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“No-poach” class actions: Fourth Circuit reinstates naval engineers’ Sherman Act claims against shipbuilders

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Takeaway: We have written about “no-poach” class actions, in which employers allegedly conspire not to recruit or hire each other’s employees with the intent of driving down wages. *See Eleventh Circuit reinstates no-hire antitrust claims against Burger King* (September 19, 2022). The Fourth Circuit recently allowed a no-poach case in the shipbuilding engineer context to go forward. *Scharpf v. General Dynamics Corp.*, 137 F.4th 188 (4th Cir. 2025). In a 2-1 decision, the majority panel concluded that the putative class representatives had adequately alleged fraudulent concealment tolling the antitrust statute of limitations, thereby demonstrating the difficulty of winning a Rule 12 dismissal of well-pled fraudulent concealment allegations.

In *Scharpf*, two naval engineers, Anthony D’Armiento and Susan Scharpf, filed a putative antitrust class action against the nation’s largest shipbuilders and naval-engineering consultancies, alleging a “ubiquitous” “no-poach” conspiracy in which the employers reached a “gentlemen’s agreement” not to recruit each other’s engineers in a concerted effort to keep wages low. 137 F.4th at 193-94. Mr. D’Armiento worked as a naval engineer from 2002 to 2004 and Ms. Scharpf from 2007 to 2017—well outside the four-year period before they filed their action in late 2023. *Id.* at 193. They allegedly discovered the existence of the conspiracy in April 2023, following an investigation that supposedly uncovered direct evidence “from eyewitness industry participants.” *Id*. They further alleged “that Defendants concealed this conspiracy by ‘carefully avoiding’ the creation of any documentation of its existence and by referring to it obliquely.” *Id*. at 194.

The defendants moved to dismiss plaintiffs’ claims as barred by the Sherman Act’s four-year statute of limitations. The Eastern District of Virginia granted the motion and dismissed the claims as time-barred, reasoning that defendants’ “gentlemen’s agreement”—a “non-ink-to-paper agreement”—was nothing more than a simple “failure to admit wrongdoing,” and thus was insufficient to toll the limitations period under the fraudulent concealment doctrine. *Id*.

Plaintiffs appealed and a divided Fourth Circuit panel reversed, holding “that neither logic nor our precedent supports distinguishing between defendants who destroy evidence of their conspiracy and defendants who

carefully avoid creating evidence in the first place." *Id*. at 193. In so ruling, the panel held that although plaintiffs' fraudulent concealment allegations were subject to Federal Rule 9(b)'s pleading fraud with particularly requirement, the standard was relaxed where plaintiffs alleged fraud by "omission or concealment" and "those facts will often be in the sole possession of the defendant." *Id*. at 195, 200 (quoting *Corder v. Antero Res. Corp.*, 57 F.4th 384, 402 (4th Cir. 2023)).

The panel identified three competing fraudulent concealment standards: "the separate-and-apart standard, the self-concealing standard, and the affirmative-acts standard." *Id*. at 196. "Under the separate-and-apart standard, the plaintiffs must show that the defendants engaged in fraudulent concealment separate and apart from the antitrust conspiracy. Under the self-concealing standard, 'a plaintiff ... merely [must] prov[e] that a self-concealing antitrust violation has occurred.' Finally, under the intermediate affirmative-acts standard, a plaintiff 'must prove that the defendants affirmatively acted to conceal their antitrust violations, but the plaintiff's proof may include acts of concealment involved in the antitrust violation itself.'" *Id*. The panel further explained that the Fourth Circuit follows the affirmative-acts standard, which is the majority rule. *Id.* at 196-99.

Under the relaxed 9(b) pleading standard, the panel concluded that plaintiffs' allegations satisfied the affirmative-acts standard: "Defendants allegedly *covered up* their no-poach conspiracy by, among other things, 'carefully avoiding putting anything in writing' and using coded language to refer to it. That meets the affirmative-acts standard, which allows 'the plaintiff's proof [to] include acts of concealment involved in the antitrust violation itself.'" *Id*. at 200-01 (emphasis in original) (quoting *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995)).

The panel further ruled in plaintiffs' favor on the essential fraudulent concealment element of due diligence, noting that due diligence is typically a fact-intensive issue for a jury and plaintiffs' allegations raised an issue of fact. *Id.* at 203-04.

Chief Judge Diaz dissented, noting among other things, that the Fourth Circuit has "declined to adopt the so-called 'self-concealing' standard, which turns simply on whether the plaintiffs proved 'that a self-concealing antitrust violation has occurred.'" *Id*. at 205 (Diaz, C.J., dissenting) (citation omitted). According to Judge Diaz, the majority applied the self-concealing standard instead of the governing affirmative-acts standard, and that "the district court was right to reject the plaintiffs' argument that the defendants' 'unwritten rule' was an *affirmative act* of concealment." *Id*. at 207 (emphasis added).