegally tapping his phone in connection with efforts to plug leaks of information to the press. Id. at 1118 & n.1. In view of the secrecy surrounding the wiretapping, the court held that Smith could avail himself of the fraudulent concealment doctrine. Id. at 191 & n.44.

3. In Barrett v. United States, 689 F.2d 324 (2d Cir. 1982), the plaintiff’s father was the unknowing subject of chemical warfare experiments conducted by the Army in 1953, id. at 326, and had died as a result of an injection of a mescaline derivative. The tolling claim was premised on the Army’s suppression of information concerning its involvement until 1975. Id. In United Klans of America v. McGovern, 621 F.2d 152 (5th Cir. 1980), plaintiff Ku Klux Klan relied on concealment in a suit for injuries
Fraudulent Concealment

The doctrine assumes its principal and substantial importance. The Supreme Court first adopted the doctrine in 1874 as a matter of federal common law in Bailey v. Glover. In 1946 the Court declared in Holmberg v. Armbricht that "[t]his equitable doctrine is read into every federal statute of limitation." Since then, the courts have been asked to apply the federal tolling doctrine to claims under an array of federal statutes including the Clayton Antitrust Act, the Reconstruction Era Civil Rights Acts, sections 11 and 12, and 17 of the 1933

allegedly sustained as a result of a counterintelligence program by the Federal Bureau of Investigation (FBI) in violation of the Klan’s rights under the first, fourth, and fifth amendments. Id. at 153.

In Fitzgerald v. Seamens, 553 F.2d 220 (D.C. Cir. 1977), a former Air Force employee successfully utilized the doctrine in his claim against Alexander Butterfield, Deputy Assistant to the President. The plaintiff alleged that he was fired because he testified before Congress about cost overruns in the Air Force. Id. at 222. The plaintiff was able to invoke the doctrine of fraudulent concealment because he did not become aware of his claim until Butterfield testified before the Senate Select Committee on Presidential Campaign Activities. Id. at 229. After a number of further developments, the case resurfaced as Fitzgerald v. Nixon, 102 S. Ct. 2690 (1982), the notorious “wager” case. Justice O’Connor commented that the parties had essentially placed a wager on the Court’s decision by having reached a settlement in a limitation of liability agreement and making the remainder of the damages requested depend on the outcome of the case before the Supreme Court. Transcript of Oral Argument before the Supreme Court, November 30, 1981, at 38 (University Publications of America), Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982) (copy on file at Georgetown Law Journal).


5. 327 U.S. 392 (1946).
6. Id. at 397.
9. 15 U.S.C. §§ 77k, 77v (1976). See Summer v. Land & Leisure, Inc., 664 F.2d 965, 968 (5th Cir. 1981), cert. denied, 102 S. Ct. 3485 (1982); In re Commonwealth Oil/Tesoro Petroleum Securities Litig., 484 F.Supp. 253, 257 (W.D. Tex. 1979); Brick v. Dominion Mortgage & Realty Trust, 442 F. Supp. 283, 291 (W.D.N.Y. 1977). As the cases cited above indicate, tolling generally is not available, however, for claims based on § 11 or § 12 of the Securities Act of 1933 because such claims are controlled by § 13 of the 1933 Act, 15 U.S.C. § 77m (1976), which provides in part that “[n]o event shall any such action be brought to enforce a liability... more than three years after the security was bona fide offered to the public.” Cf. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 (1976) ("[s]ection 13 specifies a statute...”)
Securities Act, sections 10(b)\(^\text{11}\) and 14(a)\(^\text{12}\) of the 1934 Securities Exchange Act, the Commodity Exchange Act,\(^\text{13}\) the Federal Torts Claims Act,\(^\text{14}\) the National Labor Relations Act,\(^\text{15}\) the Railroad Labor Act,\(^\text{16}\) the Death on the High Seas Act,\(^\text{17}\) the Interstate Land Sales Full Disclosure Act,\(^\text{18}\) the Omnibus Crime Control and Safe Streets Act of 1968,\(^\text{19}\) the Age Discrimination in Employment Act,\(^\text{20}\) the Emergency Petroleum Allocation Act,\(^\text{21}\) the Occupational Safety and Health Act of 1970,\(^\text{22}\) the Motor Vehicle Information and Cost Sav-

of limitations of one year from the time the violation was or should have been discovered, in no event to exceed three years from the time of offer or sale\(^{\text{23}}\).

10. 15 U.S.C. § 77q (1976). See Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1041-42 (10th Cir. 1980); Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2d Cir. 1979); Cook v. Avien, Inc., 573 F.2d 685, 695 (1st Cir. 1978); see also Comment, Plaintiff's Duty of Care After Ernst & Ernst v. Hochfelder, 73 Nw. U.L. Rev. 158, 175 (1978) (tolling doctrine has always applied to actions under § 10(b) and rule 10b-5).

11. 15 U.S.C. § 78j(b) (1976). See, e.g., Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1041-42 (10th Cir. 1980); Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2d Cir. 1979); Cook v. Avien, Inc., 573 F.2d 685, 695 (1st Cir. 1978); see also Comment, Plaintiff's Duty of Care After Ernst & Ernst v. Hochfelder, 73 Nw. U.L. Rev. 158, 175 (1978) (tolling doctrine has always applied to actions under § 10(b) and rule 10b-5).


ings Act,\textsuperscript{23} the Employee Retirement Income Security Act,\textsuperscript{24} the Selective Service Act,\textsuperscript{25} the Copyright Act,\textsuperscript{26} and claims against the United States under the Tucker Act.\textsuperscript{27} In addition, this tolling doctrine has been raised in a suit to recover taxes,\textsuperscript{28} and in cases involving claims based on the Constitution.\textsuperscript{29} It has even been argued that fraudulent concealment sometimes forecloses application of res judicata.\textsuperscript{30} The frequency of tolling arguments appears to have increased substantially in the last fifteen years. The most dramatic growth began in the mid-1970's,\textsuperscript{31} notably about the time the Watergate affair left its mark on the national consciousness.

Despite the growing importance of fraudulent concealment, it has received little attention from the Supreme Court or legal commentators. \textit{Bailey v. Glover} did not carefully explain how the doctrine should be applied, and the Supreme Court has provided little meaningful guidance on the subject since that decision. Since Professor John Dawson exhaustively chronicled the historical development of the tolling doctrine fifty years ago,\textsuperscript{32} academic analysis has been sporadic and limited to the application of the tolling doctrine under specific federal statutes.\textsuperscript{33} Left to themselves to decide an increasing number of

\begin{footnotes}
\item 31. The dramatic increase in claims of fraudulent concealment is apparent to anyone who does research in the area. A review of the footnotes in this article shows that the majority of such cases have been decided since 1975. There is, of course, no way to know for certain how many plaintiffs have raised fraudulent concealment claims. In an effort to verify the apparent increase, the author made a search on LEXIS computerized research system that yielded the results set forth in the Appendix. As indicated there, LEXIS reports indicate that there have been nearly twice as many such cases in the federal courts of appeals and district courts since January 1, 1975, as during the 30 years before that.
fraudulent concealment cases, lower courts rarely analyze the rules governing the application of the doctrine and often state conclusions without explaining them. Given the ad hoc approach of the lower courts, haphazard results have been almost inevitable, causing some district judges to complain that they cannot discern proper standards for application of the doctrine.

Uncertainty surrounding the tolling doctrine may be exacerbated by the Supreme Court’s decisions in two civil rights cases, Johnson v. Railway Express Agency, Inc. and Board of Regents v. Tomanio. Broadly construed, these cases arguably require the application of state tolling principles to claims under many federal statutes, thereby adding confusion to an already unsettled area. In both cases the trial courts had followed the well-established practice of borrowing limitations periods from the states in which the claim arose because the federal civil rights statutes at issue did not specify a limitations period for claims brought under the statute. Although these decisions were based in part on statutory interpretations of the Civil Rights Acts at issue, they also were based on the general notion that tolling doctrines are an integral part of limitations policy, and that state principles permitting or refusing tolling must therefore be borrowed along with the limitations period.

Neither Johnson nor Tomanio dealt with fraudulent concealment or explicitly overruled prevailing case law. Nevertheless, some lower federal courts have, not surprisingly, read their broad reasoning to mean that fraudulent concealment principles, like other tolling matters, should be governed by state law whenever the limitations period is borrowed from state law. The claims falling into that category are not unimportant. They include claims based on the Constitution, all but one of the Civil Rights Acts, and section 10b of the 1934 Securities Exchange Act, claims that are asserted hundreds of times annually. The uncertainty already surrounding the application of the fraudulent concealment doctrine before Johnson and Tomanio could thus be compounded by the introduction of a multitude of state rules of tolling in a very significant number of cases. Although the results may not be different under the various state rules than under federal common law, it is undoubtedly a move in the


34. 421 U.S. 454 (1975).
36. See infra notes 171-77 and accompanying text (discussing role of statutes in Johnson and Tomanio).
37. See infra notes 116-18 and accompanying text (discussing lower courts' interpretations of Tomanio).
38. See supra note 29 and accompanying text (discussing claims based on Constitution).
39. See supra note 8 and accompanying text (discussing civil rights claims).
40. See supra note 11 and accompanying text (discussing securities claims).
41. Although a comprehensive survey of state law is beyond the scope of this article, a brief review indicates that there is reason to expect differences from the federal approach. Commentators have discerned a trend in some states toward adoption of the discovery standard, under which the limitations period begins to run from the date the plaintiff discovers his injury. See Scott, For Whom the Time Tolls: Time of Discovery and the Statute of Limitations, 64 Ill. Bar J. 326, 332 (1976) (noting that accepted rule in Illinois is that statute of limitations begins to run from date of discovery; advocating that application of rule to specific causes of action depends on whether plaintiff should have known of
wrong direction to introduce additional disparity into an area that already experiences conflict.

The current and growing disarray in the law of fraudulent concealment has resulted in large measure from inattention. The potential impact of Johnson and Tomanio on the fraudulent concealment doctrine appears unintended, and the lower courts' disparate applications of the doctrine do not seem carefully reasoned. Given the growing importance of federal claims and the increasing culpable conduct within statutory period); Comment, Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule, 68 CALIF. L. REV. 106, 124-25 (1980) (advocating adoption of uniform discovery of injury standard for all causes of action in place of current system in which discovery standards vary for each cause of action).

Because the discovery standard seems essentially the same as the federal approach, there is little reason to be concerned about inconsistency on this particular element of limitations doctrines. Naturally, the debate about the application of state or federal law that Johnson and Tomanio presents is of little consequence unless the state discovery standard is different from the federal one.

There certainly will be situations in which litigants will assert that the federal and state tolling rules are different. When such situations arise, Professor Bromberg notes, the federal rule usually is more liberal than the state approach. See A. Bromberg, SECURITIES FRAUD & COMMODITIES FRAUD § 2.5(1), at 42 (1978). At the outset, it does not appear that any state has flatly rejected the tolling doctrine. In 1933 Professor Dawson reported that twenty-seven states had accepted the doctrine, but that four states, Kansas, North Carolina, Ohio, and Washington, had rejected any extension of the tolling principle beyond fraud cases. See Undiscovered Fraud, supra note 32, at 593 n.6. Since then, at least Washington has embraced the doctrine. See Peters v. Simmons, 87 Wash. 2d 400, 406, 552 P.2d 1053, 1056 (1976) (statute of limitations for legal malpractice action tolled until client discovers, or in the exercise of due diligence should discover, facts giving rise to cause of action). Kansas, however, has maintained a hard line on the theory that any exceptions to the statute of limitations should come from the legislature, which has authorized tolling only for actions based on fraud. See Hill v. Hays, 193 Kan. 453, 457, 395 P.2d 298, 301 (1964) (enumeration by legislature of specific exceptions to statute of limitations excludes all others by implication); Christensen Grain, Inc. v. Garden City Coop. Equity Exch., 192 Kan. 785, 788, 391 P.2d 81, 83-84 (1964) (same). Nevertheless, some recent Kansas cases suggest that this policy has softened. See Newton v. Hornblower, Inc., 224 Kan. 506, 516, 582 P.2d 1136, 1145 (1978) (defendant cannot take advantage of statute of limitations when his own concealment is cause of delay).

An exhaustive effort to locate divergent views seems unwarranted; the point is that the doctrine is not nearly so venerably established in many states as in the federal common law.

Beyond the question of whether tolling is available, it appears that states apply the fraudulent concealment doctrine differently. For example, despite the current federal practice, many states place substantial emphasis on affirmative acts of concealment, even in cases based on fraud. See, e.g., Zagar v. Health & Hosp. Governing Comm'n, 83 Ill. App. 3d 894, 898, 404 N.E.2d 496, 500 (1980) (fraudulent misrepresentations that form basis of cause of action do not constitute fraudulent concealment under relevant statute in absence of showing that misrepresentations tended to conceal cause of action); United States Fidelity & Guaranty Co. v. DiMassa, 496 F. Supp. 71, 74 (E.D. Pa. 1980) (Pennsylvania law clearly requires that to toll statute of limitations, fraud must be active, continuing, and perpetrated by affirmative independent act of concealment); Shipp v. O'Dowd, 454 S.W.2d 845, 847 (Tex. Civ. App. 1970) (mere failure to disclose, or mere concealment, insufficient to toll statute in absence of allegations of affirmative fraudulent concealment).

On the other hand, it has been urged in some cases that the state standard, requiring affirmative acts of concealment, is easier to satisfy. In Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687 (10th Cir.), cert. denied, 452 S. Ct. 392 (1981), plaintiff sought to rely on the state rule and the defendant advanced the federal rule. Id. at 691-92. State rules also may diverge from the federal standard by employing a different measure of the time available to sue after the statute has been tolled. Under the federal rule the plaintiff has the full statutory period to bring suit after the date on which he discovered or should have discovered his claim. Newton's Children's Institutes, Inc. v. James E. Smith & Sons, Inc., 658 F.2d 440, 443 (6th Cir. 1981). This approach, however, is not universal among the states. For example, regardless of the particular limitations period for the claim, whenever a statute of limitations is tolled in New York, "[the action must be commenced within two years after such actual or imputed discovery." N.Y. Civ. PRAC. LAW § 203(3) (McKinney 1972 & Supp. 1982). Thus, in Cestaro v. Mackell, 429 F. Supp. 465 (E.D.N.Y.), aff'd, 573 F.2d 1288 (2d Cir. 1977), the court dismissed a civil rights action because it had not been brought within two years of discovery of the claim, although the borrowed statute of limitations was three years. Id. at 469-70. The federal courts have had enough difficulty articulating and applying the federal standard without trying to employ state standards as well. The threat of greater disparity in standards, therefore, cannot be disregarded.
popularity of the fraudulent concealment doctrine in litigation, such inatten-
tion results in confusion that is unfair to trial judges and litigants.

This article argues that focusing on the policies underlying limitations points
the way toward greater consistency in application of fraudulent concealment.
After briefly examining the policies furthered by statutes of limitations, the
article reviews the emergence of the federal tolling doctrine since Bailey v.
Glover, demonstrating that it came to be applied to all federal claims, whether
or not the limitations period was specified by Congress. Against this back-
ground, it analyzes Johnson and Tomanio and concludes that these cases
should not be interpreted to abandon this history and introduce disparities be-
tween two arbitrary categories of federal claims.

After concluding that the tolling of federal claims should not be muddled by
the introduction of state tolling principles, the article turns to the analytical
difficulties presented by the application of the federal fraudulent concealment
doctrine. In theory, the principle is disarmingly simple—when the defendant
has concealed his wrongdoing, the statute of limitations is tolled until the date
the plaintiff would, with “due diligence,” have learned of the existence of his
claim. Neither the concealment prong nor the diligence prong, however, has
proved easy to apply. With respect to concealment, for historical reasons
courts did not require plaintiffs to prove concealment at all if the claim was
based on fraud. Given their desire to avoid barring diligent plaintiffs on stat-
ute of limitations grounds, the courts over time de-emphasized concealment as
an independent requirement for tolling the statute of limitations. This article
argues, however, that despite its sometimes difficult application the conceal-
ment requirement should be disinterred because it provides important protec-
tion for defendants. With respect to plaintiff’s diligence, the article first rejects
cases dispensing with proof of diligence when the defendant has been guilty of
concealment and argues that proof of diligence should be required of every
plaintiff. It then reviews a variety of factors that are important in evaluating
plaintiff’s diligence, concluding that the diligence standard must remain
flexible.

Finally, the article considers the various procedural devices available for
deciding tolling issues in advance of the trial on the merits. Although deter-
mining whether actions are barred by limitations before a full trial on the mer-
its is desirable, the procedural opportunities for doing so, particularly by
summary judgment, may be more limited than the courts have recognized.

I. POLICIES FURTHERED BY STATUTES OF LIMITATIONS

At the outset, it is necessary to say something about why statutes of limita-
tions exist. Although they may appear unduly draconian to plaintiffs, statutes
of limitations embody policies that have been recognized for centuries. In
1849 the Supreme Court observed that “Statutes of Limitation form a part of
the legislation of every government, and are necessary to the peace and repose
of society.”42 Five years after the Supreme Court first applied tolling principles
in Bailey v. Glover, it expanded on the policies underlying statutes of limita-

tions in another tolling case, *Wood v. Carpenter*. 43

Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by presumption which renders proof unnecessary. Mere delay, extending to the limit proscribed, is itself a conclusive bar. 44

Since that time the Court has re-emphasized the significance of protecting defendants from stale claims and protecting the courts against the burden of attempting to resolve such belated suits. 45

These policies of protecting defendants and courts from stale claims are important. The interests of defendants are relatively obvious. As the Supreme Court recently observed, a limitations period "establishes a deadline after which the defendant may legitimately have peace of mind." 46 More importantly, the passage of time could seriously impair a defendant's ability to defend himself. Coping with stale claims also poses substantial logistical difficulties for courts. At trial, factfinders would be presented with mountains of moldy evidence resulting from discovery relating to events that occurred, perhaps, decades ago. In addition, it may be necessary to contrive alternatives to live testimony when important witnesses are unavailable or cannot recall events. These logistical difficulties are not mere inconveniences that vex judges. To the extent that overburdened courts are entangled in such problems, they may be unable to attend to timely claims. Thus, to safeguard the interests of defendants and courts, the general rule is that claims automatically accrue at the time of injury and are barred after a specified time has elapsed. 47

43. 101 U.S. 135 (1879).
44. *Id* at 139.
45. In Glus v. New York Central R.R., 380 U.S. 424 (1965), the Court observed that statutes of limitations are primarily designed to ensure fairness to defendants. The Court rationalized that such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

*Id* at 428, quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944). *See also* Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (limitations periods spare courts from litigation of stale claims and defendants from defending when events forgotten and evidence lost); *cf.* Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) (limitations periods prevent unfairness of requiring defendants to piece together defense after certain period of time has elapsed). Acknowledging that statutes of limitations sometimes work harsh results, the Supreme Court recently noted, "It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or applicable." United States v. Kubrick, 444 U.S. 111, 125 (1979).
Any tolling doctrine, obviously, is an exception to this general rule. Whenever courts toll the limitations period, the certainty sought by the statute is evaded and the interests of both defendants and the courts are threatened. Tolling should be allowed, therefore, only when a sufficient showing is made to justify disregarding the policies underlying statutes of limitations.

The remainder of this article identifies rules that should be applied to determine whether a sufficient showing has been made to justify tolling by fraudulent concealment. Indeed, it is the absence of clear rules that has bred uncertainty about the scope of this tolling doctrine, which in turn has undermined the policies of the statute of limitations. To bring order to this area of uncertainty, courts should strive to apply the fraudulent concealment doctrine consistently and to give effect to the policies underlying the statute of limitations.

II. THE IMPACT OF JOHNSON AND TOMANIO ON THE TOLLING OF FEDERAL CLAIMS

In creating numerous private rights of action, Congress has often failed to specify an appropriate limitations period, leaving this detail to the courts. In 1830 the Supreme Court first applied a limitations period to such a federal claim by borrowing a limitations period from state law. Thereafter, the Court regularly looked to analogous state law to select limitations periods for federal claims when Congress did not provide for statutes of limitations, and the lower courts followed. In addition, to further the enforcement of federal interests, the federal courts also have developed doctrines of federal common law that apply to federal claims without reference to state law. The federal doctrine of fraudulent concealment is one such doctrine.

Both Johnson and Tomanio could affect the application of the federal fraudulent concealment doctrine. Both cases contain reasoning that arguably forecloses further application of the federal fraudulent concealment doctrine to claims based on statutes that do not have congressionally-set limitations periods. Although neither decision expressly displaces the fraudulent concealment doctrine, they have caused confusion about whether the federal doctrine can

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48. Congress' failure to provide statutes of limitations sometimes has vexed courts. In London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir. 1981), for example, the court complained that Congress' failure to provide clear statute of limitations guidelines engenders confusion for litigants, administrative agencies, and courts. Id. at 813.


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still be applied. Nevertheless, the following review of the development of the federal doctrine suggests, as at least two lower courts of appeals have held, that the Supreme Court did not intend to abandon the prevailing case law as enunciated in *Holmberg v. Armbrecht* and jettison this century-old equitable doctrine sub silentio.

A. THE EMERGENCE OF THE FEDERAL DOCTRINE

Some historical background is necessary to put *Johnson* and *Tomanio* in context. In 1874, the Supreme Court embraced the fraudulent concealment doctrine in *Bailey v. Glover*. In that case, the assignee in bankruptcy sought to set aside certain conveyances to the bankrupt's relatives on the ground that they were made in an effort to defraud creditors. The prevailing federal bankruptcy statute, however, required an assignee to assert such claims within two years of appointment. When the plaintiff sued more than three years after his appointment, he asserted that the defendant kept secret the fraudulent conveyances giving rise to the claim.

The Court declined to follow the state law of limitations, which did not permit tolling, because Congress had enacted a federal statute of limitations for claims under the Bankruptcy Act. Instead, the Court held that defendant's concealment allowed the plaintiff to escape the limitations bar. It reasoned that "a sound and philosophical view of the principles of the statutes of limitation" prohibited applying the bar of limitations in favor of one who had obtained its protection "by concealing a fraud, or by committing a fraud in a matter that it concealed itself." The Court concluded by stating that tolling principles generally would apply "where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, . . . provided suit is brought within proper time after discovery of the fraud." It added, however, that "though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party," the statute would be tolled until discovery when "the party injured by the fraud remains in ignorance of it without any

53. See infra notes 116-22 (discussing lower courts' interpretations of *Johnson* and *Tomanio*).

54. See infra note 122 and accompanying text (discussing courts of appeals' affirmation of *Holmberg* after *Johnson* and *Tomanio*).

55. 88 U.S. (21 Wall.) 342 (1874).

56. Id. at 348.

57. The Bankruptcy Act of 1867, ch. 176, § 2, 14 Stat. 517, 518, provided that actions by the assignee should be brought "within two years from the time the cause of action accrued, for or against such assignee." Id. A similar provision has continued in effect under subsequent bankruptcy acts, and is now codified at 11 U.S.C. § 108 (Supp. IV 1980). Although it might be argued that this provision is designed to encourage the settlement of estates and, therefore, is not a true statute of limitation, the Court held that "[t]his is a statute of limitation . . . precisely like other statutes of limitation . . . ." 88 U.S. at 346.

58. 88 U.S. at 347.

59. Id. at 345, 348.

60. Id. at 349-50. Although the Court noted that following applicable state law was a possibility, it declined to do so with a right created by a federal statute. Id.

61. Id. at 348.

62. Id. at 349.

63. Id. at 347-48.
fault or want of diligence or care on his part." 64

From an early date the Court applied the fraudulent concealment doctrine to all congressionally-set limitations periods. In a 1918 case involving an attempt by the United States to invalidate a land patent on the ground that it had been procured by fraud, 65 the Court confronted an 1891 statute providing that suits to annul patents "shall only be brought within six years after the date of the issuance of such patents." 66 Despite the obvious congressional objective to make such patents inviolate after six years, the Court had no trouble applying the equitable doctrine of fraudulent concealment. It reasoned that when Congress passed the statute in 1891, Bailey v. Glover was "the established doctrine of this court" and Congress therefore acted "with the ruling of that case in mind." 67 Beyond that, the Court concluded that Congress could not have "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." 68

There remained, however, the question whether Bailey v. Glover should apply to the multitude of federal statutes that did not specify limitations periods. That question was addressed in 1946 in Holmberg v. Armbrecht, 69 a suit under section 16 of the Federal Farm Loan Act 70 to require shareholders of a defunct bank to pay an assessment equal to the par value of their stock in the bank. 71 Although the bank in question had closed in 1932, plaintiffs claimed that they did not sue until 1943 because defendant Jules S. Bache 72 had concealed his ownership of 100 shares of stock under a false name. 73 Because the federal act did not specify a limitations period, the ten year New York statute of limitations applied. 74 Despite the allegations of concealment, the United States Court of Appeals for the Second Circuit held that the suit was barred because the federal court could not apply federal equitable principles to toll the state limitations period. 75

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64. Id.
68. Id.
69. 327 U.S. 392 (1946).
70. Ch. 245, § 16, 39 Stat. 360, 374 (1916). Under the Act shareholders of joint stock land banks were individually responsible, to the extent of their stockholdings, for the debts of the bank. Id.
71. 327 U.S. at 393.
72. If the name Bache looks familiar, that is because it should. Born in 1861 in New York City, Bache began as cashier with the banking firm of Leopold Cahn & Co. at the age of 19. In 1892 he became head of the firm, which then changed its name to J.S. Bache & Co. See 15 WHO'S WHO IN AMERICA 203 (1928-29). His firm still exists, now known as Bache Halsey Stuart Shields, Inc.
73. 327 U.S. at 393.
74. Id.
75. Holmberg v. Armbrecht, 150 F.2d 829, 832 (2d Cir. 1945), rev'd, 327 U.S. 392 (1946). This decision resulted from continuing uncertainty in the courts about the effect of Erie R.R. v. Tompkins, 394 U.S. 64 (1938). The Second Circuit relied on the Supreme Court's decision in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), which held that a federal court passing on a state-created right in a diversity case should not toll the state statute of limitations on federal equitable grounds. Id. at 108-09. In reversing the Second Circuit's decision, Justice Frankfurter, who also authored York, noted in a somewhat irritated tone that unlike the York case, which was concerned solely with state-created rights, the statute in Holmberg involved a federal right. 327 U.S. at 394-95. Thus, the broad language of Holmberg reflects the Court's desire to emphasize the difference in treatment between state and federal claims after Erie.
The Supreme Court reversed the Second Circuit without dissent.\footnote{Holmberg, 327 U.S at 397. Justice Jackson took no part in the consideration of the case, and Justice Rutledge concurred in a brief opinion expressing some reservations about York. Id. at 398.} Noting that the case involved “a federal right for which the sole remedy is in equity,”\footnote{Id. at 395.} and that “statutes of limitations are not controlling measures of equitable relief,”\footnote{Id. at 396.} the Court readily embraced the “old chancery rule” stated in Bailey v. Glover. It characterized limitations as a “fraudulent defense” in cases of concealment, and asserted that “[e]quity will not lend itself to such fraud.”\footnote{Id. at 397.} Instead, the Court asserted broadly that “[t]his equitable doctrine is read into every federal statute of limitation.”\footnote{Id. at 398.} It justified this broad statement as necessary to avoid the “incongruous” result of applying Bailey v. Glover to statutes with specified limitations periods, while leaving other federal claims to “the bare terms of a State statute of limitations unrelieved by the settled federal equitable doctrine.”\footnote{Id. at 84-85.}

The remaining question whether the “settled federal equitable doctrine” would apply to a borrowed state statute when the claim was “at law” was answered by the Second Circuit in the leading case, Moviecolor Ltd v. Eastman Kodak Co.,\footnote{288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961).} an antitrust action brought before the enactment of the federal antitrust limitations period. Defendants contended that the federal concealment rule applied to borrowed state limitations periods only when the action was in equity.\footnote{Id. at 82.} The court of appeals, in an opinion by Judge Friendly, rejected the defendants’ arguments for a number of reasons.\footnote{Id. at 83-86.} First, the federal interest in enforcement of the antitrust laws suggested that Congress would prefer a uniform federal rule.\footnote{Id. at 84.} Second, Judge Friendly wrote, “[T]here is no reason for borrowing a state doctrine when there is an established federal one.”\footnote{Id. at 85.} Third, the critical fact in Holmberg was that the right was federally created, not that it was enforceable “in equity.”\footnote{Id. at 85-86.} Fourth, drawing such distinctions between actions at law and in equity would undercut “the merger of law and equity.”\footnote{Id. at 84-85.} Finally, quoting Holmberg’s concern with incongruity, Judge Friendly concluded that “[s]ince Bailey v. Glover applied ‘at law’ as well as ‘in equity,’ the incongruity would seem as great in one case as in the

To speak of “uniformity” as between federal and state courts in such a case is somewhat of a misnomer, and it is hard to see what policy would be served by attempting to achieve it. It seems far more likely that Congress would have desired the federal suitor it was creating to have the benefit of the federal rule prolonging the period of suit during concealment by the wrongdoer. This is particularly so when, under the Clayton Act, enforcement of the right often serves not merely private but public ends.
other." 89 The Supreme Court denied certiorari.90

B. JOHNSON AND TOMANIO

Until 1975 the courts of appeals almost unanimously91 had held that the federal tolling doctrine applied to all federal claims.92 Although it never squarely addressed Holmberg v. Armbrecht or the fraudulent concealment doctrine,93 the Supreme Court cast doubt on this practice in 1975 when it decided Johnson v. Railway Express Agency, Inc.94 The plaintiff in Johnson argued that the statute of limitation for his civil rights claim under 42 U.S.C. § 1981 should be tolled during the pendency of his title VII employment discrimination proceeding before the Equal Employment Opportunity Commission.95 The case thus did not involve the fraudulent concealment doctrine, but rather the application of a new tolling doctrine that had been endorsed by two circuits.96 The Supreme Court could have rejected this new tolling doctrine simply on its own merits, but its approach was not so limited. Instead, the Court departed from the prevailing practice of deciding tolling issues as a matter of federal law and it based its decision on the absence of tolling principles under the applicable

89. Id. at 85.
91. Even before Johnson, the United States Court of Appeals for the Third Circuit concluded that state principles of tolling should apply when the state limitations period is borrowed. See Ammlung v. Chester, 494 F.2d 811, 816 (3d Cir. 1974).
92. For cases in which federal courts of appeals tolled state statutes of limitations because of fraudulent concealment, see Ashland Oil Co. v. Union Oil Co., 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977) (claim under Emergency Petroleum Allocation Act of 1973), cert. denied, 435 U.S. 994 (1978); Briley v. California, 564 F.2d 849, 855 (9th Cir. 1977) (civil rights action); Hilton v. Mumaw, 522 F.2d 588, 602 n.13 (9th Cir. 1975) (securities fraud action); Newman v. Prior, 518 F.2d 97, 100 (4th Cir. 1977) (same); Tomera v. Galt, 511 F.2d 504, 509 (7th Cir. 1975) (same); Vanderloom v. Sexton, 422 F.2d 1233, 1240 (8th Cir.) (same), cert. denied, 400 U.S. 852 (1970); Esplin v. Hirschi, 402 F.2d 94, 103 (10th Cir. 1968) (same), cert. denied, 394 U.S. 928 (1969); Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 8 (5th Cir. 1967) (same); Janigan v. Taylor, 344 F.2d 781, 784 (1st Cir.) (same), cert. denied, 392 U.S. 879 (1965); see also Cox v. Stanton, 529 F.2d 47, 49-50 (4th Cir. 1975) (reversing district court that failed to apply federal tolling doctrine); Hess v. Empire Petroleum Co., 435 F.2d 1223, 1226 n.3 (10th Cir. 1970) (noting that district court erred in applying state doctrine of tolling for concealment, but not reversing because federal doctrine would lead to same result). In a securities case, Rochelle v. Marine Midland Grace Trust Co. of N.Y., 535 F.2d 523 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit noted that "although we have borrowed the California statute to fill the statutory limitations gap, Congress has never evinced any intention to look to the states for any definition of this federally created right [under section 10(b) of the 1934 Securities Exchange Act]." Id. at 532.
93. Holmberg was cited in connection with the case, however. In his opinion, concurring in part and dissenting in part, Justice Marshall did cite both Holmberg and Moviecolor. See Tomanio, 421 U.S. at 470 (Marshall, J., with Douglas & Brennan, J.J., concurring in part and dissenting in part). Furthermore, the plaintiff-petitioner himself argued that "Judge Friendly's rationale [in Moviecolor] . . . in determining the tolling effect of concealment is equally applicable to the case at bar." Reply Brief For Petitioner at 2, Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). Nevertheless, in rejecting this argument, the Court need not have rejected Judge Friendly's reasoning, but only petitioner's attempted analogy to it. Neither Justice Marshall's opinion nor the parties made any direct reference to the concealment doctrine.
95. Id. at 457.
state law. The Court justified this approach as intrinsic to the process of borrowing the state limitations period:

Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. . . . In virtually all statutes of limitations the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

Taken to its logical extreme, the Court's statement could be interpreted to preclude application of any federal principle of tolling when state limitations periods are borrowed for federal claims.

The Court limited the reach of its statement, however, and acknowledged that "considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." The Court found no such inconsistency in Johnson because the plaintiff unquestionably could have filed his section 1981 action during the pendency of his title VII proceeding. As a consequence, the Court reasoned, "in a very real sense, petitioner has slept on § 1981 rights." The Court went on to distinguish two of its own earlier decisions that created federal tolling principles on the ground that in Johnson there was no federal policy to protect and "no relevant body of federal procedural law to guide our

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97. 421 U.S. at 464. The Court rejected the plaintiff's argument that tolling is always a matter of federal law, stating,

Petitioner concedes, at least implicitly, that no tolling circumstance described in the State's statutes was present to toll the period for his § 1981 claim. He argues, however, that state law should not be given so broad a reach. He claims that, although the duration of the limitation period is bottomed on state law, it is federal law that governs other limitations aspects, such as tolling, of a § 1981 cause of action.

Id. at 463.

98. Id. at 463-64.

99. For this reason, Johnson cannot easily be limited to the civil rights context. See infra notes 171-77 and accompanying text (discussing application of Johnson and Tomanio outside civil rights area).

100. 421 U.S. at 465.

101. Id. at 465-66.

102. Id. at 466.

103. Id. at 466-67. The two cases the Court distinguished were American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), and Burnett v. New York Central R.R., 380 U.S. 424 (1965). American Pipe was a civil antitrust action in which the Court held that the pendency of a class action tolled the statute of limitations for unnamed members of the purported class when the district court ultimately refused to certify the class on grounds of lack of numerosity. 414 U.S. at 553. Burnett was a Federal Employers Liability Act action commenced in federal court after the limitations period had passed. 380 U.S. at 425. The plaintiff earlier had sued in state court within the limitations period, but that action was dismissed because of improper venue. Id. The Court held that the filing of the action in state court tolled the running of the statute of limitations on the claim. Id. at 434-35. In Johnson the Court distinguished both American Pipe and Burnett on two grounds. First, the limitations period in each was congressionally determined, unlike the limitations period in Johnson, which was borrowed from state law. 421 U.S. at 466. Second, in Johnson there was no substantial pre-existing body of federal procedural law as there was in American Pipe and Burnett. Id. at 466-67.

As a result of Tomanio, some question has arisen about whether American Pipe determines the tolling effect of a class action in a case when there is no federal limitations period. Two courts of appeals have held that the federal rule continues to apply, both to achieve uniformity and because there is an existing federal rule. See Pavlak v. Church, 681 F.2d 617, 618-19 (9th Cir. 1982), pet. for cert. filed, 51 U.S.L.W.
In 1980 the Supreme Court reiterated Johnson's approach in Board of Regents v. Tomanio. The Court held that the pendency of the state court litigation between the parties could not toll the running of the borrowed statute of limitations against a claim under 42 U.S.C. § 1983. The district court had invented this new ground for tolling to encourage exhaustion of state court remedies, in part to relieve "the present overburdening of the federal courts and the increased filings of civil rights actions." The Second Circuit affirmed the decision to toll, which it justified as "advancing the goals of federalism.

The Supreme Court reversed. It relied on 42 U.S.C. § 1988, which directs federal courts to apply federal law in civil rights actions unless it is "not adapted to the object" or "deficient," in which case the federal court should refer to state law "so far as the same is not inconsistent with the Constitution or laws of the United States." The Court did not focus on the predicate of section 1988 that federal law be "deficient," presumably because there was no federal law addressing this issue until the district court's novel ruling. Instead, it emphasized the state's interests and concluded that section 1988 makes state tolling rules "[i]n most cases . . . binding rules of law." Since the pertinent state law did not authorize tolling under these circumstances, the federal court could not invent a tolling doctrine because under Johnson tolling rules "are an integral part of a complete limitations policy." To illustrate the concerns that might constitute "integral parts" of a state's "complete limitations policy,"

3320 (U.S. Oct. 12, 1982); Fernandez v. Chardon, 681 F.2d 42, 50 (1st Cir. 1982). This reasoning seems correct. See infra notes 129-34 and accompanying text.

104. Tomanio, 421 U.S. at 467. The Court explained in a footnote that in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), it could look to the history of rule 23 of the Federal Rules of Civil Procedure. Id. at 466-67 n.12. The Court in Johnson further explained that in Burnett v. New York Central R.R., 380 U.S. 424 (1965), it relied upon "the express federal policy liberally allowing transfer of improper venue cases" set forth in 28 U.S.C. § 1406(a). 421 U.S. at 466-67 n.12. Although it might be persuasively argued that Burnett is not so easily distinguished because it did not rely heavily on § 1406(a), it is clear that there was no body of federal procedural law similar to § 1406(a) available in Johnson because the tolling doctrine in issue there was extremely new.


106. Id. at 492.

107. Id. at 482. It appears that the tolling doctrine the district court applied was entirely unprecedented. Quite clearly, in undertaking such judicial legislation the district court in Tomanio was engaged in a very different activity from applying the "established doctrine" of fraudulent concealment.


The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

110. 446 U.S. at 484.

111. Id. at 488. The fact that the Court found Johnson controlling in Tomanio underscores the Court's attachment to the principles enunciated there. The parties in Tomanio certainly paid no attention to these issues in their briefs filed with the Court. Indeed, the statute of limitations was only a tertiary point made by the petitioner. Petition for Certiorari at 19-21, Board of Regents v. Tomanio, 446 U.S. 478 (1980). Neither party cited Johnson in its brief, although the case was cited in a portion of a Third Circuit opinion quoted by the petitioner. See Brief for Petitioner at 27, quoting Ammlung v.
the Court referred to the principle that "defendants may not, by tactics of evasion, prevent the plaintiff from litigating the merits of a claim." This reference to the principle underlying fraudulent concealment suggests that, even though no issue of fraudulent concealment was involved in the case, the Court arguably intended that federal courts borrow state fraudulent concealment rules along with a state statute of limitations. Nevertheless, the Court mentioned neither Holmberg nor the federal fraudulent concealment doctrine. Finally, the Court held that under the circumstances the state's failure to toll was not inconsistent with federal law because plaintiffs could readily enforce their civil rights claims by suing within the statutory period.

C. FRAUDULENT CONCEALMENT IN THE WAKE OF JOHNSON AND TOMANIO

The Supreme Court did not directly address the issue of fraudulent concealment in its recent tolling cases, Johnson and Tomanio. Nevertheless, even before these cases were decided, the United States Court of Appeals for the Third Circuit stated that a federal court should look to state law to resolve fraudulent concealment claims in actions based on the Civil Rights Acts. After Tomanio, several lower courts considering federal claims based on federal statutes lacking a congressionally-specified limitations period approached fraudulent concealment arguments with great circumspection. For example,

Chester, 494 F.2d 811, 820 n.4 (3d Cir. 1974). One suspects that the parties were surprised at the outcome of the case.

113. Id. at 488.

114. In McGuire v. Leigh, 446 U.S. 962 (1981), the Court vacated and remanded for further consideration in light of Tomanio a Second Circuit ruling that civil rights claims of unlawful firing were tolled during state court litigation regarding the discharge. Id., citing Leigh v. McGuire, 613 F.2d 380 (2d Cir. 1979). On remand from the Supreme Court, the district court held that under Tomanio the case would have to be dismissed as time-barred. Leigh v. McGuire, 507 F. Supp. 458, 462 (S.D.N.Y. 1981). Because the case involved yet another novel theory of tolling, not that of fraudulent concealment, it provides no insight into the Court's position regarding fraudulent concealment.

In another case, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982), the Court held that former President Nixon was immune from liability for damages for his role in firing a Pentagon cost analyst who claimed he was fired from his Air Force job in retaliation for his testimony before Congress. Id. at 2706. The Court noted, in passing, that the District of Columbia Circuit earlier had held that concealment tolled the statute of limitations as to claims against White House personnel. Id. at 2696; see Fitzgerald v. Seamens, 553 F.2d 220, 229 (D.C. Cir. 1977). The Court did not comment, however, on the propriety of that ruling. 102 S. Ct. at 2696. In Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982), the Court held that presidential aides sued by Fitzgerald were entitled to only qualified immunity and remanded for a determination whether they should be granted summary judgment on that ground. Id. at 2736, 2739-40. In passing, the Court noted that petitioner Butterfield had been sued in 1974 and that petitioner Harlow had not been sued until 1978, id. at 2732 n.9, but it did not comment on any statute of limitations issues. See also infra note 121 and accompanying text (discussing Supreme Court opinion in Chardon v. Fernandez).

116. See Hackbart v. Holmes, 675 F.2d 1114, 1120 (10th Cir. 1982) (declining to decide whether Tomanio applies to fraudulent concealment claims in securities fraud cases because state and federal tolling rules coincide); Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1041 (10th Cir. 1980) (same); Kurzawa v. Mueller, 545 F. Supp. 1254, 1259 (E.D. Mich. 1982) ("as to the issue of tolling the statute of limitations, the court is clearly obliged to apply Michigan law"); Whitmore v. New York, 541 F. Supp. 564, 565 (E.D.N.Y. 1982) ("tolling of any limitations period is governed primarily by the law of the state providing the limitations period"); Davidov v. Honeywell, Inc., 515 F. Supp. 1358, 1361 (D. Minn. 1981) (declining to decide whether state or federal fraudulent concealment doctrine applies in Bivens-type claim because doctrine available under both); Marrapese v. State of Rhode Island, 500 F. Supp. 1207, 1225 (D.R.I. 1980) (declining to decide whether state or federal tolling doctrines apply in
in a civil rights case the United States Court of Appeals for the Ninth Circuit cited *Tomanio* and observed:

> [T]here has been some confusion . . . "whether state or federal law determines . . . whether the statute is tolled." The Supreme Court, however, has recently resolved that confusion in favor of the application of state tolling law where not inconsistent with the Constitution or other federal law.117

Thereafter a panel of the United States Court of Appeals for the Tenth Circuit stated, without deciding the issue, that *Tomanio*’s borrowing requirement was based on “reasons equally applicable” to fraudulent concealment claims in securities fraud actions.118

Frequently, however, lower courts have ducked the issue on the ground that the state and federal rules involved would lead to the same result, so that the selection of the appropriate law did not appear critical.119 Other courts have sidestepped the issue on the questionable theory that the determination of when a cause of action accrues, which is conventionally said to be a matter of federal law,120 is materially different from the determination whether the statute should be tolled.121 In contrast, two courts of appeals recently disregarded

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118. Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1041 (10th Cir. 1980). In Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687 (10th Cir.), cert. denied, 102 S. Ct. 392 (1981), another panel specifically decided not to extend *Tomanio* to securities fraud cases. *Id.* at 691. Oddly enough, in this case it was the plaintiff who was relying on state law, while the defendant urged that the federal doctrine apply. *Id.* at 694-95. In Hackbart v. Holmes, 675 F.2d 1114 (10th Cir. 1982), yet another panel of the Tenth Circuit noted that "whether Colorado or federal law governs the tolling of the statute is not entirely clear." *Id.* at 1120. Thus, confusion reigns in the Tenth Circuit.

119. See supra note 116 and accompanying text (discussing cases in which courts of appeals and district courts declined to decide whether state or federal tolling doctrines apply after *Tomanio*).


121. For example, in Leonhard v. United States, 633 F.2d 599 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981), the Second Circuit cited *Tomanio*, but nevertheless asserted that “[a]lthough we must look to state law to determine what period of limitations applies, . . . the issue as to when Leonhard’s cause of action accrued remains a question of federal law.” *Id.* at 613. Other courts simply state that federal law determines the date of accrual without further analysis of the issue or citation to *Tomanio*. See, e.g., Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1309 (9th Cir. 1982); Sumner v. Land of Leisure, Inc., 664 F.2d 965, 968 (5th Cir. 1981); Kurzawa v. Mueller, 545 F. Supp. 1254, 1259 (E.D. Mich. 1982); cf. Cline v Brusett, 661 F.2d 108, 110 (9th Cir. 1981) (not fraudulent concealment case).

The distinction between the labels “accrual” and “tolling” is tenuous at best, and hardly justifies different results. Accrual occurs when the plaintiff has a right to sue even though he may be ignorant of his right. It seems undeniable that in fraudulent concealment cases plaintiffs’ ignorance does not deprive them of the right to assert their claims; therefore the question is not one of accrual, but suspension of the running of the statute, which is tolling.

Despite its apparent insignificance as a ground for continuing to apply federal law, the distinction between tolling and accrual may have gotten an unintended boost from the Supreme Court’s per curiam opinion in Chardon v. Fernandez, 102 S. Ct. 28 (1981). There the trial court dismissed as time-
Tomanio altogether, asserting on the basis of Holmberg v. Armbrecht that tolling of the ground of fraudulent concealment is a question of federal law in an action based on a federally created right. Although Johnson and Tomanio may not be disregarded so easily, there are a number of factors indicating that these two courts of appeals were correct in applying federal principles of fraudulent concealment rather than extending the borrowing notions enunciated in those cases to fraudulent concealment.

First, the Supreme Court has never indicated that it intended to overrule Holmberg and disapprove the Second Circuit's decision in Moviecolor. Yet, interpreting Johnson and Tomanio to apply to fraudulent concealment inevitably would have that effect. Holmberg held that even when the state limitations period was borrowed, the federal fraudulent concealment doctrine applies to actions in equity in order to avoid “incongruous” inconsistency with statutory claims that have federal limitations periods. Moviecolor similarly reasoned that the interest in avoiding incongruity warranted applying the federal standard to actions at law. There has been no indication that the Supreme Court intends to reject these decisions. To the contrary, in a case decided the term before Johnson, a unanimous Court appeared to endorse Holmberg explicitly. Moreover, the Court has cited both Holmberg and Moviecolor with approval on numerous other occasions. It should not be presumed that a

barred the plaintiff's claim under 42 U.S.C. § 1981 for illegal termination from employment. 506 F. Supp. 229 (D.P.R. 1981). The First Circuit reversed on the ground that the limitations period did not begin running until plaintiff's termination became effective, reasoning in part that "[w]hen the cause of action accrues . . . is a matter of federal law." Fernandez v. Chardon, 648 F.2d 765, 767 (1st Cir. 1981). Without citing Tomanio, the Supreme Court in turn reversed the First Circuit on the basis of Delaware State College v. Ricks, 449 U.S. 250 (1980), holding that as a matter of federal law the statute of limitations began running when plaintiffs received their letters of termination, not on the date the termination became effective. 102 S. Ct. at 28. Thus, the Court seemed to accept the notion that federal law applied to the accrual issue, a view that has been urged by at least one lower court. See Salgado v. Piedmont Capital Corp., 534 F. Supp. 938, 947-48 n.10 (D.P.R. 1981).

122. See Campbell v. Upjohn Co., 676 F.2d 1122, 1126 (6th Cir. 1982) (claim based on fraudulent inducement to merger agreement); Trecker v. Seag, 679 F.2d 703, 706 (7th Cir. 1982) (securities fraud case); see also Small v. Signal LP Gas, Inc., 548 F. Supp. 46, 49 (E.D. Mo. 1982) (“though a state statute of limitations is employed when a federal statute has none, the complementary principles of accrual and tolling remain the province of federal common law”); Appelbaum v. Ceres Land Co., 546 F. Supp. 17, 21 (D. Minn. 1981) (action brought under federal law, even if subject to state statute of limitations, subject to federal tolling doctrine).

123. See supra notes 79-81 and accompanying text (quoting Holmberg).

124. See supra note 89 and accompanying text (discussing Moviecolor).

125. In American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), the court stated: “[I]n cases where the plaintiff has refrained from commencing suit . . . because of fraudulent concealment [citing Holmberg] this Court has not hesitated to stat the statutory period tolled or suspended by the conduct of the defendant.” Id. at 559.

126. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 n.20 (1979) (citing Holmberg for proposition that federal courts may fill in interstices of federal statutes); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) (citing Holmberg for proposition that federal courts may absorb state statute of limitations when federal substantive statute silent); Runyon v. McCrory, 427 U.S. 160, 185 (1976) (citing Holmberg for proposition that as to actions at law, congressional silence has been interpreted to mean that federal policy is to adopt state statute of limitations); Moor v. County of Alameda, 411 U.S. 693, 702 n.12 (1973) (citing Holmberg for the proposition that federal court may look to state law or fashion single federal rule to fill in interstices of federal statute); Chevron Oil Co. v. Huson, 404 U.S. 97, 104 (1971) (citing Holmberg for proposition that federal statute of limitations should be fashioned only when need for uniformity great or nature of federal right demands particular statute of limitation).

127. In UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), Moviecolor was cited with approval by both the majority, id. at 708 n.10, and the dissent, id. at 711 n.2 (White, J., with Douglas & Brennan, JJs., dissenting).
century of case law developing the doctrine, and the lower courts' near unanimity in applying it to all federal claims, was meant to be abandoned sub silentio by the general pronouncements of *Johnson* and *Tomanio*.128

Second, by their own terms, *Johnson* and *Tomanio* do not apply when established federal procedural doctrines are available. Although the Court in *Johnson* applied state law, it specifically noted that “[i]n the present case there is no relevant body of federal procedural law to guide our decision.”129 *Tomanio* also applied state law, but relied on 42 U.S.C. § 1988 of the Civil Rights Act, which calls for application of “the laws of the United States” and directs reference to state law only when federal doctrines “are deficient.”130 In *Johnson* and *Tomanio* there arguably were no federal procedural doctrines to apply because the tolling principles under review did not exist until the lower courts invented them. Indeed, in *Tomanio* it appears that the district court relied on little more than perceived federal convenience when it devised a tolling doctrine designed to induce civil rights plaintiffs to take their grievances to state court first.131 Fraudulent concealment is materially different from the tolling principles at issue in *Johnson* and *Tomanio* because it represents an existing body of federal procedural law that makes reference to state law unnecessary. The Supreme Court recognized in 1918 that fraudulent concealment was “the

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128. The Court's disposition of Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322 (1978), adds credence to this argument. In that case the plaintiff sought to utilize the tolling provisions of § 5(i) of the Clayton Act, 15 U.S.C. § 16(i) (1976), which tolls the antitrust statute of limitations during any Interstate Commerce Commission (ICC) proceeding instituted by the Government. 437 U.S. at 324. The Government had not initiated the ICC proceeding, but had intervened in a proceeding brought by the plaintiff. *Id.* at 327. The Court held that statutory tolling was not possible because the proceeding was not initiated by the government, but it remedied for further consideration of the possibility that the statute of limitations should be tolled on “equitable principles.” *Id.* at 337 n.21. Chief Justice Burger concurred, emphasizing the district court's broad discretion to employ such tolling: "The authority of a federal court, sitting as a chancellor, to toll a statute of limitations on equitable grounds, is a well-established part of our jurisprudence." *Id.* at 338 n.*.

Because fraudulent concealment could not bridge the tolling gap plaintiff solved by relying on § 5(i), the Court seemed to be inviting the lower court to remand to toll the statute based on general equitable principles other than fraudulent concealment. In light of this attitude of extreme flexibility with respect to tolling a congressionally-established limitations period, it would surely be odd to suggest that two years later in *Tomanio* the Court intended to eliminate the established doctrine of fraudulent concealment when the limitations period is borrowed from a state.

129. 421 U.S. at 466-67.
130. 446 U.S. at 484-85. See supra note 109 (quoting § 1988 in part). One commentator recently argued that § 1988's predicate that federal law be deficient refers only to federal statutory law, not to federal common law. Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. Pa. L. Rev. 499, 508-15 (1980). Professor Eisenberg argues in part that reference to federal common law will cause § 1988's choice of law provisions to vanish into nonsense because some thread of federal authority can be found for almost any proposition, thereby demonstrating that federal law is not deficient. See *id.* at 513-14.

Although it is doubtful that even a thread of authority could be found for the tolling doctrine invented by the district court in *Tomanio*, one must admit the logic of Professor Eisenberg's position. The courts, however, do not appear to have embraced it. To the contrary, the Supreme Court in *Johnson* stressed the absence of federal case law and distinguished other cases on the ground that substantial pre-existing federal procedural law existed. 421 U.S. at 466-67 (citing Burnett v. New York Central R.R., 380 U.S. 424 (1965)). At least one lower court has continued to look to federal common law when assessing the deficiency of federal law. See Smith v. Jordan, 527 F. Supp. 167, 171-72 (S.D. Ohio 1981) (refusing to apply state law of respondent superior to an action under 42 U.S.C. § 1983 because federal case law on subject exists). Whether or not Professor Eisenberg's logic ultimately carries the day with respect to § 1988, the long history of the federal common law doctrine of fraudulent concealment clearly is relevant to deciding whether *Johnson* and *Tomanio* were meant to require the application of state law, a concern that carries beyond the civil rights area. See infra text accompanying notes 171-77.
established doctrine of this court" and later in Holmberg that it was a "settled federal equitable doctrine." As Judge Friendly said in Moviefone, "There is no reason for borrowing a state doctrine when there is an established federal one."

Third, interpreting Johnson and Tomanio to apply to fraudulent concealment would lead to the very incongruity that caused the Court in Holmberg to announce that the doctrine should apply to every federal statute of limitations. It is quite possible that the newly-minted tolling notions rejected in Johnson and Tomanio will never again be applied. It is certainly questionable whether the Supreme Court would uphold such doctrines on their merits if applied to federal statutes that do have limitation periods. But there can be no question that the federal fraudulent concealment doctrine will continue to be applied to claims under a variety of federal acts that incorporate statutes of limitations, including the Clayton Act, certain Civil Rights Acts, and the National Labor Relations Act. Indeed, it appears that plaintiffs are using it more and more frequently. To the extent that the applicable state law of fraudulent concealment differs from the federal doctrine, claims based on statutes without federal limitations periods would be treated differently from claims founded on statutes with federal limitations periods, and incongruity would result.

It could be argued that such incongruity is not significant in contrast to the greater incongruity of having claims under the same statute subject to different

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133. 327 U.S. at 397.
134. 288 F.2d at 84-85.
135. See supra text accompanying note 81.
136. Clearly courts may apply new federal common law principles of tolling to claims based on federal statutes that have their own limitations periods. Indeed, in Johnson the Court distinguished Burnett v. New York Central R.R., 380 U.S. 424 (1965), and American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), which both established new tolling doctrines for statutes with congressionally-set limitations periods. 421 U.S. at 466-67. The development of other such doctrines, however, must proceed with caution, and the doctrines involved in Johnson and Tomanio seem unlikely to survive. In addition to pointing out that the limitation periods involved in Burnett and American Pipe derived directly from the federal statutes themselves, the Court in Johnson cited three other considerations to justify tolling doctrines developed as federal common law: (1) that there was a substantial body of federal procedural law to which to refer; (2) that there was a federal policy that would have conflicted with a decision not to toll the statute; and (3) that the prior filings in the earlier cases involved exactly the same cause of action as subsequently asserted. Id. at 466-67.

It is unclear whether all the above criteria need to be satisfied to justify creation of a new tolling doctrine applicable to a federal limitations period. The Supreme Court provided some insight into this question in International Union of Electrical, Radio & Machine Workers, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976), when it held that the new tolling principle could not be applied to a congressionally-set limitations period established under title VII. Id. at 236. The plaintiff there argued that the time for filing her title VII charge should be tolled while she was pursuing her grievance under the machinery of the collective bargaining agreement. Id. at 231. The Court rejected her argument, stating that because the plaintiff was asserting a contract right in the grievance proceeding, she had not raised the same cause of action in the later proceeding in which she asserted a statutory claim under title VII. Id. at 238. Accordingly, tolling was not justified under the third criterion in Johnson, which requires that the same cause of action be asserted in both proceedings. Id.

Whatever the ultimate resolution of such issues, the tolling doctrines rejected in Johnson and Tomanio when the statutes of limitations were borrowed from the state probably also would be rejected when the statute of limitations was provided by the federal statute. In both situations, there is no pre-existing body of procedural law to justify application of new tolling doctrines. Cf. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351-52 (1976) (Court granted writ of mandate to overturn remand of removed civil action that was justified on grounds of crowding of federal docket; concerns similar to those used to justify the tolling doctrine in Tomanio).

137. See Appendix (discussing increasing frequency of fraudulent concealment claims).
limitation periods in different states.\textsuperscript{138} The logical conclusion of the incongruity argument could thus be that the Court should also declare a uniform limitations period for those federal statutes that lack a congressionally-specified period. This approach has appeal, particularly in connection with judicially implied causes of action, but the Court understandably has been reluctant to take such a step. In 1966 the Court rejected similar reasoning when urged to establish a uniform statute of limitations for claims under section 301 of the Labor Management Relations Act,\textsuperscript{139} which created a right of action but specified no limitations period.\textsuperscript{140} Characterizing this argument as seeking a "drastic sort of judicial legislation,"\textsuperscript{141} the Court refused to indulge in "so bald a form of judicial innovation."\textsuperscript{142} Nevertheless, although courts are peculiarly unsuited to perform the legislative function of setting limitation periods, they still are highly qualified to develop equitable tolling principles, as indeed has been done with fraudulent concealment.

Thus, the possibility of incongruity cannot be easily disregarded. Not only would borrowing state tolling law for some statutes but not others create seemingly unwarranted differences in treatment between statutory schemes,\textsuperscript{143} but it also could result in different doctrines of fraudulent concealment being applied to different provisions of the same statutory scheme. For example, although most of the civil rights acts lack federal limitations periods, 42 U.S.C. § 1986 specifies that suit should be brought within one year.\textsuperscript{144} Such incongruity is no less disturbing now than it was in 1946, when it motivated the Holmberg Court to state that the federal doctrine applies to all federal statutes of limitations.\textsuperscript{145}

Fourth, in view of the long history of the federal doctrine, to abandon it now with respect to statutes without limitations periods would be inconsistent with the implied expectations of Congress. In \textit{Bailey v. Glover} the Court specifically declined to follow state law regarding tolling.\textsuperscript{146} In 1918 the Court held that because "the rule of \textit{Bailey v. Glover} was the established rule of this court" in 1891, a statute passed that year "was presumably enacted with the ruling of that case in mind."\textsuperscript{147} Notably, except for claims based on the Civil Rights Acts, all of the statutory claims in which fraudulent concealment has been as-

\textsuperscript{138} For example, securities claims under rule 10b-5 have been subject to borrowed limitations periods ranging from one to ten years. \textit{See} \textit{Ruder \& Cross, Limitations on Civil Liability Under Rule 10b-5}, 1972 DÜKE L.J. 1125, 1144 (1972). The authors argue for the adoption of a uniform federal limitations period. \textit{See id.} at 1148-50.


\textsuperscript{140} \textit{See} \textit{UAW v. Hoosier Cardinal Corp.}, 383 U.S. 696, 698 (1966).

\textsuperscript{141} \textit{Id.} at 703.

\textsuperscript{142} \textit{Id.} at 701.

\textsuperscript{143} That is, why is a claim under the federal antitrust law, which has a statutory limitations period, treated differently from a claim based on an alleged violation of the securities acts, which does not? \textit{Civil Rights Acts, 42 U.S.C. § 1986 (1976 & Supp. IV 1980).}

\textsuperscript{144} Another incongruity that would result is that in cases involving conduct alleged to injure parties across the nation, the tolling principles would vary when the applicable statute of limitations depends upon residence of the victims. Such state-by-state determinations of tolling would burden the courts and limit the utility of class actions by creating new and somewhat individualized questions of fact. Even with different borrowed limitations periods, uniform tolling principles could still be efficient because the court could determine the date on which plaintiffs in general should have been aware of their claim and then, by simple arithmetic, determine whether the statute had expired in given instances. \textit{Exploration Co. v. United States}, 247 U.S. 435, 449 (1918). \textit{See supra} notes 65-68 and accompanying text (discussing \textit{Exploration Co. v. United States}). \textit{ Cf. Public Serv. Co. v. General Elec. Co.}, 315 F.2d 306, 311 (10th Cir.) (enactment by Congress of specific tolling provision shows no intention to
asserted have involved statutes Congress passed after 1891. It seems more reasonable now to assume, as the Court did in 1918, that Congress expected that the "established doctrine" of fraudulent concealment would be available to claimants relying on these statutes. Indeed, there is some indication that Congress expressly relied on the existence of the doctrine when it enacted an antitrust statute of limitations in 1955. Since Holmberg was decided in 1946, Congress has had an explicit case law basis for believing the doctrine would apply regardless of whether the statute specified a limitations period.

Congress could well be surprised to learn that after Johnson and Tomanio state law, and not the federal doctrine, would be applied to a large body of federal claims. Congress could, of course, rectify the situation by enacting federal limitations periods for every statute, but ninety years of congressional expectations should not be lightly disregarded. Because the tolling rules before the Court in Johnson and Tomanio were so novel that Congress could not have reasonably expected their availability to claimants, neither case directly addressed this issue. At a minimum, courts should squarely address the issue before federal principles are abandoned wholesale in favor of state law.

Fifth, even if Johnson and Tomanio were applied to fraudulent concealment, it is likely that the federal fraudulent concealment doctrine nevertheless will be employed unless the result under state law is the same because a different result is likely to be held to be inconsistent with federal policy. Johnson explicitly acknowledged that "[a]lthough state law is our primary guide in this area, it is not, to be sure, our exclusive guide. . . . [C]onsiderations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." The Court in Tomanio echoed the same sentiments by considering whether the state rule was inconsistent with federal law. In both cases the Court concluded that application of state tolling rules was not inconsistent with the federal policy underlying the cause of action, partly because the plaintiff could simply have filed suit sooner.

No such situation prevails with respect to the victim of fraudulent conceal-
ment, however, creating a risk of compromising the federal policy underlying the statute at issue. Indeed, the doctrine was created precisely because without it plaintiffs with otherwise meritorious claims would have no effective redress in court. As Judge Friendly noted in *Moviecolor*, when federal statutes are involved, "federal interests transcend those of the states."

Several of the federal claims that lack congressionally-set limitations periods are based on statutes enacted to deal with such transcendent national interests. For example, the Securities Acts were passed, partly in response to the 1929 Stock Exchange crash, to protect the public against deceptive practices in connection with securities. Claims under the Securities Acts, in particular, are highly susceptible to concealment. The Civil Rights Acts initially were designed to achieve the national objective of granting freedmen legal weapons with which to protect their newly-acquired rights. The doctrine of fraudulent concealment is therefore important to furthering these statutes’ objectives, which might be frustrated by substitution of more restrictive state rules.

The Supreme Court is not blind to the potential for mischief to federal policy that could result from an unthinking adoption of state law on limitations. Thus in *Occidental Life Ins. Co. v. EEOC*, the Court refused in 1977 to apply a state statute of limitation because doing so would have conflicted with national policy. In that case the EEOC filed an action against Occidental after conciliation efforts had failed. Under title VII, the EEOC could not sue until completing its voluntary compliance endeavors. Occidental nevertheless argued that the action was barred by a state one-year statute of limitations, even though the EEOC could not have sued within one year because conciliation efforts had not been completed. Although it recognized that courts generally should borrow a state limitations period when the federal statute did not include one, the Court refused to apply the state statute of limitation. It reasoned that “[s]tate legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.” To apply the state standard on the facts before it, the Court concluded, would frustrate the federal goal of encouraging conciliation.

A victim of fraudulent concealment of a federal cause of action is in a position somewhat similar to that of the EEOC in *Occidental Life*. Just as the

153. 288 F.2d at 84.
157. Id. at 367.
158. Id. at 357-58.
161. Id. at 372-73.
162. Id. at 367. The Court observed that the “State's wisdom” in establishing a general limitation period could not have taken into account the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities. Id. at 368.
163. Id. at 367-72.
EEOC could not sue until after the statute had run because it had to complete conciliation efforts first, the victim of concealment cannot sue because he is unaware of his claim. Depending upon the vagaries of state law, those who conceal their violation of federal statutes from the victim until the statutory period has run might be immunized from suit if state law applied. In such cases, the application of the federal doctrine of fraudulent concealment furthers the national goals served by enforcement of the statute involved whether or not the statute specifies a limitations period. Accordingly, federal courts are likely to apply federal tolling principles whenever they would preserve the claim and state rules would not. Indeed, one district judge has already announced that he would interpret Tomanio to require the application of the federal doctrine in civil rights cases if state law of tolling were narrower. By the same token, given the federally-recognized policies served by limitations, state rules that are more generous to plaintiffs also appear to be inconsistent with important federal policies. Most lower courts that have confronted fraudulent concealment problems since Tomanio, however, have finessed these issues by concluding that the applicable state doctrines were essentially the same as the federal rule. But whenever there is a material difference between the federal and the state rules on fraudulent concealment, the reasoning of Johnson and Tomanio probably mandates that the federal rule should apply.

164. In contrast, when the plaintiff in a civil rights case, Singleton v. City of New York, 632 F.2d 185 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981), was aware of his action against New York for false arrest, the court refused to toll the limitations period during the pendency of state criminal proceedings. Id. at 191. The court reasoned that its decision was not inconsistent with federal policy because the defendant could have brought his civil action when the criminal action was pending. Id. at 192.

165. At least one commentator has concluded that fraudulent concealment reflects a federal policy and therefore is unaffected by Johnson. See Note, Filing of an Employment Discrimination Charge Under Title VII as Tolling Statute of Limitations Applicable to a 1981 Action: The Unanswered Questions of Johnson v. REA, 26 CASE W. RES. L. REV. 889, 905-06 (1976).

166. In Marrapese v. Rhode Island, 500 F. Supp. 1207, 1226 (D.R.I. 1980), the district court concluded that the state and federal rules would operate in the same way, but announced that it would not apply the state rule if it were more restrictive:

This Court believes that if Rhode Island would not apply the discovery rule to the facts of the present case, then application of the state rule would be fundamentally inconsistent with the policies of § 1983. . . . If, however, the discovery rule were not employed, a certain class of § 1983 plaintiffs would never be able to enforce their claims. In cases of latent injury, the limitations period could run before even the most diligent person realized that he had been wronged, and the salutory goals of compensation and deterrence would be completely frustrated. Id. at 1226. In Trecker v. Scag, 679 F.2d 703 (7th Cir. 1982), the court took a similar tack with respect to state law interpreting the meaning of discovery of the claim: “[S]hould the state law defining discovery be more stringent than the comparable federal tolling doctrines, the latter would govern by operation of the Supremacy Clause.” Id. at 706 n.7.

167. See supra text accompanying notes 42-47.

168. Since Tomanio at least one court has refused to apply a state tolling doctrine on the ground that to allow the limitations period to be tolled would be inconsistent with federal law. London v. Coopers & Lybrand, 644 F.2d 811, 815 (9th Cir. 1981). In that case, the plaintiff sought to toll the state limitations period for her claim based on section 1981 of the Civil Rights Act on the ground that she had initiated administrative proceedings during the limitations period. Id. at 814-15. California law provided for such tolling, but the Ninth Circuit nevertheless held that to apply the state tolling rule would be inconsistent with Johnson, which held that § 1981 and title VII provided separate and independent remedies. Id. at 815.

169. See supra note 116 and accompanying text.

170. Notably, the Tomanio Court quoted the following passage from Robertson v. Wegmann, 436 U.S. 584, 593 (1978):
Finally, it should be noted that even if Johnson and Tomanio were intended to preclude application of the federal fraudulent concealment doctrine, it could be argued that their reach is limited to claims based on the Civil Rights Acts because in both cases the Court relied on 42 U.S.C. § 1988, which applies only to civil rights claims.171 In Tomanio the Court reasoned that section 1988 mandated that state law should provide “binding rules” for such claims,172 and described the claim in Johnson as “another [claim] subject to § 1988.”173 A panel of the Tenth Circuit has recently held that Johnson and Tomanio are limited to civil rights claims,174 and although the argument has some force, careful scrutiny shows that it is not persuasive.

The problem with attempting to limit Johnson to civil rights cases is that the decision, although premised in part on section 1988, was bottomed on more general principles. The Court in Johnson relied principally on the theory that a state’s tolling doctrine should be borrowed along with the statutory period of limitation.175 The Court referred to section 1988 almost as an afterthought:

There is nothing anomalous or novel about . . . [borrowing state tolling doctrines]. State law has been followed in a variety of cases that raised questions concerning the overtones and details of application of the state limitation period to the federal cause of action. . . . Nor is there anything peculiar to a federal civil rights action that would justify special reluctance in applying state law. Indeed, the express terms of 42 U.S.C. § 1988 suggest that the contrary is true.176

Far from reasoning that section 1988 compelled the result reached, then, Johnson treated the statute merely as confirming that civil rights claims should be treated the same as others. Moreover, the examples the Court cited in the passage quoted above177 are not civil rights cases, further indicating that its gen-

A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would always be one favoring the plaintiff, and its source would then be essentially irrelevant.

Johnson, 446 U.S. at 488.

The prediction that courts will apply federal tolling principles when necessary to protect federal claims is different from the point the Court was addressing in the above passage. With respect to fraudulent concealment, the point is not merely that state rules might cause plaintiffs to lose, but that such rules could undermine the federal statute sought to be enforced by exonerating a party that has concealed the existence of the claim. The question is not whether the state rule causes the plaintiff to lose, but whether the fraudulent concealment doctrine serves important federal objectives by protecting federal suitors against the effects of concealment.

171. See Tomanio, 446 U.S. at 484-85; Johnson, 421 U.S. at 464.
172. 446 U.S. at 484.
173. Id. at 485.
174. In Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687 (10th Cir.), cert. denied, 102 S. Ct. 392 (1981), the court stated:

Section 1988 applies only to the civil rights provisions of Title 18 and Title 42, United States Code. To apply the Tomanio rule by analogy to cases where federal courts borrow a state limitations period as a matter of judicial convenience would in effect overrule Holmberg v. Armbrrecht, a decision whose continuing vitality is attested by the many cases relying upon it in § 10(b) private actions.

Id. at 691 (citations omitted).
175. 421 U.S. at 462-64.
176. Id. at 464.
177. The cases Johnson cited as examples of reliance on state law for the details of applying a borrowed state limitations period were UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) (action under
eral reasoning is not limited to such cases. The argument that *Tomanio* and *Johnson* are limited to civil rights cases, therefore, appears weak.

In summary, *Johnson* and *Tomanio* do not forbid applying federal principles of fraudulent concealment to claims based on federal statutes that lack federal limitations periods. Neither case involved a claim of fraudulent concealment. The Court has neither overruled nor questioned the vitality of *Holmberg*, and *Johnson* suggests instead that when there is a "relevant body of federal procedural law," the federal courts may continue to employ it rather than borrow state law. To abandon the federal doctrine would result in incongruities in treatment between statutes, would undermine congressional expectations, and probably would force the courts to readopt federal principles whenever the state law is materially different from the federal approach. The federal doctrine of fraudulent concealment should continue to be applied to all federal claims; the lower courts that have disregarded *Johnson* and *Tomanio* in concealment cases are reaching the right result.

III. A FRAMEWORK FOR THE APPLICATION OF THE FEDERAL DOCTRINE

In view of the conclusion in section II that the federal fraudulent concealment doctrine should continue to apply to all federal claims, it would be comforting to be able to report that such application will prove relatively straightforward. Unfortunately, the decisions make that impossible. The elements of fraudulent concealment can be stated rather simply: the plaintiff must prove that the defendant concealed the wrong and that as a result the plaintiff could not, with due diligence, have discovered his claim sooner.178 Nevertheless, as Judge Devitt and Professor Blackmar have noted, "The case law is not well developed as to the precise proof which must be made in order to establish tolling of the statute of limitations through fraudulent concealment."179 As a result, the application of these superficially simple concepts has left some courts groping with seemingly contradictory rules and empty concepts.180 The

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178. See *Bailey* the Court held that the period of limitations did not begin until plaintiff discovered his cause of action when "the fraud has been concealed, or is of such character to conceal itself." According
following review of tolling decisions provides a framework for analysis in the future. It also demonstrates that deviant rules adopted by some courts should be rejected, and that the principal theoretical question that remains to be conclusively answered is the importance attached to proof of concealment.

A. CONCEALMENT

The fraudulent concealment tolling doctrine originated at equity, which had no statute of limitations. Instead, the English courts of chancery applied the equitable concept of laches, which bars a plaintiff who has delayed an unreasonable length of time in bringing his claim.\textsuperscript{181} When the claim was based on fraud, the chancery courts applied laches by looking not to the date the wrongdoing occurred, but to the date on which the plaintiff should have learned of his claim.\textsuperscript{182} At equity, then, diligence was the sole criterion. \textit{Bailey v. Glover} adopted this rule for fraud actions at law, even when there were "no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."\textsuperscript{183} Thus, in fraud cases concealment is usually said to be unnecessary to tolling.

From the perspective of the policies underlying the statute of limitations, however, this single-minded focus on diligence is troubling. Ordinarily defendants are entitled to the protection of limitations when they have done nothing more than commit the substantive wrong. Defendants who go beyond the substantive wrong and conceal their wrongdoing, on the other hand, cannot claim that it is unfair to suspend the running of limitations until the effects of that concealment have worn off. Thus, the concealment prong serves as an important protection for defendants' rights. The Supreme Court itself gave voice to this concern in \textit{Wood v. Carpenter}, decided five years after \textit{Bailey v. Glover}, stating that "[c]oncealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."\textsuperscript{184} In cases not involving fraud claims, therefore, proof of concealment was required. Thus arose the often-cited distinction between tolling requirements for fraud (in which concealment need not be proved) and fraudulent concealment (in which it was required), a supposed dichotomy\textsuperscript{185} that has had...
an uneasy life.

Using the label "fraud" to determine whether proof of concealment is required created problems. Indeed, this approach may have been flawed from the very outset because *Wood v. Carpenter*, in which the Supreme Court articulated the concealment requirement, was in essence a fraud case. The disparate treatment of fraud and nonfraud cases tended to undercut the concealment requirement in nonfraud cases. The plaintiff with a claim not based on traditional fraud might have been equally as diligent as the fraud victim, but have failed to discover the wrong despite the absence of affirmative concealment. The courts were loathe to shut the courthouse door in the face of such a plaintiff, and the concealment prong underwent a continuing erosion as courts struggled to avoid it.

This section reviews the federal tolling cases and concludes that, as a practical matter, concealment has not been an independent requirement for tolling. Looking to the types of proof that have been held sufficient to satisfy the concealment prong, it finds that courts have accepted a showing either of acts to cover up the wrongdoing or representations by the defendant, including denials of wrongdoing. Even when the defendant has been guilty of nothing more than mere silence, courts bar only plaintiffs who have not been diligent. With diligent plaintiffs, the courts may sidestep the concealment issue by labeling the claim "constructive fraud," thereby eliminating the need to prove concealment. In other cases, particularly civil rights claims, they have disregarded it altogether. Thus, it seems that the distinction between concealed fraud and fraudulent concealment is generally more a matter of form than substance, and that defendants will have to rely on the requirement that plaintiffs act diligently for protection of their statute of limitations interests. The issue that remains is whether the courts should disinter concealment as a genuine requirement for tolling, a question that depends on the importance attached to the policies underlying limitations.

1. Affirmative Acts

The clearest case of concealment occurs when the defendant has not only committed the substantive wrong, but has taken affirmative action to conceal it. In such a situation, there is no risk of tolling the statute for conduct that is nothing more than the substantive wrong. The problem, however, is to determine whether the alleged acts of concealment are actually independent of the substantive wrong. One approach suggested by early Supreme Court reason-

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other cases, sometimes saying that there are really two separate rules. See, e.g., Prather v. Neva Paperbacks, Inc., 446 F.2d 338, 341 n.2 (5th Cir. 1971) (doctrine of fraudulent concealment, applicable to any cause of action, but should not be confused with different doctrine of undiscovered fraud); Byrne v. Autohaus on Edens, Inc., 488 F. Supp. 276, 280 n.4 (N.D. Ill. 1980) (doctrine of fraudulent concealment should be distinguished from rule that statutes of limitation for fraud actions do not begin to run until date of discovery); see generally Dawson, *Fraudulent Concealment*, supra note 32, at 877-82 (when undiscovered fraud is basis of liability, courts have now said that no new concealment is necessary provided plaintiff has opportunity to discover fraud; in contrast, when deciding fraudulent concealment claim, court must look beyond original cause of action and examine means by which defendant obstructed discovery).

186. *Wood v. Carpenter*, 101 U.S. 135 (1879), was a suit to set aside transfers of defendant's property in fraud of creditors, seemingly a traditional fraud claim.
ing\textsuperscript{187} is to ask whether the alleged acts of concealment occurred after the wrong was committed. This approach appears to be a simple device to ensure that there have in fact been independent acts of concealment. For example, in \textit{Smith v. Nixon},\textsuperscript{188} New York Times columnist Hedrick Smith sued to recover damages from federal officials and the telephone company for allegedly placing illegal wiretaps on his telephone.\textsuperscript{189} Smith's concealment claim was based on allegations that the defendants concealed records of the wiretapping from him and falsely denied press reports of the surveillance program.\textsuperscript{190} The District of Columbia Circuit held that the denials and concealment of wrongdoing, clearly separate from the surveillance itself, justified the application of the tolling doctrine.\textsuperscript{191} Similarly, in a securities case the Second Circuit found concealment in an accounting firm's destruction of records and alteration of accounting entries.\textsuperscript{192} In these situations it was easy to conclude that the defendants' actions served to conceal the wrong after it was committed.

Although chronology is a useful method for isolating acts of concealment, it has proved unsatisfactory in many cases. When the wrongdoing takes place over a period of time, the acts of concealment, although independent of the wrongdoing, still may occur simultaneously with the wrongdoing. In one case, for example, the plaintiff alleged that the Atomic Energy Commission had appropriated without notice or compensation a scientific process he had developed.\textsuperscript{193} Because the operation had been kept secret, the plaintiff learned of the defendant's activities only after certain classified materials were made public.\textsuperscript{194} The court held that the defendant's secret operations, although legal, resulted in concealment of the claim.\textsuperscript{195} Similar simultaneous activity designed...

\textsuperscript{187} In \textit{Wood v. Carpenter}, 101 U.S. at 142, the Court cited an "instructive" Indiana case, \textit{Stanley v. Stanton}, 36 Ind. 445 (1871). The Indiana court had required that such acts of concealment must occur after the wrong is committed. 36 Ind. at 449. The plaintiff in \textit{Stanley v. Stanton} claimed that the defendant had obtained money from the plaintiff by representing himself to be the agent of one of plaintiff's creditors, and that the defendant had thereafter concealed his deceit for twenty years. \textit{Id.} at 450-51. The Indiana court held that such concealment was inadequate to toll the statute because "[t]he facts, and only the facts, necessary to show the existence of it, are relied upon to show a concealment of the cause of action. It seems to us to be a contradiction in terms to talk of concealing a cause of action before the same has any existence." \textit{Id.} at 449. Thus, not only did the court require proof of concealment to justify tolling in a fraud action, it also required that the acts of concealment postdate the fraud.

This requirement appeared satisfied in \textit{Wood v. Carpenter} itself. The plaintiff did not have to rely on the challenged fraudulent transfers themselves to establish concealment because the defendant thereafter "falsely pretended to plaintiff and his other creditors that he was poor" and falsely claimed poverty in a debtor's oath. 101 U.S. at 136. The Court decided for the defendant on the ground that plaintiff had not alleged due diligence, but also appeared satisfied with the allegation of concealment.


\textsuperscript{189} \textit{Id.} at 1185-86.

\textsuperscript{190} \textit{Id.} at 1191 & n.44.

\textsuperscript{191} \textit{Id.} at 1191 n.44. For another recent example, see \textit{Barrett v. United States}, 689 F.2d 324 (2d Cir. 1982), in which the court held that a claim that plaintiff's decedent died as a result of having been subjected to a secret chemical warfare experiment did not accrue for over twenty years. \textit{Id.} at 333. The court stressed the following factors as proof of concealment: the Army's use of classification of materials to keep the testing program secret; its campaign to prevent disclosure by threatening prosecution under the Espionage Act; and its efforts to put incriminating documentary evidence "beyond the subpoena power." \textit{Id.} at 328.

\textsuperscript{192} \textit{Robertson v. Seidman & Seidman}, 609 F.2d 583, 593 (2d Cir. 1979).

\textsuperscript{193} \textit{Spevack v. United States}, 390 F.2d 977, 980-81 (Ct. Cl. 1968).

\textsuperscript{194} \textit{Id.} at 981.

\textsuperscript{195} \textit{Id.}
to conceal other federal claims has been held to show concealment. Thus, it is not necessary for the plaintiff to show that the concealment occurred after the wrong was committed or that the acts of concealment were intrinsically wrongful. At most, some action taken by the defendant independent of the wrongdoing, but tending to conceal it, is required.

Isolating acts of concealment that are separate from the wrongful conduct is more difficult when the act of concealment is inherent in the wrongful conduct. Perhaps the best illustrations of this problem are price fixing conspiracies, which require secrecy to be successful. As Judge Weinstein stated in rejecting a tolling argument in an antitrust case:

It 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. If it did, the tolling exception to the statute of limitations would eclipse the basic statute itself.

As a general principle, then, to toll the statute antitrust plaintiffs must show more than the wrongful conduct that underlies the substantive cause of action.

Nonetheless, courts have been quite willing to find acts of concealment in antitrust conspiracy cases. Perhaps the most famous examples of tolling in antitrust cases were the electrical equipment price fixing cases of the late 1950's and early 1960's, in which the conspirators hid their misdeeds by meeting secretly, using pay telephones, calling from home rather than from the office, using plain envelopes without return addresses, and destroying records. It has been said that the underlings who actually fixed prices were so successful in concealing their actions that even the chief executive officer of General Electric was unaware of the conspiracy. Such behavior, although an integral part of the substantive wrong, continues to be found sufficient to toll the statute of limitations. In a recent price fixing case, for example, the defendant's regional manager maintained a “talk” and “no talk” chart on which he distinguished between participants in the conspiracy and outsiders in order to guard against disclosure to outsiders. He also made his price-fixing calls after normal working hours. The district court ruled that concealment had been established as a matter of law and need not even be submitted to a jury. The Tenth Circuit affirmed. In yet another recent case, in which it was alleged that the conspirators submitted fictitious bids to camouflage a bid-rigging conspiracy, the district court held that such additional action constituted concealment.

Such behavior undeniably should toll the statute of limitations. A theoreti-

196. See NLRB v. Don Burgess Constr. Corp., 596 F.2d 378, 383 (9th Cir. 1979) (defendant fraudulently concealed from union its unlawful employment of nonunion carpenters by twice assuring union that it would no longer employ nonunion carpenters).
201. Id.
202. Id.
203. Id.
cal problem arises, however, because this conduct is not easily separated, chronologically or otherwise, from the conduct that underlies the claim. Undoubtedly all the above-described evidence would be admissible on the substantive claim itself. In their case-by-case approach to concealment, the lower federal courts have not explicitly addressed the theoretical problem created by the overlap of substantive wrongs and acts of concealment. Their implicit conclusion is that whenever they identify specific conduct that tends to conceal the wrong, albeit “part” of the substantive wrong itself, they will toll the statute if the plaintiff is diligent. This conclusion seems legitimate when such conduct clearly prevents timely commencement of the suit because it provides a justification for depriving the defendant of the protection of limitations. Lurking in the background, however, is the question whether this approach amounts to no more than a determination whether the defendant’s conduct was sufficiently “aggravated” to warrant tolling. Such an approach is hazardous because it blends the grounds for tolling and the grounds for liability, and the wrongfulness of the alleged offense is not itself supposed to be a ground for suspending the running of the statute of limitations. Even decisions premised upon affirmative acts of concealment suggest that, as a practical matter, the concealment prong is no longer an independent requirement.

2. Representations to Plaintiff

In some cases, the plaintiff’s evidence of concealment consists only of representations made by the defendant. As with other acts purportedly intended to conceal, such representations may be an integral part of the wrongful conduct itself or entirely independent of it. Representations may closely resemble traditional fraud and, therefore, can easily be viewed as providing grounds for application of the fraudulent concealment doctrine. In evaluating a claim that the defendant’s representations deterred or deferred investigation of the claim, courts normally toll the statute of limitations if the plaintiff’s reliance on the defendant’s representations was reasonable. This approach is consistent with the policies underlying limitations because it identifies conduct of the defendant that justifies depriving him of the protection of limitations.

Courts typically find that defendant’s representations constitute concealment when the defendant obscures its wrongful conduct by providing an innocent explanation for unfavorable developments. For example, in Mt. Hood Stages v. Greyhound Corp.205 the plaintiff, a small bus company, alleged that for twenty years Greyhound had violated the antitrust laws by pursuing a routing strategy that was designed to eliminate the plaintiff as a competitor.206 Because the plaintiff was aware of many of the routing decisions,207 it could not prove that the defendant surreptitiously concealed its actions. Instead, it proved that when it complained about routing decisions, the defendant explained that the

205. 555 F.2d 687 (9th Cir. 1977), rev’d on other grounds, 437 U.S. 322 (1978). For a discussion of the Supreme Court’s decision, see supra note 128. It is noteworthy that the plaintiff’s initial success against Greyhound gave rise to a milestone of civil procedure, Shaffer v. Heitner, 433 U.S. 186 (1977), which was a derivative action seeking to hold the directors and officers of Greyhound liable for the judgment against the company in Mt. Hood. See 433 U.S. at 190 n.2.
207. Id. at 698.
decisions were isolated and unauthorized acts by low-level personnel.\textsuperscript{208} The Ninth Circuit concluded\textsuperscript{209} that these representations supported a jury finding of concealment of a company-wide policy, determined by high-level management, to injure plaintiff as a competitor.\textsuperscript{210} Similarly, when a former Philadelphia teacher asserted that she had been fired because of her opposition to mayor Frank Rizzo, the district court indicated that tolling would be justified by proof that the defendant falsely informed her she was laid off due to financial constraints.\textsuperscript{211} In the same vein, the Ninth Circuit held that an employer had concealed its violation of its duty to bargain with a carpenters union by representing to the union that it would no longer employ carpenters when in fact it was employing them.\textsuperscript{212}

When defendants volunteer an innocent and false explanation for their conduct, it is easy to find that independent acts of concealment have occurred. The routing strategy in \textit{Mt. Hood Stages}, the termination of the Philadelphia teacher, and the employer's violation of its duty to bargain were separate and distinct from the representations that concealed the wrongdoing. In other situations, however, the defendant merely denied wrongdoing without volunteering an explanation. These cases have greatly troubled the courts. On one hand, it is difficult to argue that a defendant conceals his wrongdoing by merely denying allegations. Surely the denial does not retroactively conceal the wrongdoing when it comes only \textit{after} the plaintiff's suspicions have been aroused. Indeed, if such reasoning were carried to its logical extreme, a defendant would engage in concealment by merely filing an answer in court denying the charges of the complaint. In theory, at least, a defendant is not required to advertise his wrongdoing to qualify for the protection of the statute of limitations. On the other hand, a knowingly false denial of specific charges of wrongdoing could certainly be labeled fraudulent. It seems inequitable for a defendant to profit from his misrepresentations when plaintiffs have reasonably relied upon them.

Responding to such equitable concerns, courts ultimately focus on the reasonableness of the plaintiff's reliance on the denial. Thus, although it is sometimes said that mere denials cannot as a matter of law suffice to show

\textsuperscript{208} Id.

\textsuperscript{209} The court's observation that "Greyhound does not deny the sufficiency of the evidence to show it attempted to conceal its conduct," 555 F.2d at 698, indicates that it did not decide the concealment issue. Nonetheless, the conclusion that the representations were sufficient to constitute concealment was implicit in the court's opinion.

\textsuperscript{210} Id. at 698-99. Greyhound made the same representations below to the Interstate Commerce Commission. Mt. Hood Stages, Inc., 104 I.C.C. 449, 459-63 (1968). The ICC eventually found that its actions were inspired by a desire to stifle competition and "injure or destroy" the plaintiff. Id. at 461. The Ninth Circuit concluded that "the conduct underlying the regulatory proceedings and that underlying the antitrust suit are essentially the same." 555 F.2d at 691. The plaintiff was awarded damages for the period 1953 through 1973 despite the four year antitrust statute of limitations. Id. at 697. Although the Supreme Court reversed on other grounds, it refused to consider Greyhound's contentions that there was insufficient evidence of concealment to toll the statute of limitations. 437 U.S. at 329-30 n.12.

\textsuperscript{211} Boyce v. School Dist. of Philadelphia, 447 F. Supp. 357, 362 (E.D. Pa. 1978); see also Richards v. Mileski, 662 F.2d 65, 68-69 (D.C. Cir. 1981) (declining to dismiss complaint when plaintiff asserted that defendant fraudulently concealed evidence which showed that fabricated charges were knowingly used to force plaintiff's resignation).

\textsuperscript{212} NLRB v. Don Burgess Constr. Corp., 596 F.2d 378, 382-83 (9th Cir. 1979).
concealment,\textsuperscript{213} in reality the rule is not so rigid. The oft-cited Ninth Circuit case of Rutledge v. Boston Woven Hose & Rubber Co.,\textsuperscript{214} decided less than a year after Mt. Hood, illustrates the tension between the stated rule and its application. The plaintiff claimed that the defendant had engaged in price discrimination in violation of the antitrust laws.\textsuperscript{215} Years before, the plaintiff had sued a number of other manufacturers on comparable claims (Rutledge I) and lost.\textsuperscript{216} The plaintiff’s only allegation of concealment was that the defendant denied engaging in price discrimination.\textsuperscript{217} The defendant moved to dismiss on statute of limitations grounds, and the district court granted the motion.\textsuperscript{218}

Plaintiff appealed. Over a dissent concluding that “Rutledge had the right to accept without mistrust the alleged fraudulent misrepresentations by Woven Hose,”\textsuperscript{219} the court of appeals affirmed on statute of limitations grounds.\textsuperscript{220} The majority stressed the requirement that the plaintiff prove that the defendant “actively misled” him,\textsuperscript{221} and reasoned that the plaintiff could not do so by relying only upon the defendant’s denials:

Silence or passive conduct of the defendant is not deemed fraudulent unless the relationship of the parties imposes a duty upon the defendant to make disclosure. The affirmative act of denying wrongdoing may constitute fraudulent concealment where the circumstances make the plaintiff’s reliance upon the denial reasonable, but this is not such a case. As early as 1965, Rutledge had expressed his suspicion to attorneys for the Justice Department’s antitrust division that Woven Hose was giving a secret additional discount to one of Rutledge’s competitors, the Weatherhead Company, a suspicion based on Weatherhead’s low resale price. . . . He was not a man insensitive to the implications of the antitrust laws, nor was he a person who lightly disregarded his suspicions. His extensive litigation of similar issues in Rutledge I and his continued efforts to pursue his suspicions of other wrongdoing forbid any inference that he would be thrown off the trail by a simple denial of wrongdoing.\textsuperscript{222}

Given the posture of the appeal—from a motion to dismiss, not from a motion for summary judgment—the above psychological analysis of the plaintiff is indeed a remarkable effort to justify dismissal in the face of other decisions in which denials sufficed as concealment. The trouble with this analysis is not that the court considered the reasonableness of the plaintiff’s reliance, but that it considered the reasonableness of the reliance to have a bearing on whether


\textsuperscript{214} 576 F.2d 248 (9th Cir. 1978).

\textsuperscript{215} \textit{Id.} at 250.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{Id.}

\textsuperscript{218} \textit{Id.} at 249-50.

\textsuperscript{219} \textit{Id.} at 250-51 (Merrill, J., dissenting).

\textsuperscript{220} \textit{Id.} at 250.

\textsuperscript{221} \textit{Id.} at 249.

\textsuperscript{222} \textit{Id.} at 250.
concealment occurred. Although reliance on a defendant’s representations must be reasonable to toll the statute, it is not the standard by which one determines whether there has been concealment. Rather, it is the language of due diligence. The reasoning of Rutledge, therefore, suggests that plaintiffs need prove only due diligence and not concealment to toll the statute, which would be detrimental to defendants’ legitimate interests.

Comparison to equitable estoppel cases indicates that elsewhere defendants’ interests receive the recognition they deserve. Equitable estoppel precludes reliance on limitations by a defendant who has induced the plaintiff to delay suit by misrepresenting the plaintiff’s legal rights to him or assuring the plaintiff that a settlement has been reached. Obviously equitable estoppel differs from fraudulent concealment in that it applies in favor of a plaintiff who is undeniably on notice of his claim. Nevertheless, equitable estoppel cases are analogous to fraudulent concealment cases in which the defendant simply denies allegations of wrongdoing because the “concealment” in such cases occurs only after the plaintiff’s suspicions have been sufficiently aroused to stimulate inquiry.

The reason the comparison is informative is that in order to assert equitable estoppel, the plaintiff must prove not only that his reliance on the defendant’s statements was reasonable, but also that the defendant was culpable for the delay by having made a misrepresentation of material fact designed to induce the plaintiff to delay suit. It is this factor that justifies depriving the defendant of the protection of limitations. Arguably a lower degree of culpability would be appropriate in a fraudulent concealment case in which the plaintiff is not on notice of his claim, but defendant’s interests are also more forceful


224. See United States v. Fidelity & Gas Co., 402 F.2d 893, 898 (4th Cir. 1968) (defendant estopped when falsely assured plaintiff that contract dispute resolved); see also Atkins v. Union Pac. R.R. Co., 685 F.2d 1146, 1148-49 (9th Cir. 1982) (reversing trial court’s dismissal because defendant should be estopped from pleading statute of limitations defense if court finds that plaintiff relied on defendant’s assurances that the claim would be settled); Ott v. Midland Ross Corp., 600 F.2d 24, 34 (6th Cir. 1979) (remanding to give plaintiff opportunity to prove that defendant should be estopped because it falsely assured plaintiff that employment dispute resolved); Longo v. Pittsburgh & Lake Erie R.R., 355 F.2d 443, 445 (3d Cir. 1966) (remanding to give plaintiff opportunity to prove that defendant should be estopped because it falsely assured plaintiff that FELA claim could be settled).

225. The Seventh Circuit has emphasized the difference between tolling and estoppel:

Equitable estoppel . . . is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his action has induced another into forbearing suit within the applicable limitations period.

Bomba v. W.L. Belvidere, Inc., 579 F.2d 1067, 1070 (7th Cir. 1978). Although this distinction theoretically may have some weight, in practice, estoppel does closely resemble concealment by representations or denial of wrongdoing. Indeed, in Ott v. Midland-Ross Corp., 600 F.2d 24 (6th Cir. 1979), the court in an equitable estoppel case looked to Holmberg v. Armbricht for the principle that equitable tolling is read into all federal statutes. Id. at 30. Thus, the two doctrines are part of a continuum of law excusing plaintiff’s failure to sue within the period of limitations.

226. See Sanchez v. Loeffland Bros. Co., 626 F.2d 1228, 1231 (5th Cir. 1980) (nature of representations and conduct of defendant have crucial significance when determining whether plaintiff may invoke equitable estoppel), cert. denied, 452 U.S. 962 (1981); Ott v. Midland-Ross Corp., 600 F.2d 24 (6th Cir. 1979) (defendant may be equitably estopped if plaintiff can prove that defendant falsely assured him that employment dispute resolved).

under such circumstances. In equitable estoppel cases the defendant has already been threatened with suit, so he cannot claim surprise if later sued. The defendant who only denies wrongdoing is not similarly on notice. In fraudulent concealment cases in which a defendant's misrepresentation involves a simple denial of wrongdoing, therefore, the comparison to equitable estoppel cases shows that plaintiffs should be required to prove some culpability pertinent to the tolling question—concealment. In this context, the emphasis in Rutledge on the reasonableness of the plaintiff's reliance further suggests the erosion of concealment as an independent requirement.

3. Mere Silence

The plaintiff who is completely ignorant of the defendant's wrongdoing may never receive a denial of wrongdoing because he never asks. If he attempts to avoid the bar of limitations when the defendant has never denied wrongdoing, he is confronted by the admonition of Wood v. Carpenter that, in the absence of a fiduciary duty to speak, mere silence will not toll the statute of limitations because there has been no concealment.228 If the plaintiff has been diligent, however, he seems to be as worthy of equitable relief as the plaintiff whose suspicions have arisen sufficiently to cause him to inquire. Nevertheless, it appears that here, at least, the concealment requirement should have continuing vitality even against a diligent plaintiff.

On the surface, recent decisions indicate that it does. The Temporary Emergency Court of Appeals rejected a tolling argument with respect to a claim that Union Oil had overcharged the plaintiff in violation of Federal Energy Administration (FEA) regulations. The court noted:

The fact that FEA pricing regulations involve complicated accounting processes and that price information resulting from those processes is not “self-revealing” is not enough to sustain a claim of fraudulent concealment, nor is any mere failure on Union's part to publish information that it was not required otherwise to publish.229

Similarly, in a Puerto Rico case the plaintiff claimed that he was fired for political reasons in violation of his civil rights. The First Circuit rejected his argument that the statute should be tolled because he did not learn of the defendant's wrongdoing until a friend, by “a stroke of luck,” overheard an admission in the town square.230 The court reasoned that it could “find no suggestion that any efforts were made to hide the conspiracy.”231

Not far below the surface, however, the courts pay substantial attention to whether the plaintiff was diligent even in “mere silence” cases. Thus, in the Union Oil case, the court was careful to note that the plaintiff began an investigation of Union's pricing through special counsel and was advised, within a month, that Union had charged improper prices. Nevertheless, the plaintiff did not sue until more than nine months later. As the court stated, “[T]hese facts

231. Id.
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appear contrary to any theory of due diligence."232 Similarly, in the Puerto Rico civil rights action, the court pointed out that the plaintiff did nothing to investigate for months even though his supervisor told the plaintiff that he was subject to political pressures.233 Thus, even courts that rely expressly on the mere silence rationale appear anxious to avoid barring diligent plaintiffs, suggesting that in mere silence cases the statute of limitations can be tolled as to diligent plaintiffs.234 But 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. If the concealment requirement does not survive in this citadel, it is difficult to imagine where it will.235

4. Treating Fraud Claims Differently

The courts' treatment of the supposedly separate tolling doctrine for fraud claims, which omits the concealment requirement, actually suggests that functionally there is only one tolling principle. Professor Dawson has explained the separate treatment of claims based on fraud as an historical coincidence236 and urged that "any sharp distinction between the two exceptions is artificial."237 Some courts emphasize the distinction as though it delineated a sepa-

234. For another example from the civil rights area, see Baker v. F & F Investment, 420 F.2d 1191 (7th Cir.), cert. denied, 400 U.S. 821 (1970), in which the court held tolling inapplicable to a claim that defendants had engaged in discrimination in the sale of residential real estate in Chicago:

Here there is no indication in the complaints that defendants concealed from plaintiffs or that plaintiffs actually lacked knowledge of the facts disclosing the discriminatory sales practices upon which this case rests. There is no allegation that defendants attempted to create or perpetuate an erroneous impression in the minds of the plaintiffs that the homes were being sold to them at the same price, on the same terms, and under the same conditions as they would be sold to whites.

Id. at 1199. Thus, although the court pointed out that there were no misleading representations, the equivalent of mere silence, it also emphasized that there was no reason to believe plaintiffs did not in fact know of the challenged practices. See also Davis v. United States, 642 F.2d 328, 331 (9th Cir.), (court held that failure of government to disclose its alleged negligence in connection with polio vaccine did not toll the statute of limitations because once the plaintiff learned of his injury, burden was on plaintiff to assert his cause and identify those at fault) cert. denied, 102 U.S. 1273 (1981). Here again, the absence of acts of concealment alone was not treated as sufficient to deprive the plaintiff of the benefits of tolling; only the plaintiff's lack of diligence provided the necessary additional justification for the refusal to toll.

235. In Glazer Steel Corp. v. Toyomenka, Inc., 392 F. Supp. 500 (S.D.N.Y. 1974), the court held that mere silence during discovery may constitute concealment of claims that truthful answers would not unearth. Id. at 503. The court stated, "It is true that '[m]ere silence, where there is no duty to speak, does not toll the statute.' However, the history of discovery in this case contains several instances in which judges and magistrates held that the defendants were under a "duty to speak." Id. The case apparently has not been followed, but it illustrates another method for avoiding the mere silence problem when it appears that the plaintiff has been diligent.

236. As Professor Dawson has explained, after the enactment of the first statute of limitations, 21 James 1, ch. 16 (1623), "[Bill]s in equity were not included in the enumeration of actions barred by the statute of James. The Chancery was thus left free to formulate, under the cloak of its own doctrine of laches, independent tests for equitable remedies." Dawson, Undiscovered Fraud, supra note 32, at 597. Thereafter, an analogous doctrine of tolling developed for claims not based on fraud. Dawson, Fraudulent Concealment, supra note 32, at 880. Due to concern about the hazards of tolling in favor of all ignorant plaintiffs, the notion developed that "there should be added to the suitor's ignorance some affirmative misconduct by the opposite party, preventing discovery and excusing delay." Id. Thus, the origin of the differing doctrines appears to depend, in the first instance, upon the limits of the jurisdiction of the Courts of Chancery.

237. Dawson, Fraudulent Concealment, supra note 32, at 878. Addressing fraud and fraudulent con-
rate doctrine, while others seem to believe that evidence of concealment is necessary even though the claim is based on fraud. Some courts even attempt to justify the distinction on policy grounds. For example, one court has suggested that "Holmberg is based on the premise that fraud as a common law cause of action is self-concealing by its nature." But the same has been said of conspiracy. It is certainly odd that the victim of a nationwide price-fixing conspiracy that is inherently self-concealing must prove affirmative concealment to justify his delay in suing when a plaintiff alleging securities fraud against a defendant with whom he dealt personally is relieved of that burden.

The dichotomy between fraud and fraudulent concealment was shrouded in confusion from the outset. Despite the allegations of concealment in Bailey v. Glover, the Court stated that concealment was not a necessary element for a claim based on fraud. Wood v. Carpenter also involved a claim labeled fraud, but there the Court stated that affirmative concealment had to be proved. Consequently, the confusion that arose about the concealment issue probably was inevitable, and it was compounded by the idea, volunteered in Bailey v. Glover, that concealment would not be required in nonfraud cases when the wrongdoing was "of such character as to conceal itself." 

...
The approach the lower courts have taken, however, has greatly reduced the importance of the distinction between fraud and nonfraud cases. When the claim involves traditional fraud, lower courts have treated affirmative concealment as an important factor in evaluating the plaintiff's diligence.\textsuperscript{246} A plaintiff alleging fraud may have a difficult time showing that he was diligent if he cannot identify some concealment. It is in cases not involving traditional fraud, however, that the lower courts' development seems more significant. As Professor Dawson observed nearly fifty years ago, "By judicial decision 'fraud' has been extended far beyond the field of misrepresentation . . . and out toward the open spaces of naked tort."\textsuperscript{247} Developments since that time have not stemmed the tide.

One such development of the extension of the doctrine of fraud is the increasing willingness of courts to classify statutes as being premised on fraud for the purposes of deciding tolling issues. For example, one court has reasoned that for tolling purposes a claim under the Motor Vehicle Information and Cost Savings Act\textsuperscript{248} should be treated as fraud because it allows recovery to private plaintiffs only upon proof of intent to defraud.\textsuperscript{249} More significantly, section 10(b) of the Securities Exchange Act of 1934\textsuperscript{250} is intended to apply to conduct that is fraudulent.\textsuperscript{251} Proceeding from this characterization of the statute to concealment issues, however, leads to some curious results. A prime example is the much-cited case of\textit{Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.},\textsuperscript{252} in which the plaintiff asserted a section 10(b) claim for churning her securities account.\textsuperscript{253} The plaintiff could not prove concealment because every transaction was accurately and promptly reported to her.\textsuperscript{254} Nevertheless, the Tenth Circuit reversed a summary judgment for defendants on the ground that under section 10(b) churning is treated as "fraud in law" even though it is treated differently than common law fraud\textsuperscript{255} and, therefore, con-
Although the decision to toll might be explained on the ground that some sort of fiduciary relation existed between the broker and the plaintiff, who was inexperienced in securities trading, the case illustrates the risks of premising the fraud distinction on the nature of the statute allegedly violated. When addressing claims not based on statutes premised on fraud, the courts have been more creative in finding that the plaintiff was nevertheless the victim of fraud and therefore excused from proving concealment. In an antitrust case, for example, a district judge concluded that the alleged conspiracy "involves a fraud" because one of the defendants had bribed a judge of the Third Circuit to obtain a favorable ruling in prior litigation. Much more significantly, numerous civil rights cases involve innovative use of the fraud concept despite the absence in the history of the Civil Rights Acts of any suggestion that they were designed to combat fraud. A leading example is *Cox v. Stanton*, in which the plaintiff alleged that county authorities had threatened to terminate welfare to her family unless she agreed to a temporary sterilization. Instead, the defendants performed an irreversible sterilization. When she discovered this fact years later, the plaintiff sued under 42 U.S.C. § 1983. Without inquiring whether there was affirmative concealment, the Fourth Circuit held that the statute was tolled until the plaintiff should have discovered the facts underlying her claim. Similarly, in another case in

convincing evidence, a complainant alleging fraudulent churning activity carries a less stringent burden of proof—one measured by the "preponderance of the evidence" standard.

Id. at 171 n.2 (citations omitted).

256. Id. at 171.


258. 529 F.2d 47 (4th Cir. 1975).

259. Id. at 49.

260. Id.


262. 529 F.2d at 50. The court stated that "[f]ederal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action." Id. The sole support the court cited for this proposition was Young v. Crinchfield R.R. Co., 288 F.2d 499 (4th Cir. 1961), an action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1976), to recover for injury to the lungs caused by exposure to silica dust. Id. at 503. *Young* relied in turn on *Urle v. Thompson*, 337 U.S. 163 (1949), which held that the time at which the plaintiff contracted silicosis is "inherently unknowable" and, therefore, that the statutory period for a claim for injury due to silicosis runs only from the time when it could have been diagnosed. Id. at 169-70. The problem with silicosis, and the reason that the time of its contraction is "inherently unknowable," is that the disintegration of the lungs resulting from silicosis is not identifiable for years or even decades. Thus, the plaintiff in *Urle* had been inhaling silica during his employment with defendant since 1910, but he did not become aware of the impairment until 1940. *Id.* at 170. To hold that the statute of limitations runs from the date of the initial inhalation of silica would make the compensation statute a "delusive remedy," *id.* at 169, and the Court refused to do so.

Similar problems, but of much greater magnitude, have arisen in connection with the burgeoning asbestosis litigation that is estimated to be the largest single subject of litigation in the country at present. See *The Asbestos Case Explosion*, Nat'l J., Oct. 19, 1981, at 1, col. 3. This limitations problem has prompted some innovative solutions. The California legislature, for example, enacted a special statute of limitations applicable only to asbestosis claims which provided that the limitations period run from the date of discovery. Cal. Code Civ. Proc. § 340.2 (West 1982). In addition, under *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1037 (1982), many shipyard workers with asbestosis claims may be able to assert admiralty claims, *id.* at 241, thereby avoiding limitations problems and confronting only the laches doctrine as a bar to their claims. Yet another area in which such limitations problems might arise is in connection with claims based on disposal of haz-
which the plaintiff alleged that the defendants had persuaded him to agree to
castration as part of a plea bargain by representing that such a practice was
customary, the Ninth Circuit applied the "established rule" that "where a
plaintiff has been injured by fraud . . . the statutory period does not begin to
run until discovery of the injury." 263

These rulings do not appear to be consistent with the fraud exception. Al-
though Dzenits stated that fraud was the gravamen of the underlying securities
statute, the actual claim of churning bears little resemblance to common law
fraud. 264 The antitrust laws and civil rights acts are not even aimed at fraud.
The courts' characterization of these claims as fraud, therefore, is misplaced.
Indeed, the civil rights violations alleged above 265 would have been equally
actionable whether the defendants used force or deception. When there is
something that can be classified as deception, however, the plaintiff gains the
advantage of being able to invoke the fraud tolling rule.

Subsequent cases have not limited the expanding concept of fraud. In one
civil rights case, for example, the plaintiff alleged that state police officers had
violated his rights by applying a carcinogenic chemical to his skin in a test
performed in connection with a criminal investigation. 266 He alleged further
that he did not learn of the carcinogenic properties of the chemical until
shortly before he brought suit. 267 He did not claim that the defendants made
false representations about the test, but only that they performed it. 268 In deny-
ing the defendants' motion to dismiss, the court cited Cox v. Stanton for the
proposition that in claims based on section 1983, the cause of action does not
accrue until the plaintiff knows or has reason to know of his
injury. 269 In defer-
ence to Tomanio, the court examined the applicable state law and found that it
supported the same result that the federal accrual rule would achieve. 270 The
court cautioned, however, that if state law required proof of more than dili-
gence, it would actually contravene federal policy. So far has the concealment
prong been eclipsed in civil rights cases, then, that to require proof of more
ardous wastes, in which the injury cannot be noticed for years. See generally Note, Accrual Dilemma:

Whatever the ultimate resolution of the limitations issue in asbestos and silicosis cases, it is evident
that the situation in Cox v. Stanton is not analogous to such cases. Although it was impossible for the
silicosis and asbestosis victims to determine whether they were afflicted until years after exposure, the
plaintiff in Cox could have learned of her injury at any time. Thus, the attempt to enlarge the doctrine
of Urie v. Thompson to warrant tolling in civil rights cases such as Cox v. Stanton has no real support.
Nevertheless, as set forth infra in the text accompanying note 269, the rule of Cox v. Stanton that the
limitations period is tolled until the plaintiff should have discovered his injury, has achieved substantial
acceptance.

263. Briley v. California, 564 F.2d 849, 855 (9th Cir. 1977). The problem with this reasoning, of
course, is that Briley was suing not for fraud but for violation of his civil rights.
264. See supra note 255 (distinguishing churning from common law fraud).
265. See supra notes 258-63 and accompanying text (discussing civil rights cases).
267. Id. at 1225.
268. Id.
269. Id. For a similar example of application of the discovery rule to a civil rights claim, see Pollard
v. United States, 384 F. Supp. 304, 307 (M.D. Ala. 1974) (defendant's summary judgment motion de-
nied because issue of fact whether plaintiffs could have discovered civil rights violation through reason-
able diligence).
270. 500 F. Supp. at 1226.
than due diligence would, in the eyes of one court, actually contravene federal policy.

The collateral possibility of labeling a defendant’s conduct as “inherently self-concealing,” suggested in *Bailey v. Glover*, tends to confirm the suspicion that diligence is presently the only real criterion. One court has attempted to provide a definition for this notion:

A fraud “conceals itself” when a plaintiff, even by the exercise of due diligence, could not uncover it. It is distinguishable from “affirmative concealment” because that doctrine requires some conduct of the defendant directed at the objective of keeping the fraud concealed. By contrast, a fraud conceals itself when the defendant does only what is necessary to perpetrate the fraud, and that alone makes the fraud unknowable, without additional efforts at concealment. In other words, the very essence of the fraudulent practice itself prevents discovery.  

This definition suffers from an inherent, and probably unavoidable, tautology. A wrong is “inherently concealed” whenever it is “unknowable” despite the absence of affirmative concealment. Obviously it was not “unknowable” forever, since the plaintiff must have discovered it at some time in order to sue and bring the statute of limitations problem to the attention of a court in the first place. The real question, therefore, is whether it was “unknowable” until the discovery of the claim. What could be better proof that it was unknowable than the fact that the plaintiff did not discover it despite due diligence? The “inherently unknowable” wrong consequently becomes the obverse of due diligence—a wrong that a plaintiff even by the exercise of due diligence, could not uncover. When all else fails, this fallback notion apparently will obviate proof of concealment for the diligent plaintiff.

In summary, it appears that fraud is usually treated differently mainly in that it is easier to justify looking only at diligence in fraud cases. When traditional fraud is not involved, courts have relieved plaintiffs of the burden of proving concealment through such devices as the notion of constructive fraud and the concept of an “inherently self-concealing” fraud. In civil rights cases, at least, some courts have simply discarded the distinction between fraud claims and other claims altogether. As presaged by Professor Dawson, it appears that the distinction has, for all practical purposes, been eliminated.

5. Disinterred the Concealment Requirement

Questions about the actual importance of the concealment “requirement” have troubled thoughtful courts and commentators.  


272. Nearly fifty years ago Professor Dawson noted that in most, but not all, cases concealment was merely an aspect of diligence. Dawson, *Fraudulent Concealment*, *supra* note 32, at 887. Similarly, Judge Newman questioned whether concealment as well as diligence is needed or only diligence. *See supra* note 180 (quoting Judge Newman in *Long v. Abbott Mortgage Co.*, 459 F. Supp. 108, 117 (D. Conn. 1978)).
Fraudulent Concealment

plaintiff was not diligent, the absence of concealment at least provides a convenient ground for the refusal to toll.\textsuperscript{273} At the same time, it seems that when a court concludes that the plaintiff was diligent, it will devise a method for satisfying or disregarding the concealment issue.\textsuperscript{274} Under these circumstances, despite some lip service paid to concealment,\textsuperscript{275} the concealment prong does not have independent significance.\textsuperscript{276}

The extent to which one is troubled by the erosion of the concealment requirement depends upon the importance one attaches to the policies underlying statutes of limitations. In the absence of an independent concealment requirement, defendants are virtually powerless to assure themselves of the protections of limitations. In rare cases, a defendant may protect himself by revealing facts that would spur a diligent plaintiff to inquire. For example, in a suit by the Ku Klux Klan against the Federal Bureau of Investigation for illicit counterespionage activities, defendants conceded that the secrecy of the activities tolled the limitations period.\textsuperscript{277} Nevertheless, they successfully asserted that the statute began running when Attorney General Saxbe held a press conference in which he revealed the activities involved and named the Klan as one of the organizations that had been a target.\textsuperscript{278} Although a defendant need not advertise his wrongdoing, such advertisement may improve his ability to rely on limitations. Such stratagems are rarely feasible.\textsuperscript{279} and in

\textsuperscript{273} See supra notes 228-35 and accompanying text (discussing cases in which defendants' mere silence did not justify tolling when plaintiff not diligent).

\textsuperscript{274} See supra notes 248-71 and accompanying text (discussing cases in which courts analogize non-fraud claims to fraud and relieve plaintiff of burden of proving concealment when plaintiffs act reasonably).

\textsuperscript{275} In Peck v. United States, 470 F. Supp. 1003 (S.D.N.Y. 1979), the court held that a plaintiff in a civil rights action had to prove concealment to toll the statute of limitations. \textit{Id.} at 1018. The plaintiff complained that the FBI had failed to warn him that he might be subject to mob violence if he participated in Freedom Rider activities in the South in 1961. \textit{Id.} at 1015-19. The court held that the government's failure to disclose the fact that it had advance notice from an informant of the plan for such a beating did not constitute concealment. \textit{Id.} at 1019. The court denied the defendant's motion for summary judgment, however, because the matters alleged were "covert" and the fact of concealment might be disclosed by further discovery. \textit{Id.} Although the court did not dismiss the plaintiff's claim because of his failure to prove concealment, it made little effort to specify what proof of concealment it would ultimately require. In fact, the case was still pending years later. See Peck v. United States, \textit{522 F. Supp.} 245 (S.D.N.Y. 1981).

\textsuperscript{276} An examination of the proposed jury instructions contained in the standard compilation of federal jury instructions by Judge Devitt and Professor Blackmar illustrates the uncertainty about the need for concealment. Section 90.41 of this compilation includes jury instructions on fraudulent concealment in antitrust cases, and states that a plaintiff may invoke the doctrine "by showing by preponderance of the evidence . . . that the defendants took affirmative steps to conceal the existence of the conspiracy . . . [and that plaintiff] could not have discovered it by the exercise of due diligence." \textit{3 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions} § 90.41, at 195 (1977). In their 1982 Supplement, however, the authors include Special Instruction 2.5 of the Fifth Circuit, which seemingly applies to all cases. \textit{Id.} § 90.40, at 827 (Supp. 1982). The Fifth Circuit's instruction makes no mention of concealment and states that the limitations period "began to run when the Plaintiff first knew, or by the exercise of reasonable care should have known" of his claim. \textit{Id.} Thus, it appears that the Fifth Circuit requires only diligence. These seemingly inconsistent instructions illustrate the ambiguous situation that exists with respect to the concealment "requirement."

\textsuperscript{277} United Klans of America v. McGovern, \textit{621 F.2d} 152, 153 n.4 (5th Cir. 1980).

\textsuperscript{278} \textit{Id.} at 154.

\textsuperscript{279} There are few securities fraud cases involving public declarations about the defendants' conduct that were alleged to have provided notice to plaintiffs of possible claims. In Robertson v. Seidman & Seidman, \textit{609 F.2d} 583 (2d Cir. 1979), defendant accountants wrote to their client to withdraw their earlier reports, stating that the reports "should no longer be relied upon by you or anyone to whom they have been furnished by you." \textit{Id.} at 589-90. The Second Circuit reversed a summary judgment for the
most cases the abandonment of the concealment prong substantially under-
mines the interest in limiting the period during which a defendant may be
sued, which runs from the date of injury.

Thus, from a defendant's perspective, requiring proof of concealment serves
an important function in ensuring that the period of limitations will apply.
This concern is consistent with the origins of the tolling doctrine itself. (Bailey
v. Glover justified the tolling exception to the statute of limitations on the
ground that it is inequitable to allow a defendant who has concealed his
wrongdoing to profit from his concealment, a judgment the Court has since
reiterated. Proof of some wrongful conduct by the defendant beyond the
commission of the substantive wrong was implicit in the Court's willingness to
hold that the benefits of tolling outweighed the policies underlying limitations.
Standing alone, the fact that the defendant has been accused of committing a
wrong, however heinous, should not suffice to toll the statute of limitations.
Limitations periods recognize that determinations of guilt cannot be made reli-
ably after a certain amount of time has passed, and that courts cannot fairly be
asked to resolve ancient disputes. Thus, they must protect the guilty as well as
the innocent. Before tolling limitations periods, courts should insist on a show-
ing of some wrongful behavior by the defendant that caused delay in filing suit
and therefore outweighs the policies underlying statutes of limitations. Re-
quiring proof of concealment performs this function.

Although the Supreme Court's stated view has remained firmly in support of
the social policies furthered by statutes of limitations, it is not clear that lower
courts share this enthusiasm. Some courts may be reluctant to bar the claim of
a diligent plaintiff unable to prove concealment because, as at least one com-
mentator has concluded, the statute of limitations unjustly forecloses valid
claims. Indeed, one court has suggested that the policies underlying statutes of
defendants, holding that this letter was insufficient to constitute notice to the plaintiff investor in the
client company. Id. at 592. The court noted that "there is nothing in the letter itself which would lead
one to the conclusion the accounting firm was withdrawing its report because of fraudulent statements
and omissions." Id. Thus, it appears that a defendant's statement may have to be explicitly inculpatory
start the statute running. This inference is confirmed by Arneil v. Ramsey, 550 F.2d 774 (2d Cir.
1977), in which the court affirmed the dismissal of the plaintiffs' claims on statute of limitations
grounds. It held that the plaintiff should have been put on notice by a public admission in an SEC
release of willful violations of the securities laws more than three years before the suit was filed. See id.

280. 88 U.S. at 349. The Court stated that "to hold that by concealing a fraud . . . 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." Id. Professor Dawson viewed this reasoning as a "play on words, supported by the precepts of homely morality." Dawson, Undiscovered Fraud, supra note 32, at 600-01.

281. In Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959), the Court applied equitable estop-
apel against a defendant that misled the plaintiff about the statute of limitations under the Federal
we decide the case we need look no further than the maxim that no man may take advantage of his own
wrong." Id.

282. For a discussion of the problem of defining such wrongful behavior, see infra note 287.

283. One commentator has noted:

While there is an element of fairness in the notion that defendants should not be burdened
forever by potential liability, this concern for psychological well-being weakens when com-
pared to the basic principle of justice that a remedy exists for every legal wrong diligently
pursued.
limitations are irrelevant to the decision to toll.\textsuperscript{284} This approach seems to attack those policies directly.

The apparent reluctance of some lower courts to apply statutes of limitations strictly is perhaps understandable. Admittedly, there are flaws in limitations policies. A limitations period is necessarily arbitrary\textsuperscript{285} and does not serve the underlying policies with absolute consistency.\textsuperscript{286} Although disinterring the concealment requirement may improve the extent to which the limitations doctrine as a whole serves its underlying policies, it may resurrect other problems. For example, it is exceedingly difficult to define the quantum of proof needed to show concealment in addition to the proof needed to prove the substantive wrong.\textsuperscript{287} Moreover, revitalizing the concealment prong will raise once again the ancient question whether fraud should be treated differently from other claims and, if so, how it should be defined for tolling purposes.

\textsuperscript{284} In Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981), the court stated:

\begin{quote}
We are conscious of the strong policies in favor of statutes of limitations, of the interest of defendants in being free of claims after a reasonable period of time in which no action is brought, and of the practical difficulties inherent in any judicial attempt to reconstruct the truth, especially the facts of a situation that existed 26 years ago. Our discomfit is not a valid reason, however, for rearranging the statutory limits on Richards' cause of action by refusing to employ the doctrine of tolling in a case where it clearly applies.
\end{quote}


\textsuperscript{286} As Professor Dawson has noted, despite the underlying concern with stale evidence, statutes of limitations arguably do not serve this goal because they are not tailored to the type of evidence involved. See Dawson, \textit{Undiscovered Fraud, supra} note 32, at 596. Admittedly there are inconsistencies. For example, different claims arising from a given transaction and involving the same evidence may have different limitations periods. Similarly, allowing a claim that is barred by limitations to be asserted as an offset permits reliance on stale evidence. Moreover, the statute of limitations looks to the delay between the events and the filing of suit, not the period of time between the events and trial. Accordingly, the staleness of the evidence when it is ultimately used seems to be less than a compelling concern.

Nevertheless, there is at least some indication in the statutes that the legislatures were aware of variations in types of evidence. For example, statutes often provide that the limitations period in an action for breach of a written contract is longer than the period for an oral contract. \textit{Compare} CAL. CIV. PROC. CODE \S 337 (West 1982) (four years for breach of written contract) \textit{with} CAL. CIV. PROC. CODE \S 339 (West 1982) (two years for breach of oral contract). Surely the courts should be at least as sensitive as legislatures to the problems of stale evidence. No experienced lawyer would deny that the passage of time irretrievably eliminates vital evidence. The plaintiff, who has the burden of proof, may well be disadvantaged by such problems. But the unfairness to a defendant who is unable to defend due to the passage of time is more significant when the defendant was not responsible for the delay.

\textsuperscript{287} The difficulties of defining the necessary quantum of proof should not be underestimated. Like the notice concept central to the diligence analysis, the definition of concealment must remain general. Fifty years ago, Professor Dawson observed that "the types of concealment that courts have held sufficient have taken as many forms as human obliquity." Dawson, \textit{Fraudulent Concealment, supra} note 32 at 883. The standard must be general to permit proof of innovative concealment devices. Dawson himself characterized the approach of the courts as looking for "some affirmative misconduct by the
Nonetheless, such sniping does not undermine the social judgment in favor of closing the books on past conduct after a certain period of time has passed or satisfy the doubts about the ability of courts accurately to reconstruct ancient history. Particularly in light of the inherent difficulty of refining the notice concept in the diligence analysis, retaining concealment as an independent requirement seems justified. Otherwise the rule that limitations periods run from the date of injury will be entirely swallowed by the supposed exception that it runs from date of the discovery when the wrong has been concealed.

B. DUE DILIGENCE

*Bailey v. Glover* clearly stated that tolling is available “when there has been no negligence or laches on the part of a plaintiff in coming into the knowledge of the fraud.” The due diligence rule evolved from this principle and makes tolling available only to a plaintiff who acts reasonably to protect his own interests. This requirement flows naturally from the underlying purpose of the opposite party, preventing discovery and excusing delay,” *id.* at 880, and it may be difficult to be more particular.

One commentator has argued that the solution in antitrust cases would be to focus on intent instead of actions. Comment, *Intent to Conceal: Tolling the Antitrust Statute of Limitations Under the Fraudulent Concealment Doctrine*, 64 Geo. L.J. 791, 803-06 (1976). This comment urges that such an approach would free a court to look beyond a defendant’s specific acts to “the totality of circumstances surrounding the cause of action.” *Id.* at 804 n.85. Such flexibility, however, should be available under a more conventional concealment analysis; it seems to resemble equitable estoppel analysis. *See supra* text accompanying notes 223-27. Moreover, refocusing on “purpose” and “bad faith” would be likely, as the commentator acknowledges, to “introduce new difficulties into the application of the fraudulent concealment doctrine.” *Id.* at 806. Although this analysis indicates the need for flexibility, then, it does not seem that labeling the inquiry as a search for intent to conceal will markedly assist the courts in identifying concealment.

The key ingredient is that the concealment inquiry looks to something attributable to the defendant that tended to conceal the wrong. Although the test should be flexible, it should not be simply the converse of the diligence test, *i.e.*, a wrong that was not discovered with due diligence. The wrongful act of the defendant should have an impact on the plaintiff’s ability to sue on time. Absent a duty to disclose, therefore, the “mere silence” cases should be decided solely on grounds of absence of concealment.

288. *See infra* notes 342-460 and accompanying text (discussing difficulties of applying objective standard to determine whether plaintiff had actual notice).

289. 88 U.S. (21 Wall.) 342, 349 (1874).

290. In securities cases the phrase “due diligence” is commonly used outside the limitations context, but the principle is not precisely analogous to the principle of due diligence in the tolling doctrine. Under the Securities Act of 1933, due diligence is a statutory defense available to anyone except the issuer in actions for misstatements in registration statements or prospectuses. Securities Act of 1933, § 11(b)(3), 15 U.S.C. § 77k(b)(3) (1976). This statutory defense imposes an obligation on defendants to perform a “reasonable investigation” and to have reasonable grounds to believe that the statements made are true. *Id.* at 806. Although this analysis indicates the need for flexibility, then, it does not seem that labeling the inquiry as a search for intent to conceal will markedly assist the courts in identifying concealment.

Similarly unhelpful is the due diligence defense recently developed in litigation under rule 10b-5. This is a defense on the merits asserting that plaintiff failed to use due diligence in making his investment decisions. It applies whether or not the suit is promptly filed. *See generally* Wheeler, *Plaintiff’s Duty of Due Care Under Rule 10b-5: An Implied Defense to an Implied Remedy*, 70 Nw. U.L. Rev. 561 (1975) (rule 10b-5 requires plaintiff to use due care when investing). Unlike the tolling doctrine, *see infra* text accompanying notes 321-41, this defense is admittedly subjective, looking only to the actions of a reasonable person with the same degree of market sophistication as the plaintiff. *See, e.g.*, Dupuy v. Dupuy, 551 F.2d 1005, 1016 (5th Cir.) (standard by which plaintiff’s conduct is measured is investor with attributes of plaintiff; rather than average investor), cert. denied, 434 U.S. 911 (1977); Clement A. Evans & Co. v. McAlpine, 434 F.2d 100, 104 (5th Cir. 1970) (same), cert. denied, 402 U.S. 988 (1971);
fraudulent concealment doctrine, which is to avoid unfair application of the statute of limitations. A plaintiff who has not acted reasonably to protect his own interests may not cry foul when his belated claim is barred.

In some cases it is easy to conclude that the plaintiff has not acted reasonably, as illustrated by *Campbell v. Upjohn Co.* In that case the plaintiff’s claim arose out of a 1969 merger agreement pursuant to which Upjohn acquired a small concern in which the plaintiff had been an officer and stockholder. The plaintiff claimed that the parties had agreed during the four months of negotiations leading up to the closing that he would be employed by the successor firm. At the closing, however, Upjohn demanded and obtained his resignation. Stunned by this development, plaintiff executed the merger agreement and received Upjohn stock in exchange for his stock in the acquired company. In 1975 he sued Upjohn, claiming that he had been misled about his continued employment and other terms of the agreement. Although he had hired a lawyer in 1971 to represent him in his dealings with Upjohn, plaintiff claimed that his suit was not time-barred because Upjohn had concealed the actual provisions of the agreement and he had not read it until mid-1975, nearly six years after he signed it. Not surprisingly, the court granted summary judgment to defendants on the ground that the claim was time-barred under a two-year statute of limitations.

Most cases are not so clear. Because courts decide them on a case-by-case basis, it is difficult to identify consistent principles governing the due diligence requirement. Nevertheless, in defining due diligence, several basic rules emerge. First, the fact that concealment is proved does not release the plaintiff from proving his diligence. In addition, although some courts have used a subjective standard to define due diligence, an objective standard is appropri-

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**Notes:**

292. *Id.* at 724.
293. *Id.* at 724-25.
294. *Id.* at 731.
295. *Id.* at 726.
296. *Id.* at 731-32.
ate, at least when applied to plaintiffs who claim to be less sophisticated than the ordinary person. Beyond that, however, only generalizations can characterize the due diligence requirement.

1. The Duty to Investigate—Is the Plaintiff's Diligence Ever Irrelevant?

Courts generally recognize that a plaintiff has a duty to investigate if there are indications of wrongdoing. Plaintiff's investigative efforts and the circumstances surrounding the discovery of the wrong must therefore be pleaded in the complaint with particularity to claim fraudulent concealment. When a plaintiff should have known about the claim, his actual ignorance of the claim is not excused. Although this principle obviously follows from the precepts of the tolling doctrine, several courts have abandoned it when the defendant actively concealed his wrongdoing. It is difficult to identify the origins of this strain of thought. It may derive in part from *Bailey v. Glover*, in which the Supreme Court stated that in cases of fraud or inherently concealed wrongs, tolling should apply even in the absence of active concealment. The courts that have disregarded the plaintiff's conduct may have believed that proof of actual concealment should give the plaintiff in such a case some additional dispensation, and consequently decided he should not have to prove diligence.

The leading case for excusing proof of diligence is *Tomera v. Galt*, a rule 10b-5 action alleging that the defendants had misrepresented various features of a Mexican mining venture in which the plaintiff had invested. The Seventh Circuit held that plaintiff's adequately alleged actual concealment. When other investors attempted to investigate, the defendants refused to provide information. In addition, the defendants failed to keep records of various questionable activities, thereby insulating themselves from scrutiny by investors. Because plaintiff had alleged that the defendants took positive steps to conceal their fraud, the court concluded that due diligence was irrelevant. In support of this proposition, the court cited a 1901 Pennsylvania case holding that in cases of fraud there is no tolling absent concealment, but that

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300. See infra notes 467-69 and accompanying text (discussing requirement that plaintiff plead with particularity elements of fraudulent concealment, including due diligence).
302. 511 F.2d 504 (7th Cir. 1974).
303. Id. at 506-07.
304. Id. at 509-10.
305. Id. at 507.
306. Id. at 510.
307. Id. The court noted:

At least two types of fraudulent behavior toll a statutory period. In the first type, the most common, the fraud goes undiscovered even though the defendant after commission of the wrong does nothing to conceal it and the plaintiff has diligently inquired into its circumstances. In the second type, the fraud goes undiscovered because the defendant has taken positive steps after commission of the fraud to keep it concealed. This type of fraudulent concealment tolls the limitations period until actual discovery by the plaintiff.

The court therefore labeled plaintiff's failure to inquire "unimportant" because "defendant's conduct is reason enough to toll the limitations period." *Id.* This approach appears inconsistent with earlier Seventh Circuit authority. In *Morgan v. Koch*, 419 F.2d 993 (7th Cir. 1969), the court apparently had insisted upon diligence, stating, "The statute is tolled only for those who remained ignorant through no fault of their own. Unawareness of facts or law, alone, does not justly suspend the operation of the statute." *Id.* at 997.
the limitations period is tolled until actual discovery if there is concealment.\textsuperscript{308} Obviously the Pennsylvania case did not state the law as articulated in \textit{Bailey v. Glover}, which dispensed with proof of concealment in fraud cases.\textsuperscript{309} Although it could have been argued that the court in \textit{Tomera} excused the plaintiff's lack of diligence on the ground that diligence would not have uncovered the fraud anyway,\textsuperscript{310} the rule that diligence is irrelevant when there is actual concealment has since been squarely adopted by the Seventh Circuit\textsuperscript{311} as well as by the Second Circuit.\textsuperscript{312}


\textit{Tomera}'s rule has been rejected, however, both implicitly\textsuperscript{313} and explic-
by a number of courts. As a matter of precedent and policy, these courts are correct. The precedent begins with Bailey v. Glover, which stressed the plaintiff’s lack of negligence and directed that a diligence standard be applied. Five years later, in Wood v. Carpenter, the plaintiff alleged manifold acts of concealment, but the court held that his pleading was inadequate because “[a] party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it . . . .” The plaintiff in Wood v. Carpenter lost precisely because he was not diligent. In short, the early Supreme Court cases required proof of diligence despite allegations of concealment.

As a matter of policy, the requirement of due diligence is necessary to protect defendants’ legitimate interests. Statutes of limitations serve to “stimulate . . . activity and punish negligence.” Tolling the statute may require courts to decide cases on the basis of unreliable evidence and postpone adjudication of more timely claims, which is hardly justified when the delay resulted from the plaintiff’s inattention to his own affairs. Tolling claims until “actual discovery” also could introduce confusion about what that term means. As of the date the plaintiff filed suit, he obviously had enough information to satisfy himself that he had a claim. Even though “discovery” must have occurred earlier, there is no easy way to define it. This area already has a sufficient supply of ill-defined concepts, and there is no need to inject yet another.

2. The Objective Standard

Evaluating due diligence is generally said to be an objective inquiry because it rests on a determination of when a hypothetical reasonable person would have learned of the claim. The principal impact of the objective approach is on plaintiffs who seek to be excused from acting reasonably. For example, the plaintiff in Campbell v. Upjohn Co. asserted that he was so traumatized when defendant forced him to resign that he was unable to investigate his rights diligently. The court had little difficulty rejecting his argument:

Campbell’s physical and mental difficulties may well have been caused by the shock of the closing events, and may even have postponed the time when he should have learned of the alleged scheme,


315. 88 U.S. (21 Wall.) 342, 349 (1874).


317. Id. at 141.

318. Id. at 139.

319. Different issues are presented if a defendant has actively concealed his misdeeds so that investigation would have been futile. Under such circumstances courts may toll the statute even though the plaintiff did not exercise diligence, but only so long as no amount of diligence could have uncovered the wrong. Arguably, this could have been the basis of the court’s holding in Tomera v. Galt. See supra note 310 and accompanying text (discussing possible alternative holding of case). See also Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 118 n.7 (D. Conn. 1968); Ruder & Cross, Limitations on Civil Liability Under Rule 10b-5, 1972 DUKE L.J. 1125, 1143 (1972) (defendant’s concealment excuses plaintiff’s lack of diligence).

but they cannot operate to require a lower level of diligence than that expected of a reasonable person.\textsuperscript{321}

Similarly, in a suit alleging that singer Bessie Smith had been victimized in connection with recording contracts, the court categorically rejected the claim that her alleged lack of business sophistication tolled the statute of limitations for forty years.\textsuperscript{322}

Such refusals to consider individual circumstances may invite injustice in certain cases. Wrongdoers who prey on the gullible and ignorant may reap unjust rewards if plaintiffs fail to discover the wrongdoing as a result of their ignorance. Courts have sometimes evinced sympathy in such cases.\textsuperscript{323} Nevertheless, relaxing the standard of ordinary care would be ill-advised in the absence of evidence that a defendant schemed to capitalize on a plaintiff's incapacity.\textsuperscript{324} To the extent that delays result from such factors as incompetence, infancy, or other incapacity, these issues should more properly be dealt with in connection with tolling principles tailored to those problems. Although many states do provide for tolling on such grounds,\textsuperscript{325} federal courts

\textsuperscript{321}Id.

\textsuperscript{322}See Gee v. CBS, Inc., 471 F. Supp. 600, 627 (E.D. Pa. 1979); see also Koke v. Stifel, Nicolaus & Co., 620 F.2d 1340, 1343 (8th Cir. 1980) (although plaintiffs were elderly widow in nursing home and her daughter, who were inexperienced in financial affairs, court refused to toll in securities case because there was no concealment since plaintiffs received accurate monthly account statements from defendant); Miilitsky v. Merrill Lynch, Pierce, Fenner & Smith, 540 F. Supp. 783, 787-88 (N.D. Ohio 1980) (although statute of limitations falls harshly on naive, unsophisticated plaintiff, statute not tolled).

\textsuperscript{323}In Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, 494 F.2d 168 (10th Cir. 1974), the plaintiff sued for "churning" of her securities account. \textit{Id.} at 169-70. The court of appeals reversed a summary judgment for the defendant, noting that the foreign-born plaintiff lacked business experience and education and that churning "is conduct which is not common to the experience of the ordinary individual." \textit{Id.} at 170, 172. This suggests that the plaintiff's delay was not in any way unreasonable when measured against the objective standard. Thus, it does not appear that the court was attempting to retreat from the requirement of ordinary care.

Perhaps a more appropriate situation for such concern about a plaintiff's possible lack of sophistication was Pollard v. United States, 384 F. Supp. 304 (M.D. Ala. 1974), a case involving claims arising from the Tuskegee Syphilis Study in the 1930's. After the court denied the government's motion for summary judgment on statute of limitations grounds, \textit{Id.} at 312, the parties settled for $10 million. J. Jone\textit{s}, \textit{BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT} 217 (1981). The settlement fund was to be paid out to those subjects of the study who could be located, or to their heirs. The court placed responsibility for locating the claimants on the plaintiff's counsel, Messrs. Gray and Carter. Their experiences in distributing the fund underscore the continuing risk that unsophisticated people are vulnerable:

Perhaps the most distressing thing that Gray and Carter encountered was the lack of social and economic mobility among the heirs of the subjects of the study. "There were more people who had to execute documents by making marks than I'll ever see for the rest of my life," Carter recalled. "It didn't matter whether they had gone to Cleveland or stayed right here, so many of them were illiterate and uneducated." Many of the heirs did not even know their family members' last names, referring to them only by nicknames such as "Kid" and "Coon." Carter added: "The sad thing is that it could happen all over again. These people could just as easily be conned and taken advantage of as their fathers and grandfathers in the syphilis study."

\textit{Id.} at 218-19.

\textsuperscript{324}In proper cases, it seems that courts could fashion a doctrine of fiduciary relationship to satisfy the equitable need to toll the statute of limitations, or simply hold on equitable grounds that the statute should be tolled. \textit{See} Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 338-39 (1978) (Burger, C.J., concurring) (courts may toll statutes on equitable grounds). They would not, therefore, have to manipulate the fraudulent concealment doctrine to accomplish this end.

\textsuperscript{325}\textit{See}, e.g., \textit{CAL. CIV. PROC. CODE} \textsection 352 (West 1982) (infancy, insanity, and imprisonment may be grounds for tolling); \textit{MD. RTS. & JUD. PROC. CODE ANN.} \textsection 2-201(a) (1974) (infancy and mental incompetence may be grounds for tolling).
have held that there are no parallel federal doctrines of tolling. If the federal courts are not willing to allow tolling overtly on these grounds, it is hardly appropriate to modify the fraudulent concealment doctrine to achieve the same result indirectly. This would only invite a battery of creative excuses from plaintiffs like Mr. Campbell who do not fall into any traditional category of incapacity.

Different issues arise when the plaintiff is more sophisticated and knowledgeable than the ordinary person. Although it could be argued that the same standard should still apply, such a rigid approach seems unjustified. Clearly, a plaintiff who actually learns fortuitously of the wrong may not excuse his failure to sue promptly on the ground that a reasonable person using due diligence would not have discovered it. Hence, there is a subjective component of the test which looks to what the plaintiff actually knew as well as to what he could discover by due diligence. Surely the plaintiff’s actual knowledge about complicated matters or obscure fields is relevant to this inquiry. Most courts have so recognized. For example, in a securities case growing out of a bank reorganization, the court implied that the plaintiff’s expertise should have alerted him to the alleged fraud even though the ordinary person would not have recognized it. The plaintiff had been involved in a similar bank reorganization and related litigation shortly before the reorganization giving rise to the suit. He testified, moreover, that “he recognized the similarities or identity of the procedures [in the two reorganizations] and realized that any information or knowledge obtained about the legality of [the first reorganization] would be applicable to [the second reorganization].” Such specialized insight may be rare, but courts often have referred to the sophistication of the plaintiff, the amount in controversy, and the plaintiff’s personal knowledge about complicated matters or obscure fields.


2. In Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 116-17 (D. Conn. 1978), the court refused to apply a higher standard of diligence despite a claim that the plaintiff was sophisticated. The court found, however, that plaintiff had failed to satisfy the reasonable person standard:

   In deciding if the plaintiff has met his burden of proving diligence, it appears that his conduct should be evaluated with reference to the objective standard of a hypothetical reasonable man, rather than the subjective standard of a reasonable man with plaintiff's characteristics. Moreover, even if a subjective approach to reasonableness were employed, plaintiff would be held to a higher standard than a hypothetical average investor because of his background and experience.

   Id. at 116-17.

3. In Richards v. Milevski, 662 F.2d 65 (D.C. Cir. 1981), the court described the plaintiff's discovery of his claim as "entirely fortuitous," but there is no question that the statute began running from that date. Id. at 72-73. See also Hernandez-Jimenez v. Calero Toledo, 604 F.2d 99, 102 (1st Cir. 1979) (plaintiff asserted he learned of claim by "a stroke of luck").


5. Id.

6. Id.

7. See, e.g., Arneil v. Ramsey, 550 F.2d 774, 781 (2d Cir. 1977) (referring to investors of plaintiff's
edge of law as bearing on the reasonableness of his delay. One court has even affirmed the dismissal of a securities claim on statute of limitations grounds because “[i]t is clear from the complaint . . . that plaintiffs were professional market traders who surely had ready access to legal advice . . .”  

Applying an individualized standard of diligence to sophisticated plaintiffs may cause problems, however, in the massive litigation that is suited for class action treatment. Tolling is often of great importance in such litigation. Indeed, the fraudulent concealment doctrine first received major attention in the early 1960’s in hundreds of electrical equipment antitrust cases. Since then, it has been invoked in numerous class actions. Applying a higher diligence standard for sophisticated plaintiffs may impede class action certification for two reasons. First, if the would-be class representative is sophisticated, it could be argued that he cannot represent the class because his claim is not typical. Second, it may be argued that the diligence of each class member must be determined and, therefore, the class may not be certified because common questions of fact would not predominate. Thus, the tolling doctrine could operate as a tool for defendants seeking to defeat class certification.

In an effort to avoid such problems, courts may be tempted to hold that in class actions the sophistication of the class representative is irrelevant to due diligence. At least one district judge has apparently done so. There are sub-


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334. See Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978) (referring to plaintiff’s having litigated same issues in previous suit).


338. In securities actions, two courts have held that the sophistication of the named plaintiff may bar his acting as a representative of the class. See Gazonik v. Shearson Hayden Stone, Inc., 574 F.2d 1220, 1221 (5th Cir. 1978) (refusing to certify named plaintiff as class representative in securities class action because he would be susceptible to “sophisticated investor” defense), cert. denied, 439 U.S. 1072 (1978); Lewis v. Johnson, 92 F.R.D. 758, 760 (E.D.N.Y. 1981) (same).

339. In Commonweath Oil/Tesoro Petroleum Securities Litig., 484 F. Supp. 253, 256-57 (W.D. Tex. 1979), the defendants challenged the certification of the plaintiff class on the ground that the named plaintiff was a sophisticated investor who therefore would not be an appropriate representative of a class of ordinary investors. Id. Judge Higginbotham rejected this argument, reasoning as follows:

The standard to be applied to Stern as well as to the class is objective—whether the facts available would have put a reasonably prudent investor on “inquiry notice” of the possibility
stantial difficulties, however, with this approach. Plaintiffs in class actions, like other plaintiffs, must act diligently to protect their rights or risk losing them because of limitations. Serious problems could arise if courts were to deny a defendant the right to prove that individual class members or the class representative had actual knowledge of the defendant’s misconduct and that, therefore, the statute should not be tolled as to them. Moreover, it may well be that different class members had different data available to them, so that the stimulus to inquire might vary widely throughout the class. Finally, the diligence standard does not function well in a vacuum. In determining diligence, a jury will inevitably evaluate the actions and expertise of the class representative as the personification of the plaintiff class. The sophistication of the class representative is therefore quite important, and the above problems must be considered in the decision whether to certify the class.

Despite these problems, a hypothetical reasonable person standard appears preferable in class actions. The interests of both the courts and society in the efficient resolution of class actions warrants some flexibility in the application of tolling doctrines. The very massiveness of such cases makes individualized insight less likely to be important because the wrong often is committed against the public as a whole and the concealment, if any, presumably is also practiced against the public as a whole. Not surprisingly, courts have cited the existence of fraudulent concealment issues as a ground supporting certification of a class. As with other class action certification issues, balancing in given cases is best left to trial judges, but the subjective tinge of the tolling doctrine rarely should present an insurmountable barrier.

3. Applying the Objective Standard

The objective standard of diligence is easy to articulate: the plaintiff is held to be on notice of the claim if a reasonable person would have been. The

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that the registration statement contained misstatements and omissions, thus triggering the duty to act with due diligence and make reasonable inquiries. The fact that Stern managed his own portfolio and had some degree of expertise in so doing does not render a more stringent standard appropriate.

*Id.* at 257-58 (citations omitted). Presumably, Judge Higginbotham would hold that the tolling doctrine would not raise issues concerning each individual’s sophistication, thus making class action treatment inappropriate. See also *Dektro v. Stern Bros. & Co.*, 540 F. Supp. 406, 416 (W.D. Mo. 1982) (abundantly clear that due diligence is objective and applied class-wide; unnecessary to evaluate mental state of each class member).

340. For a discussion of the impact of procedural rulings under rule 23 on the substantive rights of defendants, see generally Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance—Procedure Dilemma*, 47 So. Cal. L. Rev. 842 (1974). See also *Blackie v. Barrack*, 524 F.2d 891, 908 n.24 (9th Cir. 1975) (asserting that court could, in rule 10b-5 class action, predicate liability solely on materiality rather than causation without exceeding its power under Rules Enabling Act or violating defendant’s rights). In *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 556 (4th Cir. 1974), the court upheld a summary judgment for the defendants because the named plaintiff could not represent the class when his individual claim was barred by the statute of limitations. *Id.* at 556.

In *Lee v. Shield Petroleum Corp.*, No. 82-334 (6th Cir. 1982), cert. denied, 103 S. Ct. 213 (1982), the Sixth Circuit upheld the trial court’s decertification of a class after trial on the ground that it then appeared that the class representative’s claim was barred by the statute of limitations. See 51 U.S.L.W. 3269 (U.S. Oct. 5 1982) for a description of the issues raised.

problem is that applying the objective standard to given cases requires a subjective evaluation of the facts. Some courts have tried to introduce order by segmenting the problem into two steps, examining first the facts the plaintiff knew or should have known, and then the inferences therefrom. Because the issue fundamentally turns on a gestalt evaluation of the reasonableness of the plaintiff's behavior, however, such segmenting of the subjective analysis ultimately provides little assistance in determining whether the plaintiff exercised due diligence. Instead, the cases suggest a number of factors that should be considered to determine due diligence.

As a starting point, it is clear that although the reasonable plaintiff has no duty to inquire into the behavior of the defendant until something stimulates inquiry, he cannot disregard "storm warnings" of wrongdoing. Such storm warnings need not themselves be sufficient to put the plaintiff on notice of the claim, but only to prompt inquiry that would in turn put him on notice. Thus, the vexing problem for the court, beyond identifying the stimulus, is to determine whether more information is needed to constitute notice. A starting point is the actual stimulus for the suit before the court. Something obviously caused the plaintiff to file suit when he did. A plaintiff who cannot point to some recent development that explains his decision to sue will have a difficult time arguing that until recently he lacked critical information to alert him to the claim. The plaintiff rarely, if ever, is aware from the moment of injury of every fact that will ultimately be offered in evidence at trial. Indeed, the broad discovery and liberal pleading prescribed by the Federal Rules of Civil Procedure assume that plaintiffs will file suit even though they lack evidentiary facts to prove their cases. But how many facts are enough to put plaintiff on notice?

The stated rule is that the plaintiff is on notice as soon as he is aware of a potential claim, although ignorant of evidence. As the Second Circuit noted in a securities case, "The statutory period . . . did not await appellant's leisurely discovery of the details of the alleged scheme." Similarly, in a copyright case, the Fifth Circuit refused to toll the statute of limitations in favor of a plaintiff who claimed that he had been unable to verify his plagiarism claim because the defendant had refused to give him a copy of the allegedly infringed book. That court stated:

[T]he mere fact that plaintiff was unable to procure a copy of the

See, e.g., Campbell v. Upjohn Co., 498 F. Supp. 722, 730-32 (W.D. Mich. 1980) (analyzing in separate steps what plaintiff knew and should have known, and reasonable inferences therefrom), aff'd, 676 F.2d 1122 (6th Cir. 1982); Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 113-17 (D. Conn. 1978) (analyzing facts surrounding plaintiff's claim and inferring what should have been apparent to plaintiff); Maine v. Leonard, 365 F. Supp. 1277, 1282-83 (S.D. Ohio 1973) (analyzing whether circumstances sufficient to put plaintiff on notice, and whether suspicion arose or should have arisen).

The "storm warnings" phrase comes from Cook v. Avien, Inc., 573 F.2d 685, 697 (1st Cir. 1978). The function of storm warnings is to require that the plaintiff take reasonable steps to investigate his rights. If he does take such steps, the storm warnings may be held not to put him on notice of his claim until he garners additional information. See infra notes 370-73 and accompanying text. Further, when the defendant has in fact been guilty of concealment, that concealment may sanitize what would otherwise be storm warnings and excuse plaintiff's delay in discovering his claim after receiving the storm warnings. See infra notes 403-10 and accompanying text. Thus, the fact that plaintiff has been stimulated to inquire does not always mean that he is on notice.


Id.

book is insufficient to show the successful concealment necessary to toll the statute of limitations. This was merely ignorance of evidence, not ignorance of a potential claim. The appellant knew of the alleged infringement but did not have in his possession the precise minutiae of the plagiarism. The bells do not toll the limitations statute while one ferrets out the facts.  

Although the courts agree that the plaintiff is on notice even if he is unaware of all relevant facts, they reach inconsistent results. In a recent case decided by the District of Columbia Circuit, for example, the plaintiff was coerced into quitting his federal job in 1955 when confronted with a false assertion that he was a homosexual. Although he knew then that the charge was false, he did not learn that his supervisors had manufactured false evidence until he made a Freedom of Information Act request in 1978. When he brought suit in 1978, the court held that he was not previously on notice of his claim against his superiors: “It was no mere ‘detail’ in 1955 that the false charges against [plaintiff] had been fabricated as part of a deliberate conspiracy against him, or that his own superiors rather than an unknown informant were the source of his misery.” In another recent civil rights case, however, a federal district court reached the opposite conclusion on seemingly indistinguishable facts. The plaintiffs there were arrested in 1972 and prosecuted on the basis of fabricated evidence concocted by federal and state law enforcement officers. When the plaintiffs discovered the fabrication in 1978, they brought suit against the responsible officers. The district court refused to toll the statute, holding that plaintiffs were aware of the “operative facts surrounding the situation in 1972” because, although ignorant of the officers’ roles, they knew they were innocent.

It is easy to label proffered data “operative facts” or “mere details,” but these labels in fact provide little assistance in deciding whether particular plaintiffs are actually on notice. The following review of the decisions discusses a number of discrete concerns that are relevant to the notice issue. Ultimately, however, diligence determinations appear too individualized for decisions to be absolutely consistent. Instead, as one court has put it, “The concept of due diligence is not imprisoned within the frame of a rigid stan-

348. Id. at 341.
349. Richards v. Mileski, 662 F.2d 65, 67 (D.C. Cir. 1981). Judge Mikva, who wrote for the majority in Richards v. Mileski, generally is reluctant to infer notice. For example, in Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981), when the court reversed summary judgment for defendants on limitations grounds, he wrote, “As a matter of law, we believe that one article challenging the accounting procedures of a reputable firm is insufficient to impute knowledge of fraud to appellants.”
350. Richards v. Mileski, 662 F.2d at 68.
351. Id. at 69.
353. Id.
354. Id. at 716. The court said that “[i]n the awareness of the facts giving rise to the cause of action, and not the awareness that the illegality of the action is conclusively provable that begins the running of the statute of limitations.” Id. at 716-17. It also noted that once plaintiff had testified before a grand jury investigating the conduct of the officers more than three years before the suit was filed. Id. at 717 n.3. For a similar result, see Sandutch v. Muroski, 684 F.2d 252, 254 (3d Cir. 1982) (when plaintiff learned of police conspiracy to extract false testimony against plaintiff, he should have been led, by exercise of due diligence, to awareness of cause of action).
Attempts to reformulate such a protean standard are unlikely to assist the courts in deciding cases.\textsuperscript{356}

a. Storm warnings

It is impossible to delimit the types of stimuli that could prompt a person to investigate another person’s conduct. The label “storm warnings” is as good as any. Consistent with the objective approach, the courts make their own evaluation of the significance of such developments. At a minimum, the inquiry looks to plaintiff’s awareness that he has been harmed. Thus, the victim of an automobile accident is immediately aware that he has been injured and that he should consider the possibility that he has a claim against somebody.\textsuperscript{357} In contrast, it may be more difficult for the victim of a securities, antitrust, or civil rights violation to discern the fact of injury. But Americans tend to be extraordinarily alert to protecting their own interests, and the courts may not reasonably disregard the high level of suspiciousness that pervades this society. Accordingly, anything that might pique the prospective plaintiff’s curiosity deserves consideration when a plaintiff seeks to justify his delay beyond the statutory period. An overheard comment, a newspaper story, the defendant’s reluctance to give out information, any and all of these should trigger the duty to inquire.

\textsuperscript{355} Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 9 (5th Cir. 1967).

\textsuperscript{356} Some theories that courts rely upon are not helpful. A prime example is the supposed distinction between representations of law and representations of fact, an issue that has troubled commentators for years in the fraud area. See W. Prosser, \textit{Handbook of the Law of Torts} 724-25 (4th ed. 1971) (noting courts’ present tendency to eliminate distinction between misrepresentations of law and fact). This notion has cropped up from time to time and continues to be employed in the decision about whether to toll. See Gaetzi v. Carling Brewing Co., 205 F. Supp. 615, 622-23 (E.D. Mich. 1962). In Goldstandt v. Bear Stearns & Co., 522 F.2d 1265 (7th Cir. 1975), the court held that plaintiffs were not warranted in relying on defendant’s representations concerning the legality of the proposed conduct. \textit{Id.} at 1269. Plaintiffs claimed that defendant told them that certain trading practices were, in the opinion of defendant’s legal staff, consistent with prevailing statutes and regulations. \textit{Id.} at 1266. The court held that because the alleged misrepresentation involved a legal opinion, and not facts, tolling was unavailable. \textit{Id.} at 1269.

Although the result in \textit{Goldstandt} may have been correct in view of the apparent expertise of plaintiffs, see \textit{Id.}, broad reliance on the law/fact distinction is unwise. It is certainly true that a reasonable plaintiff should normally inquire about the applicable law, but that expectation should not give rise to an inflexible rule. Indeed, the Supreme Court refused to apply an absolute rule when confronted with the related question of estopping the defendant from pleading the statute of limitations when he has misled the plaintiff about the applicable period of limitations, which is clearly a legal matter. The Court observed: “It is no answer to say, as respondent does, that the representations alleged were of law and not of fact and therefore could not justifiably be relied on by petitioner. Whether they could or not depends on who made them and the circumstances in which they were made.” Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 235 (1959). Similarly in the tolling area, the analysis must look to the circumstances of each case.

\textsuperscript{357} This notion applies similarly in other negligence cases. For example, in Davis v. United States, 642 F.2d 328 (9th Cir. 1981), \textit{cert. denied}, 102 S. Ct. 1273 (1982), plaintiff sued under the Federal Tort Claims Act, claiming that the government failed to properly test the polio vaccine that injured him. He had sued the manufacturer of polio vaccine in 1964 and had known then that the government tested the vaccine, but alleged in his suit against the government that he did not learn until 1973 that when the government tested the vaccine it proved to be outside normal tolerances. \textit{Id.} at 329-30. The court rejected his tolling argument:

\textit{With knowledge of the fact of injury and its cause the malpractice plaintiff is on the same footing as any negligence plaintiff. The burden is then on plaintiff to ascertain the existence and source of fault within the statutory period.}
The most likely stimulus for a plaintiff’s suspicion is a development that contradicts his expectations. Many federal claims depend upon the defendant’s having created false expectations in the plaintiff, particularly in cases in which the defendant has asked the plaintiff to invest money. Often those expectations do not long survive the test of time because conflicting realities intrude. Plaintiffs who nevertheless wait years to take their disappointment to court may expect a cool reception. Securities cases present the best examples of plaintiffs disappointed by an unexpected turn of events. Indeed, some courts have indicated that it is almost a general “rule” that when securities that are represented as being certain to increase in value actually lose value, the purchaser is on notice of the possibility of wrongdoing.\(^{358}\) Other similar reverses in fortune lead to the same result.\(^{359}\)

The contradiction of expectations analysis is not limited to the investment situation, however. Thus, in *Rutledge v. Boston Woven Hose & Rubber Co.*,\(^{360}\) the Ninth Circuit noted that plaintiff, who was alleging that defendant had given illegal secret discounts to his competitors, had become suspicious because his competitor’s prices were lower than could reasonably be expected in the absence of illegal discounts.\(^{361}\) In another antitrust case, the plaintiff alleged that the defendant terminated his distributorship without notice pursuant to a conspiracy, contrary to the defendant’s assurances that the distributorship would be continued.\(^{362}\) In granting summary judgment to the defendant on statute of limitations grounds, the district court noted that “the very manner in which the termination occurred could hardly have discouraged...”

\(^{358}\) See, e.g., Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2d Cir. 1979) (decline in value of stock should have alerted plaintiff to possible fraud); Hupp v. Gray, 500 F.2d 993, 996-97 (7th Cir. 1974) (investor should have realized possibility of fraud when market price fell drastically below predicted level); cf. Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 650 F.2d 342, 349-50 (D.C. Cir. 1980) (although decline in value of stock is important factor, it alone is not sufficient to put plaintiff on notice); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 410-11 (2d Cir. 1975) (when combined with other indicators, precipitous decline of stock’s price defeats plaintiff’s claim that he could not have known about alleged fraud).

\(^{359}\) Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978), the case in which the “storm warnings” label originated, presents a good example of plaintiffs who were inattentive to such a change in fortune. In reliance on certain optimistic predictions by the defendant, plaintiffs purchased notes issued by defendant Avien, Inc. in 1968. *Id* at 691. As the court stated, “[C]ollectively, plaintiffs, had been led to believe that Avien had a ‘rosy’ future.” *Id* at 695. The court held that plaintiffs were “charged with inquiry” by January 1, 1970, *id* at 698, reasoning as follows:

Avien’s serious financial difficulties, in direct conflict with what plaintiffs complain they were led to believe, were unquestionably apparent by the end of 1969. . . . The financial data available to the purchasers provided them with sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved in the sale of the notes.

*Id* at 697-98. For other examples of financial setbacks that courts have held to constitute sufficient notice of defendant’s fraud, see Koke v. Stifel, Nicolaus & Co., 620 F.2d 1340, 1342, 1343-45 (8th Cir. 1980) (“no risk” investments repeatedly resulted in losses); Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980) (prediction of stock split and increased dividend incorrect); Roberts v. Magnetic Metals, Co., 463 F. Supp. 934, 946 (D.N.J. 1978) (suspiciously low price offered to minority shareholders), *rev’d on other grounds*, 611 F.2d 450 (3d Cir. 1980); see also Johns Hopkins Univ. v. Hutton, 422 F.2d 1124, 1131 (4th Cir. 1970) (failure of wells to produce as scheduled, coupled with production company’s evasive communications, constituted sufficient notice of fraud).

\(^{360}\) 576 F.2d 248 (9th Cir. 1978) (claim under Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1976)).

\(^{361}\) 576 F.2d at 250 & n.2.

investigation or caused plaintiff to slumber on his rights, but more likely would have produced the opposite effect.\textsuperscript{363} Similarly, the Ninth Circuit held that a minority employee whose dismissal was justified to him on grounds of a "last hired, first fired" policy, was put on notice of a potential claim when others with less seniority were not laid off.\textsuperscript{364} In short, the plaintiff whose expectations are disappointed should pursue the matter.

b. Plaintiff's investigation

Beyond hypothesizing about what plaintiffs should have done, the courts will scrutinize what they actually did. If a plaintiff does not inquire into the defendant's conduct despite storm warnings, it is unlikely that a court will decide that he was diligent. The Supreme Court emphasized this concern in \textit{Wood v. Carpenter}, stating that "[w]ith the strongest motives to action, the plaintiff was supine. If the underlying frauds existed, as he alleges, he did nothing to unearth them."\textsuperscript{365} The courts regularly stress the fact that the plaintiff has done practically nothing in holding that he has not acted diligently.\textsuperscript{366}

This analysis of plaintiff's own conduct involves a subjective assessment of the notice issue because the plaintiff's own vigor may demonstrate whether he was on notice of the claim. For example, in a well-known antitrust case, the plaintiff sued in 1947 claiming that the defendants conspired to monopolize the borax trade pursuant to a 1929 agreement.\textsuperscript{367} The defendants moved for a summary judgment on limitations grounds, arguing that the plaintiff was on notice of its claim as demonstrated in various affidavits and testimony prepared by the plaintiff in earlier litigation between 1930 and 1934. The Ninth Circuit affirmed summary judgment on the ground that it was "beyond dispute that at all times pertinent to this inquiry appellants knew and believed that they were being grievously damaged by [defendants]."\textsuperscript{368} Thus, the plaintiff's own belief that he had a claim, rather than the court's opinion that circumstances objectively amounted to storm warnings, should suffice to start the statute running.

A similar inquiry is possible even when the plaintiff himself has not alleged

\textsuperscript{363. Id. at 622-23.}
\textsuperscript{364. See Conerly v. Westinghouse Elec. Co., 623 F.2d 117, 119-21 (9th Cir. 1980).}
\textsuperscript{365. 101 U.S. at 140.}
\textsuperscript{366. See, e.g., Cook v. Avien, Inc., 573 F.2d 685, 698 (1st Cir. 1978) (despite signs that defendant corporation was experiencing financial difficulties, plaintiff's only response was to meet once with corporation's president); Arnsel v. Ramsey, 550 F.2d 774, 781 (2d Cir. 1977) (although one plaintiff admitted knowledge about defendant stockbroker's financial difficulties within limitations period, neither plaintiff took action); Hupp v. Gray, 500 F.2d 993, 997 (7th Cir. 1974) (although plaintiff knew something was amiss, he did nothing); Morgan v. Koch, 419 F.2d 993, 998 (7th Cir. 1969) (although securities transaction failed to fulfill plaintiff's expectations, plaintiff never inquired into transaction); Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 114 (D. Conn. 1978) (despite knowledge of defendant's default on mortgage payments, plaintiff did nothing other than discuss default with defendant).}
\textsuperscript{367. Suckow Borax Mines Consol. v. Borax Consol. Ltd., 185 F.2d 196, 199-200 (9th Cir. 1950), cert. denied, 340 U.S. 943 (1951).}
\textsuperscript{368. Id. at 209. See also Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978) (plaintiff expressed his suspicion to Department of Justice that defendant was giving secret illegal discount as early as ten years before suit); Fitzgerald v. Seamens, 553 F.2d 220, 228 (D.C. Cir. 1977) (plaintiff's letter appealing termination of his job showed that he was on notice of conspiracy four years before suit); Starview Outdoor Theatre, Inc. v. Paramount Film Distrib. Corp., 254 F. Supp. 855, 857 (N.D. Ill. 1960) (plaintiff had sufficient notice of antitrust claim more than six years before suit, as shown by notifying Department of Justice of alleged monopolization by defendant).}
wrongdoing by the defendant but others similarly situated have done so. Particularly in securities or antitrust cases, it is likely that many people will have been harmed by the allegedly wrongful conduct. In such situations, courts have often pointed out that the dilatory plaintiff was aware of the claims asserted by others.369 A plaintiff's continued inactivity in the face of known prosecution by others of similar claims argues powerfully that he has not acted diligently. Even if the plaintiff was not actually aware of claims by others, the existence of such claims undercuts his claims of diligence because others were able to discern the existence of a claim and seek redress. Under the objective standard, such evidence is highly probative that a diligent person would have learned of the defendant's wrongdoing even though unaware of the claims of others.

When the plaintiff took some steps to investigate once his suspicions were aroused, however, a court is less likely to equate suspicion with notice. For example, in a First Circuit case the plaintiff suspected that the defendant had unlawfully appropriated the plaintiff's secret electronic processes, but was unable for a prolonged period to prove its suspicions.370 Noting that the plaintiff "continually instructed its salesmen to attempt to acquire information on defendant's circuitry,"371 the court reversed a summary judgment granted to the defendant on statute of limitations grounds.372 Similarly, in tolling the statute of limitations in a securities action, the Second Circuit emphasized that once the plaintiff began to suspect wrongdoing, he had hired an attorney and cooperated with an investigation by the Securities and Exchange Commission, and thus exercised due diligence.373

When plaintiff has taken some action to investigate, the court must ultimately decide whether he did enough. Using hindsight, a defendant is likely to argue that the plaintiff failed to pursue other avenues of recourse or sources

369. See, e.g., Breen v. Centex Corp., 695 F.2d 907, 912-14 (5th Cir. 1983) (plaintiffs aware that suit "alleging essentially the same claims" filed more than two years before their suit); Arneil v. Ramsey, 550 F.2d 774, 781 (2d Cir. 1977) (suit by other investors was "important and significant" fact that should have put plaintiff on notice); Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975) (industry-wide publicity given to FTC suit against Goodyear should have put plaintiff on notice); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 410 (2d Cir. 1975) (plaintiff knew about suit by SEC and private parties against defendant for same misconduct); Robert's v. Magnetic Metals Co., 463 F. Supp. 934, 946 (D.N.J.) (plaintiff aware of dissatisfaction of other similarly situated stockholders); rev'd on other grounds, 600 F.2d 1148 (5th Cir. 1979) (reversing summary judgment granted to defendants on ground that plaintiff should have been put on notice of his claim by similar suit filed seven years earlier; court of appeals held that defendants failed to show that the plaintiff should have known about this particular claim), cert. denied, 449 U.S. 905 (1980).

370. Tracerlab, Inc. v. Industrial Nucleonics Corp., 313 F.2d 97, 98 (1st Cir. 1963) (suit over trade secret violation under Massachusetts law).

371. Id. at 101.

372. Id. at 102.

373. See Robertson v. Seidman & Seidman, 609 F.2d 583, 588 (2d Cir. 1979).
of information. Such arguments may have merit, but should be analyzed carefully. The due diligence standard requires only that the plaintiff use reasonable care to protect his interests, not that the wrong was impossible to discover by any means imaginable. Particularly when there has been some affirmative concealment by the defendant, it would be inappropriate to second-guess a plaintiff who has taken steps to investigate the defendant's conduct. As the grounds for suspicion mount, however, the energy devoted to ferreting out the wrong should correspondingly increase. Although a defendant's representations that all is well may defer the date on which contrary indications constitute notice,\footnote{374. See Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687, 698-99 (9th Cir. 1977) (although defendant denied responsibility and gave assurances, it does not follow as a matter of law that indications of antitrust violations put plaintiff on notice), rev'd on other grounds, 437 U.S. 322 (1978); see also supra notes 205-10 and accompanying text (discussing Mt. Hood Stages).} it will often be true, as one court put it, that the "plaintiff was obliged to do more by way of inquiry than make fruitless inquiries of the suspected wrongdoer.\footnote{375. Gaetz v. Carling Brewing Co., 205 F. Supp. 615, 622 (W.D. Mich. 1962).}"

\section*{c. The scope of notice—Added claims and added wrongdoers}

Assuming plaintiff is held to be on notice of some wrongdoing, the court must still decide the precise scope of the claim. The basic rule is that the plaintiff will be held to be on notice of any claim that he could have discovered by diligent investigation. Thus, the statute begins to run for all claims against every wrongdoer who can be sued.

\textit{Additional claims.} When the plaintiff suspects that the defendant has committed the specific wrong for which he later charges the defendant, the statute of limitations will rarely be tolled while he gathers his proof.\footnote{376. See Prather v. Neva Paperbacks, Inc., 446 F.2d 338, 341 (5th Cir. 1971) ("[t]he bells do not toll the limitations statute while one ferrets the facts").} Nor will the statute necessarily be tolled when the plaintiff has less than specific knowledge of the defendant's wrongdoing. Instead, the maxim \textit{falsus in uno, falsus in omnibus} applies well to the due diligence requirement: when the plaintiff knows that the defendant has injured him in connection with a given transaction, his failure to investigate related wrongs will not be excused. For example, a plaintiff who had pledged certain securities as collateral discovered that the defendants had improperly used the securities,\footnote{377. Klien v. Bower, 421 F.2d 338, 341 (2d Cir. 1970).} and in 1961 he sued for the tort of conversion.\footnote{378. \textit{Id.} at 342.} Not until 1966, however, did he allege violations of the securities acts.\footnote{379. \textit{Id.} at 343.} He attempted to excuse his delay in bringing the securities claim by asserting that he did not discover the "full enormity" of the fraud until 1966.\footnote{380. \textit{Id.} at 343.} The Second Circuit rejected this argument, holding that his knowledge in 1961 of the defendants' misuse of his securities constituted "suffi-
cents knowledge... to put him on notice as to any alleged fraud. 381 Other cases similarly have emphasized the plaintiff's awareness of some wrongdoing by the defendant. 382 Obviously, this approach is consistent with liberal rules of joinder of claims, which seek to have all claims tried at once. 383

Such notice of additional claims depends on a nexus between the known claim and the later-discovered claim that is sufficient to warrant the running of limitations for both. The fact that a plaintiff is aware of one species of wrongdoing by the defendant does not show that he is aware of an entirely unrelated claim. This point is illustrated by a recent price-fixing case in which the defendant argued that because the plaintiff suspected that the defendant was engaged in predatory pricing, the statute of limitations should not be tolled on the plaintiff's price-fixing claim. 384 The court rejected this argument, distinguishing knowledge of predatory pricing from awareness of a conspiracy to fix prices. 385 This distinction makes sense because awareness of single-firm predatory tactics is significantly different, in terms of evidence and legal grounds, from suspicion of coordinated price-fixing activities. At a minimum, then, the defendant must show that the plaintiff's suspicions about the defendant pointed in the legal or evidentiary direction of the claim ultimately asserted in order to show that investigation of the suspected claim should reasonably have led to discovery of the belated one.

Additional wrongdoers. Consistent with the general view that the plaintiff should investigate all wrongdoing by a defendant whom he suspects, he also is required to attempt to identify every person who participated in the wrong in order that they all may be brought before the court at the same time. This requirement is in accord with the liberal rules on joinder of parties, 386 but often presents a challenge for the plaintiff. Many federal statutes have a wide potential net of liability, which may be expanded even further by doctrines attaching liability to aiders and abettors. 387 As a result, even the diligent plain-

381. Id.
382. See Prather v. Neva Paperbacks, Inc., 446 F.2d 338, 341 (5th Cir. 1971) (plaintiff had made other allegations of infringement of copyright against defendant); Suckow Borax Mines Consol. v. Borax Consol. Ltd., 185 F.2d 196, 206 (9th Cir. 1950) (plaintiff on notice because at least suspected defendant's attempts to monopolize borax industry), cert. denied, 340 U.S. 943 (1951); cf. Glazer Steel Corp. v. Toyomanka, Inc., 392 F. Supp. 500, 503 (S.D.N.Y. 1974) (interrogatories propounded by plaintiff to defendant showed that plaintiff aware of additional possible claims he later asserted; defendant's repeated failure to answer until plaintiff moved to compel answers constituted concealment and justified tolling for additional claims).
383. See Fed. R. Civ. P. 18 (party asserting claim to relief may join all claims he has against opposing party).
385. Id. at 1156.
386. See Fed. R. Civ. P. 19 & advisory committee note (whenever feasible, all materially interested parties should be joined as parties).
387. Almost certainly the best example of a statute with a broad and somewhat uncertain ambit of liability is § 10(b) of the 1934 Securities Exchange Act, 15 U.S.C. § 78j(b). When transactions are challenged as fraudulent in actions under this statute, there is possible liability not only on the part of the principal actors, but also on a wide array of collateral participants such as accountants, Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979), and attorneys, Wachovia Bank & Trust Co. v. National Student Marketing Corp., 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 854 (1981). Liability for aiding and abetting a violation of § 10(b) remains an issue of debate among commentators. See Fischel, Secondary Liability Under Section 10(b) of the Securities Act of 1934, 69 CALIF. L. REV. 80,
tiff who unearthed a substantial store of facts may have great difficulty identifying all the proper defendants by the time he does file suit. Nevertheless, the plaintiff does have the tools of discovery available, and he is obviously on notice of some claim worth prosecuting. Meanwhile, the unnamed potential defendant normally can expect that the statute of limitations continues to run despite the pendency of litigation because rule 15(c) of the Federal Rules of Civil Procedure permits relation back only of claims "changing the party against whom a claim is asserted."388 Thus, refusing to extend the tolling to additional defendants is consistent with the plaintiff's duty to protect himself and with the legitimate expectations of nonparties.

The courts generally have been sensitive to these concerns, and have allowed tolling to extend only to parties whose involvement was kept secret by some concealment. For example, in Fitzgerald v. Seamens,389 the plaintiff was a former Air Force employee who alleged that he was fired in retribution for his testimony before Congress regarding cost overruns on the C-5A aircraft.390 After the district court dismissed his civil rights action on statute of limitations grounds, the District of Columbia Circuit affirmed the dismissal of the claim against all Air Force defendants because the plaintiff should have known or suspected their involvement.391 It reversed the dismissal, however, of the claim against Alexander Butterfield, special counsel to President Nixon, because the involvement of the White House in the matter had been concealed until it surfaced during the Senate Watergate hearings.392

Similarly, in a recent securities case the Second Circuit allowed a plaintiff to pursue a belated action against accountants involved in a scheme that he earlier had concluded was fraudulent.393 When the plaintiff first realized that the investment scheme was fraudulent, he cooperated with the Securities and Exchange Commission's investigation and ultimately intervened as a plaintiff in an action against underwriters and marketmakers.394 Later the SEC charged the accountants with wrongdoing, and only then did the plaintiff sue them.395 Noting that the plaintiff had alleged that the defendant accountants had con-

89-94 (1981); Ruder, Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification and Contribution, 120 U. Pa. L. Rev. 597, 630-31 (1972). Under these circumstances, plaintiffs cannot disregard claims against possible aiders and abettors. Beyond that, § 20(a) of the Act, 15 U.S.C. § 78t(a), imposes liability for violation on "every person who controls any person liable under any provision of this title," opening vistas of additional defendants based on a statutory analogue to respondeat superior. In sum, the prospective plaintiff in a securities case has a host of potential defendants to identify and locate.

388. Fed. R. Civ. P. 15(c). By way of contrast, California allows the naming of fictitious or "Doe" defendants, a device that ameliorates the statute of limitations problem with respect to added wrongdoers. CAL. CIV. PROC. CODE § 474 (1982). See generally Hogan, California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth, 30 Stan. L. Rev. 51 (1977) (describing common practice in California of naming fictitious parties to preserve opportunities to join real parties as they become known, thereby circumventing statutes of limitations).

389. 553 F.2d 220 (D.C. Cir. 1977).
390. Id. at 222.
391. Id. at 228-29. The court did note, however, that the case would have presented a different situation if plaintiff had timely sued the Air Force officials whose involvement was known to him and then later tried to add "lesser fry" he identified in the course of litigation. Id. at 229.
392. Id.
393. See Robertson v. Seidman & Seidman, 609 F.2d 583, 588 (2d Cir. 1979).
394. Id.
395. Id. at 589.
cealed their involvement by altering work papers and destroying documentary evidence, and that he had proceeded diligently to seek legal relief with respect to the known culprits, the court allowed the plaintiff to rely upon tolling.

Even if the additional defendant did conceal his wrongdoing, if he has been sued by others that fact has been held to undermine a later plaintiff's claim of diligence. In a securities case, for example, plaintiff initially sued the issuer, its accountants, and a number of others for fraud. Years later, plaintiff sued the law firm that had acted as counsel to the issuer in connection with the securities involved, arguing that the limitations period should be tolled because the law firm had concealed its wrongdoing. Stressing the fact that eleven other plaintiffs had sued the law firm, the court rejected this argument. In a similar securities case, another court rejected the plaintiff's assertion of diligence with respect to claims against the lawyers on the ground that there was "a clearly marked trail . . . to the attorney-defendants."

Except in cases in which the defendant conceals his involvement and defeats the plaintiff's actual discovery of wrongdoing, there is good reason to deny tolling for all claims growing out of the transaction in issue once the plaintiff is on notice that he has a claim arising from it. The plaintiff has a formidable array of discovery tools available once he has filed suit against one wrongdoer, and he should use them. Litigation lasts long enough without replays against a new set of defendants.

d. Interference by defendant—Concealment revisited

Although concealment may have little enduring importance as an independent requirement for tolling, it is clearly relevant to the question of diligence. First, as indicated above, concealment can excuse the plaintiff's failure to identify an additional defendant if that defendant's wrongdoing could not be discovered by due diligence. If successful, concealment may camouflage events that would otherwise be storm warnings and may excuse the failure of the plaintiff to recognize storm warnings in information he possesses. For example, in a labor case the employer allegedly concealed its decision to relocate its plant in the South by representing that the decision was not made until it had already decided to close its northern plant. When the National Labor Relations Board considered various matters connected with the closing of the northern plant, the company's representative lied about the date of the decision.

396. Id. at 593. The court indicated that it viewed this factor as tolling the statute of limitations until the plaintiff actually knew about his claim. In so deciding it relied on Tomera v. Galt, id., which held that proof of concealment is enough to toll the statute. Id.; see supra notes 302-12 and accompanying text (discussing Tomera v. Galt).
397. Id. at 588.
398. Id. at 593.
400. Id. at 690, 694.
401. Id. at 690, 695.
403. See supra notes 386-402 and accompanying text (discussing additional wrongdoers).
Among the documents entered in evidence at the NLRB hearing, however, was an agreement that showed that the company had applied for concessions from the southern town before deciding to close the northern plant. This evidence surely was a storm warning that the defendant was violating the labor laws, but the union overlooked the significance of this item during the administrative hearing, and did not notice it until sixteen months after the hearing, well beyond the normal six month limitations period for reopening the proceeding. Noting that the company was responsible for a “flagrant distortion of the facts,” the District of Columbia Circuit held that the time limit had been tolled:

At the time of the initial hearing, the union had no reason to suspect that [the employer’s] testimony was false. Thus it would indeed have been surprising if the union had recognized immediately the import of an obscure phrasal reference in the 27-page, single spaced, drily technical lease agreement which was executed long after the events in controversy had occurred.

Because there had been concealment, the court held that the union’s prompt action once it realized the significance of the document satisfied the diligence requirement.

Second, concealment remains an important factor in due diligence analysis because the absence of concealment may also be used to rebut a plaintiff’s claim of diligence. Thus, in a securities case the plaintiff had sold her stock in a family concern during a family dispute over management. The plaintiff alleged that she was assured that the defendant purchaser would fire her brother, who was running the company. After acquiring the plaintiff’s stock, however, the defendant never fulfilled his promise. Over nine years later the plaintiff sued. Stressing that there was “nothing covert” and that the defendants “made no effort to conceal their actions,” the Seventh Circuit barred her claim because she failed to exercise diligence.

Finally, the defendant’s concealment may be so obvious that it undermines any claim of diligence. As indicated above, simple denials of wrongdoing or refusals to provide information are often said not to satisfy the concealment requirement because plaintiffs may not reasonably rely upon them. A plaintiff confronted with such obstruction is not entitled to desist entirely in his investigation. To the contrary, a defendant’s stonewalling may itself signal that some wrongdoing has occurred and thus call for the plaintiff to increase his efforts to ferret out the facts. Every experienced litigator knows that vigorous resist-

405. Id. at 914.
406. Id. at 922.
407. Id.
408. Id. at 914.
409. Id. at 922-23.
410. Id. at 923.
411. Morgan v. Koch, 419 F.2d 993, 995 (7th Cir. 1969).
412. Id.
413. Id.
414. Id. at 996.
415. Id. at 998.
416. Such stonewalling does not invariably trigger a duty to dig deeper or sue. In Tomera v. Galt, 511 F.2d 504 (7th Cir. 1975), the court reversed a summary judgment for the defendants although other
The courts are aware of this simple truth; one court noted that the plaintiffs filed suit precisely because they were unable to get responsive information from defendants without the aid of discovery. If the concealment is sufficient to prevent discovery even despite redoubled efforts, it does not destroy a claim of diligence, although a plaintiff who has not utilized the tools of discovery will have a difficult time showing that he exhausted all available avenues.

e. Reliance on governmental authorities

In this pervasively regulated society there is a natural tendency to turn to the government for assistance when one feels wronged. Certainly there are a variety of federal, state and local agencies commissioned to respond to such complaints. It is difficult to imagine a form of activity that could not be of concern to one of these agencies. Diligent potential plaintiffs should be aware of these agencies. An effort to enlist their assistance not only is an indication of due diligence, but also is a sign that the plaintiff suspects wrongdoing by the defendant. If the government agency informs a potential plaintiff that it can find no violation by the suspected defendant, the question arises whether the plaintiff nevertheless should be held to be on notice of the defendant’s wrongdoing.

It would certainly be easy to decide that a plaintiff fulfills diligence requirements when he relies on advice from the government. Indeed, in many important cases it has been the government itself, with its greater investigative powers, that unearthed the wrongdoing and brought it to the attention of private plaintiffs. Thus, one important facet of the practice of plaintiffs’ antitrust counsel during the last two decades has consisted of keeping tabs on the government’s prosecutions.

The courts have declined the easy route of giving controlling weight to reliance on the advice of government agencies, a choice that appears well-justified because the government is not omnipotent. Although private plaintiffs often benefit from the government’s investigations, there is no reason why undiscovered private causes of action should be kept alive forever because some governmental agency has expressed a lack of immediate interest in the potential plaintiff’s suspicions. A rule permitting plaintiffs to rely on government advice without further investigation would raise enormous proof problems about
what the plaintiff told the agency and the advice the agency actually gave. Further, such a rule could cause agencies to forbid lower level representatives to comment to complainants for fear that such statements might be taken as the official government position. Moreover, the government’s interests are simply different from those of private plaintiffs. Although a given company may have violated the antitrust laws to the harm of some private plaintiff, the Department of Justice or the Federal Trade Commission may have no interest in the matter because it must husband its resources for more important cases. Indeed, the private attorney general principle underlying the treble damages and attorneys fees provisions of the Clayton Act assumes that private parties will be primary enforcers of the statutory scheme. Accordingly, particularly in antitrust actions, the courts have held that assurances from government representatives do not relieve a plaintiff from the duty of thoroughly investigating potential claims. The government’s decision that the available information does not warrant proceeding against the defendant does not excuse the plaintiff from being constructively on notice of the wrongdoing.

f. The problem of publicly available information

Another aspect of the pervasive influence of government is the quantity and variety of information it makes available to the public. Particularly since the passage of the Freedom of Information Act, it has been possible for many alert potential plaintiffs to obtain information from the federal government about the activities of those they suspect of wrongdoing. After they are sued, defendants may also take advantage of the vast stores of information collected by the government by gleaning from it those facts that they claim should have alerted plaintiffs to the existence of their claims earlier. Storm warnings of wrongdoing can come from any source, and they are often found in the public record.

The public availability of information is thus often fatal to plaintiffs’ attempts to show due diligence. As early as 1879 in Wood v. Carpenter, the Supreme Court rejected a plaintiff’s fraudulent concealment claim in part because the defendant’s allegedly fraudulent conduct was a matter of public record. In many cases, there can be no question that the plaintiff should have discovered the information. For example, in one case the allegedly concealed  

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422. See, e.g., Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 n.2 (9th Cir. 1978) (government assurances do not necessarily negate plaintiff’s well-founded suspicion of antitrust violation); Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 947 (D.N.J.) (plaintiff may not rely on SEC letter which condoned defendant’s disclosures), rev’d on other grounds, 611 F.2d 450 (3d Cir. 1979); Starview Outdoor Theatre v. Paramount Film Distrib. Corp., 254 F. Supp. 855, 857-58 (N.D. Ill. 1966) (Assistant Attorney General’s letter stating that defendant’s actions were lawful did not negate plaintiff’s knowledge of alleged antitrust violations). Compare Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2d Cir. 1979) (plaintiff cooperated with SEC, but also pursued his own rights).


424. 101 U.S. 135, 139-40 (1879).
fact had been reported in the Encyclopedia Britanica’s Year Book.425 Tolling also has been denied when the plaintiff failed to consult materials as obscure as reports of the Tariff Commission426 and congressional hearings.427 In fact, in one antitrust case a report to the Minister of Justice of the Canadian Government was held to put plaintiff on notice of the existence of the conspiracy alleged in his suit.428

The obvious problem with such analyses is that they ignore a plaintiff’s actual awareness of publicly available information and consider only his constructive knowledge. Few plaintiffs who exercise due diligence can be expected to be aware of the entire mass of information the government has available for the asking, even within their own industry. In the case of the Canadian report noted above, there was no question about the plaintiff’s knowledge of its existence since he mentioned it in his complaint.429 In other cases, however, courts have been more sensitive to the problem that much “public” information is, as a practical matter, not meaningfully available. For example, in Smith v. Nixon,430 the court rejected the argument that the plaintiffs should have learned of surveillance activities against them sooner by requesting information pursuant to the Omnibus Crime Control Act and Safe Streets Act of 1968.431 The court stated, “We cannot impose an obligation on all citizens to initiate a triennial request of the Government as to whether they are under official surveillance.”432 Moreover, even if the plaintiff does request information from the government, he is not assured of immediate results. In another tolling case, the plaintiff alleged that after he made his FOIA request government officials delayed nearly a year in furnishing the requested information and then attempted to delete or falsify key portions.433 Thus, for the ordinary citizen the mere existence of public information is no panacea for discovering his claims. Obscure information in government records should not be allowed to become a sword in the hands of defendants relying on limitations.

Plaintiffs also may have difficulty disclaiming constructive knowledge of public information emanating from sources other than government files. In a

429. Id.
432. Id. Similarly, in Spevak v. United States, 390 F.2d 977 (Ct. Cl. 1968), the plaintiff alleged that the Atomic Energy Commission had concealed its use of his secret heavy water process without compensating him for it. Id. at 980-81. Although the government acknowledged that its use of the process was classified, it pointed out that information about it could be gleaned from some technical reports that had been declassified. Id. at 981. Indeed, the plaintiff had sued to restrain the release of information about his process in order to protect its secrecy, thereby delaying the date of public disclosure of the government’s use of the process. Id. at 982. The court held that the declassification of various reports did not give plaintiff constructive notice of their contents until there was a public announcement of their availability in a manner calculated to alert plaintiff to their existence. Id. at 982-84.
civil rights action, for example, the plaintiff sued the United States Government in 1977 to recover for injuries he sustained in 1961 when he was beaten by a mob while participating in Freedom Rider activities in the South. The plaintiff claimed that even though an informant had notified the FBI in advance that there would be violence, the FBI failed to warn the plaintiff or prevent the violence. The Government claimed that the plaintiff should have learned of his claim against it in 1965 when the informant testified during a well-publicized trial and revealed that he had been an FBI informant since 1960. Unquestionably, the testimony was public. Despite the publicity, however, the court refused to hold that the 1965 trial put the plaintiff on notice of his claim. Underlying the court's decision was its finding that the newspaper reports covering the trial showed neither that the witness had been an FBI informant during the 1961 events nor that the Government had advance knowledge of the planned attack. Such skepticism about the actual utility of publicly available information should not be limited to claims against the Government. Other defendants may also have a far superior ability than the average plaintiff to gather and analyze information about their own activities. Their claims that plaintiffs are constructively on notice of reports of their wrongdoing should therefore be closely scrutinized to evaluate whether such information was genuinely available to the plaintiff.

g. Countervailing considerations—Avoiding groundless lawsuits

Courts tend to hold that once a plaintiff’s suspicions are aroused, he should be held to be on notice of his claim and the tolling of the limitations period should end. There are countervailing considerations, however. Americans are already too litigious; compelling them to file suit based on suspicion alone to avoid the risk of the limitations bar could be hazardous. Although most litigants in fact may not attend closely to the courts’ development of the doctrine of fraudulent concealment, a requirement that plaintiffs file suit merely on the basis of suspicion may undermine the interest in limiting groundless claims.

Putting aside the ethical problems posed by suits based on suspicion rather than evidence, two federal rules of civil procedure underscore the problem. First, rule 9(b) requires that a party allege with particularity claims of fraud or fraudulent concealment. Some courts have injected a substantive compo-

435. Id. at 1019. The trial arose out of the murder of civil rights worker Viola Liuzzo, which received great attention in the national press.
436. Id. at 1019-20.
437. Id. at 1020.
438. For an example of restraint in holding that publicly available information puts plaintiff on notice when the defendant is a private litigant, see Sperry v. Barggren, 523 F.2d 708, 710-11 (7th Cir. 1975) (report on purchase of company in national financial publication giving overall price did not put plaintiff on notice of price per share).
439. See supra notes 289-319 and accompanying text.
440. For a discussion of these ethical issues, see generally Cann, Frivolous Lawsuits—The Lawyer’s Duty to Say “No,” 52 U. COLO. L. REV. 367 (1981).
441. For an example of restraint in holding that publicly available information puts plaintiff on notice when the defendant is a private litigant, see Sperry v. Barggren, 523 F.2d 708, 710-11 (7th Cir. 1975) (report on purchase of company in national financial publication giving overall price did not put plaintiff on notice of price per share).
442. FED. R. CIV. P. 9(b).
443. Id.; see infra notes 468-79 and accompanying text (discussing rule 9(b)).
ment into rule 9(b) to use it as a warrant to scrutinize the evidence on which the plaintiff based his allegations in order to decide whether the plaintiff investigated the alleged fraud and reasonably believed that a wrong had occurred. If the plaintiff's evidence is found wanting, these courts will dismiss the case. Thus, in some cases the courts may interpret rule 9(b) to forbid suits based on mere suspicion.

Second, rule 11 provides that by signing a complaint, an attorney certifies "that to the best of his knowledge, information and belief there is good ground to support it." Courts have stricken complaints for violation of rule 11, concluding that the rule imposes an affirmative obligation on the attorney to satisfy himself there is a ground for the complaint. Recent proposed amendments to rule 11 emphasize that the lawyer has an independent responsibility to investigate both the law and the facts underlying the claim. Even though a plaintiff may be comfortable with filing suit solely on a suspicion, then, the attorney is under an independent obligation to satisfy himself that the plaintiff's claim is well-grounded.

The policies of rules 9(b) and 11 are relevant to deciding whether mere suspicion should end the tolling period, and some courts have emphasized them.

444. See DuPont v. Wyly, 61 F.R.D. 615, 631 (D. Del. 1973). The Second Circuit has energetically endorsed this view: Rule 9(b)'s specificity requirement stems ... from the desire to protect defendants from the harm that comes to their reputations or their good will when they are charged with serious wrongdoing: "It is a serious matter to charge a person with fraud and hence no one is permitted to do so unless he is in a position and is willing to put himself on the record as to what the fraud consists of specifically."

Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972), quoting 1A W. BARRON & A. HOLTZHOFF, FEDERAL PRACTICE & PROCEDURE § 302, at 215-16 (C. Wright ed. 1960). For similar reasoning, see Horwitz v. Sprague, 440 F. Supp. 1346, 1350 (S.D.N.Y. 1977) (rule 9(b) mandates particularity in pleading because allegation of fraud is potent weapon); Lincoln Nat'l Bank v. Lampe, 414 F. Supp. 1270, 1279 (N.D. Ill. 1976) (rule 9(b) requires pleading with particularity to protect defendants from unjustified injury to their reputations and goodwill); Temple v. Haf, 73 F.R.D. 49, 52 (D. Del. 1976) (same); Macchiavelli v. Shearson Hamill & Co., 384 F. Supp. 21, 28 (E.D. Cal. 1974) (same). This approach seems to stretch rule 9(b) almost to the breaking point because it depends upon a decision on the merits rather than on issues of fair notice to defendant.


446. See Gage v. Wexler, 82 F.R.D. 717, 720 (N.D. Cal. 1979) (attorney under professional obligation not to bring frivolous suit), aff'd mem., 649 F.2d 867 (9th Cir.), cert. denied, 454 U.S. 1100 (1981); Ferrer Delgado v. Sylvia de Jesus, 440 F. Supp. 979, 982 (D.P.R. 1976) (attorney has responsibility to ascertain that reasonable basis exists for allegations); Freeman v. Kirby, 27 F.R.D. 395, 397 (S.D.N.Y. 1961) (attorney has affirmative obligation to satisfy himself that there is good ground to support claim).

But see Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems With Fed. R. Civ. P. 11, 61 MINN. L. REV. 1, 33 (1976) (arguing that it is improper to strike complaint under rule 11 because plaintiff has right to jury trial).

447. The Advisory Committee on Civil Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed that rule 11 be amended to provide sanctions against a person who signs a pleading without complying with the rule. The Committee's notes suggest that the lawyer may not even rely on the client with regard to factual matters, but must investigate them independently. The Advisory Committee on Civil Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 90 F.R.D. 451, 463, 464 (1981). In addition, the advisory committee has proposed that rule 7(b) be amended to allow similar sanctions for frivolous motions. Id. at 458-59. The committee has also recommended that rule 11's provision for striking pleadings be deleted. Id. at 458-66. For a discussion of the proposed amendments, see Marcus, Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure, 66 JUDICATURE 363, 364-65 (1983).
In a price-fixing suit, for example, the defendants obtained summary judgment on the limitation issue because the plaintiffs had known about a virtually identical action, but failed to file suit themselves. Even though the plaintiff's awareness of complaints of others about the defendant's wrongdoing usually shows that he is on notice, the Fifth Circuit reversed the summary judgment on the theory that mere suspicion produced by complaints of others does not serve as a substitute for evidence of wrongdoing. Because others' lawsuits may be frivolous or groundless, the court reasoned that they do not necessarily provide adequate grounds for the plaintiff to bring his own lawsuit. Similarly, in a trade secrets case the First Circuit declined to hold that mere suspicion should have put the plaintiff on notice:

While [the president of the plaintiff corporation] did indeed have a "feeling" that the defendant had plagiarized the plaintiff's designs, it was a feeling based on the gossamer threads of speculation, suspicion and surmise. Knowledge—in the sense of an awareness of concrete facts—was conspicuously absent.

Although sensitivity to the tension between the interest in encouraging plaintiffs to bring suit as soon as they have reasonable grounds to suspect wrongdoing and the interest in avoiding groundless lawsuits is important, it should not be overemphasized. The plaintiff is not required to file suit immediately simply because the tolling period has ended. Instead, he has the full period established by the statute of limitations to investigate and satisfy himself and his lawyer that there are adequate grounds for suit. Ultimately every plaintiff must decide whether to file suit or risk the bar of limitations. The fact that concealment has tolled the running of limitations does not forever save the plaintiff from having to make that choice.

h. The value of consistency

The above discussion identifies a number of discrete concerns that are important in the courts' analysis of diligence. It also shows that the courts have an eclectic approach in deciding whether a given plaintiff has been diligent. As a consequence, it appears impossible to reconcile all the cases. Even within a given circuit there are decisions that appear inconsistent with one another. Perhaps the best illustration of this phenomenon emerges from a comparison of the Ninth Circuit's decisions in *Mount Hood Stages, Inc. v. Greyhound*
one panel upheld a jury determination that the plaintiff was not on notice of its claim despite its repeated formal complaints to the Interstate Commerce Commission about Greyhound’s routing decisions. In Rutledge, decided less than a year later, another panel held that the plaintiff’s complaints to the Justice Department should have put him on notice even though the Justice Department assured him that the defendant had not violated the law. Other similar examples can be cited. Consistency is important to the policies underlying statutes of limitations. This appearance of inconsistency, therefore, is troubling, particularly because the decision to toll apparently turns entirely on the plaintiff’s diligence. Nevertheless, seemingly inconsistent results may be inevitable because the diligence standard, like the standard of negligence, is ultimately one of reasonableness.

Faced with a similarly eclectic approach for deciding negligence cases, Justice Holmes believed that instead of allowing juries to decide apparently similar cases differently, courts instead should draw on their experience and identify a number of distinct rules of conduct that could be applied in preference to the general reasonable person standard. In a 1927 case Justice Holmes authored, the Supreme Court adopted this approach and held that a driver crossing a railroad track must get out of his vehicle to determine whether a train is coming. This approach seemingly obviates the need to decide each case on its own facts. Seven years later the Court repudiated this approach, and it has been out of favor since. Similar attempts to break down the diligence analysis suffer from the same problem. Some courts have hinted at the existence of such rules in securities cases, stating that plaintiffs should invariably be held to be on notice of wrongdoing upon the decline in value of securities. It is not genuinely possible, however, to identify and attach paramount importance to a few factors at the expense of all others.

Whatever verbal formulation is used to describe the reasonable person test, apparently inconsistent results are inevitable. Unquestionably the courts should strive for consistency in deciding issues of diligence. The persistence of apparent inconsistency, however, does not in itself mandate revision of the diligence standard. Equitable doctrines such as fraudulent concealment should not require mathematical precision, even if they could be so refined, because they rely on a judge’s sense of justice to the parties before the court. Although individualized decisions will not always be easily reconciled with
each other, therefore, the key fact is that each represents a judge’s effort to protect the legitimate interests of both the plaintiff and the defendant.

IV. EARLY DETERMINATION OF TOLLING ISSUES

By its very nature, tolling compromises the policies underlying statutes of limitations. If a defendant must defend on the merits whenever a plaintiff invokes tolling, the protection of the statute of limitations will be substantially undermined. A brief review of tolling cases in which the statute of limitations defense has been sustained before trial on the merits illustrates the problem. In a civil rights action filed in 1979 to recover for alleged racial discrimination against singer Bessie Smith between 1923 and 1933, for example, the court observed that most or all of the people involved in these transactions were long dead.461 In *Moviecolor Ltd. v. Eastman Kodak Co.*,462 the plaintiff sought to resurrect a transaction that occurred nearly thirty years before the suit was filed.463 In other antitrust cases plaintiffs have sued more than a decade after the alleged violation.464 In these cases the defendants denied the plaintiffs’ substantive allegations, but to disprove them at best would have required the use of dim recollections and long forgotten records, and at worst could have necessitated attempts to obtain substitutes for the testimony of the dead and for records that had been destroyed or lost.

Although antiquated claims often survive to trial,465 the desirability of pretrial resolution of tolling questions is obvious. The Manual for Complex Litigation specifically mentions tolling as a matter suitable for early resolution.466


462. 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961). For further discussion of this case, see supra text accompanying notes 82-90.

463. Id. at 88.


465. For examples in which tolling was sustained despite the passage of many years, see Richards v. Mileski, 662 F.2d 65, 67 (D.C. Cir. 1981) (23 years); *Birley v. State of California*, 564 F.2d 849, 853 (9th Cir. 1977) (13 years); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 698 (9th Cir. 1977) (damages incurred over twenty-year period), rev’d on other grounds, 437 U.S. 322 (1976); *Pollard v. United States*, 384 F. Supp. 304, 308 n.3 (M.D. Ala. 1974) (suit filed in 1973 for claims arising out of the Tuskegee Syphilis Study of the 1930’s).

466. The *MANUAL FOR COMPLEX LITIGATION* (1981) states in part:

In some complex cases it becomes apparent at the preliminary pretrial conference or shortly thereafter that the determination of a legal question will expedite the disposition of the case. . . . For example, in the electrical equipment civil antitrust cases the question whether fraudulent concealment would toll the running of the statute of limitations was one of the most important questions. It was very desirable to secure a determination of this question as early as possible, for if the statute was not tolled by fraudulent concealment, the discovery would be comparatively narrow in scope of time and a summary judgment on some or all issues could be rendered in many cases.

*Id.* § 1.80.

At least one court has treated the Manual’s directive as recommending that the question of tolling under the circumstances of particular cases be decided as promptly as possible. *See In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1170 (5th Cir. 1979) (citing Manual’s suggestion that fraudulent concealment should be determined as early as possible in order to define scope of discovery), cert. denied,
Responding to such a directive, the courts have, if anything, been too willing to resolve tolling before trial. If the courts' apparent abandonment of concealment as an independent requirement for invoking tolling has deprived defendants of some deserved measure of protection, they have overcompensated by rejecting plaintiffs' claims of due diligence based upon pretrial filings in court. Because the actual operation of the tolling doctrine depends on the procedural context, the procedural devices employed to resolve tolling issues before trial on the merits deserve independent attention.

A. DISMISSAL

In 1849 the Supreme Court announced stringent standards for pleading fraudulent concealment:

[E]specially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made.467

These precepts are now embodied in rule 9(b) of the Federal Rules of Civil Procedure, which requires that fraud be alleged "with particularity." Courts regularly hold that rule 9(b) applies to claims of fraudulent concealment468 and often find that bare allegations of diligence are insufficient to satisfy rule 9(b).469 Because rule 9(b) requires a plaintiff to plead the particular facts of his diligence, the rule provides a vehicle for the court to determine the plaintiff's diligence on the complaint alone. This approach, however, appears inconsistent with the Federal Rules of Civil Procedure because diligence should be evaluated with reference to all surrounding circumstances. Even when diligence is pleaded with particularity, additional facts may be necessary to determine whether a reasonably diligent person would have discovered the claim. As a number of courts have noted, summary judgment is a more appropriate procedure for evaluating diligence because it permits consideration of additional facts.470

449 U.S. 905 (1980). The language of the Manual does not require that result, however. Instead, the reference in § 1.80 to "the determination of a legal question" may be interpreted to refer to whether tolling of the statute of limitations is available as a matter of law, but such an interpretation would unduly narrow the scope of the quoted directive. There is no longer any genuine question, except perhaps as a result of Johnson and Tomanio, whether tolling on the ground of fraudulent concealment is at least theoretically available under Holmberg v. Armbrecht. All that remains to be determined in each case is whether it should be applied in the circumstances before the court. That is the matter whose early resolution could narrow the issues remaining for trial.

469. See, e.g., Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 249-50 (9th Cir. 1978) (plaintiff failed to plead particular facts of his diligence); Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975) (same); Gee v. CBS, Inc., 471 F. Supp. 600, 627 (E.D. Pa. 1979) (plaintiff failed to plead particular facts about why defendant's fraudulent scheme was self-concealing and why detection was impossible for fifty years), aff'd, 612 F.2d 572 (1980). One court, however, has stated that rule 9(b) requires only "slightly more" than rule 8. Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975).
470. Many courts have questioned whether the issue of fraudulent concealment may be decided on
In spite of the asserted advantage of deciding tolling claims in a summary judgment procedure, some courts nevertheless have decided the diligence question on the pleadings. A leading example is *Goldstandt v. Bear, Stearns & Co.*, 471 a securities action by broker-dealers engaged in the purchase and sale of securities.472 According to the complaint, the defendants' representative proposed that the plaintiffs adopt a new trading strategy and then falsely assured the plaintiffs that the defendants' legal department had determined that this strategy was proper.473 The plaintiffs alleged that they had acted diligently in relying upon the alleged conclusion of the defendant's legal department.474 The Seventh Circuit affirmed the dismissal of the complaint on the ground that ignorance of the law does not toll the statute of limitations.475 Regardless of the validity of this principle as a question of law,476 the court's opinion does not explain its holding. Although the court acknowledged that certain investors could rely on brokerage houses for legal advice, it based its ruling that plaintiffs could not do so on the ground that "[i]t is clear from the complaint . . . that plaintiffs were professional market traders who surely had ready access to legal advice." 477 It is difficult to understand how the court could make this factual assumption based on the pleadings, and its conclusion is therefore highly questionable. The results reached by other courts that similarly have relied on factual determinations to justify rule 12(b)(6) dismissals for lack of diligence478 likewise must be viewed with skepticism.

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the pleadings. In *Richards v. Mileksi*, 662 F.2d 65 (D.C. Cir. 1981), the court reversed a dismissal granted to defendants when plaintiff alleged fraudulent concealment, emphasizing,

> There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs to such an affirmative defense. The filing of an answer, raising the statute of limitations, allows both parties to make a record adequate to measure the applicability of such a defense, to the benefit of both the trial court and any reviewing tribunal.

Id. at 73; *see also* Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 235 (1959) (question whether plaintiff justifiably relied on defendant's agents must be tried on merits); *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 970 (5th Cir 1981) (district court erred in dismissing fraudulent concealment claim since plaintiff made significant allegations supporting due diligence); *Jones v. Rogers Memorial Hosp.*, 442 F.2d 773, 775 (D.C. Cir. 1971) (statute of limitations may not be decided on motion to dismiss "unless it appears beyond doubt" that plaintiff can prove no facts to entitle him to relief); *Houlihan v. Anderson-Stokes, Inc.*, 434 F. Supp. 1319, 1324 (D.D.C. 1977) (plaintiff's allegation of due diligence sufficient to withstand motion to dismiss).

Some defendants have attempted to circumvent this issue by styling their motions as motions to strike under rule 12(f) on the theory that insufficient allegations of concealment are "immaterial." *See Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*, 520 F.2d 289, 292, 296 (8th Cir. 1975) (upholding district court's granting of defendant's 12(f) motion to strike fraudulent concealment claim from complaint because plaintiff could have discovered claim by exercising due diligence), *cert. denied*, 424 U.S. 915 (1976). To decide the issue on a rule 12(f) motion, the court must still pass on the merits of the plaintiff's diligence. Accordingly, the same problem remains however one labels the motion.

471. 522 F.2d 1265 (7th Cir. 1975).
472. Id. at 1266.
473. Id. at 1266-67.
474. Id. at 1268. The plaintiffs' theory was that the fraud was a continuing one because no reasonable person, once so defrauded, would have sought other legal advice in the absence of an intervening event. Id.
475. Id. at 1268-69.
476. *Cf.* supra note 356 (discussing distinctions between representations of law and fact).
477. 522 F.2d at 1269.
478. *See Conerly v. Westinghouse Elec. Co.*, 623 F.2d 117, 121 (9th Cir. 1980) (upholding dismissal because no allegation about why plaintiff could not have discovered facts giving rise to his claim in more timely manner); *Jablov v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (upholding...
By its terms, rule 9(b) applies to the defendant's concealment as well as the plaintiff's diligence, but its role with regard to this prong of the fraudulent concealment doctrine is much less important. A plaintiff who has developed sufficient facts to warrant filing suit may not yet have substantial information about the stratagems a defendant used to conceal information from him. Unlike issues of diligence, a court could not purport in any event to pass upon concealment at the pleading stage. It therefore seems pointless to apply stringent pleading standards to allegations of concealment.479

Despite the requirements of rule 9(b), it will be impossible to resolve tolling issues on the pleadings in many cases. Instead, it appears that the principal function of rule 9(b) is to require that the specifics of the tolling argument be spelled out promptly so that the court can reach the merits of tolling at an early date.

B. SUMMARY JUDGMENT

Once the plaintiff has satisfied rule 9(b) and avoided dismissal, the defendant's attention likely will turn to summary judgment. To put the matter in context, the lower courts agree that a plaintiff seeking to toll the statute of limitations faces a heavy burden of proof at trial.480 As one court has stated, "All presumptions are against him, since his claim to exemption is against the current of the law and is founded on exceptions."481

dismissal because, based on allegations of complaint, plaintiff should have been aware of her claim within the statutory period); Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978) (upholding dismissal because plaintiffs' reliance upon defendant's denial of wrongdoing unreasonable when plaintiff had suspicion of and opportunity to discover fraud); Weinberger v. Retail Credit Co., 498 F.2d 552, 555-56 (4th Cir. 1974) (upholding dismissal because plaintiffs' allegation of fraudulent concealment insufficient when defendant's "deceptive practices" effectively concealed very little from plaintiff); Davis v. Edgemere Fin. Co., 523 F. Supp. 1121, 1128 (D. Md. 1981) (granting motion to dismiss because plaintiffs' complaint demonstrated lack of diligence).

479. See Chambers & Barber, Inc. v. General Adjustment Burea, Inc., 60 F.R.D. 455, 459 n.7 (S.D.N.Y. 1973) ("to require specificity in a complaint regarding secret techniques of concealment is to expect more than Rule 9(b) requires").

480. See, e.g., In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1171 (5th Cir. 1979) (ultimate burden of persuasion on fraudulent concealment issue is heavy), cert. denied, 449 U.S. 905 (1980); Hupp v. Gray, 500 F.2d 993, 996 (7th Cir. 1974) (plaintiff has burden of showing he exercised reasonable care and diligence); Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230, 233 (6th Cir. 1974) (all presumptions are against party seeking to avoid statute of limitations because claim to exemption is against current of law), cert. denied, 419 U.S. 997 (1974); Detroit v. Grinnell Corp., 495 F.2d 448, 461 (2d Cir. 1974) (plaintiff must show due diligence and that affirmative act of fraudulent concealment frustrated such diligence); Baker v. F & F Investment, 420 F.2d 1191, 1199 (7th Cir.) (plaintiffs must be prepared to adduce sufficient evidence to warrant conclusion that defendants concealed basic facts disclosing existence of cause of action and that plaintiffs remained ignorant of facts through no fault of their own), cert. denied, 400 U.S. 821 (1970).

In Richards v. Mileksi, 662 F.2d 65 (D.C. Cir. 1981), however, the court took the opposite approach:

When tolling is proper because the defendants have concealed the very cause of action . . . they have the burden of coming forward with any facts showing that the plaintiff could have discovered their involvement or the cause of action if he had exercised due diligence.

Id. at 71. In reaching its decision, the court in Richards v. Mileksi cited Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979), cert. denied, 453 U.S. 992 (1981). Id. Although the court in Smith v. Nixon stated that "[p]ossibly appellees can offer evidence that the Smiths could have acquired information about the wiretap but simply failed to take the needed steps," id. at 1191, it clearly did not deviate from the rule that the burden of proof ultimately is on the plaintiff. Thus Richards v. Mileksi ought not presage the erosion of that principle.

At the summary judgment stage, however, defendants confront a heavy burden of their own in contesting the plaintiff's tolling claim. In this connection, it should be kept in mind that the defendants normally have denied the substantive charges against them as well as having pleaded the statute of limitations defense. Accordingly, defendants may find themselves in the anomalous position of urging that the plaintiff should have discovered sooner the wrongdoing that they deny occurred.

Moreover, some courts have added hurdles for defendants by indicating that diligence issues are particularly unsuited to summary judgment. One court has stated:

Inevitably the factual issue of due diligence involves, to some extent at least, the state of mind of the person whose conduct is to be measured against this test and it is simply not feasible to resolve such an issue on motion for summary judgment.

Such a sentiment makes the prospect for resolving fraudulent concealment issues before trial appear grim. Reality confounds this expectation, however, and there are numerous cases in which summary judgments have been entered against plaintiffs.

Notwithstanding the factual question whether the plaintiff's state of mind

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482. Admiralty Fund v. Jones, 677 F.2d 1289, 1294 (9th Cir. 1982) (defendant has "extremely difficult burden to show that there exists no issue of material fact regarding notice").

483. Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1042 (10th Cir. 1980) (question of due diligence under doctrine of equitable tolling does not lend itself to determination as matter of law); Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2d Cir. 1979) (summary judgment particularly inappropriate when sought on basis of inferences which parties seek to have drawn as to questions of motive, intent, and subjective feelings and reactions); Dzenitz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168, 172 (10th Cir. 1974) (issues of due diligence and constructive knowledge require appraisal of full testimony); Lighting Fixture and Elec. Supply Co. v. Continental, 420 F.2d 1211, 1213 (5th Cir. 1969) (summary judgment may be improper even though basic facts undisputed if parties disagree regarding material factual inferences that properly may be drawn from facts).

484. Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 10 (5th Cir. 1967).


By way of contrast, it should be noted that in some cases courts have held that tolling may be established as a matter of law. For example, in King & King Enter. v. Champlin Petroleum Co., 657 F.2d 1147, (10th Cir 1981), cert. denied, 102 S. Ct. 1058 (1982), the court stated that, "[t]here is not one bit of evidence in the record from which the jury could have entertained the thought that the price fixing conspiracy, if the jury believed that a conspiracy did exist, had not been fraudulently concealed." Id. at 1155; see also Newman v. Prior, 518 F.2d 97, 100 (4th Cir. 1975) (record conclusively establishes that plaintiffs did not and could not have discovered fraud; court not obliged to submit issue of due diligence to jury).
could ever be determined on a summary judgment, cases that dispose of fraudulent concealment issues on summary judgment could be explained on the basis that in each case, no genuine issue of fact existed. The courts have tried to use such reasoning by asserting variously that the parties do not dispute historical facts concerning concealment, that the plaintiff failed to present any evidence of inquiry, or that the courts themselves have accepted the plaintiff's factual assertions as true but found them insufficient to warrant tolling.

In reality, however, it appears that courts do make their own evaluation of the plaintiff's diligence on summary judgment. When they do so, the subjective application of the objective test of diligence becomes most apparent. In a recent securities case, for example, the Eighth Circuit reached a substantive, but subjective, conclusion about the plaintiff's diligence. In this case, the plaintiff alleged that she told defendants to invest her money in "no risk" securities, but that they instead invested in speculative issues. In her deposition, the plaintiff admitted that she had received monthly account statements that detailed each transaction, but claimed that she did not understand them and had not asked for an explanation. Squarely facing the merits of the diligence issue, the appellate court upheld summary judgment for the defendants:

It comes down to this: Should a reasonable person in the position of [plaintiff], upon reasonable inquiry, have discovered the facts constituting the alleged fraud on or before March 30, 1975?

The answer is yes. The confirmation slips and monthly account statements which were sent to [plaintiff] were sufficient to require the initiation of an inquiry. While they are not a model of clarity for the novice investor, they provide information sufficient to require a reasonable person to ask questions.

[Plaintiff] simply did not exercise the care and diligence reasonable under the circumstances to understand what was happening to her account.

By focusing on what a reasonable person in plaintiff's position could have discovered, the court implied that it was answering a question upon which reasonable minds could not differ.

Although the Eighth Circuit seems to have concluded that reasonable minds

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486. For example, the court in Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir. 1968), stated that "since the facts surrounding this concealment claim are undisputed, the trial court was perfectly correct in deciding on summary judgment whether these facts were sufficient as a matter of law to toll the three year statute of limitation." Id. at 340.

487. See Morgan v. Koch, 419 F.2d 993, 998 (7th Cir. 1969) (no evidence of any attempt to learn true facts, although every reason and means to do so).

488. See Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 411 (2d Cir. 1975) (because basic facts appear in plaintiff's complaint, appropriate case for summary judgment); Klein v. Bower, 421 F.2d 338, 344 (2d Cir. 1970) (even accepting plaintiff's assertions of due diligence as true, he cannot escape statutory bar); Rickel v. Levy, 370 F. Supp. 751, 756 (E.D.N.Y. 1974) (plaintiff's own version of facts demonstrates without doubt that he could have discovered fraud within statutory period with reasonable diligence).


490. Id. at 1343.

491. Id. at 1342.

492. Id. at 1343-44.
could not differ on the plaintiff's diligence, other decisions denying summary judgment on nearly identical facts suggest otherwise. Thus, in *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith*, the district court granted summary judgment for the plaintiff on the theory that the plaintiff should have discovered her securities claim against the broker defendant when she received confirmation slips and periodic reports about her account. The Tenth Circuit reversed, holding that the determination whether the plaintiff should have discovered her claim depended on questions about which reasonable minds could differ, such as the plaintiff's knowledge and experience and common practice among investors. In light of the court's reasoning in *Dzenits*, it is extremely difficult to accept the Eighth Circuit's conclusion on analogous facts that the undisputed facts left no room for an opposite finding by a jury. To the contrary, such issues of reasonableness, looking to "the mainsprings of human conduct [as applied] to the totality of the facts of each case," are traditionally left to the jury, even when the historical facts are undisputed, on the ground that twelve jurors can reach a better decision than one judge.

Although disposing of the diligence issue on summary judgment seems questionable given the traditional function of the jury, courts have done little to enunciate a theoretical justification for treating diligence differently from other issues that depend upon a determination of reasonableness. Addressing the diligence issue in general, the First Circuit suggested that a judge may decide the issue on summary judgment because it is a "mixed question of law and fact." A demand for a jury trial, however, may limit a court's latitude in deciding diligence issues on summary judgment motions.

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493. 494 F.2d 168 (10th Cir. 1974); see supra notes 252-56 and accompanying text (discussing *Dzenits*).
494. Id. at 172.
495. Id. at 172-73.
497. The seminal case on the role of the jury in cases in which reasonableness must be determined is *Railroad Co. v. Stout*, 84 U.S. 657 (1873). In that case the Supreme Court held that even when the historical facts are undisputed, the question of negligence is for the jury to decide because "it is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." Id. at 664. For a recent exposition of this view, see *TSC Indus., Inc. v. Northway, Inc.* 426 U.S. 438, 450 & n.12 (1976) (discussing jury's "unique competence" to apply "reasonable man" standard); cf. *Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1789-90 (1982) (discussing vexing nature of distinction between questions of fact and questions of law). Commentators differ on whether the judge or the jury should decide questions of reasonableness. Compare *Weiner, The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1928 (1966) (judge does not possess greater qualifications than jury to decide what is reasonable because such a question is not technical and legal learning will not assist in answering it); cf. Comment, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CALIF. L. REV. 106, 117 (1980) (judges and juries excel in deciding whether plaintiff is justifiably ignorant of his claim by reason of having exercised reasonable diligence).
498. See *Cook v. Avien, Inc.*, 573 F.2d 685, 697 (1st Cir. 1978). The First Circuit was addressing the role of an appellate court in a case on appeal not from a summary judgment motion, but from a judge's decision after trial. In justifying its determination that the plaintiff had not been diligent, the circuit court stated:

Although the question of whether reasonable diligence has been exercised is factually based, we conclude that the actual determination is a sufficiently mixed question of law and fact to permit an appellate court to resolve the issue at least where the action below was tried to the court.

Id. The court acknowledged that if the diligence issue had been decided by a jury, an appellate court could not make an independent factual determination of diligence. Id. at 697 n.27.
499. Cf. id. at 697 n.27 (when issue of diligence arises in jury case, jury decides whether due care has
A panel of the Tenth Circuit recently addressed the diligence issue in Ohio v. Peterson, Lowry, Rall, Barber & Ross, and granted courts unusual latitude to resolve questions of equitable tolling. The court acknowledged that decisions granting summary judgment on diligence could not be explained under traditional principles of summary judgment. Instead, it premised its decision in part on an historical analysis of the practices of the English courts of chancery, which decided the issue of diligence on written presentations, "a procedure much like our summary judgment." Relying on this insight into English history, the court explained that its exercise of equitable powers allowed the resolution of the diligence issue on summary judgment.

It is refreshing to have a court recognize that tolling decisions do not easily fit into the traditional summary judgment mold, but the historical analysis the Tenth Circuit offered does not completely explain why the jury should not decide the diligence issue. Although the historical analysis probably disposes of arguments against summary judgment based on the seventh amendment right to a jury trial, it does not necessarily follow that tolling questions should be excluded from the jury. To the contrary, it would seem that the diligence issue is particularly suited for determination by jurors because it looks to interpretation of the circumstances of the case under a standard of reasonableness. Although there is cause for concern that juries may not be properly sympathetic to the societal policies underlying the statute of limitations, and may hesitate to hold for defendants on limitations grounds when persuaded that the plaintiff's rights were violated, juries nevertheless have the capacity to decide tolling issues. Juries have indeed been willing to decide

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501. Id. at 693. The court seemingly rejected earlier dicta by other panels of the same court. See Aldrich v. McCulloch Properties, Inc., 827 F.2d 1036, 1042 (10th Cir. 1980) (question whether plaintiff should have discovered claim does not lend itself to determination as matter of law); Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168, 172 (10th Cir. 1974) (dictum) (seldom, if ever, possible for judge to determine summarily when injured person became fully aware that he or she had been victimized).
502. 651 F.2d at 693 n.13 (recognizing that such cases "cannot be adequately explained as individual determinations of law, each on a question of first impression unique to the particular facts of the case").
503. Id.
504. Id.
505. Id. at 692-93.
506. It has long been settled that allowing the judge to grant summary judgment does not violate the seventh amendment. Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320-21 (1902). Accordingly, at least in the summary judgment context the right to jury trial need not circumscribe the court's power to decide fraudulent concealment issues on summary judgment. Beyond that, using an historical analysis confirms that the seventh amendment does not entitle a plaintiff seeking to toll the statute of limitations grounds when persuaded that the plaintiff's rights were violated, juries nevertheless have the capacity to decide tolling issues. Juries have indeed been willing to decide
against plaintiffs on limitations grounds. Moreover, courts may use interrogatories, special verdicts, or instructions to the jury to assure that it decides against the plaintiff if it finds that the plaintiff was not diligent. Thus, it seems that courts should continue to submit the diligence issue to the jury in cases that go to trial.

Perhaps a better explanation than the purely historical justification for deciding diligence issues on summary judgment is that the statute of limitations defense is different from other affirmative defenses and requires greater solicitude from the courts. Obviously defendants would argue that summary judgment should be used flexibly to decide any affirmative defense in order to vindicate their interests in advance of trial. In that context it is odd to contend that the statute of limitations, which does not go to the merits of the substantive claim, should be accorded greater importance than affirmative defenses that do go to the merits of the claim. Although it has been said that the limitations issue lends itself more readily to summary judgment than other affirmative defenses, the strictures of rule 56 of the Federal Rules of Civil Procedure still apply, and summary judgment may be granted only when there is no genuine dispute about any material fact. How, then, is limitations different from other defenses?

First, as suggested by the Manual for Complex Litigation, the early resolution of limitations often materially streamlines the litigation. If limitations is a complete bar to the claim, it ends the litigation. If limitations bars claims antedating a certain date, that determination may affect the necessity of discovery for that period. Although these points are legitimate, they are not very forceful because other defenses can likewise terminate or simplify litigation. Disposing of punitive damage claims, for example, may substantially affect the scope of the litigation, but that possibility does not mean that they should be resolved on summary judgment rather than after trial. Moreover, it will often be necessary to allow discovery before deciding the summary judgment motion. Administrative convenience for the courts, therefore, does not forcefully support treating limitations differently from other defenses.

Second, the limitations defense arguably is different from other defenses in that forcing defendants to trial on the merits in itself undermines the purpose of statutes of limitations even if the limitations defense is ultimately sustained. Under some circumstances, the extent to which trial on the merits may undercut policies behind certain defenses is relevant to a court’s decision to resolve such defenses on summary judgment. For example, one court has suggested that a defense to a defamation action based on the first amendment is more suitable to disposition on summary judgment because the simple prospect of trial, even assuming defendant’s ultimate success at trial, could chill

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508. See In re Corrugated Container Antitrust Litig., 659 F.2d 1322, 1325 n.2 (5th Cir. 1981) (civil jury in class action ruled against plaintiffs on fraudulent concealment issue), cert. denied, 102 S. Ct. 2283 (1982); Swietlovich v. County of Bucks, 610 F.2d 1157, 1161 (3d Cir. 1979) (jury found that police records fraudulently altered to “cover-up” negligent failure to prevent prisoner’s suicide, but that suit time-barred).


510. Id. § 2728, at 552.


512. Rule 56(f) of the Federal Rules of Civil Procedure directs the court to continue the motion or deny it when discovery is necessary. Fed. R. Civ. P. 56(f).

513. See supra notes 42-47 and accompanying text (discussing purposes of statutes of limitations).
free expression.514 A similar approach to limitations was adopted in *Ohio v. Peterson, Lowry, Rall, Barber & Ross.*515 There the court premised its flexible standard for deciding cases on summary judgment on the theory that requiring a trial in every case in which a jury was demanded would "effectively neutralize" the statute of limitations, and thereby impinge on the interests of the courts as well as defendants.516

Although the policy considerations behind statutes of limitations are hardly as compelling as the policies of the first amendment, they do serve to distinguish limitations from other defenses. Forcing the defendant to trial to vindicate his limitations defense substantially undermines the utility of the defense, which allows him to close his books on transactions after a certain time. Perhaps more significantly, requiring trials of such cases imposes on the courts the very problems of stale evidence that limitations is designed to avoid. How can the court protect a defendant against the prejudice caused by the passage of time? In view of the equitable origins of the tolling doctrine, which assume active involvement by the court in the decisionmaking, the actual flexibility in using the summary judgment procedure seems justified. Courts also should keep in mind, however, that there is no warrant for completely disregarding the requirements of rule 56.

C. BIFURCATION

When flexible use of summary judgment does not resolve the tolling issue prior to trial, the court might consider severing the tolling issue or bifurcating the trial to obtain a resolution on limitations first. This device may be particularly attractive in complex litigation.517 Rule 42(b) of the Federal Rules of Civil Procedure allows bifurcation "when separate trials will be conducive to

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Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement . . . .

In the First Amendment area, summary procedures are even more essential . . . . The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.


516. *Id.* at 694. The court reasoned:

Not only defendants but also courts have an interest in the timely commencement of actions. The adjudication process is hampered by stale evidence and absent witnesses; the burden on court calendars would instantly increase if actions now time-barred were revived by a new statute or tolling rule.

Any rule which makes the statute of limitations necessarily a jury question defeats the statute's purpose of preventing trials of stale claims.

517. *See* Contract Buyers' League v. F & F Investment, 300 F. Supp. 200, 219 (N.D. Ill. 1969), aff'd sub nom. Baker v. F & F Investment, 420 F.2d 1191 (7th Cir.), cert. denied, 400 U.S. 821 (1970). With respect to statutes of limitations, the court observed that "considering the scope of the present litigation and the consequent magnitude of the discovery to be undertaken, it is particularly desirable that there
expedition and economy." This rule has been used to sever the limitations issue in several cases, but usually only when each party has agreed to such treatment. In addition, courts may limit discovery to limitations issues and, thus, effectively bifurcate pretrial proceedings. Both plaintiffs and defendants may agree to bifurcation when they want to remove the uncertainty about limitations as soon as possible. When they agree on bifurcation, it is of substantial utility.

It is to be expected, however, that a plaintiff will often oppose severance for at least two reasons. First, in jury cases plaintiffs will be concerned that in a bifurcated trial they may lose the jury sympathy that might exist if they were able to present their full case of defendant’s alleged wrongdoing. Second, when evidence on the merits is admissible on the limitations issue, it is a proper subject of discovery and will have to be presented twice if plaintiff prevails on the limitations issue. Instead of achieving greater efficiency, such duplication wastes time and effort and undermines the purpose of severance.

Duplication in the presentation of evidence may be necessary to prove both the defendant’s affirmative acts of concealment and the plaintiff’s due diligence. In proving affirmative acts of concealment, plaintiffs may need to introduce evidence of the substantive wrong to show that it was part of a scheme to conceal the wrongdoing. For example, in an antitrust case the plaintiff based his fraudulent concealment claim on the defendant’s submission of prearranged losing bids as a device to give the illusion of competition and to camouflage a bid-rigging conspiracy. In such a case, the plaintiff would have to prove much of his substantive antitrust claim of conspiracy to support his tolling claim. In another case, the plaintiff based his fraudulent concealment claim on the defendant’s use of a “talk” and “no talk” list, which was designed to identify people with whom the price-fixing could safely be discussed. In that case the acts of concealment were inseparable from the substantive wrong itself. Even seemingly straightforward acts of concealment, such as destruction of evidence or alteration of accounting entries, can be understood only

be expeditious definition of the exact limits of the litigation in order to avoid unnecessary complexity and expense.” Id.


520. See Ingram Corp. v. J. Ray McDermott & Co., 495 F. Supp. 1321, 1334 (E.D. La. 1980). In refusing to sever the tolling claim from the substantive claim, the court reasoned:

In order to prove their lack of actual or constructive knowledge, plaintiffs will have to present a substantial amount of evidence relevant to their substantive claims. Indeed, it seems impossible to delineate any boundary between the evidence relevant to the knowledge issue and that relevant to the substantive claims. Thus, a separate trial, rather than saving time and effort, would probably require duplication of both.

Id.

521. See King & King Enter. v. Champlin Petroleum Co., 657 F.2d 1147, 1155 (10th Cir. 1981), cert. denied, 102 S. Ct. 1038 (1982).

522. See Robertson v. Seidman & Seidman, 609 F.2d 583, 587 n.5 (2d Cir. 1980).
against the background of the alleged wrongdoing. Without that frame of reference, their importance as concealment is difficult or impossible to assess.

Bifurcation presents less serious duplication problems in connection with proving due diligence, but may nevertheless be inappropriate. Although evidence concerning the defendant's acts may be less important when external events, such as the decline in the value of stock, put the plaintiff on notice of his claim, the due diligence inquiry usually comprehends all circumstances surrounding the transaction at issue. Also, when a plaintiff relies upon the defendant's concealment to excuse his failure to discover his claim despite "storm warnings," proof of the defendant's conduct again becomes important to the limitations issue.

As a consequence of these problems, it may be that bifurcation is useful principally in cases in which the tolling issue focuses on a relatively isolated event separate from the broad sweep of the plaintiff's claim. For example, in an antitrust case the plaintiff alleged that the defendants had conspired to drive the plaintiff out of business by filing frivolous patent infringement lawsuits against anyone who bought the plaintiff's product. The defendants won only one of these frivolous infringement suits, a victory they obtained by bribing a Third Circuit judge. The tolling question turned on the narrow issue of when the plaintiff should have learned of the bribery, and litigation of the underlying conspiracy issues was deferred by agreement of the parties pending resolution of the limitations defenses. When such isolated events may be extracted from the mosaic of facts, separate resolution of tolling issues is probably appropriate. In more complicated situations, however, bifurcation has limited utility.

CONCLUSION

It is inequitable to allow a defendant who has concealed his wrongdoing to hide behind limitations when his misdeeds are eventually discovered. The fraudulent concealment doctrine is thus necessary to add a human element to the application of limitations, but it introduces uncertainty into an otherwise arithmetic inquiry. This uncertainty has been compounded by the application of inconsistent rules to tolling, causing disparity of outcomes without furthering any legitimate interest. Because the doctrine is being invoked with increasing frequency in federal courts, the need to establish a consistent set of rules for tolling decisions has become particularly acute. This article has identified a number of principles that should promote consistency and has suggested the direction for future analysis.

Certain principles have emerged clearly. First, despite possible implications to the contrary in Johnson and Tomanio, tolling issues should be determined by federal principles, not state law, whenever a federal claim is involved. Second, proof of diligence should be required of all plaintiffs whether or not there has been active concealment. The notion that tolling runs until "actual discov-

524. Id. at 24.
525. Id. at 20-21.
ery” in certain cases should be rejected. Third, although diligence should be measured by an objective reasonable person standard, sophisticated plaintiffs should be held to a higher standard of expertise. Fourth, courts should encourage early resolution of diligence issues through flexible and appropriate use of summary judgment, but should be wary of attempting to decide such issues on the pleadings. Uniform acceptance of these principles would substantially reduce existing disparities in tolling decisions.

There is no magic formula that will make the fraudulent concealment doctrine function with arithmetic precision, however. It could be argued that the diligence standard itself should be revised to yield more consistent results. Although consistency is important, it seems impractical and undesirable to insist on consistency as an end in itself. No precise definition of diligence is possible and efforts to atomize the standard into subrules that can be applied mechanically are unwarranted. Accordingly, although courts should give some thought to uniformity in applying this standard, tinkering with the concept of diligence is unlikely to further the goals of uniform treatment. Ultimately the decisions are not so much inconsistent in theory as individual in application.

The tolling issue that requires further attention is the proper role of concealment. By its very name, the fraudulent concealment doctrine depends on concealment. The presence of concealment provided the initial justification for disregarding the policies of the statute of limitations in tolling cases. Recently, however, it seems that concealment has been demoted to the status of a factor in the diligence analysis. This development has resulted in part from the admittedly difficult problem of identifying the quantum of proof of a defendant’s misconduct needed to satisfy the concealment requirement. Nevertheless, to abandon concealment as an independent requirement undercuts the policies underlying the statute of limitations. Unless the plaintiff alleges something more against the defendant than the commission of the substantive wrong, the defendant should not be deprived of the protections of limitations and the courts should not be required to resolve ancient claims. It seems that some lower courts view this position as unduly draconian, and they accordingly relieve the plaintiff of the burden of proving concealment, but camouflage their reasoning behind such labels as “constructive fraud.” The debate about whether tolling should occur in the absence of concealment is thus largely unspoken, which hardly assists in reasoned analysis. In the future, courts should openly confront and resolve the tension between the policy of repose and the reluctance to bar diligent plaintiffs.

Unhappily, a careful review of the tolling decisions leaves unanswered this article’s initial question—whether the present trend toward more disparate results will continue. The trend should be avoidable, but it may be necessary that the stimulus for change come from the Supreme Court. Rather than providing guidance and direction, however, the Court has added to the confusion with its opinions in Johnson and Tomanio. Although the effect of those cases on the fraudulent concealment doctrine appears to have been unintentional, the Court has indicated no interest in deciding whether the federal fraudulent concealment doctrine should continue to be applied when limitations periods
are borrowed from a state.\textsuperscript{526} Indeed, last term the Court denied certiorari in a case that presented several issues this article discusses.\textsuperscript{527} Until the Supreme Court acts, it is likely that lower courts and litigants will confront conflicting applications of the fraudulent concealment doctrine, and disparity in the resolution of fraudulent concealment cases will continue.

\textsuperscript{526} The Court has, however, addressed tolling issues in another context. See \textit{G.D. Searle & Co. v. Cohn}, 102 S. Ct. 1137, 1143 (1982) (New Jersey statute tolling limitations period as against foreign corporation that has no officer on whom service may be made does not violate equal protection clause).

\textsuperscript{527} The Court denied certiorari in \textit{Ohio v. Peterson, Lowry, Rall, Barber & Ross}, 651 F.2d 440 (10th Cir.), \textit{cert. dened}, 454 U.S. 895 (1981). See supra notes 500-15 and accompanying text (discussing case). The petition to the Court presented the questions (1) whether summary judgment was appropriate for determination of tolling issues; (2) whether active concealment tolls the statutory period until actual discovery; and (3) whether \textit{Tomanio} requires application of state tolling principles to an action under § 10(b) of the Securities Exchange Act of 1934 when the limitations period was borrowed. See Petition for Writ of Certiorari, 454 U.S. 895 (1981). The Court also denied certiorari in \textit{Summer v. Land & Leisure, Inc.}, 664 F.2d 965 (5th Cir. 1981), \textit{cert. dened}, 102 S. Ct. 3485 (1982). Although the petitioner defendants asserted that the case raised important issues regarding application of the equitable tolling doctrine, a review of the Fifth Circuit's opinion demonstrates that the court simply decided that the issue of plaintiff's diligence could not be decided on a rule 12(b) motion. \textit{Id.} at 971. Thus, all issues were left open for later resolution.
In order to verify that the tolling doctrine of fraudulent concealment has been used more frequently in recent years, the author used LEXIS computerized research to determine the number of reported cases in which the doctrine was invoked during various time periods. The library used was General Federal Cases, and the file was Cases, which includes officially and unofficially reported federal cases. The initial search was "fraudulent w/5 concealment" and yielded 921 cases. A second level of search was added to improve the selection: "and statute w/5 limitations." The second level search yielded 540 cases, which formed the sample. Unavoidably, there are reported cases that are relevant but are not included among these 540 cases, and there are irrelevant cases that are included. Moreover, state law diversity cases are included, so these 540 cases are not limited to the cases involving the federal doctrine. Nevertheless, the appearance of more state law cases also indicates the growing popularity of the doctrine. An inspection of portions of the list indicates that it includes a substantial proportion of tolling cases and thus provides some measure of the frequency of assertion of fraudulent concealment.

The results of the LEXIS search confirm that the fraudulent concealment doctrine is being used with growing frequency:

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