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Statutes of Limitation and Corporate Fiduciary Claims: A Search for Middle Ground on the Rules/Standards Continuum

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STATUTES OF LIMITATION AND CORPORATE
FIDUCIARY CLAIMS: A SEARCH FOR MIDDLE
GROUND ON THE RULES/STANDARDS
CONTINUUM*

Matthew G. Doré[†]

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INTRODUCTION

The tension between rules and standards is perhaps more pronounced in corporate law than in any other legal discipline, for the law uses both rules and standards to address the fundamental problem of corporations: keeping managers (directors and officers) faithful to owners (shareholders).¹ Legislatures of every state have enacted *rules*—comprehensive governance codes—to define the terms of the corporate relationship.² Yet courts supplement these statutes with *standards*—open-ended fiduciary duties—that further restrict directors' and officers' discretion.³ The proper accommodation of these competing approaches to corporate law continues to engender debate among scholars. "Contractarians" from the law and economics movement favor bright-line, but permissive, statutory rules for corporations, and a right to "opt out" of conventional fiduciary duty schemes. "Anticontractarian" traditionalists, on the other hand, support mandatory corporate rules of a more general nature, backed by searching judicial review where appropriate.⁴

Limitations law presents similar rules/standards tensions. Statutes of limitation function as bright-line *rules* that establish time limits for the pursuit of litigation. The judicial *standard* for determining when a claim should be time-barred, in contrast, is the equitable defense of laches. Under this doctrine a claim prescribes only when plaintiff has "unreasonably or

¹ See ROBERT CHARLES CLARK, CORPORATE LAW §1.5, at 33-34 (1986) (describing "the major problem dealt with by corporate law" as "how to keep managers accountable").

² The American Bar Association's REVISED MODEL BUSINESS CORPORATION ACT (1984) [hereinafter MBCA] is a good example of statutory corporate law as it exists in most states.

³ See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (holding directors liable for breach of the fiduciary duty of care); *Shlensky v. South Parkway Bldg. Corp.*, 166 N.E.2d 793 (Ill. 1960) (holding directors liable for breach of the fiduciary duty of loyalty). See also CLARK, *supra* note 1, at 34 ("The most general formulation of corporate law's attempted solution to the problem of managerial accountability is the fiduciary duty of loyalty.")

⁴ For a helpful overview of these competing perspectives on corporate law, see John C. Coffee, Jr., *No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919 (1988). See also *infra* Part II.B.2.

inexcusably" delayed its assertion and thereby caused "prejudice" to defendant.⁵ As distinctions between law and equity have blurred during this century, statutes of limitation have eclipsed laches as the controlling defense in most cases.⁶ Yet, in recent decades, laches have made a comeback in the guise of fact-based tolling doctrines that extend limitation periods. Most prominent among these is the "discovery rule," which postpones accrual of a cause of action (and therefore running of the statute of limitations) until plaintiff, in the exercise of reasonable diligence, discovers or should have discovered the claim.⁷ Courts have struggled to define the proper parameters for the discovery rule and similar tolling doctrines.⁸ Thus, limitations law, like corporate law, reflects a continued search for the proper accommodation of bright-line rules and fact-based standards.

This Article explores the contemporary confluence of corporate law and limitations law, and their inherent rules/standards tensions, in the "adverse domination" tolling theory. Adverse domination asserts that while directors and officers control a corporation, the statute of limitations does not run on any corporate claim that may implicate them.⁹ As will be explained, this theory is a fact-based standard premised on the fiduciary obligations of corporate managers, obligations that assertedly justify tolling bright-line limitations rules that would otherwise apply.¹⁰

In the wake of the recent bank and thrift crisis, federal regulators successfully invoked the adverse domination theory as an antidote for limitations problems in hundreds of director and officer liability cases ("D & O suits") and related litigation they pursued as successors of failed institutions.¹¹ Courts

⁵ 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 3.3.2, at 183 (1991).

⁶ See *infra* Part II.A.

⁷ 2 CORMAN, *supra* note 5, § 11.1.1, at 134 ("[T]he discovery rule . . . allows the cause of action to accrue when the litigant first knows or with due diligence should know facts that will form the basis for an action."). For a general discussion of the discovery rule and the issues it presents, see 2 CORMAN, *supra* note 6, § 11, at 134-205.

⁸ 2 CORMAN, *supra* note 5, § 11.1.3, at 143-54. See also *infra* Part IV.B.

⁹ See, e.g., FDIC v. Hudson, 673 F. Supp. 1039, 1042-43 (D. Kan. 1987) (applying adverse domination theory to postpone accrual of breach of fiduciary duty claims against bank director).

¹⁰ See *infra* Part III.A.

¹¹ Representative cases include *Farmers & Merchants Nat'l Bank v. Bryan*, 902

have since extended the theory beyond the failed financial institution context. In the past few years, for example, the adverse domination theory has defeated corporate directors' and officers' statute of limitations defenses in insurance company receiverships, bankruptcy cases and Delaware corporate fiduciary litigation.¹² The theory has also been applied to toll limitations when a corporation pursues litigation against third parties, such as malpractice claims against lawyers and accountants who failed to prevent or detect wrongdoing by corporate directors and officers.¹³

Adverse domination is no panacea for limitations problems in corporate fiduciary litigation, however. Indeed, as Part I of the Article describes, courts throughout the country, including dozens of federal district courts, nearly half the federal circuit courts, and numerous state supreme courts and lower appellate tribunals, are now divided over key aspects of the theory.¹⁴ In the early years of the bank and thrift crisis judicial enthusiasm for adverse domination standards threatened extinction of the limitations defense for claims that implicate corporate fiduciaries. More recently, the pendulum has begun to swing in favor of statutes of limitation. Courts have parted company on the basic question of institutional competency—whether judges intrude on the legislative prerogative in the corporate context when they engraft adverse domination tolling standards on bright-line statutes of limitation.¹⁵ Courts

F.2d 1520 (10th Cir. 1990); *RTC v. O'Bear*, 840 F. Supp. 1270 (N.D. Ind. 1993); *FDIC v. Howse*, 736 F. Supp. 1437 (S.D. Tex. 1990); *Hudson*, 673 F. Supp. at 1039; and *FSLIC v. Williams*, 599 F. Supp. 1184 (D. Md. 1984). Indeed, in mid-1993, the RTC could boast that "district courts [had] never resolved [the limitations] issue against the RTC on summary judgment, and that the FDIC's average [was] nearly as good." *RTC v. Dean*, No. Civ 91-2026, 1993 WL 837065, at *4 n.7 (D. Ariz. July 20, 1993).

¹² See, e.g., *Levitt v. Riddell Sports, Inc. (In re MacGregor Sporting Goods Inc.)*, 199 B.R. 502 (Bankr. N.J. 1995) (bankruptcy case); *Clark v. Milam*, 452 S.E.2d 714 (W. Va. 1994) (insurance company receivership); *Safecard Servs., Inc. v. Halmos*, 912 P.2d 1132 (Wyo. 1996) (action by corporation against director for insider trading under Delaware law).

¹³ See, e.g., *Clark*, 452 S.E.2d at 718 (claims against lawyers and accountants).

¹⁴ Part I of this Article discusses these divisions and identifies the courts that have generated them. One does not need this detail to appreciate the growing scope of adverse domination jurisprudence, however. For example, a recent WESTLAW search using the query " 'adverse domination' and limitations and corporation" lists over 150 cases noting the existence of the theory or applying it in some fashion. Most of these cases were decided in the last dozen years.

¹⁵ Compare, e.g., *RTC v. Armbruster*, 52 F.3d 748 (8th Cir. 1995) (rejecting

have also begun to disagree about the categories of corporate fiduciary cases to which the adverse domination theory should apply and whether the theory should toll limitations for corporate claims against third parties.¹⁶ Among courts that support the adverse domination theory, long-standing divisions continue over the procedures for implementing its tolling standards.¹⁷ All of these developments demonstrate the need for reassessment of the adverse domination tolling theory, and, more generally, the need for critical reevaluation of limitations issues in D & O cases and related corporate litigation settings.

Part II of the Article supplies the necessary historical and policy background for such analysis. It explains that, since at least the turn of the century, courts have generally substituted bright-line statutes of limitation for equitable laches standards in corporate fiduciary litigation. Yet, as Part II also explains, current adverse domination tolling standards do not completely break established patterns. While the adverse domination theory lay virtually dormant until the bank and thrift crisis, its roots can be found in persistent limitations and corporate law strains that have preserved a role for standards in the face of the growing popularity of bright-line rules.

Part III of the Article evaluates the several rationales courts have relied upon to adopt the adverse domination tolling theory. Some courts assume that a corporation is "disabled" from pursuing claims that implicate its directors and officers

adverse domination as part of Arkansas law); *RTC v. Everhart*, 37 F.3d 151 (4th Cir. 1994) (same—Virginia law); *RTC v. Artley*, 28 F.3d 1099 (11th Cir. 1994) (same—Georgia law); *FDIC v. Cocks*, 7 F.3d 396 (4th Cir. 1993) (same—Virginia law), and *Brandt v. Basset (In re Southeast Banking Corp.)*, 855 F. Supp. 353, 358 (S.D. Fla. 1994) (same—Florida law) *aff'd*, 69 F.3d 1539 (11th Cir. 1995), with *FDIC v. Jackson*, 133 F.3d 694, 698-99 (9th Cir. 1998) (adopting adverse domination as part of Arizona law); *RTC v. Scaletty*, 891 P.2d 1110 (Kan. 1995) (adopting adverse domination doctrine as part of Kansas law), and *Hecht v. RTC*, 635 A.2d 394 (Md. 1994) (same—Maryland law).

¹⁶ Compare, e.g., *FDIC v. Dawson*, 4 F.3d 1303, 1313 (5th Cir. 1993) (adverse domination applies only to claims against directors and officers for conduct more serious than negligence), with *Jackson*, 133 F.3d 698-99 (contra) and *Scaletty*, 891 P.2d 1110 (contra). Compare also *FDIC v. Shrader & York*, 991 F.2d 216, 227 (5th Cir. 1993) (adverse domination does not apply to corporate claims against third parties, like outside lawyers and accountants), with *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873 (9th Cir. 1984) (contra).

¹⁷ Compare, e.g., *Hecht*, 635 A.2d at 394 (adopting "majority disinterested director" formulation of adverse domination), with *Clark*, 452 S.E.2d at 719 (adopting the competing "single disinterested director" formulation).

because of conflicts of interest and other practical barriers to litigation which exist while these managers remain in control of the entity. Others view the adverse domination theory as rooted in problems of concealment and notice. Part III finds these rationales largely persuasive, provided one embraces an expansive view of corporate directors' and officers' fiduciary duties. Part III also explains the implications of the various competing rationales for adverse domination issues that divide the courts.

Part IV of the Article then identifies a serious problem with the adverse domination tolling theory: because all rationales that support the theory are rooted in open-ended fiduciary standards, the theory's application inevitably entails complex factual inquiries that typically cannot be resolved short of trial. And if trial is necessary to determine the merits of the limitations defense for most corporate fiduciary claims, then the statute of limitations' purposes and function as a bright-line rule are substantially defeated. Part IV points out that such a change in limitations rules for corporate fiduciary claims flies in the face of a trend in both limitations law and corporate law toward a "convergence" of rules and standards that accommodates values of both through compromise. This larger perspective, Part IV argues, best explains judicial trends that have expanded, then later contracted, application of the adverse domination theory. Indeed, Part IV concludes, many recent judicial efforts to limit application of adverse domination tolling standards effectuate desirable reforms that preserve the policies behind rule-based statutes of limitation.

Part V then identifies additional "middle ground" compromise positions that courts might adopt to resolve limitations disputes in corporate fiduciary litigation. It concludes with a statutory limitations proposal that includes both tolling and repose concepts, which together may achieve the optimum balance between bright-line limitations rules and fact-based tolling standards.

To date, legal scholars have virtually ignored these issues.¹⁸ Yet the tremendous volume of litigation over statutes

¹⁸ Although several writers have chronicled limitations developments in financial institution receivership litigation, including use of the adverse domination theory, most of this work is primarily descriptive. *See, e.g.*, D. Annette Fields et

of limitation and adverse domination tolling standards in recent years, and the damage amounts at stake in those battles, show their practical importance in corporate litigation.¹⁹ Indeed, the significance of limitations rules and tolling standards in corporate cases may increase as changes in the securities laws prompt greater reliance on state corporate law.²⁰

And while it is tempting to regard statutes of limitation as "procedural" defenses unworthy of scholarly or judicial attention, they are not mere technicalities. Indeed, they "are fundamental to a well-ordered judicial system."²¹ Thus, judicial attitudes towards statutes of limitation, while historically antipathetic,²² now acknowledge that such defenses reflect significant "substantive" policy determinations.²³

al., *The Statute of Limitations*, in DEFENDING BANK & THRIFT DIRECTORS & PROFESSIONALS 143 (PLI Litig. & Admin. Practice Course Handbook Series No. H-514, 1994). Student commentary has slowly begun to fill this void. See Michael E. Baughman, Comment, *Defining the Boundaries of the Adverse Domination Doctrine: Is There Any Repose For Corporate Directors?*, 143 U. PA. L. REV. 1065 (1995); Kelly Tubman Hardy, Note, *The Doctrine of Adverse Domination and Tolling the Statute of Limitations*, 54 MD. L. REV. 670 (1995); Sheila S. Woodward, Comment, *Adverse Domination and the Statute of Limitations Defense in Bank Director Liability Cases: Greater Protection for Directors in FDIC v. Dawson*, 80 IOWA L. REV. 177 (1994). See also C. A. Beier, *Civic Duty and Civic Risk: The Supreme Court Throws the Balance Out of Whack*, 34 WASHBURN L.J. 495 (1995) (practitioner's essay).

¹⁹ The limitations defense was one of the most frequently litigated issues in D & O suits that followed the bank and thrift crisis. See Ronald R. Glancz & Melissa Landau Steinman, *Recent Developments in Director and Officer Liability Litigation*, in DEFENDING BANK & THRIFT DIRECTORS & PROFESSIONALS 41 (PLI Litig. & Admin. Practice Course Handbook Series No. H-532, 1994). As this litigation unfolded, key decisions on the scope of the adverse domination tolling theory affected billions of dollars in claims. See Marianne Lavelle, *Thrift Officials are Finding the Law is on Their Side*, NAT'L L.J., July 11, 1994, at B1. See also Albert R. Karr, *Interstate Banking Clears the Senate, Goes to Clinton*, WALL ST. J., Sept. 14, 1994, at 20.

²⁰ For example, the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.), imposes pleading requirements and discovery restrictions that have shifted litigation from federal court to state court. See John Gibeaut, *Corporate Boards Can Kill Suits*, A.B.A. J., July 1997, at 43 (citing unnamed study that documents 26% shift to state court).

²¹ 1 CORMAN, *supra* note 5, §1.1, at 10.

²² 1 CORMAN, *supra* note 5, §1.1, at 10. ("Courts have variously described statutes of limitations as arbitrary by necessity; a mechanical operation possibly unrelated to the merits of litigation; failing to create vested property rights; or not affecting fundamental rights.")

²³ For example, federal courts sitting in diversity apply state limitations rules as substantive law. *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945). In a

At the most basic level, limitations rules encourage plaintiffs to pursue their claims promptly and assure a measure of fairness to potential defendants by precluding litigation of claims where fact-finding is likely to be impaired by the passage of time.²⁴ As the Supreme Court explained over fifty years ago: "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."²⁵

There is also an important social dimension to statutes of limitation. Because courts can more quickly and accurately resolve controversies where evidence is fresh, statutes of limitation promote a societal interest in a speedy, efficient justice system.²⁶ Indeed, one commentator argues that statutes of limitation promote efficiency generally by adding a temporal dimension to legal rights that reduces uncertainty.²⁷

Limitations scholarship outside the corporate context acknowledges the importance of limitations problems, and it is time for corporate law commentary to do so as well.²³ As will

similar effort to accommodate the substantive import of limitations rules in state court proceedings, judges, and even legislatures, have developed significant exceptions to the *lex fori* choice of law rule that generally applies in such cases. See 1 CORMAN, *supra* note 5, § 1.5.1, at 82-84.

²⁴ See Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 471, 488 (1997). Professor Ochoa and Judge Wistrich provide a comprehensive and thoughtful review of the justifications traditionally offered for statutes of limitation.

²⁵ *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). See generally 1 CORMAN, *supra* note 5, § 1.1, at 11-14. The concern is, in part, that plaintiff may intentionally delay pursuit of his claim until defendant's ability to resist it is impaired by the passage of time. 1 CORMAN, *supra* note 5, § 1.1, at 11-14.

²⁶ 1 CORMAN, *supra* note 5, § 1.1, at § 1.1, at 16 ("Judicial efficiency is the reward when these statutes produce speedy and fair adjudication of the rights of the parties. Certainty and finality in the administration of affairs is promoted, and courts are relieved of the burden of trying stale claims when plaintiffs have 'slept' on their rights."). See also Lyman Johnson, *Securities Fraud and the Mirage of Repose*, 1992 WIS. L. REV. 607, 632 (1992) (making similar observations and labeling them as the "social dimension" of statutes of limitation).

²⁷ Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1181-83 (1986).

²⁸ Limitations problems in a variety of disciplines have attracted much scholarly attention. See, e.g., Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965 (1988); Laurie L. Kratky, Comment, *Statutes of Repose in Products Liability: Death Before Conception?*, 37 SW. L.J. 665 (1983); Jocelyn B. Lamm, *Easing Access to the Courts for Incest Vic-*

be shown, over the past two decades, limitations disputes in corporate fiduciary litigation have added new verses to a very old song in both corporate and limitations law: the tension between bright-line rules and fact-based standards. So viewed, the issues this Article explores may offer new lessons for both of these categories.

I. THE FLOWERING OF THE ADVERSE DOMINATION TOLLING THEORY AND RECENT JUDICIAL PRUNING

This Part of the Article describes how, starting in the 1980s, federal regulators successfully used the adverse domination theory to solve limitations problems in failed bank and thrift cases. This Part also describes how the theory then rapidly spread to corporate litigation generally. Finally, this Part identifies key doctrinal questions that have emerged as courts have, in recent years, rejected the adverse domination theory or retreated from its expansive application.

A. *Timing Problems in Failed Bank and Thrift Litigation*

In the 1980s and early 1990s, banks and savings and loans failed at an unprecedented rate.²⁹ The Federal Deposit Insurance Corporation, and its now extinct colleagues, the Federal Savings and Loan Insurance Corporation and the Resolution Trust Corporation (hereinafter collectively the "FDIC"), typically acted as receivers or successors of these institutions. Most were organized as corporations, and the FDIC inherited any claims the institutions might have against their former directors, officers or professional advisers.³⁰ A tremendous number

tims: Toward an Equitable Application of the Delayed Discovery Rule, 100 YALE L. J. 2189 (1991). There is also recent work of broader scope that implicates or focuses on limitations issues. See, e.g., Epstein, *supra* note 27; CORMAN, *supra* note 5 (two volume treatise on limitations).

²⁹ During the past ten years, for example, over 1,000 banks and nearly 900 savings and loans have failed. John L. Douglas, *The Liability of Directors of Financial Institutions*, in DEFENDING BANK & THRIFT DIRECTORS & PROFESSIONALS 1995, 191 (PLI Litig. Course Handbook Series No. H-532, 1995). This trend, which peaked in the early 1990s, has now subsided. The FDIC closed only six institutions during all of 1996. FDIC, *Closed FDIC-Insured Institutions and Assistance Transactions for 1996* <<http://www.fdic.gov/banknews/bkfail96.html>>.

³⁰ For a discussion of the corporate form of ownership that prevailed among

of D & O suits and related malpractice actions ensued.³¹

Statutes of limitation, however, posed considerable obstacles to pursuit of these claims. Risky lending and other questionable activities that might create a cause of action on behalf of a failed institution typically occurred many years before its receivership.³² Once a receivership began, generous federal statutes of limitation applied to the FDIC's claims as an institution's successor (three years for tort claims and six years for contract claims).³³ But these provisions did not resurrect any claims of the institution that had lapsed under state law prior to the receivership.³⁴ As one court summarized the situation:

Improvident loans cause financial institutions to bleed internally. The institutions seldom succumb quickly. They linger. Many years usually pass by between the dates of the making of improvident

failed financial institutions and the capacities in which federal agencies can pursue D & O and related malpractice claims, see Matthew G. Doré, *Presumed Innocent? Financial Institutions, Professional Malpractice Claims, and Defenses Based on Management Misconduct*, COLUM. BUS. L. REV. 127, 129-32 (1995).

³¹ For example, from 1992 to 1995, the FDIC and the RTC filed 593 "professional liability" lawsuits. Most fell into two categories: (i) breach of fiduciary duty claims against directors and officers of failed financial institutions, and (ii) malpractice claims against their professional advisers, typically lawyers and accountants. *FDIC Congressional Liaison Office Report*, June 12, 1996 (copy on file with author). As with institution failures, the volume of cases has now subsided. For example, the FDIC filed only three professional liability lawsuits during the first half of 1996. *Id.* A total of 153 cases against directors, officers and professional advisers of failed financial institutions were active at the end of that year. Marianne Lavelle, *FDIC Biggie Says Errors Were Made*, NAT'L L. J., Dec. 2, 1996, at A10.

³² In the southwest, where most thrift failures occurred, many loans and investments that caused insolvencies and receiverships in the late 1980s were made in the early "boom" years of the decade. See generally NATIONAL COMM'N ON FIN. INST. REFORM, RECOVERY AND ENFORCEMENT, ORIGINS AND CAUSES OF THE S&L DEBACLE: A BLUEPRINT FOR REFORM, 8, 43-55 (1993) [hereinafter ORIGINS & CAUSES].

³³ 12 U.S.C. § 1821(d)(14)(A) (1994). Congress established a more generous limitations rule for claims of fraud and intentional misconduct. See 12 U.S.C. §§ 1441a(b)(14)(E), 1821(d)(14)(C) (1994).

³⁴ 12 U.S.C. § 1821(d)(14)(B) provides that the federal statute of limitations begins to run on the later of "(i) the date of the appointment of the [FDIC or RTC] as conservator or receiver; or (ii) the date on which the cause of action accrues." The courts have not construed this statute literally, but instead hold that it tacks on an additional period, no less than that specified in § 1821(d)(14)(A), at the start of the conservatorship or receivership, but only for claims for which state law limitations periods have not expired as of that time. See, e.g., *FDIC v. Dawson*, 4 F.3d. 1303, 1307 (5th Cir. 1993) (collecting cases).

loans and their cumulative effect of bringing the institution to its knees. More time goes by before there is a federal agency ready to file suit. . . . [G]enerally speaking, the statute [of limitations] would run before the action could be brought by the federal agency unless some special doctrine or exception exists which tolls the statute.³⁵

State limitations law provided little help for the FDIC in this regard. The critical issue in most cases, an issue legislatures generally left for the courts to decide, was when the state statute of limitations began to run—that is, when the failed institution's cause of action "accrued."³⁶ In corporate D & O suits of the type the FDIC typically pursued on behalf of failed institutions, accrual could variously be defined as the time of the alleged breach of duty (an "occurrence" rule), the time the breach produced losses (a "damage" rule), or the time disinterested representatives of the institution or its shareholders learned about the breach (a "discovery" rule).³⁷ Courts had traditionally declined to depart from the occurrence rule in corporate cases. As summarized in a leading treatise: "Generally, . . . the statute of limitations begins to run against an action against the directors of corporations for their malfeasance or nonfeasance from the time of the perpetration of the wrongs complained of."³⁸

³⁵ *RTC v. Scaletty*, 891 P.2d 1110, 1114 (Kan. 1995).

³⁶ Legislatures often provide that the limitations period for a cause of action begins upon its "accrual," but, intentionally or not, allow the courts to define that term. *See, e.g.*, 1 CORMAN, *supra* note 5, § 6.1, at 373-75 ("A cause of action does not necessarily accrue on the date of the wrongful act, but instead when the plaintiff has a legal right to maintain his or her action, leaving the court to ascertain when such action effectively could be initiated."). *See also*, 1 CORMAN, *supra* note 5, § 6.1, at 370-71. There were other important questions besides "accrual" of course, such as *which* statute of limitations applied to D & O claims. As discussed in Part V of this Article, only a few states have express statutes of limitation covering such cases. The range of options available to courts was necessarily limited to statutorily prescribed time periods, which in most jurisdictions did not exceed 6 years. *See infra* Part V.B.1-2.

³⁷ *See* 1 CORMAN, *supra* note 5, § 6.1, at 370.

³⁸ 3A WILLIAM MEADE FLETCHER, ET AL., *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1306.10, at 683 (Perm. ed. 1994) [hereinafter FLETCHER, CORPORATIONS]. *See also id.* § 1306, at 675-76; Annotation, *Limitation of Actions Against Directors of Corporation for Malfeasance or Nonfeasance*, L.R.A. 1917A, 980, 982. Indeed, this pattern holds even where the full extent of damage from the corporate fiduciary's wrongdoing is not apparent until long after the transaction is approved. For example, many courts have held that a cause of action against bank directors for improper approval of a loan accrues "as soon as the loan is made and the bank parts with its money," rather than at the time the loan matures or the

Nor did delayed accrual or "tolling" doctrines hold much promise for the FDIC.³⁹ Courts rejected the damage rule on the theory that a corporation is entitled to sue (and its legal rights are "fixed") as soon as a breach of duty occurs.⁴⁰ The discovery rule typically applied only in cases where corporate fiduciaries were alleged to have engaged in fraud or fraudulent concealment.⁴¹ Even if the discovery rule did apply, notice to a single disinterested corporate representative of the institution presumably satisfied its requirements.⁴² Moreover, courts generally refused to recast as "continuing wrongs" (for which accrual is delayed) either the continued ill effects of past breaches of duty by corporate fiduciaries, or their failure to prosecute such breaches.⁴³ In short, under accrual principles that prevailed in most states at the inception of the bank and thrift crisis, the FDIC's D & O claims and related malpractice claims were time-barred.

B. *The Adverse Domination Remedy*

The limitations issue was critical in the first reported

borrower defaults. 3A FLETCHER, CORPORATIONS, *supra*, § 1306, at 677. *See, e.g.*, *Corsicana Nat'l Bank v. Johnson*, 251 U.S. 68, 86 (1919); *RTC v. Blasdel*, 930 F. Supp. 417, 429 (D. Ariz. 1994). *Accord* *Nunrick v. Baker*, 14 N.Y.S.2d 503, 506 (N.Y. Sup. Ct. 1939). There are occasional exceptions, however. *See, e.g.*, *FDIC v. Stahl*, 89 F.3d 1510, 1521-22 (11th Cir. 1996) (holding claims against directors for improper approval of loans were timely under either damage rule (when loans were not repaid) or discovery rule). *Accord* *System Dynamics Int'l, Inc. v. Boykin*, 683 So.2d 419 (Ala. 1996) (corporation's claim against CEO for improper payments accrued when IRS disallowed deductions for the payments).

³⁹ This Article equates "tolling" of limitations for a claim with postponement of "accrual" of the cause of action beyond the point when breach of duty occurred. Although these two concepts might not be the same for all purposes, *see, e.g.*, *West v. Conrail*, 481 U.S. 35, 40 n.6 (1987), most courts have not distinguished them when applying adverse domination analysis. *See* *Hecht v. RTC*, 635 A.2d 394, 402 n.11 (Md. 1994) (collecting cases).

⁴⁰ *See, e.g.*, *Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993).

⁴¹ These tolling exceptions are discussed in more detail in Part II(C)(2).

⁴² *See* 3 A. FLETCHER, CORPORATIONS, *supra* note 38, § 790, at 15.

⁴³ *See, e.g.*, *Kahn*, 625 A.2d at 271. In the case of a continuing wrong/continuing injury, the plaintiff's harm "results from continued unlawful acts and differs from the continuing ill effects of an original violation. . . . Postponement of the date of accrual until termination of a continuing wrong permits the inclusion of damages for the duration of the violation." 1 CORMAN, *supra* note 5, § 7.4.11, at 601.

failed bank D & O decision of the 1980s, *FDIC v. Bird*.⁴⁴ The FDIC sued an insolvent bank's directors on behalf of the institution, alleging lending violations and related breach of fiduciary duty claims.⁴⁵ The defendant directors, citing the prevailing "occurrence" theory of accrual, contended that the statute of limitations started running on claims against them at the time any improper loans were made, and had therefore expired prior to the receivership.⁴⁶ The FDIC, citing a handful of older cases (discussed in detail in Part II) that recognized a "domination and control" tolling exception, argued that the bank's cause of action did not accrue "while the culpable directors remain[ed] in control of the bank."⁴⁷ The court adopted the FDIC's position, reasoning that in light of defendants' control of the institution, there was no meaningful opportunity for a suit to protect the bank's interests "prior to the bank's failure and the appointment of the receiver."⁴⁸ Thus, modern adverse domination tolling standards were born.

As more banks and savings and loans failed in the early and mid-1980s, other courts followed *Bird's* lead.⁴⁹ By the time the rate of bank and thrift insolvencies peaked in the late 1980s and early 1990s, the adverse domination theory was, as one federal district court described it, a "widely-accepted proposition."⁵⁰ This same court summarized the three rationales most often advanced for tolling limitations under the adverse domination theory:⁵¹ (i) a corporate entity is "disabled" and cannot sue wrongdoing directors or officers while they control it; (ii) during the period of their control, directors and officers are in a position to conceal information about their own wrongdoing from those who might try to bring suit on behalf of the

⁴⁴ 516 F. Supp. 647 (D.P.R. 1981).

⁴⁵ *Id.* at 648.

⁴⁶ *Id.* at 650-51.

⁴⁷ *Id.* at 651.

⁴⁸ *Id.* According to the court, such a tolling exception also comports with broader corporate law trends, like the federal securities laws, that encourage disclosure by corporate managers. *Id.* at 651-52.

⁴⁹ *See, e.g.*, *FDIC v. Berry*, 659 F. Supp. 1475, 1486 (E.D. Tenn. 1987); *FDIC v. Dempster*, 637 F. Supp. 362, 368 (E.D. Tenn. 1986); *FDIC v. Buttram*, 590 F. Supp. 251, 254-55 (N.D. Ala. 1984); *FSLIC v. Williams*, 599 F. Supp. 1184, 1193-95 (D. Md. 1984).

⁵⁰ *FDIC v. Hudson*, 673 F. Supp. 1039, 1042 (D. Kan. 1987).

⁵¹ This Article evaluates these rationales in detail *infra* Part III.

corporation; and (iii) the corporation should not be charged with "notice" of claims against wrongdoing directors and officers while they control the entity.⁵² As the following paragraphs explain, until recent retrenchment in growth of the adverse domination theory, these arguments threatened a total eclipse of statutes of limitation in corporate fiduciary litigation.

C. *The Adverse Domination Theory Flowers and Multiplies*

1. D & O Cases

In the early years of the bank and thrift crisis, the FDIC uniformly succeeded in applying the adverse domination theory to toll limitations for D & O claims.⁵³ The only issue on which courts divided was the proper standard for determining when adverse domination ceased. One line of cases held that adverse domination tolled limitations so long as a majority of the board was comprised of persons alleged to have engaged in wrongdoing.⁵⁴ A competing line of cases required the FDIC to make a stronger showing of "full, complete and exclusive control" of the financial institution by defendant directors, i.e., to "effectively negate the possibility that an informed director could have induced the corporation to sue."⁵⁵ Under the latter version of adverse domination, the presence of a "single disinterested director" on the board might be sufficient to protect the

⁵² *Hudson*, 673 F. Supp. at 1042-43 (describing arguments and collecting cases). Neither *Hudson* nor the decisions it cites expressly addresses how the potential for derivative suits factored into the adverse domination analysis. This Article explores this issue *infra* Part III.A.2.

⁵³ The most serious potential obstacle to adverse domination tolling arguments in the early bank and thrift cases was the claim by defendant directors that regulators' control over a financial institution prior to the receivership (e.g., through annual bank examinations, supervisory arrangements, consent decrees) prevented adverse domination—a claim the courts consistently rejected. The courts reasoned that regulators had neither the power nor the duty to sue prior to a receivership. See, e.g., *RTC v. Hecht*, 833 F. Supp. 529, 532 (D. Md. 1993); *FDIC v. Howse*, 736 F. Supp. 1437, 1442-43 (S.D. Tex 1990); *Buttram*, 590 F. Supp. at 254.

⁵⁴ See, e.g., *Howse*, 736 F. Supp. at 1441-42; *Williams*, 599 F. Supp. at 1195.

⁵⁵ See, e.g., *Farmers & Merchants Nat'l Bank v. Bryan*, 902 F.2d at 1523 (citing *International Rys. v. United Fruit Co.*, 373 F.2d 408, 414 (2d Cir. 1967)). *Farmers* relied on federal "equitable tolling" precedent from the Second Circuit where this same domination standard was applied. See, e.g., *United Fruit Co.*, 373 F.2d at 414.

institution's interests, and therefore end adverse domination tolling.⁵⁶ These competing tests became known, respectively, as the "majority disinterested director" and "single disinterested director" formulations of the adverse domination theory.

Even under the more onerous single disinterested director formulation of adverse domination, the FDIC survived dispositive limitations defense motions by raising fact issues about the "disinterest" of directors that had not participated in the alleged wrongdoing.⁵⁷ Indeed, factual disputes about director wrongdoing, director "interest" and similar issues on which adverse domination tolling depends worked to the FDIC's advantage by enabling it to defeat motions to dismiss or for summary judgment based on limitations. The Resolution Trust Corporation boasted in 1993 that, despite repeated litigation over adverse domination in dozens of lawsuits, "district courts [had] never resolved [the limitations] issue against the RTC on summary judgment, and that the FDIC's average [was] nearly as good."⁵⁸ Thus, and not incidentally, the FDIC retained leverage for settlements.

2. Third Party Claims

Not only did the FDIC use adverse domination successfully in D & O cases, it also applied the theory to toll limitations for failed financial institutions' malpractice claims against lawyers and accountants, and for similar claims against other third parties. These cases, which proliferated alongside D & O claims in the wake of bank and thrift failures,⁵⁹ were critical to the FDIC's recovery efforts, since collecting judgments or settlements against directors and officers of failed institutions was often difficult.⁶⁰ Until 1993, the FDIC was uniformly suc-

⁵⁶ See *RTC v. Grant*, 901 P.2d 807, 817 (Okla. 1995).

⁵⁷ See, e.g., *FDIC v. Appling*, 992 F.2d 1109 (10th Cir. 1993) (fact issues precluded summary judgment on adverse domination); *Bryan*, 902 F.2d at 1523-24 (fact issues precluded directed verdict on adverse domination); *RTC v. Dean*, No. 91 Civ. 2026 1993 WL 837065, at *9 (D. Ariz., Jul. 20, 1993) (same-summary judgment); *FDIC v. Gantenbein*, No. Civ. A. 90-2303-V, 1992 WL 279772, at *4 (D. Kan. Sept. 30, 1992) (same).

⁵⁸ *Dean*, 1993 WL 837065, at *4 n.7.

⁵⁹ For details on the scope of the FDIC's malpractice litigation, see *supra* note 31. See also Doré, *supra* note 30, at 129-30.

⁶⁰ Exclusions in directors' and officers' liability insurance policies made coverage

cessful in its arguments that adverse domination tolled statutes of limitation applicable to a corporation's claims against third parties where the claims might expose wrongdoing by directors and officers. The FDIC contended, and the courts agreed, that adverse domination tolling was appropriate in these lawsuits because controlling directors of failing institutions would not pursue such third party claims.⁶¹ The FDIC had more limited success using the adverse domination theory to overcome time restrictions in insurance policies that covered failed institutions' D & O claims.⁶²

3. Adverse Domination Extends to Corporate Litigation Generally

Soon after the adverse domination theory attained prominence in failed bank and thrift litigation, other corporate liti-

problematic in many cases. *See, e.g.,* Wisla C. Heneghan & Daniel E. Rhyhart, *Developments in Banking Law: 1994 (pt.3)*, 14 ANN. REV. BANKING L. 27, 29-30 (1995). Even where directors appeared personally wealthy, tracing non-exempt assets and other obstacles complicated the prospects for recoveries. *See, e.g.,* Karr, *supra* note 19. Directors' and officers' professional advisers, on the other hand, provided more reliable deep pockets, since they were typically organized under a partnership structure with substantial personal assets at stake, and were often insured under malpractice policies that did not contain exclusions similar to those in D & O policies. *See, e.g.,* Ronald W. Stevens, *FDIC and RTC Suits Against Former Directors and Officers: When Will the Pendulum Swing the Other Way?*, 47 CONSUMER FIN. L.Q. REP. 222, 227 (1993).

⁶¹ *See, e.g.,* RTC v. O'Bear, 840 F. Supp. 1270 (N.D. Ind. 1993) (appraiser); FDIC v. Nathan, 804 F. Supp. 888, 890 (S.D. Tex. 1992) (attorney); RTC v. Gardner, 798 F. Supp. 790, 792 (D.D.C. 1992) (same); *Gantenbein*, 1992 WL 279772 (attorney/director); *In re American Continental Corp.*, 794 F. Supp. 1424, 1453 (D. Ariz. 1992) (attorney). *Accord* *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873 (9th Cir. 1984) (accountant—non-FDIC case); *IIT v. Cornfeld*, 619 F.2d 909, 931 (2d Cir. 1980) (same).

⁶² For example, the FDIC often made claims on fidelity bonds that were in effect at many banks and thrifts before their failure. *See generally* Michael Keeley & Toni Scott Reed, 'Superpowers' of Federal Regulators: *How the Banking Crisis Created an Entire Genre of Bond Litigation*, 31 TORT & INS. L.J. 817 (1996). These claims were based on alleged fraudulent or illegal conduct by the institutions' directors or officers during the period of the bonds' coverage. Strict "discovery of loss" and related notification provisions had often expired before the FDIC made its bond claims, however. *Id.* at 833. At least two federal circuits recognized the possibility that adverse domination tolled the period for discovery of loss, though neither applied the theory on the facts presented. *See* FDIC v. Oldenburg, 34 F.3d 1529 (10th Cir. 1994) (remanding for application of adverse domination theory); *California Union Ins. Co. v. American Diversified Sav. Bank*, 948 F.2d 556, 565 (9th Cir. 1991) (adverse domination not applicable on facts).

gants invoked its tolling standards to solve limitations problems for D & O and related third party claims. Insurance receivers used adverse domination to resurrect otherwise untimely D & O claims in the failed insurance corporation setting.⁶³ Bankruptcy trustees took the same approach when traditional for-profit corporations became insolvent.⁶⁴ Like the FDIC, these litigants also used the theory to preserve coverage under corporate insurance policies with discovery of loss provisions that had ostensibly lapsed.⁶⁵ Most importantly, adverse domination tolling began to alleviate limitations obstacles in more traditional corporate litigation venues, such as direct corporate actions and shareholder derivative suits.⁶⁶ Responding to this trend, the limitations discussions in leading corporate treatises were supplemented to include references to the adverse domination theory.⁶⁷

In short, by the early 1990s, it appeared that bright-line statutes of limitation for corporate fiduciary claims and related causes of action had metamorphosed into fact-based tolling standards under the adverse domination theory. Limitations periods were no longer measured from the occurrence of corporate fiduciaries' alleged misconduct but instead from the time the corporation was in a meaningful position to police that

⁶³ See, e.g., *Clark v. Milam*, 872 F. Supp. 307 (S.D. W. Va. 1994); *Guarantee Sec. Life Ins. Co. v. Blackburn (In re Blackburn)*, 209 B.R. 4 (Bankr. M.D. Fla. 1997); *Clark v. Milam*, 452 S.E.2d 714 (W. Va. 1994).

⁶⁴ See, e.g., *In re MacGregor Sporting Goods, Inc.*, 199 B.R. 502 (Bankr. N.J. 1995); *Kaliner v. Load Rite Trailors, Inc. (In re Sverica Acquisition Corp. Inc.)*, 179 B.R. 457 (Bankr. E.D. Pa. 1995); *Schwartz v. Jetronic Industries, Inc. (In re Harry Levin)*, 175 B.R. 560 (Bankr. E.D. Pa. 1994). See also *In re Lajet*, No. 93-3266, 93-3267, 1994 WL 392893, at *__ (E.D. La. June 2, 1994) (suit untimely even if adverse domination applied).

⁶⁵ See, e.g., *Paradis v. Aetna Cas. & Sur. Co.*, 796 F. Supp. 59, 62-63 (D.R.I. 1992) (collecting cases); *In re Lloyd Sec., Inc.*, 153 B.R. 677 (Bankr. E.D. Pa. 1993).

⁶⁶ See, e.g., *Safecard Servs., Inc. v. Halmos*, 912 P.2d 1132 (Wyo. 1996) (direct corporate action against director for insider trading under Delaware law); *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880 (Utah 1993) (direct D & O suit following change in control, but court found adverse domination inapplicable on facts). See also *Saylor v. Bastedo*, 100 F.R.D. 44, 50-52 (S.D.N.Y. 1983) (shareholder derivative suit); *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 173-77 (Mass. 1997) (reaching result similar to adverse domination in derivative suit by applying trust principles and fraudulent concealment rule).

⁶⁷ See, e.g., 3A FLETCHER CORPORATIONS, *supra* note 38, § 1306.20; DOUGLAS M. BRANSON, CORPORATE GOVERNANCE § 10.02 (1993 & Supp. 1997).

misconduct. In most cases such a determination could not be made prior to a trial on the merits.

D. *Recent Judicial Pruning of the Adverse Domination Theory*

The trend favoring adverse domination tolling has not continued unabated. Judicial adoption of the theory has slowed considerably in recent years, as has expansive application of the theory in jurisdictions that previously embraced it.

The first significant reversal came in 1993, when the Fourth Circuit declined to recognize adverse domination as part of Virginia law.⁶⁸ The court reasoned that Virginia required intentional concealment of wrongful conduct by corporate fiduciaries before a court could toll limitations.⁶⁹ In subsequent years, the Eighth and Eleventh Circuits reached similar conclusions under Arkansas and Georgia law, respectively, as did federal district courts interpreting the laws of Louisiana, Illinois, Florida, and Tennessee.⁷⁰ These decisions—all from federal courts attempting to predict state law—undoubtedly reflect restraint that is in part rooted in federalism concerns.⁷¹ Yet this same forbearance was also the product of concerns about the institutional competency of the judiciary in matters of limitations, or, as the Eighth Circuit expressed it, the “view that a reformulation of the law regard-

⁶⁸ *FDIC v. Cocke*, 7 F.3d 396, 402 (4th Cir. 1993).

⁶⁹ *Id.* The court reaffirmed this position one year later in *RTC v. Everhart*, 37 F.3d 151 (4th Cir. 1994) (refusing to apply adverse domination to Virginia-based financial institution chartered under federal law).

⁷⁰ *RTC v. Armbruster*, 52 F.3d 748 (8th Cir. 1995); *RTC v. Artley*, 28 F.3d 1099 (11th Cir. 1994); *FDIC v. Caplan*, 874 F. Supp. 741 (W.D. La. 1995); *RTC v. Gravee*, No.94 Civ. 4589 1995 WL 75373, at *__ (N.D. Ill. [FEB. 22, 1995] 1995); *Brandt v. Basset*, 855 F. Supp. 353, 358 (S.D. Fla. 1994); *RTC v. Wood*, 870 F. Supp. 797, 811 (W.D. Tenn. 1994). *See also* *RTC v. Barton*, 96 F.3d 128 (5th Cir. 1996) (declining to apply adverse domination tolling principles as part of Louisiana's *contra non valentum* doctrine where the claims against directors did not allege fraud or misrepresentation by defendant directors); *Howe Grain, Inc. v. Bantz*, 209 B.R. 496 (Bankr. D. Neb. 1997) (predicting Nebraska law and declining to apply adverse domination on the facts presented).

⁷¹ *See, e.g., Wood*, 870 F. Supp. at 810-11 (rejecting “application of the doctrine of adverse domination in the absence of clear state intent” and citing with approval the judicial restraint of the Fourth Circuit in *FDIC v. Cocke*, 7 F.3d at 396, 402 (4th Cir. 1993)). *See also Artley*, 28 F.3d at 1103-04 (refusing to adopt adverse domination as part of federal common law); *RTC v. Gravee*, N.D. Ill. Feb. 22, 1995 WL 75373.

ing when the statute of limitations begins to run is a matter better left to the legislature.⁷²

At about the same time as courts began declining invitations to adopt the adverse domination theory, the Fifth Circuit began to restrict the theory's application in Texas, where state courts had previously embraced it.⁷³ The court ruled in one case that adverse domination tolling standards did not apply to D & O claims alleging "mere negligence" on the part of directors,⁷⁴ in another that conclusory allegations of "gross negligence" were insufficient to trigger the theory,⁷⁵ and in yet another that "some sort of self-dealing or fraudulent conduct is required" for adverse domination tolling.⁷⁶ Lower courts in the Fifth Circuit interpreted Louisiana's adverse domination theory along similar lines.⁷⁷ Following this lead, other federal courts predicting state law on adverse domination limited its application to claims against directors for conduct more serious than negligence.⁷⁸ The trend in state courts has been less clear, with some embracing expansive versions of adverse domination, and others applying it quite restrictively.⁷⁹

Federal courts have circumscribed the adverse domination theory in other respects as well. In 1993, the Fifth Circuit held that adverse domination was a "very narrow doctrine" applicable only to D & O suits, and that the theory did not toll limitations for a corporation's claims against third parties, even

⁷² *Armbruster*, 52 F.3d at 752. See also *Brandt*, 855 F. Supp. at 357.

⁷³ *Allen v. Wilkerson*, 396 S.W.2d 493, 500-02 (Tex. Civ. App. 1965).

⁷⁴ *FDIC v. Dawson*, 4 F.3d 1303, 1311 (5th Cir. 1993).

⁷⁵ *RTC v. Seale*, 13 F.3d 850, 854-55 (5th Cir. 1994).

⁷⁶ *RTC v. Acton*, 49 F.3d 1091 (5th Cir. 1995).

⁷⁷ See, e.g., *RTC v. Gaudet*, No. 92 Civ. 2661 1996 WL 34131, at *3-6 (E.D. La. Jan. 29, 1996) (adverse domination tolling in Louisiana requires the same level of misconduct by directors as Fifth Circuit predicted for Texas law self-dealing or fraudulent conduct).

⁷⁸ See, e.g., *RTC v. Franz*, 909 F. Supp. 1128 (N.D. Ill. 1995) (Illinois law of adverse domination requires that a majority of directors exhibit gross negligence or recklessness); *RTC v. Blasdel*, 930 F. Supp. 417 (D. Ariz. 1994) (Arizona law of adverse domination requires allegations of intentional misconduct or concealment). But see *FDIC v. Jackson*, 133 F.3d. 694, 698-99 (predicting that Arizona law of adverse domination would apply, "at a minimum" to gross negligence claims).

⁷⁹ Compare *RTC v. Scaletty*, 891 P.2d 1110 (Kan. 1995) (adopting adverse domination doctrine for all claims), and *Hecht v. RTC*, 635 A.2d 394 (Md. 1994) (same), with *RTC v. Grant*, 901 P.2d 807, 814 (Okla. 1995) (limiting application of the doctrine to claims for fraudulent conduct).

where those claims might implicate controlling directors.⁸⁰ This ruling significantly curtailed the scope of the FDIC's professional malpractice litigation in Texas, and attracted a limited following elsewhere.⁸¹ And, starting at about the same time, several courts reversed an earlier judicial trend and ruled that regulators' preredeivership supervision of financial institutions ended what would have otherwise constituted adverse domination by allegedly culpable directors.⁸²

Long-standing divisions among courts on procedural aspects of the adverse domination theory—in particular, the competing “majority disinterested director” and “single disinterested director” versions of adverse domination—continue unabated.⁸³ Several recent decisions treat these two alternatives as presumptions: the majority disinterested director version presumes that a corporation is incapable of suing while controlled by a majority of directors who are implicated in wrongdoing; the single disinterested director version presumes, from the presence of a single disinterested director on a corporation's board, that the corporation is in a position to sue any wrongdoing directors or officers, whether or not they constitute a majority of the board.⁸⁴ In either case, however, the

⁸⁰ *FDIC v. Shrader & York*, 991 F.2d 216, 227 (5th Cir. 1993).

⁸¹ See *Lavelle*, *supra* note 19 (describing impact of negative rulings in thrift cases). While the majority view is that adverse domination applies to corporate claims against third parties (see, e.g., *RTC v. Gardner*, 798 F. Supp. 790, 795 & n. 6 (D.D.C. 1992) (collecting cases)), a few other courts have followed the Fifth Circuit and limited application of adverse domination to claims against directors and officers. See *RTC v. Aycock*, No. 92 Civ. 761 1995 WL 46707 (E.D. La. Feb. 2, 1995) (adverse domination did not toll limitations for attorney malpractice claims under Louisiana law); *FDIC v. Leonard*, No. 91-1773 (E.D. Va. 1992) (same). See also *B.P. Oil, Inc. v. J.R. Sousa & Sons, Inc.*, No. 83-4046 1995 WL 842003, at *9 (D. Mass. Sept. 12, 1995) (adverse domination did not apply to corporation's claims against third parties).

⁸² See, e.g., *RTC v. O'Bear, Overholser & Smith*, 886 F. Supp. 658, 663-67 (N.D. Ind. 1995) (consent decree ended adverse domination); *RTC v. Phelps*, 860 F. Supp. 389, 390-391 (S.D. Tex. 1994) (appointment of supervisory agent ended adverse domination); *RTC v. Holmes*, 839 F. Supp. 449 (S.D. Tex. 1993) (same).

⁸³ Compare *Hecht*, 635 A.2d at 402 (applying majority disinterested director version), and *Grant*, 901 P.2d at 817-818 (same), with *Clark v. Milam*, 452 S.E.2d 714, 719 (W. Va. 1994) (applying single disinterested director version); *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880 (Utah 1993) (same).

⁸⁴ See, e.g., *Scaletty*, 891 P.2d at 1113; *Hecht*, 635 A.2d at 407-08; *Grant*, 901 P.2d at 817.

applicable presumption can be rebutted at trial.⁸⁵

E. *The Need for Doctrinal Analysis*

These developments raise several issues. That courts have refused to adopt or apply the adverse domination theory in so many recent cases calls into question, implicitly if not explicitly, the justifications traditionally offered to support it. Not only are these arguments ripe for reevaluation, they also implicate difficult questions of institutional competency. That is, when one asks whether courts should toll bright-line statutes of limitation with fact-based adverse domination standards, one must also consider whether courts have any authority to do so. An evaluation of the rationales for adverse domination may shed light on this issue, as well as on divisions that have developed among courts concerning the categories of claims to which it should apply and procedures for its implementation.

Of course, there is a somewhat cynical alternative explanation for the conflicting developments described above, an explanation that does not require doctrinal analysis. Most adverse domination cases are a product of litigation that ensued in the wake of the bank and thrift crisis. Changing views about the causes of that crisis, and perceived abuses by government regulators in the litigation that ensued in its wake, may have contributed both to the adverse domination theory's meteoric

⁸⁵ Under the majority disinterested director version, defendants can prevail on the limitations defense at trial despite the presumption by showing that a majority of the board was *not* involved in wrongdoing or was otherwise disinterested with respect to the claim, thus ending adverse domination tolling. *See, e.g., Hecht*, 635 A.2d at 407; *Scaletty*, 801 P.2d at 1113. Under the single disinterested director version, plaintiff can defeat the limitations defense at trial by showing that allegedly disinterested board members were not, in fact, "willing and motivated" to sue on the corporation's behalf. *See, e.g., FDIC v. Appling*, 992 F.2d 1109, 1115-16 (10th Cir. 1993) (denying defendant's motion for summary judgment); *Farmers & Merchants Nat'l Bank v. Bryan*, 902 F.2d 1520, 1523 (10th Cir. 1990) (denying defendants' motion for directed verdict).

In the Fifth Circuit, however, the courts have refused to follow this presumption approach. Tolling apparently follows only where the corporate plaintiff both pleads and sustains its burden of proof at trial that a majority of the board has engaged in sufficiently serious wrongdoing. *See FDIC v. Dawson*, 4 F.3d 1303, 1311 (5th Cir. 1993). ("[P]laintiff still bears the burden of proving that a majority of the board consisted of wrongdoers for the relevant time period; the [adverse domination theory] does not shift onto the defendants the burden of proving that a majority of the board was *not* culpable.")

rise and to its more recent decline.⁸⁶

Yet, while development of the common law is undoubtedly influenced to some degree by the political capital of the litigants that bring disputes to the courts, such explanations of legal doctrine are not helpful tools for courts or lawyers to use in resolving future disputes. Judges encapsulate policy decisions, whether or not politically motivated, in doctrinal rules that have the force of precedent. They may later temper the logic of these rules, as Justice Holmes explained, based on experience.⁸⁷ Like most standard-based formulations in limitations and corporate jurisprudence, the adverse domination theory has developed as part of this common law process, and its future largely depends upon it. Thus, while the political

⁸⁶ At the outset, prevailing popular opinion blamed fraud and abuse by unscrupulous owners and operators as the primary causes of financial institution insolvency. See Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 DUKE L.J. 469, 508-09 (1992) (describing popular acceptance of the fraud and abuse theory in the early stages of the recent thrift crisis). By suspending limitations under the adverse domination theory, courts facilitated the government's efforts to catch and punish those the public believed to be responsible for the losses incurred. See, e.g., *RTC v. Gardner*, 798 F. Supp. 790 (D.D.C. 1992) (applying adverse domination theory to toll limitations for claims against attorneys that represented Charles Keating's Lincoln Savings and Loan); *In re American Continental Corp./Lincoln Sav. and Loan Sec. Litig.*, 794 F. Supp. 1424, 1453 (D. Ariz. 1992) (same).

Later, more complex views of the bank and thrift crisis emerged, challenging the fraud and abuse theory, or at least its extent. See, e.g., Swire, *supra*, at 509-10 (describing a "stiff competition" explanation of the crisis); ORIGINS & CAUSES, *supra* note 32, at 82-87 (describing differing views on role of fraud and abuse as cause of the thrift crisis). At the same time, the FDIC and other regulators began targeting not only fraud and abuse by those who managed financial institutions (and professional advisers who knowingly assisted them), but also negligent mismanagement and malpractice claims based on negligence. See, e.g., John K. Villa, *Liabilities of Bank and Thrift Counsel*, in LITIGATING FOR AND AGAINST THE FDIC AND THE RTC 1993, 485, 490-97 (PLI Com. L. & Practice Series No. A4-4429, 1993) (describing FDIC's "decision to sue" process).

As the categories of "wrongdoers" expanded into the mainstream, including governors, federal judges, and Members of Congress who had associated with failed banks and thrifts, and as regulators pursued more controversial liability theories, so did the volume and force of opposition to the government's positions in failed financial institution litigation. See, e.g., AMERICAN BAR ASSOCIATION, LABORERS IN DIFFERENT VINEYARDS: THE BANKING REGULATORS AND THE LEGAL PROFESSION (Discussion Draft Jan. 1993) (strongly criticizing the theories and tactics used by the OTS against the Kaye, Scholer law firm). Against this backdrop, it is not surprising that by the mid-1990s courts began to distance themselves from recovery theories they had readily embraced in the heady early days of the bank and thrift crisis.

⁸⁷ OLIVER W. HOLMES, *THE COMMON LAW* 1 (1881).

dimensions of failed bank and thrift cases can aid our understanding of them, the lessons of that litigation for the adverse domination theory will be more helpful if articulated in traditional doctrinal terms. This Article now turns to that task.

II. HISTORICAL PATTERNS, UNDERLYING POLICY DEBATES AND THE ROOTS OF THE ADVERSE DOMINATION TOLLING THEORY

This Part of the Article provides a historical and policy background that puts adverse domination tolling issues in perspective. As this Part describes, early in this century the rule-based statute of limitations began to supplant equitable laches standards in corporate fiduciary litigation. Yet, even as the substitution of limitations for laches became complete as the century progressed, courts embraced various tolling theories that preserved a role for the application of standards (and, therefore, a degree of judicial discretion) to solve limitations problems in corporate cases. This rules/standards tension is reflected not only in the caselaw roots of the adverse domination theory, but also in larger policy debates concerning the proper role of rules and standards in limitations and corporate law.

A. *Statutes of Limitation Supplant the Laches Defense in Modern Corporate Fiduciary Litigation*

Judges used trust principles to develop the law of directors' and officers' fiduciary duties in the late nineteenth and early twentieth century.⁸⁸ In express trust cases, the statute of limitations did not run on the beneficiary's claims against the trustee so long as there was no denial or repudiation of the trust. Instead, laches principles determined whether suit was timely filed.⁸⁹ Not surprisingly then, in the early

⁸⁸ See, e.g., LEWIS D. SOLOMON ET AL., *CORPORATIONS LAW AND POLICY* 672 (3d ed. 1994) ("Perhaps because many of the earliest corporations cases involved charitable corporations, courts began to analogize the duties of a director in managing corporate property to the duties of a trustee in managing trust property.")

⁸⁹ Note, *The Statute of Limitations in Stockholders' Derivative Suits Against Directors*, 39 COLUM. L. REV. 842, 845 (1939) [hereinafter, Note, *Statute of Limitations*].

days of corporate jurisprudence, courts applied these same equitable standards to determine the time bar in breach of fiduciary duty cases against corporate directors and officers.⁹⁰ Indeed, some decisions endorsed the laches defense not only on the basis of the express trust analogy, but also because laches' flexible analysis, which balances the reasonableness of the corporate plaintiffs delay against any resulting prejudice to the defendant fiduciaries, produced more equitable results than statutes of limitation.⁹¹

But the flexibility that trust principles offered was somewhat limited. As the twentieth century progressed, courts began to sever corporate law's ties to the law of trusts, and the limitations area was no exception.⁹² The majority view emerged that claims against corporate directors and officers were more in the nature of claims for breach of an *implied* trust, to which statutes of limitation could apply.⁹³ Nonetheless, courts continued to invoke laches standards in certain cases based on their equity jurisdiction.⁹⁴

Directors, 39 COLUM. L. REV. 842, 845 (1939) [hereinafter, Note, *Statute of Limitations*].

⁹⁰ See, e.g., *Felsenheld v. Bloch Bros. Tobacco Co.*, 192 S.E. 545, 549 (W. Va. 1937); *Greenfield Sav. Bank v. Abercrombie*, 97 N.E. 897, 901 (Mass. 1912); *Joy v. Ft. Worth Compress Co.*, 58 S.W. 173, 174 (Tex. Civ. App. 1900); *Ellis v. Ward*, 25 N.E. 530, 533 (Ill. 1890).

⁹¹ See, e.g., *Lippitt v. Ashley*, 94 A. 995, 1004 (Conn. 1915) (suggesting that whether laches or limitations applied in a corporate fiduciary case should depend on the level of misconduct by the defendant—the more serious the offense, the more appropriate the express trust analogy and concomitant relaxation of limitations rules.) See also *Brinckerhoff v. Roosevelt*, 143 F. 478 (2d Cir. 1906).

⁹² See, e.g., SOLOMON ET AL., *supra* note 88, at 672.

⁹³ See, e.g., J.W. Oler, Annotation, *Statute of Limitations in Stockholder's Derivative Suit Against Directors or Officers*, 123 A.L.R. 346, 347-48 (1939) ("[M]ost of the cases which . . . discuss the question are to the effect that directors of a corporation are not such express trustees as will prevent the operation of the statute of limitations in their favor . . ."); Note, *Statute of Limitations*, *supra* note 89, at 846 ("A majority of jurisdictions [hold that] directors, like agents held to a fiduciary liability on constructive trust theories, may avail themselves of the statutory bar."). See generally 3A FLETCHER, CORPORATIONS, *supra* note 38, § 1301 at ____.

⁹⁴ Where claims against directors and officers were not remediable at law, for example, some courts found authority to provide relief in equity and therefore applied laches rather than statutes of limitations. See Oler, *supra* note 93, at 350-51 (collecting cases). The equitable origins of the derivative suit offered further theoretical support for the use of laches. See Note, *Statute of Limitations*, *supra* note 89, at 847 ("On the face of [the equity jurisdiction] rule, it might seem that a stockholders' derivative suit would never be barred, since such a suit has always been solely cognizable in equity . . .").

majority of courts embraced the "concurrent remedy" theory, which ultimately spelled the end for the laches defense in corporate fiduciary litigation. Under this view, a court sitting in equity could substitute laches for limitations only where its equity jurisdiction was exclusive.⁹⁵ Where there was a concurrent remedy at law, the court was required to apply the statute of limitations.⁹⁶ Not surprisingly, distinctions between laches and statutes of limitation blurred under this theory.⁹⁷ For example, by 1970, the Delaware courts were applying the statute of limitations "whenever plaintiff seeks money in a derivative suit."⁹⁸ Thus, despite a somewhat shaky start, courts ultimately recognized and applied statutes of limitation to claims against corporate fiduciaries.

B. *The Underlying Policy Debate: Rules/Standards Tensions in Limitations and Corporate Law*

The substitution of rule-based statutes of limitation for laches standards was much more than a simple choice about which time-bar rule should apply. As many scholars have explained, rules-based modes of decision entail substantially different jurisprudential and policy considerations than do standards-based decisional processes.⁹⁹ Indeed, as Professor

⁹⁵ Note, *Statute of Limitations*, *supra* note 89, at 844. See generally 2 SPENCER W. SYMONS & JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 419e (5th ed. 1941) ("If . . . the cause is one of which courts of chancery take exclusive cognizance, the statute [of limitations] will not necessarily be applied.").

⁹⁶ *Id.* See also 3A FLETCHER, CORPORATIONS, *supra* note 38, § 1303.

⁹⁷ See *Kahn v. Seaboard Corp.*, 625 A.2d 269, 273 (Del. Ch. 1993) (Allen, Chancellor) ("As decades passed, [the distinctions between legal and equity jurisdiction] evolved from every day practical knowledge of lawyers to professional exotica. By the mid-twentieth century, judges were beginning to grow less comfortable with those old concepts . . .").

⁹⁸ *Id.* at 274 (construing *Bokat v. Getty Oil Co.*, 262 A.2d 246 (Del. 1970) and other cases). The limitations defense was, however, subject to a discovery rule exception for claims of fraud and self-dealing. This exception is discussed in more detail *infra* Part II.C.3.

⁹⁹ For an excellent overview of these issues, see *Symposium on Law and Philosophy*, 14 HARV. J.L. & PUB. POLY 615 (1991). For an analysis of rules/standards issues from an economic perspective, see Isaac Ehrlich and Richard Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

Gail Heriot noted when she recently examined the rules/standards issues that limitations decisions entail, choosing between statutes of limitation and the laches defense is akin to choosing between the rigid code-based laws of Solon and the case-specific discretion with which King Solomon dispensed justice.¹⁰⁰ The question is, which approach is preferable to carry out the substantive policy goals of limitations law, both generally and in corporate fiduciary litigation?

1. The Rules/Standards Debate in Limitations Law

Professor Heriot offers several reasons why bright-line rules may be the preferred vehicle for carrying out limitations policies. When applied formalistically, i.e., measuring limitations as a fixed period from the occurrence of defendant's actionable conduct, statutes of limitation provide better guidance for adjudication of limitations disputes, and permit their resolution with fewer errors and at lower cost.¹⁰¹ Strict enforcement of statutes of limitation can also provide better guidance for conduct, enabling potential defendants to put their resources to productive uses once the statutory period has passed.¹⁰² Bright-line statutes of limitation can even be considered beneficial from plaintiffs' perspective, for by clearly identifying the point at which claims are barred, such statutes help prevent premature "panic" filings by plaintiffs.¹⁰³ Moreover, Professor Heriot argues, statutes of limitation enable legislatures to achieve a value-neutral compromise between conflicting defendant-focused and plaintiff-focused positions on limitations issues.¹⁰⁴

rules/standards issues from an economic perspective, see Isaac Ehrlich and Richard Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

¹⁰⁰ Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 B.Y.U. L. REV. 917, 930-34 (1992).

¹⁰¹ Professor Heriot argues that when rules rather than standards govern adjudication, they minimize the costs of "(1) incorrect judgments resulting from mistakes in the application of discretion; (2) incorrect judgments resulting from errors in the fact-finding process; . . . and [(3)] administration." *Id.* at 935-39. Other scholars have identified similar benefits from the use of rules in a legal system. See Ehrlich & Posner, *supra* note 99, at 264-67.

¹⁰² Heriot, *supra* note 100, at 940; Ochoa and Wistrich, *supra* note 24, at 468-49.

¹⁰³ Heriot, *supra* note 100, at 941; Ochoa and Wistrich, *supra* note 24, at 486.

¹⁰⁴ She explains that a potential defendant would want the law to bar any claim where the passage of time might impair one's ability to defend against it,

The cost of bright-line rules, as Professor Heriot acknowledges, is that they are both under- and over-inclusive. A rigidly enforced statute of limitations will bar some claims where plaintiff's delay in filing suit is reasonable and defendant is not prejudiced by it, and will permit other claims where plaintiff has delayed without good reason and to defendant's detriment.¹⁰⁵ The loss of flexibility in adjudication is the trade-off for the repose and simplicity of administration that bright-line statutes of limitation make possible.

A time-bar based on laches does not suffer from these problems. Indeed, that is the beauty of the laches defense: because it bars litigation only where plaintiff has unreasonably delayed pursuit of the claim to defendant's detriment, the laches defense produces more equitable results in individual cases where limitations issues are raised.¹⁰⁶ The drawback of the laches defense is that, as a flexible standard, it is not a helpful guide for litigants' conduct or judicial decisions. Potential defendants can never be sure of repose, nor can potential plaintiffs ever be sure their claims are timely. In any given case the reasonableness of plaintiff's delay might outweigh the prejudice to defendant, or vice versa.¹⁰⁷ In addition, when courts decide issues such as the "reasonableness" of plaintiff's delay or "prejudice" to defendant on a case-by-case basis, they may misapply these standards in at least some cases.¹⁰⁸ Fi-

regardless of whether plaintiff has a reasonable opportunity to pursue the claim. A potential plaintiff, on the other hand, would not be concerned about prejudice to defendants, but rather about preserving a reasonable opportunity to sue. A bright-line rule (e.g., a statute of limitations barring claims after X years) makes consensus between these two divergent limitations "standard" formulations possible, for such a rule is, on its face at least, neither defendant- nor plaintiff-focused. That is, a statute of limitations of X years will not necessarily protect defendants against all stale claims; nor will it necessarily allow all plaintiffs a reasonable time to protect their rights. Most of the time, however, it will do both. Heriot, *supra* note 100, at 941-43.

¹⁰⁵ Heriot, *supra* note 100, at 937-38. See also Erlich and Posner, *supra* note 99, at 22 (describing general problems of over-and under-inclusion when rules are used in place of standards).

¹⁰⁶ See, e.g., 1 CORMAN, *supra* note 5, § 3.3.1, at 182 (describing operation of laches principles in admiralty cases).

¹⁰⁷ See Heriot, *supra* note 100, at 939 (describing benefits of certainty in limitations rules). See also Erlich and Posner, *supra* note 99, at 262-63 (describing the potential "chilling" effect of legal standards on conduct).

¹⁰⁸ See Heriot, *supra* note 100, at 936-37 ("the further one proceeds towards the standard end of the rule-standard continuum, the greater the likelihood of error in

nally, to the extent that the proper outcome under laches standards is bound up with the merits of the claim, a court may need to try a case in order to decide whether to bar it as untimely.¹⁰⁹

The rules/standards debate is evidenced in modern limitations law by the discovery rule. This tolling doctrine replaces the occurrence rule of accrual with a fact-based standard for commencing the limitations period: accrual occurs when plaintiff "first knows or with due diligence should know facts that will form the basis for an action."¹¹⁰ Use of this more flexible accrual principle has expanded in recent years from "foreign object" surgery cases, to malpractice cases generally, as well as to a host of other categories of litigation where plaintiff may be "blamelessly ignorant" of the claim at the time defendant's misconduct occurs.¹¹¹

Discovery rule advocates contend that tempering bright-line statutes of limitation with discovery rule standards better effectuates limitations policy. They argue that legislatures establish limitations periods assuming that plaintiff will know of and be able to sue for wrongs committed against him; but where plaintiff remains blamelessly ignorant of his injury by the time limitations expires, he is deprived of the opportunity the legislature intended to provide him to protect his rights.¹¹² Under this view, when judges apply the discovery rule, they restore the unexpressed but implicit sense of balance the legislature intended to achieve with statutes of limitation.¹¹³

the application of discretion."). See also Erlich and Posner, *supra* note 99, at 267 (explaining how rules reduce "mistakes and usurpations" by adjudicators).

¹⁰⁹ See Heriot, *supra* note 100, at 938 ("The doctrine of laches, which shrouds little or nothing from the judge's consideration, is more likely to involve significant administrative costs than the statute of limitations."). See also Ehrlich and Posner, *supra* note 99, at 266 ("Decision by standard . . . increases the interval between an incident giving rise to a legal dispute and final judicial resolution of the dispute.").

¹¹⁰ 2 CORMAN, *supra* note 5, § 11.1.1, at 134.

¹¹¹ 2 CORMAN, *supra* note 5, § 11.1.2.2, at 139-140; Heriot, *supra* note 100, at 954-960.

¹¹² See, e.g., 1 CORMAN, *supra* note 5, § 7.4.2, at 542-43 ("Repose is not independent of the other goals of statutes of limitations, however, as these statutes also recognize plaintiffs' interest in bringing meritorious claims.").

¹¹³ See, e.g., Johnson, *supra* note 26, at 636. Indeed, commentators have criticized judges who decline to adopt the discovery rule on institutional grounds as

As described in Part IV of the Article, there are a number of concerns about the proper scope and use of the discovery rule. Carried to its logical conclusion, the discovery rule may entail factual inquiries about plaintiff's actual and constructive knowledge that effectively reinstate laches standards and thereby eliminate the ability of statutes of limitation to provide repose.¹¹⁴ For present purposes, the important point is that, despite the general triumph of statutes of limitation over laches, the "rules/standards" debate in limitations law has not completely subsided. Instead, the law has developed other outlets for at least some of the judicial discretion that the laches defense would otherwise entail.

2. The Rules/Standards Debate in Corporate Law

Even if one agrees that bright-line statutes of limitation are more suitable than the laches defense for effectuating limitations policy goals, it is less clear whether the same holds true for corporate fiduciary litigation. As Chancellor Allen noted in a recent Delaware limitations decision: "[W]hen we ask whether the passage of time alone should bar a [suit against] corporate directors . . . we are asking a very practical question whose answer should make practical sense, while being consistent with our legal traditions."¹¹⁵ The "traditional view" of corporate law raises questions about the bright-line approach that statutes of limitation typically entail.

Under the traditional view, corporations are entities created by concession of the state, which reserves the power to regulate them in the public interest.¹¹⁶ Traditionalists support the use of mandatory corporate governance rules (stat-

"ossified." See Green, *supra* note 28, at 978. An obvious line of attack on this view is that the legislature struck what it believed to be the appropriate plaintiff-defendant balance when it established the statute of limitations. See Heriot, *supra* note 100, at 961-62.

¹¹⁴ Indeed, recent discovery rule developments in response to this problem have significant implications for use of the adverse domination theory in corporate litigation. See *infra* Part IV.B.1.

¹¹⁵ Kahn v. Seaboard Corp., 625 A.2d 269, 275 (Del. Ch. 1993).

¹¹⁶ See, e.g., Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . .").

utes) to the extent necessary to protect shareholder interests and achieve other public policy goals, but do not reject judicial standards.¹¹⁷ The traditional view holds that, as a further means of accomplishing corporate law's regulatory tasks, courts properly require corporate managers to discharge their obligations to the corporation and its shareholders consistently with fiduciary duties (the duties of care and loyalty).¹¹⁸ These fiduciary duties, derived from trust and agency law, have traditionally been enforced as fact-based standards rather than bright-line rules.¹¹⁹

Consider, for example, corporate directors' and officers' fiduciary duty of loyalty, which prohibits their "use of corporate position to make a personal profit or gain other personal advantage."¹²⁰ In the seminal case of *Guth v. Loft*,¹²¹ the Delaware Supreme Court described this duty in the following terms: "The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale."¹²²

¹¹⁷ See, e.g., ADOLF BERLE, JR. & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (justifying corporate law rules that protect shareholder interests based on the separation of ownership from control in modern public corporations). Some contemporary scholars advocate broader regulatory goals for corporate law. See, e.g., *PROGRESSIVE CORPORATE LAW* (Lawrence E. Mitchell, ed., 1995).

¹¹⁸ See, e.g., CLARK, *supra* note 1, §4.1, at 141 (describing duty of loyalty as a "residual concept that can include factual situations that no one has foreseen and categorized.").

¹¹⁹ For a description of the trust and agency law roots of corporate fiduciary duties under this view, see Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1407-08 n.15 and accompanying text (1985).

¹²⁰ AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* Introductory Note to § 4.01, 137 (1994) [hereinafter *PRINCIPLES OF CORPORATE GOVERNANCE*]. The duty of loyalty might also be expressed as "a duty in good faith to act in the best interests of the corporation." BRANSON, *supra* note 67, § 8.02 at 394. See also MBCA § 8.30(a)(1) & (3).

¹²¹ 5 A.2d 503 (Del. 1939).

¹²² *Id.* at 510. The fiduciary duty of care is also enforced by standards that require corporate directors and officers to perform their functions "with the care an ordinarily prudent person in a like position would exercise under similar circumstances." MBCA § 8.30(a)(2). See also *PRINCIPLES OF CORPORATE GOVERNANCE*, *supra* note 120, § 4.01(a). While the business judgment rule qualifies this open-ended standard somewhat, it does so with judicially created standards rather than bright-line rules. See Official Comment to MBCA § 8.30 ("The elements of the business judgment rule and the circumstances for its application are continuing to

While such open-ended legal duties offer little guidance for either conduct or adjudication, traditionalists offer several justifications. First, and as the preceding quote from *Guth* suggests, standards are superior to rules as an enforcement mechanism because one cannot readily contemplate all of the possible situations in which fiduciary breaches might arise. Second, when expressed as standards, fiduciary duties serve an aspirational function.¹²³ Finally, without open-ended fiduciary duties, shareholders might be reluctant to participate in a corporate relationship in which they necessarily cede all significant means of control over their collective welfare to elected managers.¹²⁴

Formalistic application of statutes of limitation to claims against corporate directors and officers ignores their open-ended fiduciary obligations to further shareholder welfare. As Chancellor Allen explained:

The corporate shareholder commits capital to the supervision and management of the corporate board. In doing so the shareholder becomes dependent upon the skill and loyalty of those in control of the corporate enterprise. Legally sanctioned relationships of dependence and trust are important for the law to enforce for both instrumental and expressive reasons. Given the fiduciary duties that the law imposes upon the relationship among those serving as corporate directors, stockholders are entitled to rely on the good faith of the directors when they act with respect to the corporation's property or processes. There is, of course, great social utility in the willingness of some to trust others in this way. Since trust and good faith are the essence of this relationship, it would be corrosive and contradictory for the law to punish reasonable reliance on that good faith by applying the statute of limitations woodenly or automatically to

that "the business judgment is in the best interests of the corporation." PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 120, § 4.01(c).

¹²³ As the Washington Supreme Court observed in *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 391 P.2d 979, 983 (Wash. 1964): "fidelity in the agent, and not merely prevention of harm to the principal, is the law's goal." One might question whether rigid, code-based approaches to the duty of loyalty, such as the ABA has proposed can accomplish that same end. See MBCA §§ 8.60-8.63 (1989).

¹²⁴ See generally Brudney, *supra* note 119.

[claims against directors].¹²⁵

Indeed, from the corporate law traditionalist's perspective, an arbitrary time bar on enforcement may inappropriately blunt fiduciary duties' deterrent and aspirational functions. The flexible defense of laches seems more congruent with the "standards" that these duties traditionally represent.

There is, of course, an alternative view of corporate law that is more firmly rooted in bright-line rules. Scholars in the law and economics movement have in recent years advanced a contractual paradigm to explain the law of corporations. From this perspective, the corporation is not so much a creature of the state as a web of voluntary economic relationships among managers, shareholders, creditors, suppliers, employees, customers and others that coalesce in a "nexus of contracts."¹²⁶ Under this "contractarian" view of corporations, the role of corporate statutes is not to establish mandatory rules for shareholders and managers, but instead to create "off the rack" corporate governance provisions for them to use. Shareholders and managers should remain free to "opt out" of these corporate law default rules if they choose to do so.¹²⁷

The contractarian view has important implications for the role of standards in corporate law. Contractarians contend that competitive economic forces, including the prospect for corporate takeovers of poorly-managed firms, the labor market for corporate managers, and shareholders' ability to diversify their investments, all minimize the importance of fiduciary duties corporate managers owe to shareholders.¹²⁸ Thus, contractarians argue, participants in the corporation should be free to "opt out" of such duties. To the extent that contractarians support application of fiduciary principles as a matter of choice by corporate participants, they tend to reject broad and open-ended formulations, and instead prefer interpretations that (consistent with the contractual paradigm)

¹²⁵ Kahn v. Seaboard Corp., 625 A.2d 269, 275 (Del. Ch. 1993).

¹²⁶ See generally Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 99 (1989). The seminal work outlining contractual and related economic explanations of corporate law that compete with the traditional model is FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991).

¹²⁷ EASTERBROOK & FISCHEL, *supra* note 126, at 34-35.

¹²⁸ EASTERBROOK & FISCHEL, *supra* note 126, at 90-93.

effectuate the likely intent of the parties had they bargained over them.¹²⁹ The more limited role for standards is intended to increase predictability and certainty in corporate law, a result that not only conforms with contractarians' preference for private ordering, but also reduces the liability exposure of corporate managers and thus promotes what contractarians contend is desirable risk-taking by corporate enterprises.

A number of recent developments are arguably consistent with the contractual model of corporate law. Corporation codes have become increasingly permissive in character.¹³⁰ The duty of loyalty has become more "rule-based," as legislatures have authorized procedures that help immunize conflict of interest transactions from attack.¹³¹ Moreover, in many jurisdictions, corporate statutes now authorize charter provisions through which shareholders may waive the corporation's right to impose monetary liability on directors for most breaches of the duty of care.¹³² In short, as Professor John Coffee has observed, the "fiduciary strictures of American corporate law," have "shrunk significantly" during this century.¹³³ Viewed in this light, the substitution of statutes of limitation for laches in corporate litigation echoes modern corporate law's greater

¹²⁹ EASTERBROOK & FISCHER, *supra* note 126, at 92 (describing the fiduciary principle as "a rule for completing incomplete bargains in contractual structure . . .").

¹³⁰ For example, the Delaware General Corporation Law and the MBCA, both of which have served as templates for corporate statutes in many states, eliminate traditionally mandatory corporate governance rules like preemptive rights and cumulative voting. *See, e.g.*, MBCA §§ 6.30, 7.28; Del. Gen. Corp. L. §§ 161, 214 (1991).

¹³¹ *See, e.g.*, Del. Gen. Corp. L. § 144 (1991); MBCA §§ 8.31-8.32 (now superseded by MBCA §§ 8.60-8.63). *But see* Ahmed Bulbulia and Arthur R. Pinto, *Statutory Responses to Interested Directors' Transactions: A Watering Down of Fiduciary Standards?*, 53 NOTRE DAME L. REV. 201 (1977) (arguing that despite statutory provisions governing interested directors' transactions which allow a director to bypass fairness considerations if he obtains board or shareholder approval, the courts should continue to apply the fairness test to prevent oppression of the minority shareholders).

¹³² *See, e.g.*, MBCA § 2.02(b)(4); Del. Gen. Corp. L. § 102(b)(7) (1991). *See generally* James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS. LAW. 1207 (1988) (arguing that shareholders are equipped to make well-informed decisions on limiting the liability of directors and officers, thus eliminating the need for the legislature to conduct further cost/benefit analysis in most circumstances).

¹³³ John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1621 (1989).

emphasis on bright-line rules and the concomitant relaxation of fiduciary standards.

Yet, these "contractarian" trends have not ended the arguments in corporate law about the need for both mandatory rules and open-ended fiduciary standards. Debate continues about the validity of the contractual paradigm for corporate law, in part because of challenges to its "bargaining" model and in part because its explanatory power is not complete.¹³⁴ Moreover, since many disagree with implicit normative assumptions of the law and economics movement, the case for mandatory standards in corporate law will not likely rest any time soon.¹³⁵

3. Implications of the Rules/Standards Debate for the Statute of Limitations Defense in Corporate Fiduciary Litigation

As the foregoing discussion demonstrates, the substitution of statutes of limitation for the laches defense in corporate fiduciary litigation represents much more than a change of labels. Statutes of limitation represent a bright-line rules approach to the limitations defense rather than a fact-based standard. Strict enforcement of such statutes fosters underlying repose values better than laches standards, but at the expense of flexibility in adjudication of limitations disputes. Indeed, the emergence of the discovery rule suggests that such flexibility remains an important value in limitations jurisprudence.

Perhaps more importantly, the substitution of statutes of limitation for laches may contradict corporate law's traditional reliance on open-ended fiduciary duties to protect shareholders from abuse by corporate managers. Without case-specific inqui-

¹³⁴ See, e.g., Robert C. Clark, *Agency Costs versus Fiduciary Duties*, in JOHN W. PRATT & RICHARD J. ZECKHAUSER, *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* 66-69 (1985) (arguing that legal relationships in the modern public corporation are not primarily the product of actual contracts); William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 *NW. U. L. REV.* 180, 193-97 (1992) (arguing that the failure of the corporate law of takeovers to develop in conformity to the nexus-of-contracts model's predictions "show[s] emphatically that corporate law does not always instantiate contractual norms").

¹³⁵ See, e.g., Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 *TEX. L. REV.* 865, 891-96 (1990).

ries as to whether a particular corporate fiduciary claim should be time-barred, how can courts protect corporations and their shareholders from fiduciaries who decline to police their own derelictions in a timely fashion? Corporate fiduciary law's deterrent and aspirational function may be blunted if statutes of limitation impose arbitrary time limits on its enforcement.

On the other hand, corporate fiduciaries have no less need for repose than do other defendants, and if courts must balance equities to determine the time bar in every case, meaningful repose will not be possible. Moreover, such a balancing test ignores the societal interest in limitations rules and the growing importance of rules in corporate law generally.

In short, persistent rules/standards tensions in both limitations law and corporate law suggest that the substitution of statutes of limitation for laches standards in corporate fiduciary litigation is problematic. The following discussion, which describes how courts have administered statutes of limitation in corporate fiduciary litigation, and in particular the doctrinal roots of the adverse domination theory, confirms that intuition. As will be seen, for as long as courts have applied statutes of limitation in corporate fiduciary cases, they have preserved outlets for the exercise of judicial discretion. Viewed in this light, adverse domination tolling standards may be more consistent with corporate law traditions than a departure from them.

C. Application of Statutes of Limitation in Corporate Fiduciary Litigation and the Roots of the Adverse Domination Theory

1. Choice of Limitations Rule and Defining Accrual

Today, in the wake of the concurrent remedy theory, it is difficult to find cases where courts apply the laches defense to claims against corporate fiduciaries.¹³⁶ Because most states have not adopted an express statute of limitations for such

¹³⁶ A rare but recent example is *McDuffie v. O'Neal*, 476 S.E.2d 702, 708 (S.C. Ct. App. 1996) (concluding, in a shareholder derivative action that also sought dissolution: "[T]his is an action in equity, and only the doctrine of laches, not the statute of limitations, applies.").

cases, however, two outlets for judicial discretion remain.¹³⁷ In the absence of legislative direction, courts are free to decide *which* limitations rule (e.g., the limitations period for tort cases or for breach of contract cases) should apply to corporate fiduciary claims, and *when* the corporate cause of action "accrued" under the statute.¹³⁸ As already described, the latter is the most critical limitations decision in corporate fiduciary litigation, and courts making it have traditionally adhered to the occurrence rule.¹³⁹

2. Tolling Until Discovery in Fraud and Fraudulent Concealment Cases

Nonetheless, the prevailing "occurrence" definition of accrual is subject to two long-standing exceptions in corporate cases and in litigation generally. Where defendant is alleged to have engaged in fraud or has fraudulently concealed her wrongdoing from plaintiff, the court postpones accrual until plaintiff discovers or should have discovered her cause of action.¹⁴⁰ Although these well-established discovery rule exceptions to the occurrence rule have frequently been lumped together under the "equitable tolling" heading, they are separate and distinct tolling theories.¹⁴¹ In fraud cases, courts apply the discovery rule because defendant's actionable conduct is so inherently deceptive that plaintiff may not learn of her injury until long after the offense is completed.¹⁴² In fraudulent con-

¹³⁷ See discussion *infra* Part V.B.1-2. of existing statutes of limitation that expressly apply to corporate fiduciary claims.

¹³⁸ The range of judicial options is necessarily limited to statutorily-prescribed time periods, however, which rarely exceed six years. As in other areas of law, many factors influence a court's decision on the appropriate limitations provision. See generally 1 CORMAN, *supra* note 5, § 4.1.

¹³⁹ See *supra* Part I.A.

¹⁴⁰ For a discussion of the fraud and fraudulent concealment exceptions in corporate cases, see Note, *Statute of Limitations*, *supra* note 89, at 854-56; 3A FLETCHER, CORPORATIONS, *supra* note 38, § 1306.10. For a discussion of these exceptions in litigation generally, see 2 CORMAN, *supra* note 5, §§ 9.7 & 11.5.

¹⁴¹ See Johnson, *supra* note 26, at 646-55. These exceptions are further distinct from a third statute of limitations doctrine that is even more limited in scope: equitable estoppel. Under this last concept, the court can preclude the defendant from asserting a limitations defense where plaintiff was aware of the claim, but defendant induced plaintiff to delay its pursuit. See 2 CORMAN, *supra* note 5, § 9.1.

¹⁴² See, e.g., Johnson, *supra* note 26, at 635-36 ("The grounds for suspending the

cealment cases, courts withhold repose not only because of plaintiff's discovery problems, but also because defendant caused those problems by intentionally concealing her wrongdoing after the fact (whether the wrong was initially fraudulent or not), thereby reducing her legitimate expectations of repose.¹⁴³

Both the fraud and fraudulent concealment exceptions are fairly narrow, of course, and one finds relatively few cases that invoke them to suspend limitations against corporate officers and directors.¹⁴⁴ They are noteworthy here because they enable courts to avoid formalistic application of statutes of limitation. While one might question the source of courts' power to apply such exceptions, its exercise is arguably consistent with assumed legislative objectives.¹⁴⁵ Such assumptions are unnecessary in most jurisdictions, because legislatures have generally codified the fraud and fraudulent concealment exceptions.¹⁴⁶

Whether judicially created or sanctioned by statute, these

statute were not simply the plaintiff's ignorance of claims, but the fact that the claim itself was both the result of a deliberate defrauding effort by the defendant and, by its very nature, difficult to detect." (citing Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1220 (1950)).

¹⁴³ Johnson, *supra* note 26, at 636. Explaining judicial recognition of the fraud exception on the theory that:

[t]hrough the process of divining one of the vital (but unstated) premises of limitations periods—a proper aspect of interpreting a statute—repose was *judicially* thought to be *legislatively* regarded as a contingent value, one reserved only for defendants whose dereliction had not simply been *committed* a specified period of time before, but which had been *unearthed* (and unchallenged) for that entire period. Believing legislators took that background assumption for granted, judges did too.

Johnson, *supra* note 26, at 636 (emphasis in original). See also Johnson, *supra* note 26, at 653 (explaining judicial recognition of the fraudulent concealment exception on the theory that "[j]udges thought that, in enacting limitations periods, legislators had addressed only the question of granting repose for one-shot wrongful behavior and that they did not intend to confer repose on defendants committing secondary misdeeds, particularly where the very object of the later wrong was to hide the earlier.").

¹⁴⁴ Several sources collect cases. See, e.g., 3A FLETCHER, CORPORATIONS, *supra* note 38, § 1306.10; Note, *Statute of Limitations*, *supra* note 89, at 854-56.

¹⁴⁵ See, e.g., Johnson, *supra* note 26, at 636 (arguing that if legislatures intend the limitations bar to operate only where plaintiff is aware of the claim, or only where defendant has legitimate expectations of repose, the fraud and fraudulent concealment exceptions seem appropriate vehicles to implement those policies).

¹⁴⁶ Johnson, *supra* note 26, at 636.

tolling exceptions are also important because they require courts to apply the discovery rule in the corporate setting, and in both fraud and fraudulent concealment cases, the courts have had trouble doing so. For example, the courts have long disagreed about whether knowledge of claims by one or more disinterested directors constitutes discovery by the corporation or whether a majority of the corporation's board must be both disinterested and aware of the claim before corporate "discovery" will occur.¹⁴⁷ Such disagreements foreshadow the majority/single disinterested director split in adverse domination cases.¹⁴⁸

3. Delaware's "Shareholder Discovery Rule" for Derivative Suits

As Chancellor Allen recently explained in his decision in *Kahn v. Seaboard Corporation*,¹⁴⁹ the Delaware courts have adopted an additional discovery rule tolling exception for shareholder derivative litigation. Extrapolating from older Delaware cases that applied the laches defense to claims of self-dealing or more serious misconduct by corporate fiduciaries,¹⁵⁰ modern Delaware courts hold that where a shareholder derivative suit alleges that corporate fiduciaries have engaged in (i) fraud or fraudulent concealment, or (ii) actionable self dealing, the statute of limitations begins to run from the time the plaintiff shareholder, or shareholders of the corporation generally, discovered or should have discovered the basis for the claims in the exercise of reasonable diligence.¹⁵¹

¹⁴⁷ As one commentator observed over 50 years ago: "The chief problem [with a discovery rule in fraud and fraudulent concealment cases] . . . is as to whose knowledge constitutes knowledge to the 'corporation' sufficient to start the running of the statute." Note, *Statute of Limitations*, *supra* note 89, at 854. Compare, e.g., *Curtis v. Conny*, 257 U.S. 260, 264 (1921) ("Notice to an officer, in the line of his duty, was notice to the bank. A single director like a single stockholder could proceed in the courts."), with *Grussemeyer v. Harper*, 60 P.2d 702, 703 (Wash. 1936) ("[T]he corporation and its stockholders had notice of the facts . . . from the time that these respondents' trustees retired and were succeeded by a new board . . .").

¹⁴⁸ See *supra* notes 54-56, 83 and accompanying text.

¹⁴⁹ 625 A.2d 269 (Del. Ch. 1993).

¹⁵⁰ See, e.g., *Bovay v. H.M. Byllesby & Co.*, 38 A.2d 808 (Del. 1944).

¹⁵¹ *Kahn*, 625 A.2d at 276-77. See generally, Staff Article, *An Increasing Role for Statute of Limitations in Courts of Equity: Kahn v. Seaboard Corp. and In re*

Although apparently limited to shareholder derivative actions, this judicial modification of the Delaware statute of limitations defense is important for at least three reasons. First, Chancellor Allen justifies the tolling exception in Kahn based on the "traditional view" of corporate law fiduciary duties.¹⁵² Second, the exception includes tolling for claims alleging *self-dealing* by corporate fiduciaries, and thus extends beyond the parameters of the traditional fraud and fraudulent concealment tolling exceptions. Third, and finally, the exception avoids the difficulties of the "corporate discovery" inquiry by focusing solely on shareholder knowledge.¹⁵³

4. The Early Domination and Control Cases

There are also a handful of cases dating from the turn of the century that recognize a broader "control" or "domination" tolling exception to the occurrence rule of accrual in corporate fiduciary litigation. In the earliest reported case, *National Bank of Commerce v. Wade*,¹⁵⁴ the court concluded that "domination" or "control" of a bank by its directors and managing officers justified tolling limitations for the bank's claims against them until they relinquished control to their successors.¹⁵⁵ *Wade* and decisions following it offered three reasons for such an exception to the normal occurrence rule: (i) while one or more directors control a corporation, the entity is, as a practical matter, unable to sue them;¹⁵⁶ (ii) such directors

USACafes, 19 DEL. J. CORP. L. 493 (1994).

¹⁵² *Kahn*, 625 A.2d at 275 ("In functional terms there are good reasons why a corporate stockholder ought to be treated differently than a plaintiff who is a stranger to the defendant from whom he seeks compensation for a tort. That good reason arises out of the assigned roles of stockholder and director in our corporation law."). See also *supra* note 125 and accompanying text (quoting from the *Kahn* decision).

¹⁵³ It is not clear whether the Delaware courts would apply the same discovery concept in direct corporate actions, however. See *Safecard Serv., Inc. v. Halmos*, 912 P.2d 1132, 1135 (Wyo. 1996) (predicting the Delaware courts would apply the adverse domination tolling theory in such cases).

¹⁵⁴ 84 F. 10 (C.C.D. Wash. 1897).

¹⁵⁵ Although influenced by the "trust" analogy, the court suspended limitations primarily on the basis of control by defendant directors. *Id.* at 15.

¹⁵⁶ See, e.g., *Rankin v. Cooper*, 149 F. 1010, 1016 (C.C.W.D. Ark. 1907) ("[I]n consequence of [defendants] having full control of the corporation no suit could be brought . . ."); *Ventress v. Wallace*, 71 So. 636, 641 (Miss. 1916) ("[I]n the very nature of things this suit could not have been filed any earlier.").

have a duty to disclose or police their own misconduct, which they breach by failing to take action against themselves;¹⁵⁷ and (iii) such directors or their appointed officers are the only means for the corporation to acquire notice of its claims against them.¹⁵⁸ These are essentially the same arguments courts have used in modern adverse domination cases, arguments this Article examines along with other justifications for the adverse domination theory in Part III.

From a historical perspective, there are not enough decisions to permit any firm conclusions about the general acceptance of this theory prior to the recent bank and thrift crisis. Most of the early cases applying a domination and control tolling rationale involved failed banks, and all presented circumstances where the "occurrence" rule of accrual would have barred a corporate entity's claims against its allegedly responsible fiduciaries.¹⁵⁹ The Second Circuit acknowledged the existence of a federal domination and control tolling theory in two antitrust cases in the 1960s, but each time declined to find the theory applicable on the facts.¹⁶⁰ Indeed, it was in one of

¹⁵⁷ See, e.g., *Ventress*, 71 So. at 640-41 ("As a part of their duties, [the defendant directors] alone could determine the propriety of any suit at law or equity, and were alone charged with the authority to institute such suits . . . It is true that the stockholders have their annual or periodic meeting. . . . but at these meetings they looked to the directors, their agents, for a true and correct account of their stewardship . . .").

¹⁵⁸ See, e.g., *id.* at 641 ("If anyone had notice of the negligence complained of, it is these directors themselves . . ."). See also, e.g., *Farmer v. Standeven*, 93 F.2d 959, 962 (10th Cir. 1937) (Symes, J., dissenting) (applying Oklahoma law); *Beal v. Smith*, 189 P. 341, 345 (Cal. Ct. App. 1920); *Whitten v. Dabney*, 154 P. 312, 315-16 (Cal. 1915); *Bilby v. Morton*, 247 P. 384, 387-88 (Okla. 1925).

¹⁵⁹ In addition to the authorities cited in notes 155-158, *supra*, all of which involved failed financial service institutions and banks, the following list includes all of the principal authorities endorsing a domination and control tolling theory as a matter of state law: *Michelsen v. Penney*, 135 F.2d 409, 415-16 (2d Cir. 1943) (applying New York law in a failed bank case); *Adams v. Clarke*, 22 F.2d 957, 959 (9th Cir. 1927) (applying Montana law in a failed bank case); *Schilling v. Parman*, 35 F.2d 780, 780-81 (D. Or. 1928) (deciding a failed bank case); *Greenleaf v. Profile Cotton Mills*, 180 So. 582, 583 (Ala. 1938); *San Leandro Canning Co., Inc. v. Perillo*, 295 P. 1026, 1028 (Cal. 1931); *Bates St. Shirt Co. v. Waite*, 156 A. 293, 297 (Me. 1931); *Allen v. Wilkerson*, 396 S.W.2d 493, 502 (Tex. Civ. App. 1965).

¹⁶⁰ See *International Rys. v. United Fruit Co.*, 373 F.2d 408, 412-17 (2d Cir. 1967); *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 82-83 (2d Cir. 1961). Two district courts endorsed and applied the domination and control theory to toll limitations for a corporation's securities claims. *Saylor v. Lindsley*, 302 F. Supp. 1174, 1184 (S.D.N.Y. 1969); *Austrian v. Williams*, 103 F. Supp. 64, 113-17

these decisions that Judge Friendly first coined the term "adverse domination."¹⁶¹

These early domination and control cases are nonetheless instructive for several reasons. First, they endorsed a tolling doctrine that was the clear forerunner of the modern adverse domination theory. Second, like the fraud, fraudulent concealment, and Delaware tolling exceptions, the domination and control cases preserved the use of judicial standards to resolve certain limitations disputes in corporate fiduciary litigation. Third, and perhaps most importantly, the domination and control cases departed further from rule-based statutes of limitation than did any of the other judicial tolling concepts applied in corporate fiduciary litigation.

Some courts invoked the domination and control tolling exception to identify the point of corporate "discovery" of claims in cases alleging fraud or fraudulent concealment, where, as already explained, the discovery rule generally defines accrual.¹⁶² But other courts applied the theory more broadly as a "disability" tolling exception or as a discovery rule exception for claims that did not allege fraud or fraudulent concealment, but did raise allegations of self-dealing or other illegality.¹⁶³ A number of courts applied the theory to even less serious claims, like negligent mismanagement.¹⁶⁴

The early domination and control decisions are also signifi-

(S.D.N.Y.). In all of these cases the courts concluded that a domination and control tolling doctrine was subsumed within the general "equitable tolling" principle that *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), held would be "read into every federal statute of limitation." Since the latter tolling principle refers to the discovery rule for claims of fraud or fraudulent concealment, see *Johnson, supra* note 26, at 647-50, it is not at all clear that the domination and control theory should be so readily included within it, however.

¹⁶¹ *Moviecolor*, 288 F.2d at 88.

¹⁶² See, e.g., *Farmer v. Standeven*, 93 F.2d 959, 963 (10th Cir. 1937) (Symes, J., dissenting) (applying Oklahoma law); *Whitten v. Dabney*, 154 P. 312, 315-16 (Cal. 1915); *Beal v. Smith*, 189 P. 341, 345 (Cal. Ct. App. 1920); *Bilby v. Morton*, 247 P. 384, 387 (Okla. 1925).

¹⁶³ See, e.g., *Greenleaf v. Profile Cotton Mills*, 180 So. 582, 583 (Ala. 1938) (theft of funds); *San Leandro Canning Co., Inc. v. Perillo*, 295 P. 1026, 1028 (Cal. 1931) (improper commission payments); *Bates St. Shirt Co. v. Waite*, 156 A. 293, 297 (Me. 1931) (allegedly unlawful salaries).

¹⁶⁴ See, e.g., *Michelsen v. Penney*, 135 F.2d 409, 415-16 (2d Cir. 1943); *Rankin v. Cooper*, 149 F. 1010, 1016 (C.C.W.D. Ark. 1907); *Ventress v. Wallace*, 71 So. 636, 641 (Miss. 1916).

cant because, in many cases from this era, courts expressly declined to adopt such an exception to the occurrence rule on the ground that they lacked authority to do so.¹⁶⁵ Expressing similar authority concerns, other courts narrowly construed the domination and control concept once they recognized it, holding that majority control of the board by defendant directors (as opposed to total control) did not prevent accrual of a corporation's claim, again foreshadowing the current majority disinterested director/single disinterested director split in adverse domination cases.¹⁶⁶

5. Doctrinal Hiatus

Aside from the theories and decisions described above, the issue of tolling limitations does not seem to have arisen with great frequency in corporate fiduciary litigation prior to the

¹⁶⁵ See, e.g., *Squire v. Guardian Trust Co.*, 72 N.E.2d 137, 147 (Ohio Ct. App. 1947) ("In the absence of statute or controlling authority, the doctrine of continuing domination will be rejected as a basis for tolling the statute of limitations."); *Mobley v. Faircloth*, 164 S.E. 195, 196 (Ga. 1932) ("The General Assembly deemed [the examination duties of state banking regulators] sufficient and appropriate protection to all persons interested in or dealing with banks chartered by this state."); *Pietsch v. Milbrath*, 101 N.W. 388, 393 (Wis. 1904), *overruled by Peters v. Kell*, 106 N.W. 2d 407 (Wis. 1960) ("While counsel earnestly insist that under such circumstances the statutes of limitation ought not to apply, no authority is cited to our attention varying the unqualified language of such statutes. . . . [T]here is no exception to the rule of the statute to fit a case of this sort.")

Other authorities rejecting the adverse domination theory include *Laird v. United Shipyards*, 163 F.2d 12, 15-16 (2d Cir. 1947) (applying New York law); *Bluefields S.S. Co. v. United Fruit Co.*, 243 F. 1, 20 (3d Cir. 1917) (applying Pennsylvania law); *Department of Banking v. McMullen*, 278 N.W. 551, 554-55 (Neb. 1938); *Hart v. Guardian Trust Co.*, 75 N.E.2d 570, 586 (Ohio Ct. C.D. Cuyahoga Cty. 1945); *Jones Mining Co. v. Cardiff Mining & Milling Co.*, 191 P. 426, 430-31, *rev'd*, 72 N.E. 2d 137 (1947) (Utah 1920). Still other courts failed to decide whether to accept or reject adverse domination on the ground that it would be inapplicable on the facts in any event. See, e.g., *Payne v. Ostrus*, 50 F.2d 1039, 1042 (8th Cir. 1931) (applying Iowa law); *Hughes v. Reed*, 46 F.2d 435, 441-42 (10th Cir. 1931) (applying Oklahoma law).

¹⁶⁶ See, e.g., *Anderson v. Gailey*, 33 F.2d 589, 592 (N.D. Ga. 1929). Indeed courts generally disagreed whether majority control was sufficient to suspend limitations under the domination and control rationale. Compare, e.g., *Smith v. Lyle*, 241 N.W. 512, 513 (S.D. 1932) (majority control sufficient to preclude corporation's discovery of claim against its directors), and *Mencher v. Richards*, 9 N.Y.S.2d 990, 993 (App. Div. 1939) (same), with *McNair v. Burt*, 68 F.2d 814, 816 (5th Cir. 1934) (election of new directors sufficient to start limitations), and *Van Schaick v. Aron*, 10 N.Y.S.2d 550, 560 (Sup. Ct. 1938) (same).

bank and thrift crisis of the 1980s. There are several possible reasons for this. First, with the adoption of federal securities laws in the 1930s, shareholders of public corporations had greater and more rapid access to information about potential claims against corporate fiduciaries,¹⁶⁷ and also enjoyed remedies against them that did not hinge on the corporation's knowledge or ability to sue.¹⁶⁸ Second, for corporate claims pursued through derivative litigation, weapons such as securities for expenses statutes, special standing requirements and the demand rule emerged, and thus may have obviated the need for corporate fiduciaries to rely on limitations defenses.¹⁶⁹ Third, in the close corporation context, courts began to recognize the right of individual shareholders to pursue relief against corporate managers on a variety of theories that did not involve the right of the corporation as an entity.¹⁷⁰ Collectively, these developments may have relieved pressure for the relaxation of limitations rules in corporate fiduciary litigation during the decades that preceded the bank and thrift crisis.

Yet, as the foregoing history and policy review demonstrates, the difficult theoretical and practical questions that emerge when statutes of limitation bar enforcement of corporate fiduciary claims are not new. These issues are particularly problematic in receivership settings, which in modern times include bankruptcy litigation and other specialized insolvency venues applicable to regulated corporations. The trend has been for courts to provide relief through tolling in exceptional cases, but the parameters of an "exceptional case" have never been clearly defined. The bank and thrift debacle has now refocused the attention of both courts and litigants on this problem, and in particular, on the merits of the adverse domi-

¹⁶⁷ For example, the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, imposed significant mandatory disclosure obligations on management of corporations that made public securities offerings. The Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, imposes similar obligations on all companies whose securities were publicly traded.

¹⁶⁸ See, e.g., 15 U.S.C. § 77k (1994), providing remedy to security purchasers for material misstatements and omissions in registration statement. The remedy allows the security purchaser to sue, *inter alia*, *directors* of the issuer.

¹⁶⁹ See generally SOLOMON, *supra* note 88, at 1047-1115.

¹⁷⁰ See, e.g., *Donahue v. Rodd Electrotypes Co.*, 328 N.E.2d 505 (Mass. 1975). See generally F. HODGE O'NEAL & ROBERT B. THOMPSON, *O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS* ch.7 (2d ed. 1985).

nation tolling theory, the issue to which the Article now turns.

III. THE LOGIC AND LIMITS OF THE ADVERSE DOMINATION TOLLING THEORY

This Part of the Article explains and critiques the several rationales that litigants and courts have traditionally advanced to support adverse domination tolling standards. Each rationale combines an existing limitations tolling theory with corporate fiduciary law, and is persuasive if one is willing to take an expansive view of the latter. This Part also demonstrates how the varied sources of doctrinal support for adverse domination explain some of the conflicting positions courts have taken when asked to apply its tolling standards. As will be shown, however, doctrinal analysis does not explain all of the conflicting positions, nor does it explain the pattern in which those positions have developed.

A. *Rationales for the Adverse Domination Theory*

1. Disability Arguments

In most jurisdictions, statutes of limitation do not run against certain categories of "disabled" litigants who are incapable of protecting their rights, like minors, mental incompetents, or incarcerated persons.¹⁷¹ Many courts have offered similar justifications for tolling limitations under the adverse domination theory, i.e., that a corporation is "disabled" from bringing any claims that might implicate its directors in wrongdoing (whether the claims are against the corporation's directors, its officers or third parties) during the period of such directors' control.¹⁷²

¹⁷¹ See 2 CORMAN, *supra* note 5, §§ 10.2, 10.4 & 10.5.

¹⁷² One finds this rationale advanced in both contemporary and early adverse domination decisions. See, e.g., *RTC v. Grant*, 901 P.2d 807, 810 (Okla. 1995) ("The rationale for [adverse domination] is that control of the board by wrongdoers precludes the possibility for filing suit. . . ."); *Rankin v. Cooper*, 149 F. 1010, 1016 (C.C. W.D. Ark. 1907) ("[I]n consequence of [the defendant directors] having full control of the corporation no suit could be brought . . . until a receiver was appointed."). The rationale is perhaps expressed most clearly in *RTC v. Fiala*, 870 F. Supp. 962, 973 (E.D. Mo. 1994): "Based on these principles, where a suit arises in the context of control by wrongdoers of the entity that would have initiated the

From a technical corporate law perspective, the logic of the disability rationale for adverse domination is straightforward. The power to manage a corporation is vested in its board of directors, so that members of the board are in a position to control or "dominate" the corporation's decisions about who and when to sue.¹⁷³ Of course, corporate boards rarely make formal decisions expressly *declining* to pursue claims that might implicate one or more board members before limitations on such claims expire. Nonetheless, a board's failure to timely litigate such claims achieves the same result. And since members of the board owe the corporation and its shareholders a duty of undivided loyalty,¹⁷⁴ a duty courts have traditionally enforced by subjecting board decisions to exacting scrutiny where the interests of its members conflict with those of the corporation,¹⁷⁵ one can legitimately question the board's power to bind the corporation in this regard. Thus, adverse domi-

action, but could not, it is the same as if the entity is suffering from an incapacity. Therefore [adverse domination tolling should apply]."

¹⁷³ See, e.g., MELVIN ARON EISENBERG, *THE STRUCTURE OF THE CORPORATION* 139 (1976) ("Under the received legal model of the corporation, the board of directors manages the corporation's business and sets business policy; indeed, this aspect of the model is reflected in a central provision of the traditional corporate statutes: 'The business and affairs of a corporation shall be managed by a board of directors.'").

¹⁷⁴ Committee on Corporate Laws, American Bar Association, *Corporate Director's Guidebook*, 33 BUS. LAW. 1591, 1599 (1978) ("By assuming his office, the corporate director commits allegiance to the enterprise and acknowledges that the best interests of the corporation and its shareholders must prevail over any individual interest of his own. The basic principle to be observed is that the director should not use his corporate position to make a personal profit or gain other personal advantage.").

¹⁷⁵ See, e.g., Harold Marsh, Jr., *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 36-7 (1966) (describing traditional view that interested director transactions were voidable without regard to fairness). *But see* Norwood P. Beveridge, Jr. *The Corporate Director's Fiduciary Duty of Loyalty: Understanding the Self-Interested Directors Transaction*, 41 DEPAUL L. REV. 655, 659-62 (1992) (challenging Professor Marsh's reading of the case law). While modern corporate law has reduced the strictures of the duty of loyalty to some degree, its core remains intact. For example, where a board of directors acts while subject to a conflict of interest and its decision has not been approved by disinterested directors or shareholders, its decision is not protected by the business judgment rule, but is instead subject to searching court review for compliance with fairness standards. See, e.g., MBCA § 8.31; Del. Gen. Corp. L. § 144 (same). Even where statutory approval steps are followed, some jurisdictions still require a fairness review. See, e.g., *Fliegler v. Lawrence*, 361 A.2d 218 (Del. 1976); *Remillard Brick Co. v. Remillard-Dandini Co.*, 241 P.2d 66 (Cal. Ct. App. 1952).

nation tolling can be viewed as judicial recognition of a corporation's decisional "disability" with respect to litigation matters that implicate its board members, at least during the period of their control.

Indeed, precedent on the issue of demand futility—whether shareholders are excused from seeking board of directors' permission before instituting derivative litigation—directly supports the disability rationale for adverse domination. While the standard for finding demand futility varies depending on the court's understanding of the purpose of the demand requirement,¹⁷⁶ the prospect of director liability will at some point excuse the shareholder from making demand on the board.¹⁷⁷ For similar reasons, courts allow committees of directors to settle derivative or other intracorporate litigation claims against their fellow board members, but only where the committee members satisfy requisite standards of independence and disinterest with respect to the litigation.¹⁷⁸

Of course, the very existence of special litigation committees reveals a potential problem with the disability rationale for adverse domination: a corporate board *can* act where less than all directors have a conflict of interest. The board can simply refer the matter to one or more of its disinterested members, who can then decide the issue.¹⁷⁹ Adverse domination decisions applying the "single disinterested director" version of the theory may implicitly take this possibility into account.¹⁸⁰ Yet, there is an important distinction between a

¹⁷⁶ Some jurisdictions view the demand rule as primarily a procedural device to encourage intracorporate dispute resolution, while others view it as a recognition of the substantive power of the board of directors. DEBORAH A. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS LAW AND PRACTICE* § 5:09, at 29-31 (1987). Differences in demand futility standards are in part a function of different understandings of the demand requirement. *Id.* § 5:13, at 52.

¹⁷⁷ *See, e.g., Kaufman v. Belmont*, 479 A.2d 282, 286-87 (Del. Ch. 1984) (Delaware futility standards require plaintiff to allege with particularity facts "that show that a reasonable doubt exists that the directors were not sufficiently disinterested or independent to have entertained a pre-suit demand. . .").

¹⁷⁸ *See, e.g., DEMOTT, supra* note 176, § 5:23 (discussing requirement that litigation committees maintain "independence").

¹⁷⁹ *See, e.g., MBCA* § 8.25 (describing board's power to delegate its authority to committees). *Accord* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 120, § 3.02 cmt. j. ("It is commonly provided by statute that the board may delegate to a committee the authority to exercise any of its powers, subject to certain limitations.")

¹⁸⁰ *See supra* Part I.C.1.

board's failure to sue in adverse domination cases and decisions of special litigation committees: the adverse domination tolling theory responds to a corporate board's *failure* to take action, not to considered and informed refusals to sue by disinterested directors. Courts traditionally have been less deferent to director inaction than to action by corporate directors.¹⁸¹ Thus, some adverse domination decisions have assumed that, absent express delegation of the decision to sue to disinterested directors, such directors could not take action on the corporation's behalf.¹⁸²

2. Disability Counter-Arguments

a. *Derivative Remedies*

A potentially serious problem with the disability rationale is that the derivative suit has long enabled shareholders to bring corporate claims against directors and officers, despite their control of the enterprise.¹⁸³ Shareholders can even use derivative suits to bring corporate claims against third parties.¹⁸⁴ In light of the possibility of shareholder derivative litigation, one may fairly ask whether the board "domination" necessary to establish legal "disability" really exists in the corporate context.¹⁸⁵

A student commentator has suggested one answer: the

¹⁸¹ See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984). Of course, the distinction between action and inaction is a matter of degree. Some degree of deference is surely appropriate, for example, where oversight requires the exercise of discretion by directors. See PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 120, § 4.01(c) cmt. c, at 175. See also Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 BUS. LAW. 1477, 1485-86 (1984) (criticizing the distinction between action and inaction on the ground that this distinction overemphasizes the board's decision-making function).

¹⁸² See, e.g., *Hecht v. Resolution Trust Corp.*, 635 A.2d 394, 407 (Md. 1994) ("A director or officer may not act alone for the corporation without authority from the board.").

¹⁸³ On the origins of the derivative suit, see generally Bert S. Prunty, Jr., *The Shareholders' Derivative Suit: Notes on its Derivation*, 32 N.Y.U. L. REV. 980 (1957).

¹⁸⁴ DEMOTT, *supra* note 176, § 1:01, at 1 ("[D]erivative suits may also assert, on the corporation's behalf, claims against third parties.").

¹⁸⁵ Unfortunately, few courts have addressed this issue. See Baughman, *supra* note 18, at 1095-96 n. 142 and accompanying text.

demand requirement and the specificity of pleading necessary to establish a demand futility exception (and thereby overcome friendly disposition of the derivative suit by director committees) make the derivative remedy impractical in many cases.¹⁸⁶ While this observation is undoubtedly true, opponents of adverse domination might well respond that the derivative suit adequately protects a corporation's interests because these procedural barriers permit the airing, if not the trial, of corporate grievances, and are in any event subject to judicial review.

But there are still other reasons why a shareholder derivative suit is a poor substitute for corporate litigation brought by a disinterested board of directors. For one thing, information is a necessary predicate for the derivative remedy. Unless shareholders know there is a basis for claims against corporate directors, officers or third parties, they cannot invoke their right to sue on the corporation's behalf. As discussed in the following section, which advances a concealment rationale for adverse domination, a corporation's directors and officers control the flow of information to shareholders and can thereby influence the prospect for derivative suits. Moreover, assuming a shareholder has information sufficient to pursue a derivative suit, she owes neither the corporation nor her fellow shareholders any obligation to do so.¹⁸⁷ That is, shareholder derivative litigation can compensate for the board's failure to sue on claims that implicate its members only to the extent that shareholders have adequate incentives to bring such claims, a fact issue whose outcome can complicate the adverse domination inquiry considerably.¹⁸⁸

Courts, perhaps implicitly recognizing the obstacles to derivative suits, have not been easily persuaded that this shareholder litigation avenue overcomes adverse domination problems. Indeed, most courts have concluded that, for limita-

¹⁸⁶ Baughman, *supra* note 18, at 1095-99.

¹⁸⁷ As the Supreme Court noted in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), a shareholder who files a derivative suit is a "volunteer champion." *Id.* at 549. A shareholder has no "obligation to institute a derivative action even if it is in the best interest of the corporation." *RTC v. Fleischer*, 890 F. Supp. 972, 978 (D. Kan. 1995) (collecting cases).

¹⁸⁸ *C.f.* *Clark v. Milam*, 872 F.Supp. 307, 315 (S.D. W. Va. 1994) (fact issues on shareholder knowledge and incentives in prior derivative litigation precluded summary judgment on whether such litigation ended adverse domination tolling).

tions purposes, possible derivative remedies are not a meaningful substitute for litigation brought by a disinterested board.¹⁸⁹ Where all shareholders are made aware of the basis for corporate claims, however, courts have concluded that the potential for a derivative remedy cures disability problems and thus ends any adverse domination tolling that might otherwise apply.¹⁹⁰

b. *Authority Concerns*

The most serious problem with the disability rationale for adverse domination is the issue of judicial authority. That is, even if a court is persuaded by the foregoing "disability" arguments, the disability tolling exceptions that limitations law has traditionally recognized (e.g., minority, mental incompetence) are typically specified by statute.¹⁹¹ No statute carves out a similar "disability" tolling exception for corporations. Moreover, there is a related policy dimension to the authority problem: if courts provide relief for problems not solved by statutes, the legislature will have no incentive to do so. It is not surprising, therefore, that most of the courts that have rejected the disability rationale for adverse domination have done so not on its merits, but on the ground that judicial authority to toll limitations for corporate claims is limited to the traditional fraud and fraudulent concealment tolling exceptions.¹⁹² Cases that

¹⁸⁹ See, e.g., *Fleischer*, 890 F. Supp. at 978 (the potential for shareholder derivative suits does not end adverse domination); *Hecht v. RTC*, 635 A.2d at 407-08 (same). See also *FDIC v. Hudson*, 673 F. Supp. 1039, 1042-43 (D. Kan. 1987) ("A stockholder's failure to use due diligence in discovering [director] wrongdoing maybe excused since a fiduciary duty exists between the members of a board and the stockholders.") (citing *FSLIC v. Williams*, 599 F. Supp. 1184, 1194-95 (D. Md. 1984)).

The question is somewhat closer when one or more disinterested directors know of potential corporate claims against their fellow corporate fiduciaries. Unlike shareholders, directors are obligated to protect the corporation's welfare, and some jurisdictions recognize the right of a director to sue derivatively on the corporation's behalf. See *PRINCIPLES OF CORPORATE GOVERNANCE*, *supra* note 120, § 7.02 cmt. h. The Article discusses this issue in more detail in Part III.B.4.

¹⁹⁰ Court decisions support this distinction. See, e.g., *White v. FDIC*, 122 F.2d 770, 775 (4th Cir. 1941); *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 890 (Utah 1993).

¹⁹¹ See 2 *CORMAN*, *supra* note 5, §§ 10.2, 10.4 & 10.5.

¹⁹² See, e.g., *RTC v. Armbruster*, 52 F.3d 748, 751-52 (8th Cir. 1995) (concluding that Arkansas does not recognize adverse domination but does toll limitations

embrace the disability rationale for adverse domination have provided no clear answer to this objection.¹⁹³

Nonetheless, one can construct a case for "authority" based on courts' long-standing role as enforcers of corporate directors' and officers' fiduciary obligations. Courts' power to enforce such duties is rooted more firmly in tradition and precedent than in express statutory provisions. For example, aside from references to "good faith" and "best interests of the corporation," nowhere do modern corporate governance codes expressly confer power on courts to enforce corporate fiduciaries' duty of loyalty obligations.¹⁹⁴ Yet, courts have recognized such duties for centuries, and continue to do so despite statutes that ostensibly limit their scope.¹⁹⁵

Moreover, most state legislatures have not even bothered to enact a limitations provision that specifically covers corporate fiduciary claims.¹⁹⁶ Thus, courts in corporate litigation must define "accrual" under generally applicable limitations provisions. One could argue that courts should perform this task mindful of the disability problems that arise from directors' obligations of loyalty to the corporation (the "adversity" problem) and directors' practical power to control a corporation's decisions (the "domination" problem).

based on fraudulent concealment); *RTC v. Artley*, 28 F.3d 1099, 1102 n.4 (11th Cir. 1994) (concluding that Georgia does not recognize adverse domination but does toll limitations for fraud claims); *RTC v. Everhart*, 37 F.3d 151, 155 (4th Cir. 1994) (concluding that Virginia does not recognize adverse domination but does toll limitations where there is "intentional concealment by the directors of the wrongful conduct"); *FDIC v. Cocke*, 7 F.3d 396, 402 (4th Cir. 1993) (same as *Everhart*); *RTC v. Wood*, 870 F. Supp. 797, 811-12 (W.D. Tenn. 1994) (Tennessee does not recognize adverse domination but does toll limitations based on fraudulent concealment).

¹⁹³ Consider, for example, the following passage from *RTC v. Fiala*, 870 F. Supp. 962 (E.D. Mo. 1994):

Defendants argue that the examples of Missouri statutes that provide for tolling do not support the adoption of adverse domination because the such tolling statutes represent special legislative exceptions. The Court is not persuaded by this argument because Missouri courts provide for tolling the statute of limitations in situations involving fraud. In addition, where the legislature has already acted to create a special situation where tolling applies, the courts need not do so. However, that is not to say that the courts would not have recognized such an application of tolling at some point in the future.

Id. at 974.

¹⁹⁴ See, e.g., MBCA § 8.30(a).

¹⁹⁵ See *supra* note 175.

¹⁹⁶ See *infra* Part V.B.1.

Perhaps factual patterns speak most clearly to the need for a disability tolling theory of some kind. In the hundreds of reported D & O decisions arising out of the bank and thrift crisis, it is difficult, if not impossible to find any examples where directors and officers of failing banks and thrifts took action to police their own alleged misconduct. While a few shareholder derivative actions were filed, most were pursued only after the institutions' insolvency was brought to light by federal regulators.¹⁹⁷

3. Concealment Arguments

Courts have also frequently cited the potential for "concealment" of incriminating information by controlling directors as a justification for adverse domination tolling.¹⁹⁸ One sees the concealment rationale for adverse domination running through judicial decisions in a variety of ways,¹⁹⁹ but perhaps the most powerful "concealment" argument is that the board of directors can prevent the release of information that might otherwise permit representatives of the corporation to protect its rights, through derivative litigation or otherwise.²⁰⁰ As

¹⁹⁷ See, e.g., *Burns v. International Ins. Co.*, 929 F.2d 1422, 1423 (9th Cir. 1991) (describing derivative suits filed following bank insolvency).

¹⁹⁸ See, e.g., *FDIC v. Dawson*, 4 F.3d 1303, 1309 (5th Cir. 1993) (adverse domination rests on a "presumption" that a culpable majority of the board will conceal its wrongdoing); *FDIC v. Hudson*, 673 F. Supp. 1039, 1042 (D. Kan. 1987) (justifying adverse domination on the ground that "control of the [corporation] includes the power to conceal incriminating information" (citing *FSLIC v. Williams*, 599 F. Supp. 1184, 1194 (D. Md. 1984))).

¹⁹⁹ For example, courts that apply the majority disinterested director version of adverse domination as a presumption in favor of tolling have defended it on the ground that "[defendant directors] have greater access to relevant information [because of their] control of corporate records." *RTC v. Grant*, 901 P.2d 807, 818 (Okla. 1995). In a similar vein, many decisions adopting adverse domination suggest that tolling is an appropriate sanction for corporate directors' failure to disclose or police their own misconduct. See, e.g., *RTC v. Scaletty*, 810 F. Supp. 1505, 1513 (D. Kan. 1992) ("The principle of adverse domination is ultimately based on the principle of silence: that the defendant directors responsible for damage to the corporation have remained silent, rather than protecting the interest of the corporation."); *Ventress v. Wallace*, 71 So. 636, 640-41 (Miss. 1916) ("As a part of their duties, [the defendant directors] alone could determine the propriety of any suit at law or equity, and were alone charged with the authority to institute such suits. . . . It is true that the stockholders have their annual or periodic meeting . . . but at these meetings they looked to the directors, their agents, for a true and correct account of their stewardship . . .").

²⁰⁰ See, e.g., *Hecht v. RTC*, 635 A.2d 394, 407-08 (Md. 1994) ("[W]here directors

such, this justification for adverse domination reinforces the disability rationale. Indeed, the predominant theme in the first adverse domination decision of the modern era, *FDIC v. Bird*,²⁰¹ is that adverse domination is consistent with current trends in corporate law that protect shareholders through duties of disclosure for corporate management.²⁰²

It should be noted, however, that the concealment rationale for adverse domination is a legal fiction. That is, adverse domination does not depend on a showing of affirmative efforts by directors to conceal information (which might constitute fraudulent concealment) or any other fraudulent acts on the part of directors. As the Maryland Court of Appeals noted when explaining "concealment" as a justification for adverse domination: "It is the fact of [corporate directors'] control over information, not necessarily any fraudulent activity, that makes [adverse domination] necessary."²⁰³

4. Concealment Counter-Arguments

To the extent that the adverse domination theory tolls limitations in situations that would not be encompassed by the traditional fraud and fraudulent concealment tolling exceptions, one can again object to the theory on grounds of authority. In most states, the legislature has expressly approved tolling where fraud or fraudulent concealment is shown.²⁰⁴ One could argue that, by passing such statutes, the legislature has expressly foreclosed courts' power to toll limitations on broader grounds.

One possible response is that the concealment rationale for adverse domination fits comfortably within the traditional

control all information and resources, it may be extremely difficult, if not impossible, for shareholders to gain access to the information and resources necessary to bring suit.").

²⁰¹ 516 F. Supp. 647 (D.P.R. 1981). This case is discussed in the text accompanying notes 44-48, *supra*.

²⁰² *Id.* at 651-52.

²⁰³ *Hecht*, 635 A.2d at 408.

²⁰⁴ *See supra* note 146.

fraud and fraudulent concealment tolling exceptions if one makes certain assumptions about corporate fiduciaries' disclosure obligations. Under both common law fraud and corporate law principles, silence is "fraudulent" when there is a duty to speak.²⁰⁵ Applying this well-settled rule, if corporate directors or officers have an affirmative obligation to reveal their wrongdoing to shareholders, it is "fraudulent" for them to refrain from doing so. One could then support tolling limitations for claims of wrongdoing against corporate fiduciaries under the traditional fraud and fraudulent concealment tolling exceptions.²⁰⁶

But the validity of the major premise in the aforementioned syllogism, which depends on the parameters of corporate directors' and officers' duty of disclosure, is unclear. The traditional view under state corporate law has been that fiduciaries must disclose all relevant information to shareholders, but only when seeking shareholder action.²⁰⁷ Other authority suggests that corporate fiduciaries must disclose such information "whether or not . . . seeking shareholder action."²⁰⁸ It is likewise unclear whether corporate fiduciaries must disclose their wrongdoing in all cases under the securities laws.²⁰⁹

²⁰⁵ See, e.g., *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986) (when the particular circumstances impose upon a person the duty to speak and he deliberately remains silent, his silence is equivalent to a false representation). *C.f.* *Chiarella v. US*, 445 U.S. 222, 228 (1980) (characterizing silence as a basis for fraud liability under insider trading rules, but only where trader owes an independent legal duty (e.g., a fiduciary duty) to disclose the information).

²⁰⁶ Some courts have been willing to take this step, concluding that fraudulent concealment principles justify the adverse domination theory because no affirmative concealment is required where the defendant has a fiduciary relationship with plaintiff. See, e.g., *RTC v. Fiala*, 870 F. Supp. 962, 974 (E.D. Mo. 1994).

²⁰⁷ See *SOLOMON ET AL.*, *supra* note 88, at 891 ("The duty to disclose arises traditionally when a fiduciary (generally, the corporation's management . . .) communicates to the shareholders, soliciting shareholder action."). See also *BRANSON*, *supra* note 67, § 10.07. Otherwise, shareholder informational rights are limited to public corporate records and statutory avenues that provide access to certain internal corporate documentation. See, e.g., *MBCA* §§ 16.01-16.22.

²⁰⁸ See *SOLOMON ET AL.*, *supra* note 88, at 891.

²⁰⁹ See, e.g., *Gaines v. Haughton*, 645 F.2d 761, 776-77 (9th Cir. 1981) ("We draw a sharp distinction . . . between allegations of conduct involving breach of trust or self-dealing—the non-disclosure of which is presumptively material—and allegations of simple breach of fiduciary duty/waste of corporate assets—the non-disclosure of which is never material for § 14(a) purposes.").

Thus, whether adverse domination tolling is justified as part of the traditional fraud or fraudulent concealment tolling exceptions depends in part on unsettled disclosure rules of corporate and securities law. Indeed, courts that are willing to recognize adverse domination on the basis of "concealment" may indirectly create a new flank for those in the vanguard of the disclosure movement.

And there is yet another "fiduciary" aspect to the concealment justification for adverse domination. If applicable, a concealment tolling exception should simply trigger use of the discovery rule to define accrual of a corporation's claim.²¹⁰ As explained below, the "notice" requirements of the discovery rule, as applied in the corporate fiduciary context, provide a separate and distinct explanation for the adverse domination theory.

5. Discovery and Notice Arguments

Courts have adopted the adverse domination theory not only on the basis of the disability and concealment rationales, but also on the ground that, so long as wrongdoing directors or officers remain in control of a corporate entity, the corporation has no "notice" of any claims that implicate them.²¹¹ Lack of notice is important, of course, only if the discovery rule, rather than the occurrence rule, defines accrual of the corporation's claim. And many courts have concluded that the discovery rule does apply to claims that implicate corporate fiduciaries, independent of any "concealment" rationale that might otherwise support its use.²¹²

²¹⁰ Recall that the fraudulent concealment tolling exception does not suspend limitations indefinitely. Instead, it permits the court to define accrual using the discovery rule, i.e., to ask when the corporation knew or should have known of its claims. See *supra* note 141 and accompanying text.

²¹¹ See, e.g., *RTC v. Scaletty*, 891 P.2d 1110, 1116 (Kan. 1995) (adverse domination theory determines when a corporation can "reasonably ascertain" injury caused by those in control of the corporation).

²¹² See, e.g., *RTC v. Farmer*, 865 F. Supp. 1143, 1157 (E.D. Pa. 1994) ("[T]he adverse domination doctrine [is] in accord with the essence of Pennsylvania's discovery rule."); *RTC v. O'Bear*, 840 F. Supp. 1270, 1284 (N.D. Ind. 1993) (adopting adverse domination theory as part of Indiana's discovery rule); *FSLIC v. Williams*, 599 F. Supp. 1184, 1193-95 (D. Md. 1984) (adopting adverse domination as consistent with Maryland discovery rule); *Hecht v. RTC*, 635 A.2d 394, 401 (Md. 1994) (finding adverse domination relevant to determination of "accrual" of cause

This expanded application of the discovery rule is consistent with the tendency of modern courts to extend discovery rule tolling to any case where plaintiff is "blamelessly ignorant" of her claim.²¹³ The incorporeal nature of a corporation—its inherent inability to act except through directors' and officers' and other representatives as agents—arguably renders the corporation "blamelessly ignorant" of claims that implicate its directors and officers, at least while they control the institution. Indeed, one commentator argues that recent widespread acceptance of the adverse domination theory recognizes that there is an "inherently unknowable . . . injury" when a corporation is controlled by those who are alleged to have injured it.²¹⁴

The connections between the discovery rule and adverse domination are most readily apparent when courts must identify the point at which a corporation "discovers" a litigation claim. This issue is determined not by limitations law, but by corporate fiduciary law, or, more specifically, fiduciary principles derived from agency law. The general "imputed notice" rule from agency law is that a principal is bound by the knowledge of its agent.²¹⁵ Yet agency law expressly excepts out from this general imputation rule situations where the agent's interests are "adverse" to the principal.²¹⁶ In the corporate setting, this exception means that, as between the corporation and its fiduciaries, the fiduciaries' knowledge of claims that implicate themselves in wrongdoing are not imputed to the

1994) (finding adverse domination relevant to determination of "accrual" of cause of action under discovery rule); *RTC v. Grant*, 901 P.2d 807, 813 (Okla. 1995) ("[The discovery rule], much like the doctrine of adverse domination, arises from the inability of the injured, despite the exercise of due diligence, to know of the injury or its cause."); *Clark v. Milam*, 452 S.E.2d 714, 719 (W. Va. 1994) (recognizing adverse domination theory as a "subspecies" of the discovery rule). *C.f.* *FDIC v. Gonzalez-Gorrondona*, 833 F. Supp. 1545, 1556 (S.D. Fla. 1993) (not adopting adverse domination outright, but reaching similar result by applying discovery rule).

²¹³ Heriot, *supra* note 100, at 954.

²¹⁴ Boughman, *supra* note 18, at 1092-1095.

²¹⁵ RESTATEMENT (SECOND) OF AGENCY § 272 (1957) (agent's knowledge may determine principal's liability). These same rules apply to corporate agents. *See* 3A FLETCHER, CORPORATIONS, *supra* note 38, § 787.

²¹⁶ *See* RESTATEMENT (SECOND) OF AGENCY § 279 (1957) ("[A principal is] not affected by the knowledge of an agent as to matters . . . in which the agent deals with the principal . . . as . . . an adverse party . . .").

corporation, for the fiduciaries have an inherent conflict of interest that makes them "adverse" to the corporation with respect to such claims.²¹⁷ Thus, many courts have concluded that the adverse domination theory is justified in the corporate context based on a combination of the discovery rule and the adverse interest exception to imputed notice.²¹⁸

6. Discovery and Notice Counter-Arguments

In one sense, the "discovery and notice" rationale for adverse domination is the least susceptible to challenge on grounds of judicial authority, at least in jurisdictions where use of the discovery rule is already authorized by legislation or judicial decision. In another sense, however, the discovery and notice rationale for the adverse domination theory still raises questions. If the discovery rule applies to a corporation's claims against its directors or officers, one would expect courts to find "notice" of the claim as soon as any disinterested representative of the corporation became aware of it.²¹⁹ But courts typically require a bit more under the adverse domination theory.

Courts applying the majority disinterested director version of adverse domination require a change in control of the board of directors before notice will be imputed. As the Maryland

²¹⁷ As I have explained elsewhere, the adverse interest exception to imputed notice principles is an application of corporate fiduciaries' duty of loyalty to the institution. See Doré, *supra* note 30, at 171-203.

A slightly different exception applies where *third parties* seek to impute knowledge to a principal based on the knowledge of an agent whose interests are adverse to the principal: "[A] principal is not affected by the knowledge of an agent [where] the agent secretly is acting adversely to the principal and entirely for his own or another's purposes . . ." RESTATEMENT (SECOND) OF AGENCY § 282 (1957) The "complete" adversity requirement in this context protects the interests of third parties where the agent acts with "mixed motives," only some of which are adverse to the principal. See Doré, *supra* note 30, at 174. See also Part V.A.2. (explaining special problems that arise when imputation principles are applied in the context of corporate litigation against third parties).

²¹⁸ See, e.g., *RTC v. Chapman*, 895 F. Supp. 1072, 1077 (C.D. Ill. 1995) (a "[l]ogical application" of the Illinois discovery rule and the adverse interest exception "leads to recognition of the adverse domination doctrine"); *RTC v. Farmer*, 865 F. Supp. 1143, 1155 (E.D. Pa. 1994) (finding adverse domination consistent with Pennsylvania discovery rule and adverse interest exception); *In re Blackburn*, 209 B.R. 4, 10-11 (Bankr. M.D. Fla. 1997) (adverse interest exception justifies adverse domination).

²¹⁹ See, e.g., 3A FLETCHER, CORPORATIONS, *supra* note 38, § 790.

Court of Appeals expressed:

Because, in most cases, defendants' control of the corporation will make it impossible for the corporate plaintiff independently to acquire the knowledge and resources necessary to bring suit, actual notice of a claim will not be possible until the corporate plaintiff is no longer under the control of the defendant board members. . . . [Thus,] the adverse domination theory] goes beyond principles of agency law which provide that the knowledge of the agent will not be imputed to the principal if the agent acts adversely to the principal.²²⁰

The single disinterested director version of adverse domination adds a similarly pragmatic spin to the notice question, requiring not only a finding of notice to a disinterested director, but also that the director was "motivated and willing to sue" on the corporation's behalf.²²¹ Thus, in adverse domination cases, the question of corporate "notice" under discovery rule principles becomes substantially the same as whether the corporation was "disabled" from filing suit!

There are potential authority objections to such an expanded notice analysis—essentially the same objections that apply to the disability and concealment rationales for adverse domination. As with those rationales, the answer, if one exists, must be that courts are authorized to apply the corporate "notice" analysis in a manner consistent with corporate directors' duty of loyalty obligations and the practical realities associated with their control over the corporation. Whether one finds this analysis persuasive depends largely on one's view of corporate law and the role of fiduciary duties.²²²

B. *Implications of Doctrinal Rationales*

The foregoing doctrinal analysis of adverse domination tolling standards is somewhat artificial, because it separates the various rationales for the theory for discussion purposes.

²²⁰ See, e.g., *RTC v. Scaletty*, 891 P.2d 1110, 1112-14 (Kan. 1995) (citing both problems of corporate notice under discovery rule and practical inability to sue as justifications for adverse domination); *Hecht v. RTC*, 635 A.2d 394 (Md. 1994) (same).

²²¹ See, e.g., *Farmers & Merchants Nat'l Bank v. Bryan*, 902 F.2d 1520, 1523-24 (10th Cir. 1990).

²²² See *supra* Part II.B.2.

While a court might rely on one rationale to the exclusion of others, courts typically embrace one or more in combination.²²³ Indeed, the separate rationales' common dependence on fiduciary duties comes close to establishing a "continuing wrong" accrual rule for corporate fiduciary claims.²²⁴

The multiple rationales for adverse domination also make it somewhat difficult to oppose the tolling theory. Its defenders can shore up weaknesses in the disability rationale (e.g., the possibility of derivative litigation) based on insufficient corporate notice of potential claims. They can buttress weaknesses in the notice rationale (e.g., why does notice to a single disinterested corporate representative not always defeat adverse domination) with disability problems associated with majority control. Nonetheless, the various rationales courts have used to support the adverse domination theory have potentially differing implications for at least some of the adverse domination issues that have divided the courts.

1. Recognition of the Adverse Domination Theory

As described in Part I of the Article, there is a recent but growing judicial trend that refuses to recognize the adverse domination tolling theory. Most of these decisions have focused not so much on the merits of adverse domination arguments as on judicial authority concerns.²²⁵ Yet, these same courts universally acknowledge that tolling under the discovery rule is appropriate where the corporation's claims against corporate fiduciaries allege fraud or fraudulent concealment.²²⁵ Indeed, the approach courts have used to define corporate "discovery"

²²³ See, e.g., *RTC v. Fiala*, 870 F. Supp. 962, 974 (E.D. Mo. 1994); *Scaletty*, 891 P.2d at 1112, 1115; *Hecht*, 635 A.2d at 405, 408.

²²⁴ As Chancellor Allen has explained, delayed accrual under a "continuing wrong" theory is generally limited to extraordinary situations, such as a nuisance that continues for many years. In such a case plaintiff can prove the elements of her cause of action with reference to events occurring entirely within the limitations period. See *Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993). A corporate fiduciary argument might run along similar lines: that directors' failure to act on or disclose their breaches of fiduciary duty effectively continues the original breach of fiduciary obligation. Chancellor Allen expressly rejected such an argument in *Kahn*, however. See *id.*

²²⁵ See *supra* notes 191-193 and accompanying text.

²²⁶ See *supra* note 192.

in fraud and fraudulent concealment cases closely resembles, if it is not identical to, the adverse domination theory.²²⁷ Thus, most of the recent decisions that “decline to adopt” adverse domination as a tolling theory may more appropriately be analyzed below, along with other decisions that restrict the categories of claims to which adverse domination applies.

2. The Categories of Claims to Which the Adverse Domination Theory Applies

Recall that courts that accept the adverse domination theory disagree whether it should toll limitations: (i) only where corporate fiduciaries are alleged to have engaged in fraud or fraudulent concealment; (ii) also where corporate fiduciaries are alleged to have committed intentionally wrongful acts that are less serious than fraud, such as self dealing; or (iii) also where corporate fiduciaries are alleged to have acted recklessly or negligently.²²⁸ Doctrinal analysis helps explain some, but not all, of the conflicting positions courts have taken.

Consider courts that view corporate “disability” as the basis for adverse domination. One might take the position, as some courts have, that the tolling theory should be applicable to any claim that implicates controlling corporate directors, because a corporation is no less “disabled” by directors’ conflict of interest and power of control with respect to negligence claims than it is with respect to claims for more serious misconduct.²²⁹ These courts have not drawn distinctions, often seen in the demand futility context, that implicitly tie the question of directors’ conflict of interest to the seriousness of their alleged misconduct.²³⁰ However, at least one court that has ad-

²²⁷ See *supra* Part II.C.2. (describing early caselaw approaches to “notice” issue as courts applied the discovery rule to corporate claims alleging fraud or fraudulent concealment). It is hard to see any real distinction between these cases and those such as *RTC v. Grant*, 901 P.2d 807, 814-19 (Okla. 1995), where the court expressly adopted adverse domination but restricted its application to claims alleging “fraudulent conduct” by corporate directors.

²²⁸ See *supra* Part I.D.

²²⁹ See, e.g., *RTC v. Fiala*, 870 F. Supp. 962, 974 (E.D. Mo. 1994) (collecting cases).

²³⁰ For example, Delaware courts excuse demand if “plaintiff has alleged with particularity facts that, taken as true, would support a reasonable doubt that the

vanced a disability rationale for adverse domination declined to apply the tolling theory to claims less serious than fraud or fraudulent concealment.²³¹

If the "discovery and notice" rationale provides the theoretical underpinnings for adverse domination tolling, the claims to which the theory applies should track the scope of the discovery rule. To some extent, the cases reflect a pattern in this regard. Where legislatures have authorized courts to apply the discovery rule to all civil cases, or broad application of the discovery rule is sanctioned by precedent, judges have been comfortable extending adverse domination tolling to all corporate claims, no matter what their basis.²³² In jurisdictions that have declined to extend the discovery rule beyond the fraud and fraudulent concealment categories, courts have concluded that the adverse domination theory should be similarly confined.²³³ Unfortunately, in many states the parameters of the discovery rule are unclear and are developed piecemeal by judicial decision. Courts in these jurisdictions must confront the policy question of whether the discovery rule should be extended to claims that implicate corporate fiduciaries, a question the discovery and notice rationale for adverse domination does not answer.

The concealment rationale suggests the potentially narrowest scope for adverse domination tolling. From a judicial authority perspective, the most defensible position is to toll limitations only under the legislatively authorized fraud and fraudulent concealment tolling exceptions, and to reject the adverse domination theory's expansive approach to the "discov-

challenged transaction was the product of a valid exercise of business judgment." See PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 120, § 7.03 cmt. a, at 54.

²³¹ See, e.g., *Grant*, 901 P.2d at 814.

²³² See, e.g., *RTC v. Scaletty*, 891 P.2d 1110, 1117 (Kan. 1995) (reasoning adverse domination tolling was consistent with Kansas "accrual" statute that authorized tolling of limitations for any civil claim until it is "reasonably ascertainable" and that the court had no authority to "pick and choose" among claims to which this statute applied); *Hecht v. RTC*, 635 A.2d 394, 399 (Md. 1994) (reasoning in part that adverse domination tolling was an application of the discovery rule, which, by court decision "applie[d] generally in all civil actions").

²³³ See, e.g., *RTC v. Armbruster*, 52 F.3d 748, 751-53 (8th Cir. 1995) (refusing to apply adverse domination to negligence and breach of fiduciary duty claims, reasoning that Arkansas applies discovery principles only in cases of fraudulent concealment).

ery and notice" issue these exceptions raise.²³⁴ A court with a slightly more generous view of its authority might use adverse domination standards as the test for "notice" or "discovery" of corporate fiduciary claims under the fraud and fraudulent concealment tolling exceptions.²³⁵ A court that takes a broad view of corporate fiduciaries' duty of disclosure might expand the scope for adverse domination tolling beyond these categories, but it is difficult to predict how far that logic might take the court.²³⁶ Perhaps the best that can be said is that the theoretical underpinnings of the concealment rationale—the tendency of directors to conceal their own wrongdoing and the legal support for their obligation to disclose it—increase in strength with the seriousness of the misconduct at issue.

3. Claims Against Third Parties

Recall that courts also disagree whether adverse domination should toll limitations for a corporation's claims against third parties, a question that has arisen most frequently in connection with malpractice claims against lawyers, accountants and other experts who advise corporations.²³⁷ The majority view is that adverse domination applies where the corporation's claim against the third party might implicate controlling corporate fiduciaries in wrongdoing.²³⁸ These courts reason that, in such situations, corporate fiduciaries are no more likely to pursue the third party claim than they would be to pursue the related D & O action, so that the "disability" and "concealment" rationales for adverse domination apply.²³⁹ Indeed, since one can defend adverse domination as an application of the discovery rule in the corporate context, and the discovery rule generally applies in malpractice actions, the adverse domination theory should arguably apply to any such corporate claims against third parties²⁴⁰ The courts that have

²³⁴ See *supra* Part III.A.6.

²³⁵ See, e.g., *Grant*, 901 P.2d 807.

²³⁶ See *supra* notes 204-09 and accompanying text.

²³⁷ See *supra* notes 80-81 and accompanying text.

²³⁸ See *supra* Part I.D.

²³⁹ See, e.g., *RTC v. Gardner*, 798 F. Supp. 790, 795-96 (D.D.C. 1992).

²⁴⁰ See 2 CORMAN, *supra* note 5, § 11.1.2.3 ("Today the discovery rule [generally] applies to malpractice litigation against [medical and] nonmedical profession-

have offered little support for that position, other than the assertion that adverse domination is a "narrow doctrine."²⁴¹

Nonetheless, there are several important distinctions between D & O claims and third party claims that may justify different tolling rules. First, while one can defend courts' authority to toll limitations for D & O claims as an extension of their power to enforce corporate fiduciary duties, third parties are technically outside of that jurisdiction.²⁴² Moreover, to the extent adverse domination is intended to punish corporate fiduciaries' for improper "concealment" or failure to disclose their wrongdoing, tolling limitations for related claims against third parties misdirects the penalty.²⁴³

In addition, where the discovery rule already applies to claims against a third party (e.g., in the typical professional malpractice case), adverse domination tolling gives the corporate plaintiff two chances to prevail on the issue of discovery. There can be no corporate discovery of a claim until a disinterested representative of the corporation receives notice of it.²⁴⁴ The imputed notice rules of agency law thus subject third parties to the risk that corporate agents' knowledge may not bind the corporation under the adverse interest exception.²⁴⁵ Where defendant establishes that a corporation did receive notice under these principles, the adverse domination theory nonetheless provides the corporation a second opportunity to toll limitations if it can show sufficient adverse interest on the part of those who control the corporation.²⁴⁶

²⁴¹ See, e.g., *FDIC v. Shrader & York*, 991 F.2d 216, 227 (5th Cir. 1993).

²⁴² In this sense adverse domination tolling may be an example of what one scholar has labeled the "gatekeeper" liability phenomenon of corporate law. See generally Reinier H. Kraakman, *Corporate Liability Strategies and the Cost of Legal Controls*, 93 *YALE L.J.* 857 (1984).

²⁴³ Indeed, for courts that view the adverse domination theory as the test for corporate "discovery" when the fraud or fraudulent concealment tolling exceptions apply, adverse domination tolling should *not* apply to claims against third parties unless those third parties have themselves engaged in fraud or fraudulent concealment.

²⁴⁴ See *supra* Part III.A.5.

²⁴⁵ See *supra* Part III.A.5. See also Doré, *supra* note 30, at 171-75.

²⁴⁶ This "two bites at the apple" problem was present in *FDIC v. Shrader & York*, 991 F.2d 216, 226-27 (5th Cir. 1993), where the Fifth Circuit first declined to extend the adverse domination tolling theory to third parties. Indeed, similarities between the adverse domination tolling theory and the "imputed notice" inquiry that the discovery rule requires in the corporate setting have effectively enabled lower courts in the Fifth Circuit to avoid the limitations established by the

4. Procedural Issues

The most significant divisions among courts that have applied the adverse domination tolling theory concern the proper procedures for its implementation. Recall that the primary dispute is whether courts should toll limitations until directors implicated in wrongdoing are replaced by a "disinterested majority" on the board, or whether the corporate plaintiff should be required to prove "complete domination" of the corporation during the period for which tolling is sought, i.e., that there was not a "single disinterested director" on the board to protect the corporation's rights.

Many of the arguments that support the "disability" rationale for adverse domination also support the majority disinterested director version of the theory. A decision to bring litigation typically rests in the hands of a majority of the board, and, applying well-established duty of loyalty principles, where directors act subject to a conflict of interest (or, as is more likely in the case of adverse domination, fail to take any action at all), their decision should not bind the corporation.²⁴⁷ While a disinterested director may have the right to sue derivatively on behalf of the corporation in some jurisdictions, that right does not necessarily entail a duty to sue.²⁴⁸ Moreover, as scholars have argued and courts in at least some jurisdictions have recognized, "structural bias" on corporate boards makes it unlikely that individual "disinterested" directors will support corporate action that may adversely affect their peers.²⁴⁹ And, even if disinterested directors want to sue on

to extend the adverse domination tolling theory to third parties. Indeed, similarities between the adverse domination tolling theory and the "imputed notice" inquiry that the discovery rule requires in the corporate setting have effectively enabled lower courts in the Fifth Circuit to avoid the limitations established by the *Shrader & York* decision. See, e.g., *Askanase v. Fatjo*, 828 F. Supp. 461, 464 (S.D. Tex. 1993) (recognizing that adverse domination tolling could not apply to third party claims, but nonetheless tolling limitations on the theory that there was no corporate "discovery" of the claims).

²⁴⁷ See *supra* Part III.A.1.

²⁴⁸ See PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 120, § 7.02 cmt. h.

²⁴⁹ See, e.g., James D. Cox & Harry Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS. 48 n.3, 83, 103-04 (1985); *Will v. Engebretson & Co.*, 261 Cal. Rptr. 868, 874 (Ct. App. 1989); *Miller v. Register and Tribune Syndicate, Inc.*, 336 N.W.2d 709, 716 (Iowa 1983).

policy, coverage exclusions may compel the directors to refrain from doing so.²⁵⁰ Considering this state of affairs, one can make a strong case that “disability” exists, at least until an independent board majority is in place.

On the other hand, if courts that endorse the “concealment” or “discovery and notice” rationales for adverse domination apply imputed notice principles from agency law along traditional lines, notice to a single disinterested director should be sufficient for corporate discovery of its litigation claims.²⁵¹ Since most courts have conflated the disability, concealment and discovery rationales for adverse domination, however, or have applied “notice” principles along the same lines as disability analysis, procedural distinctions that logically attend these rationales for adverse domination may be moot.²⁵²

In *International Railways v. United Fruit Co.*,²⁵³ the case most often cited as authority for the “complete domination” version of adverse domination, Judge Friendly offered an additional reason for use of the single disinterested director test: courts should set a high threshold before overriding repose that the legislature has conferred with statutes of limitation.²⁵⁴ But courts have ignored a distinction that makes the *United Fruit* case unique: the facts giving rise to the corporation’s claims were known to all directors as well as all shareholders—there was no question of concealment. The only

²⁵⁰ In many cases D & O insurance provides the only vehicle for meaningful recovery of damages from defendant directors and officers. Modern D & O policies typically eliminate coverage for claims commenced with the cooperation of the corporation or any insured officer. See, e.g., Melvin R. Goldman et al., *Directors’ and Officers’ Insurance: An Analysis of Current Issues*, in *PLI SECURITIES LITIGATION 1992: STRATEGIES AND CURRENT DEVELOPMENTS* (PLI Order No. H4-5138) (describing the “insured vs. insured exclusion” and the “derivative action exclusion”).

²⁵¹ See *supra* note 42 and accompanying text.

²⁵² See *supra* Part III.A.6.

²⁵³ 373 F.2d 408 (2d Cir. 1967).

²⁵⁴ *Id.* at 416 n.11 (“We here enforce the important policy of the statute of limitations in protecting a defendant from stale claims; a court should require a clear showing before applying a judicially created exception.”).

question was whether the corporation was able to sue on the claims during the period of alleged domination.²⁵⁵ Since there were no disclosure or notice problems (which are separate rationales for adverse domination), and a potential derivative litigation remedy existed, *United Fruit's* high threshold for adverse domination is understandable.²⁵⁶

While, in this writer's view, the case for the majority disinterested director version of adverse domination is more persuasive than that for the single disinterested director approach, the modern judicial trend to treat both versions of adverse domination as "presumptions" makes distinctions between them less important. As will be explained in Part IV, under either version of the adverse domination theory, the merits of the limitations defense will not likely be resolved prior to trial.

In summary, the case for adverse domination tolling outlined in this Part of the Article is quite strong, provided one also favors strong fiduciary duties on the part of corporate directors and officers. The link to fiduciary duties is necessary because, whatever the rationale for the adverse domination theory, an expansive view of fiduciary obligation answers the obvious judicial authority objections the theory raises. That is, one can defend adverse domination tolling (i) as a recognition that a corporation is, as a legal and practical matter, disabled from pursuing claims against directors and officers while they control the corporation; or (ii) as a means of determining a corporation's "notice" of claims that implicate its directors and officers, whether the notice issue arises under a "concealment" tolling exception or as part of a more general application of the discovery rule. These separate rationales, all rooted to varying degrees in corporate fiduciary duty analysis, help explain divi-

²⁵⁵ *Id.* at 414.

²⁵⁶ Indeed, these assumptions are signaled by the rule announced in the case: "[The adverse domination tolling] principle must mean at least that *once the facts giving rise to possible liability are known*, the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue." *Id.* (emphasis added). A better approach to facts such as those presented in *United Fruit* is that disclosure to shareholders triggers the possibility of a derivative remedy and therefore ends any possibility of tolling. See *infra* Part V.A.3.

sions that have developed among the courts concerning the adverse domination tolling theory.

For the same reason, doctrinal analysis of adverse domination tolling is not completely satisfying. A particular court's receptivity to the various rationales for the theory, as well as its application of those rationales, will inevitably vary with the court's concerns about judicial authority and with its views on the importance of fiduciary duty enforcement. Because each of the rationales for adverse domination tolling standards are rooted in the soil of open-ended fiduciary duties, those seeking clear and consistent parameters for the theory's application should perhaps expect no more.

But there is a further reason doctrinal analysis comes up short. How does one explain the seeming "pendulum swing" in limitations decisions, i.e., that courts found adverse domination tolling analysis persuasive and applied it expansively in the 1980s and early 1990s, yet have recently become much more discriminating?²⁵⁷ Have the later courts put their doctrinal compass aside and simply imposed arbitrary and politically motivated restrictions on the scope of adverse domination tolling?²⁵⁸ Part IV offers an alternative explanation, one rooted in the fundamental tensions between rules and standards in both limitations law and corporate law.

IV. THE ADVERSE DOMINATION TOLLING THEORY AND THE SEARCH FOR MIDDLE GROUND BETWEEN RULES AND STANDARDS

One difficulty with doctrinal analysis is that legal doctrine sometimes assumes a life of its own and thereby impedes efforts to solve the problem it was intended to address in the first place.²⁵⁹ Remember that the "disability," "concealment," and "discovery and notice" rationales for adverse domination all reflect courts' desire, if not need, for a degree of flexibility in resolving limitations problems in corporate cases. The use of

²⁵⁷ See *supra* Part I.D.

²⁵⁸ See *supra* Part I.E.

²⁵⁹ See Johnson, *supra* note 26, at 676.

fact-based tolling standards, such as adverse domination, not only enables courts to achieve an equitable resolution of limitations problems that mechanical application of statutes of limitation would not permit, but also resolves limitations issues in a manner more congruent with the flexible legal traditions of corporate fiduciary duty enforcement.

This Part of the Article examines the consequences of such flexibility in terms of limitations policy. It argues that because adverse domination tolling standards tend to postpone resolution of limitations issues until trial, they largely defeat the rule-based statute of limitations' ability to provide repose. This tendency contrasts with prevailing trends in both limitations law and corporate law that gravitate to a compromise "middle ground" position on the rules/standards continuum. This Part argues that judicial adoption of the adverse domination theory, and more recent retrenchment from broad application of its tolling standards, is best understood not in doctrinal terms but as the courts' attempt to find that same middle ground for limitations analysis in corporate cases.

A. *Adverse Domination Standards Postpone Resolution of Limitations Issues Until Trial*

Considered from the historical and policy perspectives outlined in Part II of the Article, adverse domination tolling standards seem but an extension of courts' practice of tempering rule-based statutes of limitation in extraordinary cases. Part III has outlined the doctrinal rationales for doing so. There is an important distinction between adverse domination tolling standards and others that preceded them, however. Because adverse domination tolling standards are rooted in fiduciary duties, the factual inquiry required to apply them is both open-ended and complex. To decide when a corporation's cause of action "accrued" under the theory, the court essentially must determine when the corporation was in a meaningful position to protect its rights. This question is difficult to resolve short of trial no matter which of the various rationales for adverse domination the court adopts, and no matter which of the competing procedural versions of the tolling theory the court applies.

By way of comparison, consider conventional "disability"

factual questions unrelated to the merits of the litigation. These fact issues, e.g., plaintiff's status as a minor or as an incarcerated person, can easily be resolved prior to trial.²⁵⁰ The adverse domination "disability" inquiry, in contrast, involves at least three sets of variables: (i) plaintiff's allegations of wrongdoing; (ii) the makeup of the board of directors and its various members' level of "disinterest" with respect to plaintiff's allegations; and (iii) the ability of "interested" board members to exert control over the corporation. One's intuition is that the stronger the corporate plaintiff's claims are and the more board members the claims implicate, the stronger the case for "disability," and hence tolling. But where along the continuum between pleading and ultimate proof on the merits does one draw the line?

Precedent from derivative litigation, where courts have long been required to make similar determinations of "demand futility," reflect the difficulty of the task.²⁵¹ While some courts allow plaintiff to avoid the demand requirement simply by naming all of the corporation's directors as defendants,²⁵² most courts require more by way of pleading.²⁵³ The Delaware pleading standards are particularly complex, tying demand futility to the business judgment rule's protection of the

²⁵⁰ Most statutes that toll limitations based on disability list minority, incarceration and mental disability as the triggering categories. See 2 CORMAN, *supra* note 5 §§ 10.2, 10.4 & 10.5. While a determination of plaintiff's mental capacity may require a complex inquiry, it is an issue that will likely be separate from the merits of the litigation in most cases, and therefore can be resolved prior to trial.

²⁵¹ Though facially apt, the demand futility cases are not completely analogous. One might argue that since the adverse domination theory overcomes corporate fiduciaries' substantive rights of repose, not mere procedural hurdles in corporate litigation, it should entail a stronger conflict of interest showing than that required for demand futility. See *International Rys. v. United Fruit Co.*, 373 F.2d 408, 416 n.11 (2d Cir. 1967) (rejecting plaintiff's argument that the court should find adverse domination to exist when demand would be excused under New York law).

²⁵² See, e.g., *Abramowitz v. Posner*, 672 F.2d 1025, 1033 (2d Cir. 1982); *Joy v. North*, 692 F.2d 880, 887-88 (2d Cir. 1982).

²⁵³ The "traditional" approach is to excuse demand where there are allegations of wrongdoing that somehow implicate a majority of the board of directors. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 120, § 7.04, cmt. d. (citing 13 WILLIAM FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5965 (Perm. Ed. 1980)). Other courts excuse demand "only if a majority of the board was interested or knowingly participated in a manner that amounted to aiding and abetting the wrong." *Id.* (citing *Weiss v. Temporary Invest. Fund*, 692 F.2d 928 (3d Cir. 1982)).

mand futility to the business judgment rule's protection of the board decision plaintiff seeks to challenge.²⁶⁴ Despite the efforts of many courts and scholars to achieve a workable pleading formulation, none has proved completely satisfactory. Like determinations of corporate "disability" under the adverse domination theory, the demand futility inquiry is inevitably bound to the merits of the litigation itself, e.g., whether one or more directors actually engaged in the misconduct that plaintiff complains of.²⁶⁵ This problem has led the American Law Institute to suggest that the inquiry be abandoned and led others to suggest that demand futility standards be placed on a different footing.²⁶⁶

Nor do the "concealment" or "discovery and notice" justifications for adverse domination simplify its standards to any great degree, for the outcome of the "notice" inquiry as applied by most courts in adverse domination cases hinges on these same questions of conflict of interest and control.²⁶⁷ The problem reaches its zenith where courts apply the adverse domination theory to toll limitations for claims that implicate corporate fiduciaries in negligence. No matter how many or how few corporate directors are implicated in claims by the corporation, could it not always be contended that the remaining directors were themselves negligent (and hence interested for purposes of the adverse domination inquiry) for failure to discover and prosecute their fellow board members' misconduct?²⁶⁸

Given the fact-intensive nature of the issues adverse domination tolling standards raise, most courts have reserved them for trial. Indeed, in the view of one court: "The [adverse domination] tolling issue cannot be resolved on a motion to dismiss, nor can it be resolved on the basis of affidavits submitted in support of a motion for summary judgment."²⁶⁹ Although that

²⁶⁴ *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

²⁶⁵ *DEMOTT*, *supra* note 176, § 5.13, at 50 ("The difficulty . . . is that the court is compelled to adjudicate factual issues determinative of substantive liability in the context of a dispute over pleading.").

²⁶⁶ See *PRINCIPLES OF CORPORATE GOVERNANCE*, *supra* note 120, § 7.03 (recommending universal demand requirement except in cases of "irreparable injury"). See also *DEMOTT*, *supra* note 176, § 5.13, at 50 (expressing support for Third Circuit demand futility test that asks "whether a demand on the directors would be likely to prod them to correct a wrong").

²⁶⁷ See *supra* Part III.A.6.

²⁶⁸ *Cf. FDIC v. Dawson*, 4 F.3d 1303, 1312 (5th Cir. 1993).

²⁶⁹ *In re MacGregor*, 199 B.R. 502, 516 (Bankr. N.J. 1995). Published pre-trial

view may be overbroad, the tendency of modern courts to treat the competing "majority disinterested director" and "single disinterested director" formulations of adverse domination as presumptions for and against tolling creates similar problems, because in either case the presumption can be rebutted at trial.²⁷⁰

B. *Implications for the Statute of Limitations Defense*

To the extent that adverse domination tolling standards inevitably postpone resolution of limitations issues until trial, they raise a number of serious policy concerns. First, from the perspective of individuals who may be subjected to corporate litigation claims, the tolling theory substantially defeats any prospects for repose. Unless there has been a complete change of control of a corporation, the corporation's directors and officers, and even its professional advisers, can never be certain that the statute of limitations has extinguished the sparks of all potential corporate claims against them.²⁷¹ So long as the corporate plaintiff can make credible allegations of director involvement or conflict of interest with respect to the claims it brings (which may amount to no more than a failure on the part of some directors to discover and prosecute the claims), a successful limitations defense is not assured, no matter how much time has elapsed from the occurrence of the alleged misconduct.

This concern highlights a related objection to the adverse domination theory. If, under adverse domination tolling standards, the outcome of the limitations defense depends on answers to fact questions that are typically decided along with the merits of plaintiff's claims at trial, does the limitations defense "bar litigation" of stale claims in any meaningful

decisions in some of the early adverse domination cases (e.g., opinions denying motions to dismiss or for summary judgment based on limitations) appear to finally decide the issue of limitations in the plaintiff corporation's favor. See, e.g., *FDIC v. Howse*, 736 F. Supp. 1437, 1441-42 (S.D. Tex. 1990); *FSLIC v. Williams*, 599 F. Supp. 1184, 1195 (D. Md. 1984). However, nothing in these opinions expressly limits defendants' ability to prevail on the limitations defense at trial by disproving the factual allegations on which pre-trial adverse domination rulings depended.

²⁷⁰ See *supra* notes 83-85 and accompanying text.

²⁷¹ See, e.g., *Baughman*, *supra* note 18, at 1112-13 (providing illustration of this problem).

sense? After all, most civil lawsuits are resolved through settlement prior to trial.²⁷² Thus, the fact-intensive nature of the adverse domination tolling theory may transform the limitations defense from a right to be free of stale claims into a mere bargaining chip for settlement.²⁷³ The FDIC took full advantage of this situation in failed bank and thrift litigation, disposing of most of its claims through settlement, but only if it first prevailed on dispositive pre-trial defense motions based on limitations and related issues.²⁷⁴

Adverse domination tolling standards may also make it more difficult for defendants to insure against potential corporate claims. D & O insurers have consistently implemented policy exclusions where corporate litigation developments posed excessive underwriting risks.²⁷⁵ To the extent that adverse domination tolling standards extend the life of corporate claims beyond what insurers conclude are reasonable bounds, there is no reason to expect them to treat those claims any differently. Indeed, existing D & O insurance exclusions may already bar coverage of many claims for which adverse domination might otherwise toll limitations.²⁷⁶

²⁷² See, e.g., Marc Galanter and Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994) (citing study showing over two-thirds of cases settle before any dispositive decision in the case).

²⁷³ Of course, since settling parties presumably bargain "in the shadow of the law," this objection also applies to any limitations defense that raises factual issues. Yet because adverse domination tolling standards are so closely linked with the merits of the corporate plaintiffs' claims, the objection applies with greater force. That is, if the trial on the merits goes forward along with limitations issues, defendants face considerably greater risks than if the limitations issue were tried in isolation.

²⁷⁴ See, e.g., Villa, *supra* note 86 (describing FDIC's investigation, decision to sue and settlement procedures in failed bank and thrift cases).

²⁷⁵ See generally Goldman, *supra* note 250 (describing development of various D & O policy exclusions).

²⁷⁶ Like other insurers, D & O carriers have moved away from "occurrence" based policies to "claims made" based policies over the past 20 years or so. Despite their label, many "claims made" policies do not cover all claims made in a policy year, but only those that are so made and that are based on conduct that occurred within a defined time window, typically the point at which the carrier commenced coverage. Thomas W. Hyland et al., *Directors and Officers Liability Insurance: An Overview and Current Issues*, Part (A), in 10TH ANNUAL INSURANCE, EXCESS AND REINSURANCE COVERAGE DISPUTES 1993 (PLI Litg. Course Handbook Series No. H4-5148, 1993). There is a similar trend to impose time limits on "claims made" D & O coverage with "prior act" exclusions. See Goldman, *supra*

Finally, because adverse domination tolling standards prevent pre-trial disposition of claims based on the limitations defense in so many corporate cases, they also interfere with the "social dimension" of statutes of limitation. Recall that one of the purposes behind the limitations defense is to promote an efficient judicial system for all litigants by relieving courts of the burden of litigating claims where the fact-finding task is likely to be impaired by stale evidence.²⁷⁷ Adverse domination tolling standards defeat this goal to the extent they require full-blown litigation of cases that are ultimately determined to be time-barred.

C. *Reprise: The Rules/Standards Debate in Limitations Law and Corporate Law*

Part II of the Article described the rules/standards tensions that are endemic in both limitations law and corporate law. Returning to this theme, one can readily appreciate that all of the foregoing policy objections to the adverse domination tolling theory stem from its substitution of fact-based standards for a bright-line limitations rule. As has been shown, such standards are the inevitable byproduct of the adverse domination theory's roots in open-ended corporate law fiduciary duty principles. And because adverse domination standards cannot be applied with the precision of a bright-line rule, the tolling theory offers few prospects for a middle ground compromise between rules/standards modes of decision-making. Nonetheless, there is a strong tendency towards just such compromises in both limitations law and corporate law.

1. Limitations Law Developments

Consider, for example, modern discovery rule jurisprudence. Courts first applied this modified definition of accrual outside the fraud and fraudulent concealment context in cases where defendant doctor left a foreign object in plaintiff patient.²⁷⁸ In those cases, although the statute of limitations

note 250, § II(F)(3).

²⁷⁷ See *supra* note 24.

²⁷⁸ 2 CORMAN, *supra* note 5, § 11.1.2.1, at 136-39.

had expired if accrual was measured on an "occurrence" basis, the discovery rule provided a somewhat plausible tolling alternative that did not stray very far from a "rule-based" system of limitations. Plaintiff's discovery of defendant's fault in causing the injury typically occurred at a point that could be identified with some certainty. But the discovery rule has not been limited to "foreign object" cases. Indeed, it has been applied in an ever-widening variety of situations where plaintiff is "blamelessly ignorant" of one or more aspects of the claim,²⁷⁹ ranging from malpractice and toxic tort claims, to claims for "title [to real property], defamation of character, products liability, . . . and construction contracts."²⁸⁰

As Professor Gail Heriot has explained, this expansion of the discovery rule in recent decades led to an "obvious" question: "Just what is it that has to be discovered in order to trigger the rule?"²⁸¹ Plaintiff might be aware of the injury but not that defendant caused it, or aware of defendant's conduct but not that it was wrongful. If the discovery rule is intended give plaintiff a "reasonable opportunity" to file suit within the legislatively-prescribed time period, one might logically postpone accrual "until plaintiff is in possession of sufficient facts to give notice of each element of the cause of action."²⁸² Some courts have taken precisely this step in medical malpractice cases, deciding that "the cause of action accrues, and the statute of limitations runs, from the time the plaintiff first knows or should know that the injury is caused by the negligence of the defendant."²⁸³

Like the adverse domination theory, these more open-ended versions of the discovery rule link the limitations issue closely to the merits of the litigation and make the issue difficult to resolve short of trial. If defendant cannot prevail on the limitations issue at the outset of litigation (i.e., by motion to dismiss or by motion for summary judgment), he must defend against plaintiff's claim, and the court must try it, because the claim might ultimately be found not to be time-barred. Proponents of bright-line rules argue that such open-ended tolling

²⁷⁹ Heriot, *supra* note 100, at 958.

²⁸⁰ 2 CORMAN, *supra* note 5, at §11.1.2.2, at 139-40.

²⁸¹ Heriot, *supra* note 100, at 956.

²⁸² Heriot, *supra* note 100, at 956.

²⁸³ 2 CORMAN, *supra* note 5, § 11.1.4, at 146.

principles do not provide any true measure of repose to defendants, nor do they alleviate courts of the necessity of litigating stale claims.²⁸⁴

Some courts, though perhaps not a majority, have been receptive to these concerns and have declined to extend the discovery rule to its logical conclusions. In *United States v. Kubrick*,²⁸⁵ for example, the Supreme Court decided that under the Federal Tort Claims Act,²⁸⁶ the statute of limitations begins to run once a plaintiff is aware of the injury and its cause, regardless of whether plaintiff has or should have had evidence of defendant's wrongdoing in connection with the injury.²⁸⁷ As the Court explained: "[Discovery rule standards that hinge on plaintiff's knowledge of a breach of legal duty] would go far to eliminate the statute of limitations as a defense separate from the denial of breach of duty."²⁸³

The lesson of the discovery rule experiment, as evidenced by *Kubrick*, is that while limitations tolling standards can restore a measure of equity to rule-based statutes of limitation, if the standards are too open-ended, they defeat the purpose of the limitations defense.²⁸⁹ Another "middle ground" may be

²⁸⁴ Heriot, *supra* note 100, at 961. Indeed, even supporters of the discovery rule have acknowledged that its application can be problematic in some circumstances. For example, Professor Michael Green has noted that when the discovery rule is applied in toxic substances litigation, which typically involves an extended chronology of causation, resolution of issues concerning plaintiff's knowledge can dramatically enlarge the scope of legitimate disagreement and, therefore, litigation:

Extensive discovery proceedings, contested factual hearings, and ultimate submission of this issue to the jury become necessary conditions for resolution. No longer can the statute of limitations issue be decided at an early stage, thus obviating the need for the parties to prepare for and litigate the merits as well. Not only does the statute of limitations fail to reduce the resources poured into litigating the merits, but the judicial and party resources expended to resolve the protracted disputes over its application, like all procedural wrangling, in no way contribute to the resolution of the merits of the case.

Green, *supra* note 28, at 983-84.

²⁸⁵ 444 U.S. 111 (1979).

²⁸⁶ 28 U.S.C. §§ 26711-80 (1994).

²⁸⁷ *Kubrick*, 444 U.S. at 116. While *Kubrick* may not represent a majority view, it "has been applied beyond the Federal Tort Claims Act in a wide variety of legal settings." 2 CORMAN, LIMITATIONS, *supra* note 5, § 11.1.4, at 146.

²⁸⁸ *Kubrick*, 444 U.S. at 125.

²⁸⁹ *Id.* at 123 ("[The expansive discovery standard requested by plaintiff "would undermine the purpose of the limitations statute . . ."]. Indeed, other recent precedent on limitations reflects the Supreme Court's recognition that clear and

desirable, even if courts must define it with arbitrary boundaries. In the words of Professor Heriot:

Kubrick and the cases that follow it attempt to halt the progress of the discovery rule. They draw an arbitrary line and refuse to go further. The particular line they draw may be difficult to defend. . . . Nevertheless, the line preserves some of the rulelike qualities of the statute of limitations.²⁹⁰

Legislatures have taken a similar "arbitrary" middle ground approach by softening the impact of discovery rules with statutes of repose. Unlike a statute of limitations, a statute of repose "is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body."²⁹¹ Legislatures originally adopted statutes of repose to bar claims for defective design or construction of buildings once a designated number of years elapsed from the structure's completion,²⁹² but now use them more generally to establish an outer time limit on claims to which the discovery rule applies.²⁹³

Unfortunately, courts applying judicially-sanctioned discovery rules are rarely in a position to establish such a two-tiered approach.²⁹⁴ Instead, as in *Kubrick*, where courts find

easily applied limitations rules facilitate litigation for both plaintiffs and defendants, as well as the courts who must hear their controversies. *See, e.g.,* *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (adopting a uniform federal limitations rule for Rule 10b-5 claims); *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987) (adopting a uniform federal limitations rule for RICO claims); *Wilson v. Garcia*, 471 U.S. 261, 268 (holding that all § 1983 claims should be characterized the same way for limitations purposes).

²⁹⁰ Heriot, *supra* note 100, at 958.

²⁹¹ *First United Methodist Church v. United Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989).

²⁹² *See, e.g.,* VA. CODE ANN. § 8.01-250 (Michie 1950).

²⁹³ *See* 2 CORMAN, *supra* note 5, § 11.2 at 170-71.

²⁹⁴ An interesting but rare example of a court creating such a rule is *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). In *Lampf*, the Court adopted a uniform federal statute of limitations for Rule 10b-5 claims that parallels the 1-year from discovery, 3-years from occurrence repose rule that Congress expressly provided for certain similar securities law claims. The *Lampf* decision can perhaps be best understood as an effort to provide badly needed uniformity in limitations standards for Rule 10b-5 claims. *See* Harold S. Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*,

the cost of tolling standards too high relative to the need for the repose and clarity that bright-line limitations rules can provide, they draw seemingly arbitrary boundaries that circumscribe the use of tolling standards. The same forces may be at work in adverse domination cases.

2. Corporate Law Developments

While the advent of the discovery rule has enabled courts to apply statutes of limitation more as standards than bright-line rules, the movement in corporate law has been in the opposite direction. Recall that bright-line rules have grown increasingly important in corporate law over the course of this century.²⁹⁵ As in the limitations area, however, there is evidence that corporate law gravitates toward a middle ground between rules/standards extremes.

Consider recent legislative enactments permitting limitations on director and officer liability for fiduciary duty violations. Statutes in most states now allow corporations to limit their directors' and officers' monetary liability for certain violations of the duty of care, but do not permit complete elimination of fiduciary duty liability.²⁹⁶ In many jurisdictions, the limitation on liability may not encompass breaches of the duty of loyalty, bad faith acts or omissions, acts or omissions involving intentional misconduct or knowing violations of law, or transactions from which the fiduciary derives an improper personal benefit.²⁹⁷ It is difficult to reconcile such a "middle ground" position with either traditional views of corporate law, which place a high premium on fiduciary duty enforcement, or with contractual paradigms, which view corporations as voluntary economic relationships. Nonetheless, such liability limitations can be understood as a compromise position that preserves some degree of judicial review of corporate fiduciaries'

60 U. COLO. L. REV. 235 (1989). Interestingly, one commentator argues that the *Lampf* decision should not be construed to provide repose for defendants who have fraudulently concealed their 10b-5 violations. See Johnson, *supra* note 26.

²⁹⁵ See *supra* Part II.B.3.

²⁹⁶ For a representative sample of such statutes, see the ALI's PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 120, § 7.19, Reporter's Note (4), at 897. For a survey and analysis of this legislation see Hanks, *supra* note 132.

²⁹⁷ See, e.g., DEL. GEN. CORP. L. § 102(b)(7) (1991).

conduct while eliminating the disproportionate monetary liability with which corporate litigation often threatens them.²⁹⁸

Consider also caselaw developments in connection with the duty of loyalty. One could take a strict rules-based approach to enforcement that either (i) bans all conflict of interest transactions, or (ii) permits all such transactions where procedural safeguards attend the approval process. But either approach would necessarily be over- or under-inclusive.²⁹⁹ The courts have gravitated to a middle ground between these two extremes, which recognizes that bright-line procedural safeguards can alleviate many concerns about conflict of interest transactions, but also that limited judicial review serves as an appropriate safeguard against potential abuse.³⁰⁰

Courts have also taken a middle-ground approach when interpreting corporate statutes. For example, judicial "veil piercing" doctrine in every state qualifies statutory language that literally immunizes shareholders from liability for corporate obligations.³⁰¹ Even in Delaware, considered by many to be the most "pro-management" corporate law jurisdiction, courts are reluctant to embrace an entirely permissive approach to statutory interpretation. One line of Delaware cases suggests that courts will not second-guess the purpose behind

²⁹⁸ See John C. Coffee, Jr., *Litigation and Corporate Governance: An Essay on Steering Between Scylla and Charibidis*, 52 GEO. WASH. L. REV. 789 (1984).

²⁹⁹ The duty of loyalty might be enforced, as some have argued it was during the 19th century, with a rule that conflict of interest transactions are always invalid. See Marsh, *supra* note 175. Such a rule would eliminate managerial abuses that conflict of interest transactions may entail, but would also forbid conflict of interest transactions that might be beneficial to the corporation. The duty of loyalty could also be rule-based at the other extreme, with conflict of interest transactions defined quite precisely, along with procedural approval avenues to eliminate the possibility of judicial review. See, e.g., MBCA §§ 8.60-8.63. The problem with such an approach is that the rules might be so precise as to be underinclusive, either with respect to the definition of "conflict of interest" or necessary procedural safeguards.

³⁰⁰ In Delaware, for example, courts have subjected conflict of interest transactions to "fairness" review, despite statutory rules that arguably preempt such standards where disinterested directors or shareholders have approved the matter. See, e.g., *Fliegler v. Lawrence*, 361 A.2d 218, 222 (Del. 1976) (holding that statutory approval mechanisms merely remove an "interested director" cloud from conflict of interest transactions, which remain subject to judicial scrutiny). Accord *Weatherhead v. Griffin*, 851 P.2d 993, 999-1000 (Idaho App. 1992). See generally BRANSON, *supra* note 67, § 8.01, at 393.

³⁰¹ See, e.g., MBCA § 6.22.

actions that corporate statutes permit.³⁰² But other Delaware authority supports the proposition that "inequitable action [by corporate directors] does not become permissible simply because it is legally possible."³⁰³

A potential unifying theme among these disparate decisions is that courts serve as a backstop that, through open-ended standards for corporate fiduciaries' conduct, can punish and deter undesirable activities that statutory rules might otherwise permit. Professor John Coffee, a scholar who has defended "middle ground" approaches on a variety of corporate law issues, has most clearly articulated this view. Professor Coffee argues that both traditional and contract paradigms of corporate law are "correct" in the sense that the American system supports each viewpoint, but only to a degree. That is, the institution of judicial review of fiduciaries' actions compensates for the otherwise permissive nature of American statutory corporate law, but one would not be desirable (or, judging from comparative corporate legal systems, realistically possible) without the other.³⁰⁴ The American Law Institute's recent defense of the derivative litigation remedy in the *Principles of Corporate Governance* echoes similar themes.³⁰⁵

D. Adverse Domination Developments and the Search for Middle Ground

One can identify a similar pattern in adverse domination developments. The theory was born out of a perceived need to soften the impact of bright-line limitations rules in corporate cases. Yet, as application of adverse domination tolling standards in recent failed bank and thrift cases have shown, the theory does so by moving bright-line limitations rules to the

³⁰² See, e.g., *Hariton v. Arco Electronics, Inc.*, 182 A.2d 22 (Del. Ch. 1962) ("There is [Delaware] authority . . . that the various sections of the Delaware Corporation Law conferring authority for corporate action are independent of each other and that a given result may be accomplished by proceeding under one section which is not possible, or is even forbidden under another.").

³⁰³ *Schnell v. Chris Craft Industries*, 285 A.2d 437, 439 (Del. 1971). See generally Douglas M. Branson, *The Chancellor's Foot in Delaware: Schnell and its Progeny*, 14 J. CORP. L. 515 (1989).

³⁰⁴ Coffee, *supra* note 133.

³⁰⁵ PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 120, Introductory Note to Part VII, at 4-6.

extreme "standards" end of the rules/standards continuum. Recent judicial decisions refusing to adopt the adverse domination theory or narrowly restricting its application are perhaps best understood as an attempt to restore balance to this equation.

For example, when courts decline to apply adverse domination tolling standards except in extreme situations, i.e., where the corporate plaintiff's claims implicate controlling directors in fraud or fraudulent concealment, courts leave a large segment of corporate fiduciary breaches (e.g., due care claims, duty of loyalty claims or other intentional misconduct falling short of fraud) in the realm of bright-line statutes of limitation. Even where courts draw the lines for application of adverse domination a bit more generously, e.g., to include duty of loyalty violations, courts still preserve more of the "rule-like" character of statutes of limitation than would be possible if the theory applied to all claims.

And as courts require more serious corporate fiduciary misconduct before adverse domination tolling can apply, they also make the theory's tolling standards themselves more rule-like. That is, as the categories of conduct that trigger tolling move from negligence-based claims to claims involving duty of loyalty violations (e.g., self dealing) or intentionally wrongful acts such as fraud, there is also a shift in the type of misconduct the plaintiff corporation must be able to identify to achieve tolling. No longer can the corporation invoke adverse domination based on allegedly actionable omissions by corporate fiduciaries; rather, it is required to allege that one or more corporate fiduciaries have been active participants in wrongdoing.³⁰⁶ As such it becomes more difficult for the cor-

³⁰⁶ As the Fifth Circuit observed in *FDIC v. Dawson*, 4 F.3d 1303 (5th Cir. 1993), if the adverse domination theory tolls limitations for negligence claims against corporate fiduciaries, plaintiff corporations can easily avoid the statute of limitations defense by arguing that corporate fiduciaries who failed to police alleged misconduct by their counterparts were themselves "negligent" and therefore also culpable directors for purposes of adverse domination. *Id.* at 1312. The easier it is to raise fact issues about possible director "interest," the easier it will be to postpone resolution of the adverse domination question—and hence the validity of the limitations defense—until trial. Indeed, as the Fifth Circuit later determined in a separate case, because distinctions between negligence and gross negligence are so subtle, and relate to matters of degree rather than kind, the same objections apply to use of adverse domination tolling for gross negligence claims. *RTC v.*

poration to satisfy the threshold pleading and proof requirements and courts can more frequently resolve limitations issues short of a trial on the merits.³⁰⁷

This tendency is perhaps most apparent in the Fifth Circuit's interpretation of adverse domination tolling standards under Texas law. When the court declined to apply the theory to negligence claims or to corporate claims against third parties,³⁰⁸ the court limited the scope of adverse domination tolling standards and concomitantly enlarged the scope of bright-line limitations rules. But the court did not abandon the adverse domination theory. While many courts confined its tolling standards to the fraud and fraudulent concealment context,³⁰⁹ the Fifth Circuit recognized a potentially broader scope for the theory's application, i.e., that it should toll limitations for claims implicating directors in duty of loyalty violations or other intentionally wrongful conduct.³¹⁰

The Fifth Circuit has also made adverse domination tolling standards more rule-like through procedural restrictions on their application. For example, to establish adverse domination under Texas law (as construed in the Fifth Circuit), the corporate plaintiff must plead and ultimately prove at trial that a majority of directors were actively involved in self dealing or more serious misconduct. The corporation cannot establish adverse domination in any other way, i.e., by showing conflicts of interest on the part of allegedly disinterested directors or by showing that a minority of the board engaged in wrongdoing and, despite their minority status, dominated the remaining directors and thereby dominated the corporate entity.³¹¹ A

Acton, 49 F.3d 1086, 1090-91 (5th Cir. 1995).

³⁰⁷ The only situation in which this may not be true is when the corporation is insolvent or nearly so, and the plaintiff corporation's claim is for a duty of loyalty violation that is triggered by corporate management's failure to recognize the required shift in their allegiance from shareholders to creditors. Such claims may punish corporate fiduciaries for what amounts to inattention to the financial condition of the corporation. While such claims are not "self dealing" claims in the conventional duty of loyalty sense, they do involve duty of loyalty violations. *See* Doré, *supra* note 30, at 198-203.

³⁰⁸ *See, e.g., Dawson*, 4 F.3d at 1312 (adverse domination does not apply to claims of directorial negligence); *FDIC v. Shrader & York*, 991 F.2d 216, 226-27 (5th Cir. 1993) (adverse domination does not apply to corporate claims against third parties).

³⁰⁹ *See, e.g., FDIC v. Cocks*, 7 F.3d 396, 402 (4th Cir. 1993).

³¹⁰ *Acton*, 49 F.3d at 1090-91.

³¹¹ *See RTC v. Henderson*, 61 F.3d 421, 427-28 (5th Cir. 1995) (numerical ma-

federal district court explained this restriction in terms that recognize the importance of bright-line rules:

As for the policy rationale, while it may seem counterintuitive for a state to adopt an adverse domination rule with the intent of elevating substance over form, only to erect another formal barrier that ignores substance and thereby precludes invocation of the tolling principle, there is a countervailing interest. '[S]tatutes of limitations are themselves expressions of important legislative policies.' . . . Texas recognizes that limitations periods afford plaintiffs a reasonable time to present their claims, and protect defendants and the courts from the obligation 'to deal with cases in which the search for truth may be seriously impaired by the loss of evidence' caused by lost witnesses and documents and fading memories. . . . Statutes of limitations 'should not be judicially abrogated without due consideration of those policies.' . . .³¹²

In sum, the lines courts have drawn in recent years that circumscribe application of adverse domination tolling standards are not necessarily defensible in terms of the theory's internal logic. Rather, as in the *Kubrick* line of cases that limit the scope of the discovery rule, these lines may be understood as an attempt to effect a compromise that preserves open-ended standards for fiduciary enforcement in serious cases, as well as a substantial measure of bright-line rules from limitations law that can better effect policy goals.

V. PROPOSALS FOR REFORM

Part IV has shown that both limitations law and corporate law, as well as in some recent adverse domination cases, favors a middle ground compromise between rules and standards. This Part of the Article tries to identify what may be the most defensible middle ground approaches for resolving limitations problems where corporate claims implicate controlling corporate fiduciaries in wrongdoing. It considers potential judicial

jority of board of directors must be alleged to have engaged in wrongdoing or fraud for adverse domination tolling to apply).

³¹² *RTC v. Bright*, 872 F. Supp. 1551, 1562 (N.D. Tex. 1995). As the quotation suggests, the Fifth Circuit's restrictions on the use of adverse domination tolling theories not only foster repose goals for potential defendants facing corporate claims, but also the judicial system's larger stake in those values. It is surely no accident that the federal circuit that faced the greatest number of cases arising out of the bank and thrift crisis substantially eased its workload through restrictions on use of the adverse domination theory.

and legislative reforms that might accommodate the goals of limitations policy and fiduciary duty enforcement better than the lines the courts have drawn thus far.

A. *Potential Judicial Reforms*

1. Claims Limitations

The Fifth Circuit has already embarked on what may be the most sensible judicial reform measure: limiting application of adverse domination tolling standards to cases where the claims against corporate fiduciaries allege wrongdoing that is more serious than negligence or gross negligence. Indeed, drawing adverse domination boundaries as the court apparently did in *RTC v. Acton*,³¹³ to include not only claims of fraud but also duty of loyalty violations (e.g., self dealing) and other intentional misconduct short of fraud, not only furthers limitations policies, but also echoes policy choices that corporate law has made on its own in director exculpation statutes and derivative litigation.³¹⁴ Moreover, applying the adverse domination theory only in cases alleging such fiduciary misconduct is also consistent with prevailing views on the scope of the disclosure obligations of corporate fiduciaries.³¹⁵

³¹³ 49 F.3d 1086, 1090-91 (5th Cir. 1995).

³¹⁴ The balance that corporate law has struck in statutes permitting corporate fiduciaries to limit their monetary liability to the corporation through charter amendments is instructive. While these statutes do not protect directors against fraud or fraudulent concealment claims, nor do they insulate them from all conduct outside of those categories. As already noted, charter amendment statutes generally do *not* permit exculpation for violations of the duty of loyalty (e.g., self dealing), intentional misconduct or knowing violations of the law. See *supra* note 297 and accompanying text. The American Law Institute's recommended reforms for derivative litigation contemplate a similar scope for fiduciary duty liability. The reforms include a proposed sliding scale of judicial review of director responses to derivative litigation, with duty of care claims at one end and claims involving self dealing or knowing and culpable violations of law at the other. See *PRINCIPLES OF CORPORATE GOVERNANCE*, *supra* note 120, § 7.10, cmt c. Cf. *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) (tying demand futility issue in derivative litigation to availability of business judgment rule protection for challenged board decision).

³¹⁵ For example, while the precise parameters of corporate fiduciaries' duty of disclosure is not entirely clear, there appears to be some consensus that corporate fiduciaries must disclose all *material* information when seeking shareholder action. See *supra* notes 207-08 and accompanying text. The courts have construed the "materiality" concept to require disclosure of matters that involve self dealing or

There is one potential objection to eliminating adverse domination tolling for negligence and gross negligence claims. A contractarian might argue that whether adverse domination tolling principles apply to such claims is less important than whether the corporation and its fiduciaries can contract around applicable limitations and tolling rules. And such "contracts" are possible, at least to some degree. That is, in most jurisdictions, corporations and their fiduciaries can use charter provisions to insulate their fiduciaries from monetary liability for negligence and gross negligence claims, thus mooted the limitations issue for such claims from the fiduciaries' perspective.³¹⁶ It is less clear whether a contractual modification running in the other direction (i.e., an agreement by directors not to assert the limitations defense or to lengthen the statute of limitations) would be permissible.³¹⁷ Thus, adverse domination standards may effectively provide a default rule of tolling for negligence and gross negligence claims that should apply to corporations and fiduciaries who do not "opt out" of that scheme through the charter amendment process.

Yet, this objection ignores the fact that limitations rules are not crafted solely for the benefit of litigants. Statutes of limitation also promote larger societal interests in a speedy and efficient judicial system, values that tolling principles may improperly compromise.³¹⁸ Moreover, there are some corporations, particularly those not chartered under general corporate codes, for which the charter amendment option may not available, thus making tolling *vel non* (depending on position the

more serious misconduct, since they reflect on the integrity of management. *See, e.g.,* Maldonado v. Flynn, 597 F.2d 789, 796 (2d Cir. 1979) ("Since self-dealing presents opportunities for abuse of a corporate position of trust, the circumstances surrounding corporate transactions in which directors have a personal interest are directly relevant to a determination of whether they are qualified to exercise stewardship of the company."); *Gaines v. Haughton*, 645 F.2d 761, 778 (9th Cir. 1981) ("We draw a sharp distinction . . . between allegations of conduct involving breach of trust or self-dealing—the non-disclosure of which is presumptively material—and allegations of simple breach of fiduciary duty/waste of corporate assets—the non-disclosure of which is never material for § 14(a) purposes . . .").

³¹⁶ *See supra* notes 296-97 and accompanying text.

³¹⁷ "[M]ost courts view an advance contractual agreement of waiver [of the statute of limitations defense] to be legally invalid and violative of the policy that statutes of limitations are generally beneficial to the public as well as to the individual." 1 CORMAN, *supra* note 5, § 3.2.1 at 174.

³¹⁸ *See supra* notes 27-28 and accompanying text.

court takes on negligence and gross negligence claims) a mandatory rule.³¹⁹

2. Third-Party Claims

The courts remain divided on the issue of adverse domination tolling for corporate claims against third parties, and there are as yet no signs of judicial compromise. However, there is a possible middle ground position courts might consider. As outlined below, fundamental agency law "imputation" rules may justify use of the adverse domination theory in cases where the corporation pursues claims against third parties, at least where those claims also implicate controlling corporate fiduciaries in a breach of their duty of loyalty or more serious misconduct. The argument requires a basic review of respondeat superior principles of agency and corporate law.

As in all principal-agent relationships, the directors and officers of a corporation are responsible to the corporation for any breaches of duty they commit.³²⁰ For example, unless a corporation has adopted a charter amendment limiting director liability, the corporation can recover from a grossly negligent director for the damages her misconduct causes.³²¹ The director, not the corporation, is responsible for those losses. But the same rule does not apply when third parties are harmed by corporate fiduciaries' misconduct. Under generally applicable agency and corporate law principles, an agent's negligence

³¹⁹ Some jurisdictions allow specially chartered corporations, like financial institutions, to limit the duty of care liability of their fiduciaries. See Doré, *supra* note 30, at 182 n. 202 (collecting statutes). However, it is not clear that this option is available in all states or for all specially chartered corporations. See Matthew M. Kristufek, *Trying Not to Get Burned by FIRREA: The Attempts to Shield Directors or Officers of Financial Institutions From Personal Liability*, nn. 32 & 38 (unpublished manuscript dated 12/96 on file with author) (listing states that permit charter amendment shields for financial institution directors). Federal law provides a minimum gross negligence liability standard for directors and officers of financial institutions in any event. 12 U.S.C. §1821(k) (1994). See generally Atherton v. FDIC, 117 S.Ct. 666 (1997).

³²⁰ Directors of a corporation are not agents in a technical legal sense, of course, since they occupy a *sui generis* legal position. They are appointed by shareholders, but are not subject to control by shareholders in the management of the corporation. Cf. MBCA § 8.01(b) ("All corporate powers shall be exercised by or under the authority of . . . its board of directors . . .").

³²¹ See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858,8 (Del. 1985).

maybe "imputed" to the corporation, which can then be made to pay third parties for the resulting losses.³²² Thus, the director's gross negligence in the previous example would be imputed to the corporation if the corporation sued a third party on a related claim, and that third party raised a contributory (or comparative) negligence defense against the corporation.³²³

If a corporate fiduciary's misconduct violates her duty of loyalty to the corporation, however, exceptions to general imputation rules of agency and corporate law may apply. Where the fiduciary's interests are "completely adverse" to those of her corporation, her knowledge and conduct are not imputed to the corporation, even where third party interests are affected.³²⁴ Of course, the "complete adversity" requirement of the exception means that its parameters are not precisely coterminous with duty of loyalty violations, which can arise from any conflict of interest situation.³²⁵ Nonetheless, where a corporate fiduciary's actions are completely adverse to her corporation, she has necessarily breached her duty of loyalty. Thus, for at least some duty of loyalty violations by corporate fiduciaries, and for all more serious misconduct, the adverse interest imputation exception supports application of adverse domination tolling principles to related third party claims.³²⁶

Recall that the adverse domination theory is itself rooted in duty of loyalty concerns—that corporate fiduciaries do not want the corporation to sue them for any breach of duty they may have committed, whether the breach was mere negligence

³²² See Doré, *supra* note 30, at 172-73. Of course the corporate fiduciary, as agent, is also responsible to the third party. Cf. RESTATEMENT (SECOND) OF AGENCY ch. 11, Topic 3 (1958). However, as in any respondeat superior situation, the corporation must bear the third party's loss if the agent does not or cannot cover it.

³²³ See Doré, *supra* note 30, at 196. The classic example would be a malpractice claim by the corporation against its lawyers or accountants for failing to prevent or detect negligent mismanagement by corporate directors. The lawyers or accountants might assert the directors' mismanagement as a contributory or comparative negligence defense to the malpractice claim. See Doré, *supra* note 30, at 132-33.

³²⁴ See generally RESTATEMENT (SECOND) OF AGENCY § 282 (1957); 3A FLETCHER, CORPORATIONS, *supra* note 38, § 787.

³²⁵ Doré, *supra* note 30, at 174.

³²⁶ See generally Doré, *supra* note 30, at 171-75 (making similar argument with respect to imputation defenses generally).

or more serious misconduct.³²⁷ In terms of imputation theory, there is “complete adversity” between the fiduciary and the corporation with respect to all such claims. One might then argue that the adverse domination theory should logically suspend limitations on corporate claims against third parties that implicate corporate fiduciaries in any sort of misconduct. But that approach bootstraps fiduciary violations for which the corporation is expected to absorb the risk of harm to third parties (e.g., negligence-based claims) into “complete adversity” duty of loyalty violations for purposes of adverse domination tolling.

A more limited use of adverse domination tolling in connection with third party claims would be more consistent with underlying agency and corporate law principles. The dividing line suggested earlier for D & O claims, i.e., one that restricts adverse domination tolling for claims against third parties to situations where the related corporate fiduciary breach involves conduct that amounts to a violation of the duty of loyalty or more serious misconduct, works fairly well. While not a precise fit with underlying agency and corporate law imputation rules,³²⁸ this compromise position more closely approximates the risk allocation principles upon which such rules are based.³²⁹

3. Simplifying Factual Determinations

Another set of reforms courts might implement to achieve better compromises between bright-line limitations rules and adverse domination tolling standards concerns procedures for resolving the factual issues upon which adverse domination tolling standards depend.

³²⁷ See *supra* notes 173-75 and accompanying text.

³²⁸ See *supra* notes 324-26 and accompanying text.

³²⁹ See Doré, *supra* note 30, at 173-74. This approach would seem particularly appropriate in jurisdictions that, like the Fifth Circuit, generally restrict application of adverse domination tolling to such claims. See, e.g., *RTC v. Acton*, 49 F.3d 1086, 1090-91 (5th Cir. 1995).

a. *Pleading Standards*

Courts might consider whether adverse domination tolling questions could be resolved on the basis of the pleadings. If the corporate plaintiff makes sufficiently detailed allegations of director involvement in wrongdoing or conflict of interest with respect to the litigation claims at issue, the court might simply toll limitations and end the matter. Conversely, the court could refuse to toll where plaintiff cannot plead in sufficient detail concerning these issues.³³⁰ This reform might work best where adverse domination tolling standards require allegations of a fairly specific nature, i.e., that a majority of directors have actively engaged in self dealing or more serious wrongdoing. Federal courts used a similar approach for resolving the issue of demand futility in derivative cases prior to the Supreme Court's decision in *Kamen v. Kemper Financial Services, Inc.*³³¹ Under these standards, the federal courts excused demand only if plaintiff could plead that "a majority of the board was interested or knowingly participated in a manner that amounted to aiding and abetting the wrong."³³²

The objections to an approach that resolves disputed fact issues on the basis of pleadings are fairly obvious, and they have long been voiced in the derivative litigation context. If pleading standards are too high, plaintiffs may be unable to meet them without the benefit of discovery. If pleading standards are too low, plaintiffs can sidestep limitations defenses through artful pleading. Either way, courts must make premature factual determinations without the benefit of developed evidence.³³³

³³⁰ Cf. *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984).

³³¹ *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90 (1991).

³³² PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 120, § 7.03, cmt. d. at 56 (citing *Weiss v. Temporary Invest. Fund*, 692 F.2d 928 (3d Cir. 1982)). *Kamen* held that state law should control the demand futility issue and thus overruled the "federal" standards *Weiss* and other courts had established. 500 U.S. at 108-09.

³³³ See PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 120, § 7.03, cmt. d. at 56-57. *Accord DEMOTT*, *supra* note 176, § 5.13, at 50.

b. *Judges as Fact-Finders*

Another alternative is to make the judge the fact-finder on issues relevant to adverse domination tolling. Some jurisdictions have taken this very step when applying the discovery rule, reasoning that if the court can determine the tolling question through factual hearings prior to trial, then limitations values will be better served.³³⁴ If the court has determined that limitations have expired, defendant will not face the risks of a trial on the merits, nor will the court have to conduct one. Yet, because adverse domination issues are quite complex, and are also closely linked to the merits of the corporation's underlying claim,³³⁵ separating trial of the limitations question from the case on the merits may disserve values of judicial economy.³³⁶

c. *Shareholder Notice*

Another possible reform goes more directly to the heart of adverse domination tolling standards. Recall that the goal of the adverse domination inquiry is to determine the point at which a corporation is able to pursue litigation against its fiduciaries in light of the problems of disability, concealment and notice that their control over the corporation engenders. But when this inquiry is answered by focusing on the board of directors' makeup, knowledge and conduct, complex factual issues result that can make the limitations issue a moot point if postponed until trial. Thus, courts should consider whether the inquiry might be conducted using another criteria.

One possibility, drawn from existing Delaware tolling standards for derivative litigation, is notice to shareholders. Recall that Delaware courts toll limitations for derivative claims that allege self dealing or more serious misconduct by

³³⁴ See, e.g., *Lopez v. Swyer*, 300 A.2d 563, 567 (N.J. 1973) (deciding that in cases where the discovery rule applies, the court should determine the issue of plaintiff's "discovery" prior to trial).

³³⁵ See *supra* Part IV.A.

³³⁶ In this regard, Delaware courts' experiences in derivative litigation is instructive. The multiple hearings required in Delaware derivative procedure may needlessly postpone judicial consideration of the merits of the case. See *Kaplan v. Wyatt*, 484 A.2d 501 (Del. Ch. 1984).

directors.³³⁷ That is, when a Delaware shareholder plaintiff complains of such misconduct, the resulting claim may be timely even if facially time-barred by the statute of limitations measured on an occurrence basis. To prevail on limitations the shareholder must plead and prove that he sued within the limitations period, measured from the point the shareholder first knew or had reason to know of the facts constituting the alleged wrong.³³⁸

The appeal of such a shareholder notice test lies in the avoidance of complex issues of director disinterest, knowledge, ability and motivation to sue with respect to potential corporate claims.³³⁹ Indeed, there is precedent for the use of a shareholder notice standard in the adverse domination context. In *United Park City Mines Co. v. Greater Park City Co.*,³⁴⁰ the Utah Supreme Court held that disclosure of alleged self dealing transactions in proxy materials made available to all shareholders ended any tolling that might have otherwise applied based on alleged adverse domination by members of the board.³⁴¹

Of course, some might argue that the issue of sufficiency of notice will be equally difficult to resolve as board domination. But limited precedent suggests that this is not the case. For example, Delaware courts have held that public disclosure to shareholders is an acceptable substitute for "actual notice."³⁴² And if the judicial task is to measure the adequacy of public disclosures by the corporation, the court should be able to

³³⁷ *Kahn v. Seaboard Corp.*, 625 A.2d 269 (Del. Ch. 1993). See *supra* Part II.C.3.

³³⁸ *Kahn*, 625 A.2d at 276-77.

³³⁹ These issues would remain relevant, of course, where a court was reviewing a board committee's decision not to pursue claims that implicate corporate fiduciaries. The adverse domination tolling theory operates in the *absence* of such decisions.

³⁴⁰ *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880 (Utah 1993).

³⁴¹ *Id.* at 887 ("we conclude that as a matter of law [that] (1) the shareholders, as a class, were given sufficient information in the proxy statement that was mailed to them to put them on notice of further inquiry into the fairness of the restructuring agreements . . .").

³⁴² See, e.g., *In re USACafes, L.P. Litigation*, Civ. A. No. 11146 1993 WL 18769, 18 Del. J. Corp. L. 1204 (Del. Ch. 1993) (stating that shareholders are put on inquiry notice that ends tolling where public filings disclose the basic facts concerning transactions about which the corporation later complains).

resolve the limitations issue without a trial.³⁴³ Moreover, the corporation (or its shareholders if the suit were derivative in nature) would not need discovery to establish the merits of any tolling arguments, since the information that controls the outcome of the issue will by definition be that which the corporation has already made available.

Finally, so long as adverse domination tolling is limited to duty of loyalty violations or more serious misconduct by corporate fiduciaries, determining adverse domination based on disclosure of these issues to shareholders would also be consistent with current minimum thresholds for directorial disclosure obligations.³⁴⁴

B. *Potential Legislative Reforms*

Statutes might be a better tool for demarking, in comprehensive fashion, a middle ground in which bright-line statutes of limitation and tolling theories can operate side by side in the corporate arena. Statutes can draw sharper lines and address policy concerns more fully than judicial precedent. Indeed, statutes of limitation are supposed to embody a legislative compromise that accommodates not only defendants' desire for repose, but also plaintiffs' need for a reasonable opportunity to protect their rights.³⁴⁵ The balance of the Article reviews statutory limitations provisions that currently apply to claims in corporate fiduciary litigation and then suggests reforms that might make those statutes useful vehicles for middle ground compromise.³⁴⁶

³⁴³ See, e.g., *In re Maxxam Inc./Federated Dev. Shareholders Litig.*, 1995 WL 376942, 21 Del. J. Corp. L. 262 (Del. Ch. 1995) (deciding, in the context of a motion to dismiss, that tolling continued where public disclosures obfuscated pertinent facts that would otherwise have put shareholders on inquiry notice).

³⁴⁴ See *supra* note 315 and accompanying text.

³⁴⁵ See, e.g., 1 CORMAN, *supra* note 5, § 1.1, at 14 ("[T]he legislature is expected to assess the nature of the subject and the purpose of the enactment and to assure potential litigants a balanced attitude.") (citations omitted); Johnson, *supra* note 26 at 631-32 ("[S]tatutes [of limitations] are said to represent a balancing of, on the one hand, 'the interests in favor of protecting valid claims' and, on the other hand, 'the interests in prohibiting the prosecution of stale ones.'") (footnotes citing Supreme Court cases omitted). See also Heriot, *supra* note 100, at 942-43 (describing compromises that are necessary to create limitations rules).

³⁴⁶ Professor Robert W. Hamilton, of the University of Texas Law School, reviewed this Article prior to publication and advocated a slightly different approach.

1. Currently Applicable Limitations Provisions

To date, legislative policy on the issue of limitations for corporate fiduciary claims has been conspicuous by its absence. Only three states—Michigan, South Carolina and Tennessee—have statutes of limitation that expressly apply to breach of duty claims against corporate directors and officers.³⁴⁷ These statutes impose a one or two year limitations period measured from discovery (an undefined concept) of the breach of duty claim, but subject to a three-year outer limit of repose.³⁴⁸ New York imposes a six year time limit on suits against corporate directors “to recover damages for waste or for an injury to property,” but includes no express reference to directors’ fiduciary duties, nor any provision concerning discovery or repose.³⁴⁹ California and nine other states have substantially identical statutes of limitation that cover actions

He pointed out that Congress could have avoided much of the controversy over adverse domination and other limitations issues in failed bank and thrift litigation by adopting special limitations provisions that would have applied in the receivership context. Such relief, Professor Hamilton argues, would have appropriately compensated for conflicts of interest and other moral hazard problems that prompted managing owners of financial institutions to take undue risks with insured deposits prior to the institutions’ ultimate insolvency and receivership. I agree with Professor Hamilton about the conflict of interest and moral hazard problems (see Doré, *supra*, note 30, at 184-96), but I am not persuaded that Congressional relief would have been appropriate. My concern is that such relief, to the extent it changed the time limits for litigation *after* a financial institution became insolvent, would have altered the substantive rights of the parties based upon an event of insolvency, something a receivership proceeding is not supposed to do. See Doré, *supra* note 30, at 145. The statutory relief this Part of the Article proposes is prospective only, and thus does not alter existing rights. Moreover, the proposed statutes would apply to all corporate entities, not just financial institutions, and all corporate fiduciary litigation, whether or not it occurs in the context of receivership.

³⁴⁷ MICH. COMP. LAWS § 450.1541a.(4) (1990) (earlier of two years from discovery or three years from occurrence); S.C. CODE ANN. §§ 33-8-300(e), 33-8-420(e) (Law Co-op. 1990) (same); TENN. CODE ANN. § 48-18-601 (1995) (earlier of one year from discovery or three years from occurrence).

³⁴⁸ See *supra* notes 292-94 and accompanying text (discussing differences between statutes of limitation and statutes of repose).

³⁴⁹ N.Y. C.P.L.R. § 213(7) (McKinney 1990). A recent decision seems to eliminate much of this uncertainty. See *Whitney Holdings, Ltd. v. Givotovsky*, No. 96 Civ. 8388 1997 WL 790579 at *6 (S.D.N.Y. 1997) (“The legislative history of Section 213(7) and principles of statutory construction make clear that Section 213(7) supplants all other statutes of limitation potentially applicable to a suit on a corporation’s claim against its director, officer or shareholder).

against "directors, shareholders or members of a corporation . . . to recover a penalty or forfeiture imposed, or to enforce a liability created by law."³⁵⁰ However, courts disagree whether these statutes impose any time limits on common law breach of fiduciary duty claims against corporate directors and officers, or whether they apply only to claims for statutory violations.³⁵¹

2. Suggested Reforms

a. *Express Coverage*

The dearth of specific statutory limitations rules for corporate fiduciary claims is somewhat surprising, given modern trends of codification in corporate law.³⁵² The omission is even more striking when one considers that statutes of limitation originated in commercial settings, with their attendant need for repose.³⁵³ Perhaps legislatures have intentionally

³⁵⁰ "[A]ctions against directors, shareholders, or members of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law . . . must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created." CAL. CIV. PROC. § 359 (West 1982). The states of Idaho, Missouri, Montana, Nevada, North Dakota, South Dakota, Utah, Vermont and Wisconsin all have similar statutes, though the time periods used vary slightly. See IDAHO CODE § 5-237 (1990) (three years); MO. ANN. STAT. § 516.420 (West 1952) (six years); MONT. CODE ANN. § 27-2-211(3) (1997) (three years); NEV. REV. STAT. § 11.380 (1995) (three years); N.D. CENT. CODE § 28-01-33 (1991) (six years); S.D. CODIFIED LAWS § 15-2-19 (Michie 1984) (six years); UTAH CODE ANN. § 78-12-27 (1996) (three years); VT. STAT. ANN. tit. 13, § 4511 (1974) (six years); WIS. STAT. ANN. § 893.60 (1997) (six years). South Carolina also has such a provision in addition to the specific D & O statute of limitations cited in note 347, *supra*. S.C. CODE ANN. § 15-3-530 (Law. Co-op. 1977).

³⁵¹ See, e.g., *Briano v. Rubio*, 54 Cal. Rptr. 2d 408 (Cal. Ct. App. 1996) (holding that California limitations provision applies only to statutory claims not actionable at common law); *Hoover v. Galbraith*, 498 P.2d 981, 984 (Cal. 1972) (in bank) (same); *Melgard v. Moscow Idaho Seed Co.*, 251 P.2d 546 (Idaho 1952). See also *Davis v. Mills*, 194 U.S. 451 (1904) (applying Montana statute of limitations to claims against corporate directors arising out of failure to file statutorily required reports); *Adams v. Clarke*, 22 F.2d 957 (9th Cir. 1927) (applying Montana statute of limitations to statutory claims against bank directors for illegal loans). *But see* *Quinn v. Elliott*, No. 94-15181 1996 WL 233144 (9th Cir. 1996) (interpreting Nevada's essentially identical limitations provision to cover common law breach of fiduciary duty claims); *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880 (Utah 1993) (same).

³⁵² See *supra* Part III.B.2.

³⁵³ It was the need for repose in real property law and other commercial set-

left the issue of limitations to judicial development along with the rest of corporate fiduciary law. More likely, the current state of affairs is simply a product of the statute of limitations' gradual replacement of the laches defense in corporate fiduciary litigation over the course of this century.³⁵⁴ Because this process occurred through judicial decision rather than legislation, no clear statutory model emerged for states to emulate.

In any event, in the absence of specific legislative direction concerning corporate fiduciary claims, American courts have handled the limitations issue in a variety of ways. Courts in many jurisdictions first categorize breach of duty claims against corporate directors and officers as either torts or breaches of contract, and then apply the corresponding statute of limitations.³⁵⁵ In some jurisdictions, courts apply a more specific limitations rule, albeit one that does not expressly reference corporate fiduciary claims. For example, Delaware courts use the three-year limitations period applicable to actions "to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant."³⁵⁶ Colorado courts use the limitations rule applicable to breach of fiduciary duty claims generally.³⁵⁷ In still other states, courts apply a residual or other general statute of limi-

tings that gave birth to modern statutes of limitations. See Heriot, *supra* note 100, at 923-25 (describing origin of statutes of limitations in medieval England as an effort to quiet title to real property). See also Green, *supra* note 28, at 971-72 (tracing history of limitation in personal injury actions and noting that limitations rules first emerged in commercial settings).

³⁵⁴ See *supra* Part II.A.

³⁵⁵ Compare, e.g., *FDIC v. Dawson*, 4 F.3d 1303 (5th Cir. 1993) (claims against directors and officers of failed bank sounded in tort and were therefore governed by Texas' two year statute of limitations), and *Crosby v. Beam*, 615 N.E.2d 294 (Ohio Ct. App. 1992) (minority stockholder's claims against corporate directors and officers and corporate entity governed by Ohio's four year tort statute of limitations), with *RTC v. Armbruster*, 52 F.3d 748 (8th Cir. 1995) (claims against directors of failed savings and loan governed by Arkansas three year limitations provision for contract actions), and *Bibo v. Jeffrey's Restaurant*, 770 P.2d 290 (Alaska 1989) (claims against corporate directors governed by Alaska's six year statute of limitations for contract actions).

³⁵⁶ DEL. CODE ANN. tit. 10, § 8106 (1975).

³⁵⁷ *Michaelson v. Michaelson*, 923 P.2d 237 (1995), *rev'd and remanded*, 939 P.2d 835 (1997) (applying 3-year limitations period of COLO. REV. STAT. § 13-80-101(1)(f) (1997)). See also *Lawly Brooke Burns Trust v. RKR, Inc.*, 691 So.2d 1349, 1352 (La. Ct. App. 1997) (Louisiana's 10-year prescriptive period applies to breaches of fiduciary duty claims against corporate directors) (*dicta*).

tations to such claims.³⁵⁸ In roughly half the states it is not clear which statute of limitations applies to corporate fiduciary claims.³⁵⁹

Enactment of express limitations provisions for corporate fiduciary claims would eliminate much of this uncertainty, although legislatures would need to draft such statutes with a fair degree of precision to accomplish that goal. In the few states that have adopted express limitations provisions, outcomes remain unpredictable because most statutes are not specific about which "breaches of duty" are covered. For example, the Michigan, South Carolina and Tennessee statutes of limitation each reference the broad duties their respective state corporation codes impose on corporate managers, but do not otherwise define the character of the corporate fiduciary claims to which they apply.³⁶⁰

This lack of clarity essentially nullified the effect of the Tennessee statute of limitations provision in *RTC v. Wood*.³⁶¹ The court applied the statute to those claims against directors and officers that were styled as "breach of fiduciary duty," but refused to apply the statute to causes of action against the same directors and officers for "breach of implied contract," "gross negligence" and "negligence per se," even though all of

³⁵⁸ See, e.g., *FDIC v. Cocke*, 7 F.3d 396 (4th Cir. 1993) (claims against former directors of failed savings and loan governed by Virginia's one year residual statute of limitations); *Hecht v. RTC*, 635 A.2d 394 (Md. 1994) (claims against former directors of failed savings and loan governed by Maryland's three year residual statute of limitations).

³⁵⁹ Precedent in Massachusetts illustrates the problem one typically encounters when researching limitations rules in many jurisdictions. One recent case holds that D & O claims are governed by the statute of limitations applicable to tort claims (see *Demoulas v. Demoulas Supermarkets, Inc.*, Civ. A. No. 90-2927(B) 1995 WL 476772 (Mass. Super.), while another holds that such claims are governed by the statute of limitations for breaches of contract (see *RTC v. Gladstone*, 895 F. Supp. 356, 374 (D. Mass. 1995)).

³⁶⁰ See *supra* note 347 and accompanying text. A recent decision interpreting the Michigan statute of limitations held it applicable to "any action for breach of fiduciary duty against a corporate officer or director." *Baks v. Moroun*, No. 92-438547 1998 WL 27550 (Mich. App. 1998).

³⁶¹ *RTC v. Wood*, 870 F. Supp. 797 (W.D. Tenn. 1994).

the claims in the case were premised on the same fact pattern.³⁶² The "California model" limitations provision, in effect in ten states,³⁶³ suffers from an even more basic problem: courts disagree whether these statutes impose any time limits on common law breach of fiduciary duty claims against corporate directors and officers.³⁶⁴

An express limitations provision that comprehensively covers D & O claims would cure these problems. And to the extent that fiduciary breaches entail varying types of claims, the statute of limitations could vary the time periods associated with each. For example, and as already described, most jurisdictions now allow corporations to waive claims against corporate directors and officers for monetary damages arising out of most breaches of fiduciary duty, but not for certain categories of serious misconduct.³⁶⁵ A limitations provision might make similar distinctions, establishing a comprehensive statute of limitations for most breaches of duty by directors and officers, with a more generous period applicable to claims for serious misconduct. A sample provision might read:

A. Except as otherwise provided in Part (B), any action for damages brought against a director or officer of a corporation for breach of duty as a director or officer shall be filed within X years of the date of the alleged act or omission constituting such breach. This time limit applies whether such breach of duty creates a cause of action sounding in contract, express or implied; negligence; gross negligence; negligence per se; or any other cause of action.

B. If the alleged breach of duty by a director or officer of a corporation constitutes a breach of the duty of loyalty, a bad faith act or omission, or an act or omission involving intentional misconduct or a knowing violation of law, or arises out of a transaction from which the director or officer derives an improper personal benefit, then the time period specified in Part (A) shall instead be Y years.³⁶⁶

³⁶² *Id.* at 806.

³⁶³ *See supra* note 350.

³⁶⁴ *See supra* note 351.

³⁶⁵ *See supra* notes 297-98 and accompanying text.

³⁶⁶ The only corporate statute of limitations that currently takes such a "two-tiered" approach is Louisiana's statute of limitations for claims against directors and officers of financial institutions. LA. REV. STAT. ANN. § 6:787 (West 1986) (setting limits of one year from discovery, but no later than three years from occurrence for due care claims, and similar two and four year limits for more serious misconduct).

b. *Tolling and Repose*

The statute of limitations suggested above draws distinctions between negligence-based (i.e., duty of care) D & O claims and claims for more serious misconduct. To the extent that limitations periods for both groups of cases are sufficiently generous (that is, longer than the one, two or three year periods that most existing statutes have adopted), then tolling issues might not arise. Yet, for the claims listed in Part (B) of the statute, additional judicial flexibility might be appropriate. It is in these cases that courts are in greatest agreement concerning the use of adverse domination tolling theories.

A statute of limitations might draw similar lines by adding an express discovery rule tolling exception for these claims. Courts could then, as they have already done in so many adverse domination decisions, use adverse domination to define the concept of corporate "discovery." There would be no authority concerns about courts taking this step, since the limitations statute will necessarily embody the legislature's decision about when use of the discovery rule is appropriate. Indeed, the legislature could confine the dimensions of corporate discovery if it desired, by defining the concept of corporate notice.³⁶⁷ Disclosure to shareholders might be an appropriate benchmark if bright-line discovery standards are desired.³⁶⁸

But even if courts retain the power to define corporate notice through existing adverse domination concepts, an express limitations provision will enable the legislature to confine the scope of such judicial standards within manageable bounds. That is, an express statute of limitations for corporate fiduciary claims can include an outer limit of repose beyond which tolling concepts cannot operate. As in many modern discovery rule statutes, the legislature could provide that all claims against corporate officers and directors are barred after a certain number of years.³⁶⁹ As an example, Part (B) of the proposed model limitations provision might revised to read as

³⁶⁷ Cf. U.C.C. (1995) § 1-201(27) (defining notice and knowledge concepts as applied to "organizations," which include corporations).

³⁶⁸ See *supra* notes 337-44 and accompanying text.

³⁶⁹ See 2 CORMAN, *supra* note 5, § 11.2, at 170-71.

follows:

B. If the alleged breach of duty by a director or officer of a corporation constitutes a breach of the duty of loyalty, a bad faith act or omission, or an act or omission involving intentional misconduct or a knowing violation of law, or arises out of a transaction from which the director or officer derives an improper personal benefit, then the time period specified in Part (A) shall instead be *the later of Y years from the alleged act or omission constituting such breach, or Y years from the date the corporation discovers or should have discovered the alleged act or omission in the exercise of reasonable diligence. In all events, any claims covered by this Part (B) shall be barred Z years after the date of the alleged act or omission.*

Such a two-pronged legislative approach to limitations problems in corporate fiduciary litigation provides both a rules and a standards dimension that neither limitations rules nor adverse domination tolling standards alone can provide. If sanctioned by legislative action, such an approach creates no judicial authority concerns and has the added benefit of providing notice to both potential litigants and courts of the rules that should apply.³⁷⁰

3. Potential Constitutional Objections

The "statute of repose" dimension of the proposed legislative solution outlined above might be subject to constitutional objections. For example, is there any rational basis, as Due Process requires, for a statute of repose that cuts off a corporation's claim against its fiduciaries before the corporation has actual or constructive notice of the claim? One might even argue that such a statute is void as a denial of Equal Protection to third parties (e.g., lawyers and accountants) who remain at risk for related claims if the corporation does not discover the claims under traditional imputation standards. One might also contend that such a statute denies corporations "access to the courts," at least where such access is guaranteed by state constitutional provisions. Similar objections have long plagued statutes of repose, and have produced a wealth of caselaw and commentary.³⁷¹

³⁷⁰ See also Baughman, *supra* note 18, at 1116-18 (making similar statute of repose proposal, but without drawing any distinctions among types of potential fiduciary claims).

³⁷¹ See, e.g., Kratky, *supra* note 28; Terry Morehead Dworkin, *Product Liability*

While a detailed analysis of all the possible constitutional issues such challenges would entail is beyond the scope of this Article, a few observations are possible. First, most statutes of repose have been held constitutional.³⁷² Second, the law has long recognized the importance of repose interests in commercial settings.³⁷³ This Article has demonstrated the serious obstacles adverse domination theory places in the path of repose for corporate directors and officers, as well as how the theory's tolling standards upset the otherwise prevailing balance in limitations and corporate law. These policy concerns may well be adequate to satisfy any necessary rational basis review that constitutional standards might entail.

Second, constitutional challenges to statutes of repose have been most successful on grounds that they deny equal protection to classes of defendants they do not cover.³⁷⁴ In the corporate fiduciary context, the only plausible additional defendant categories would be third party advisers to corporations, like lawyers and accountants, but these parties will not inevitably be involved in corporate fiduciary duty claims. Moreover, since these defendants are increasingly subject to discovery rule tolling standards in all aspects of their practice, they might best be protected with statutes of repose directed to their professions generally.

Finally, and as Professor Richard Epstein has counseled, courts should not strike down statutes of repose without due regard to the advantages of their enforcement.³⁷⁵ There is

of the 1980s: "Repose is not the Destiny" of Manufacturers, 61 N.C. L. REV. 33 (1982); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579 (1981).

³⁷² See, e.g., McGovern, *supra* note 371, at 581, 622-24 (summarizing decisions on the constitutionality of statutes of repose covering product liability claims).

³⁷³ See Dworkin, *supra* note 371, at 37.

³⁷⁴ See 1 CORMAN, LIMITATIONS, *supra* note 5, § 1.3.2.3, at 34 (describing architecture and building statutes of repose).

³⁷⁵ See Epstein, *supra* note 27, at 1218.

nothing inevitably "correct" about adverse domination tolling theory. Corporate law functioned well for many years without it, and its recent emergence may unduly upset the balance that both limitations and corporate law have long strived for. Indeed, statutes of repose may in the end permit tolling theories like adverse domination to remain viable, for unless some sense of balance is restored, courts are likely to continue to reject or restrict open-ended tolling standards in the spirit of compromise. The few decisions available suggest that courts will enforce statutes of repose in the corporate context.³⁷⁶

CONCLUSION

In both limitations and corporate jurisprudence the opposing interests of rules and standards create an inevitable, and perhaps desirable, tension in the law. Statutes of limitation are bright-line legal rules, but limitations law tempers their mechanistic application in exceptional cases with standards-based discovery principles. Traditional corporate fiduciary law naturally gravitates towards standards, but modern corporate law's increasing reliance on rules adds desirable certainty and predictability to their application. In both cases, the movement towards the middle ground recognizes that neither approach alone provides an ideal model for solving legal problems.

The statute of limitations defense in corporate fiduciary litigation, and the adverse domination tolling theory's response to it, collapse these issues into a single paradigm. As the FDIC discovered in the wake of the bank and thrift crisis, if courts impose time limits on corporate fiduciary claims through mechanistic application of rule-based statutes of limitation, the scope of judicial enforcement of such claims may be unreasonably restricted. On the other hand, as courts and litigants discovered when the FDIC invoked the adverse domination theory as an antidote to limitations defenses, tolling theories that substitute open-ended fiduciary standards for bright-line statutes of limitation may err too far in the other direction.

Two sets of responses are possible: judicial line drawing that may be difficult to defend from a doctrinal perspective,

³⁷⁶ *Baks v. Moroun*, 1998 WL 27550 (Mich. Ct. App. 1988) (enforcing repose provision in Michigan's D & O statute of limitations).

but which nonetheless preserves the policy goals of limitations; or a more comprehensive statute of limitations that itself provides room for the operation of both rules and standards. The recent pendulum swing in adverse domination decisions reflects courts' efforts to do their part. It remains to be seen whether state legislatures will do theirs.

