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Comment

*637 TRUST ME, I'M A LAWYER: RESTORING FAITH IN FIDUCIARIES BY DUMPING "DUE DILIGENCE" AND TOLLING THE STATUTE OF LIMITATIONS FOR POSTPETITION BREACH OF FIDUCIARY DUTY IN CHAPTER 11

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Introduction

Imagine the following scenario: Corporation X files for bankruptcy under chapter 11 of the U.S. Bankruptcy Code ("Bankruptcy Code"). The directors of X, as the debtor-in-possession ("DIP"), propose what appears to be a feasible reorganization plan and the plan is confirmed. The plan, however, which depends on maintaining X's current business contracts for its success, was formulated under false pretenses. After confirmation of the plan, the DIP proceeds to divert the very business contracts that would have allowed Corporation X to successfully reorganize to Corporation Y, which is wholly owned by X's directors. As a result of the DIP's usurpation of Corporation X's business contracts, the reorganization fails. This is one example of how the DIP can breach her fiduciary duty of loyalty in chapter 11. [FN1]

As the above scenario demonstrates, the ability to enforce fiduciary duties in chapter 11 is crucial because breaches of fiduciary duty can cause a potentially successful reorganization to fail. There is a plethora of scholarly commentary concerning fiduciary duties in chapter 11. [FN2] Few scholars, ***638** however, have discussed the problems associated with enforcing those fiduciary duties. [FN3]

Statutes of limitations hinder one's ability to enforce fiduciary duties because of the nature of fiduciary relationships; a beneficiary will often fail to file a timely action because she has trusted the fiduciary was acting in her best interests. This is especially likely during a complex reorganization, which necessitates the beneficiary placing trust and reliance in others, especially those with fiduciary obligations. In this context, barring actions because the statute of limitations has run is detrimental--it effectively encourages, rather than deters, fiduciaries to breach their obligations. [FN4]

Further, the tolling provisions available in bankruptcy, which are intended to ameliorate the harsh application of the statute of limitations, are inadequate because they only prevent the running of the statute of limitations if a plaintiff has exercised due diligence to discover her claim. [FN5] It is inconsistent with the very nature of a fiduciary relationship to require the beneficiary to engage in "aggressive oversight" of her fiduciary. [FN6]

This Comment argues Congress should create a federal "reliance on fiduciary" tolling provision under chapter 11 of the Bankruptcy Code that would automatically toll the statute of limitations if a plaintiff failed to file suit because of reliance on a fiduciary relationship. Part I of this Comment discusses the fiduciary duties of the DIP, the chapter 11 trustee, and reorganization committees. Part II discusses the rationale for statutes of limitations and the

tolling provisions applied in chapter 11.

Part III collects and analyzes bankruptcy and non-bankruptcy cases that have discussed the effect of a fiduciary relationship on a tolling analysis. These decisions conflict on whether and to what extent a fiduciary duty should influence a decision to toll statute of limitations. Part IV discusses Burtch v. Ganz (In re Mushroom Transportation Co.), a recent Third Circuit opinion that considered the effect reliance on a fiduciary relationship should have on ***639** tolling. [FN7] Although the Third Circuit applied a tolling provision that requires the plaintiff to act with due diligence, [FN8] this opinion is important because the court's reasoning supports the case for a federal fiduciary tolling provision.

In light of the conflicting case law and the Third Circuit's recent opinion, Part V calls upon Congress to create a federal fiduciary tolling provision because it would comport with the purposes and policies of both limitations law and bankruptcy law and empower plaintiffs to enforce the fiduciary duties in chapter 11. As a preliminary matter, this Part explains why a bankruptcy court can apply a federal tolling provision. Part V then argues a federal fiduciary tolling provision is justified because it promotes the policies and overall goals of chapter 11 by deterring breaches of fiduciary duty. Likewise, the fiduciary tolling provision is in accord with the policies of limitations law. Additionally, a fiduciary tolling provision would create uniformity and certainty for the major parties in chapter 11 reorganizations. Finally, creating a fiduciary tolling provision is imperative because the current tolling provisions fail to appreciate the nature of a fiduciary relationship.

I. Fiduciary Duties in Chapter 11

A fiduciary relationship contains “a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.” [FN9] The Supreme Court has warned the “whole body of law” imposes “the most rigorous responsibilities for fair dealing” on fiduciaries that represent the rights of others. [FN10] According to Justice Frankfurter, “[T]o say that a man is a fiduciary only begins [the] analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations?” [FN11] This section will use Justice Frankfurter's analysis to discuss the fiduciary duties chapter 11 imposes upon a DIP, a chapter 11 trustee, and a reorganization committee.

***640** A. Fiduciary Duties of the DIP

As an alternative to liquidation, an insolvent debtor-corporation may file under chapter 11 of the Bankruptcy Code and attempt to reorganize. [FN12] The debtor immediately becomes the DIP upon filing for chapter 11. [FN13] Generally, the DIP remains in control of the estate for the duration of the chapter 11 proceedings; however, a court may remove the DIP and appoint a trustee “for cause.” [FN14]

Section 1107 of the Bankruptcy Code governs the rights, powers, and duties of the DIP. [FN15] Pursuant to this provision, the DIP is entrusted with the rights and powers of a chapter 11 trustee under § 1106. [FN16] The DIP must also perform most of the duties of a chapter 11 trustee. [FN17] Most importantly, the DIP is authorized to continue operating the business during the reorganization proceedings. [FN18] In chapter 11, the directors and officers of the corporation control the corporate DIP, therefore, it is the directors and officers of the DIP who owe fiduciary duties. [FN19]

The DIP is a fiduciary of the bankruptcy estate and all parties who have an interest in it. [FN20] Parties who have an interest in the estate include secured creditors, unsecured creditors, and stockholders of the debtor-corporation. [FN21] Therefore, courts have held the DIP owes fiduciary duties to these three parties. [FN22]

***641** The DIP's officers and directors continue to owe the same fiduciary duties in bankruptcy that officers and

directors owe a corporation and its stockholders outside of bankruptcy. [FN23] These fiduciary duties are generally referred to as the duty of care [FN24] and the duty of loyalty. [FN25]

1. The Duty of Care

A DIP in chapter 11 owes the same fiduciary duty of care to its beneficiaries that any corporate officer or director owes to his corporation. [FN26] The standard corporate fiduciary duty of care mandates corporate officers and directors perform their duties with the level of care that an ordinarily prudent person would exercise under similar circumstances. [FN27] Moreover, corporate officers and directors must exercise those duties in a manner they reasonably believe to be in the best interests of the corporation. [FN28] The DIP is held to these same standards. [FN29]

Many facets of a DIP's role in a chapter 11 proceeding give rise to fiduciary duties. [FN30] The DIP has a duty to "protect and maximize the return on estate assets" as it manages the estate. [FN31] A DIP has a fiduciary duty not to waste assets by continuing to operate or incurring additional debt if it becomes apparent there is no reasonable chance for a successful reorganization. [FN32] Additionally, the duty of care "requires the debtor-in-possession to 'furnish [financial information and records] concerning the estate and the estate's ***642** administration as is requested by a party in interest.'" [FN33] Finally, when drafting a reorganization plan, the DIP must exercise reasonable diligence and care in formulating a feasible plan that maximizes the value of the estate. [FN34]

Bankruptcy courts often apply the business judgment rule and refuse to hold the DIP liable for breach of fiduciary duty arising out of its business decisions. [FN35] The business judgment rule assumes, "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." [FN36] Therefore, a court will not second-guess a DIP's business decisions unless they were made by an uninformed DIP without diligence. [FN37] Courts are generally concerned with the decision making process rather than the substantive decision itself. [FN38]

In most circumstances, a court will not hold a DIP liable under the business judgment rule if the DIP articulates a business justification for its decisions. [FN39] Under the business judgment rule, a DIP is not liable for merely negligent business decisions. [FN40] Rather, a DIP has only breached the duty of care if the "corporate decision lacks a business purpose, is tainted by a conflict of interest, is so egregious as to amount to a no-win decision, or results from an obvious and prolonged failure to exercise oversight or supervision." [FN41]

2. The Duty of Loyalty

In chapter 11, a DIP continues to owe the fiduciary duty of loyalty that binds the management of a solvent corporation. [FN42] Broadly speaking, the duty of loyalty requires the DIP to conduct itself with a "view towards promoting ***643** the interests of the corporation." [FN43] Thus, the duty of loyalty prohibits a DIP from engaging in self-dealing transactions unless the transaction is inherently fair. [FN44] The duty of loyalty also encompasses the duty to disclose all conflicts of interest and avoid the appearance of impropriety. [FN45] Additionally, the DIP must treat all parties fairly and equitably. [FN46]

The business judgment rule does not immunize the DIP with respect to the duty of loyalty. [FN47] Therefore, contrary to the duty of care, in terms of the duty of loyalty courts are concerned with both the DIP's decision-making process and the substance of the decisions. [FN48] As a result, in a suit for breach of the duty of loyalty the DIP bears the burden of proving the fairness of the transaction. [FN49]

Generally, a DIP that engages in self-dealing or places its interest above those of the estate violates the duty of loyalty. [FN50] One DIP breached its duty of loyalty for failing to deposit earnings from assets of the bankruptcy estate into the estate account and for later failing to account for such earnings to the bankruptcy court. [FN51]

Courts have held usurping a business opportunity from the debtor-corporation contravenes the duty of loyalty. [FN52] Additionally, a DIP that misrepresents the amount of a creditor's claim breaches its duty of loyalty. [FN53]

***644** B. Fiduciary Duties of the Chapter 11 Trustee

Section 1104 of the Bankruptcy Code provides a party in interest or the U.S. Trustee may move to have the court appoint a chapter 11 trustee at any time between the filing of the voluntary petition and confirmation of the plan of reorganization "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, . . . or if the appointment of a trustee is in the best interest of creditors, equity security holders, and other interests of the estate." [FN54] Bankruptcy courts give wide discretion to the DIP to manage the debtor-corporation and are generally reluctant to appoint a chapter 11 trustee. [FN55] One commentator noted the appointment of a trustee is an "extraordinary remedy" intended as "a major creditor protection device." [FN56] If appointed, "the purpose of the chapter 11 trustee is to represent the estate for the benefit of all parties in interest." [FN57] The trustee's obligations are enumerated in § 1106. [FN58]

Like the DIP, the chapter 11 trustee owes the duties of loyalty and care to the creditors and the bankruptcy estate. [FN59] However, the trustee is not a fiduciary to the debtor-corporation. [FN60] If appointed, the chapter 11 trustee effectively becomes the chief executive officer of the corporation and must remain loyal to the estate while serving in that capacity. [FN61] The trustee's duty of loyalty prohibits the trustee from engaging in self-dealing transactions or allowing her personal interests to take precedence over the interests of the estate. [FN62] Additionally, under the duty of loyalty, the trustee "may [not] permit his agents or employees to do so." [FN63]

In discussing the chapter 11 trustee's duty of care, the Tenth Circuit explained:

> the standard of care for a bankruptcy trustee is the exercise of due care, diligence and skill both as to affirmative and negative conduct; and that the standard or measure of care, diligence and skill is that of ***645** an ordinarily prudent man in the conduct of his private affairs under similar circumstances and with similar objects in view. [FN64]

A trustee will be held liable, both in her official capacity and personally, for willful and intentional violations of her fiduciary duties. [FN65] While some courts have held a trustee may be personally liable for acts of negligence, a trustee is given wide discretion by the courts and will not be held liable for mistakes in judgment if based on an adequate decision making process. [FN66] A chapter 11 trustee runs the debtor's business and is therefore exposed to more liability than a chapter 7 trustee. [FN67] Accordingly, bankruptcy courts recognize this increased exposure and "usually are reluctant to find liability in all but the most egregious circumstances." [FN68]

C. Fiduciary Duties of Reorganization Committees

According to § 1102 of the Bankruptcy Code, the U.S. Trustee must create a committee of unsecured creditors "as soon as practicable after the order for relief under chapter 11 . . . ." [FN69] The U.S. Trustee also has the authority to create other committees of creditors or equity owners as she "deems appropriate." [FN70] Additionally, if a party in interest requests the appointment of a committee of creditors or stockholders, the U.S. Trustee must create such a committee "if necessary to assure adequate representation of creditors or of equity security holders." [FN71] Reorganization committees are common in chapter 11 proceedings. Ordinarily, these committees consist of representatives from the seven largest unsecured creditors, secured creditors, or equity owners. [FN72]

A reorganization committee supervises the debtor's operations and represents the interests of the particular class. Its most important legal duties include investigating the "acts, conduct, assets, liabilities, and financial condition of the debtor" to determine whether the corporation should continue ***646** to operate and "participate in the formation of [the reorganization] plan." [FN73] These duties impose fiduciary obligations on the committee. [FN74]

The scope of a reorganization committee's fiduciary duties is narrow. [FN75] Each member of a reorganization committee owes fiduciary duties only to the class that the committee represents [FN76] and the duty is owed to the class as a whole rather than to the individual members of the class. [FN77] Contrary to the DIP and trustee, committees do not owe fiduciary duties to the debtor, estate, or any other party. [FN78]

Members of a reorganization committee have a duty to provide "loyal and disinterested service." [FN79] This duty includes being "honest, loyal, trustworthy and without conflicting interests, and with undivided loyalty and allegiance to their constituents." [FN80] It is imperative reorganization committees honor their fiduciary duties because "[r]eorganization committees are the primary negotiating bodies for the plan of reorganization." [FN81]

A reorganization committee member will be liable for breach of fiduciary duty if that member seeks to represent an interest adverse to the interests of the class it represents. [FN82] For example, a committee member breaches her fiduciary duty if she places her own interests above the interests of the class the committee represents. [FN83] Moreover, if a committee member reveals private, ***647** sensitive business information regarding the debtor-company to the public, she may have breached her fiduciary duty if the direct harm to the debtor indirectly harms the class the committee represents. [FN84]

The utility of chapter 11 depends in large part on the enforcement of fiduciary duties. It is imperative the DIP, or an appointed chapter 11 trustee, honor fiduciary obligations because a successful reorganization of the debtor-corporation can be severely frustrated if those in control do not act in the best interests of the estate. Additionally, it is crucial that reorganization committees satisfy their fiduciary duties, particularly because reorganization committees serve as a mechanism for each class to negotiate a fair and successful reorganization plan. [FN85]

II. Statutes of Limitations and Tolling Provisions

This Part describes the background information necessary to understand the need for a federal fiduciary tolling provision in chapter 11. Part II.A defines statutes of limitations and discusses the rationale for enforcing a time period within which a plaintiff can file an action. Part II.B explains tolling provisions and elaborates on the four most common tolling provisions applied in chapter 11: the discovery rule, equitable tolling, fraudulent concealment, and equitable estoppel.

A. Statutes of Limitations

Time limitations for filing a lawsuit are created by statutes; at common law, there are no defined periods within which a plaintiff must file. [FN86] Statutes of limitations are intended to be used by defendants as a defensive bar to an action brought against them. [FN87] Therefore, the defense "is applicable only when affirmative relief is sought." [FN88] Courts rarely allow plaintiffs to use statutes of ***648** limitations as a "sword." [FN89] Additionally, if a defendant does not assert the time limitations defense, she waives the defense. [FN90]

1. Definition

A statute of limitations specifies a time period within which a particular action may be brought. [FN91] If a plaintiff fails to file suit prior to the expiration of the statute of limitations, the plaintiff's claim will be barred, absent any applicable tolling provisions. [FN92] Typically, the time period begins to run from the moment the injury accrued. [FN93] A cause of action accrues "when the plaintiff has suffered a legal injury . . . or when the action can be brought without being subject to dismissal for failure to state a claim." [FN94]

2. The Rationale for Statutes of Limitations

The rationale for limitations law focuses on the needs of potential defendants and the general public. [FN95]

One of the most commonly asserted purposes for time limitations is promoting repose for a potential defendant. [FN96] "In the context of limitation actions, 'repose' includes at least four distinct but overlapping concepts: (a) to allow peace of mind; (b) to avoid disrupting settled expectations; (c) to reduce uncertainty about the future; and (d) to reduce the cost of measures designed to guard against the risk of untimely claims." [FN97]

***649** Additionally, limitations law benefits defendants by preserving evidence that may be lost if plaintiffs are allowed too much time to bring a suit. [FN98] Courts are concerned the passage of time will give plaintiffs a competitive edge and make it "unreasonably difficult for defendants to answer the claims against them." [FN99] Therefore, statutes of limitations require plaintiffs to provide "timely notice to potential defendants" so both parties are given the opportunity to collect evidence while the "facts are still fresh." [FN100] Consequently, defendants are relieved of the burden of defending against stale claims where there is a greater risk that necessary evidence is unavailable because "memories may have faded, or important witnesses may have disappeared." [FN101]

Statutes of limitations further protect defendants by reducing the likelihood that "contemporary legal and moral standards" will be applied to "conduct that occurred in the distant past." [FN102] The longer a plaintiff waits to bring an action, the more likely societal and legal standards for behavior will have changed. [FN103] It is unfair to subject defendants to legal and moral standards that differ from the standards in place when the relevant conduct occurred. [FN104]

Limitations law also serves the public interest. [FN105] It encourages plaintiffs to pursue their legal rights diligently. [FN106] It promotes judicial efficiency [FN107] because courts are ultimately "relieved of the burden of trying stale claims when plaintiffs have 'slept' on their rights." [FN108]

Some commentators argue statutes of limitations work to deter wrongdoing. [FN109] The sooner a defendant is punished after the commission of the offense, the less likely the defendant is to be involved in future unlawful ***650** activity. [FN110] Swifter punishment more effectively deters recidivism because it allows a defendant less time between act and punishment to commit additional wrongs. [FN111] Finally, "the incremental value of deterrence obtained by the pursuit of old claims is likely to be minimal." [FN112]

B. Tolling Provisions

Tolling provisions temporarily pause the running of the limitations period or prevent it from starting until the occurrence of some event. [FN113] Most courts look to the text of the particular statute of limitations to determine whether a tolling provision applies. [FN114] Courts generally avoid implying tolling provisions unless based on necessity, even if reading a tolling provision into the statute would be both reasonable and equitable. [FN115] If the plaintiff is unable to file suit or the defendant has fraudulently concealed the cause of action from the plaintiff, however, some courts will imply a tolling provision into the statute of limitations based on necessity. [FN116]

Case law is in conflict regarding the appropriate construction of tolling provisions. [FN117] Some courts adopt the view that exceptions that toll statutes of limitations must be narrowly construed. [FN118] These courts avoid broadening those exceptions even in the case of undue hardship or inequality. [FN119] Other courts, however, favor a plaintiff's right to bring a suit over a defendant's right to assert the statute of limitations defense and accordingly interpret exceptions to statutes of limitations liberally when necessary to achieve that purpose. [FN120] When courts suspend a statute of limitations, they do so using one of four ***651** tolling provisions: the discovery rule, equitable tolling, fraudulent concealment, or equitable estoppel.

1. The Discovery Rule

The discovery rule is a judicially created exception to the statute of limitations. [FN121] "[T]he cause of action [accrues] when the litigant first knows or with due diligence should know facts that will form the basis for an ac-

tion." [FN122] In the absence of this exception, a cause of action would accrue and the statute would begin to run when the injury or event that caused the breach of duty occurred. [FN123] Thus, the statute would begin to run regardless of the plaintiff's knowledge of the injury or breach. [FN124]

The plaintiff's knowledge of the factual, rather than the legal, basis for the action is what is important under the discovery rule. [FN125] The first part of the test to determine whether to apply the discovery rule contains both a subjective and an objective component. [FN126] The subjective inquiry asks whether the plaintiff had actual knowledge of the facts that created her cause of action. [FN127] If the plaintiff had actual knowledge of the facts that form the basis for her suit, her action accrued when the harm occurred and no tolling will be permitted. [FN128] The objective inquiry asks "what a reasonable person of due diligence should know through the information available." [FN129] The focus is whether the plaintiff knew facts that would place a reasonable person on inquiry notice that a potential claim exists. [FN130]

***652** The second part of the test for the discovery rule asks whether the plaintiff was on inquiry notice of her cause of action. [FN131] If a plaintiff was on inquiry notice, a court will look to see if the plaintiff exercised due diligence in seeking to discover facts that ultimately give rise to her claim for relief. [FN132] The question of whether a plaintiff exercised due diligence is fact intensive. [FN133] If a court determines a plaintiff did not exercise due diligence, the statute of limitations will not be tolled. [FN134]

The discovery rule evolved from an effort to "mitigate the potential harshness" of general limitation law. [FN135] The rule is based in equity and application of the rule requires a balancing of the plaintiff's interest in bringing the action against the defendant's concerns about litigating stale claims. [FN136] Although the discovery rule was developed by the courts, it is now contained in many federal and state statutes. [FN137]

2. Equitable Tolling

"The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable" [FN138] because the plaintiff exercised due diligence to preserve her legal rights. [FN139] Equitable tolling is an exception to the statute of limitations that is closely related to the discovery rule. [FN140] If equitable tolling applies, a plaintiff will be able to bring ***653** her cause of action even after the statutory time period to file suit has expired. [FN141] Because equitable tolling is an exception to the statute of limitations, the plaintiff bears the burden of establishing that it should apply. [FN142]

Equitable tolling applies if it is "necessary to prevent unfairness to a diligent plaintiff." [FN143] Courts apply the doctrine most often when a defendant intentionally misleads the plaintiff, [FN144] but wrongful conduct on the part of the defendant, such as fraud or misrepresentation, is not a necessary element of the exception. [FN145] For example, equitable tolling will apply if a plaintiff, after exercising due diligence, remains unaware of information that would put him on notice that he has a claim. [FN146]

Equitable tolling interrupts the running of the statute of limitations until the event that triggered the tolling ends. [FN147] For example, equitable tolling would toll the statute of limitations for an attorney malpractice claim until the attorney-client relationship ends. [FN148] Although the malpractice may have occurred early in the attorney-client relationship, the statute of limitations will not begin to run until the attorney no longer represents the client even if the relationship continues years after the malpractice. [FN149]

3. Fraudulent Concealment

The doctrine of fraudulent concealment is another exception to the statute of limitations. [FN150] Under this doctrine, if a party through actual fraudulent concealment prevents another party from asserting her cause of action or from obtaining information about her cause of action, the time period will be tolled until the "right of action is

discovered or by the exercise of ordinary diligence might have been discovered." [FN151] The rationale for this doctrine is that a defendant who commits fraud may not conceal that fraud and then later assert ***654** the statute of limitations as a defense where the plaintiff had no way to know the fraudulent actions occurred. [FN152]

A defendant commits fraudulent concealment if he actively hides the truth from the plaintiff or, if he has a duty to disclose, fails to disclose the truth with the intent to prevent inquiry or knowledge of the injury. [FN153] The plaintiff must have relied on the misrepresentation in her failure to bring the action. [FN154] If the defendant acted affirmatively to prevent the plaintiff from discovering relevant information, it is immaterial whether the misrepresentation occurred before or after the cause of action accrued. [FN155]

The mere failure to disclose information, in the absence of a duty to disclose, is generally not fraudulent concealment within the definition of the exception. [FN156] In the context of a fiduciary relationship, however, some courts have held failure to disclose information pertinent to the plaintiff's cause of action "constitutes fraudulent conduct and is equivalent to fraudulent concealment." [FN157] For example, when there is a relationship of trust and confidence, such as in a doctor-patient relationship, the failure to disclose to the patient the cause of the patient's injury may be sufficient to constitute fraudulent concealment. [FN158]

The test for fraudulent concealment is identical to the test for the discovery rule and equitable tolling. [FN159] The tolling provision is unavailable to a plaintiff who could have discovered the existence of the cause of action had she exercised due diligence. [FN160] Therefore, to successfully assert the fraudulent concealment exception, the plaintiff must show why the material fact(s) and the cause of the action were not discovered or could not have been discovered despite her diligence. [FN161]

Fraudulent concealment is distinguishable from the discovery rule and equitable tolling because fraudulent concealment will not apply unless the ***655** defendant acts affirmatively. [FN162] "Unlike the discovery rule, which determines when the limitations period begins to run, the doctrine of fraudulent concealment suspends the running of the limitations period after it has begun because the defendant concealed facts necessary for the plaintiff to know that a claim existed." [FN163] Thus, the doctrine tolls the statute of limitations only if the defendant has actively covered up the cause of action. [FN164] The suspension, however, is not permanent; the statute is tolled only until the plaintiff acquires knowledge of facts that would make a reasonable person "inquire and discover a concealed cause of action." [FN165]

4. Equitable Estoppel

The statute of limitations is an affirmative defense. Therefore, it is subject to the equitable defense of estoppel. [FN166] Equitable estoppel aims to avoid a "fraudulent or inequitable resort to the statute of limitations." [FN167] The doctrine is rooted in fairness and is implicated when a defendant attempts to prevent a plaintiff from bringing her suit within the appropriate time period. [FN168]

Equitable estoppel tolls the statute of limitations if a party can prove four elements. [FN169] First, the defendant, through a fraudulent or inequitable misrepresentation, must cause the plaintiff to miss the filing deadline. [FN170] Second, the defendant's misrepresentation must occur prior to the expiration of the statute of limitations. [FN171] Third, the plaintiff must justifiably, [FN172] reasonably, [FN173] and in good faith [FN174] rely on the defendant's misrepresentation ***656** and fail to timely file suit because of that reliance. [FN175] Finally, upon learning of the misrepresentation, the plaintiff must exercise due diligence and promptly file suit. [FN176]

Courts have taken two approaches to determine what acts or misrepresentations constitute sufficient grounds to apply equitable estoppel. [FN177] The approaches diverge in terms of the defendant's required intent. [FN178] One line of cases holds the defendant's action or representation "must have been calculated to mislead or deceive and to induce inaction by the injured party . . . ." [FN179] The alternative approach holds equitable estoppel is available if

the plaintiff did not timely file suit because of reliance on defendant's misrepresentations, even if the defendant did not "inten[d] to mislead, deceive, or delay the plaintiff." [FN180] Both approaches require an awareness of the facts by the defendant, [FN181] and the defendant's misrepresentation must have been separate from, or in addition to, the conduct that forms the basis for the underlying cause of action. [FN182]

Equitable estoppel is different from equitable tolling. [FN183] Equitable tolling delays the accrual of the cause of action because the plaintiff lacks knowledge of, or cannot discover through the exercise of due diligence, material information that would alert her to the cause of action. [FN184] In contrast, equitable estoppel "focuses on the defendant's conduct [and] . . . presupposes that the plaintiff knows of the facts underlying the cause of action but delayed filing suit because of the defendant's conduct" or misrepresentations after the plaintiff became aware of the cause of action. [FN185] However, equitable estoppel does not apply unless the plaintiff, already aware of the underlying cause of action, does not timely file a complaint because she relied on some later ***657** conduct by the defendant. [FN186] Likewise, the doctrine of fraudulent concealment is implicated when the defendant actively conceals facts that make up the underlying cause of action. [FN187]

III. The Problem: When Applying Current Tolling Provisions to Breach of Fiduciary Claims, Bankruptcy Courts Reach Different Results, Which Create Uncertainty and Hinder the Ability to Enforce Fiduciary Duties in Chapter 11

In a cloudy area of law, [FN188] courts considering the potentially illuminating effect reliance on a fiduciary relationship has on a due diligence analysis do not agree. Some courts have tolled the statute of limitations if a plaintiff relied on a fiduciary relationship with the defendant. [FN189] Other courts have held the existence of a fiduciary relationship is a factor that must be considered when determining whether a plaintiff exercised due diligence. [FN190] Finally, some courts ignore the fact that the defendant was a fiduciary. [FN191] This last group of courts refuses to toll the statute of limitations, irrespective of the fiduciary relationship between the plaintiff and defendant, unless the plaintiff exercised reasonable diligence to discover the facts that gave rise to her cause of action.

Courts' employment of due diligence analysis in the context of a fiduciary relationship is problematic. First, rather than giving guidance, the incongruent court opinions create uncertainty for the parties to a reorganization as to how much they can rely on and trust their fiduciaries. Second, courts effectively encourage fiduciaries to breach their duties when they do not toll the statute of limitations for reliance on a fiduciary relationship by making it more exacting to enforce those duties. [FN192] Finally, requiring due diligence, or "aggressive oversight" of a fiduciary, is counterintuitive to the purpose of a fiduciary relationship. [FN193] This Part discusses the differing approaches bankruptcy and non-bankruptcy courts take in an effort to identify the confusion and ***658** uncertainty created by the current case law and to illuminate the incompatibility of a due diligence analysis in the context of a breach of fiduciary duty claim.

A. Reliance on a Fiduciary Relationship Tolls the Statute of Limitations

A few non-bankruptcy decisions have tolled the statute of limitations expressly because the plaintiff relied on a fiduciary relationship with the defendant. [FN194] In Rademeyer v. Farris, the Eighth Circuit held that due to the fiduciary relationship between the parties, [FN195] a cause of action for fraud between a minority shareholder and a majority shareholder did not accrue until the minority shareholder obtained actual knowledge of the facts constituting the alleged fraud. [FN196] The minority shareholder sued the majority shareholder after the majority shareholder bought out the minority shareholder and then sold the company for a higher price per share. [FN197] The lower court held the plaintiff's action was time barred because he failed to exercise due diligence to discover the fraud. [FN198] The Eighth Circuit reversed because "[t]he law deems it reasonable for someone to place trust in a fiduciary, and so a person is not expected to be as vigilant with respect to fiduciaries as he or she might otherwise be." [FN199]

Similarly, in Strangman v. ARC-SAWS, Inc., an investor sued an officer of a corporation, who was also the investor's attorney, for breach of fiduciary duty arising out of the attorney-officer's solicitation and recommendation that plaintiff invest in his corporation. [FN200] The attorney-officer failed to inform the ***659** investor that he was an officer of the corporation and promised the investor that, in exchange for an investment of $10,000, the investor would receive ten percent ownership in the corporation. [FN201] The court found the "plaintiff failed to make inquiry as to the truth of the statements of [the attorney-officer] because of the confidence and trust reposed in him and plaintiff's reliance upon [the] representations." [FN202] The court held the statute of limitations defense was unavailable to the defendant because the plaintiff relied on the fiduciary duties he was owed from the lawyer-client relationship. [FN203]

Although not relying solely on the existence of a fiduciary relationship, several bankruptcy courts have employed various tolling doctrines to prevent a defendant-fiduciary from asserting the statute of limitations where a plaintiff has relied on a fiduciary relationship. In Bornstein v. Poulos, the First Circuit tolled the statute of limitations under a theory of fraudulent concealment. [FN204] In Bornstein, a chapter 11 trustee appealed the District Court of Maine's determination that his malpractice cross-claim against the debtor's attorney was barred by the statute of limitations. [FN205] The First Circuit analogized the facts to Livermore Falls Trust & Banking Co. v. Riley, a Maine Supreme Court decision. [FN206]

In Livermore, a corporation sued to recover on a promissory note signed by three defendants, one of whom was an officer of the corporation. [FN207] The Maine Supreme Court held the statute of limitations defense was unavailable to the officer because he breached his fiduciary duty to the corporation and that breach amounted to fraudulent concealment. [FN208] The court explicitly held when there is a breach of fiduciary duty, "[t]he case does not depend upon what is termed ordinary care and diligence on the part of the directors." [FN209] Therefore, the statute did not begin to run until the corporation had actual knowledge of the officer's breach of fiduciary duty. [FN210]

***660** The First Circuit found the facts of Livermore and Bornstein were similar, [FN211] and tolled the statute of limitations in Bornstein. [FN212] Although fraudulent concealment generally requires a showing the plaintiff exercised due diligence, [FN213] the First Circuit did not inquire into the plaintiff's due diligence because the attorney's breach of fiduciary duty effectively concealed the action. [FN214]

In an effort to achieve an equitable result, some courts have applied the doctrine of fraudulent concealment broadly, tolling the statute of limitations even in the absence of active concealment by the fiduciary. [FN215] Generally, fraudulent concealment only tolls the statute of limitations if a defendant actively conceals the cause of action or otherwise prevents the plaintiff from inquiring about the cause of action. [FN216] Some courts, however, are of the opinion that "[a]bsent a disclosure, the fiduciary commits an act of continual covering up of the fraud." [FN217] These courts interpret mere silence to constitute fraudulent concealment because a fiduciary has a duty to disclose material facts to its beneficiary. [FN218]

The bankruptcy court in Mi-Lor Corp. v. Gottseger (In re Mi-Lor Corp.) held "[w]hen suit is instituted against a fiduciary based on malfeasance, the repudiation of trust and fraudulent concealment doctrines recognize the fiduciary's obligation of disclosure." [FN219] In that case, the chapter 11 DIP sued a ***661** former director for breach of fiduciary duties. [FN220] The DIP argued the cause of action did not accrue until the plaintiffs had actual knowledge of the prior director's malfeasance. [FN221] The court agreed, stating that because of the fiduciary's obligation of disclosure, "the doctrine [of fraudulent concealment] require[s] actual knowledge by the plaintiff and reject[s] the usual rule that the statute of limitations begins to run [when the plaintiff is on inquiry notice.]" [FN222] The court concluded the statute of limitations did not begin to run until the DIP had actual knowledge of the former director's breach of fiduciary duty. [FN223]

Similarly, in Official Committee of Unsecured Creditors v. Pardee (In re Stanwich Financial Services Corp.), the creditors committee commenced an adversary proceeding against the officers of the debtor to recover fraudulent

transfers made during a leveraged buyout. [FN224] The officers raised the affirmative defense that the statute of limitations barred the creditors committee's claim. [FN225] The fact that the defendants did not actively conceal the cause of action was immaterial because the officers were fiduciaries and "non-disclosures are sufficient [for fraudulent concealment] where . . . the defendant is under a fiduciary duty to disclose material facts." [FN226]

Finally, in Bresset v. Rue (In re Truco, Inc.), a chapter 11 trustee sued the debtor's president for breach of fiduciary duty because the president allegedly paid personal debts with corporate funds. [FN227] The court found the president had been writing checks from the corporation to pay his personal creditors for over five years. [FN228] Additionally, because the president failed to file monthly reports with the bankruptcy court, the trustee and creditors were unable to discover the irregularities. [FN229] The court tolled the statute of limitations in this case "[w]here [the] fiduciary commit [ed] an act of fraud against his principal, . . . [because] the very position the fiduciary is in, prohibits the principal from uncovering the fraud." [FN230] While not explicitly discussed, the court implicitly followed the principle of fraudulent concealment in reasoning the failure to file monthly ***662** reports with the bankruptcy court was equivalent to a breach of the duty to disclose. [FN231] Consequently, tolling of the statute of limitations was appropriate because the plaintiffs relied on the fiduciary relationship and did not have actual knowledge of the president's breach of fiduciary duty. [FN232]

While the preceding cases agree the statute of limitations should be tolled when a plaintiff has failed to file an action because of reliance on a fiduciary duty, they diverge in their approach to the issue. Some courts have ignored a plaintiff's duty to exercise due diligence and held the statute should be automatically tolled until a plaintiff has actual notice of her cause of action. [FN233] Other courts, however, have loosely applied tolling provisions, such as fraudulent concealment, [FN234] in an effort to justify a plaintiff's failure to act with due diligence. Finally, a few courts have suggested reliance on a fiduciary duty satisfies a plaintiffs obligation to exercise due diligence. [FN235]

B. The Existence of a Fiduciary Relationship is Relevant when Determining Whether a Plaintiff Exercised Due Diligence

Some courts hold the existence of a fiduciary relationship is simply one of the factors that must be considered when determining whether a plaintiff exercised due diligence. [FN236] In Lawrence v. Jackson Mack Sales, Inc., the court identified all of the factors and recognized the relevance of a fiduciary relationship to the due diligence inquiry:

> While the question of whether the plaintiff should have discovered her claim is governed by an objective standard, "the determination of whether a plaintiff actually exercised reasonable diligence requires a more subjective inquiry focusing upon the circumstances of the particular case," including the existence of a fiduciary relationship, ***663** the nature of the wrong alleged, the plaintiff's opportunity to discover the wrong, and the subsequent actions of the defendants. [FN237]

When there is a fiduciary relationship between the parties, courts following this approach apply a relaxed due diligence standard. [FN238] "When a fiduciary relationship exists, diligence does not exact as prompt and searching an inquiry into the conduct of the fiduciary as if strangers were involved or parties on equal terms were dealing with each other at arm's length." [FN239] Courts have adopted this relaxed due diligence standard because a plaintiff may not be suspicious of certain facts due to the element of trust inherent in a fiduciary relationship. [FN240]

Another rationale for the relevance of a fiduciary relationship to the due diligence analysis is, in light of the complex nature of a chapter 11 reorganization, reliance on a fiduciary is both reasonable and encouraged because it creates efficiency. [FN241] In Vaughn v. Vaughn (In re Legal Econometrics, Inc.), the debtor's president sued his counsel for gross negligence and intentional breach of fiduciary duty arising out of the law firm's implementation of a plan for reorganization that ultimately deprived the president of control of the corporation. [FN242] The court found the statute of limitations did not bar the president's action because his reliance on the fiduciary relationship with his attorney made him unable, through the exercise of due diligence, to discover the essential facts that constituted his cause of action. [FN243] Additionally, the court found the president was justified in relying on his attor-

neys even though the debtor was a sophisticated businessman because “the transactions designed and executed by the [defendant attorneys] were also complex and sophisticated. . . . [and the attorneys] were specifically engaged because of their expertise in designing and executing complicated ***664** reorganizations . . . .” [FN244] Likewise, §§ 327(a) and 329, expressly authorize the retention [FN245] and compensation [FN246] of professionals and are indicative of Congress's aim to “encourage trustees [and DIP's] to delegate their duties where such delegation would lower costs of administration.” [FN247]

C. Existence of a Fiduciary Relationship Is Not Relevant to the Due Diligence Analysis

A few courts have explicitly held reliance on a fiduciary relationship is not sufficient to toll the statute of limitations in the absence of due diligence. [FN248] In Renz v. Beeman, the court noted equitable estoppel is not available in all cases of breach of fiduciary duty even if there is a duty to disclose. [FN249] Therefore, the statute of limitations was not tolled because the court found the plaintiffs failed to exercise due diligence. [FN250] Other courts, however, have implied that a fiduciary relationship is not relevant to the due diligence analysis by simply ignoring the relationship when conducting their analysis. [FN251]

In Rademeyer v. Farris, the Eighth Circuit refused to toll the statute of limitations for the minority shareholder of a close corporation with respect to a breach of fiduciary duty claim against the majority shareholder. [FN252] There, the court tolled the statute of limitations for the minority shareholder's fraud claim because his failure to inquire as to the fraud was due to reliance on the fiduciary relationship. [FN253] The plaintiff's fraud and breach of fiduciary duty claims arose out of the same wrong by the majority shareholder. [FN254] The court held, however, the discovery rule did not toll the statute for the breach of fiduciary duty claim because “Mr. Rademeyer's failure to inquire [about the breach] . . . demonstrated a lack of reasonable diligence . . . .” [FN255] The court ***665** attributed the disparate result to Missouri courts' “rather strict interpretation” of tolling provisions for breach of fiduciary duty claims. [FN256]

Many courts toll the statute of limitations if the failure to timely file suit occurred because the plaintiff trusted her fiduciary. [FN257] However, courts reach varying results when they apply existing tolling provisions: some courts ignore the due diligence requirement based on the type of claim [FN258] or conclude reliance on a fiduciary is sufficient to satisfy due diligence; [FN259] some courts interpret the requirements of tolling provisions broadly to achieve the desired result; [FN260] some courts require the jury to take the fiduciary relationship into consideration when determining whether the plaintiff exercised due diligence; [FN261] and other courts rigidly apply the due diligence requirement even when it creates disparate results. [FN262] The courts' conflicting approaches and the subsequent conflicting outcomes are problematic because they leave litigants, attorneys, and judges completely uncertain as to how the currently available tolling provisions apply to a breach of fiduciary duty claim.

Additionally, the decision in Rademeyer highlights the fact that statutes of limitations make it difficult to police breaches of fiduciary duty. Current tolling provisions fail to preserve valid claims because they unreasonably require the beneficiary of a fiduciary relationship to exercise due diligence, and many courts are bound by precedent to apply the due diligence requirement rigidly. [FN263] As discussed in In re Mushroom Transportation Co., the difficulty in policing breaches of fiduciary duty is likely to encourage fiduciaries to disregard their obligations. [FN264]

IV. The Reasoning in In re Mushroom Opens the Door for a Federal Fiduciary Tolling Provision in Chapter 11

In In re Mushroom Transportation Co., the Third Circuit recently considered the effect reliance on a chapter 11 fiduciary relationship should ***666** have in the discovery rule analysis. [FN265] In In re Mushroom Transportation Co., Jonathan Ganz, the attorney for the bankruptcy estate, embezzled funds from the estate and related debtor companies (collectively “MTC”). [FN266] The Third Circuit overturned the lower court's grant of summary judgment, instead finding genuine factual issues as to whether the debtor exercised reasonable diligence. [FN267] The appellate court rejected a rule that would preclude the debtor from bringing the action against the embezzling attorney as

a matter of law. [FN268] The court reasoned such a rule would establish a policy that fostered lawyers' abuse of their fiduciary duties to bankrupt clients and "fail adequately to protect the justifiable reliance of clients on their lawyers' probity and trustworthiness." [FN269]

A. Background

On June 24, 1985, MTC filed petitions under chapter 11 of the Bankruptcy Code. [FN270] Six months later, however, the case was converted to chapter 7. [FN271] MTC allocated a large chunk of the proceeds from the liquidation to Continental Bank. [FN272] The bankruptcy court authorized the creation of an escrow account at Continental Bank to hold the liquidation proceeds until the money was transferred to Continental. [FN273] In June 1987, the bankruptcy court approved an agreement between Continental and PVHR, Ganz's law firm. [FN274] The agreement required Continental, after its debts had been satisfied, to remit any excess funds to the escrow account for the benefit of the debtor's estate (the "Stipulation"). [FN275] In August, Continental deposited $766,624 into the escrow account. [FN276] The bankruptcy court then granted Ganz's motion to excuse him from the statutory requirement of filing monthly operating statements for the escrow account. [FN277] Over the next eight months, Ganz ***667** embezzled over $500,000 of the estate's funds from the Continental escrow account. [FN278]

Michael C. Arnold, MTC's vice-president and court-appointed "Special Liquidation Consultant," [FN279] made several inquiries to Ganz regarding the funds in the escrow account. [FN280] Arnold requested an accounting of the funds in late 1987 or early 1988, but Ganz responded only by sending Arnold a copy of the Stipulation. [FN281] Arnold then sent another letter to Ganz stating the copy of the Stipulation "did not clear up the problem of how much [money] is being held and by whom." [FN282] On February 19, 1988, after some oral communications between Ganz and Arnold, [FN283] Ganz sent correspondence assuring Arnold "the assets were invested in passbook certificates of deposit at various banks." [FN284] The letter did not account for the amount of the funds, however, and Arnold never made another request for written confirmation or verification of Ganz's statements regarding the location and amount of the money. [FN285]

In 1992, the court approved the consolidation of MTC, and Arnold prepared to distribute the liquidation proceeds to MTC's creditors. [FN286] When Arnold called Ganz to have him transfer the funds, however, Ganz never responded. [FN287] Later, the U.S. Trustee informed Arnold that Ganz was suspected of stealing estate funds from other clients. [FN288] This information prompted Arnold to conduct an investigation. [FN289] Ultimately, he discovered Ganz had "absconded with the Mushroom funds under [his] control." [FN290]

***668** B. Procedural Posture

After the case was converted to chapter 7, Arnold was appointed trustee. [FN291] In October of 1992, the trustee filed suit on behalf of Mushroom against Ganz and PVHR for breach of fiduciary duty. [FN292] The defendants moved for summary judgment based on the affirmative defense that all claims were barred by laches and the statute of limitations. [FN293] The bankruptcy court agreed and granted summary judgment because the plaintiffs "failed to exercise reasonable diligence in uncovering these claims so as to toll the statute of limitations and preclude laches." [FN294] The district court affirmed. [FN295]

C. The District Court's Opinion

The District Court held MTC could not rely on the discovery rule or equitable tolling to extend the statute of limitations because the debtors failed to exercise reasonable diligence in discharging their fiduciary duty to safeguard assets of the estate. [FN296] The District Court first determined Arnold, acting for the debtor, had a "statutory duty to safeguard the assets of the estate." [FN297] The debtors argued the bankruptcy court approved the delegation of the duty to liquidate MTC's assets, therefore, they were relieved of this responsibility. [FN298] The District Court disagreed, observing that

> [a]lthough delegation of duties is one thing, abdication of responsibility is quite another. In this case, the debtors not only 'delegated' to Ganz the duty to collect the funds generated from the sale of assets . . . they surrendered totally their obligation to oversee the liquidation of the estate or to supervise, even in the most relaxed fashion, the activities of a retained professional. [FN299] ***669** Therefore, the District Court opined, the discovery rule did not toll the statute of limitations because the debtors failed to exercise reasonable diligence in discharging their duty to safeguard the assets of the estate. [FN300]

D. The Third Circuit's Opinion

The Third Circuit reversed the grant of summary judgment and remanded for further consideration whether MTC's Trustee acted with "reasonable diligence in uncovering Ganz's embezzlement." [FN301] The Third Circuit agreed with the lower courts that the applicable Pennsylvania two-year statute of limitations had run. [FN302] Therefore, the salient issue on appeal was "[d]id Mushroom fail as a matter of law to exercise reasonable diligence in uncovering Ganz's embezzlement?" [FN303] Because the underlying cause of action arose in Pennsylvania, the court discussed Pennsylvania's discovery rule and doctrine of equitable tolling. [FN304] The court noted either "will only toll the statute of limitations where the plaintiff shows that he or she has exercised 'reasonable diligence' in ascertaining the existence of the injury and its cause." [FN305] The Third Circuit determined the bankruptcy court and district court conflated the duty to maximize the value of the estate and the duty to exercise reasonable diligence. [FN306] The Third Circuit disagreed that the trustee's failure to maximize the value of the estate amounted to a failure to act with reasonable diligence [FN307] and disagreed with the outcome for several reasons. [FN308]

Most importantly, the court stated, "we find highly relevant the fact that the genesis of this action is Ganz's abuse of his fiduciary, lawyer-client relationship with Mushroom, an abuse which very well could have caused Mushroom to relax its vigilance in overseeing the execution of the duties it ***670** delegated to Ganz." [FN309] The court discussed approvingly other decisions that emphasized reliance on a fiduciary duty as an important factor in a discovery rule/equitable tolling analysis. [FN310] The court concluded

> where the wrongdoing underlying causes of action has been perpetrated by a fiduciary to the detriment of its principal, this fact militates strongly against summary judgment on the issue of whether the principal (here Mushroom) exercised reasonable diligence in failing to discover the fiduciary's malfeasance within the applicable statues of limitation. [FN311]

The Third Circuit emphasized it was not holding the existence and abuse of the fiduciary relationship independently precluded judgment as a matter of law in favor of the law firm. [FN312] Instead, the fiduciary relationship is relevant to the determination of whether the trustee exercised reasonable diligence "precisely because it entails such a presumptive level of trust in the fiduciary by the principal that it may take a 'smoking gun' to excite searching inquiry on the principal's part into its fiduciary's behavior." [FN313] However, the court left open the possibility that, under some circumstances, the nature of the fiduciary relationship itself might be sufficient to toll the statue of limitations. [FN314]

In re Mushroom Transportation Co. is important for several reasons. First, although the court recognized a fiduciary relationship embodies such a "presumptive level of trust" that a "smoking gun" may be needed to incite inquiry, the court held a due diligence analysis must be conducted pursuant to the discovery rule. [FN315] This result is a prime example of how courts' hands are often tied when applying current tolling provisions. Additionally, this opinion underscores the need for an alternative tolling provision in chapter 11 because ***671** a due diligence analysis is inappropriate in the context of a fiduciary relationship. Second, the Third Circuit explicitly stated it reversed the district court opinion because tolling the statute of limitations would "foster" abuses of fiduciary duty and penalize "justifiable reliance" on a fiduciaries "probity and trustworthiness." [FN316] Third, although in dicta, the court recognized that in some circumstances, reliance on a fiduciary duty may be sufficient to toll the statute of limitations. Part V argues reliance on a chapter 11 fiduciary should be one of those circumstances.

V. The Solution: Congress Should Create a Federal "Reliance on Fiduciary Relationship" Tolling Provision Under the Bankruptcy Code

The statute of limitations should be tolled automatically if a plaintiff fails to bring his claim because he relied on a chapter 11 fiduciary. Creating a federal "reliance on fiduciary duty" tolling provision under chapter 11 of the Bankruptcy Code ("fiduciary tolling provision") would comport with the purposes and policies of both limitations law and bankruptcy law. Moreover, such a provision enables plaintiffs to enforce the fiduciary duties implicated in chapter 11. First, a federal tolling provision preventing fiduciaries from asserting the statute of limitations would deter fiduciaries from taking advantage of their positions of trust. [FN317] This, in turn, would advance the overall purpose of chapter 11--the successful reorganization of corporate debtors for the benefit of their creditors, shareholders, and customers. [FN318] Second, a fiduciary tolling provision is consonant with the policies and objectives behind limitations law. [FN319] Third, a federal fiduciary tolling provision would eliminate uncertainty stemming from conflicting case law, thus ensuring uniform application of the law to all major parties in chapter 11. [FN320] Finally, a new federal tolling provision is necessary because the current tolling provisions fail to contemplate and respond to the nature of a fiduciary relationship. [FN321]

***672** Before discussing the necessity of a fiduciary tolling provision, it must be determined whether bankruptcy courts apply federal tolling provisions to common law claims. Generally, when Congress has not provided a statute of limitations for a federal common law cause of action, a court must "borrow" an analogous statute of limitations from the state where the harm occurred. [FN322] The court must also use state tolling provisions. [FN323] However, there is an exception to this rule. [FN324] "[I]f borrowing an analogous statute of limitations from state law would 'frustrate or interfere with the implementation of national policies,' courts must look to federal law for an analogous limitations period." [FN325] In In re Mushroom, the Third Circuit analogized the statute of limitations for a postpetition breach of fiduciary claims to the two-year federal bankruptcy statute of limitations for recovery of postpetition fraudulent transfers. [FN326] However, as this Comment has explained, borrowing state statutes of limitations and the accompanying tolling provisions makes it difficult for principals to enforce the fiduciary duties in chapter 11, thus frustrating the overall policy of promoting an effective reorganization. [FN327] Therefore, bankruptcy courts should borrow from the federal statute of limitations for federal common law claims, which would allow courts to apply a fiduciary tolling provision created under the Bankruptcy Code.

A. A Fiduciary Tolling Provision Furthers the Policy Goals of Chapter 11 by Deterring Breaches of Fiduciary Duty

The successful reorganization of an insolvent debtor depends on the major parties to the reorganization upholding their fiduciary duties. [FN328] For example, a feasible plan of reorganization is hindered when the DIP engages in self-dealing transactions or fails to maximize the value of estate assets. ***673** Unfortunately, a fiduciary has no incentive to honor the relationship if he believes breach of that relationship cannot be enforced because of the statute of limitations. [FN329] A fiduciary tolling provision that automatically tolls the statute of limitation when there has been a breach of fiduciary duty would increase the chances of a successful reorganization because it will deter fiduciaries from taking advantage of their positions.

One important chapter 11 policy that a fiduciary tolling provision would advance is the concept of collectivism. [FN330] Collectivism refers to a preference for dealing with all claims and interests of the estate together rather than individually. [FN331] Pursuant to this policy, "[d]ecisions and the power to enforce them are taken away from individual claimholders who might seek to protect only their narrow personal interest." [FN332] The directors of the DIP violate the policy of collectivism when they usurp a profitable business opportunity from the debtor in violation of their duty of loyalty. [FN333] Management places their individual interests over the interests of the creditors, shareholders, employees, and the estate itself. Likewise, the policy of collectivism is frustrated when an attorney misappropriates estate funds. [FN334] Automatically tolling the statute of limitations for breaches of this type will discourage fiduciaries from putting their individual interests above the "collective" group's interests.

The fiduciary tolling provision also furthers the bankruptcy policy of fairness and equitable treatment of all parties in interest. According to one commentator:

> In bankruptcy, equitable considerations govern . . . . [The] underlying policies of the [sic] bankruptcy law are essentially equitable in nature: to achieve fair treatment for creditors and other claimants, i.e., the public, in the distribution of the bankrupt estate or in the allocation of cash or new securities in the reorganized enterprise. [FN335] Often, the interested parties in chapter 11, especially the debtor's employees and the shareholders, become vulnerable to abuse of fiduciary duty because the Bankruptcy Code creates new fiduciary relationships that did not exist prior to ***674** the debtor's insolvency. [FN336] A fiduciary tolling provision would be fair and equitable because it would encourage fiduciaries to honor the court-imposed trust relationship. Additionally, the Bankruptcy Code presumes the directors and managers of an insolvent corporation are fully capable of operating the business and allows them to remain in control after filing for chapter 11. [FN337] One rationale for allowing the DIP to remain in operational control is an assumption that "existing management . . . [will not] act out of a self-interest that conflicts with that of other parties." [FN338] It is unfair for existing management to avoid liability for breach of their fiduciary duties while acting as the DIP, especially since their right to remain in control is premised on the idea that they will respect those relationships.

Finally, a fiduciary tolling provision promotes economic efficiency because a reorganization is more likely to be successful if those in control act in accordance with the best interests of the estate. The legislative history to chapter 11 states, "[I]t is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets." [FN339] Therefore, the deterrent effect of a fiduciary tolling provision harmonizes with Congress's purpose of promoting reorganizations that benefit the economy by both maintaining current jobs and facilitating a process for creditor repayment. [FN340]

B. A Fiduciary Tolling Provision Accords with the Policies of Limitations Law

A fiduciary tolling provision is consistent with the policies of limitations law. One rationale for statutes of limitations is promoting repose for a defendant, or the idea that "it is unfair to subject an individual to the threat of being sued indefinitely." [FN341] This rationale crumbles in the context of a breach of fiduciary duty, however, because it is equally unfair to bar a plaintiff's claim that was delayed merely because of reliance on and trust in a fiduciary ***675** relationship. Another purpose of statutes of limitations is to place defendants and plaintiffs on "equal footing" in response to "concern that the passage of time will . . . allow the plaintiff to gain an unfair advantage over the defendant." [FN342] In the context of a fiduciary relationship, however, tolling the statute of limitations rather than enforcing it is necessary to negate the benefit the defendant received by taking advantage of her position of trust, thus reestablishing "equal footing." Additionally, the fiduciary tolling provision does not raise issues of "retrospective application of contemporary social attitudes" because it is unlikely that what is currently considered a breach of fiduciary duty in chapter 11 will change drastically in the future. [FN343] Finally, the deterrent effect of tolling the statute of limitations when a plaintiff has relied on a fiduciary duty is greater than the effect achieved by enforcing the statute of limitations. [FN344]

C. A Fiduciary Tolling Provision Would Create Uniformity and Certainty for the Courts and the Major Parties in Chapter 11

A federal fiduciary tolling provision is necessary because bankruptcy courts reach different results when confronted with the issue of whether reliance on a fiduciary relationship is sufficient to toll the statute of limitations. [FN345] Numerous bankruptcy courts have recognized the relevance of a fiduciary relationship to the tolling analysis, but there is no statutory mandate to do so. [FN346] Thus, many courts ignore fiduciary relationships in the tolling analysis. [FN347] This inconsistency creates uncertainty for both the courts and parties in chapter 11. The uncertainty in the application of statutes of limitations and tolling provisions wastes estate assets because attorneys must spend time researching potentially applicable tolling provisions and arguing them to the bankruptcy court. Such waste is repugnant to the bankruptcy policy of maximizing estate assets. [FN348] Creating a federal fiduciary tolling

provision that automatically tolls the statute of limitations in chapter 11 would ***676** eliminate this uncertainty. Additionally, creditors, shareholders, and the other interested parties to the estate would be certain they could fully rely on their fiduciaries. Finally, a fiduciary tolling provision would eliminate the potential for disparate results because all bankruptcy courts would be required to toll the statute of limitations where a plaintiff has failed to file suit due to reliance on a fiduciary relationship.

D. A Fiduciary Tolling Provision Is Necessary Because Current Tolling Provisions that Require a Plaintiff to Exercise Due Diligence Fail to Contemplate and Respond to the Nature of a Fiduciary Relationship

A fiduciary tolling provision is warranted because the available tolling provisions are inadequate. Fraudulent concealment, the discovery rule, and equitable tolling are ineffective because they fail to account for the trust relationship and require a plaintiff to exercise due diligence to discover her claim. [FN349] Because of the nature of the fiduciary relationships in chapter 11, the interested parties to the estate may not be put on inquiry notice until long after the statute of limitations for that claim has run. [FN350] For example, unsecured creditors may rightfully trust that those in charge of the creditors committee are representing their interests and fail to discover or inquire as to whether the leaders were favoring their own interests over the other unsecured creditors. As evidenced by previous discussion, [FN351] many courts would bar the action if filed untimely, notwithstanding the fiduciary relationship, if the unsecured creditors failed to act with due diligence. However, "[t]o require a principal to engage in aggressive oversight of its fiduciary's conduct is to deny the very essence of a fiduciary relationship." [FN352]

Some bankruptcy courts strain to apply current tolling provisions because they recognize a beneficiary's right to trust her fiduciary should outweigh her obligation to exercise due diligence. For example, courts have tolled the statute of limitations for fraudulent concealment where a fiduciary fails to disclose the breach. [FN353] Similarly, others courts have applied a relaxed due ***677** diligence standard to fiduciary relationships. [FN354] A fiduciary tolling provision eliminates the need for bankruptcy courts to liberally apply the current tolling provisions in an effort to reach an equitable result. Moreover, a fiduciary tolling provision would allow a party in interest to rely on their fiduciaries and enable enforcement of the fiduciary duties in chapter 11.

Conclusion

The famed Russian playwright Anton Chekhov once said, "[y]ou must trust and believe in people or life becomes impossible." [FN355] While this may be a nebulous philosophical notion regarding life, when applied to the context of chapter 11, it becomes concrete and practical. Chapter 11 recognizes fiduciary obligations because of necessity; however, statutes of limitations hinder the ability to enforce those trust relationships. Moreover, current tolling provisions are ineffective because, by requiring beneficiaries to engage in aggressive oversight of their fiduciaries, they fail to contemplate and respond to the trust element implicit in every fiduciary relationship. In order to avoid rendering reorganizations "impossible," Congress must create a federal fiduciary tolling provision that tolls the statute of limitations when a plaintiff has failed to timely file suit due to trust in and reliance on a chapter 11 fiduciary.

[FN1]. This scenario was inspired by the facts in Bernstein v. Donaldson (In re Insulfoams, Inc.), 184 B.R. 694, 698-99 (Bankr. W.D. Pa. 1995), aff'd, 104 F.3d 547 (3d Cir. 1997). There, the court held the directors of the DIP owed a fiduciary duty to the corporation and were forbidden from diverting contracts to another corporation to further their own interests. Id. at 707-08.

[FN2]. Daniel B. Bogart, Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back--Something May Be Gaining on You," 68 Am. Bankr. L.J. 155 (1994); Stephen H. Case, Fiduciary Duty of Corporate Directors and Officers, Resolution of Conflicts Between Creditors and Shareholders, and Removal of Directors by Dissident Shareholders in Chapter 11 Cases, C371 A.L.I.-A.B.A. 1 (1989); Stephen H. Case, Rights of Creditors to Sue Corporate Directors for Breach of Fiduciary Duty in America, C946 A.L.I.-A.B.A. 311 (1994); Regina Stango Kelbon

et al., Conflicts, the Appointment of "Professionals," and Fiduciary Duties of Major Parties in Chapter 11, 8 Bankr. Dev. J. 349 (1991); Thomas G. Kelch, The Phantom Fiduciary: The Debtor in Possession in Chapter 11, 38 Wayne L. Rev. 1323 (1992); Ralph T. Nimmer & Richard B. Feinberg, Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees, and Exclusivity, 6 Bankr. Dev. J. 1 (1989); John T. Roache, The Fiduciary Obligations of a Debtor in Possession, 1993 U. Ill. L. Rev. 133 (1993); Andrew D. Schaffer, L.L.M. Thesis, Corporate Fiduciary-Insolvent: The Fiduciary Relationship Your Corporate Law Professor (Should Have) Warned You About, 8 Am. Bankr. Inst. L. Rev. 479 (2000).

[FN3]. See, e.g., Carlos J. Cuevas, The Myth of Fiduciary Duties in Corporate Reorganization Cases, 73 Notre Dame L. Rev. 385 (1988) (arguing chapter 11 should be amended to ensure unsecured creditors have efficient remedies to enforce fiduciary duties).

[FN4]. See Burtch v. Ganz (In re Mushroom Transp. Co.), 382 F.3d 325, 331 (3d Cir. 2004).

[FN5]. See 1 Calvin W. Corman, Limitation of Actions 4-7 (1991); 2 Calvin W. Corman, Limitation of Actions 134-36 (1991).

[FN6]. See Rubin Quinn Moss Heaney & Patterson, P.C. v. Kennel, 832 F. Supp. 922, 935 (E.D. Pa. 1993).

[FN7]. See In re Mushroom Transp. Co., 382 F.3d at 325.

[FN8]. Id.

[FN9]. Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 761 A.2d 1268, 1278 (Conn. 2000).

[FN10]. Young v. Higbee Co., 324 U.S. 204, 213 (1945).

[FN11]. SEC v. Chenery Corp., 318 U.S. 80, 85-86 (1943).

[FN12]. See generally Charles Jordan Tabb, The Law of Bankruptcy (1997).

[FN13]. See 7 Collier on Bankruptcy P 1101.01[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004).

[FN14]. See 11 U.S.C. §1104(a) (2000).

At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appoint of a trustee - (1) for cause... or... (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate....

Id.

[FN15]. Id. §1107(a).

[FN16]. Id.; see also id. §1106.

[FN17]. Id. §1107(a).

[FN18]. Id. §1108.

[FN19]. See Slater v. Smith (In re Albion Disposal, Inc.), 152 B.R. 794, 798 (Bankr. W.D.N.Y. 1993). When this Comment refers to the DIP as owing fiduciary duties, the author means the directors and officers of the DIP. For the sake of brevity, however, DIP will be used as shorthand.

[FN20]. See In re N.S. Garrott & Sons, 63 B.R. 189, 191 (Bankr. E.D. Ark. 1986).

[FN21]. See In re B&W Tractor Co., 38 B.R. 613, 614 (Bankr. E.D.N.C. 1984).

[FN22]. See, e.g., Hall v. Perry (In re Cochise Coll. Park), 703 F.2d 1339, 1357 (9th Cir. 1983).

[FN23]. See Fulton State Bank v. Schipper (In re Schipper), 933 F.2d 513, 515 (7th Cir. 1991); see also United States v. Aldrich (In re Rigden), 795 F.2d 727, 730 (9th Cir. 1986); Ford Motor Credit Co. v. Weaver, 680 F.2d 451, 461 (6th Cir. 1982); Johnson v. Clark (In re Johnson), 518 F.2d 246, 251 (10th Cir. 1975). This "corporate fiduciary" standard is the majority view. See Roache, supra note 2, at 145 (arguing DIPs should be held to the same standard as bankruptcy trustees). A minority of courts have held the DIP to the fiduciary duties of a bankruptcy trustee. Id.

[FN24]. See, e.g., Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

[FN25]. See, e.g., Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

[FN26]. See In re Rigden, 795 F.2d at 730; Ford Motor Credit Co., 680 F.2d at 461; In re Johnson, 518 F.2d at 251.

[FN27]. See, e.g., Smith, 488 A.2d at 858; see also Model Bus. Corp. Act §8.30(a) (2004).

[FN28]. See, e.g., Smith, 488 A.2d at 858.

[FN29]. Id.

[FN30]. 1 William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d §27:3 (2005).

[FN31]. Id. (citing In re Rigden, 795 F.2d at 727). This duty "entails investing all funds not needed to meet current expenses, whenever a period of time is expected to elapse before distribution, even after a final report is filed." Id.

[FN32]. See, e.g., In re Hampton Hotel Investors, Ltd. P'ship, 270 B.R. 346, 352 (Bankr. S.D.N.Y. 2001). For an analysis of waste in chapter 11 in the context of deepening insolvency, see David E. Gordon, Comment, The Expansion of Deepening Insolvency Standing: Beyond Trustees and Creditors' Committees, 22 Emory Bankr. Dev. J. 221 (2005).

[FN33]. Peterson v. Scott (In re Scott), 172 F.3d 959, 967 (7th Cir. 1999) (quoting 11 U.S.C. §704(7) (2000)).

[FN34]. See 1 Norton, supra note 30, §27:5.

[FN35]. See 7 Collier, supra note 13, P 1108.07. "[T]he business judgment rule has been justified on several grounds, including the recognition that even prudent and disinterested directors can make decisions that in hindsight seem improvident, and that directors are better equipped than judges to make business decisions." Id.

[FN36]. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), overruled on other grounds sub nom., Brehm v. Eisner,

746 A.2d 244 (Del. 2000).

[FN37]. Id.

[FN38]. Id.

[FN39]. See Fulton State Bank v. Schipper (In re Schipper), 109 B.R. 832, 836 (Bankr. N.D. Ill. 1989), aff'd, 933 F.2d 513 (7th Cir. 1991).

[FN40]. See Joy v. North, 692 F.2d 880, 887 (2d Cir. 1982).

[FN41]. FDIC v. Brown, 812 F. Supp. 722, 726 (S.D. Tex. 1992).

[FN42]. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

[FN43]. See Official Comm. of Unsecured Creditors of Toy King Distribs. v. Liberty Sav. Bank (In re Toy King Distribs.), 256 B.R. 1, 170 (Bankr. M.D. Fla. 2000) (quoting Bernstein v. Donaldson (In re Insulfoams Inc.), 184 B.R. 694, 707 (Bankr. W.D. Pa. 1995)).

[FN44]. See, e.g., Lopez-Stubble v. Rodriquez-Estrada (In re San Juan Hotel Corp.), 847 F.2d 931, 950 (1st Cir. 1988), aff'd sub nom., Kagan v. Bigles (In re San Juan Hotel Corp.), 230 F.3d 1347 (1st Cir. 2000). A fiduciary may not benefit at the expense of the estate or the creditors. See Pepper v. Litton, 308 U.S. 295, 310 (1939).

[FN45]. See In re San Juan Hotel Corp., 847 F.2d at 931; In re Hampton Hotel Investors, Ltd. P'ship, 270 B.R. 346 (Bankr. S.D.N.Y. 2001); see also Bennitt v. Gemmill (In re Combined Metals Reduction Co.), 557 F.2d 179, 196-97 (9th Cir. 1977).

[FN46]. See In re Spielfogel, 211 B.R. 133, 144 (Bankr. E.D.N.Y. 1997).

[FN47]. See, e.g., Terrydale Liquidating Trust v. Barness, 642 F. Supp. 917, 919-20 (S.D.N.Y. 1986).

[FN48]. Id.

[FN49]. Id.

[FN50]. See 7 Collier, supra note 13, P 1108.09[3].

[FN51]. In re Harp, 166 B.R. 740, 755 (Bankr. N.D. Ala. 1993).

[FN52]. See, e.g., Bernstein v. Donaldson (In re Insulfoams, Inc.), 184 B.R. 694, 707-08 (Bankr. W.D. Pa. 1995).

[FN53]. See In re Analytical Sys., Inc., 97 B.R. 676, 678 (Bankr. N.D. Ga. 1988), rev'd on other grounds, 933 F.2d 939 (11th Cir. 1991).

[FN54]. 11 U.S.C. §1104(a)(1)-(2) (2000). For example, courts have replaced a DIP for failing to file income taxes for three years. In re Evans, 48 B.R. 46, 47 (Bankr. W.D. Tex. 1985).

[FN55]. See Bogart, supra note 2, at 164.

[FN56]. See Cuevas, supra note 3, at 397.

[FN57]. See 7 Collier, supra note 13, P 1106.01.

[FN58]. See 11 U.S.C. §1106.

[FN59]. See 7 Collier, supra note 13, P 1106.02[3].

[FN60]. See Hall v. Perry (In re Conchise Coll. Park, Inc.), 703 F.2d 1339, 1357 (9th Cir. 1983).

[FN61]. See Kelbon et al., supra note 2, at 397-98; see also Mosser v. Darrow, 341 U.S. 267, 271 (1951).

[FN62]. Kelbon et al., supra note 2, at 398.

[FN63]. Id.

[FN64]. Sherr v. Winkler, 552 F.2d 1367, 1374 (10th Cir. 1977) (citing Johnson v. Clark (In re Johnson), 518 F.2d 246 (10th Cir. 1975)).

[FN65]. See In re Johnson, 518 F.2d at 251.

[FN66]. See Zeigler v. Pitney, 139 F.2d 595 (2d Cir. 1943).

[FN67]. See 4 William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d §79:23 (2005).

[FN68]. See id.; Mosser v. Darrow, 341 U.S. 267, 274 (1951) ("Courts are quite likely to protect trustees against heavy liabilities for disinterested mistakes in business judgment.").

[FN69]. See 11 U.S.C. §1102(a)(1) (2000).

[FN70]. See id.

[FN71]. See id. §1102(a)(2).

[FN72]. See id. §1102(b)(1)-(2).

[FN73]. Id. §1103(c)(2)-(3) (specifying the reorganization committee's duties).

[FN74]. Id.

[FN75]. See Johns-Manville Sales Corp. v. Doan (In re Johns-Manville Corp.), 26 B.R. 919, 924-25 (Bankr. S.D.N.Y. 1983).

[FN76]. Id.

[FN77]. See Picciotto v. Screiber, 260 B.R. 242, 246 n.2 (D. Mass. 2001) (noting that holding a member of an unse-

cured creditors' committee personally liable for breach of a fiduciary duty to an individual unsecured creditor violates public policy because it discourages creditors from serving on committees and interferes with committee activities).

[FN78]. See Pan Am. Corp. v. Delta Air Lines, Inc., 175 B.R. 438, 514 (S.D.N.Y. 1994) (holding a creditors' committee owes fiduciary duties to creditors it represents, but not to the debtor or any other party).

[FN79]. See In re Johns-Manville Corp., 26 B.R. at 925.

[FN80]. Id.

[FN81]. Id. "[Reorganization committees] represent those classes of creditors from which they are selected. They also provide supervision of the debtor and execute an oversight function in protecting their constituent's interests." Id. (citing H.R. Rep. No. 95-595, at 401 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6357).

[FN82]. Id.

[FN83]. See United Steelworkers of Am. v. Lampl (In re Mesta Mach. Co.), 67 B.R. 151, 157 (Bankr. W.D. Pa. 1986).

> A committee member violates his fiduciary duty by using his position to further self-interest.... A fiduciary's dealings with those it represents are subject to rigorous scrutiny. Where any of its transactions are challenged, the burden is on the fiduciary not only to prove the good faith of the challenged transaction but also to show its inherent fairness from the viewpoint of those that the fiduciary represents.
>
> Id.

[FN84]. See 7 Collier, supra note 13, P 1103.05[2][a].

[FN85]. See 11 U.S.C. §1103(c)(3) (2000).

[FN86]. See 51 Am. Jur. 2d Limitation of Actions §1 (2004).

[FN87]. See 1 Corman, supra note 5, at 10.

[FN88]. 51 Am. Jur. 2d Limitation of Actions §2 (2004).

[FN89]. See 1 Corman, supra note 5, at 10, n.13. For example, courts are reluctant to allow plaintiffs to file a malicious prosecution action solely because the defendant filed a suit against the plaintiff that was barred by the statute of limitations. See Lackner v. La Crois, 159 Cal. Rptr. 693, 696 (Cal. 1979).

[FN90]. Bellevue Sch. Dist. v. Brazier Constr. Co., 675 P.2d 232, 235 (Wash. 1984), superseded by statute on other grounds as stated in Rice v. Dow Chem. Co., 875 P.2d 1213 (Wash. 1994) (citations omitted).

[FN91]. Black's Law Dictionary 1422 (7th ed. 1999).

[FN92]. See 1 Corman, supra note 5, at 4; 2 Corman, supra note 5, at 1-3.

[FN93]. See 1 Corman, supra note 5, at 4; 2 Corman, supra note 5, at 1-3. In the context of statutes of limitations, "'to accrue' means to arrive, to commence, to come into existence, or to become a present enforceable demand." 51 Am. Jur. 2d Limitation of Actions §148 (2004) (citations omitted).

[FN94]. 51 Am. Jur. 2d Limitation of Actions §148 (2004).

[FN95]. See 1 Corman, supra note 5, at 11.

[FN96]. See Bernson v. Browning-Ferris Indus., 873 P.2d 613, 618 (1994) ("[T]he primary interest served by statutes of limitations is that of repose.").

[FN97]. Tyler T. Ochoa & Andrew J. Wistrich, The Puzzling Purposes of Statutes of Limitation, 28 Pac. L.J. 453, 460 (1997).

[FN98]. See id. at 471. "[A]voiding deterioration of evidence serves several distinct but overlapping purposes: (a) to ensure accuracy in fact-finding; (b) to prevent the assertion of fraudulent claims; (c) to reduce the costs of litigation; and (d) to preserve the integrity of the legal system." Id.

[FN99]. See id. at 483.

[FN100]. Id. at 483-84; see Davies v. Krasna, 535 P.2d 1161, 1168 (Cal. 1975).

[FN101]. 1 Corman, supra note 5, at 11-12.

[FN102]. Ochoa & Wistrich, supra note 97, at 493. It would be unfair to retroactively apply today's standards to conduct that occurred long ago, especially if those standards have changed substantially. Id. at 494.

[FN103]. Id.

[FN104]. Id.

[FN105]. See 1 Corman, supra note 5, at 16.

[FN106]. Id.

[FN107]. See, e.g., Smith v. City of Chicago, 769 F.2d 408, 411 (7th Cir. 1985).

[FN108]. See 1 Corman, supra note 5, at 16.

[FN109]. See Ochoa & Wistrich, supra note 97, at 492.

[FN110]. Id.

[FN111]. Id.

[FN112]. Id.

[FN113]. See 51 Am. Jur. 2d Limitation of Actions §169 (2004).

[FN114]. Id. §170.

[FN115]. Id.

[C]ourts will not graft onto a general statute of limitations an exception that is not clearly xpressed in the statute;unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, it must receive a general construction, and the courts cannot arbitrarily subtract from or add to it.

Id.

[FN116]. Id.; see Wagner v. N.Y., Ont. & W. Ry., 146 F. Supp. 926, 929 (M.D. Pa. 1956).

[FN117]. 51 Am. Jur. 2d Limitation of Actions §172 (2004).

[FN118]. See, e.g., Travis v. Ziter, 681 So. 2d 1348, 1352 (Ala. 1996); Rohrig v. Whitney, 12 N.W.2d 866, 868 (Iowa 1944).

[FN119]. See, e.g., Travis, 681 So. 2d at 1352; Rohrig, 12 N.W.2d at 868.

[FN120]. See, e.g., Caseldine v. Johnson (In re Goldsworthy's Estate), 115 P.2d 627, 632 (N.M. 1941).

[FN121]. 2 Corman, supra note 5, at 134.

[FN122]. Id.; see United States v. Kubrick, 444 U.S. 111, 111 (1979).

[FN123]. See 2 Corman, supra note 5, at 134.

[FN124]. Id.

[FN125]. See Germain v. Pullman Baptist Church, 980 P.2d 809, 812 (Wash. Ct. App. 1999).

[FN126]. See 2 Corman, supra note 5, at 180.

[FN127]. See id. at 179-80.

[FN128]. Id. at 180.

[FN129]. Id.

[FN130]. See Ray v. Queen, 747 A.2d 1137, 1141 (D.C. 2000). A plaintiff is on "inquiry notice when, given all of the facts, a person 'exercising reasonable diligence should have discovered his injury."' Fruehauf Trailer Corp. v. Terex Corp. (In re Fruehauf Trailer Corp.), 250 B.R. 168, 189 (D. Del. 2000) (citations omitted). The Eighth Circuit Court distinguished actual notice from inquiry notice by explaining a plaintiff is on "actual notice only 'if he [or she] has sufficient facts to inform a reasonable person that a fraud has been committed."' Rademeyer v. Farris, 284 F.3d 833, 837 (8th Cir. 2002) (quoting Vogel v. A.G. Edwards & Sons, Inc., 801 S.W.2d 746, 755 (Mo. Ct. App. 1990)).

[FN131]. See Ray, 747 A.2d at 1142.

[FN132]. See, e.g., Burtch v. Ganz (In re Mushroom Transp. Co.), 382 F.3d 325 (3d Cir. 2004). "The critical question in assessing the existence vel non of inquiry notice is whether the plaintiff exercised reasonable diligence under the circumstances in acting or failing to act on whatever information was available to him." Ray, 747 A.2d at 1141-

42. Whether the plaintiff is on inquiry notice is generally the key issue and is determined by a fact-finder. Id. "[O]nly where the facts are so clear that reasonable minds cannot differ may the commencement of the limitations period be determined as a matter of law." Pearce v. Salvation Army, 674 A.2d 1123, 1125 (Pa. Super. Ct. 1996).

[FN133]. Ray, 747 A.2d at 1142.

[FN134]. See Overstreet v. Ky. Ctr. Life Ins., 747 F. Supp. 1195, 1199 (W.D. Va. 1990).

[FN135]. 2 Corman, supra note 5, at 134.

[FN136]. See id. at 135.

[FN137]. Id. "[T]he concept is now expressed in federal statutes and in state law pertaining to breach of warranty, progressive occupational disease, fraud, medical and other professional malpractice, breach of contract, bond performance, and general tort." Id. at 170-71.

[FN138]. See Coleman v. Johnson, 184 F.3d 398, 402 (5th Cir. 1999).

[FN139]. Broadwater v. Heidtman Steel Prods., 182 F. Supp. 2d 705, 718 (S.D. Ill. 2002) (holding equitable tolling should be exercised sparingly and not where plaintiff failed to exercise due diligence in preserving her legal rights). This requirement is similar to the due diligence requirement under the discovery rule, and courts apply the requirement in a similar fashion. See, e.g., Burtch v. Ganz (In re Mushroom Transp. Co.), 382 F.3d 325, 338 (3d Cir. 2004).

[FN140]. See Coleman, 184 F.3d at 402.

[FN141]. Id.

[FN142]. See, e.g., Polanco v. USDA, 158 F.3d 647, 655 (2d Cir. 1998).

[FN143]. Haekal v. Refco, Inc., 198 F.3d 37, 43 (2d Cir. 1999).

[FN144]. See Ott v. Johnson, 192 F.3d 510, 513 (5th Cir. 1999).

[FN145]. See Hentosh v. Herman M. Finch Univ. of Health Scis./The Chic. Med. Sch., 167 F.3d 1170, 1174 (7th Cir. 1999).

[FN146]. Id.

[FN147]. See 51 Am. Jur. 2d Limitation of Actions §174.

[FN148]. See Cooper v. James, 627 N.W.2d 784, 788 (S.D. 2001).

[FN149]. Id.

[FN150]. See 51 Am. Jur. 2d Limitation of Actions §183.

[FN151]. Id.; see Reitmeyer v. Meinen (In re Meinen), 232 B.R. 827, 835 (Bankr. W.D. Pa. 1999).

[FN152]. See 51 Am. Jur. 2d Limitation of Actions §183.

[FN153]. See Res. Ventures, Inc. v. Res. Mgmt. Int'l, Inc., 42 F. Supp. 2d 423, 436 (D. Del. 1999).

[FN154]. See In re Meinen, 232 B.R. at 834.

[FN155]. See 51 Am. Jur. 2d Limitation of Actions §185.

[FN156]. See Randles v. Cole, 2 S.W.3d 90, 92 (Ark. 1990); Howard v. McFarland, 515 S.E.2d 629, 633 (Ga. Ct. App. 1999).

[FN157]. 51 Am. Jur. 2d Limitation of Actions §187.

[FN158]. Esener v. Kinsey, 522 S.E.2d 522, 523-24 (Ga. Ct. App. 1999).

[FN159]. See Urland v. Merrell-Dow Pharms. Inc., 822 F.2d 1268, 1273 (3d Cir. 1987).

[FN160]. See, e.g., Curtis v. Connly, 257 U.S. 260, 264 (1921).

[FN161]. See id. at 260.

[FN162]. See 32 Am. Jur. Proof of Facts 3d Proving Fraudulent Concealment to Toll Statutory Limitations Period §1, at 129 [hereinafter Proving Fraud].

[FN163]. See Booker v. Real Homes, Inc., 103 S.W.3d 487, 493 (Tex. App. 2003).

[FN164]. Id.

[FN165]. Id.

[FN166]. See 51 Am. Jur. 2d Limitation of Actions §380.

[FN167]. Id.

[FN168]. Id. "[F]alsely promising not to plead the statute of limitations" is one example of an act that would implicate the doctrine of equitable estoppel. Id.

[FN169]. See 51 Am. Jur. 2d Limitation of Actions §383.

[FN170]. See id. (citing Kelley v. NLRB, 79 F.3d 1238 (1st Cir. 1996)).

[FN171]. See, e.g., Speicher v. Dalkon Shield Claimants Trust, 943 F. Supp. 554 (E.D. Pa. 1997).

[FN172]. See Waage v. Cutter Biological Div. of Miles Labs., Inc., 926 P.2d 1145, 1152 (Alaska 1996); Barlow v. Liberty Nat'l Life Ins. Co., 708 So. 2d 168, 174 (Ala. Civ. App. 1997).

[FN173]. See Narum v. Faxx Foods, Inc., 590 N.W.2d 454, 461-62 (N.D. 1999). A plaintiff's reliance on representations made by her insurance adjuster is not reasonable because an insurance adjuster is her adversary. Gibson v. EPI

Corp., 940 S.W.2d 912, 913 (Ky. Ct. App. 1997).

[FN174]. See King v. Knudson, 229 N.W. 839, 841 (Iowa 1930).

[FN175]. See, e.g., Speicher, 943 F. Supp. at 557.

[FN176]. See, e.g., Narum, 590 N.W.2d at 454.

[FN177]. See 51 Am. Jur. 2d Limitation of Actions §387.

[FN178]. See id.

[FN179]. Id.; see Adams v. Ison, 249 S.W.2d 791, 793 (Ky. 1952).

[FN180]. 51 Am. Jur. 2d Limitation of Actions §387; see Davis v. A.O. Smith Corp., 691 N.Y.S.2d 605, 608 (N.Y. App. Div. 1999); Gehrke v. Crafco, Inc., 923 P.2d 1333, 1338 (Or. Ct. App. 1996).

[FN181]. See 51 Am. Jur. 2d Limitation of Actions §387.

[FN182]. Hoffman-Dombrowski v. Arlington Int'l Race Course, Inc., 11 F. Supp. 2d. 1006, 1011 (N.D. Ill. 1998).

[FN183]. See Ahsafa v. City of Chicago, 146 F.3d 459, 462-64 (7th Cir. 1998); supra notes 138-49 and accompanying text.

[FN184]. See supra notes 138-49 and accompanying text.

[FN185]. Bell v. Fowler, 99 F.3d 262, 266 & n.2 (8th Cir. 1996) (emphasis added).

[FN186]. See Dever v. Simmons, 684 N.E.2d 997, 1001 (Ill. App. Ct. 1997).

[FN187]. Res. Ventures, Inc. v. Res. Mgmt. Int'l, Inc., 42 F. Supp. 2d 423, 436 (D. Del. 1999).

[FN188]. D. Gordon Smith, The Critical Resource Theory of Fiduciary Duty, 55 Vand. L. Rev. 1399, 1400 (2002) ("Fiduciary law is messy... [and] 'elusive."') (citations omitted).

[FN189]. See infra Part III.A.

[FN190]. See infra Part III.B.

[FN191]. See infra Part III.C.

[FN192]. See Burtch v. Ganz (In re Mushroom Transp. Co.), 382 F.3d 325, 331 (3d Cir. 2004). For a detailed examination of In re Mushroom Transportation Co., see Part IV.

[FN193]. See Rubin Quinn Moss Heaney & Patterson, P.C. v. Kennel, 832 F. Supp. 922, 935 (E.D. Pa. 1993).

[FN194]. At least one bankruptcy court has suggested, in dicta, that equitable estoppel may apply to prevent a defendant from asserting the statute of limitations if "the defendant was in a fiduciary relationship with the plaintiff,

entitling the latter to rely on the advice of the former." Apex Auto. Warehouse, L.P. v. WSR Corp. (In re Apex Auto. Warehouse, L.P.), No. 96 B 94596, 1999 Bankr. LEXIS 209, at *17 (Bankr. N.D. Ill. Mar. 9, 1999).

[FN195]. In a close corporation, a majority shareholder may owe fiduciary duties to a minority shareholder. Pepper v. Litton, 308 U.S. 295, 306 (1939).

[FN196]. 284 F.3d 833, 837 (8th Cir. 2002). More specifically, the court held the cause of action did not accrue until the plaintiff obtained "actual notice." Id. The court distinguished actual notice from inquiry notice, explaining a plaintiff is on "actual notice only 'if he [or she] has sufficient facts to inform a reasonable person that a fraud has been committed."' Id. (quoting Vogel v. A.G. Edwards & Sons, Inc., 801 S.W.2d 746, 755 (Mo. Ct. App. 1990)).

[FN197]. Id. at 833.

[FN198]. Id. at 836.

[FN199]. Id. at 837. The Ninth Circuit, although refusing to decide the question as a matter of law, has also suggested reliance on a fiduciary relationship may satisfy a plaintiff's duty to exercise due diligence. Hilton v. Mumaw, 522 F.2d 588, 595 (9th Cir. 1975).

[FN200]. 267 P.2d 395, 396 (Cal. Dist. Ct. App. 1954).

[FN201]. Id.

[FN202]. Id. at 397.

[FN203]. Id.

[FN204]. 793 F.2d 444, 449 (1st Cir. 1986).

[FN205]. Id. at 446.

[FN206]. Id. at 447 (citing Livermore Falls Trust & Banking Co. v. Riley, 78 A. 980 (Me. 1911)).

[FN207]. Id.

[FN208]. Livermore, 78 A. at 983.

[FN209]. Id.

[FN210]. Id.

[FN211]. Bornstein, 793 F.2d at 448. The court stated, "[w]e recognize that in Livermore the defendant was a corporate fiduciary by virtue of his position as a corporate officer whereas Parent was a fiduciary by virtue of his position as attorney. But we consider this a distinction without a difference, since in each case the defendant violated a significant fiduciary duty." Id.

[FN212]. Id. at 449.

[FN213]. See supra Part II.B.3.

[FN214]. Bornstein, 793 F.2d at 449.

[FN215]. See Fenn v. Yale Univ., 283 F. Supp. 2d 615, 636-37 (D. Conn. 2003); Sheffield Steel Corp. v. HMK Enters., Inc. (In re Sheffield Steel Corp.), 320 B.R. 405, 418 (Bankr. N.D. Okla. 2004); Shields v. Nat'l Union Fire Ins. Co. (In re Lloyd Sec., Inc.), No. 90-0985S, 1992 WL 119362, at *9 (Bankr. E.D. Pa. May 21, 1992) ("Where a fiduciary commits an act of fraud against his principal, the statute of limitations will be tolled... [and] the fiduciary, because of his position of trust, would have an affirmative duty to the principal to disclose the fraud.") (quoting Schwartz v. Pierucci, 60 B.R. 397, 403 (E.D. Pa. 1986)); Chi. Park Dist. v. Kenroy, Inc., 402 N.E.2d 181, 184-85 (Ill. 1980).

[FN216]. See supra Part II.B.3.

[FN217]. Pierucci, 60 B.R. at 403.

[FN218]. Official Comm. of Unsecured Creditors v. Pardee (In re Stanwich Fin. Servs. Corp.), 317 B.R. 224, 231 (Bankr. D. Conn. 2004). But see Whitlock Corp. v. Deloitte & Touche, Ltd. Liab. P'ship, 233 F.3d 1063, 1066 (7th Cir. 2000) (noting the function of the fraudulent concealment doctrine is not to postpone running of the statute of limitations until after a party admits culpability; "even a fiduciary is entitled to the benefit of the statute of limitations without a need to confess to wrongdoing").

[FN219]. 233 B.R. 608, 613 (Bankr. D. Mass. 1999).

[FN220]. Id. at 611.

[FN221]. Id. at 613.

[FN222]. Id.

[FN223]. Id. at 614.

[FN224]. 317 B.R. 224, 226 (Bankr. D. Conn. 2004).

[FN225]. Id. at 230.

[FN226]. Id. at 231 (quoting Fenn v. Yale Univ., 283 F. Supp. 2d 615, 636 (D. Conn. 2003)).

[FN227]. 110 B.R. 150, 152 (Bankr. M.D. Pa. 1989).

[FN228]. Id. at 152-53.

[FN229]. Id. at 154.

[FN230]. Id. (quoting Schwartz v. Pierucci, 60 B.R. 397, 403 (E.D. Pa. 1986)).

[FN231]. See In re Truco, 110 B.R. at 154. "[W]e determine that under these circumstances, and in accordance with the reasoning of the Schwartz case, that the applicable statute of limitations tolled as to the trustee." Id.

[FN232]. Id.

[FN233]. See, e.g., Rademeyer v. Farris, 284 F.3d 833, 837 (8th Cir. 2002).

[FN234]. See, e.g., Bornstein v. Poulos, 793 F.2d 444, 449 (1st Cir. 1986); Chi. Park Dist. v. Kenroy, Inc., 402 N.E.2d 181, 184-85 (Ill. 1980).

[FN235]. Strangman v. ARC-SAWS, Inc., 267 P.2d 395, 396 (Cal. Dist. Ct. App. 1954); see also Hiton v. Mumaw, 522 F.2d 588, 595 (9th Cir. 1975).

[FN236]. See Burtch v. Ganz (In re Mushroom Transp. Co.), 382 F.3d 325, 341 (3d Cir. 2004); Maggio v. Gerard Freezer & Ice Co., 824 F.2d 123, 128 (1st Cir. 1987); Ray v. Queen, 747 A.2d 1137 (D.C. 2000); Gurfein v. Sovereign Group, 826 F. Supp. 890, 919 (E.D. Pa. 1993); Neel v. Magana, Olney, Levey, Cathcart & Gelfand, 491 P.2d 421, 429 (Cal. 1971).

[FN237]. 837 F. Supp. 771, 781-82 (S.D. Miss. 1992) (quoting Rodriquez v. Banco Cent., 727 F. Supp. 759 (D.P.R. 1989), aff'd, 42 F.2d 642 (5th Cir. 1994)).

[FN238]. See Tex. Worker's Comp. Ins. Fund v. A.C. Painting, Inc. (In re A.C. Painting, Inc.), 283 B.R. 404, 416 (Bankr. N.D. Tex. 2002), rev'd on other grounds, No. 3:02-CV-1582-P, 2003 WL 222572 (N.D. Tex. Jan. 28, 2003); see also Stafford v. Shultz, 270 P.2d 1, 8 (Cal. 1954) ("[T]he fiduciary relationship of physician and patient excused plaintiff from greater diligence in determining the cause of his injury....").

[FN239]. In re A.C. Painting, Inc., 283 B.R. at 416.

[FN240]. See Hobbs v. Bateman Eichler, Hill Richards, Inc., 210 Cal. Rptr. 387, 404 (Cal. Ct. App. 1985); Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988).

[FN241]. See Vaughn v. Vaughn (In re Legal Econometrics, Inc.), 191 B.R. 331, 346 (Bankr. N.D. Tex. 1995), aff'd in part and vacated in part, No. 3-95-CV-0457-R, 1997 WL 560617 (N.D. Tex. Aug. 29, 1997).

[FN242]. Id.

[FN243]. Id. at 346.

[FN244]. Id.

[FN245]. 11 U.S.C. §327(a) (2000).

[FN246]. Id. §329.

[FN247]. Boldt v. U.S. Trustee (In re Jenkins), 130 F.3d 1335, 1340 (9th Cir. 1997).

[FN248]. See, e.g., Davenport v. A.C. Davenport & Son Co., 903 F.2d 1139, 1142 (7th Cir. 1990), overruled on other grounds as stated in Unity House v. First Commer. Fin. Group, No. 96C-1716, 1997 U.S. Dist. LEXIS 17653, at *21 (N.D. Ill. Oct. 31, 1997).

[FN249]. 589 F.2d 735, 750 (2d Cir. 1978).

[FN250]. Id.

[FN251]. See Gleasman v. Jones, Day, Reavis & Pogue (In re Gleasman), 933 F.2d 1277, 1283-84 (5th Cir. 1991); Pender v. Tex. Napco, Inc. (In re LaJet, Inc.), 150 B.R. 648, 656-57 (Bankr. E.D. La. 1993).

[FN252]. 284 F.3d 833, 838 (8th Cir. 2002).

[FN253]. Id. at 837 (holding a "person who relies on a fiduciary is under no duty to make inquiry" as to the facts that constitute a fraud); see supra notes 197-201 and accompanying text.

[FN254]. Rademeyer, 284 F.3d at 836.

[FN255]. Id. at 838.

[FN256]. Id.

[FN257]. See supra Part IV.A.-B.

[FN258]. See, e.g., Rademeyer, 284 F.3d at 837.

[FN259]. See, e.g., Strangman v. ARC-SAWS, Inc., 267 P.2d 395, 396 (Cal. Dist. Ct. App. 1954).

[FN260]. See, e.g., Mi-Lor Corp. v. Gottsegen (In re Mi-Lor Corp.), 233 B.R. 608, 613 (D. Mass. 1999).

[FN261]. See, e.g., Lawrence v. Jackson Mack Sales, Inc., 837 F. Supp. 771, 782 (S.D. Miss. 1992), aff'd, 42 F.2d 642 (5th Cir. 1994).

[FN262]. See, e.g., Rademeyer, 284 F.3d at 838.

[FN263]. Id.

[FN264]. See discussion supra Part V.

[FN265]. 382 F.3d 325 (3d Cir. 2004).

[FN266]. Id. at 331. At the time of the trial, Mr. Ganz was an attorney with Pincus, Verlin, Hahn & Reich ("PVHR"). Id.

[FN267]. Id.

[FN268]. Id. at 343.

[FN269]. See id. at 331.

[FN270]. Id.

[FN271]. Id.

[FN272]. Id. Continental Bank was a secured creditor with a perfected security interest in all of Mushroom's assets. Id.

[FN273]. Id. at 332.

[FN274]. Id.

[FN275]. Id.

[FN276]. Id.

[FN277]. Id.

[FN278]. Id. at 332.

[FN279]. Id. As “Special Liquidation Consultant,” Arnold was in charge of the liquidation of MTC's assets. Id.

[FN280]. Id.

[FN281]. Id.

[FN282]. Id.

[FN283]. Id. It is not clear what exactly Arnold and Ganz spoke about. Id. Ganz testified he told Arnold “there were funds in an approximate amount--I wouldn't recall the exact number--and they were in CDs and we were holding them. I was holding them.” Id. at 332-33. However, the court noted “[i]t is undisputed that Arnold failed to request written confirmation of, or otherwise attempt to verify, Ganz's representations about the amount and location of the funds.” Id. at 333.

[FN284]. Id.

[FN285]. Id.

[FN286]. Id. at 333.

[FN287]. Id.

[FN288]. Id.

[FN289]. Id.

[FN290]. Id.

[FN291]. Id. Arnold will be hereinafter referred to as the “Trustee.”

[FN292]. Id. The Trustee later amended the complaint to include Continental, the bank that held the funds in escrow. Id. The bankruptcy court granted summary judgment in favor of Continental with respect to the ERISA claims, and the district court and Third Circuit affirmed. Id. at 334.

[FN293]. Id. at 333.

[FN294]. Id. at 334.

[FN295]. Id. Judge Fisher wrote "the district court affirmed on essentially the same bases relied upon by the bankruptcy court." Id.

[FN296]. See In re Mushroom Transp. Co., 282 B.R. 805, 825 (E.D. Pa. 2002).

[FN297]. Id. at 824.

[FN298]. Id.

[FN299]. Id. at 825.

[FN300]. Id.

[FN301]. Burtch v. Ganz (In re Mushroom Transp. Co.), 328 F.3d 325 (3d Cir. 2004).

[FN302]. Id. at 335. The court held "state law would supply the applicable statute of limitations pursuant to the Supreme Court's directive that 'when Congress has failed to provide a statute of limitations for a federal cause of action, a court "borrows" or "absorbs" the local time limitation most analogous to the case at hand."' Id. (citations omitted). Additionally, the court noted, "[a]long with the state statues of limitations, a borrowing court 'must also borrow from state law the relevant tolling principles."' Id. (quoting Island Insteel Sys., Inc. v. Waters, 296 F.3d 210, 210 n.4 (3d Cir. 2002)).

[FN303]. Id. at 338.

[FN304]. Id.

[FN305]. Id. (citations omitted).

[FN306]. Id. at 339-40.

[FN307]. Id. at 340.

[FN308]. Id. at 340-41. First, the Bankruptcy Code specifically provides for the retention and compensation of professionals in a bankruptcy proceeding. Id. Second, the bankruptcy court issued two orders entrusting Mushroom's assets to Ganz. Id.

[FN309]. Id. at 341.

[FN310]. Id. at 341-42 (citing Gurfein v. Sovereign Group, 826 F. Supp. 890 (E.D. Pa. 1993); Rubin, Quinn, Moss,

Heaney & Patterson, P.C. v. Kennel, 832 F. Supp. 922 (E.D. Pa. 1993); Schwartz v. Pierucci, 60 B.R. 397 (E.D. Pa. 1986); see also Ray v. Queen, 747 A.2d 1137, 1142 (D.C. 2000); Hobbs v. Bateman Eichler, Hill Richards, Inc., 210 Cal. Rptr. 387, 410 (Cal. Ct. App. 1985); Rieff v. Evans, 630 N.W.2d 278, 290 (Iowa 2001); Cmty. Title Co. v. U.S. Title Guar. Co., 965 S.W.2d 245, 252 (Mo. Ct. App. 1998); Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988)).

[FN311]. Id. at 341.

[FN312]. Id. at 342-43.

[FN313]. Id. at 343.

[FN314]. Id. "At the same time, however, we would not foreclose the possibility that in some instances, the nature of the fiduciary relationship might be such that the relationship alone would be sufficient to trigger application of the discovery rule." Id. at 343 n.11.

[FN315]. Id. at 342-43.

[FN316]. Id. at 331.

[FN317]. See generally id.

[FN318]. See, e.g., NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.").

[FN319]. See infra Part V.A-B.

[FN320]. See infra Part V.C.

[FN321]. See infra Part V.D.

[FN322]. Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson, 501 U.S. 350, 355 (1991), superseded by statute on other grounds as stated in Litton Ind., Inc. v. Lehman Bros. Kuhn Loeb, Inc., 967 F.2d 742, 751 (2d Cir. 1992).

[FN323]. Bd. of Regents of Univ. of N.Y. v. Tomanio, 446 U.S. 478, 485 (1980). Some courts have criticized this holding, arguing a court should apply both federal and state tolling provisions when it borrows a state statute of limitations. See, e.g., Cange v. Stotler & Co., 826 F.2d 581, 585-86 (7th Cir. 1987); Hemmings v. Barian, 822 F.2d 688, 691 (7th Cir. 1987); Suslick v. Rothschild, 741 F.2d 1000, 1004-06 (7th Cir. 1984). Because Tomanio has not been overruled, however, the author has assumed the general rule is courts must apply state tolling provisions. See Burtch v. Ganz (In re Mushroom Transp. Co.), 328 F.3d 325 (3d Cir. 2004).

[FN324]. See Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State, 470 U.S. 226, 241 (1985).

[FN325]. Island Insteel Sys., Inc. v. Waters, 296 F.3d 200, 207 (3d Cir. 2002) (quoting DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 161, 163 (1983)).

[FN326]. 11 U.S.C. §549(d) (2000); In re Mushroom Transp. Co., 382 F.3d at 335-36.

[FN327]. See infra Part V.A.

[FN328]. See generally Nimmer & Feinberg, supra note 2.

[FN329]. See, e.g., In re Mushroom Transp. Co., 382 F.3d at 341-42.

[FN330]. See Nimmer & Feinberg, supra note 2, at 5.

[FN331]. Id.

[FN332]. Id.

[FN333]. Cf. United States v. Aldrich (In re Rigden), 795 F.2d 727, 731-32 (9th Cir. 1986).

[FN334]. Cf. In re Mushroom Transp. Co., 382 F.3d at 325.

[FN335]. Nimmer & Feinberg, supra note 2, at 7.

[FN336]. See, e.g., 11 U.S.C. §1104(a) (2000) (the court's power to appoint a trustee upon motion by a party in interest); id. §1102(a) (appointment of an unsecured creditors committee); see also Deborah A. Demott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 Duke L.J. 879, 914 (1988) (“A beneficiary in significant respects depends upon and is vulnerable to the fiduciary. The power held by the fiduciary that enables him to act to benefit the beneficiary also enables him to indulge his own interest and to injure the beneficiary.”).

[FN337]. See generally 7 Collier, supra note 13.

[FN338]. Nimmer & Feinberg, supra note 2, at 24.

[FN339]. H.R. Rep. No. 95-595, at 220 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6179.

[FN340]. Id.

[FN341]. Ochoa & Wistrich, supra note 97, at 460.

[FN342]. Id. at 483.

[FN343]. Id. at 493-94.

[FN344]. Id. at 493. “Although encouraging the prompt enforcement of claims increases the level of deterrence by increasing the present value of punishment of a given severity to the wrongdoer, extinguishing valid claims decreases the level of enforcement or reduces the accuracy of adjudication by increasing the probability that the wrongdoer will escape punishment altogether.” Id.

[FN345]. See supra Part V.

[FN346]. See, e.g., Burtch v. Ganz (In re Mushroom Transp. Co.), 328 F.3d 325 (3d Cir. 2004); Bornstein v. Poulos, 793 F.2d 444, 449 (1st Cir. 1986).

[FN347]. See, e.g., Benz v. Freeman, 589 F.2d 735 (2d Cir. 1978).

[FN348]. See, e.g., Shanri Holdings Corp. v. Kmart Corp. (In re Kmart), 297 B.R. 525, 530 (N.D. Ill. 2003).

[FN349]. See supra Part III.

[FN350]. See In re Mushroom Transp. Co., 382 F.3d at 343 (discussing the nature of a fiduciary relationship and concluding a fiduciary relationship is relevant to the discovery rule analysis "precisely because it entails such a presumptive level of trust in the fiduciary by the principal that it may take a 'smoking gun' to excite searching inquiry on the principal's part into its fiduciary's behavior").

[FN351]. See supra Part III.

[FN352]. Rubin, Quinn, Moss, Heaney & Patterson, P.C. v. Kennel, 832 F. Supp. 922, 935 (E.D. Pa. 1993).

[FN353]. See, e.g., Mi-Lor Corp. v. Gottsegen (In re Mi-Lor Corp.), 233 B.R. 608, 613 (D. Mass. 1999).

[FN354]. See, e.g., Tex. Worker's Comp. Ins. Fund v. A.C. Painting, Inc. (In re A.C. Painting, Inc.), 283 B.R. 404, 416 (Bankr. N.D. Tex. 2002), rev'd on other grounds, No. 3:02-CV-1582-P, 2003 WL 222572 (N.D. Tex. Jan. 28, 2003).

[FN355]. Thinkexist, http://en.thinkexist.com/quotes/Anton_Chekhov (last visited March 21, 2006).

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22 Emory Bankr. Dev. J. 637

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7 BANKRUPTCY BIBLIOGRAPHY, 09-6-06 West's Bankruptcy Newsletter 19 (2006)