866 F.2d 1480, 275 U.S.App.D.C. 362, RICO Bus.Disp.Guide 7138, 8 UCC Rep.Serv.2d 575
(Cite as: 866 F.2d 1480, 275 U.S.App.D.C. 362)

United States Court of Appeals,
District of Columbia Circuit.
Roland RIDDELL, Appellant,
v.
RIDDELL WASHINGTON CORPORATION, et al.

No. 88-7017.
Argued Sept. 27, 1988.
Decided Feb. 3, 1989.

D.H. GINSBURG, Circuit Judge:

This appeal involves an intra-familial dispute over the sale, in 1981, of substantial stock interests in two closely held corporations. The stock was sold for $106,936 pursuant to a foreclosure provision in a loan agreement between plaintiff Roland Riddell, as borrower, and his mother, defendant Jean Riddell, as lender. In 1987, the corporations sold their principal assets-two parcels of real estate-for approximately $13,000,000. Plaintiff now asserts that he was defrauded by other members of the family as to the value of his stock in 1981.

***1483 **365** In his amended complaint against his mother, his sisters Sally Arthur, Joan Baer, and Marise Reynolds, his brother-in-law Robert Arthur, and the two corporations, plaintiff alleges: (1) that all defendants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1982 & Supps. 1984 & 1986) (RICO); (2) that all but the corporate defendants engaged in common law fraud, deceit, and conspiracy to defraud and to deceive; (3) that Jean Riddell violated Rule 10b-5, promulgated under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), (4) converted plaintiff's property, (5) violated the provision of the Uniform Commercial Code (UCC), D.C.Code § 28:9-504, that prescribes the terms under which a secured party may dispose of collateral, and (6) breached her loan agreement with plaintiffs; (7) that Jean Riddell, Robert Arthur, and Sally Arthur, the corporate officers, breached their fiduciary duty to plaintiff as a shareholder; and (8) that the corporate defendants wrongfully transferred plaintiff's shares in their stockholder records and (9) were obliged to replevy the shares. The district court granted defendants' motion for summary judgment and partial judgment on the pleadings on the ground that plaintiff's claims were barred by relevant statutes of limitations. *Riddell v. Riddell Washington Corp.*, 680 F.Supp. 4 (D.D.C.1987). The court found that plaintiff had sufficient knowledge of the underlying facts to put him on notice of his claims by 1983. The court did not address plaintiff's argument that defendants fraudulently concealed his causes of action from him. *Id.* at 8.

The district court apparently never ruled on the Securities Exchange Act and replevin claims; we are therefore required to remand the matter for the district court to pass upon those claims in the first instance. Otherwise, we affirm, except with regard to the RICO and common law fraud, deceit, conspiracy, and breach of fiduciary duty claims, where reversal is required because the entry of summary judgment was dependent upon an erroneous factual finding bearing on fraudulent concealment.

* * * *

III. BACKGROUND

Prior to January 1979, plaintiff was a substantial stockholder in two family-owned corporations. The principal assets of the two corporations were parcels of real estate, which were encumbered by 99-year ground leases, and on which were situated office buildings. One of the parcels relevant to this dispute, located at 1730 K Street, N.W., Washington, D.C., was owned by Riddell Washington Corporation (RWC). The other parcel, located at 1776 K Street, N.W., was owned by Riddell Properties, Inc. (RPI).

The RWC lease, executed in 1959, provided for an annual rental of $40,000 to be renegotiated as of June 30, 1981 and every ten years thereafter to 5% of the appraised value of the land. The RPI lease, executed in 1967, provided for an annual rental of $36,000, subject to a similar provision for renegotiation in 1992.

At all relevant times, Jean Riddell held all of the voting common stock (1.96% of the equity) of RWC and all of the voting common plus approximately one

half of the non-voting common (totalling 54.96% of the equity) of RPI. Prior to the sale of plaintiff's shares, the remainder of the equity (non-voting common) in each corporation was divided in equal shares among plaintiff and his three sisters. Thus, plaintiff's shares in the equity of RWC and RPI were approximately 25% and 11%, respectively. Jean Riddell, Robert Arthur, and Sally Arthur were officers and directors of each of the corporations.

In 1978, plaintiff was experiencing financial difficulties in connection with a home mortgage brokerage business of which he was president. He sought a bank loan of $150,000, offering as security his stock holdings in RWC and RPI. In order to support his representation that the stock was worth at least $150,000, plaintiff secured an appraisal of the long-term leases on the K Street properties (the Donnelly Appraisal).

The Donnelly Appraisal presented plaintiff with certain information relevant to the present statute of limitations issues. First, the Donnelly Appraisal noted the terms of the leases and the years in which they were to be renegotiated. Second, it estimated that the 1981 renegotiation of the RWC lease would result in an increase in the annual rental to $133,875 from $40,000 and that the 1992 renegotiation of the RPI lease would produce an increase to $86,700 from $36,000.

Nonetheless, the bank declined to make the loan because it was concerned that a minority interest in a family-owned corporation would not be marketable. The bank suggested, however, that it would accept the stock as security if the corporations agreed to buy back the stock in the event of default. Plaintiff called a meeting of the shareholders of the corporations and proposed the buy-back arrangement. There is some dispute about what was said at this meeting. The upshot, however, was that plaintiff's mother instead agreed to lend plaintiff the money herself.

The resulting loan agreement, dated January 3, 1979, provided that the loan was to be repaid in 90 days with an annual interest rate of 13%. As security for the timely payment of the note, plaintiff pledged all of his stock in both RWC and RPI, together with his shares in related family corporations,***1486 **368** and all dividends associated with the stock. The agreement expressly gave Mrs. Riddell "authority to sell, transfer, [and] rehypothecate said collateral." The agreement further provided that in the event of default:

> holder may apply all collateral received towards the balance due and full power and authority are hereby given to the holder to sell, assign, and deliver the whole of the above mentioned collateral, or any part thereof, [at] a public or private sale, [at] the option of the holder, without demand, advertisement or notice, and to collect the proceeds thereof, and after deducting all legal and other costs and expenses of collection, sale and delivery, to apply the residue of the proceeds to the payment of any and all liabilities hereunder.

In the event of such a sale, "[a]ny surplus [was] to be returned to [Roland Riddell] with a full and accurate accounting."

In addition to authorizing Jean Riddell to apply the proceeds of a sale of the stock toward the underlying debt, the agreement stated that in the event of default, plaintiff's three sisters would receive a 30-day option to "redeem the pledged collateral by paying the principal and all interest due to holder, thus relieving [plaintiff] of all further liability to holder."

As of January 1979, plaintiff's stock was placed in Jean Riddell's name and, pursuant to the terms of the loan agreement, all dividends were sent to her. Plaintiff failed to repay the loan when it came due in April 1979.

The next events relevant to this dispute occurred in 1981. First, as noted above, the lease on the property at 1730 K Street became subject to renegotiation, by its terms, as of June 30, 1981. Accordingly, on April 15, 1981, the rental was increased not threefold, as Donnelly had predicted in 1979, but more than sixfold, to $258,000 from $40,000. Plaintiff asserts that he did not learn the actual amount of the new rental until after he filed this lawsuit in 1987. Joint Appendix (J.A.) at 368-69.

Second, on May 5, 1981, Robert Arthur suggested to Jean Riddell, in a letter, that she foreclose on plaintiff's $150,000 note. J.A. 228. Two days later, Arthur made a formal offer to Mrs. Riddell, on behalf of the corporations, to purchase plaintiff's stock from her. J.A. 229. Later in the month, Arthur sent letters

to plaintiff's sisters informing them of their options to purchase the stock. J.A. 230-31, 234-36. They did not exercise their options, however, and at a meeting of the boards of directors on November 22, 1981, the directors voted unanimously to cause the corporations to purchase the shares from Jean Riddell for "the appraised figure" for their value. Plaintiff's Exhibit 15 at 2-3; J.A. 426. This transaction was effected on December 28, 1981, at a price of $106,936. J.A. 243.

There is evidence in the record from which a jury could reasonably piece together the following scenario with respect to these 1981 transactions. The renegotiation of the RWC lease in 1981 dramatically increased the value of the stock. J.A. 127. What had been an investment of very modest value suddenly became a source of substantial dividends, and increased in value concomitantly. At some point, either during negotiations over the lease or just after the new rental agreement was reached, Jean Riddell or Robert Arthur raised the question whether plaintiff or his creditors would have any claim on RWC's future income stream with respect to the RWC shares that Jean Riddell held as collateral for the 1979 loan. J.A. 228, 249, 452; deposition of Jean M. Riddell at 18-19, 94. Robert Arthur encouraged Jean Riddell to foreclose in order to avoid any such complication. Deposition of Jean M. Riddell at 18-19. Mrs. Riddell was reluctant to foreclose her son, *id.* at 78, 86-87, 92-93, but Arthur pressed the matter. J.A. 232. At the same time, he advised plaintiff's sisters of their right to exercise their options to purchase the stock by paying off the loan. J.A. 234, 244; deposition of Jean M. Riddell at 85-86. Jean Riddell did then foreclose on plaintiff's defaulted loan and sell the shares to herself in a private sale for the then outstanding balance of the loan. J.A. 200-02, 249; deposition of Jean M. Riddell at 92-93. ***1487 **369** Plaintiff was aware of none of these events at the time.

On May 11, 1981, Robert Arthur telephoned plaintiff, who questioned him as to the balance due on the loan once the dividend payments going to his mother were credited against the unpaid interest. J.A. 321, 322-23, 323-34; 360. Plaintiff also told Arthur that he believed the stock to be worth more than the $150,000 principal amount of the underlying loan, J.A. 324, 360, but Arthur disagreed with that assessment. J.A. 360.

In the meantime, discussions continued, without plaintiff's knowledge, regarding the appropriate disposition of the stock he had pledged. J.A. 420. On September 20, 1981, the boards of directors of the corporations, which as of that date were expanded to include Joan Baer and Marise Reynolds, determined to secure an independent appraisal of the shares. The minutes of the board meeting state as to this decision:

> Mr. A[r]thur moved that an appraisal be undertaken by the accountants for a determination of the stock value of the defaulted stock Mrs. Riddell now owned after the foreclosure of the Roland Riddell loan. Mr. Arthur explained that the corporation could not offer for the stock without an independent valuation.... A vote was taken, Mrs. Riddell abstained and the vote was passed, by a majority present.

J.A. 420. Since defendants were aware that plaintiff might challenge the transaction, J.A. 128; deposition of Jean M. Riddell at 146-47, they contemplated that the independent appraisal would be shared with him. J.A. 210.

On September 25, 1981, Robert Arthur wrote to the corporations' accountants, Buchanan & Co., to ask how he could "arrive at a value for the corporations to pay for their own stock." J.A. 425. Arthur's letter stated:

> I would prefer to avoid a "full blown" audit of corporations [sic], if possible. Could you do a present value of the cash flow and estimate of properties-accounting for expenses, etc. and multiplying by the percentage of ownership-closely held, etc. ownership? Tell me what you need to do the valuation, please. The purpose is so the corporations can purchase from Jean Riddell the shares she has obtained from a defaulted loan with Roland Riddell. I would like you to do this if you can, before November 1. Is it possible and what do you need?

Id. Apparently after hearing from Buchanan & Co., Robert Arthur sent a second letter providing information about the assets of the corporations, including the two leases. J.A. 422-24. This letter purported to request "an opinion of value for an 'arms's [sic] length purchaser' to use to determine how much to pay for shares of stock." J.A. 422.

There is evidence from which a jury could reasonably conclude that plaintiff's stock was not, in fact, independently appraised. First, although Robert Arthur's letter purported to request an "arm's length" opinion of value, it instructed Buchanan & Co. to deduct ("if appropriate") "a substantial factor for discount (35% to 50%) as to the nature of the securities being purchased," apparently because the stock was not readily marketable. J.A. 424. Buchanan & Co. produced worksheets reaching several different valuation figures for the stock of each of the corporations (Buchanan Appraisal I). J.A. 238-42, 363-66, 436-41. With respect to RWC, Buchanan & Co. calculated: (1) asset value of $2,507,000, which it discounted per Robert Arthur's instructions to $1,205,533; (2) after-tax capitalized earnings of $800,000, *not* taking into account the renegotiated rents; (3) after-tax cash flow of $870,000; and (4) book value of $158,000. As for RPI, Buchanan & Co. calculated: (1) asset value of $623,708, which it discounted by 50% to $312,000; and (2) capitalized earnings of $260,000, discounted by 50% to $130,000. J.A. 238. Buchanan Appraisal I did not assign weights to the various values in order to reach a single valuation figure for the corporations or for plaintiff's equity interest in them.

It is undisputed that one week later Robert Arthur, not Buchanan & Co., determined***1488 **370** the final valuation figure ($106,936) for plaintiff's equity interest. J.A. 237, 413. With respect to RWC, Arthur first simply averaged the four values produced by Buchanan & Co. (thus giving equal weight to the book value, which a Buchanan & Co. witness testified he would not have considered at all for purposes of valuing the stock of the corporations (deposition of Ronald Dungan at 40-42)), and arrived at a "mean value" of $758,250. He then multiplied that figure by 25% (plaintiff's share of the stock), yielding $189,562. Finally, despite a concern he had expressed one week earlier that plaintiff "might step in and say-I don't agree with your discount," J.A. 128, Arthur took an *additional* discount of 50% over and above the discount he had instructed Buchanan & Co. to take, thus arriving at a figure of $94,781. When asked at deposition why he discounted the value of the stock by 50% a second time, Robert Arthur said only, "Why not?"

As for RPI, Arthur again averaged the two Buchanan figures, multiplied by plaintiff's 11% share, and applied a 50% discount-again, over and above the discount applied by Buchanan & Co.-to reach a value of $12,155. Thus was reached the total figure of $106,936 that was ultimately paid for plaintiff's shares in the two corporations. J.A. 237, 243. At some subsequent point these calculations and the final figure Arthur reached by them were reprinted, by Arthur or by another, on Buchanan & Co. letterhead (Buchanan Appraisal II), according to plaintiff; and we agree at least that a jury could reasonably so infer.

According to plaintiff, it was not until the "spring or the late winter of [19]83" that he learned any of the details of the 1981 transactions. J.A. 315. It was then that his mother first informed him that she had foreclosed on his loan and sold the stock to the corporations in 1981; when she told him the price at which she had sold it, he was shocked. J.A. 280, 315-16. She showed him one or two pages of Buchanan Appraisal II, consisting of Robert Arthur's figures on Buchanan & Co. stationery, J.A. 281, 315, 329, 336, 337, and assured plaintiff that Buchanan & Co. had performed the appraisal. J.A. 213-14. Plaintiff testified at his deposition:

> It's that time that I saw an appraisal, and I remember just being shocked at what the value was and yet it looked like a bona fide appraisal.
>
> In 1983, I thought it was worth more until I had been presented with this appraisal and told that's all it was worth.
>
> I questioned the value of the stock, but Mother said it had been appraised. Mother told me repeatedly it's been appraised and we've been assured that's the value.
>
> J.A. 315, 329, 335.

Plaintiff later raised with Marise Reynolds the issue of the price paid for his stock in 1981. J.A. 96-97. According to her deposition testimony, she also assured him that his stock had been appraised by Buchanan & Co. Deposition of Marise Reynolds at 49-50, 54.

The district court found that the appraisal that plaintiff saw in 1983 "set forth a range of values for

the stock." 680 F.Supp. at 9. This finding suggests that the court understood plaintiff to have been shown Buchanan Appraisal I, which included the underlying worksheets produced by Buchanan & Co., since those worksheets are the only documents in the record that contain the "range" arrived at by Buchanan & Co. If plaintiff had in fact seen Buchanan Appraisal I, he might have realized that Buchanan & Co. had discounted the value of his shares by 50% in its initial calculations and that a second 50% discount was subsequently taken in arriving at the final figure. This might well have constituted notice of a possible fraud.

In fact, however, plaintiff testified, and defendants did not dispute for purposes of their motion, that he was not shown the underlying Buchanan & Co. worksheets containing the "range of values" but rather saw only Buchanan Appraisal II, which consisted only of Robert Arthur's calculation of the "bottom line," printed on Buchanan***1489 **371** & Co. stationery. J.A. 194-96, 203, 335-37, 369-70. The district court's factual finding to the contrary is therefore erroneous. Based upon a correct understanding of the record, a jury could reasonably find that plaintiff did not learn until after he began this litigation in 1987 that Robert Arthur, an interested party, not the independent Buchanan & Co., had produced the final figure of $106,936.

A jury could also find that when Jean Riddell showed plaintiff Buchanan Appraisal II and assured him that it was *bona fide,* she knew that the final figure of $106,936 had been calculated by Robert Arthur rather than by Buchanan & Co.; her deposition testimony so states. Deposition of Jean M. Riddell at 104, 106-09, 122, 135-36. Similarly, Marise Reynolds was aware, when she assured plaintiff that the appraisal had been performed by Buchanan & Co., that Robert Arthur had calculated the figure that was paid for plaintiff's shares, as she acknowledged in her deposition testimony. Deposition of Marise Reynolds at 17-18. In addition, as set forth above, there is evidence from which the jury could reasonably infer that Robert Arthur, since he anticipated that plaintiff might challenge the deeply discounted value at which Jean Riddell would sell the stock to the corporations, J.A. 128, knew that plaintiff might be shown Buchanan Appraisal II in support of the price the corporations paid for the stock. Finally, the jury could reasonably find that all of the members of the boards of directors of the corporations who, at the September 20, 1981 board meeting, voted to secure an "independent valuation" (1) had become aware by the November 22 board meeting that Robert Arthur had produced "the appraised figure" set forth in Buchanan Appraisal II; and (2) nonetheless voted at that meeting to approve the sale at that price. J.A. 420; deposition of Robert G. Arthur at 114, 126; deposition of Marise Reynolds at 17-18, 21-22; deposition of Joan Baer at 13, 16-17, 21, 45, 47-48, 50-51; deposition of Sara Arthur at 13, 54; plaintiff's Exhibit 15 at 2-3.

IV. FRAUD AND RICO CLAIMS

In his amended complaint, plaintiff alleges that all defendants violated RICO. The statute of limitations for RICO liability is four years. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* 483 U.S. 143, ----, 107 S.Ct. 2759, 2767, 97 L.Ed.2d 121 (1987). Plaintiff also alleges that all the non-corporate defendants engaged in fraud, deceit, conspiracy to defraud, and conspiracy to deceive. The District of Columbia three-year statute of limitations applies to all of these state law claims. *Hoffa v. Fitzsimmons,* 673 F.2d 1345, 1360 n. 41 (D.C.Cir.1982) (District of Columbia statute of limitations applies in diversity cases); *King v. Kitchen Magic, Inc.,* 391 A.2d 1184, 1186 (D.C.1978) (statute of limitations for claims sounding in fraud is three years).

Plaintiff filed this action on April 6, 1987, which is the relevant date, under federal and District of Columbia law, for determining its timeliness. Fed.R.Civ.P. 3; *West v. Conrail,* 481 U.S. 35, 39, 107 S.Ct. 1538, 1541, 95 L.Ed.2d 32 (1987); *Varela v. Hi-Lo Powered Stirrups, Inc.,* 424 A.2d 61 (D.C.1980). There can be no dispute that the time at which plaintiff's RICO, fraud, deceit, and conspiracy claims *accrued*-that is, the earliest time at which plaintiff could have maintained an action on the merits-was in 1981 when the relevant transactions occurred. If the statute of limitations began to run in 1981, each of those claims would be time-barred.

For claims sounding in fraud, however, the District of Columbia statute of limitations does not begin to run until the plaintiff "ascertains, or with the exercise of due diligence should ascertain, the material facts upon which the claim is based." *Hartford Life Insurance Co. v. Title Guarantee Co.,* 520 F.2d 1170,

1174 (D.C.Cir.1975). Several of the federal circuits have applied a similar "discovery rule" to RICO claims. *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096, 1102-05 (2d Cir.1988); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.,* 828 F.2d 211, 220 (4th Cir.1987); *La Porte Construction Co., Inc. v. Bayshore National Bank,* 805 F.2d 1254, 1256 (5th Cir.1986); ****372*1490***Alexander v. Perkin Elmer Corp.,* 729 F.2d 576, 577 (8th Cir.1984); *Compton v. Ide,* 732 F.2d 1429, 1433 (9th Cir.1984); *Bowling v. Founders Title Co.,* 773 F.2d 1175, 1178 (11th Cir.1985). Assuming this rule applies, the questions properly before the district court on the fraud, deceit, conspiracy, and RICO counts were (1) whether a jury could reasonably find that plaintiff never had sufficient knowledge of the facts to set the statutes of limitations for his respective causes of action running in the first instance; if it could not so find, (2) whether it could reasonably conclude that those statutes of limitations were tolled, either from the outset or at some subsequent point, by affirmative acts of fraudulent concealment by the defendants; and, if the jury could reasonably conclude that the statutes were so tolled, (3) whether the jury would nonetheless be compelled to conclude that defendants met their burden of showing that plaintiff was on notice of his claims under the standard for notice that is applicable once fraudulent concealment is shown.

The district court answered the first question in the negative, concluding that plaintiff, by March of 1983, had sufficient knowledge of the facts underlying his fraud, deceit, conspiracy, and RICO claims to set the statute of limitations running on those claims.

Specifically, the court: (1) found that plaintiff, in 1978, secured the Donnelly Appraisal "which valued the properties underlying the stock at $1,854,000," 680 F.Supp. at 9; (2) noted that plaintiff did not refute Sally Arthur's testimony that she advised him in 1979 of the upcoming lease renegotiation and that it would increase dividends; [FN1] (3) found-erroneously, as set forth above-that plaintiff saw, in 1983, a Buchanan & Co. appraisal that "set out various values for the stock," *id.;* (4) found that plaintiff admitted knowing in the late winter of 1982 or the early spring of 1983 that his loan had been foreclosed and that the underlying stock had been sold to the corporations; and (5) found that plaintiff believed that the price for which the corporations purchased the stock was too low and voiced this complaint to some of the defendants. *Id.* The court concluded:

> FN1. Plaintiff correctly asserts that this is a disputed fact. He concedes, however, that this fact is "irrelevant to the statute of limitations issue before the court."

> If plaintiff was unhappy in 1983 with the valuation of the stock and the sale price of the stock he could have requested his own appraisal, as he had done in 1978, or requested corporate financial statements, a course of action plaintiff admits he did not pursue. Moreover, plaintiff's assertion that he could rely on his mother, who was president of the corporations, and her statements of the values and financial condition of the company [sic] does not excuse plaintiff from exercising due diligence once the storm clouds gathered indicating that potential fraud existed.
> *Id.* (record citation omitted).

Finally, the court held as a matter of law that a reasonable business person with plaintiff's general knowledge of the real estate market and the specific facts that plaintiff knew in 1983 would have investigated his suspicion that the stock was undervalued. Thus, the court held that as of March 1983 plaintiff had a duty to investigate possible fraud, and that as a result the statute of limitations began to run at that time.

Based on its conclusion that the statute of limitations began to run on plaintiff's claims by 1983, the district court declined to reach plaintiff's allegations of fraudulent concealment. The court reasoned:

> In this jurisdiction, the Court does not address a claim of fraudulent concealment if the Court finds that the plaintiff was on notice of the wrongs of which he complains.

680 F.Supp. at 8. In support of that proposition, the court cited *Bender v. Rocky Mountain Drilling Associates,* 648 F.Supp. 330, 330 (D.D.C.1986), which in turn relied upon our decision in *Hobson v. Wilson,* 737 F.2d 1, 35 (D.C.Cir.1984). The district court then concluded that plaintiff was on notice of his claims, but in doing so looked to cases in which fraudulent concealment either was not shown or was not ***1491 **373** alleged. *E.g., Maggio v. Gerard Freezer & Ice Co.,* 824 F.2d 123, 131 (1st Cir.1987).

The district court's determination not to reach the issue of fraudulent concealment proceeds from an erroneous reading of our precedent. We held in *Hobson* that while mere inquiry notice may be sufficient to set the statute of limitations running in the absence of fraudulent concealment, when plaintiff shows that defendants committed affirmative acts of concealment with respect to a potential claim, defendants must meet a more stringent standard to bar a plaintiff on the ground that he was on notice of his claim notwithstanding the defendants' attempt to conceal it. *Hobson,* 737 F.2d at 35. Specifically, a defendant who has engaged in fraudulent concealment, in order to make out a defense based on the plaintiff's lack of due diligence, must show something closer to actual notice than the merest inquiry notice that would be sufficient to set the statute of limitations running in a situation untainted by fraudulent concealment. The fraudulent concealment by its nature makes discovery of the true facts more difficult, in part because it obscures the significance of such information as comes to plaintiff's attention. Furthermore, the concealing defendant lacks the equity to command easier access to the defense, especially in view of the inherent evidentiary difficulty of determining whether particular but isolated facts should have put the plaintiff on inquiry notice of his claim.

In light of our holding below that a jury could reasonably find that at least some of the defendants actively concealed plaintiff's RICO and common law fraud, deceit, and conspiracy claims from him, we need not reach either the issue of whether the "discovery rule" applies to RICO claims, or the question whether the facts as found by the district court-putting aside the erroneous finding that plaintiff saw Buchanan Appraisal I-would have been sufficient to put plaintiff on notice of his claim under the less rigid "discovery rule" standard.

A. *Fraudulent Concealment*

Both federal law and the law of the District of Columbia recognize that fraudulent concealment tolls the running of a statute of limitations. *Hobson,* 737 F.2d at 33. *See also Holmberg v. Armbrecht,* 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946) (fraudulent concealment is an "equitable doctrine [that] is read into every federal statute of limitations"). The elements of fraudulent concealment are the same, moreover (at least insofar as relevant to the facts of this case), in both federal and District of Columbia law. *Hobson,* 737 F.2d at 33 n. 101, 37 n. 113. As a result, the analysis of plaintiff's claims under RICO and for common law fraud, deceit, and conspiracy all turn on the same considerations inasmuch as the underlying allegations supporting those claims are directed at the manner in which defendants determined the price paid for plaintiff's shares.

In *Hobson,* we distinguished between wrongs as to which "concealment is established by the nature of the act," and wrongs as to which "additional acts of concealment are required to trigger the tolling requirement." *Hobson,* 737 F.2d at 33. In the latter type of case, "defendants must engage in some misleading, deceptive or otherwise contrived action or scheme, in the course of committing the wrong, that is designed to mask the existence of a cause of action." *Id.* at 34. Such deception "may be as simple as a single lie." *Id.* at 34-35. *See also William J. Davis, Inc. v. Young,* 412 A.2d 1187, 1191-92 (D.C.1980) ("[Defendant] must have done something of an affirmative nature designed to prevent discovery of the cause of action.... [A]ny statement, word or act which tends to suppress the truth raises the suppression to that level"). Under either approach, if the jury finds fraudulent concealment, defendants will have the burden, if the statute is not to be tolled, of proving that plaintiff "could have discovered ... the cause of action if he had exercised due diligence." *Hobson,* 737 F.2d at 35 (quoting *Richards v. Mileski,* 662 F.2d 65, 71 (D.C.Cir.1981)); *see also id.* at 37 n. 113 (applying District of Columbia law).

***1492 **374** On the facts reviewed above, plaintiff has adduced sufficient evidence to go to the jury on both the self-concealing and the subsequently concealed theories of fraudulent concealment. As to Robert Arthur, his instruction to Buchanan & Co. to discount their appraisal by a specified percentage and his later multiplicative discounting of the average of values produced by Buchanan & Co., combined with his expressed expectation that plaintiff might well challenge the resulting valuation (that is, the figure produced by Arthur's further discount), constituted sufficient evidence for a jury to conclude that Arthur defrauded plaintiff as to the existence of his cause of action. As to Jean Riddell, a jury could reasonably conclude that her presentation of Buchanan Appraisal II to plaintiff and her representation to him that the appraisal had been performed independently consti-

tuted an affirmative misrepresentation. Similarly, as to Marise Reynolds, her representation to plaintiff that his stock had been independently appraised, when she knew that it had not, could reasonably be found to constitute an affirmative misrepresentation.

Under the first test of *Hobson,* a jury could reasonably find that misrepresentations by Robert Arthur, Jean Riddell, and Marise Reynolds with respect to Buchanan II were part and parcel of the underlying fraud alleged, thus rendering the fraud self-concealing. Even if the jury finds that there was no self-concealing fraud, however, it could still reasonably find that affirmative misrepresentations by any of these three defendants constituted "additional acts of concealment" and thus tolled the statute of limitations. *Hobson,* 737 F.2d at 33.

As to the corporations, we have already seen that there is evidence that all of the directors of the corporations who had voted to secure an "independent" appraisal were aware that Robert Arthur had produced "the appraised figure," but nonetheless voted to approve the sale at that price. Thus, a jury could reasonably conclude that Robert Arthur was exercising his authority-either previously delegated or then ratified-as an agent of the corporations when he produced the figures contained in Buchanan Appraisal II, and that as a result, his actions tolled the statute of limitations as to the corporations. *See Buxton v. Diversified Resources Corp.,* 634 F.2d 1313, 1315-18 (10th Cir.1980) (scope of delegated authority); *Miller Tabak Hirsch & Co. v. Penn Traffic Co.,* 643 F.Supp. 1297, 1304-06 (W.D.Pa.1986) (retroactive ratification).

In an effort to quarantine the evidence concerning Buchanan Appraisal II, defendants raise what is essentially a materiality argument. They assert, and our dissenting colleague agrees, that because plaintiff's stock had already been sold to his mother at the time Buchanan Appraisal II was performed, "nothing relating to that document could be deemed to constitute a fraud upon him." On this theory, the only transaction in which plaintiff could have had any interest was the private sale in which his mother foreclosed on the loan and took the stock herself.

The difficulty with this argument is that there is evidence from which a jury could reasonably conclude that at least some of the defendants intended that plaintiff be lulled by Buchanan Appraisal II into accepting as reasonable the amount that Jean Riddell paid (*i.e.,* accepted in full satisfaction of plaintiff's debt) for the stock in the initial sale-a sale in which he had a stake because, if the stock was worth more than the amount owing on his debt to her, he was entitled to the excess under the terms of the loan agreement. Indeed, there is evidence that it was only when plaintiff complained that he had not received anything back after the final disposition of his stock that he was shown Buchanan Appraisal II and told that his stock had been appraised by Buchanan & Co. A jury could reasonably find that plaintiff's belief that the stock had been independently appraised prevented him from challenging either the initial sale to his mother or her subsequent sale to the corporation.

A question is nonetheless raised as to the responsibility of some of the defendants for such acts of other defendants as may amount to fraudulent concealment. ***1493 **375** There is no evidence that either Sally Arthur or Joan Baer ever told plaintiff that his stock had been independently appraised or made any other affirmative misrepresentation that could amount to fraudulent concealment. In addition to alleging the underlying wrongs of fraud and deceit, however, plaintiff also alleged that all of the individual defendants were engaged in a conspiracy to defraud and deceive him. Thus, we must determine whether fraudulent concealment by Robert Arthur, Jean Riddell, or Marise Reynolds can be imputed to the other alleged co-conspirators.

In *Hobson,* defendants challenged one of the jury instructions on the ground that it conflicted with the " 'principle' that concealment by a third party may not be attributed to the named defendants." 737 F.2d at 41. *See, e.g., Wood v. Williams,* 142 Ill. 269, 31 N.E. 681, 683 (1892); *Joseph v. Lesnevich,* 56 N.J.Super. 340, 153 A.2d 349, 358 (1959). This court held that, assuming the stated principle to be the law, the instruction was nonetheless proper because it "generally required that concealment be attributable to the defendant or, with the conspiracy claims, to the overall conspiracy." *Hobson,* 737 F.2d at 42. Thus the court implicitly, but necessarily, held that where an act of concealment is attributable to the conspiracy itself, it can also be imputed to each of the co-conspirators. The few decided cases in which other courts have addressed this question similarly hold that, at least where the original conspiracy contem-

plates concealment, or where the concealment is in furtherance of that conspiracy, affirmative acts of concealment by one or more of the conspirators can be imputed to their co-conspirators for purposes of tolling the statute of limitations. *State of New York v. Hendrickson Brothers, Inc.,* 840 F.2d 1065, 1085 (2d Cir.1988); *Parish v. Maryland & Virginia Milk Producers Ass'n,* 250 Md. 24, 242 A.2d 512, 539, 551-52 (1968); *Johnson v. McMurray,* 461 So.2d 775, 777 n. 2 (Ala.1984); *Chicago Park District v. Kenroy, Inc.,* 78 Ill.2d 555, 37 Ill.Dec. 291, 295-96, 402 N.E.2d 181, 185-86 (1980); *Holman v. Moore,* 259 Mich. 63, 242 N.W. 839, 841 (1932); *Ramey v. General Petroleum Corp.,* 173 Cal.App.2d 386, 343 P.2d 787, 794 (Dist.Ct.App.1959); *Bankers Commercial Life Ins. Co. v. Scott,* 631 S.W.2d 228, 233 (Ct.App.Tex.1982). *See also Jim Walter Homes, Inc. v. Waldrop,* 448 So.2d 301 (Ala.1983) (imputing misrepresentations where agency relationship alleged); *Martin v. Barbour,* 558 S.W.2d 200, 209 (Mo.Ct.App.1977) (same in the context of a partnership). *Cf. Colley v. Canal Bank & Trust Co.,* 159 F.2d 153, 154 (5th Cir.1947) (no imputed concealment where no collusive or joint activity shown); *International Union, United Automobile Workers v. Wood,* 337 Mich. 8, 59 N.W.2d 60, 62-63 (1953) (same where no conspiracy alleged); *Greenfield v. Kanwit,* 87 F.R.D. 129, 132 (S.D.N.Y.1980) (same where evidence failed to show that concealment was in furtherance of the original conspiracy); *Joseph v. Lesnevich,* 153 A.2d at 358 (same where defendants were not in privity and did not participate in concealment). We therefore hold that if the alleged conspiracy contemplated that plaintiff would be shown Buchanan Appraisal II in the event that he challenged the transaction, or if the representations that the appraisal was independently performed were in furtherance of that alleged conspiracy, then the acts of Robert Arthur, Marise Reynolds, and Jean Riddell may be imputed to Sally Arthur and Joan Baer for the purpose of tolling the statute of limitations.

The question remains whether the same analysis applies to the underlying fraud, deceit, and RICO claims. Under both federal and District of Columbia law, civil conspiracy is not actionable in and of itself. *Zabriskie v. Lewis,* 507 F.2d 546, 553-54 (10th Cir.1974) (federal law); *Halberstam v. Welch,* 705 F.2d 472, 477, 479 (D.C.Cir.1983) (District of Columbia law). Rather, its purpose is to serve as a device through which vicarious liability for the underlying wrong may be imposed upon all who are a party to it, where the requisite agreement exists among them. *Weiss v. Gibson,* 610 F.Supp. 609, 611 (D.D.C.1985) (federal law); *Halberstam,* 705 F.2d at 479 (District of Columbia law). In order for that purpose to be served, in a case where ***1494 **376** an act of concealment was either contemplated by or carried out in furtherance of a civil conspiracy, the statute of limitations as to the underlying wrong must be tolled. For without the support of the underlying wrongs, the conspiracy counts would collapse; as a matter of substantive law, one cannot be liable for a conspiracy that does not have as its object an actionable wrong. We do not believe that either federal or local law contemplates such a perverse result. Since we have already held that one conspirator's act of fraudulent concealment, if within the scope of the conspiracy, tolls the statute as to the other alleged conspirators, it follows that the tolling effect should apply also to the substantive wrongs underlying the conspiracy; and we so hold.

Although we should not need to say so, in light of the serious charges under discussion and the defendants' interest in their reputations, we emphasize that we do not address here the validity of plaintiff's allegations as to the existence or scope of any conspiracy or other wrongful act material to the merits of this action. We hold only that if plaintiff proves that a conspiracy existed, and that such conspiracy either contemplated or was furthered by affirmative misrepresentations on the part of Robert Arthur, Jean Riddell, or Marise Reynolds, then those misrepresentations vicariously tolled the statute of limitations as to Sally Arthur and Joan Baer with respect both to the conspiracy and to the underlying substantive claims against them. We leave it to the finder of fact to determine whether a conspiracy existed and, if it did, to delineate its scope.

B. *Notice*

Clearly, "the doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim." *Hobson,* 737 F.2d at 35. If it can be determined as a matter of law, therefore, that plaintiff had timely notice of the causes upon which he belatedly sues, then his showing of fraudulent concealment will not prevent the statute of limitations from having run. *Id.* at 38.

In *Hobson,* we defined the requisite notice, once

the plaintiff has shown that a defendant committed an act of concealment, as "an awareness of sufficient facts to identify ... the particular cause of action at issue, not [notice] of just any cause of action." *Id.* at 35. As discussed above, we distinguished the degree of notice required from that in which no fraudulent concealment has occurred: "We do not mean the kind of notice-based on hints, suspicions, hunches or rumors-that requires a plaintiff to make inquiries in the exercise of due diligence, but not to file suit." *Id.* Here, even if plaintiff was on inquiry notice, he was clearly not on notice sufficient as a matter of law to require him to file this suit.

The circumstances surrounding Buchanan Appraisal II, and Robert Arthur's participation in its preparation, play a central role in plaintiff's fraud, deceit, conspiracy, and RICO claims. As set forth above, the district court found that plaintiff was on notice of those claims by 1983, when he was told that the stock had been sold and when he was shown an appraisal by Buchanan & Co. The court's conclusion was based in part, however, on its erroneous finding that plaintiff was shown Buchanan Appraisal I, including the underlying Buchanan & Co. worksheets setting forth "a range of values for the stock." 680 F.Supp. at 6, 9. The court did not consider the significance of the undisputed fact that Robert Arthur calculated the final figure that was paid for plaintiff's shares.

Even if in 1983 plaintiff suspected that the price paid for his shares was too low, that suspicion cannot be said to have put him on notice as a matter of law of the falsity of the representations that Buchanan Appraisal II was independently prepared, much less given him reason specifically to think that Robert Arthur may have participated in preparing it-facts that are central to his fraud, deceit, conspiracy, and RICO claims.

So much is established by *Richards v. Mileski,* 662 F.2d 65 (D.C.Cir.1981). ***1495 **377** There the plaintiff had resigned from the United States Information Agency in 1955 under the weight of false charges that he had engaged in homosexual activity. He, of course, knew at the time the charges were made that they were false. He did not know until 1978, however, that his superiors had knowingly filed false reports on which the charges were based. This court held that his tort action against his superiors was not time-barred. The court found that it "was no mere 'detail' in 1955 that the false charges against Richards had been fabricated as part of a deliberate conspiracy against him, or that his own superiors rather than an unknown informant were the source of his misery." *Id.* at 69. Likewise here, plaintiff's knowledge that the price paid for his shares may have been low would not have put him on notice that Buchanan Appraisal II, on which he was induced to rely, was fraudulently prepared. Similarly, assuming that the district court was correct in holding plaintiff to a higher standard of inquiry notice due to his experience in real estate, a proposition on which we need not pass, and assuming that plaintiff's experience should have led him to believe that the price was low, expertise in real estate cannot be used to charge plaintiff, as a matter of law, with notice that Buchanan & Co. might not have prepared the appraisal that was shown to him.

We therefore hold that a jury could reasonably find that plaintiff was not on notice of his fraud and RICO claims, as set forth in the amended complaint, until he learned that Buchanan Appraisal II had been performed by Robert Arthur rather than by Buchanan & Co.[FN2] Plaintiff was therefore entitled to have the jury consider those counts as against all of the defendants.

> FN2. Plaintiff was put on inquiry notice of a possible fraud claim when he learned of the sale of the two parcels of real estate in 1987. Plaintiff duly inquired, and, on the advice of counsel, filed this action. Because the issue is not before us, we need not comment on the sufficiency of the original complaint under Fed.R.Civ.P. 9. *Cf. Hayduk v. Lanna,* 775 F.2d 441, 443-45 (1st Cir.1985) (in order to survive scrutiny under Rule 9, a complaint alleging fraud must set forth the circumstances of the alleged fraudulent activity). It suffices to say that subsequent discovery produced evidence from which a jury could find that, prior to the filing of this action, plaintiff had no notice-not even inquiry notice-of the evidence from which it now appears that there may have been fraudulent concealment.

* * * *

For the foregoing reasons, the judgment of the

district court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SEPARATE OPINIONS OMITTED.

C.A.D.C.,1989.
Riddell v. Riddell Washington Corp.
866 F.2d 1480, 275 U.S.App.D.C. 362, RICO Bus.Disp.Guide 7138, 8 UCC Rep.Serv.2d 575