UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: READY-MIXED CONCRETE ANTITRUST LITIGATION	MASTER DOCKET NO. 1:05-CV- 00979-SEB-VSS
THIS DOCUMENT RELATES TO: ALL ACTIONS	

IMI DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Introduction

On February 6, 2006, the Seventh Circuit ruled that the four year limitation period for antitrust actions is subject to the discovery accrual rule, and affirmed that fraudulent concealment requires "efforts by defendant **above and beyond** the wrongdoing" to prevent plaintiff from suing in time, as well as a plaintiff's exercise of due diligence. *In re Copper Antitrust Litigation*, 436 F.3d 782, 789-790 (7th Cir. 2006).[1] Whether *In re Copper's* discovery accrual rule (injury and who caused the injury) will survive is doubtful,[2] but at this point IMI acknowledges it requires that the Court deny, in part, this Motion. The caveat in part is important, however,

[1] *In re Copper* reversed the District Court's summary judgment, finding a question of fact regarding "when a diligent inquiry on the part of plaintiffs would have revealed Morgan's involvement", *id.* at 789 and a question of fact whether "Morgan affirmatively acted to conceal its involvement. . . . Material facts are in dispute as to whether plaintiffs can benefit from tolling under fraudulent concealment" or whether the defendants' conduct "prevented the plaintiff from discovering his claims prior to the expiration of the limitations. . . ." *Id.* at 790-792.

[2] Under the Clayton Act "[g]enerally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures the plaintiff's business". *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 38 (1971). While the Court has not had the question of whether the discovery accrual rule is applicable to the Clayton Act, it has used the Clayton Act limitations in RICO cases and based on "the Clayton Act's injury-focused accrual rule", *Rotella v. Wood*, 528 U.S. 539, 550 (2000), the Court rejected a pattern discovery accrual, and earlier it rejected a last predicate act accrual. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1977).

because plaintiffs' allegations of fraudulent concealment, based solely on secret meetings and the absence of notes, cannot survive under the Seventh Circuit fraudulent concealment precedent.

Seventh Circuit – Acts "Above And Beyond" The Wrong

For fraudulent concealment, the Seventh Circuit requires that a defendant must have engaged in affirmative deceptive acts "above and beyond" the wrongdoing to prevent the plaintiff from suing in time. Under such a requirement, whether an antitrust violation is a self-concealing wrong is beside the point. It makes no difference – there must be overt acts "above and beyond" the wrongdoing. Secret meetings, not taking notes, denying or refusing to admit wrongdoing – do not qualify as overt acts "above and beyond" a price fixing conspiracy – but are only in furtherance of the alleged conspiracy.

Plaintiffs, to extricate themselves from Rule 9(b)'s particularity requirement to plead fraudulent concealment and from Seventh Circuit's requirement that the affirmative acts must be "above and beyond" the wrong – construct that the Seventh Circuit has followed the Second Circuit concerning self-concealing wrongs, Pls. Memo, pp. 3-4.[3] Plaintiffs do so based on a case where two of the three judges concurred in the judgment only – *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078 (7th Cir. 1992).[4]

The Seventh Circuit has clearly established that fraudulent concealment (one form of equitable estoppel) requires overt acts by the defendant – "above and beyond" the wrongdoing

[3] Plaintiffs state: "the Seventh Circuit's recognition of 'self-concealing' fraudulent concealment adopts the same formulation of the doctrine as the Second Circuit. *See New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083-84 (2nd Cir. 1988). Fraudulent concealment may be proved by showing either that the defendant took affirmative steps to prevent plaintiff's discovery of inquiry or that the wrong itself is of such a nature as to be self-concealing."

[4] Judge Ripple concurred: "I join in the judgment of the Court and the essential reasoning of the principle opinion" and Judge Posner joined in the opinion except for the "discussion of laches and fraudulent concealment. . . ." *id.* at 1099 and 1103 and stated: "But I do not think he is correct in suggesting that in the petty interest of 'tidy classification' I, along with the panel in *Cada* have departed from the 'scheme' of previous cases, a scheme to which Judge Cudahy, employing the royal 'we' (for it is unclear whether Judge Ripple joins this part of his opinion), declares his adherence". *Id.* at 1102.

upon which the plaintiff's claim is founded – "to prevent plaintiff from suing in time". *Cada v. Baxter Health Care Corporation*, 920 F.2d 446, 451 (7th Cir. 1990) (rejecting Cada's attempts to come within fraudulent concealment based on defendant's refusal to inform plaintiff he was being fired because of his age). In multiple decisions since *Cada*, the Seventh Circuit has steadfastly ruled that fraudulent concealment must consist of overt acts "above and beyond" the wrongdoing,[5] most recently last month in *In re Copper*,[6] and that the alleged fraudulent concealment must be the cause in fact of the plaintiff not suing in time[7] – hence, plaintiff's reasonable reliance is required.[8]

The Seventh Circuit's exclusion of "self-concealing" wrongs from equitable estoppel/fraudulent concealment is followed in the Ninth Circuit, where based on *Cada*, estoppel/fraudulent concealment requires "active conduct by a defendant above and beyond the wrongdoing upon which the plaintiff's claim is filed," to prevent the plaintiff from suing in time.

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[5] *Shropshear v. Corporation Council of Chicago*, 275 F.3d 593, 595 (7th Cir. 2001) ("equitable estoppel . . . at times called fraudulent concealment . . . presupposes that plaintiff has discovered or, as required by the discovery rule should have discovered, that the defendant injured him. It denotes efforts by defendant, above and beyond the wrongdoing upon which the plaintiff's claim is founded, to prevent, by fraud or deception, the plaintiff from suing in time"); *Jackson v. Rockford Housing Authority*, 213 F.2d 389, 394 (7th Cir. 2000) ("equitable estoppel only where defendant in addition to committing the wrong . . . has tried to prevent plaintiff from suing"); *Hintosh v. Chicago Medical School*, 167 F.3d 1170, 1174 (7th Cir. 1999) (holding that plaintiff failed to show fraudulent concealment because plaintiff failed to "point to some conduct by defendant beyond defendant's wrongdoing. . . . We have found equitable estoppel only where the defendant in addition to committing the alleged wrong giving rise to the suit, has also tried to prevent the plaintiff from suing in time. . . ."); *W. Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 851 (7th Cir. 1996) ("Equitable estoppel . . . is invoked when the prospective defendant does make a special effort to cover up the fraud . . . acts of concealment refers to acts intended to conceal the original fraud that are distinct from the original fraud. . . . Equitable estoppel – requires active misconduct . . . ."). *See also, Shanoffe Illinois Department of Human Services*, 258 F.3d 696, 701 (7th Cir. 2001) and *Berry Aviation Inc. v. Land o' Lakes Municipal Airport*, 377 F.3d 682, 689 (7th Cir. 2004).

[6] *See* n. 1, *supra*.

[7] *Flight Attendants v. Commissioner of Internal Revenue*, 165 F.3d 572, 577 (7th Cir. 1999).

[8] *Hintosh*, 167 F.3d at 1174 (requiring "a plaintiff's actual and reasonable reliance thereon"); *Ashafa v. City of Chicago*, 46 F.3d 5459, 463 (7th Cir. 1998) (for fraudulent concealment, "plaintiff must show not only misconduct . . . but also that he actually and reasonably relied on the misconduct").

Santa Maria v. Pacific Bell, 202 F.3d 1170, 1177 (9th Cir. 2001); *Guerreo v. Gates*, 357 F.3d 911, 919 (9th Cir. 2004) (the plaintiff "must demonstrate that he relied on the defendant's misconduct in failing to file in a timely manner. . . .") *See also, State of Colorado v. Western Paving Construction Co.*, 630 F.Supp. 206 (D. Colo. 1986), affirmed by an equally divided court, 841 F.2d 1025 (10th Cir. 1988).[9]

Hence, plaintiffs' contentions, Memo pp. 3, that the alleged price fixing conspiracy was self-concealing are not enough. Similarly, even assuming arguendo that plaintiffs have met the "intermediate" affirmative act standard (Memo p. 4, n. 1) – where acts need not be separate and apart from acts of concealment involved in an antitrust violation – such is of no avail. Moreover, each of the cases cited by plaintiffs, pp. 5-6, 8 (all from the Second, Third and Fifth Circuits which do not require "above and beyond")[10] to the effect that price fixing conduct is self-concealing by nature and avoids the requirement to plead independent affirmative acts of fraudulent concealment – is of no avail under the Seventh Circuit precedent.

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[9] Circuits other than the Second, while not limiting fraudulent concealment to acts "above and beyond" the wrongful conduct, limit the concept of "self-concealing" to a wrong "in which deception is an essential element for some purpose other than merely to cover up the act. . . ." *See State of Texas v. Allen Construction Company, Inc.*, 851 F.2d 1526, 1530 (5th Cir. 1988) (finding bid rigging not self-concealing); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984) (holding that a wrong is "self-concealing" if the deception is a necessary step in carrying out the illegal act "rather than separate from the illegal act intended only to cover up the act" *Id.* at 33, n. 102). The Fourth Circuit limits "self-concealing" to where concealment is an essential element of the wrong being sued for. *See Supermarket of Marlington, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119 (4th Cir.) ("The self-concealing standard is only even arguably proper when deception or concealment is a necessary element of the antitrust violation, *i.e.*, when the antitrust violation is truly self-concealing . . ." holding that price fixing is not by its very nature concealed – "the deceptive aspect of price fixing is not an essential element of a price fixing conspiracy.") *See also, Detrick v. Panalpina, Inc.*, 108 F.3d 529, 540 (4th Cir. 1997). The Second Circuit places no limitations on self-concealing wrongs, n . 3, *supra*.

[10] *Id.* & n. 1, *supra*.

Rule 9(b)'s Particularity. While plaintiffs complain defendants have not offered a single case to support the "who, what, when, where and how" must be plead as to any fraudulent concealment, plaintiffs ignore *Wolin's* requirement that such "must be plead with particularity". There is no indication in *Wolin* that the Seventh Circuit would lessen its standards as to the particularity required. The Seventh Circuit is far from alone in this regard: *Kirtdoll v. City of Topeka*, 315 F.3d 123, 1238 (10th Cir. 2003) (affirming dismissal for failure to "plead a factual predicate" for the tolling theory); *Bache, Inc. v. Prudential Box Securities*, 23 F.3d 335 (10th Cir. 1994) (affirming dismissal for failure to allege fraudulent concealment with particularity); and *Dayco Corporation v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (*Dayco's* "mere allegations of due diligence without asserting what steps were taken is insufficient under the standard. . . ."); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987) (sustaining a dismissal for failure to allege with sufficient particularity fraudulent concealment); *See Connelly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 120 (9th Cir. 1980) (the plaintiff must plead with particularity the circumstances surrounding the factual concealment and state facts showing his due diligence in trying to uncover the facts," citing with approval *Pocahontas* to the effect that fraudulent concealment "implies conduct more affirmatively directed at deflecting litigation. . . ."

Conclusion

In the end, plaintiffs are left to contend that defendants' alleged but unspecified secret meetings and restriction of note-taking are sufficient to comply with Rule 9(b) and legally sufficient to constitute fraudulent concealment. Alleged secrecy intertwined with and in furtherance of a price fixing conspiracy, cannot be "above and beyond" as required by the Seventh Circuit precedent, much less are such affirmative acts upon which any plaintiff relied.

The Court should grant IMI defendants' motions for judgment on the pleadings, or for dismissal pursuant to Rule 12(b)(6), that plaintiff may not extend or toll the limitations period because the asserted fraudulent concealment is legally insufficient.

Respectfully submitted,

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