Defenses to the Statute of Limitations in Federal Securities Cases: The Fraudulent Concealment Doctrine and the Investment Decisions Doctrine

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NOTES

DEFENSES TO THE STATUTE OF LIMITATIONS IN FEDERAL SECURITIES CASES: THE FRAUDULENT CONCEALMENT DOCTRINE AND THE INVESTMENT DECISION DOCTRINE

I. INTRODUCTION

Statutes of limitations restrict the time during which a suit may be initiated on a cause of action.1 After the time period lapses, the cause of action becomes unenforceable.2 Thus, a plaintiff who sits on his rights until the limitations period runs is left without a remedy and the wrongdoer escapes liability. Although this may seem unfair, "[b]arring stale claims promotes justice and fairness and diminishes the risk of perjury and fraud."3

Statutes of limitations accomplish several purposes. They encourage potential plaintiffs to bring suit promptly4 and, in turn, protect potential defendants by barring claims that "have been allowed to slumber until evidence has been lost, memories faded, and witnesses disappeared."5 They also give notice to po-

1. BLACK'S LAW DICTIONARY 835 (5th ed. 1979).
4. Wood v. Carpenter, 101 U.S. 135 (1879) (statutes of limitations stimulate activity and punish delay); NLRB v. California School of Professional Psychology, 583 F.2d 1099, 1101 (9th Cir. 1978) (statutes of limitations are designed to encourage parties to file suit promptly); see also Special Project, supra note 3, at 1017 n.22.
tential defendants of the duration of exposure to liability and limit the amount of litigation in an already overloaded court system. Therefore, although sometimes creating an inequitable situation, "the certainty of the fixed time periods clearly serves the interest of everyone, for even plaintiffs benefit from a sure knowledge of the time after which a suit would be futile." As the Supreme Court noted in Wood v. Carpenter:

Statutes of limitation are vital to the welfare of society and are favored in 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 [sic] and they 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 time proscribed, is itself a conclusive bar.

To further these strong policies, statutes of limitations consistently bar claims when a plaintiff unjustifiably commences his action late. Sometimes, however, circumstances beyond a plaintiff's control prevent him from bringing suit within the applicable limitations period. The Supreme Court has stated that "most courts and legislatures have recognized that there are factual circumstances which justify an exception to these strong policies of repose. . . . These exceptions to the statute of limitations are generally referred to as 'tolling' and . . . are an integral

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(quoted in American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974); see also Gee v. CBS Inc., 471 F. Supp. 600, aff'd, 612 F.2d 572 (5th Cir. 1979) (suit for alleged racial discrimination occurring between 1923 and 1933 against singer Bessie Smith was time-barred because most of the people involved were dead).

6. United States v. Western Pac. R.R., 352 U.S. 59, 72 (1956) ("purpose of [statutes of limitations] is to keep stale litigation out of the courts").

7. Developments in the Law—Statutes of Limitations, 63 Harv. L. Rev. 1177, 1186 (1950); see also Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1980) ("Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.").


9. Id. at 139.

part of a complete limitations policy.""¹¹ Tolling doctrines embody an overriding policy decision that a plaintiff should have every reasonable opportunity to assert his claims.¹² Thus, the "policy of repose, designed to protect defendants, is frequently outweighed ... where the interests of justice require vindication of the plaintiff's rights."¹³ Tolling occurs when the plaintiff is incompetent, incarcerated, or of unsound mind; when the plaintiff cannot obtain personal jurisdiction over the defendant; or pending the administration of a decedent's estate.¹⁴ Tolling also may occur in other situations in which the defendant's ability to bring a suit is impaired. For example, the limitations period is tolled during the pendency of a class action or when a defendant fraudulently conceals the plaintiff's cause of action.¹⁵

Tolling doctrines normally suspend, rather than extend, the statute of limitations during the pendency of the event in question. Therefore, once the barrier to the suit no longer exists, the plaintiff will still be allowed whatever time remains under the applicable limitations period.¹⁶

This Note begins by discussing the relationship between federal and state law with respect to tolling the statute of limitations on federal claims which lack an express limitations period. This Note then analyzes the primary defense for tolling the statute of limitations in securities fraud cases: the doctrine of fraudulent concealment. It also analyzes the investment decision doctrine, a defense based upon the concept of a continuing sale which postpones the date upon which the limitations period accures. Finally, this Note explores the relationship between these two defenses. This Note will focus on securities fraud cases—primarily claims under Securities and Exchange Commission (SEC) rule 10b-5¹⁷ and the Racketeer Influenced and Cor-

¹². Special Project, supra note 3, at 1085.
¹⁴. Special Project, supra note 3, at 1084-85 n.342.
¹⁷. 17 C.F.R. § 240.10b-5 (1986)
rupt Organizations Act (RICO). Nevertheless, the use of these limitations defenses is certainly not restricted to these causes of action.

II. Federal Causes of Action and State Limitations Periods

Section 10(b) of the Securities Exchange Act of 1934 and SEC rule 10b-5 prohibit fraudulent and deceptive behavior in connection with the purchase or sale of any security. Although neither the statute nor the rule expressly grants a private cause of action to an injured person, every court to consider the question has implied a private right of action:

The elements necessary to prove a Section 10(b) claim have been so often applied by the lower federal courts that they can be stated in black letter fashion. To make out a claim under Section 10(b), which is based on the common law action of deceit, the plaintiff must establish: (1) a misstatement or an omission; (2) of material fact; (3) made with scienter; (4) on which the plaintiff relied; and (5) that proximately caused his injury.

RICO is intended to protect businesses from enterprises operated through illegal "predicate" acts. These predicate acts range from commercial fraud to traditional crimes like murder and arson, but the two broadest of these acts are wire fraud and mail fraud. RICO does not prohibit the predicate acts themselves, as each is a violation of some other statute. Rather, a civil RICO cause of action is based on a pattern of racketeering activity resulting from occurrence of at least two of the predicate

21. See Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 9 n.9 (1971) ("It is now established that a private right of action is implied under section 10(b)."). Banker's Life affirmed the implied rights of civil recovery first recognized in Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946), and widely accepted by the lower courts for over twenty years.
acts.25 A successful RICO plaintiff can recover treble damages, costs, and attorney’s fees.26

In Sedima, S.P.R.L. v. Imrex Co.27 the Supreme Court cautioned that a "pattern" of racketeering activity will require more than two isolated acts. The Court also noted, however, that "RICO is to be read broadly. This is the lesson not only of Congress’ self-consciously expansive language and overall approach, . . . but also of its express admonition that RICO is to ‘be liberally construed to effectuate its remedial purposes.’”28 Therefore, in Sedima the Court rejected two major barriers to civil RICO claims. First, the Court held that the existence of a prior criminal conviction is not required to prove predicate acts.29 Second, the Court suggested that the predicate acts need not be proven beyond a reasonable doubt, but rather by the lesser standard of preponderance of the evidence.30 The Supreme Court’s decision in Sedima indicates that RICO clearly reaches normal business fraud. Thus, it should end speculation and disagreement among the circuits over whether RICO’s treble damages were intended to reach “garden variety” fraud.31

There is presently no express statute of limitations applicable to claims under rule 10b-5 or RICO.32 Because of the important policies underlying limitations periods,33 however, federal courts imply an applicable time period within which to allow an action under these liability provisions. Generally, a federal court will adopt the forum state’s34 limitations period that best effectuates the policy underlying the cause of action.35 This limita-

25. Id. at 746.
28. Id. at 3286.
29. Id. at 3284-86.
30. Id. at 3282-83.
32. The Supreme Court has recently granted certiorari, however, to determine whether each state must select the one most appropriate limitations period for all civil RICO claims. See Agency Holding Co. v. Malley-Duff & Assocs., 107 S. Ct. 569 (1986).
33. See Board of Regents v. Tomanio, 446 U.S. 478 (1980); Movie Color Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir. 1961).
34. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n.29 (1976).
35. See Wilson v. Garcia, 471 U.S. 261, 271 (1985) (“By adopting the statute governing an analogous cause of action under state law, federal law incorporates the State’s judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action.”); Hudak v. Economic Re-
tions period is generally that which is applicable to the most analogous cause of action in the forum state. For a rule 10b-5 action, therefore, federal courts most often choose between the forum state's common-law fraud limitations period and that state's blue sky limitations period.

In RICO actions, most courts determine the appropriate limitations period by focusing on the particular predicate acts alleged rather than on RICO itself. For example, in Burns v. Ersek, which involved a civil RICO action alleging predicate acts of mail and securities fraud, a Minnesota district court concluded that securities fraud was the predicate act. It thus applied Minnesota's three-year statute of limitations for securities fraud cases and specifically rejected the six-year statute applicable to common-law fraud.

This "particularist approach" creates certain problems in application. If different types of predicate offenses are alleged,


36. See Cahill v. Ernst & Ernst, 625 F.2d 151, 153 (7th Cir. 1980).


38. Silverberg v. Thomson McKinnon Sec., Inc., 787 F.2d 1079, 1083 (6th Cir. 1986) ("The federal RICO statute is not such a 'uniquely federal remedy' as [a civil rights section 1983 action] and we hold that, as with most federal causes of action without incorporated periods of limitations, the selection of the applicable state limitations period in the individual case should be made on the basis of a characterization of the kind of factual circumstances and legal theories presented. ... In rejecting generic characterizations, we note that Congress specifically considered and rejected the enactment of a limitations period for civil RICO actions, thus declining to adopt a uniform limitations period for all RICO claims."). Nevertheless, this case-by-case approach may be precluded by the Supreme Court's recent decision in Wilson v. Garcia, 471 U.S. 26 (1985), in which the Court held that a state's general limitations period for personal injury actions governed all claims brought under 42 U.S.C § 1983 (1982). In Malley-Duff & Assocs. v. Crown Ins. Co., 792 F.2d 341 (3d Cir. 1986), the Third Circuit cited Wilson in holding "that in borrowing state limitations periods for civil RICO claims courts must select, in each state, the one most appropriate statute of limitations for all civil RICO claims." Id. at 349 (emphasis in original); see also Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1014-15 n.4 (11th Cir. 1986). The Third Circuit's opinion in Malley-Duff noted that RICO's "effectiveness can be substantially thwarted by uncertainty, with the concommitant [sic] dissipation of legal resources." 792 F.2d at 349. The Supreme Court has granted certiorari in this case to consider the question of how courts should choose limitations periods for civil RICO claims. Agency Holding Co. v. Malley-Duff & Assocs., 107 S. Ct. 569 (1988).


40. Id. at 845.
there may exist different analogous state statutes of limitations, thus forcing a separate analysis for each offense.41 Further, because of the wide variety of federal offenses and the disparity of circumstances in each claim,42 courts must constantly reanalyze the analogous state limitations period.43 Consequently, many courts and commentators would prefer that Congress adopt a uniform statute of limitations applicable to all RICO claims.

Although state law determines which limitations period applies to these federal causes of action, federal law determines when the statutory period runs and when it is suspended.44 As a general rule, a claim accrues when an injury occurs and is barred after the limitations period lapses.45 In certain situations, however, federal law dictates that the state limitations period should be tolled. If there is no comparable state tolling rule in these cases, the federal and state policies directly conflict.

In Johnson v. Railway Express Agency46 the Supreme Court held that although the federal policy controls, state law is the federal courts' "primary guide" in determining tolling questions.47 A federal court must adopt state law concerning "the overtones and details of application of the state limitations pe-


42. Kronfield, 638 F. Supp. at 1476.


45. Tolling suspends or temporarily stops the running of a limitations period. Accrual, however, occurs when a plaintiff acquires a legal right to sue. Tolling differs from accrual in that tolling doctrines presuppose the plaintiff's right to sue, but postpone the actual running of the statutory period. As a practical matter, the effects of accrual and tolling are often identical. In fraudulent concealment cases, "[t]he distinction between the labels 'accrual' and 'tolling' is tenuous at best, and hardly justifies different results." Marcus, Fraudulent Concealment in a Federal Court: Toward a More Disparate Standard, 71 Geo. L.J. 829, 846 nn.120 & 121 (1983).


47. Id. at 465.
period to the federal cause of action," and should apply uniform federal tolling rules only when "application [of state law] would be inconsistent with the federal policy underlying the cause of action under consideration." In Johnson the Court deemed that there was no federal policy that would toll a section 1981 civil rights claim during the pendency of a Title VII employment discrimination proceeding before the Equal Employment Opportunity Commission. Therefore, the Court held that state law governed the plaintiff's action.

In 1980 the Supreme Court reiterated Johnson's approach in Board of Regents v. Tomanio. The Court noted that state law should apply in civil rights actions when federal law is "not adapted to the object." Since the pertinent state law did not authorize tolling during the pendency of related but independent state court litigation between the parties, the Court ruled that a federal court could not invent a tolling doctrine to apply under these circumstances.

Several courts and commentators have questioned whether Johnson and Tomanio require application of state tolling rules to claims under federal statutes, including section 10(b) of the Securities Exchange Act. If state tolling rules applied, application of doctrines such as fraudulent concealment would depend upon whether the state in which the plaintiff filed suit recognized these doctrines. Thus, adopting this interpretation of Johnson and Tomanio would encourage forum shopping. By their own terms, however, Johnson and Tomanio do not apply when established federal procedural doctrines are available.

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48. Id. at 464.
49. Id. at 465.
50. Id. at 467.
52. Id. at 484 n.5 (citing 42 U.S.C. § 1983 (1982)).
53. Id. at 491-92. In Chardon v. Fumero Soto, 462 U.S. 650, 661-62 (1983), the court applied state tolling rules to another federal civil rights action, again noting that there was no controlling federal rule. See generally Note, supra note 16. On the other hand, when a state statute provides more protection for a plaintiff than a federal tolling rule, the federal rule does not apply to restrict the plaintiff's rights. McConnell v. Frank Howard Allen & Co., 574 F. Supp. 781, 787 (N.D. Cal. 1983); Cahill v. Ernst & Ernst, 443 F. Supp. 84 (E.D. Wis. 1978).
54. See Marcus, supra note 45, at 834-35.
55. Id.
56. Id.
57. Id. at 848.
Therefore, the better view indicates that these cases did not intend to abandon established federal tolling doctrines.\(^{58}\)

Another conflict between state and federal law arises in determining when a case commences. Commencement describes the activity that permanently tolls the statute of limitations.\(^{59}\) Under the federal rules a civil action commences when a plaintiff files a complaint with the court.\(^{60}\) State rules vary, however. In Oklahoma, for example, if a plaintiff does not serve process on the defendant within sixty days after filing a complaint, commencement is deemed to occur when the defendant is finally served.\(^{61}\) In *Walker v. Armco Steel Corp.*\(^{62}\) the Supreme Court held that this state rule, rather than the federal rule, defines commencement of a diversity suit for the purposes of tolling the state statute of limitations.\(^{63}\) Although *Walker* dealt with a state-created right,\(^{64}\) at least one commentator has concluded that the case "casts doubt on the continued application of rule 3 to toll statutes of limitations in actions to enforce federally created rights [since] [t]he *Walker* Court expressly reserved the question of the role of rule 3 in actions based on federal law."\(^{65}\)

### III. FRAUDULENT CONCEALMENT

The most common reason for tolling the statute of limitations in federal securities cases is fraudulent concealment. Also known as the equitable tolling doctrine, this defense recognizes that when a defendant's wrongful conduct conceals a plaintiff's cause of action, the defendant should not be allowed to assert

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58. For example, in Kronfield v. First Jersey Nat'l Bank, 638 F. Supp. 1454, 1474 (D.N.J. 1986), the federal tolling doctrine of fraudulent concealment applied even though the state statute of limitations provided for a fixed date of commencement of the limitations period.


63. *Id.* at 752.

64. *Id.* at 753.

the statute of limitations to bar the plaintiff’s claim.\textsuperscript{66} The doctrine, based on the general principle that a party should not be allowed to benefit from his own wrongdoing, originally consisted of two elements: Concealment by the defendant and due diligence by the plaintiff.\textsuperscript{67} As stated by the Supreme Court in \textit{Wood v. Carpenter},\textsuperscript{68} “Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself.”\textsuperscript{69}

The seminal Supreme Court case enunciating the fraudulent concealment tolling doctrine is \textit{Bailey v. Glover},\textsuperscript{70} in which the Court held:

When there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a nature as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing.\textsuperscript{71}

In \textit{Bailey} the defendant allegedly transferred property to his relatives and then declared bankruptcy to avoid a judgment against himself.\textsuperscript{72} After the Federal Bankruptcy Act’s statute of limitations lapsed, the plaintiff sued to set aside these conveyances. Although the suit was late, it was permitted because the Court recognized the injustice of barring a claim which the defendant had concealed until the statutory period lapsed.\textsuperscript{73} The Court stated that “though there be no special circumstances or

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\item \textsuperscript{67} Wood v. Carpenter, 101 U.S. 135 (1879); Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874). “Read together, Wood and Bailey establish first, that equitable tolling has two elements, (successful) concealment by defendant and diligence by plaintiff, and second, that a defendant who contrives to commit a wrong in such a manner as to conceal the very existence of a cause of action, and who misleads plaintiff in the course of committing the wrong, may be found to have concealed the wrong.” Hobson v. Wilson, 737 F.2d 1, 33 (D.C. Cir. 1984).
\item \textsuperscript{68} 101 U.S. 135 (1879).
\item \textsuperscript{69} \textit{Id.} at 143.
\item \textsuperscript{70} 88 U.S. (21 Wall.) 342 (1874).
\item \textsuperscript{71} \textit{Id.} at 349-50.
\item \textsuperscript{72} \textit{Id.} at 342-43.
\item \textsuperscript{73} \textit{Id.} at 343.
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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 fault or want of diligence or care on his part."

For the next forty years the Court applied this equitable tolling doctrine to all congressionally set limitations periods,76 and in 1946 it extended the doctrine to actions based on federal statutes which lacked specific limitations periods.77 The Court read the fraudulent concealment doctrine into every limitations period for federal claims in order to prevent the incongruous result of leaving a federal claim to "the bare terms of a State statute of limitations."78

Fifteen years later, in a leading case by the Second Circuit, Judge Friendly concluded that the fraudulent concealment doctrine should apply not only to claims in equity, but also to claims at law, because "there is no reason for borrowing a state doctrine when there is an established federal one."79 Judge Friendly refused to draw distinctions between actions "at law" and "in equity" because of the potential for inconsistent results.80 Thus, the fraudulent concealment doctrine now applies to all federally created causes of action, regardless of whether the right borrows a state limitations period, or whether it is an action "at law" rather than "in equity."81

74. Id. at 348.
75. Id.
76. See generally Marcus, supra note 45, at 841.
77. Holmberg v. Albrecht, 327 U.S. 392, 395-97 (1946) ("This equitable doctrine is read into every federal statute of limitations."). But see Walck v. American Stock Exch., 687 F.2d 778, 792 (3d Cir. 1982). Walck asserts that this statement in Holmberg was dictum, and "[t]he correct standard is stated in American Pipe & Construction Co. v. Utah, 404 U.S. 538, 557-58 (1974) (parallel citation omitted): 'whether tolling the limitation in a given context is consonant with the legislative scheme.' " Id. Walck refused to toll a claim brought under § 9(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(a)(1982) because § 9(e) of the Act, id. § 78l(e), provided an absolute limitations period. See infra subpart III.C.
78. Holmberg, 327 U.S. at 395-97.
80. Id. at 84.
81. See Holmberg, 327 U.S. at 397; Trecker v. Scag, 697 F.2d 703, 706-07 (7th Cir. 1982).
A. Elements

Although the Court originally described two elements of fraudulent concealment—concealment by the defendant and due diligence by the plaintiff—many courts today require the plaintiff to plead and prove an additional element to toll the statute of limitations—the plaintiff’s failure to discover the wrongful actions within the statutory period. This last element does not appear to present many problems to either courts or parties. However, the first two elements have generated a great deal of discussion, confusion, and disagreement.

1. Concealment

There is considerable uncertainty today about whether both concealment and due diligence are necessary to prove fraudulent concealment. At least one commentator has concluded that courts no longer consider concealment; due diligence is really the only criteria examined. This commentator states that even when courts claim to reject tolling because the defendant’s only concealment is “mere silence,” the courts actually “pay substantial attention to whether the plaintiff was diligent.” This indicates that due diligence is the key ingredient.

As further evidence of the erosion of the concealment element, a number of courts apply the equitable tolling doctrine even when the alleged wrong is inherently difficult to discover and the defendant has done nothing affirmative to conceal his actions. Although this treatment suggests that these courts do

83. “When defendants volunteer an innocent and false explanation for their conduct, it is easy to find that independent acts of concealment [sic] have occurred. . . . 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. . . . 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. . . . 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.” Marcus, supra note 45, at 861.
84. Id.
85. See Tomera v. Galt, 511 F.2d 504 (7th Cir. 1975); see also infra notes 97-116 and
not require concealment, no court has yet to admit to totally disregarding the concealment prong of the doctrine. 88 Rather, most of the cases address "self-concealed" wrongs; though the defendant does not do anything affirmative to conceal his actions, by their very nature the wrongs are unknowable. 87

Whether affirmative or accidental, however, not every act of concealment will toll the statute of limitations. A critical element or defense necessary to successfully maintain the particular cause of action must be concealed. The concealment need not be merely the fact of injury or identity of the inflictor. 88 For example, the concealment may be of "facts that would prevent a plaintiff from overcoming a seemingly ironclad defense." 89

Several courts have recently wrestled with the distinction between tolling the limitations period when there is a self-concealed wrong and tolling despite the lack of any concealment by the defendant. In Hobson v. Wilson 90 the Court of Appeals for the District of Columbia completed, as part of a sixty-two page opinion, an extensive survey of the fraudulent concealment doctrine. The court stated that:

[B]efore a defendant's "exposure to liability is given a potentially infinite duration, there [is] some minimum of culpability—if not affirmative concealment, then at least the construction of a scheme which by its very nature is unknowable."

... Bearing in mind Wood's requirement of "some trick or contrivance intended to exclude suspicion," we conclude that defendants must engage in some misleading, deceptive or otherwise contrived action or scheme, in the course of commit-

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accompanying text.

86. See Bethlehem Steel Corp. v. Fischback & Moore, Inc., 641 F. Supp. 271, 275-76 (E.D. Pa. 1988) ("[D]ue diligence is not sufficient to establish the defense of fraudulent concealment. However, the essence of my holding here is that defendants wrongfully or fraudulently concealed their conduct either through affirmative acts or by successfully executing a conspiracy which by its very nature is self-concealing.").

87. See Tomera v. Galt, 511 F.2d 504 (7th Cir. 1975).


89. Id. at 249-50 n.57 ("Lest our view be misconstrued, we would stress that the statute of limitations is not tolled whenever a defendant has concealed facts material to any legal issue of significance in a case. We do not provide for tolling simply because a plaintiff's ability to mount a successful case has been impaired in some degree. Instead, we provide for tolling only when concealment has so impaired the plaintiff's case that he is not able to survive a threshold motion to dismiss for failure to tender a claim that would advance beyond the pleading stage.") (emphasis in original).

90. 737 F.2d 1 (D.C. Cir. 1984).
ting the wrong, that is designed to mask the existence of a cause of action. The deception may be as simple as a single lie or as complex as that which we confront here, so long as the defendants conceal "not only their involvement, but the very conduct itself."\(^91\)

In contrast, in \textit{Bethlehem Steel Corp. v. Fischback \& Moore, Inc.}\(^92\) the Eastern District Court of Pennsylvania concluded that a self-concealing conspiracy can substitute for affirmative conduct by the defendant in order to satisfy the requirement of wrongful concealment.\(^93\) The court stated, "If the conspiracy conceals itself, it would be anomalous to require plaintiff to allege affirmative acts by defendants to conceal the conspiracy because such acts would be unnecessary and therefore never performed."\(^94\)

The \textit{Bethlehem} court, however, concluded that due diligence alone would not be sufficient to establish the defense of fraudulent concealment; something more is required.\(^95\) Thus, the court recognized that situations occur in which reasonably diligent plaintiffs will fail to discover wrongs that are not affirmatively or self-concealed, and in these cases fraudulent concealment should not apply,\(^96\) although it is not clear that such cases actually exist. It seems that a reasonably diligent plaintiff should be able to discover a wrong that is neither affirmatively nor self-concealed. Perhaps the explanation lies in the emphasis given to the term "due diligence." A truly diligent plaintiff would discover the wrong. Whether a reasonably diligent plaintiff would discover the wrong depends upon what conduct the court considers "reasonable." Another approach to this aspect of the fraudulent concealment doctrine is to assume that when there is no affirmative or self-concealment, a reasonably diligent plaintiff by definition will discover the wrong. If the wrong is neither concealed nor discovered, the plaintiff cannot be reasonably diligent. This approach would not be a change in the law—it would simply eliminate opportunities for courts to create

\(^91\) \textit{Id.} at 34-35 (emphasis omitted) (citations omitted) (footnote omitted).
\(^93\) \textit{Id.} at 275.
\(^94\) \textit{Id.} at 274.
\(^95\) \textit{Id.}.
\(^96\) \textit{Id.}.
ambiguous distinctions between cases.

At any rate, by allowing a plaintiff to assert the fraudulent concealment doctrine to toll the statute of limitations when the defendant has not committed an affirmative act to conceal his wrong, courts emphasize the plaintiff’s diligence and not the defendant’s concealment.

2. Diligence

In contrast to the tendency by certain courts to overlook the requirement of a defendant’s concealment, a number of decisions have held that if the defendant affirmatively conceals his actions, the plaintiff will be excused from his obligation of due diligence. The Seventh Circuit formulated this view in *Tomera v. Galt*.97

In *Tomera* the plaintiff claimed that the defendants misrepresented certain features of a Mexican silver mining operation in which the plaintiff had invested.98 The district court granted summary judgment for the defendant because the plaintiff filed suit four months after the Illinois Blue Sky limitations period had expired.99 The Seventh Circuit reversed this decision, however, holding that the plaintiff had alleged sufficient details which, if proven at trial, would establish the defendant’s fraudulent concealment.100

*Tomera* distinguished between the level of due diligence the plaintiff must demonstrate when the defendant actively, rather than passively, conceals his fraud.101 When a fraud goes undiscovered, even though the defendant does nothing affirmative to conceal it, the plaintiff must be duly diligent to toll the limitations period. The issue here is whether the plaintiff could discover the fraud by exercising reasonable care.102 Conversely,

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98. 511 F.2d at 510.
99. Id. at 507-8.
100. Id. at 510-11.
101. Id. at 510.
102. Sperry v. Barggren, 523 F.2d 708, 711 (7th Cir. 1975) (reiterating its prior decision in *Tomera* to excuse a plaintiff’s lack of diligence when the defendant actively conceals his fraud).
when a "fraud goes undiscovered because the defendant has taken positive steps after commission of the crime to keep it concealed...[the] fraudulent concealment tolls the limitations period until actual discovery by the plaintiff."103 The relevant inquiry in active concealment cases "looks to defendant's post-fraud conduct—the presence or absence of an effective coverup."104 Thus, the defendant's affirmative concealment relieves the plaintiff of his obligation of due diligence.105

In 1979 the Second Circuit adopted Tomera's distinction between active and passive fraudulent concealment,106 and a California district court has also endorsed this approach.107 In McConnell v. Frank Howard Allen & Co.108 the Northern District Court of California noted that the Ninth Circuit has yet to address the issue of whether a plaintiff's due diligence is required in all circumstances.109 After pointing out that other circuits are divided on this question,110 the McConnell court endorsed Tomera for two reasons. First, the rule "prevents a defendant from defrauding a plaintiff and then intentionally taking advantage of the plaintiff's naiveté or laxity to cut off his or her right of redress."111 Second, tolling the limitations period until actual discovery when a defendant has actively concealed is an easier rule to administer since it avoids the difficult inquiry into when the plaintiff should have discovered the fraud.112

Other courts have modified Tomera's distinction between

103. Tomera, 511 F.2d at 510 (citations omitted).
105. Tomera, 511 F.2d at 510. In Board of Education v. Admiral Heating & Ventilation, Inc., 94 F.R.D. 300 (N.D. Ill. 1982), an Illinois district court has extended Tomera to a nonfraud case. One commentator concluded that Admiral Heating, which dealt with an antitrust suit, "turns the concealment prong of the doctrine on its head because it deprives the defendant of protection rather than providing added protection. Under the approach of Admiral Heating, concealment dispenses with proof of due diligence altogether, a far cry from serving as an independent element of the tolling showing." Marcus, supra note 45, at 877 n.311.
106. Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979).
109. Id. at 788.
110. Id.
111. Id.
112. Id.
active and passive fraud. These courts have held that plaintiffs must be notified by "storm warnings" that something is wrong before they are required to make diligent inquiries into the circumstances of the fraudulent concealment: "Once the storm warnings appear, the statute continues to be tolled as long as the plaintiff makes diligent inquiries and will only begin to run if the plaintiff ceases to exercise due diligence." Nevertheless, in these cases the basic issue remains whether the plaintiff was negligent in not discovering the fraud before expiration of the limitations period.

Not all courts have endorsed the view that the defendant's affirmative concealment tolls the statute of limitations until actual discovery regardless of the plaintiff's diligence. For example, in Ohio v. Peterson, Lowry, Rall, Barber & Ross the Tenth Circuit stated:

[W]e see no reason why an act of concealment by defendant should excuse plaintiff from his obligation of diligence, which he owes the court as well as his adversaries. Of course, if defendant successfully conceals the fraud, the concealment would fool the hypothetical diligent plaintiff and toll the statute. But where, as here, the concealment is insufficient to fool a reasonably diligent plaintiff but nevertheless allegedly prevented discovery by Ohio, the second doctrine of fraudulent concealment urged by appellant would simply give it a second arrow to its bow.

Similarly, noting the strong policies furthered by statutes of limitations, the Sixth Circuit in Campbell v. Upjohn re-

114. Steinberg, 598 F. Supp. at 277.
115. Id.
118. Id. at 694 (emphasis in original); see also DeVargas v. Montoya, 796 F.2d 1245 (10th Cir. 1986). When the plaintiff in DeVargas claimed that he could not repair his defective complaint in a civil rights action because the defendants had concealed information, the Tenth Circuit stated, "No conspiracy by the opposition could excuse plaintiff and his counsel from the discharge of their own, affirmative duty seasonably to employ the rules of civil procedure to correct and protect litigation commenced by them. Conspiracy or no conspiracy, plaintiff's duties were absolutely fixed." Id. at 1257.
119. Commentators seem to agree that the policies behind statutes of limita-
fused to formulate a separate rule for cases involving a defendant’s active concealment. The court explained that its holding will not injure plaintiffs since a defendant’s active concealment will still be considered in determining the reasonableness of the plaintiff’s behavior under the circumstances. Further, in *Hohri v. United States* the District of Columbia Circuit rejected Tomera’s active/passive distinction despite its recognition that completely discharging a plaintiff from his obligations of reasonable diligence “serves as a punitive measure and perhaps as a deterrent of further fraud.” The court noted that this deterrence may be sound policy, but it refused to impose it without congressional direction.

Although it appears that the circuits have taken solidly different stances concerning the level of diligence necessary, this split may be more apparent than real. As both *Campbell* and *Hohri* noted, “actual discovery” cases usually concern situations in which the concealment is so effective that there would be no reason for even a diligent plaintiff to inquire into possible causes of action. For example, *Tomera, Sperry v. Barggren,* and *Robertson v. Seidman & Seidman* all involved situations in which reasonably diligent plaintiffs would not have been put on

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120. 676 F.2d 1123 (6th Cir. 1986).
121. Id. at 1128.
122. 782 F.2d 227 (D.C. Cir. 1986).
123. Id. at 248; see also In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1169-70 (5th Cir. 1979), reh’g denied, 616 F.2d 569 (5th Cir.), cert. denied, 449 U.S. 905 (1980).
124. 782 F.2d at 249. In reaching this conclusion the court emphasized that it was dealing with an action against the United States. In future cases the circuit may draw a distinction between suits against private parties and those against the United States. Thus, a plaintiff could argue that diligence is not required in an active concealment case against a private party.
125. See id. at 248 n.54; *Campbell,* 676 F.2d at 1128.
126. 523 F.2d 708 (7th Cir. 1975). In *Tomera* the officers and promoters withheld information about investments, disbursements, corporate charters, and other business affairs so that inquiry by investors into the legitimacy of the operation would have been futile. 511 F.2d at 510. In *Sperry* the defendants would not disclose the price offered by a third party for shares the defendant purchased from plaintiff until the plaintiff brought suit. 523 F.2d at 711.
127. 609 F.2d 583 (2d Cir. 1979). In *Robertson* the defendant accounting firm altered work papers and destroyed documentary evidence of its participation in the fraud. 609 F.2d at 591-92.
notice. In these cases a court may excuse the plaintiff from proving diligence since the defendant concealed all cause of reasonable suspicion. It is redundant, however, for the court to create a separate rule to denote this excuse; only one test is necessary. In other words, when the plaintiffs clearly did not and could not have discovered the fraud, there is simply no reason to submit the issue of due diligence to the jury. Thus, a court purporting to apply the active/passive distinction in this situation is not really applying a separate rule. The only situation in which the active/passive distinction makes a difference is when a reasonably diligent person would have discovered the concealment, but the particular plaintiff does not. In this situation, as the Tenth Circuit has noted, the distinction gives the plaintiff a second arrow for its bow.

When courts do require proof of due diligence before tolling a statute for fraudulent concealment, they must determine whether the plaintiff's diligence should be measured objectively or subjectively. Most courts apply an objective standard—that of a hypothetical reasonable person. Therefore, they refuse to consider excuses like shock or naivete. One commentator noted that such a harsh application of the rule will allow "[w]rongdoers who prey on the gullible and ignorant [to] reap unjust rewards if plaintiffs fail to discover the wrongdoing as a result of their ignorance. . . . 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 incapac-

129. Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 694 (10th Cir. 1981).
131. For example, in Campbell v. Upjohn Co., 498 F. Supp. 722 (W.D. Mich. 1980), aff'd, 676 F.2d 1122 (6th Cir. 1982), a Michigan district court stated that the plaintiff's "physical and mental difficulties may well have . . . postponed the time when he should have learned of the alleged scheme, but they cannot operate to require a lower level of diligence than that expected of a reasonable person." 498 F. Supp. at 732. Similarly, even when the plaintiffs were an elderly widow in a nursing home and her daughter—both inexperienced in financial affairs—the Eighth Circuit refused to toll the statute of limitations in a securities fraud case when there was no concealment. Koke v. Stifel, Nicolas & Co., 620 F.2d 1340, 1343 (8th Cir. 1980). The court found that a reasonable person should have been aware of any wrongdoing since the plaintiffs received accurate monthly statements from the defendants. Id.
ity."132 Allowing exceptions to the rule would simply "invite a battery of creative excuses from plaintiffs like Mr. Campbell who do not fall into any traditional category of incapacity."133

In Hohri the District of Columbia Circuit applied this objective standard of due diligence, but added specific guidelines to help determine just how much diligence is reasonable.134 A court should consider whether any events placed the plaintiff on inquiry notice of the fraud and whether this notice would be sufficient to allow a duly diligent person to discover what was concealed.135 Nevertheless, the court noted that inquiry notice alone would not cause the statute to begin running,136 stating that it "is merely a necessary, but not a sufficient, condition for the running of the statute."137

B. Pleading and Summary Judgment

Rule 9(b) of the Federal Rules of Civil Procedure requires plaintiffs to plead fraud with particularity.138 Therefore, when a plaintiff claims the equitable tolling doctrine should toll the limitations period, he must specifically plead the facts underlying the defendant's fraudulent concealment. Some federal courts have used this rule to dismiss plaintiffs' complaints for failure to allege the elements of fraudulent concealment with sufficient particularity.139

Most courts feel, however, that the summary judgment stage is a more appropriate time to evaluate the plaintiff's due diligence or the defendant's concealment since the court may consider additional facts.140 But even on a motion for summary

132. Marcus, supra note 45, at 879.
133. Id. at 880.
134. 782 F.2d at 250.
135. Id.
136. Id.
137. Id.
139. See, e.g., Corson v. First Jersey Sec., 537 F. Supp. 1263, 1268-69 (D.N.J. 1982) (court rejected the plaintiffs' complaint because their claim "that they did not know of the fraud at the time of purchase of the securities fails to satisfy the requirement of pleading fraudulent concealment with specificity"). But see Bethlehem Steel Corp. v. Fischback & Moore, Inc., 641 F. Supp. 271, 275 (E.D. Pa. 1986) ("Whether a party has exercised due diligence is a factual issue which cannot be decided on a motion to dismiss unless it appears beyond doubt that plaintiff can prove no facts to support the claim.").
140. See Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981); see also Marcus, supra

https://scholarcommons.sc.edu/sclr/vol38/iss4/6
judgment, the court’s role is normally quite narrow; it should grant summary judgment only if the undisputed facts established that one party is entitled to judgment as a matter of law. 143 When the plaintiff alleges fraudulent concealment, the issue of the plaintiff’s due diligence will likely be disputed. Thus, it seems that summary judgment would be inappropriate. The defendant faces an “extremely difficult burden to show that there exists no issue of material fact regarding notice.” 142 For example, in Robertson v. Seidman & Seidman 143 the Second Circuit compared the question of due diligence to those of intent or good faith and held that all of these issues were inappropriate for summary judgment. 144 The Ninth Circuit also endorses this strict summary judgment standard. 145 Trial courts in that circuit send the due diligence issue to the jury unless the undisputed facts lead to only one reasonable inference—that the plaintiff should have discovered the fraudulent concealment prior to the crucial date. 146

On the other hand, some courts adopt a broader view of their role in deciding a motion for summary judgment when due diligence is at issue. The Tenth Circuit considers diligence to be in part an equitable question. 147 If the documents presented in the motion for summary judgment clearly and convincingly persuade the trial judge that a reasonably diligent person would have discovered the fraud before the limitations period lapsed, summary judgment is appropriate. 148 If the judge is not so

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note 45, at 902-03.


142. Admiralty Fund v. Jones, 677 F.2d 1289, 1294 (9th Cir. 1982).

143. 609 F.2d 583 (2d Cir. 1979).

144. Id. at 591.


146. See, e.g., Kramas v. Security Gas & Oil, Inc., 672 F.2d 766 (9th Cir. 1982) (court granted summary judgment against plaintiff on the issue of due diligence because plaintiff had already discussed filing a lawsuit, had contacted the SEC, and had indicated a desire to retain counsel); see also Hill v. Equitable Bank, Nat’l Ass’n, 599 F. Supp. 1062, 1077 (D. Del. 1984) (“The question of reasonable diligence under the doctrine of equitable tolling raises factual issues that rarely may be decided by a court as a matter of law.”).


148. Id.
clearly persuaded, diligence will be a jury question.\textsuperscript{149}

Regardless of the court's approach, on a motion for summary judgment defendants confront a heavy burden of proving that no issue of material fact regarding the plaintiff's notice exists. However, once the case goes to trial on the merits, most courts require the plaintiff to prove due diligence "since his claim to exemption is against the current of the law and is founded on exception."\textsuperscript{160} Only the District of Columbia Circuit takes the opposite approach.\textsuperscript{161} At least in cases involving self-concealing wrongs, that circuit requires the defendant to prove the plaintiff's failure to exercise due diligence.\textsuperscript{162} It places this burden on the defendant because it characterizes due diligence as an element of the defendant's affirmative defense of the statute of limitations.\textsuperscript{163}

C. Tolling Absolute Limitations Periods

This Note deals primarily with tolling doctrines as they apply to RICO and rule 10b-5 actions; however, the fraudulent concealment doctrine also applies to many other causes of action, including some for which a statute with an absolute limitations period is applicable. Therefore, the issue arises whether this federal equitable tolling doctrine should apply to statutes with absolute limitations periods.

Every circuit to consider the question\textsuperscript{164} has concluded that fraudulent concealment cannot toll the three-year limitations period provided in section 13 of the Securities Act of 1933 (Securities Act).\textsuperscript{165} This section actually establishes two federal lim-

\textsuperscript{149} Id.


\textsuperscript{151} See Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984); Richards v. Mileski, 662 F.2d 65, 71 (D.C. Cir. 1981).

\textsuperscript{152} See cases cited supra note 151.

\textsuperscript{153} Id.


limitations periods applicable to civil actions under sections 11 and 12 of the Securities Act. First, under sections 11 and 12(2) claims must be brought within one year after a reasonably diligent person would have discovered the false statement, and claims under section 12(1) must be filed within one year after "the violation"—the sale in violation of section 5. In addition, however, section 13 creates an absolute limitations period: all action under sections 11 and 12(1) must be brought within three years after "the security was bona fide offered to the public," and claims under section 12(2) must be brought within three years after the sale of the particular security in question.

Since Congress specifically recognized and addressed the difficulty of discovering the defendant's violation, courts have chosen not to allow tolling the statute indefinitely. Otherwise, the three year absolute bar in the statute would serve no purpose.

Nevertheless, courts are split over whether the one-year limitation on a section 12(1) claim may be tolled. Unlike the other one-year provisions in section 13, this limitations period is not triggered by discovery of a wrong. Rather, a claim simply must be brought "within one year after the violation upon which it is based." In 1978 the First Circuit held that "under the explicit language of section 13, the limitations period [for an action under section 12(1)] runs from the date of violation irrespective of whether the plaintiff knew of the violation." A California district court has held, however, that section 13's one-year limitation on a section 12(1) action can be equitably tolled by fraudulent concealment. The court rejected the First Circuit decision because it felt there was no sound reason for not applying

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156. 15 U.S.C. §§ 77k, 77l(2) (1982) (providing for civil liabilities on account of false registration statement, and those arising in connection with prospectuses and communications with misstatements or omissions of material facts, respectively).
158. Id.
the tolling doctrine.\footnote{164} It noted that unlike section 13’s three-year period, the one-year period does not, on its face, pose an absolute bar to suit.\footnote{165}

Although the circuits have generally agreed not to toll an absolute limitations period provided by federal law, a different situation arises when state law mandates the absolute period, since rule 10b-5 cases must adopt a state statute of limitations. Occasionally, the applicable state limitations period will call for such an absolute bar. For example, the Wisconsin statute applicable to rule 10b-5 cases imposes one- and three-year bars virtually identical to those in section 13 of the Securities Exchange Act.\footnote{166} In Trecker v. Scag\footnote{167} the Seventh Circuit held that federal tolling doctrines apply to both of these periods, extending the “absolute” three-year limitations and supplying a “federal gloss” to the discovery requirement in the one-year period.\footnote{168} Similarly, a court in the Eastern District of Pennsylvania recently indicated that Pennsylvania’s three-year absolute limitations period would be tolled by a defendant’s fraudulent concealment.\footnote{169}

IV. THE INVESTMENT DECISION DOCTRINE

As stated earlier, courts must use state law to determine the limitations period applicable to a RICO or rule 10b-5 claim, but normally apply federal law to determine when the cause of action accrues and whether the limitations period should be tolled.\footnote{170} A rule 10b-5 cause of action accrues on the date that

\footnotesize{\begin{itemize}
\item \footnote{164}{Id.}
\item \footnote{165}{Id.; see also Houlihan v. Anderson-Stokes, Inc., 434 F. Supp. 1324 (D.D.C. 1977) (tolling the one-year limitations period under § 12(1) because of an allegation that the defendant sellers fraudulently represented that no registration was required).}
\item \footnote{166}{Wis. Stat. Ann. § 551.59(5) (West 1975).}
\item \footnote{167}{679 F.2d 703 (7th Cir. 1982), on remand, 569 F. Supp. 744 (E.D. Wis 1983), aff’d, 747 F.2d 1176 (7th Cir. 1984), cert. denied, 471 U.S. 1066 (1985). Despite this intimation, however, the court held that the plaintiff was barred by the State’s one-year discovery limitations period since he should have discovered the defendant’s wrong more than a year before he filed suit. \textit{Id.}}
\item \footnote{168}{Id. at 706.}
\item \footnote{169}{Adams v. Martyn, 639 F. Supp. 374, 376 (E.D. Pa. 1986). Despite this intimation, however, the court held that the plaintiff was barred by the State’s one year discovery limitations period since he should have discovered the defendant’s wrong more than a year before he filed suit. \textit{Id.}}
\item \footnote{170}{See supra pt. II.}
\end{itemize}
the relevant purchase or sale of securities occurred. Generally, a "purchase" or "sale" of a security occurs when a buyer commits to buy or a seller commits to sell. In other words, it occurs when there is a meeting of the minds between the parties. The transaction occurs on this date even if full performance does not occur until a later date.

On the other hand, if a party agrees to buy or sell securities but retains the power to terminate the transaction prior to full performance, that party makes a separate investment decision each time it possesses the power to terminate the transaction, yet instead chooses to go forward. Each of these investment decisions may constitute a purchase or sale of securities separate and apart from the initial transaction.

In Goodman v. Epstein the Seventh Circuit formulated the investment decision doctrine to distinguish "one-shot deals" from those which contemplate a continuing relationship between the parties. Goodman involved an alleged rule 10b-5 violation arising out of the sale of limited partnership interests in a land development scheme. After the plaintiffs lost a jury trial, they appealed on the grounds that the trial judge had erred in certain jury instructions, including those relating to the time the securities were purchased. The jury instructions stated that the plaintiffs purchased their securities when they executed the limited partnership agreements, even though they had to make subsequent capital contributions upon demand of the general partners. Because these agreements were not executed within the applicable state limitations period, this instruction practically eliminated any chance the plaintiffs had of obtaining a favorable verdict on their claims.

171. See Hill v. Equitable Bank, Nat'l Ass'n, 599 F. Supp. 1062, 1072 (D. Del. 1984) (court noted that the parties agreed that rule 10b-5 of action accrues at the date of the relevant purchase or sale).
173. Id.
175. Id.
176. 582 F.2d 388 (7th Cir. 1978), cert. denied, 440 U.S. 939 (1979).
177. 582 F.2d at 412.
178. Id. at 409.
179. Id.
180. Id.
181. Id.
The Seventh Circuit remanded *Goodman* for a new trial because it observed that “the broad remedial purpose of the federal security laws”182 necessitated that the term “purchase” be liberally construed. If the time of purchase was solely that point at which the limited partnership agreement was executed, the general partners’ obligation to furnish information to the purchasers would cease after that date.183 The purchasers would thus no longer be entitled to material information concerning their investments, even though their partnership agreements contemplated a continuing relationship under which the purchasers would have to make additional investment decisions.184 Accordingly, the court ruled that when investment decisions still exist at the time of a call for capital contribution, each subsequent payment by a limited partner constitutes a separate “purchase” of a security.185 Therefore, “so long as an investment decision remained to be made upon any possible state of facts, the [defendant’s] nondisclosure was in connection with the purchase of a security.”186

The investment decision doctrine formulated in *Goodman* coincides with the SEC’s position in an analogous context—the occurrence of a purchase or sale of assessable stock. Assessable stock is stock for which a stockholder must pay more than his original investment when corporate affairs so require.187 The SEC allows an issuer to repurchase assessable stock if a stockholder fails to meet an assessment call, but it provides that a “sale” of this stock occurs whenever the stockholder agrees to pay any part of an assessment.188 *Goodman* noted that with assessable stock the stockholder’s option “to return the stock to the issuer in lieu of meeting the assessment requires an investment decision on his part, thereby bringing this situation within the reach of the Act.”189 Similarly, *Goodman* held that each contribution a limited partner makes in response to a call requires an investment decision, and thus each contribution constitutes a

182. Id. at 410.
183. Id.
184. Id. at 414.
185. Id. at 413.
186. Id.
189. 582 F.2d at 414.
separate "purchase" of a security.\textsuperscript{190}

The investment decision doctrine prevents the statute of limitations from beginning to run until the last act necessary to purchase a security is taken.\textsuperscript{191} It applies, however, only to options that allow a party to avoid going forward with a purchase or sale of securities (\textit{i.e.}, options that represent such a change in the nature of an investment that in effect the option amounts to a new investment).\textsuperscript{192} These options include the ability to amend or dissolve a limited partnership agreement.\textsuperscript{193} They also include maintenance contracts such as those for an investment in cattle. For example, in \textit{Ingenito v. Bermec Corp.}\textsuperscript{194} a New York district court held that each payment on such a maintenance contract represented an investment decision since "the herdowner 'bought' something each month which he did not own before which, by virtue of the cancellation clause, he was not obligated to buy."\textsuperscript{195}

On the other hand, "'[m]ere retention' of securities during a period of an alleged [securities] violation does not satisfy the requirement that the violation be in connection with the purchase or sale of a security."\textsuperscript{196} The investment decision doctrine does not apply to an option to sell shares since an option to sell necessarily presumes that the plaintiff purchased the shares and currently possesses the ownership rights to them.\textsuperscript{197} Although the right to sell is an investment option, it exists sepa-
rately from the plaintiff's purchase and is not an option that allows the plaintiff to avoid going forward with his purchase. 198 Similarly, the doctrine does not apply to an option to rescind a transaction on the grounds of fraud since a plaintiff possesses the option even if he paid for his shares in full at the time of entering into a subscription agreement. If he had paid for the shares in a lump-sum agreement, any subsequent right to rescind on the basis of fraud would not constitute an investment decision under the investment decision doctrine. 199 Therefore, "[a] different result is not compelled simply by the fact that plaintiffs paid for their shares by means of fixed installment payments . . . [since] the applicability of the investment decision doctrine should not arbitrarily turn upon how purchase payments are structured under the transaction." 200

In Hill v. Equitable Bank, National Association 201 the Delaware district court held that under the investment decision doctrine the "plaintiffs must establish not only that they possessed options to avoid their payments, but also that they would have exercised these options if fraud had not occurred or if they had discovered the fraud."202 Therefore, any payments plaintiffs make after obtaining sufficient knowledge of a claim to file suit are not covered by the investment decision doctrine. 203 The plaintiffs' cause of action will be limited to those payments made prior to obtaining this knowledge. 204 Equitable Bank rejected the plaintiffs' excuses for continuing to pay defendants after filing suit against other parties to the partnership, stating that excuses were irrelevant. 205 The court stated instead that

198. Id.
199. Id.
200. Id.; see also Freschi, 551 F. Supp. at 1229 n.9.
203. Id.
204. Id. at 1075.
205. Id. at 1074-75 n.13.
"under the investment decision doctrine, it is only important that, with notice of fraud, plaintiffs failed to exercise any [of their] options."

The court in *Equitable Bank* noted that when the investment decision doctrine does apply, the plaintiff's payments will be considered integrated purchases of securities. As integrated purchases, a single cause of action for all payments would accrue on the date the last payment was made, rather than a separate cause of action accruing on the date of each separate payment. Consequently, as long as the plaintiff's last payment was made within the applicable statute of limitations, the plaintiff can recover for all payments made.

Similarly, in *Currie v. Cayman Resources Corp.* a Georgia district court stated that when there is a continuing sale "and thus an integrated offering" under the investment decision doctrine, the statute of limitations does not begin to run until the plaintiff's last purchase of a security. *Currie* based its finding of a continuing sale in part on the SEC's test for determining whether apparently separate securities offerings should be considered a single integrated offering. The five factors the SEC considers include the following: (1) Whether the offerings are part of a single plan of financing; (2) whether the offerings are made at or about the same time; (3) whether the offerings involve issuance of the same class of securities; (4) whether the same type of consideration is received; and (5) whether the offerings are made for the same general purpose. In *Currie* the final three factors heavily outweighed the time factor, and the court thus concluded that there was a continuous sale.

According to *Currie*, the five factors the SEC considers when determining whether an offering is integrated can also be used to determine whether both an initial purchase of a limited

208. *Id.* at 1075 n.13.

208. *Id.* at 1075 n.15.


210. *Id.* at 1376.

211. *Id.* at 1377-77. The SEC applies five factors to determine whether a securities offering should be considered nonpublic for purposes of the registration exemption under § 4(2) of the Securities Act. 15 U.S.C. § 77d(2) (1982). See SEC v. Murphy, 626 F.2d 633, 645 (9th Cir. 1980); see also *infra* text accompanying note 212.


213. 595 F. Supp. at 1377-77.
partnership offering and a subsequent capital contribution should be considered securities "purchases." Currie also relied, however, on the more general rule that an investment decision occurs when there is "such a significant change in the nature of the investment or in the investment risks [that the change] amount[s] to a new investment."

With respect to motions to dismiss and motions for summary judgment, the same standards applicable to the federal equitable tolling doctrine also generally apply to the investment decision doctrine. In other words, whether the investment decision doctrine applies is normally a jury question. For instance, in Hill v. Der the defendants argued that the plaintiffs' periodic contributions to a limited partnership were simply fixed installment payments and thus did not require discretionary investment decisions. Nevertheless, the Delaware district court ruled that on a motion to dismiss, it did not have the authority to determine whether each of these payments constituted a separate purchase. Rather, the court stated, "It is the prerogative of the trier of fact to resolve controverted issues raised by the pleadings," and a court is limited to determining whether "it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief."

V. THE RELATIONSHIP BETWEEN THE FRAUDULENT CONCEALMENT DOCTRINE AND THE INVESTMENT DECISION DOCTRINE

Technically, the investment decision doctrine does not toll the limitations period; rather, it postpones the date upon which the cause of action accrues. Since the effect of the doctrine is

214. Id. at 1377 (quoting Keys v. Wolfe, 709 F.2d 413, 416-17 (5th Cir. 1983)).
217. Id. at 1386.
218. Id.
219. Id.
220. Id. (quoting Bogosian v. Gulf Oil Corp., 561 F.2d 434, 444 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978)).
virtually identical to tolling the limitations period, courts sometimes fail to note the distinction.\textsuperscript{222} Some plaintiffs, however, have emphasized and attempted to capitalize on this distinction. For example, in \textit{Equitable Bank} the plaintiffs argued that because of this distinction, the investment decision doctrine and the fraudulent concealment doctrine may be used together.\textsuperscript{223} The court in \textit{Equitable Bank} held that under the investment decision doctrine the limitations period \textit{accrued} with respect to defendant Equitable Bank when the plaintiffs filed an earlier suit against other parties to the partnership.\textsuperscript{224} Nevertheless, the plaintiffs claimed that the fraudulent concealment doctrine should also apply, and the limitations period should not begin to run on their claim against Equitable until they learned of Equitable's particular role in the fraud.\textsuperscript{225} The court agreed with the distinction between the doctrines in principle, but it did not toll the limitations period because it concluded the plaintiffs should have already been aware of any fraud by Equitable.\textsuperscript{226}

In \textit{Equitable Bank} the Delaware district court recognized that there are circumstances in which both the investment decision doctrine and the fraudulent concealment doctrine apply: First, to delay accrual of the limitations period, and then to toll it.\textsuperscript{227} Although this conclusion is technically correct, it is of limited importance. Under the investment decision doctrine a plaintiff's cause of action accrues on the date of the last payment made before he obtains sufficient knowledge of the defendant's fraud to bring suit.\textsuperscript{228} The plaintiff must be duly diligent; any payments made after he should have known of the cause of

\textsuperscript{223} Equitable Bank, 599 F. Supp. at 1075.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id. Plaintiffs claimed they did not have firm evidence of Equitable's fraud at the time they filed suit in \textit{Hill v. Der}; "they merely suspected fraud." \textit{Id.} at 1074 n.12. The court rejected this argument, stating that "if these suspicions were ripe enough for plaintiffs to file a lawsuit based upon the suspicions, then they were certainly ripe enough for plaintiffs to exercise investment options allegedly available to them to avoid their payment obligations on their shares." \textit{Id.} The court also noted that "the investment decision doctrine can be a double edged sword." \textit{Id.} at 1075 n.14. The cause of action accrued at least at the time the plaintiffs filed suit against the related parties. It may have accrued even earlier, however, if the plaintiffs, in the exercise of due diligence, should have discovered fraud prior to the payments. \textit{Id.}
\textsuperscript{227} 599 F. Supp. at 1075.
\textsuperscript{228} Id.
action are not protected. Once the cause of action accrues, the fraudulent concealment doctrine may toll the limitations period; however, this doctrine also operates to forestall running of the limitations period only until the time that the plaintiff should know of the defendant’s wrongdoing. Since application of both doctrines hinge on the plaintiff’s knowledge of the cause of action, there will rarely be more than a brief period of time during which the fraudulent concealment doctrine will toll a limitations period which has already been extended by the investment decision doctrine.

For example, suppose a plaintiff enters into a maintenance contract on January 1, Year 1, and makes payments on that contract on January 1, Year 5, and June 1, Year 5. On March 1, Year 5, the plaintiff becomes aware of sufficient facts to alert him to the defendant’s wrongdoing. Assuming both doctrines apply to these facts, the investment decision doctrine would postpone accrual of the limitations period until January 1, Year 5, and the fraudulent concealment doctrine would toll the limitations period in Year 5 from January 1 to March 1. Thus, both doctrines apply to the situation, but the fraudulent concealment doctrine adds little to the plaintiff’s attempt to extend the limitations period. Of course, the real difficulty lies in determining when the plaintiff should have discovered enough information to be aware of the defendant’s wrongdoing.

VI. CONCLUSION

Statutes of limitations further strong policies and are consistently applied to bar stale claims. In securities fraud cases, however, defendants often attempt to hide behind an expired limitations period to escape wrongdoing. The result is particularly inequitable when the defendant’s own actions prevented the plaintiff from discovering the wrong early enough to bring a timely suit. To prevent a defendant from benefiting from his own wrongdoing, courts created the fraudulent concealment defense to statutes of limitations.

The doctrine of fraudulent concealment, also known as the federal equitable tolling doctrine, was originally based on two elements: Concealment by the defendant and due diligence by the plaintiff. Today, there is considerable dispute over the extent to which each of these elements is required. The effect is
that courts are often inclined to allow the defense if either element is sufficiently fulfilled.

Another defense by which to postpone the statute of limitations in securities fraud cases is the investment decision doctrine. This doctrine is related to the federal equitable tolling doctrine because both are premised on the plaintiff's inability to discover that he is being defrauded. Once the plaintiff obtains sufficient knowledge to become aware of a potential cause of action, neither of these doctrines will continue to extend the limitations period. Although some plaintiffs have attempted to apply both doctrines to bring a cause of action within the applicable limitations period, this approach will not significantly extend the limitations period since both doctrines take into consideration the plaintiff's due diligence. 229

Neil E. Grayson

229. At the time this Note went to press, the Supreme Court decided Agency Holding Corp. v. Malley-Duff & Assocs., 107 S. Ct. 2759 (1987). The Court in Malley-Duff held that the appropriate statute of limitations for actions under the Racketeer Influences and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964 (1982 & Supp. III 1985), should not be the state statute of limitations under the most analogous state claim, but should be, as examined in light of the statute's legislative history and structure, the same as that under the Clayton Act, 15 U.S.C. § 15b (1982). Id. at 2765.

The Court stated in part as follows:

In sum, we conclude that there is a need for a uniform statute of limitations for civil RICO, that the Clayton Act clearly provides a far closer analogy than any available state statute, and that the federal policies that lie behind RICO and the practicalities of RICO litigation make the selection of the 4-year statute of limitations for Clayton Act actions the most appropriate limitations period for RICO actions.

107 S. Ct. at 2767 (citation omitted). Compare supra notes 32-58 and accompanying text.