

# Determining the Right Requirements for Restarting the Limitation Period in Private Antitrust Conspiracy Suits

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*ABSTRACT: This Note explores how the Eighth Circuit and other circuits have recently expanded the liability of antitrust defendants significantly by holding that plaintiffs do not need to allege that a conspiracy was ongoing during the four-year statute of limitation period to restart the statute. These decisions undermine both the federal antitrust regime’s goal of proactive private enforcement and the repose and efficiency interests underlying statutes of limitations. This Note argues that these decisions improperly rely on the Supreme Court’s RICO precedent and contradict the Court’s pleading standard precedent. This Note proposes legislative solutions to this problem in the form of clarification to the “accrual” language in the statutory regime and through the enactment of a statute of repose. Either solution would provide clarity to defendants as to the limits of their liability and encourage plaintiffs to promptly bring their claims.*

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## I. INTRODUCTION

In 2008, Apple and a group of book publishing companies tried to challenge Amazon’s place of dominance in the e-book market.<sup>1</sup> Their strategy was to work together to raise the price of e-books. Unfortunately for them, their actions attracted the attention of no fewer than 33 state governments, who accused Apple of violating the laws that regulate competition itself: the antitrust laws. In the end, Apple’s unsuccessful attempt cost the company \$450 million to settle the suit.<sup>2</sup>

Congress first formally recognized the incredible danger posed to consumers by businesses joining together to conspire against their interest when it passed the Sherman Antitrust Act in 1890.<sup>3</sup> Private enforcement by consumers is a cornerstone of the antitrust regime enforcement mechanism. Coupled with heavy criminal punishments,<sup>4</sup> the regime provides consumers

1. Nate Raymond & Jonathan Stempel, *Apple Conspired to Fix E-book Prices: U.S. Appeals Court*, REUTERS (June 30, 2015, 9:05 AM), <https://www.reuters.com/article/us-apple-ebooks-decision-idUSKCN0PA1RS20150630>.

2. *Id.*

3. See Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)).

4. The Sherman Act’s heavy punishments are given in section 1 of the Act:

Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

with generous financial incentives<sup>5</sup> to encourage swift and proactive enforcement. To offset the threat of potentially ruinous penalties, the regime only allows a plaintiff to recover if their claim is brought within four years of the date that the claim accrues.<sup>6</sup>

On June 23, 2017, the Eighth Circuit upset this delicate balance by effectively destroying the statute of limitations for private antitrust conspiracy suits in the case of *In re Pre-Filled Propane Tank Antitrust Litigation*.<sup>7</sup> Sitting en banc, the court determined that a plaintiff need not allege an ongoing conspiracy to restart the limitation period imposed on suits brought under § 1 of the Sherman Antitrust Act.<sup>8</sup> The court's decision permits an antitrust plaintiff to sue for a defendant's alleged wrongful conduct years after the statute of limitations has run.

This Note argues that the Eighth Circuit's decision in *Propane Tank*, and similar decisions reached by other circuits,<sup>9</sup> improperly rely on Supreme Court precedent and frustrate the rationales behind both statutes of limitations and the antitrust regime's private enforcement mechanism. Part II of this Note discusses the history of private antitrust enforcement of § 1 of the Sherman Act and the rationales behind that provision's mandatory trebling<sup>10</sup> of damages. Additionally, Part II also explores the rationales underlying the use of statutes of limitation, including their ability to provide repose for defendants and promote judicial efficiency. Part III explores *Propane Tank* and discusses its reasoning, particularly its reliance on Supreme Court RICO precedent.<sup>11</sup> Part III also explains the problems with the so-called RICO analogy, and discusses problems created by permitting plaintiffs to restart the statute of limitations without having to prove the existence of an ongoing conspiracy during the limitation period.<sup>12</sup> Finally, Part IV proposes a

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5. See *id.* at § 15(a) (“[An injured party] shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” (emphasis added)).

6. *Id.* § 15b.

7. Hartig Drug Co. v. Ferrellgas Partners, L.P. (*In re Pre-Filled Propane Tank Antitrust Litig.*), 860 F.3d 1059 (8th Cir. 2017) (en banc), cert. denied sub nom. Ferrellgas Partners, L.P. v. Morgan-Larson, LLC, 138 S. Ct. 647 (2018).

8. *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d at 1068.

9. See, e.g., Oliver v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014); Tam Travel, Inc. v. Delta Airlines, Inc. (*In re Travel Agent Comm’n Antitrust Litig.*), 583 F.3d 896, 902 (6th Cir. 2009); Atl. Textiles v. Avondale Inc. (*In re Cotton Yarn Antitrust Litig.*), 505 F.3d 274, 290–91 (4th Cir. 2007); Morton’s Mkt., Inc. v. Gustafson’s Dairy, Inc., 198 F.3d 823, 828 (11th Cir. 1999) (holding in each case that the Supreme Court’s 1997 decision *Klehr v. A.O. Smith Corp.* applies to antitrust conspiracy suits).

10. *Damages*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[T]reble [D]amages [:] Damages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed.”); see also 15 U.S.C. § 15(a) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover three fold the damages by him sustained . . .”).

11. See *infra* Sections III.A–B.

12. See *infra* Sections III.C–D.

few solutions to *Propane Tank's* issues, including modifying the limitation provision for conspiracy suits<sup>13</sup> or even adopting a statute of repose or similar mechanism.<sup>14</sup>

## II. ANTITRUST CONSPIRACY SUITS AND STATUTES OF LIMITATION

To properly examine the ramifications and rationales of the Eighth Circuit's holding in *Propane Tank*,<sup>15</sup> it is necessary to explore the policies underlying the Sherman Act and how courts have interpreted the procedural requirements for bringing conspiracy suits under § 1. This Part provides: (A) an overview of private Sherman Antitrust conspiracy suits; (B) an explanation of the policy objectives underlying the use of private enforcement and treble damages in conspiracy suits; (C) an explanation of statutes of limitations and the relevant policy rationales behind them; and (D) an explanation of the Continuing Violation Doctrine.

### A. ANTITRUST CONSPIRACY SUITS

Passed in 1890, Congress designed the Sherman Antitrust Act<sup>16</sup> "to protect trade and commerce against unlawful restraints and monopolies."<sup>17</sup> The Court has stressed the antitrust regime's importance to both the economic and political health of the United States, calling the Act "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade,"<sup>18</sup> and calling antitrust law violations "a blow to the free-enterprise system envisaged by Congress."<sup>19</sup> By passing the Sherman Antitrust Act, Congress recognized the existential threat that large concentrations of wealth in a few individuals and companies posed.<sup>20</sup>

13. See 15 U.S.C. § 15b.

14. See *infra* Part IV.

15. *Hartig Drug Co. v. Ferrellgas Partners, L.P.* (*In re* Pre-Filled Propane Tank Antitrust Litig.), 860 F.3d 1059 (8th Cir. 2017) (en banc), *cert. denied sub nom.* *Ferrellgas Partners, L.P. v. Morgan-Larson, LLC*, 138 S. Ct. 647 (2018).

16. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7).

17. *Id.* at 209.

18. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

19. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972); see also *N. Pac. Ry. Co.*, 356 U.S. at 4 ("[The Sherman Antitrust Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while . . . providing an environment conducive to the preservation of our democratic political and social institutions.").

20. *Standard Oil. Co. of N.J. v. United States*, 221 U.S. 1, 50 (1911). The impetus of the Sherman Antitrust Act was described thus:

[T]he main cause which led to the [Sherman Antitrust Act] was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations

The Act broadly criminalized conspiratorial conduct, but did not define such conduct:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .<sup>21</sup>

The Act authorized private actions against offenders through similarly broad language:

Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.<sup>22</sup>

Congress later incorporated this provision into the Clayton Antitrust Act of 1914,<sup>23</sup> which prescribed a four-year limitation period for antitrust suits.<sup>24</sup> The Supreme Court has narrowly construed the Clayton Act's broad language in a number of ways. For instance, the Court has construed the act to only bar "contracts . . . which 'unreasonably' restrain competition."<sup>25</sup> Additionally, the Court has construed "conspiracy" to require more than a showing of "conscious parallelism"<sup>26</sup> in which "firms in a concentrated market

afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

*Id.*; see also *id.* at 83–84 (Harlan, J., concurring in part and dissenting in part) (calling the concentration of wealth in a few private actors "another kind of slavery").

21. Sherman Antitrust Act § 1, 15 U.S.C. § 1.

22. *Id.* at § 7, ch. 647, 26 Stat. at 210 (repealed 1955) (current version at 15 U.S.C. § 15(a)).

23. Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

24. 15 U.S.C. § 15b ("Any action to enforce any cause of action under [the Clayton Act] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.").

25. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

26. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007). The Court went on to explain that evidence produced by plaintiffs of parallel conduct by defendants must be accompanied by evidence excluding independent action:

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the

. . . recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions.”<sup>27</sup> Instead, a plaintiff seeking to bring an antitrust conspiracy suit must show “an agreement, tacit or express,” in order to succeed on the claim.<sup>28</sup>

### B. RATIONALES BEHIND PRIVATE TREBLE DAMAGES

The most striking feature of the federal antitrust regulatory scheme is not only the use of private enforcement, but the use of mandatory trebling of actual damages for some violations, including conspiracy suits to further incentivize it. While the Sherman Antitrust Act’s legislative history does not explain why Congress chose to treble damages<sup>29</sup> or why threefold damages were chosen as opposed to some other award,<sup>30</sup> commentators have put forward a number of policy rationales to justify it. These include “(1) compensation of victims; (2) deterrence; (3) forfeiture of ill-gotten gains; and (4) punishment.”<sup>31</sup> This Note focuses on the deterrence rationale.

Congress authorized private enforcement of the Sherman Act (and later the Clayton Act) to encourage litigants “to serve as ‘private attorneys general,’”<sup>32</sup> complementing the public enforcement scheme.<sup>33</sup> By nature,

trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict; proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action; and at the summary judgment stage a § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.

*Id.* at 554 (citations omitted).

27. *Id.* at 553–54 (alteration in original) (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

28. *Id.* at 553 (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)).

29. See Edward D. Cavanagh, *Trebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 782–83 (1987) (discussing the legislative history of the Sherman Antitrust Act).

30. *Id.*

31. Edward D. Cavanagh, *Trebling Antitrust Damages in Monopolization Cases*, 76 ANTITRUST L.J. 97, 100 (2009).

32. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130–31 (1969) (“[T]he purpose of giving private parties treble-damage[s] . . . was to serve . . . the high purpose of enforcing the antitrust laws.”).

33. Cavanagh, *supra* note 29, at 788–89. Professor Cavanagh explains that, in addition to enforcement by private parties,

The Antitrust Division [of the Department of Justice] has responsibility for criminal enforcement of the Sherman Act and for civil enforcement of the Sherman and Clayton Acts, including the right to seek actual damages and to obtain injunctive relief. The FTC has concurrent civil jurisdiction to restrain violators of the Clayton Act and is also empowered to enjoin unfair methods of competition under section 5 of the Federal Trade Commission Act.

*Id.* (footnotes omitted).

conspiracies are secretive. Without private enforcement, some conspiracies would go unpunished, weakening the antitrust regime's deterrent effect.<sup>34</sup>

The provision of treble damages ensures that private enforcement of the antitrust regulatory regime is economically worthwhile for plaintiffs. "If antitrust recoveries were limited to actual damages, private parties would have little motivation to sue, given the unpredictability and high costs of antitrust litigation."<sup>35</sup> This scheme's results have been clear. Today, private plaintiffs bring most antitrust enforcement actions,<sup>36</sup> and there is at least some empirical evidence that private enforcement deters more anticompetitive conduct than public enforcement.<sup>37</sup>

However, critics have disputed the deterrent value of treble damages. Specifically, some critics worry that treble damages are overdeterrent for the conduct they seek to prevent.<sup>38</sup> Because the threat of a treble damages award looms over "conduct[] which may be beneficial to competition, yet falls in the vast gray area between clearly legal and clearly illegal conduct," firms may be incentivized to refrain from conduct which otherwise would be a net benefit to the market.<sup>39</sup>

The Supreme Court's treatment of the antitrust regime has further complicated the policy rationales of the regime. Apart from the Clayton Act in 1914, Congress has amended or expanded antitrust law several times as it has recognized additional ways that people engage in anticompetitive conduct.<sup>40</sup> Historically, the Supreme Court has supported the antitrust regime.<sup>41</sup> However, in more recent years, the Court has expressed doubt in

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34. See Cavanagh, *supra* note 31, at 115–16 (contrasting the value of treble damages in conspiracy suits brought under 15 U.S.C. § 1 with their value in monopolization suits brought under 15 U.S.C. § 2).

35. *Id.* at 101.

36. See Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI-KENT L. REV. 207, 210 (2003).

37. See generally Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315 (comparing the deterrent effects of public and private antitrust law enforcement).

38. See Cavanagh, *supra* note 29, at 801–02 (discussing how treble damages may deter firms from engaging in both procompetitive and anticompetitive conduct).

39. *Id.* at 801.

40. See, e.g., Hart–Scott–Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1394 (codified as amended at 15 U.S.C. § 18a) (requiring that mergers and acquisitions receive antitrust clearance from the Department of Justice and Federal Trade Commission); Celler–Kefauver (Anti-Merger) Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18) (regulating anti-competitive mergers); Robinson–Patman (Anti-Price Discrimination) Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526 (codified as amended at 15 U.S.C. § 13) (banning price discrimination between customers if such discrimination reduces competition).

41. See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) ("The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948))).

the value of private antitrust actions. These doubts fall into four categories: “(1) fear of false positives; (2) lack of confidence in judges and juries to achieve correct outcomes; (3) the inability of federal judges to manage antitrust litigation in a cost-effective manner; and (4) a preference for regulation over judicial intervention.”<sup>42</sup> While there is some legitimacy to each of these categories, some critics argue that the Court’s recent rulings will actually endanger the viability of private actions as an enforcement mechanism for the antitrust regime.<sup>43</sup>

In summary, the Sherman Antitrust Act’s broad language and its use of treble damages lead to two conclusions about the American antitrust regime’s underlying goals. First, the Sherman Act provides strong incentives to private parties harmed by conspiratorial conduct to litigate. Second, the Act makes the punishments for that conduct as consistent and costly for wrongdoers as reasonably possible. Part IV of this Note will evaluate the courts’ ability to accomplish these goals in light of the procedural constraints imposed on private antitrust conspiracy suits and to balance these goals in light of the Supreme Court’s recent treatment of the antitrust regime and its *Propane Tank* decision.<sup>44</sup>

### C. THE RATIONALES BEHIND STATUTES OF LIMITATIONS

The term “statute of limitations” is generally used to refer to statutory provisions that restrict the timeframe in which a plaintiff may bring a suit to vindicate his or her rights.<sup>45</sup> Most of the American colonies enacted statutes of limitations prior to the Revolutionary War.<sup>46</sup> While many jurisdictions establish general statutes of limitations to provide “catch-all” limitation

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42. Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY. U. CHI. L.J. 629, 636 (2010) (discussing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)).

43. Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 27–34 (2008).

44. See *infra* Part IV.

45. See *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 105 (2013); see also Elad Peled, *Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims*, 41 OHIO N.U. L. REV. 343, 349–50 (2015) (“Statutes of limitations . . . prescribe a time period within which a plaintiff must assert a claim for relief for a violation of law.”).

46. William M. Schrier, Note, *The Guardian or the Ward: For Whom Does the Statute Toll?*, 71 B.U. L. REV. 575, 575–77 (1991).

periods,<sup>47</sup> it is common for those same jurisdictions to articulate alternative statutes for specific types of claims.<sup>48</sup>

### 1. The Repose Rationale

Statutes of limitation are justified by a number of policy rationales. First, prescribed limitation periods give defendants peace of mind, and protect them against stale claims.<sup>49</sup> By introducing a bar against claims arising from alleged wrongdoings that occurred years in the past, a defendant is provided the assurance that he or she does not bear the risk of someone suing them indefinitely. The value of the repose function depends largely on a defendant's "(a) awareness of the existence of a possible claim; (b) assessment of the merits of the claim; (c) perception of the likelihood that the claim will be filed; (d) prediction of the magnitude of an adverse outcome; (e) tolerance for risk; and (f) susceptibility to feelings of remorse."<sup>50</sup> The limitation period's length ties into part (c) of this analysis. The longer a limitation period, the higher the chance of someone filing a claim, simply because there is a longer time in which to file.

Although society may not want wrongdoers to enjoy peace of mind from limitation periods,<sup>51</sup> the presence of a limitation period is, on balance, beneficial for society. The peace of mind that comes once a limitation period has run allows potential defendants to "order their affairs in accordance with" the "status quo that has become entrenched because of the passage of time."<sup>52</sup> In the absence of certainty in the status quo, defendants would be perpetually liable for any wrongdoing, which could result in financial instability for defendants and could have chilling macroeconomic effects.<sup>53</sup> Witnesses to

47. See, e.g., 18 U.S.C. § 3282(a) (2012) (establishing a five-year limitation period to bring criminal charges against a person for non-capital offenses); 28 U.S.C. § 1658(a) (providing a default four-year limitation period for claims arising from federal statutes when no other limitation period is articulated); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950) ("In the United States today, for the great majority of actions the time for bringing suit is governed by general statutes of limitations found in every state.").

48. See, e.g., Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 124–28 (2008) (discussing the proliferation of exceptions to the general statutory limitation rule (§ 3282(a)) in criminal actions).

49. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460–62 (1997).

50. *Id.* at 461.

51. See, e.g., 18 U.S.C. § 3281 (establishing that there is no limitation period for crimes punishable by death); 26 § 6501(c) (establishing that there is no limitation period on enforcement actions when a taxpayer fails to file a return, files a false return, or intentionally tries to evade paying taxes).

52. Peled, *supra* note 45, at 350.

53. See *id.* ("[R]etaining constant preparedness for possible claims relating to any prior event would compel large groups of potential defendants to maintain financial reserves, avoid certain transactions, or purchase insurance policies for high prices. In this manner, resources and activities that could benefit both potential defendants and society . . . would be lost." (footnote omitted)).

those alleged wrongdoings<sup>54</sup> and risk-averse innocent members of the public<sup>55</sup> may also enjoy this repose effect.

It is easy to see why repose is valuable, and how costly to society a legal system without repose would be. For example, suppose a young driver causes a car accident. The other person is injured but doesn't bring any suit against the driver. Under a system without repose, the young driver is never free from potential liability. They must account for the cost of defending a suit that might never occur when making major life decisions—buying a home, retiring, etc.—even decades later.

The repose rationale applies the same in the business context. Suppose a customer gets sick while eating at a restaurant. Regardless of whether or not the restaurant actually caused the customer's illness—perhaps instead the customer was sick before ever going to the restaurant—the potential suit would exist in perpetuity, long after memories have faded and business records have been discarded or lost. The potential suit, meritorious or not, would threaten the restaurant—it would never have repose from the customer's potential claim. The restaurant's owners and managers would need to account for the cost of litigating the customer's dispute even decades after the incident occurred.

## 2. Promote Efficiency

Second, statutes of limitation protect defendants from stale claims and promote judicial efficiency. By being required to bring claims within prescribed time periods, plaintiffs are pressured to bring their claims while witness memories are relatively fresh and before physical evidence disappears, to ensure that the proper outcome is reached by the adjudication process.<sup>56</sup> This helps ensure that the claims brought against defendants—if not ultimately found to be meritorious—are not deficient because the evidence used to prove them has been lost. This also has the effect of reducing litigation costs for defendants and for the courts.<sup>57</sup>

Similarly, statutes of limitation help protect defendants against fraudulent claims by barring “fraud-minded plaintiffs” and plaintiffs who honestly but wrongly believe their claims are meritorious from bringing

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54. Ochoa & Wistrich, *supra* note 49, at 462 (“Witnesses also may have their peace of mind disrupted by long-outstanding claims. Those who have witnessed an occurrence involving potential wrongdoing . . . may be called to testify. For some, the prospect of testifying causes only minor annoyance; for others, it is anticipated with great dread.”).

55. *Id.*

56. *Id.* at 471–79 (discussing the ways in which eyewitness testimony becomes less reliable as time passes and how statutes of limitations encourage timely dispute resolution).

57. The extent to which this occurs is not clear. *See id.* at 480–81, 495–97 (discussing how the effects of statutes of limitations on litigation costs largely depend on the circumstances of the specific case, and how, for a variety of reasons, it is difficult to determine the extent to which statutes of limitations reduce the overall volume of litigation).

unfounded claims “at a time when the true facts can no longer be prove[n].”<sup>58</sup> This rationale assumes that—absent a statute of limitations—a fraud-minded plaintiff would be able to exploit inaccurate memories and unavailable physical evidence to tell distorted versions of the facts of the case.<sup>59</sup>

The rationales described above raise several observations and concerns about statutes of limitations and their application. As previously mentioned,<sup>60</sup> it is not clear whether statutes of limitations support the rationales articulated. While it seems logical that statutes of limitations would indeed provide defendants with peace of mind, reduce the costs of administering justice, and protect defendants against fraudulent and stale claims, the degree to which statutes of limitations achieve these goals is unclear.<sup>61</sup> What is clear, however, are the broader concerns motivating the use of statutes of limitations. The use of limitation periods is a compromise between a desire to protect defendants from fraudulent claims, the courts’ interest in resolving disputes shortly after they happen to ensure the availability of evidence, and society’s interest in relying on the status quo to order their future affairs. As this Note will demonstrate, these concerns also underlie the operation of the Continuing Violation Doctrine and will form an essential part of the analysis courts use to determine the proper basis for restarting the limitation period in antitrust conspiracy suits.

#### D. CONTINUING VIOLATION DOCTRINE

In addition to the numerous statutes of limitations in force at both the state and federal levels, courts have adopted a variety of doctrines that modify or clarify how statutes of limitations operate. Among these doctrines is the Continuing Violation Doctrine (“CVD”). When CVD applies to situations, a court will aggregate or separate the defendants’ behavior to extend the limitation period until the claim “accrues.”<sup>62</sup> While CVD sounds simple, its application has proven difficult, leading to “disparate treatment of similar claims.”<sup>63</sup> Courts have commonly conflated CVD with the discovery rule, even

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58. James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 591 (1996) (citing *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874)).

59. See Ochoa & Wistrich, *supra* note 49, at 479. The authors describe one hypothetical scenario where a fraud-minded plaintiff would benefit from a long delay in filing suit:

It is possible that the deterioration of evidence may place fraudulent and genuine claims on a relatively equal footing. If the plaintiff files suit after many years, when all of the witnesses to the events on which the claim is based have died except the plaintiff and the defendant, and if the deceased witnesses would have favored the defendant, then clearly the defendant’s position has been weakened.

*Id.*

60. See *supra* note 57 and accompanying text.

61. See Ochoa & Wistrich, *supra* note 49, at 463–64, 480–81.

62. See Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 272–73 (2008).

63. *Id.* at 273.

though CVD does not rely on a plaintiff's awareness of the alleged wrongdoing in its operation.<sup>64</sup> This has not, however, stopped courts from using a plaintiff's notice of the injury he or she has suffered in determining whether a continuing harm has occurred.<sup>65</sup>

Part of the difficulty in applying CVD stems from the fact that courts have used a variety of methodologies to determine whether there is a "continuing harm" warranting an extension of the limitation period. These include methods focusing on how the prior harm is related to the current harm, methods focusing on whether the current harm is the continuation of a harm stemming from a continuing wrongful act, methods for dealing with situations where there is no discernable single incident of the harm that can be considered the sole cause of the plaintiff's injury, and methods that "focus[] more on the effects of recognizing a particular type of continuing violation than on the intrinsic nature of the claim at issue."<sup>66</sup> This Note only discusses the methodologies that focus on whether the current harm stems from the previous wrongful act, as courts' commonly apply this type of CVD methodology in antitrust conspiracy litigation.<sup>67</sup>

The rationales underlying the use of limitation periods<sup>68</sup> shape the application of CVD. For instance, courts have applied what has been called the "rule of separate accrual" to antitrust suits in order to balance the interests of fairness to the defendant and the desire to encourage plaintiffs to promptly vindicate their rights.<sup>69</sup> Under this rule, a plaintiff can apply CVD to their claims to allow them to litigate the alleged wrongdoing, but can only recover damages for the individual violations that occur within the limitation period.<sup>70</sup> By limiting the damages a plaintiff can receive, the rule incentivizes plaintiffs to proactively litigate their claims, rather than abuse the antitrust regulation regime to earn a larger damages award.<sup>71</sup> This rule demonstrates the court

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64. *Id.* at 287 ("While the continuing violations doctrine may dovetail in some respects with the discovery rule, the two methodologies are not identical.").

65. *Id.* ("When courts tether [CVD] to the plaintiff's awareness of a claim, they ignore a core differentiating element of this theory, namely, that some claims 'continue' even after the plaintiff becomes aware of the essential facts behind the grievance.").

66. *Id.* at 284-96 (examining the various frameworks underlying CVD).

67. *See id.* at 312-15.

68. *See supra* Section II.C.

69. MacAyeal, *supra* note 58, at 620-21.

70. *Id.* at 620.

71. *See* Peled, *supra* note 45, at 371. Professor Peled explains the way in which the special accrual rule incentivizes action by plaintiffs:

Where the separate accrual rule applies, the continuing violation doctrine provides plaintiffs with no incentive to act diligently, since they retain a claim for a violation period of the same length so long as the violation continues. In addition, where the separate accrual rule does not apply it actually incentivizes plaintiffs to postpone suits, since they can thereby increase their damages awards.

*Id.* (footnote omitted).

system's concern over broadly applying CVD in the context of antitrust conspiracy suits. Because the availability of treble damages can already lead to large awards, courts use the rule of separate accrual to strike a compromise between allowing plaintiffs to recover for harms occurring the entire life of the alleged conspiracy—which could potentially bankrupt the defendant—and simply not extending CVD at all, which would thwart the public policy rationale behind private conspiracy antitrust suits themselves.

The Eighth Circuit has said that, to show that a current harm stems from a continuing wrongful act in conspiracy antitrust suits, a plaintiff must demonstrate that an “overt act” has been committed.<sup>72</sup> A plaintiff can show an overt act by proving two elements: that the act was “(1) [a] new and independent act that is not merely a reaffirmation of a previous act, and (2) [the act] must inflict new and accumulating injury on the plaintiff.”<sup>73</sup> The statute begins to run once the “last overt act” has been committed.<sup>74</sup> This approach does not provide clear guidance. For instance, it is not clear what conduct creates an injury, and “[r]ecognition of injuries as ‘continuing’ depends on several ill-defined factors, including the level of abstraction at which the court characterizes the injury at issue.”<sup>75</sup> In the context of antitrust conspiracy suits, courts have articulated limitation guidelines for what activities in the conspiracy constitute overt acts.<sup>76</sup>

### III. PROPANE TANK AND LIVING CONSPIRACIES

The competing interests of the antitrust regime and statutory limitation periods form the background of the Eighth Circuit's decision in *In re Pre-Filled Propane Tank Antitrust Litigation*.<sup>77</sup> *Propane Tank* is emblematic of the courts of appeals' struggle to determine what a plaintiff must plead to in antitrust suits

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72. *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004).

73. *Id.* (citing *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987)).

74. *Id.* (quoting *Peck v. Gen. Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990)).

75. *Graham*, *supra* note 62, at 287 n.78.

76. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000) (“[A]cts that ‘simply reflect or implement a prior refusal to deal or acts that are merely unabated inertial consequences (of a single act) do not restart the statute of limitations.” (quoting *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467–68 (6th Cir. 1996))); *Varner*, 371 F.3d at 1019–20 (“Acts that are merely ‘unabated inertial consequences’ of a single act do not restart the statute of limitations. . . . Performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period.” (footnote omitted) (quoting *Barnosky Oils, Inc. v. Union Oil Co. of Cal.*, 665 F.2d 74, 82 (6th Cir. 1981))); *see also Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014) (“[O]ur decisions have repeatedly emphasized that profits, sales, and other benefits accrued as the result of an initial wrongful act are not treated as ‘independent acts.’ Rather, they are uniformly viewed as ‘ripples’ caused by the initial injury, not as distinct injuries themselves.”).

77. *Hartig Drug Co. v. Ferrellgas Partners, L.P.* (*In re Pre-Filled Propane Tank Antitrust Litig.*), 860 F.3d 1059 (8th Cir. 2017) (en banc), *cert. denied sub nom. Ferrellgas Partners, L.P. v. Morgan-Larson, LLC*, 138 S. Ct. 647 (2018).

to survive a motion to dismiss in the wake of *Twombly* and *Iqbal*.<sup>78</sup> On the one hand, the antitrust regime encourages aggressive private enforcement; on the other hand, decisions like *Twombly* curtail the ability of private plaintiffs to bring conspiracy suits. This Part will serve two purposes. First, it will summarize the relevant facts and holding in *Propane Tank*. Second, it will highlight the problems with the Eight Circuit's analysis, including the court's reliance on Supreme Court RICO precedent, the decision's tension with *Twombly*, and how *Propane Tank* and decisions in other circuits reaching the same conclusion frustrate the goals of statutory limitations periods and even the antitrust regime itself.

#### A. *IN RE PRE-FILLED PROPANE TANK ANTITRUST LITIGATION*

The defendants in *In re Pre-Filled Propane Tank Antitrust Litigation* were distributors of pre-filled propane tanks.<sup>79</sup> In response to rising propane prices, in 2008, defendants reduced the amount of propane in each of their standard sized propane tanks from seventeen pounds to fifteen pounds, but they did not lower their prices.<sup>80</sup> The defendants settled a suit brought by indirect purchasers of the propane tanks in 2010.<sup>81</sup> After a conspiracy suit brought against defendants by the FTC was settled in 2014, the plaintiffs in the current suit brought their complaint, alleging conspiratorial conduct between the plaintiffs to raise prices in violation of § 1 of the Sherman Act.<sup>82</sup> Plaintiffs were a group of both direct and indirect purchasers of the propane tanks.<sup>83</sup> The district court concluded that all of the direct purchaser claims were barred by the four-year limitation period,<sup>84</sup> and that the plaintiffs did not allege facts sufficient to restart the limitation period.<sup>85</sup> In particular, the court noted that “each time Defendants sold the propane exchange tanks filled with only fifteen pounds of propane, an overt act was not committed that satisfied the

78. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

79. *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d at 1062.

80. *Id.*

81. *Id.*; see *In re Pre-Filled Propane Tank Mktg. & Sales Practices Litig.*, No. 09-2086-MD-W-GAF, 2010 WL 2008837, at \*1 (W.D. Mo. May 19, 2010).

82. *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d at 1062–63; see Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2012) (“Every . . . conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”).

83. *Hartig Drug Co. v. Ferrellgas Partners, L.P.* (*In re Pre-Filled Propane Tank Antitrust Litig.*), 834 F.3d 943, 946 (8th Cir. 2016), as corrected (Aug. 25, 2016), *reh'g en banc granted, opinion vacated*, (Dec. 29, 2016), *on reh'g en banc*, 860 F.3d 1059, *cert. denied sub nom.* *Ferrellgas Partners, L.P. v. Morgan-Larson, LLC*, 138 S. Ct. 647 (2018).

84. 15 U.S.C. § 15b.

85. *In re Pre-Filled Propane Tank Antitrust Litigation*, No. 14-02567-MD-W-GAF, 2015 WL 12791756, at \*11 (W.D. Mo. July 2, 2015) (“Because of the [FTC] action, the adjusted limitations period in this case began on March 27, 2010.”), *aff'd sub nom.* *In re Pre-Filled Propane Tank Antitrust Litig.*, 834 F.3d 943, *reh'g en banc granted, opinion vacated*, (Dec. 29, 2016), *on reh'g en banc, rev'd sub nom.* *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059.

continuing violations theory[.]”<sup>86</sup> because “there ha[d] not been any allegation that Defendants further elevated the relative price of the exchange tanks by further decreasing the fill level”<sup>87</sup> sufficient to constitute an overt act.

Direct purchasers of the propane tanks appealed. The Eighth Circuit determined 2–1 that the Supreme Court’s RICO case *Klehr v. A.O. Smith Corp.*<sup>88</sup> did not control, and that the complaint did not allege facts sufficient to restart the limitation period under CVD.<sup>89</sup> Rehearing the case en banc, the court held 5–4 that *Klehr* did control and reversed its previous ruling.<sup>90</sup> The court determined that, as long as there are sales where prices are set according to a price-fixing conspiracy, each sale is sufficient to restart the limitation period.<sup>91</sup> The court reasoned that, because *Klehr* controlled, “[e]ach time Defendants used that [unlawfully acquired market] power (i.e., each sale), they committed an overt act” restarting the limitation period.<sup>92</sup> Writing for the dissent, Judge Shepherd argued the majority misinterpreted *Klehr*, and that the Supreme Court’s other precedent demonstrates that “a necessary requirement for a continuing violation of antitrust laws is the existence of a live, ongoing conspiracy.”<sup>93</sup>

By reaching their holding, the majority in *Propane Tank* determined that, so long as a plaintiff alleges facts that show continuing harm, they do not need to show that any actual conspiracy was ongoing during the limitation period.<sup>94</sup> The Eighth Circuit joined the Fourth, Sixth, Ninth, and Eleventh Circuits in reaching the same conclusion.<sup>95</sup> Because *Propane Tank* is so recent, it is difficult to say what its impact on the Eighth Circuit will be, although the more permissive pleading requirements will likely make it easier for plaintiffs alleging antitrust conspiracy suits to survive a motion to dismiss for failure to state a claim.

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86. *In re Pre-Filled Propane Tank Antitrust Litigation*, 2015 WL 12791756, at \*5.

87. *Id.*

88. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997).

89. *In re Pre-Filled Propane Tank Antitrust Litigation*, 834 F.3d at 947–50.

90. *In re Pre-Filled Propane Tank Antitrust Litigation*, 860 F.3d at 1071.

91. *Id.* at 1068.

92. *Id.* at 1067 (citing *Klehr*, 521 U.S. at 189; *In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d 728, 736 (8th Cir. 2014)).

93. *Id.* at 1073 (Shepherd, J., dissenting) (“Without such a requirement, plaintiffs could sue many years after an antitrust violation occurred and seek damages for subsequent sales without tying the prior antitrust violation to the subsequent sales.”).

94. *Id.*

95. See *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014); *Tam Travel, Inc. v. Delta Airlines, Inc.* (*In re Travel Agent Comm’n Antitrust Litig.*), 583 F.3d 896, 902 (6th Cir. 2009); *Atl. Textiles v. Avondale Inc.* (*In re Cotton Yarn Antitrust Litig.*), 505 F.3d 274, 290–91 (4th Cir. 2007); *Morton’s Mkt., Inc. v. Gustafson’s Dairy, Inc.*, 198 F.3d 823, 828 (11th Cir. 1999) (holding in each case that the Supreme Court’s 1997 decision *Klehr v. A.O. Smith Corp.* applies to antitrust conspiracy suits).

### B. THE RICO ANALOGY

By relying on *Klehr* to reach its holding, the court in *Propane Tank* tied its conclusion to the analogy drawn by the Supreme Court to reject a rule the Third Circuit employed to toll a RICO claim statute.<sup>96</sup> The question then becomes whether reliance on the analogy is appropriate. While private civil RICO enforcement is modeled closely on the civil antitrust regime, there are important distinctions which demonstrate that the rationale in *Klehr* does not map onto antitrust conspiracy suits as well as the circuits applying *Klehr* believe it does.

#### 1. The Relationship Between Antitrust Regulation and RICO

On its face, it is clear that the RICO regulatory regime is modelled on the antitrust regime. Both statutes broadly criminalize certain economic conduct.<sup>97</sup> Additionally, both statutes provide treble damages to plaintiffs who successfully demonstrate that the defendants engaged in prohibited conduct<sup>98</sup> and “contain[] expansive, and nearly identical, procedural provisions, including nationwide service of process, expedition of actions, and a civil investigative demand.”<sup>99</sup> The similarities are not a coincidence. Congress intentionally modeled the RICO statutes on the antitrust regime, and it was originally intended to be part of it.<sup>100</sup>

Because of these similarities, the Supreme Court has often drawn upon antitrust cases to resolve RICO issues.<sup>101</sup> For instance, the Court applied the

96. *Klehr*, 521 U.S. at 182.

97. Both statutes are phrased in exceptionally broad terms. Compare 15 U.S.C. § 1 (2012) (“Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .”), with 18 U.S.C. § 1962(b) (“It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.”).

98. Compare 15 U.S.C. § 15(a) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”), with 18 U.S.C. § 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter [proscribing racketeering] may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee[] . . .”).

99. Paul B. O’Neill, Note, “*Mother of Mercy, is this the Beginning of RICO?*”: *The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. REV. 172, 184 (1990) (footnotes omitted).

100. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985) (“The clearest current in [the legislative history of RICO] is the reliance on the Clayton Act model . . .”); O’Neill, *supra* note 99, at 184–85 (discussing the legislative history of RICO).

101. See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 150–54 (1987) (applying the limitation rule used for civil suits brought under the Clayton Act because it “offers the closest analogy to civil RICO”). But see *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2109 (2016) (“Although we have often looked to the Clayton Act for guidance in construing § 1964(c), we have not treated the two statutes as interchangeable.”).

four-year limitation period to bring suits under the Clayton Act<sup>102</sup> to private RICO enforcement actions because the “similarities in purpose and structure between RICO and the Clayton Act, [and] the clear legislative intent to pattern RICO’s civil enforcement provision on the Clayton Act strongly counsels in favor of” applying that provision.<sup>103</sup> On the other hand, the Court has demonstrated that it will depart from the antitrust regime when there is reason not to import the antitrust caselaw to RICO. For example, in *RJR Nabisco, Inc. v. European Community*, the Court declined to import antitrust caselaw into a RICO case because the language present in the RICO statutes is not the same as the corollary provision in the antitrust regime.<sup>104</sup>

## 2. Distinctions Between Antitrust Regulation and RICO

There are important distinctions between the rationales underlying RICO and the antitrust laws that suggest that courts should be careful when applying RICO cases and principles to antitrust conspiracy suits as the majority did in *Propane Tank*. While RICO and antitrust both regulate economic activity, the Court has determined that “RICO is designed to remedy injury caused by a pattern of racketeering, and ‘[c]oncepts such as RICO “enterprise” and “pattern of racketeering activity” were simply unknown to common law.’”<sup>105</sup> The legislative history of RICO also reveals that Congress interpreted RICO and antitrust to have different goals, and so “while RICO does aim to protect competition in a free marketplace, it . . . is designed to root out a pervasive social evil, and not, as is the case with the antitrust laws, merely to preserve a free and competitive marketplace.”<sup>106</sup> The antitrust analogy is thus a valuable tool for resolving issues with the interpretation of RICO provisions, but it is not binding.

Because of these different goals, the Court has stressed that the antitrust analogy to RICO is an “interpretive tool” that aids in the interpretation of

102. 15 U.S.C. § 15b (“Any action to enforce any cause of action under [the Clayton Act] shall be forever barred unless commenced within four years after the cause of action accrued.”).

103. *Agency Holding Corp.*, 483 U.S. at 152.

104. *RJR Nabisco*, 136 S. Ct. at 2109–10. In rejecting the application of RICO to alleged extraterritorial violations, the Court stated that:

There is good reason not to interpret § 1964(c) to cover foreign injuries just because the Clayton Act does so. When we held . . . that the Clayton Act allows recovery for foreign injuries, we relied first and foremost on the fact that the Clayton Act’s definition of “person”—which in turn defines who may sue under that Act—“explicitly includes ‘corporations and associations existing under or authorized by . . . the laws of any foreign country.’” RICO lacks the language that the . . . Court found critical.

*Id.* (second alteration in original) (citation omitted) (quoting *Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 313 (1978)).

105. *Agency Holding Corp.*, 483 U.S. at 149–50 (alteration in original) (quoting *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 348 (3d Cir. 1986)).

106. O’Neill, *supra* note 99, at 183.

RICO statutes, and is not a hard and fast rule for interpretation.<sup>107</sup> When applied to *Propane Tank*, this means that the Eighth Circuit should have used *Klehr* as a valuable interpretive tool, but not a definitive statement of what is required to restart the limitation period if it can be shown that antitrust and RICO are not sufficiently analogous on this point. As the dissent in *Propane Tank* notes, the discussion of antitrust law “served only to illuminate the discussion of tolling RICO claims” in *Klehr*, not to “announc[e] some new standard in antitrust law nor redefin[e] a continuing violation.”<sup>108</sup>

### C. TENSION WITH THE ANTITRUST REGIME

The *Propane Tank* decision exacerbates tensions within the antitrust regulatory regime. By permitting plaintiffs to show an overt act without showing an ongoing conspiracy during the statutory period, *Propane Tank* and its coordinate decisions in other circuits open the door to antitrust suits in a way that flies in the face of the Supreme Court’s concerns raised in *Twiqbal*.

#### 1. Pleading Requirements under *Twiqbal*

*Propane Tank* disagrees with both the standard for pleading created by *Twiqbal*<sup>109</sup> and with the rationale under which those decisions were decided. The result is a standard that both requires more than “labels and conclusions,” and “a formulaic recitation of the elements of a cause of action,”<sup>110</sup> yet does not require a plaintiff to allege that a conspiracy is ongoing.

One of the cases making up the *Twiqbal* standard, *Twombly*, was itself an antitrust conspiracy suit. Plaintiff in that case brought action alleging that the defendants, telecommunications companies, had engaged in parallel conduct to keep their competitors from growing their businesses.<sup>111</sup> The district court granted defendants’ motion to dismiss the case, holding in part that plaintiffs had failed to meet the “short and plain statement of the claim showing that the pleader is entitled to relief” requirement of Federal Rule of Civil

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107. See *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997) (“[I]n these circumstances, the Clayton Act analogy is *helpful*.”) (emphasis added); *Agency Holding Corp.*, 483 U.S. at 151–53 (discussing why the Clayton Act’s four-year statute of limitations for private actions should be used for civil RICO actions because it is a *more* analogous statute to RICO, not that it is the only available statute).

108. *Hartig Drug Co. v. Ferrellgas Partners, L.P.* (*In re* Pre-Filled Propane Tank Antitrust Litig.), 860 F.3d 1059, 1072 (8th Cir. 2017) (en banc) (Shepherd, J., dissenting), *cert. denied sub nom. Ferrellgas Partners, L.P. v. Morgan-Larson, LLC*, 138 S. Ct. 647 (2018).

109. The name “*Twiqbal*” is derived from the two Supreme Court cases which together make the pleading standard for federal civil suits: *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

110. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

111. *Twombly*, 550 U.S. at 555.

Procedure 8(a)(2).<sup>112</sup> In affirming the district court's decision, the Court determined that it was not sufficient merely to allege that defendants had engaged in parallel conduct in order to allege a conspiracy: A complaint must allege "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."<sup>113</sup> The Court later applied *Twombly's* reasoning to all federal complaints.<sup>114</sup>

By permitting a plaintiff to bring suit under § 1 of the Sherman Act without alleging that a conspiracy was ongoing during the limitation period, *Propane Tank* fails to account for either the procedural concerns underlying the *Twiqbal* standard or the concerns with antitrust conspiracy suits articulated in *Twombly* and other cases. The requirement that a complaint must allege facts sufficient to cross "the line from conceivable to plausible" for which "formulaic recitation of the elements of a cause of action" will be inadequate demonstrates the Court's interest in barring suits for which the complaint does not articulate a redressable harm.<sup>115</sup> *Propane Tank* contradicts this rationale. Under *Propane Tank*, a plaintiff need not allege facts sufficient to make out a plausible showing that a conspiracy ongoing during the limitation period caused the plaintiff's injury; a plaintiff can simply allege that a conspiracy within the meaning of § 1 of the Sherman Act occurred *at any time* gave rise to the injury.<sup>116</sup> Given that time-barred claims are those for which relief cannot be granted, it makes little sense to permit a plaintiff bringing a civil antitrust conspiracy suit to survive a motion to dismiss without even alleging that a conspiracy occurred within the four-year period permitted by statute.<sup>117</sup>

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112. *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 189 (S.D.N.Y. 2003); FED. R. CIV. P. 8(a)(2) ("A pleading . . . must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . .").

113. *Twombly*, 550 U.S. at 556. The Court went on to explain:

And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the facts alleged] is improbable, and "that a recovery is very remote and unlikely." In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement . . . . Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

*Id.* at 556–57 (citation omitted) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

114. *Iqbal*, 556 U.S. at 684.

115. *Twombly*, 550 U.S. at 555, 570.

116. It is important to note that, under the Continuing Violation Doctrine, a claim will not be barred even if the plaintiff knew about the harm long before the limitation period had run. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997).

117. 15 U.S.C. § 15b (2012).

## 2. Impact of *Propane Tank* on Private Antitrust Suits

Beyond the procedural holding of *Twombly*, the Court in that case articulated concerns over the scope of private antitrust suits that cast doubt on the *Propane Tank* holding. In *Twombly*, the Court stressed that, because antitrust suits can be such “massive factual controvers[ies],” a district court must be able to demand greater specificity in the pleadings.<sup>118</sup> It is true that the conduct alleged in the complaint in *Twombly* was different than the sort of deliberate, conspiratorial conduct alleged in *Propane Tank*. However, the Court raises concerns over the scope and costs of antitrust conspiracy suits that should be carried forward to the concerns raised by *Propane Tank* in the context of limitation periods. The Court noted that, while “it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery,” it is “quite another to forget that proceeding to antitrust discovery can be expensive.”<sup>119</sup> The Court was right to highlight the cost of antitrust suits. Antitrust suits can produce a huge body of evidence<sup>120</sup> much of which concerns complex economic data.<sup>121</sup> Additionally, the expense of litigating antitrust claims is exacerbated by the length of antitrust trials and the common disputes “over settlements and attorney fees.”<sup>122</sup> In certain respects, *Propane Tank* will actually reduce the costs of litigation by absolving plaintiffs of proving that a conspiracy was ongoing during the statutory period. However, in other ways, *Propane Tank* may increase costs by permitting plaintiffs to litigate claims that occurred years in the past but are permitted by *Propane Tank*'s interpretation of “overt act.” Importantly, the parties do not equally bare these additional costs. Because discovery is very often one-sided in conspiracy suits (because the plaintiff's conduct is rarely at issue), *Propane Tank* further injures defendants by subjecting them to discovery for much longer periods of time, which can lead defendants to settle claims they would

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118. *Twombly*, 550 U.S. at 558 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

119. *Id.* at 546, 558 (“[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.” (alteration in original) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984))).

120. FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 30, at 519 (4th ed. 2004) (“Antitrust litigation can . . . involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money, calling for the application of techniques and procedures for the management of complex litigation.”).

121. *Id.* § 30.2, at 522 (“Antitrust cases often involve the collection, assimilation, and evaluation of vast amounts of evidence regarding numerous transactions and other economic data.”).

122. *Id.* § 30, at 519.

not otherwise settle.<sup>123</sup> By increasing discovery costs and permitting suits which otherwise would never get to discovery, *Propane Tank* undercuts the purposes underlying statutes of limitations.

#### D. TENSION WITH STATUTORY LIMITATION PERIODS

Beyond the tension between *Propane Tank* and the antitrust regime, the decision also injures the interests protected by statutory limitation periods. By stretching the viability of claims years into the past, *Propane Tank* encourages the litigation of stale claims. *Propane Tank* has the additional effect of injuring defendants' repose interest, which in turn has a chilling effect on economic activity.

##### 1. Extending Stale Claims and Preventing Repose

*Propane Tank* greatly expands a plaintiff's ability to litigate claims on stale facts, thwarting a core rationale of limitation periods. Preventing plaintiffs from litigating stale claims serves "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."<sup>124</sup> The inherently complex nature and difficulty of proving antitrust claims in general<sup>125</sup> in combination with the secretive nature of conspiracies further compounds this problem.<sup>126</sup>

123. *Twombly*, 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."). Commentators have noted the costs of imbalanced discovery regimes:

If the chances of a lucrative settlement are enhanced by burdensome discovery of the defendant, and if there is no concern for tit-for-tat discovery, the plaintiff is incentivized to make its discovery requests as burdensome as possible. For an allegation that the defendants, or their agents, met and agreed, the threatened burden of discovery, and therefore the likelihood of a false positive settlement [resulting in a net loss to society], is high.

Mark Anderson & Max Huffman, Iqbal, *Twombly*, and the Expected Cost of False Positive Error, 20 CORNELL J.L. & PUB. POL'Y 1, 33–34 (2010).

124. *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944). The Supreme Court further expounded on the function and importance of statutes of limitation in an earlier case:

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

*Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

125. See *supra* notes 120–22 and accompanying text (describing how antitrust suits commonly produce vast quantities of evidence and commonly require analysis of economic data).

126. See 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 320a (3d ed. 2007) ("Antitrust liability depends not only on the parties' acts but also on many surrounding

The extended ability of plaintiffs to bring stale claims goes hand in hand with how *Propane Tank* prevents defendants from getting repose from any potential wrongdoing they may have committed in the distant past. Under *Propane Tank*, any potential antitrust violator—that is, virtually anyone who participates in the market—will almost never have repose so long as sales occur under the conditions of the conspiracy, regardless of whether any conspiracy actually exists at the time. While it is desirable to prevent knowing violators of antitrust law from obtaining repose from their wrongdoings,<sup>127</sup> the potential that innocent parties are adversely affected by the fear of litigation is too great to ignore.<sup>128</sup>

## 2. Chilling Economic Activity

By effectively prohibiting any potential defendants' repose interest, *Propane Tank* may have chilling economic effects on both conscious wrongdoers and innocent parties. The harm that comes from wrongfully deterring the impactful, far-reaching commercial activity that gives rise to antitrust suits is substantial.<sup>129</sup> Worse yet, *Propane Tank* could lead innocent

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circumstances, including the behavior of rival firms and general market conditions—matters that may be hard to reconstruct long afterwards.”).

127. See Ochoa & Wistrich, *supra* note 49, at 461. The authors note that the public places little value on the repose of wrongdoers:

In assessing the validity and weight of [the repose rationale], therefore, it is necessary to ask how much value should be placed on the desire of wrongdoers, or of persons who are uncertain whether they are wrongdoers, for freedom from worry about being called to account for past misdeeds. Currently, society appears to place relatively little value on such considerations.

*Id.*

128. *Id.* at 462. The authors argue that all of society benefits from the peace of mind promoted by the limitation periods:

Preventing peace of mind also does not adequately distinguish between the innocent and the guilty. While some may benefit more than others from the promotion of peace of mind, almost everyone benefits to some degree. Every person, whether innocent or not, is a potential defendant. No one is immune from suit, ill-founded though the claims may be. . . . Thus, promoting peace of mind benefits all members of society, including the innocent and the risk-averse, not just those who actually have committed a legal wrong.

*Id.* Others, including third parties, have an interest in preserving the status quo, which statutes of limitations promote:

Potential defendants and third parties have a legitimate interest to manage their practical and financial affairs based on the assumption that the existing state of affairs will endure and will not lead to the imposition of pecuniary liability. . . . There is also a strong societal interest grounded in economic efficiency to nurture expectations for stability and to ensure they are not disrupted.

Peled, *supra* note 45, at 370–71 (footnote omitted).

129. Anderson & Huffman, *supra* note 123, at 32–33. Fear of conspiracy suits can alter business practices and, paradoxically, harm consumers:

defendants to settle claims that likely would not succeed at trial, for fear of having to pay treble damages mandated by the Sherman Act. This result is fundamentally antithetical to the purpose of antitrust regulation: to “promote vigorous competition and protect consumers from anticompetitive mergers and business practices.”<sup>130</sup> Rather than protecting consumers and promoting efficient markets, *Propane Tank* is at best ambivalent to protecting consumers and is harmful to the promotion of efficient markets.

The decision does little to protect consumers because it removes the incentive for plaintiffs to bring their claims promptly, when the evidence is most readily available and memories are fresh. The Eighth Circuit construes the primary goal of private antitrust suits to be “to correct public wrongs,” and so “it is appropriate to encourage suits as soon as possible to stop (or at least compensate) harm to the public.”<sup>131</sup> *Propane Tank* does little, if anything, to accomplish this goal. By waiting to bring their claim, a plaintiff does nothing to help the public interest. Rather, a plaintiff may actually harm that interest by creating the perception that antitrust violators will go unpunished by harmed plaintiffs, permitting lawbreaking defendants to retain at least part of their unlawfully obtained profits and reducing the antitrust regime’s deterrent effect on them.<sup>132</sup>

*Propane Tank* is harmful to the promotion of efficient markets for similar reasons. Because any potential defendant—not just knowing violators of the antitrust law—can be deterred by the possibility of fending off an antitrust suit, business actors will be more hesitant to emulate competitors and make innovations, for fear of incurring antitrust liability.<sup>133</sup> Compounding a business actor’s fears are the many ways juries can misapply the § 1 analysis or

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The error cost of a false positive in a per se claim is high. An erroneous finding of an agreement can subject the defendant to liability for socially beneficial conduct. If threatened with antitrust liability, a firm might be disinclined to attend trade shows, where engineering and marketing improvements—including cost savings, which in a competitive marketplace inure to consumers’ benefit—may be discussed. The firm might be disinclined to imitate product improvements implemented by competitors, for fear of appearing to engage in parallel conduct. The firm might be disinclined to match price reductions implemented by competitors for the same reason. The harm caused by disincentivizing such potentially beneficial business conduct is antithetical to the antitrust laws’ purpose of enhancing competition for the benefit of consumers.

*Id.* (footnotes omitted).

130. *Guide to Antitrust Laws*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws> (last visited Sept. 5, 2018); see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (“[T]he policy unequivocally laid down by the [Sherman Antitrust] Act is competition.”).

131. *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 272 (8th Cir. 2004); see also *Rotella v. Wood*, 528 U.S. 549, 557 (2000) (“Both [the Clayton Act and RICO] share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices.”).

132. Ochoa & Wistrich, *supra* note 49, at 492.

133. See Anderson & Huffman, *supra* note 123, at 32–33.

misconstrue the facts on record against their interest.<sup>134</sup> *Propane Tank* expands all of the ways a suit can be incorrectly decided across a longer time-period. Defendants and courts already fear arbitrary or otherwise prejudiced decisions by juries in antitrust decisions.<sup>135</sup> Permitting juries to make findings of fact regarding not only technical and voluminous evidence,<sup>136</sup> but also dated evidence and recollections from witness of events that occurred in the distant past, is even more worrying to a potential defendant.

#### IV. SOLUTIONS: RECONCILING *PROPANE TANK* WITH THE ANTITRUST REGIME

Having discussed at length the problems with the Eighth Circuit's *Propane Tank* decision, the issue then becomes how to remedy the problems created by the decision. In this Part, I propose a number of legislative solutions. These solutions include adopting a statute of repose or similar sunset provision for conspiracy claims and clarifying the Sherman Act's "accrual" language. Legislatively, the issues can be resolved by amending the antitrust laws to clarify when a claim accrues or adopting a statute of repose for Sherman Act § 1 claims. Judicial remedies to *Propane Tank* are limited because the Supreme Court has declined to grant certiorari in the case.<sup>137</sup>

##### A. CLARIFY "ACCRUAL"

The most logical solution to the problems created by *Propane Tank* would be to abrogate it by amending or adding to § 15b's "accrual" language. The simplest thing Congress could do is edit the provision to include the following italicized language:

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. *A claim has accrued once the conspiratorial conduct has ceased.* No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.<sup>138</sup>

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134. *Id.* at 22 (discussing different errors a factfinder could make when deciding a § 1 suit).

135. See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (counselling against expanding liability for monopolization under § 2 of the Sherman Act because of the difficulty of applying the requirement of § 2 and the harm that comes from "false condemnations"); see also Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1185 (2008) ("While opinions often do not explicitly identify the fear of jury incompetence as the justification for [rules that keep many antitrust cases from reaching trial,] resting instead on more general discussions about the risk of 'false positives,' it seems clear that the concerns about jury competence do motivate the Court's adoption of both procedural and substantive rules." (footnote omitted)).

136. See *supra* notes 120–22 and accompanying text.

137. *Ferrellgas Partners, L.P. v. Morgan-Larson, LLC*, 138 S. Ct. 647 (2018).

138. See 15 U.S.C. § 15b (2012).

The above amendment clarifies that the continuance of conspiratorial conduct is tied to the actual existence of a conspiracy. As the dissent in *Propane Tank* pointed out, *Klehr's* analogy to the Clayton Act as well as the Supreme Court decisions recognizing continuing violations of the Sherman Act are predicated on an understanding that the existence of a conspiracy is required for there to be an overt act.<sup>139</sup> Previously, the Eighth Circuit had also recognized this requirement in its own precedent in *Midwestern Machinery Co. v. Northwest Airlines, Inc.*<sup>140</sup> In that decision, the Eighth Circuit determined defendants unlawfully conspire to restrain trade “when conspirators *continue* to meet to fine-tune their cartel agreement.”<sup>141</sup> Without the requirement of an ongoing conspiracy, a “plaintiff[] could sue many years after an antitrust violation occurred and seek damages for subsequent sales without tying the prior antitrust violation to the subsequent sales.”<sup>142</sup>

The additional language also helps serve the interests of both limitation periods and the antitrust regime. By clarifying when a claim accrues, a plaintiff will be put on notice that they must allege facts sufficient to show that a conspiracy is probably ongoing during the limitation period to fulfill the requirements of *Twigg*.<sup>143</sup> Under a requirement that a conspiracy must be ongoing in order to restart the statute of limitations, plaintiffs will also be encouraged to promptly bring their claims within the four-year limitation period, when the evidence is still available, which will maximize the value of private antitrust suits as a deterrent for violators.<sup>144</sup>

#### B. ADOPT A STATUTE OF REPOSE

Another way to resolve the perpetual liability created by *Propane Tank* is by adopting a statute of repose or similar mechanism to create a definitive end to a potential defendant's liability. Statutes of repose serve a different interest than statutes of limitations. While it is true that both “are mechanisms used to limit the temporal extent or duration of liability for tortious acts,”<sup>145</sup> statutes of repose are designed to provide a “more explicit and certain

139. *Hartig Drug Co. v. Ferrellgas Partners, L.P. (In re Pre-Filled Propane Tank Antitrust Litig.)*, 860 F.3d 1059, 1072–73 (8th Cir. 2017) (en banc) (Shepherd, J., dissenting) (discussing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) and determining that each of the decisions in those cases turned at least in part on whether a conspiracy was ongoing during the limitation period).

140. *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265 (8th Cir. 2004).

141. *Id.* at 269 (emphasis added) (citing *Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa.*, 815 F.2d 270, 278 (3d Cir. 1987), *cert. denied*, 484 U.S. 851 (1987)).

142. *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d at 1073 (Shepherd, J., dissenting).

143. *See supra* Section III.C.1 (describing the *Twigg* standard and *Propane Tank's* tension with it).

144. Ochoa & Wistrich, *supra* note 49, at 492.

145. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014) (“Both types of statute can operate to bar a plaintiff's suit, and in each instance time is the controlling factor. There is considerable common ground in the policies underlying the two types of statute.”).

protection to defendants.”<sup>146</sup> While statutes of repose have not been adopted for antitrust claims in the past, their benefits are readily apparent when applied to antitrust conspiracy suits.

Perhaps the most important distinction between statutes of limitations and statutes of repose are the analyses’ focuses: Statutes of limitation look toward a potential plaintiff’s conduct and awareness of his or her claim; statutes of repose look to the defendant’s actions.<sup>147</sup> Similar to CVD, a statute of repose is not dependent on a plaintiff’s knowledge of a claim.<sup>148</sup> By establishing a bright-line timeframe in which certain actions could be brought, a statute of repose could provide potential antitrust defendants with the repose that is denied to them under *Propane Tank*. A statute of repose in the conspiracy suit context would not replace the four-year limitation period established by § 15b, but it would instead establish an outer limit on the length of time in which the action giving rise to the suit may be brought.<sup>149</sup> A plaintiff would still be able to bring a claim for a longer period than four years if the claim continues to “accrue,” but the repose provision would allow potential defendants to calculate the potential cost of an adverse antitrust judgement with more precision, which would benefit risk-averse potential defendants and relieve the chilling effect *Propane Tank* will likely have.<sup>150</sup> A repose period

146. *Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec.*, 137 S. Ct. 2042, 2049 (2017).

147. *CTS Corp.*, 134 S. Ct. at 2182. The Court explained some of the differences between statutes of limitation and repose:

[T]he time periods specified [for statutes of limitation and repose] are measured from different points, and the statutes seek to attain different purposes and objectives.

....

A statute of repose . . . puts an outer limit on the right to bring a civil action. That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant.

*Id.*

148. *Id.* (“The statute of repose limit is ‘not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered.’” (quoting 54 C.J.S. *Limitations of Actions* § 7 (2010))).

149. See Josephine Herring Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 629 (1985). The author provides an illustration of the difference between statutes of limitation and repose:

For example, a products liability statute may provide that an action must be brought within six years of injury but in no event may a plaintiff commence an action more than ten years after the date on which the product was first purchased. The six year period is a statute of limitations; the ten year period is a statute of repose.

*Id.* (footnote omitted).

150. Ochoa & Wistrich, *supra* note 49, at 461–62. The authors discuss “the value of peace of mind”:

A person who is unaware that he or she has committed a potential wrong will neither worry about being sued nor worry about losing if he or she is sued. Similarly, a person who is aware that a potential claim exists, but who is confident that he or she is

could be incorporated into § 15b by amending the statute with the following italicized language:

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued, *but in no event may suit be brought more than ten years after either the beginning the restraint of trade or the final sale made pursuant to the violation.* No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.<sup>151</sup>

This solution is not without issues of its own. Depending on the length of the repose period, a statute of repose may actually embolden conspirators and encourage them to take more efforts to hide their conspiracies, although these people will likely enter conspiracies regardless of the potential penalties and limitations on their liability.<sup>152</sup> Additionally, the repose period's length would have to balance the interests of repose and provide sufficient time for plaintiffs to bring their claims.<sup>153</sup> Regardless, a statute of repose could provide closure to business actors and incentivize potential plaintiffs to bring their claims in a timely manner, both of which have been reduced under *Propane Tank*.

## V. CONCLUSION

By holding that a plaintiff need not allege an ongoing conspiracy during the limitation period to restart the Clayton Act's four-year limitation period,

innocent and will easily defeat the claim, has only the burden of potential litigation to fear, rather than the possibility of an adverse judgment. Thus, the benefits of peace of mind are perhaps most valuable for the person who is highly risk-averse, who believes himself or herself to be guilty, or who is unsure of his or her guilt.

...

... The effect of long limitation periods, then, may be to impose most of the burden of denial of peace of mind upon the least culpable offenders.

*Id.*

151. See 15 U.S.C. § 15b (2012).

152. Ochoa & Wistrich, *supra* note 49, at 462. The authors argue that a longer limitation period adds only a "marginal increment of deterrence":

[T]he worst of wrongdoers who commit the most egregious and offensive wrongs are probably the least risk-averse and probably feel the least guilt or remorse. They will be the least troubled by the lingering possibility that they may be apprehended, publicly disgraced, or stripped of any ill-gotten gains. It is the negligent or unintentional wrongdoer, who accepts more completely the mores of the community, who may be expected to suffer most greatly under the self-inflicted lash of conscience and fear of public reproval.

*Id.*

153. The use of both limitation periods and repose periods together in federal law is not unheard of. See 5 U.S.C. § 77m (establishing both a one-year limitations periods and a three-year repose period for causes of action related to securities offerings).

the majority in *In re Pre-Filled Propane Tank Antitrust Litigation* disserved the interests underlying statutes of limitation in general and the tripartite antitrust enforcement regime as a whole. The decision creates virtually perpetual liability for potential defendants and removes the incentive for plaintiffs to promptly file their claims.

Because the Supreme Court has denied defendants' petition for certiorari,<sup>154</sup> the problems created by *Propane Tank* are not likely to be resolved soon. While it is tempting to draw some inference from the Court's decision not to review *Propane Tank*, very little information can be concluded about the decision, as the Court denies the overwhelming majority of petitions for writ of certiorari.<sup>155</sup> As things stand, potential antitrust defendants will be subject to private antitrust suits without plaintiffs having to allege a conspiracy during the statutory period.

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154. *Ferrellgas Partners, L.P. v. Morgan-Larson, LLC*, 138 S. Ct. 647 (2018).

155. See Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015*, 61 VILL. L. REV. 795, 795 (2016) (describing how, in the 2013 term, the Court accepted only 76 out of 7,376 petitions for writ of certiorari).