

cited by the Court in a footnote, it was held that the ICC had the power to compel divestiture even though such was not expressly granted by the Interstate Commerce Act. "The justification for the remedy is the removal of the violation."²⁴

Consequently, the acts charged as antitrust violations are within the jurisdiction of the CAB and that agency can grant a complete remedy. Therefore, in accordance with the primary jurisdiction principle formulated above, the CAB has sole jurisdiction over the matter and the antitrust laws are to that extent superseded. The Court thus has followed the proper course of action in dismissing the antitrust suit.

It is a well known canon of construction that repeals by implication are not favored. Yet, when the circumstances are similar to those presented in *Pan American*, the courts should be willing to find that all but review jurisdiction has been ceded to the regulatory body. The two regimes of law would surely collide if after the CAB found that the practices of the parties were in the public interest, the courts could find that they were violations of the antitrust laws. Uniformity of regulation would thereby have suffered greatly. We have not yet reached the point where all actions involving regulated industries must be brought before a regulatory agency,²⁵ although some may view *Pan American* as a step in that direction. Illustrative is the statement of the attorneys for the reclusive Mr. Howard Hughes that "the CAB, rather than the courts, should settle disputes involving control of airlines."²⁶ Finally, although the Court attempted to limit its decision to the "narrow questions" presented in the case, it may have cast doubt upon the applicability of the antitrust laws to any situation involving airlines. If that be so, a more definitive statement of the inter-relationship of the antitrust laws and the Civil Aeronautics Act will be required in subsequent cases.

CHARLES BRADFORD ABBOTT

Antitrust—Clayton Act—Section 4B—Statute of Limitations—Doctrine of Fraudulent Concealment.—*Kansas City, Mo. v. Federal Pac. Elec. Co.*¹—In February 1962 the plaintiff brought two treble damage suits against the defendant electric companies under Section 4 of the Clayton Act.² The defendants were alleged to have been implicated in a conspiracy to fix the prices of certain items of electrical equipment. The plaintiff as-

²⁴ Id. at 130.

²⁵ It has been suggested that we may be approaching that point. See Schwartz, *supra* note 7, at 469-70.

²⁶ Newsweek, February 25, 1963, pp. 79-80.

¹ 310 F.2d 271 (8th Cir. 1962), petition for cert. filed, 31 U.S.L. Week 3283 (U.S. Feb. 28, 1963) (No. 881).

² 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958). Section 4 of the Clayton Act provides: Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

serted that the conspiracy had existed since 1948, but did not claim to have sustained any injury until 1954, when the defendants overcharged it for electrical equipment purchased in that year. The conspiracy was first discovered in 1960, when the federal government indicted the defendants for violation of Section 1 of the Sherman Act.³ In the district court the defendants made a motion to dismiss, claiming that a treble damage action was barred by the four year statute of limitations provided by Section 4B of the Clayton Act.⁴ The plaintiff contended that the operation of the statute of limitations was tolled by the defendants' fraudulent concealment of the cause of action,⁵ and that the statute had not begun to run until the cause of action was discovered in 1960. Defendants' motion was sustained by the district court. On appeal the Court of Appeals for the Eighth Circuit reversed. HELD: It was the intent of Congress when passing section 4B that the doctrine of fraudulent concealment should apply to toll the statute of limitations until the cause of action was discovered.

The present case is one of more than 1,700 electrical industry price-fixing cases now before the courts. Many of these involve the question presented in the principal case, and the outcome of these cases will largely depend on a definitive resolution of the problem. Since these cases for the first time present the question of tolling the federal statute of limitations as applied in antitrust cases, pressure is put on the courts to evolve a doctrine general enough to cover any antitrust conspiracy litigation, yet specific enough to handle any individual case. At present six cases involving the same issue have been decided by various district courts,⁶ and at least four other cases have been decided by circuit courts.⁷ In the aggregate the cases have pre-

³ 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958). Section 1 provides: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

⁴ 69 Stat. 283 (1955), 15 U.S.C. § 15b (1958). Section 4B provides: Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

⁵ The doctrine of fraudulent concealment was created as an exception to the running of the statute of limitations. It is to be distinguished from the recognized exception that where the cause of action is fraud there need be no active concealment of the fraud to toll the statute, the act of concealment being included in the offense of "fraud." However, in cases where the original cause of action is not fraud there must be an affirmative act by the wrongdoer to prevent the injured party from discovering the cause of action. See generally Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875 (1933).

⁶ Courts holding that fraudulent concealment tolls the statute: *United States & T.V.A. v. General Elec. Co.*, 209 F. Supp. 197 (E.D. Pa. 1962); *Public Serv. Co. v. Allen-Bradley Co.*, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70,549 (D. Colo. 1962); *Department of Water Works v. Allis-Chalmers Mfg. Co.*, Trade Reg. Rep. (1963 Trade Cas.) ¶ 70,651 (S.D. Cal. 1963); *City of Burlington, Vt. v. Westinghouse Elec. Corp.*, Trade Reg. Rep. (1963 Trade Cas.) ¶ 70,684 (D. D.C. 1963). Courts against tolling statute: *Brigham City Corp. v. General Elec. Co.*, 210 F. Supp. 574 (D. Utah 1962); *Public Serv. Co. v. A. B. Chance Co.*, 210 F. Supp. 1, (D. N.M. 1962).

⁷ Courts holding that fraudulent concealment tolls the statute: *Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 263 (2d Cir. 1962), petition for cert. filed, 31 U.S.L. week

sented numerous and varied arguments, but, as Judge Becker has candidly stated, "... in the present state of authorities, the question could honestly be decided either way."⁸

Prior to the enactment of section 4B the federal courts applied state statutes of limitations⁹ in treble damage antitrust cases. These statutes were not specifically designed to cope with antitrust litigation, and the decisions applying them are not in point since the courts are now required to use the federal statute of limitations embodied in section 4B. A general body of federal law has been developed, however, which pertains to statute of limitations questions and which has been utilized in antitrust cases. This doctrine causes the fraudulent concealment of a cause of action to toll the statute. *Bailey v. Glover*¹⁰ first announced this rule by applying it to the two-year statute of limitations under the Bankruptcy Act of 1867.¹¹

In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.¹²

The Court did not limit the rule to suits in equity, stating that it would also apply on the law side,¹³ and the doctrine was not restricted to cases where the original cause of action was fraud.¹⁴

While there is little dispute about the history of the doctrine since the *Bailey* case, the present controversy involves a decision as to whether Congress intended, by passage of section 4B, to overrule the application of the doctrine in conspiracy cases arising under the treble damage provisions of the Clayton Act.¹⁵ Thus, the present problem, as viewed by the courts, turns

3299 (U.S. March 8, 1963) (No. 912); *Allis-Chalmers Mfg. Co. v. Commonwealth Edison Co.*, Trade Reg. Rep. (1963 Trade Cas.) ¶ 70,724 (7th Cir. 1963); *Public Serv. Co. v. General Elec. Co.*, Trade Reg. Rep. (1963 Trade Cas.) ¶ 70,716 (10th Cir. 1963). Court holding that fraudulent concealment does not toll the statute: *Rinzler v. Westinghouse Corp.*, Trade Reg. Rep. (1963 Trade Cas.) ¶ 70,723 (5th Cir. 1963).

⁸ *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 210 F. Supp. 545, 549 (W.D. Mo. 1962).

⁹ *Moviecolor, Ltd. v. Eastman Kodak Co.*, 288 F.2d 80 (2d Cir. 1961), cert. denied, 368 U.S. 821 (1961); *Norman Tobacco & Candy Co. v. Gillette Safety Corp.*, 197 F. Supp. 333 (N.D. Ala. 1960).

¹⁰ 88 U.S. (21 Wall.) 342 (1874).

¹¹ 14 Stat. 518 (1867).

¹² *Supra* note 10, at 347.

¹³ *Id.* at 349.

¹⁴ See Dawson, *supra* note 5.

¹⁵ The culmination of the application of the doctrine occurred in *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946), the dispute there being based on whether fraudulent concealment tolled the New York statute of limitations as applied to Section 16 of the Federal Farm Loan Act, 39 Stat. 374 (1916), 12 U.S.C. § 812 (1958). Among other things, the Supreme Court, by way of dictum, held that the fraudulent concealment doctrine

... is read into every federal statute of limitation. If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under § 16, the time would not have begun to run until after petitioners had discovered, or had failed

upon congressional intent, a factor discussed in every case involving the construction of section 4B, and usually deemed the most crucial factor. An analysis of the legislative history of section 4B leads to the conclusion that excellent arguments could be marshalled for either position, and any holding based wholly on that history would seem to be tenuous. Early bills introduced in the House Committee on the Judiciary¹⁶ included a provision that the statute of limitations be tolled until the plaintiff discovers "*facts upon which he relies for proof of existence of the conspiracy. . .*"¹⁷ (Emphasis supplied.) The defendants (and several district courts) placed much emphasis on these prior bills and claimed that the refusal of Congress to include such provisions in section 4B was proof that Congress did not intend to include the fraudulent concealment doctrine. As the Court of Appeals for the Eighth Circuit points out, "discovery" is not necessarily synonymous with the doctrine of fraudulent concealment. The intent of the early bills was not to toll the statute until discovery of a cause of action that had been fraudulently concealed, but to toll the statute until discovery of sufficient facts, fraudulently concealed, to prove an already known cause of action.¹⁸ The explanation given on the floor of the House by Congressman Celler, chairman of the committee reporting the final bill, indicates that a difference between "discovery" and "fraudulent concealment" was recognized. In the now famous colloquy between Congressmen Celler and Patman¹⁹ it was specifically

in reasonable diligence to discover, the alleged deception. . . . It would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud when even a federal statute in the same terms would be given the mitigating construction required by that doctrine.

¹⁶ An example of one of the earliest bills is H.R. 7905, 81st Cong., 2d Sess. (1950), which provides:

Any action . . . to enforce any cause of action under this section may be commenced within six years after the cause of action accrued or, if the cause of action is based upon a conspiracy in violation of antitrust laws, after the plaintiff discovered (or, by the exercise of reasonable diligence, should have discovered) the facts relied upon for proof of the conspiracy; and every such action . . . shall be forever barred unless commenced within such six-year period.

¹⁷ *Id.*

¹⁸ That this was the purpose of the bill is shown by the fact that the person who sought introduction of this provision was George B. Burnham who had recently received an adverse judgment in a suit for treble damages under the antitrust laws. *Burnham Chemical Co. v. Borax Consolidated*, 170 F.2d 569 (9th Cir.), cert. denied, 336 U.S. 924 (1948). It was shown in that case that Burnham had known of the cause of action but was unable to get sufficient proof within the period of the statute of limitations and was therefore barred when he later felt he had sufficient proof. The introduction of the discovery provision in the bill was an attempt to get legislative authority to bring his suit again. See generally Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, 81st Cong., 2d Sess., ser. 14, pt. 5 (1950).

¹⁹ 101 Cong. Rec. 5129, 5130, 5132-33 (1955). At 5132-33 there is the following exchange:

Mr. Celler: . . . We provide that the 4-year statute shall start to run from the time of the accrual of damages, from the time the wrong was done, not from the time of discovery.

Mr. Patman: Even in the case of fraud or conspiracy?

Mr. Celler: No. In the case of fraud or conspiracy the statute of limitation only runs from the time of discovery.

stated that as to *all* cases of fraud and conspiracy arising under the private antitrust provisions the statute of limitations would be tolled; the statute would not be tolled unless the case involved fraud or conspiracy. The persistent questioning by Patman and the consistent answers of Celler seem to preclude a finding that Celler's statements were "rash, isolated opinions. . . . On the contrary, Mr. Celler's remarks are clarifying additions that reflect the careful diligence of a congressman who virtually lived with the problem during the course of several congressional sessions."²⁰

It would seem that the courts have spent too much time "searching for the will and intent" of Congress, however necessary it may be, and not enough time working out a reasonable standard for the application of the statute of limitations to conspiracy cases in the light of the purposes of the antitrust laws. The approach of the Eighth Circuit indicates that the legislative history should be viewed in the light of the self-evident proposition that a wrongdoer should not be free of liability simply because he is able to artfully cover up his wrongdoing until the statute of limitations bars the injured party from seeking relief. The court views the creation of a federal antitrust statute of limitations as an attempt to achieve a uniform period throughout the country, its purpose being to eliminate the problems raised by applying state statutes which vary from one to twenty years. In declaring a uniform period Congress did not mean to abrogate the exceptions to the statute of limitations which have been established by the federal courts. There is no doubt that conspiracies in restraint of trade are not in the public interest, and that allowing private parties to sue for treble damages discourages such conspiracies. To overrule the fraudulent concealment doctrine would defeat the desirable public policy of aiming double-barrelled action at antitrust violators.

In addition to the antitrust considerations, the purpose of the statutes of limitations must be considered. While they are basically designed to cut off remedial rights for injuries incurred in the distant past, the statutes are aimed at inaction, negligence or wrongful conduct on the part of the injured party. Statutes of limitations

. . . were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist.²¹

Where a statute of limitations is established to prevent fraud on the part of the injured party, it must not be so construed as to allow fraud on the part of the wrongdoer. The fraudulent concealment doctrine fills the possible loophole in the statute of limitations and balances the scales of justice by preventing a wrongdoer from using the statute to perpetrate fraud.

The legislative history of section 4B is used by those not in favor of tolling the statute to find that the purposes of antitrust treble damage laws will only be carried out if the fraudulent concealment doctrine is not applied. Claims that are allowed to be drawn out for a long period of time tend to get stale, and a uniform four year statute with the tolling provisions of a

²⁰ Supra note 1, at 280.

²¹ Bailey v. Glover, supra note 10, at 349.

fraudulent concealment doctrine could promote this tendency. To allow tolling might wipe out a statute of limitations in all cases of conspiracy, since the conspiracy might remain undiscovered for a long period of time.

Those who oppose tolling the statute seem to be most concerned with procedural problems in the use of the fraudulent concealment doctrine. Judge Christensen of the District Court of Utah points out several questions that would arise: "Assuming a conspiracy is established, would mere failure of the participants to disclose the conspiracy as a whole, or limited facts with reference to it, suspend the running of the statute?" "To what degree must concealment appear, and in what form, to amount to 'fraudulent concealment'." [Sic] How will we instruct the jury; what standards for our decisions?"²² To Judge Christensen these are obstacles which are insurmountable.

Another objection is that one of the essential purposes of the antitrust laws, diligence in bringing to light antitrust violations, could be better served by requiring all actions to be brought within four years. This limited time would compel private parties to be more cautious in their business dealings and to be on constant guard against injurious conspiracies. To allow tolling might put a premium on laxity.

While the legislative history could be used to argue against tolling the statute of limitations in conspiracy cases, it could also infer that the statute should be tolled in *all* conspiracies, as suggested by Congressman Celler.²³ The latter situation presents difficulties for the court in *Kansas City* in promulgating a general rule for the application of the fraudulent concealment doctrine to conspiracy cases. The court does not go beyond the facts and particular allegations of this case, where there is a clear showing of affirmative acts of concealment by the electrical companies. Here the court is following clear precedent,²⁴ but the "self-secreting" conspiratorial compact would evade the doctrine of fraudulent concealment as presented in *Kansas City* because there could be no showing of affirmative conduct in concealing the conspiracy. These conspiracies

... may be the ones in practice that prove most effective, predatory, far reaching and damaging. ... Will we then let suits for relief from the more subtle and effective conspiracies be barred at the end of four years and keep claims as to others alive for ten, twenty, or thirty years or until the victims are demonstrably aware of the conspiracy?²⁵

Thus, there is the implication that a self-concealing conspiracy would not be subject to the doctrine. Congressman Celler supported his explanation of section 4B—that cases of fraud or conspiracy would toll the statute until the cause of action was discovered—with past case law.²⁶ These cases, however,

²² *Brigham City Corp. v. General Elec. Co.*, 210 F. Supp. 574, 577, 578 (D. Utah 1962).

²³ See text accompanying note 19, *supra*.

²⁴ *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 (9th Cir. 1936), cert. denied, 299 U.S. 613 (1937).

²⁵ *Brigham City Corp. v. General Elec. Co.*, *supra* note 22, at 577-78.

²⁶ *Supra* note 19, at 5130. "The basis of my conclusion in that regard is the cases themselves. There are innumerable cases on that score."

did not apply the fraudulent concealment doctrine unless there was evidence of affirmative acts of concealment. The court in *Kansas City* strongly emphasizes the existence of such conduct in the presentation of the facts of the case,²⁷ in discussing the doctrine,²⁸ and in its summary.²⁹ Therefore, it is questionable whether, absent the showing of affirmative acts of concealment, the statute of limitations will be tolled.³⁰

It might be suggested that it is easy to avoid the whole problem by laying down a flat rule that since Congress has shown no express intent to the contrary, section 4B should be construed strictly, and all actions will be barred if not brought within four years. This rule would not provide justice in a situation such as the present case, where the largest companies in the industry wilfully and blatantly flout the law and then seek to establish a construction of the statute which will allow them to avoid liability to the private parties they have injured. Again, to apply the fraudulent concealment doctrine in those situations where the antitrust laws may be vague or rapidly changing would be a hard rule. As one letter to the 1951 committee hearings stated:

Where learned judges can have such divergent views as to when civil liabilities accrue for antitrust law violations, it is evident that the businessman, even if he can afford the best legal advice available, must often continue to be uncertain as to whether he is on the wrong side of the law.³¹

Thus, although the courts may be willing to infer a congressional intent to have fraudulent concealment toll the statute of limitations in cases where the doctrine would not operate harshly, they might not do so if the case did not involve wilful conduct, or was less widespread in its effects, or involved a conspiracy which was self-concealing by nature.

To offset the all-inclusiveness of the doctrine of fraudulent concealment, the rules used by the Eighth Circuit seem reasonable. In the case of *Foster & Kleiser Co. v. Special Site Sign Co.*,³² where the original cause of action was a conspiracy to monopolize, the court stated that

. . . when fraud is not the gravamen of the action, in order to toll

²⁷ Supra note 1, at 272.

²⁸ Id. at 278.

²⁹ Id. at 284.

³⁰ That the fraudulent concealment doctrine would apply only in cases where the injured party could allege and prove affirmative acts of concealment is forcefully put forward by the court in *City of Burlington, Vt. v. Westinghouse Elec. Corp.*, supra note 6.

³¹ Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, 83d Cong., 1st Sess., ser. 1, pt. 3, at 30 (1951). It had been earlier stated, at 29:

From the standpoint of sound jurisprudence, no one can quarrel with the principle of providing a uniform statute of limitations applicable to damage suits under the antitrust laws. But the period should be short enough to provide some protection against the institution of suits based on new or changed construction and application of these laws. The history of antitrust law development suggests that even within a 3-year period, wholly new concepts may be established as to the legality of long-followed business practices.

³² Supra note 24.

the applicable statute of limitations, two factors must be present: (1) Fraudulent concealment; (2) nondiscovery, that is, absence of facts that would put a party upon notice of the cause of action. Mere ignorance of the injury complained of, or of the facts constituting such injury, will not prevent the running of the statute.³³

The plaintiff would be required to allege fraudulent concealment in the pleadings and "must prove both affirmative acts of concealment on the part of defendant and reasonable grounds for his own failure to penetrate the deception."³⁴ This basic procedure plus additional equitable rules on both sides should result in a workable standard. In no event should a result be reached whereby the wrongdoer is made secure from liability by fraudulently concealing the cause of action. It is obvious that many companies seem to think they have found a "loophole" in section 4B. This "loophole" has been filled by the federal courts in previous cases,³⁵ and the present litigation does not reveal any compelling reasons which prevent the application of the fraudulent concealment doctrine to this supposed gap in the law. On the other hand, there remains a possible gap in the law which, as previously stated, appears not to be covered by *Kansas City*. In the self-concealing conspiracy there may be no affirmative conduct by the wrongdoer, in which case the exception to the running of the statute may not be applied. Whether this gap will be closed is left to future case law.

EDWARD BOGRAD

Bankruptcy—Chapter XIII—Confirmation of Extension Plan within Six Years of Previous Plan.—*In re Holmes*.¹—In a Chapter XIII proceeding the debtor sought confirmation of an extension plan which would give him more time to repay his debts. The district court affirmed an order of the Referee in Bankruptcy dismissing the debtor's petition on the ground that section 14c(5) of Chapter III² taken together with section 656a(3) of Chapter XIII³ operated as a bar to confirmation of an extension plan where

³³ Id. at 752.

³⁴ Wiprud, Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles, 57 Nw. U.L. Rev. 29, 50 (1962).

³⁵ *Bailey v. Glover*, supra note 10, and cases cited, supra note 9.

¹ 309 F.2d 748 (10th Cir. 1962).

² Bankruptcy Act § 14c, 52 Stat. 850 (1938), as amended, 11 U.S.C. § 32c (1958) provides:

The court shall grant the discharge unless satisfied that the bankrupt has—

... (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy ... been granted a discharge, or had a composition or an arrangement by way of composition or a wage earners' plan by way of a composition confirmed under this title ...

³ Bankruptcy Act § 656a, 52 Stat. 935 (1938), 11 U.S.C. § 1056a (1958) provides: The Court shall confirm a plan if satisfied that—

... (4) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt ...