REPOSE VS. FREEDOM — DELAWARE'S PROHIBITION ON EXTENDING THE STATUTE OF LIMITATIONS BY CONTRACT: WHAT PRACTITIONERS SHOULD KNOW

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I. OVERVIEW

Many complex commercial and corporate agreements contain provisions that purport to allow the parties to make claims arising from breach of the contract well into the future. A typical provision might provide that claims relating to certain types of the representations and warranties, sometimes referred to as "Core Representations," can be brought indefinitely or for a certain number of days following the applicable statutory limitations period. Notwithstanding the prevalence of such provisions, under many circumstances, to the extent such a provision is deemed to constitute an attempt to lengthen the applicable statute of limitations, it will be unenforceable.

This article will examine the cases which have held that, under Delaware law, the parties to a contract may agree to modify the otherwise applicable statute of limitations by cutting short the period of time in which claims must be filed, but may not agree to a longer period for filing claims than is permitted by the applicable statute of limitations. Although there is limited Delaware authority on point, the cases that have addressed the issue are clear that a contractual provision that attempts to lengthen the period of time during which claims may be filed is unenforceable as a violation of public policy. This prohibition on extending the statute of limitations by contract has important implications for negotiating and drafting contracts. In particular, this aspect of Delaware law would invalidate contractual provisions that purport to allow parties to bring claims beyond the applicable statute of limitations, e.g., a provision providing that a claim for breach of representations and warranties can be brought for ten years from the date of closing.

This article examines the Delaware rule prohibiting contractual lengthening of the statute of limitations and whether that rule should be reconsidered in light of the value that Delaware law places on freedom of contract. Under the current state of the law, the prohibition on lengthening the statute of limitations by contract places greater value on the policy goals served by the statute of limitations than the policy of freedom of contract. This preference for the public policy goals served by the statute of limitations over freedom of contract may be misplaced, particularly in commercial contracts among sophisticated parties. Furthermore, the prohibition on extending the statute of limitations by contract is inconsistent with Delaware's goal of promoting efficient corporate and commercial laws, because, by limiting the parties' ability to contract for a remedy beyond the applicable statute of limitations, the prohibition may prevent parties from allocating risk as they deem appropriate.

Nevertheless, practitioners seeking to lengthen the applicable statute of limitations by contract could pursue alternative approaches to get to the same result. The most effective alternative approach is a contract under seal, which is subject to a twenty year statute of limitations. This approach and other alternatives are addressed in the final section of this Article.

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II. BACKGROUND

A. Statutes of Limitations Generally

Delaware has a number of different statutes of limitations, which generally provide that claims must be brought within a specified period of time. Absent specific circumstances justifying tolling, claims that are not brought within that period are time-barred. In the commercial or corporate context, the statute of limitations that is often most relevant is the three-year statute of limitations set forth in Section 8106 of Title 10. Section 8106 applies to claims "based on a promise" and claims arising from "injury unaccompanied by force," which include breach of contract, tort and fiduciary duty claims. Specifically, Section 8106 provides:

> No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.[1]

In addition to Section 8106, Delaware has a number of different statutes of limitations that could apply depending on the nature of the injury or wrong alleged to have occurred, including four years for sales contracts,[2] one year for benefits arising from work or personal service,[3] two years for personal injury,[4] and two years for wrongful death.[5]

Under Delaware law, a statute of limitations has been described as a "statute of repose," intended to discourage stale disputes where the passage of time may have made determination of the facts more difficult.[6] Statutes of limitations represent the legislature's attempt to balance a plaintiff's right to seek a remedy in circumstances where he or she may not be immediately aware of such rights with a defendant's right to avoid having to defend against stale claims.[7] The courts have explained that, as a general matter, "the purpose underlying statutes of limitations is one of fairness to the defendant; that the defendant may be secure in his expectation that he will not be called upon to defend against stale claims."[8]

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1. Del. Code Ann. tit. 10, § 8106.

2. Del. Code Ann. tit. 6, § 2-725(1) (Delaware UCC). Under Section 2-725(1) the parties to a sales contract may shorten the statute of limitations to a period not less than one year, but may not extend it. *Id.*

3. Del. Code Ann. tit. 10, § 8111.

4. Del. Code Ann. tit. 10, § 8119.

5. Del. Code Ann. tit. 10, § 8107.

6. Keller v. President, Dirs. and Co. of Farmers Bank of Del., 24 A.2d 539, 541 (Del. Super. Ct. 1942) (quoting Boston v. Bradly's Ex'r., 4 Del. (4 Harr.) 524 (1847)).

7. *See* Rudginski v. Pullella, 378 A.2d 646, 649 (Del. Super. Ct. 1977) ("Yet, in the application of the statute in a given set of circumstances, it should not be made to produce a result which the legislature as men and women of reason could never had intended. Thus, the question becomes one of balancing the difficulty of proof which may increase with the passing of time against the hardship to a plaintiff who neither knows nor has reason to have known of the existence of his right to sue.") (citation omitted).

8. Pack & Process, Inc. v. Celotex Corp., 503 A.2d 646, 650 (Del. Super. Ct. 1985).

A statute of limitations also protects the court from having to adjudicate stale claims where a plaintiff has delayed exercising his or her rights. In all of these respects, a statute of limitations serves an important public interest:

> [S]tatutes of limitation are founded in wisdom and sound policy. They have been termed statutes of repose, and are regarded as highly beneficial. They proceed on the principle, that it is to the interest of the public to discourage the litigation of old or stale demands; and are designed not merely to raise a presumption of payment, but to afford a security against the prosecution of claims where, from lapse of time, the circumstances showing the true nature or state of the transaction, may have been forgotten; or may be incapable of explanation by reason of the uncertainty of human testimony, the death or removal of witnesses, or the loss of receipts, vouchers, or other papers.[9]

Courts applying Delaware law have described the purpose of a statute of limitations similarly: "[s]tatutes of limitations protect defendants from having to confront controversies in which the search for truth may be thwarted by the loss of evidence, the fading of memories, or the disappearance of witnesses."[10] "They also protect the courts by relieving them of 'the burden of trying stale claims when a plaintiff has slept on his rights.'"[11]

Although the Delaware cases are in agreement with respect to the purpose served by statutes of limitations, the Delaware cases are not clear with respect to the exact nature of a statute of limitations. On the one hand, the courts have stated that such statutes "arbitrarily establish judicial prerequisite" for filing suit and have characterized the attempt to file suit after the applicable statute of limitations has run as a "jurisdictional defect … that cannot be excused."[12] For example, in *Scharf v. Edgcomb Corp.*, the Delaware Supreme Court discussed statutes of limitations generally in a decision involving a former CEO's pursuit of indemnification for legal fees.[13] The Delaware Supreme Court reversed the Court of Chancery's determination that the CEO's claims for indemnification were time-barred by the applicable statute of limitations.[14] Whether or not the claims were time-barred turned on when the statute of limitations began to run.[15] The court explained that determining when the statute begins to run is important because, if a complaint is not timely filed, the court does not have jurisdiction to decide the claim:

> "[A]ll statutes of limitation[s] and all statutory appeal requirements are, by their very nature, 'harsh' in that they arbitrarily establish jurisdictional prerequisites for initiating or maintaining a suit." When a

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9. *Keller,* 24 A.2d at 541 (quoting Boston v. Bradly's Ex'r., 4 Del. (4 Harr.) 524 (1847)).

10. Nat'l Iranian Oil Co. v. Mapco Int'l, Inc., 983 F.2d 485, 494 (3d Cir. 1992).

11. *Id.*

12. Scharf v. Edgcomb Corp., 864 A.2d 909, 920 (Del. 2004) (citation omitted); *see also* Hines v. New Castle County, 640 A.2d 1026, 1028 (Del. 1994) (distinguishing "notice of claim ordinances" from statutes of limitations and explaining that "the latter are true statutes of repose intended to bar causes of action by reason of the passage of time"). Generally, a statute of limitations appears to be treated as a jurisdictional prerequisite in the case of a statutory appeal requirement. *See, e.g.,* Riggs v. Riggs, 539 A.2d 163, 163-64 (Del. 1988); Mary A.O. v. John J.O., 471 A.2d 993, 995 (Del. 1983).

13. *Scharf*, 864 A.2d at 916.

14. *Id.* at 921.

15. *Id.* at 916.

> plaintiff fails to file a timely complaint, a jurisdictional defect is created that cannot be excused. Therefore, it is imperative to identify a date certain when any statute of limitations begins to run.[16]

On the other hand, the Delaware courts have also described a statute of limitations as a defense that is personal to the defendant. Characterized this way, a statute of limitations is a procedural device rather than a jurisdictional prerequisite.[17]

B. Waiver of the Statute of Limitations

The characterization of the statute of limitations as a defense that is personal to the defendant (rather than as a jurisdictional prerequisite) bears directly on the question of whether the statute of limitations may be waived. Accordingly, the Delaware courts that have characterized the statute of limitations as a procedural mechanism have also held it can be waived by the defendant.[18] The cases that have permitted waiver have done so under circumstances where the claim had already accrued. The cases have not specifically addressed whether the statute could be waived before the claim accrued, but, for the reasons discussed in Section III, it appears that it could not. For example, in *Department of Labor v. Red Rose Roofing*, the Delaware Superior Court held that the statute of limitations is a defense that is personal to a particular defendant and can, therefore, be waived.[19] In *Red Rose Roofing*, the Delaware Superior Court refused to grant a defendant's motion to dismiss former employees' claims despite the fact that the action was brought after the applicable statute of limitations had expired.[20] The court found that the statute of limitations had been waived and that such a waiver did not violate public policy. Specifically, the defendant had waived the statute of limitations through a letter from its counsel stating that it was "willing to further extend the statute of limitations … *as necessary* to provide [the plaintiffs] with sufficient time to review and reconcile the benefit calculations and thus avoid the unnecessary filing of a lawsuit."[21] The defendant's counsel wrote the letter providing the waiver as the Department of Labor was investigating the allegations and after the claim had accrued.[22] The court upheld the waiver but provided limited reasoning, and did not address whether such a waiver would be permitted before the claims had accrued.

In *Studiengesellschaft Kohle, mbH v. Hercules, Inc.*, the District Court for the District of Delaware also held that a statute of limitations defense may be waived by a defendant after a claim accrues.[23] There, the plaintiff had agreed not to bring suit if the defendant would waive the statute of limitations.[24] The waiver agreement stated that, if the plaintiff

16. *Id.* at 920 (quoting Mary A.O. v. John J.O., 471 A.2d 993, 995 n.4 (Del. 1983)) (citing *Mary A.O.*, 471 A.2d at 995; Riggs v. Riggs, 539 A.2d 163 (Del. 1988)).

17. *See, e.g.,* Dep't of Labor v. Red Rose Roofing, Inc., C.A. Nos. 98C-02-019-SCD, 98C-02-020-JOH, 2000 WL 970678 (Del. Super. Ct. Mar. 13, 2000).

18. *See, e.g.,* Studiengesellschaft Kohle, mbH v. Hercules, Inc., 748 F. Supp. 247, 249, 251 (D. Del. 1990); *Red Rose Roofing, Inc.*, 2000 WL 970678, at *1.

19. *Red Rose Roofing, Inc.*, 2000 WL 970678, at *1.

20. *Id.*

21. *Id.* (emphasis in original).

22. *Id.*

23. 748 F. Supp. 247 (D. Del. 1990).

24. *Id.* at 251.

would refrain from bringing suit for past-due royalties for a specified period of time, the defendant would "waive the defense of statute of limitations to such claim, except to the extent of any statute of limitations bar that already has fallen into place" on the date of the waiver agreement.[25] The defendant argued that it had only waived the defense for a period of a few months, but the court rejected that argument because the defendant had failed to so specify in the agreement.[26] The court found that the defendant had not waived the statute of limitations defense as to any claim that was already barred prior to the date the parties entered the waiver agreement, but had waived the defense as to claims on which the statute of limitations had not yet run.[27]

C. Laches/Equity

The statute of limitations does not apply in a court of equity. In equitable proceedings, the policy goals achieved by the statute of limitations are, instead, achieved by application of the doctrine of laches. The doctrine of laches serves a similar purpose and, where applicable, will act like a statute of limitations to cause actions in equity to be time-barred. "Laches is an equitable principle that operates to prevent the enforcement of a claim in equity where a plaintiff has delayed unreasonably in bringing suit to the detriment of the defendant or third parties."[28] To determine whether the doctrine of laches applies, a court of equity will often look to the analogous statute of limitations, if any. A court applying laches may shorten or lengthen the period of time contemplated by the analogous statute of limitations based on the equities; however, a plaintiff's failure to seek relief within the statutory limitations period is often conclusive evidence that the doctrine of laches applies.

The Delaware Supreme Court recently discussed the doctrine of laches and its relationship to the statute of limitations.[29] The court explained that while "laches does not prescribe a specific time period as unreasonable," a court in equity will apply the applicable statute of limitations by analogy.[30] The plaintiff's failure to file suit within the analogous statute of limitations period will typically be given "great weight" in determining whether laches bars the claims.[31] Laches also permits a court to apply a shorter limitations period than the analogous statutory period if the plaintiff should have sought relief and its failure to do so prejudiced the other party.[32] Elsewhere, the Delaware courts have explained that when the equitable action does not correspond to a statute of limitations, a court of equity will apply a traditional equity analysis to determine whether laches applies.[33]

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25. *Id.* at 250.

26. *Id.* at 251.

27. *Id.* at 252.

28. 1 Donald J. Wolfe, Jr. & Michael A. Pittenger, Corporate & Commercial Practice in the Delaware Court of Chancery § 11.05 (2000 & Supp. 2009).

29. Whittington v. Dragon Group, L.L.C., 991 A.2d 1 (Del. 2009).

30. *Id.* at 7.

31. *Id.* at 9.

32. *Id.* at 8.

33. Kirby v. Kirby, C.A. No. 8604, 1989 WL 111213, at *5 (Del. Ch. Sept. 26, 1989).

D. Accrual

Under Delaware law, the statute of limitations begins to run when the cause of action accrues, which is generally the time of the wrongful act.[34] In general, an action accrues when it "come[s] into existence as an enforceable claim or right," i.e., when it "arise[s]."[35] Section 8106 provides that "no action … shall be brought after the expiration of 3 years from the accruing of the cause of such action."[36]

The key to accrual, as it relates to the statute of limitations, is that it can be analyzed in a number of different ways depending on the nature of the underlying claim.[37] It is clear, for example, that a cause of action for a breach of contract will accrue when the breach, i.e., the wrongful act, occurs.[38] Such a breach could occur at signing, closing or later.[39] In the case of representations and warranties, which often speak to the state of facts at closing, a breach of such representations and warranties occurs at closing, such that the cause of action would accrue on the closing date and the statute of limitations would begin to run. Other causes of action for breach of contract might accrue post-closing. For example, covenants contained in a contract might require performance at a later date. In that case, a claim for breach of a covenant will accrue on the date that the party fails to perform its obligations.[40]

The complexity of the law with respect to the accrual of claims in the breach of contract context is demonstrated by the analysis of the Delaware courts in two unrelated decisions involving Celotex Corporation.

In a 1985 decision, *Pack & Process, Inc. v. Celotex Corp.*, the Delaware Superior Court examined the issue of accrual of claims relating to a breach of contract for purposes of determining whether the statute of limitations required dismissal of the claim — and dilated on when different types of warranties will affect accrual.[41] In *Celotex*, the plaintiff

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34. Coleman v. PricewaterhouseCoopers, LLC, 854 A.2d 838, 842 (Del. 2004); Krahmer v. Christie's Inc. (*Krahmer II*), 911 A.2d 399, 407 (Del. Ch. 2006) (stating that "a statute of limitations is calculated from the time of the wrongful act").

35. Black's Law Dictionary 22 (8th ed. 2004).

36. Del. Code Ann. tit. 10, § 8106.

37. Certainteed Corp. v. Celotex Corp., C.A. No. 471, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005).

38. Similarly, for tort claims, the cause of action accrues at the time the tort was committed. WaveDivision Holdings, LLC v. Highland Capital Mgmt. L.P., C.A. No. 08C-11-132-JOH, 2010 WL 1267126, at *4-5 (Del. Super. Ct. Mar. 31, 2010) (explaining the operation of accrual in the context of a tortious interference with contract claim).

39. *Certainteed Corp.*, 2005 WL 217032, at *7.

40. Note that while a contract claim typically accrues as of the date of breach, "a statute of limitations will not generally bar a continuing cause of action until the contract's termination." Smith v. Mattia, C.A. 4498-VCN, 2010 WL 412030, at *4 (Del. Ch. Feb. 1, 2010) (citing Guerriei v. Cajun Cove Condo. Council, 2007 WL 1520039, at *6 (Del. Super. Ct. Apr. 25, 2007)). A contract may be continuous or severable, with a continuous contract being one in which "the obligations under the contracts are all done for the 'same general purpose.'" *Id.* In the case of a continuous contract, "the statute begins to run only when full damages can be ascertained and recovered." *Id.* (internal quotation marks and footnote omitted). In *Smith*, the court explained that deciding whether a contract was continuous or severable was a fact specific determination that cannot be made on a motion to dismiss. *Id. Smith* concerned plaintiff's claim that defendants had breached a contract to build a house for plaintiff by July 1, 2005, and had failed to do so. If the obligation to build the house by July 1, 2005 was severable from defendants' overriding obligation to build the house within a reasonable time, then the action would have accrued on July 1. If the obligation to complete construction by July 1, 2005 was simply part of a continuing obligation to perform, then the cause of action would not have accrued until April 10, 2006, when defendants completely abandoned the contract.

41. Pack & Process, Inc. v. Celotex Corp., 503 A.2d 646 (Del. Super. Ct. 1985).

brought breach of express and implied warranty claims against the defendants in connection with the installation and manufacture of a warehouse roof.[42] The plaintiff had purchased the warehouse from a third party and had paid a twenty-year bond for repairs for ordinary wear and tear and ongoing inspection of the roof.[43] The court noted that the action was governed by Section 2-725 of Title 6 of the Delaware Code (Delaware's version of Article 2 of the Uniform Commercial Code), which required that a cause of action for a breach of any sale contract be brought within four years of the "tender of delivery" except where "a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance."[44]

The *Celotex* court explained that, where the warranty "extends to future performance," the cause of action does not accrue until the party should have discovered the breach.[45] The court discussed the differences between warranties extending to future performance and present warranties.[46] The court noted that the distinction in Section 2-725 between present warranties "which are representations as to the quality or condition of goods at the time of sale, and prospective warranties, those which refer to the future condition or performance of goods, is not an innovation in the law of warranty."[47] With respect to the distinction between the accrual of prospective and present warranties, the court noted that courts have attempted to balance a seller's interest "in repose" and a buyer's interest in a remedy available for "defects that cannot be discovered until several years after the sale or delivery of defective goods."[48] The court concluded that genuine issues of material fact existed with respect to whether warranties were prospective or present warranties and declined to grant summary judgment with respect to that issue.[49]

In a 2005 decision, *Certainteed v. Celotex Corp.*, the Court of Chancery distinguished between different types of claims to determine when the applicable statute of limitations or contractual limitations period began to run in connection with an asset purchase agreement.[50] The court determined that there were three categories of claims under the asset purchase agreement. The first category, the "facilities claims," arose from the seller's breach of representations and warranties relating to environmental conditions, required permits, and compliance with regulations.[51] The seller had agreed to "indemnify" the purchaser for losses for such breaches of representations and warranties. The second category, "the product liability claims," arose from the purchaser's losses to third parties for settling claims for defective products.[52]

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42. *Id.* at 648.

43. *Id.*

44. *Id.* at 652.

45. *Id.*

46. *Id.* at 652-55.

47. *Id.* at 652-53.

48. *Id.* at 653 (citation omitted).

49. *Id.* at 656.

50. Certainteed Corp. v. Celotex Corp., C.A. No. 471-VCS, 2005 WL 217032 (Del. Ch. Jan. 24, 2005).

51. *Id.* at *7-8.

52. *Id.* at *13.

The seller had also agreed to "indemnify" the purchaser for these losses. The third category of claims, the "remediation claims," arose from the seller's failure to perform certain testing and remediation activities required by the agreement.[53] These claims were breach of covenant claims.

The *Certainteed* court compared the "indemnification" obligations relating to both the "facilities claims" and the "product liability claims." The court explained that what the contract referred to as "indemnification" with respect to the breach of the representations and warranties was not common law indemnification, but was instead a contractual remedy for losses caused by the plaintiff's breach of representations and warranties. Common law indemnity, by contrast, provides "a general right of reimbursement for debts owed to third parties" by one who is a "secondarily-liable party."[54] The distinction between claims for contractual indemnification, i.e., the facilities claims, and common law indemnification, i.e., the product liability claims, was important because the court held that such claims would accrue at different times. Claims relating to breaches of representations and warranties began to accrue at closing, while common law claims for third party indemnification would not begin to accrue until the claim was resolved with certainty, i.e., once the purchaser had made payment to a third party.[55] The court also held that the remediation claims would accrue at the time when the party failed to perform its obligation.

The Delaware court's decisions involving Celotex Corporation demonstrate the subtleties under Delaware law with respect to the accrual of claims, and, in particular, breach of contract claims. Whether the claim relates to a present or a prospective warranty, a representation, a covenant, or a third-party claim, may impact when the statute of limitations begins to run.

E. Tolling

A plaintiff need not be aware that the cause of action has accrued for the statute of limitations to begin to run. However, there are circumstances where the statute of limitations will not begin to run at the time of the wrongful act. This concept is referred to as "tolling." The term "tolling" "refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting."[56]

Under Delaware law, there are two generally recognized doctrines that define the circumstances where the tolling concept will apply (as an exception to the general rule that the statute of limitations begins to run when the wrongful act occurs): the doctrine of fraudulent concealment and the doctrine of inherently unknowable injury.[57] "Each of these doctrines permits tolling of the limitations period where the facts underlying a claim were so hidden that a reasonable plaintiff could not timely discover them."[58] Under Delaware law, "ignorance of the cause of action will not toll the statute,

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53. *Id.* at *12.

54. *Id*. at *3.

55. *Id.* at *3, *5.

56. 51 Am. Jur. 2d *Limitations of Actions* § 169 (2000 & Supp. 2008).

57. *See* Krahmer v. Christie's Inc. (*Krahmer I*), 903 A.2d 773, 778 (Del. Ch. 2006); Whittingon v. Dragon Group L.L.C. (*Whittington I*), C.A. No. 2291-VCP, 2008 WL 4419075, at *6 (Del. Ch. Sept. 30, 2008), *rev'd on other grounds*, 991 A.2d 1 (Del. 2009).

58. *Krahmer I,* 903 A.2d at 778 (quoting *In re* Dean Witter P'ship Litig., C.A. No. 14816, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998)).

absent concealment or fraud, or unless the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of."[59]

With respect to the doctrine of fraudulent concealment, a claim has been fraudulently concealed for purposes of Delaware law when the defendant:

> [k]nowingly acted to prevent [the] plaintiff from learning facts or otherwise made misrepresentations intended to "put the plaintiff off the trail of inquiry." Mere silence is insufficient to establish fraudulent concealment. Rather, the evidence must show that the defendant engaged in some sort of "actual artifice" to toll the running of the limitations period.[60]

Stated differently, a claim has been fraudulently concealed when the defendant has actively "concealed facts necessary to put a plaintiff on notice of the truth."[61] The doctrine essentially requires an intentional act of concealment or a misrepresentation by the defendant.[62]

With respect to the doctrine of inherently unknowable injury, a claim is inherently unknowable and the plaintiff blamelessly ignorant when discovery of the existence of a cause of action would be a "practical impossibility."[63] The plaintiff must demonstrate that through no fault of her own she had no knowledge of the act and the injury.[64]

In either case, the statute of limitations only begins to run upon the discovery of facts "constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery" of such facts.[65] That is, the "statute is suspended only until [the plaintiff's] rights are discovered or until they could have been discovered by the exercise of reasonable diligence."[66] Although the cases have dealt extensively with the concept of tolling, the circumstances in which the courts will toll the statute of limitations are very fact specific. Accordingly, a party entering into a contract should not, at the outset, rely on the concept of tolling to protect its ability to recover for a breach that is not detected within the statutory limitations period.

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59. Coleman v. PricewaterhouseCoopers, LLC, 854 A.2d 838, 842 (Del. 2004).

60. *Krahmer II*, 911 A.2d at 407.

61. *Whittington I*, 2008 WL 4419075, at *6.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Krahmer I*, 903 A.2d at 779; *see also* Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC, C.A. No. 4119-VCS, 2010 WL 363845, at *6 (Del. Ch. Jan. 27, 2010) ("The doctrine of equitable tolling applies when a plaintiff 'reasonably relies on the competence and good faith of a fiduciary,' and tolls the relevant statute of limitations until the plaintiff is 'objectively aware of the facts giving rise to the wrong, *i.e.,* on inquiry notice.' Similarly, the doctrine of fraudulent concealment tolls the statute of limitations until a plaintiff is put on inquiry notice where an affirmative act of concealment or a misrepresentation was used to put the plaintiff 'off the trail of inquiry.'") (footnotes omitted).

66. *Whittington I,* 2008 WL 4419075, at *6 n.50 (citation omitted); *see also* Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 860 A.2d 312, 319-20 (Del. 2004) (reversing the Court of Chancery's finding that claims were time-barred because plaintiff was on inquiry notice and concluding that claims had been tolled because facts created a reasonable inference that plaintiff was blamelessly ignorant of the wrongful acts).

In addition to equitable tolling concepts, the statute of limitations may also be tolled by agreement of the parties. Such tolling agreements may prevent a party from relying on a statute of limitations or laches defense.[67] A tolling agreement will not be implied from the conduct of the parties. Instead, the parties must reach an express agreement with respect to tolling. For example, the fact that the parties are in the process of negotiating with respect to bringing claims and potential litigation will not, standing alone, cause the statute of limitations to be tolled.[68] Furthermore, it appears that tolling agreements must be entered into *after* the claims have accrued. Tolling agreements entered into prior to accrual may not be enforceable under Delaware law.[69]

III. ANALYSIS

A. Shortening The Statute Of Limitations By Contract

Under Delaware law, the parties to a contract may agree to shorten the length of time in which claims can be brought as long as the length of time is reasonable.[70] In fact, there are a number of Delaware cases that have upheld contractual limitations periods that shorten the time for filing claims or recognized that such contractual limitations provi-

67. Universal Studios Inc. v. Viacom Inc., 705 A.2d 579, 599 (Del. Ch. 1997). In *Universal Studios*, the Court of Chancery found that a tolling agreement between the parties to a merger prevented the defendant from relying on a laches defense. *Id.* The merger had created potential breach of contract issues. *Id.* at 584-85. Following the merger and after discussion of these issues, the parties entered into a tolling agreement. *Id.* at 585.

68. VLIW Tech., LLC v. Hewlett-Packard Co., C.A. No. 20069, 2005 WL 1089027 (Del. Ch. May 4, 2005). In *VLIW Technology*, the Delaware Court of Chancery found that certain of the plaintiff's claims were time-barred because of the statute of limitations. The court instructed that negotiations between the parties regarding potential litigation cannot be a basis for tolling statute of limitations:

> In almost all disputes that end up in court, the parties attempt some sort of negotiation to avoid litigation. Tolling the statute of limitations during such negotiations, without agreement of the parties, would encourage potential plaintiffs to engage in bad faith negotiations to lengthen the time they would have to bring a suit. It would also discourage potential defendants from engaging in negotiations to avoid giving plaintiffs more time to bring their suits. This is to be avoided.

Id. at *13 n.54.

69. Studiengesellschaft Kohle, mbH v. Hercules, Inc., 748 F. Supp. 247 (D. Del. 1990); Dep't of Labor v. Red Rose Roofing, Inc., C.A. Nos. 98C-02-019-SCD, 98C-02-020-JOH, 2000 WL 970678 (Del. Super. Ct. Mar. 13, 2000).

70. *Compare* Pettinaro Constr. Co. v. All Seasons Contractors, Inc., C.A. No. 4726, 1976 WL 163270, at *2 (Del. Ch. Sept. 10, 1976). In *Pettinaro*, the court held that a contractual provision requiring that notice of damages be provided to the other party within a certain number of days as a condition to the damaged party's right to bring suit will not be construed as a contractual limitations period and, thus, will not be subject to a reasonableness test. At issue was a contract provision between a general contractor and a subcontractor which required the subcontractor to notify the general contractor of any damages within ten days and to deliver a full accounting of the damages within ten days after the extent of such damages had been ascertained. The contract provided that a failure to provide such notice would cause the damages to be considered void. The court found that such a provision was enforceable and required the subcontractor to notify the general contractor of damages within the time frame required. *Id.* at *2. In so holding, however, the court rejected the plaintiff's argument that the provision was a contractual statute of limitations. *Id.* The court reasoned that the provision did not purport to modify the statute of limitations but simply required that notice of damages be given to the general contractor to be enforceable. *Id.* The court found that this did not restrict the time for filing an action in court as long as the proper notice had been given. *Id.*

sions are valid.[71] The courts reason that a provision shortening the statute of limitations by contract is consistent with the policy of a statute of limitations. The courts have explained that:

> statutes of limitation proceed on the principle that it is to the interest of the public to discourage the litigation of old or stale demands…. Therefore, an express provision in a contract which abbreviates the time for filing a claim, so long as it remains a reasonable time, hastens the enforcement and complements the policy behind the statute of limitations…[72]

This policy in favor of shortening the length of time during which claims may be brought is further reflected in Section 8121 of Title 10, the Delaware "borrowing" statute, which provides that where a cause of action accrues outside of the state of Delaware, the Delaware court must apply whichever is shorter, the statute of limitations of Delaware or the foreign jurisdiction.[73]

The reasonableness test for shortening the statute of limitations by contract is not a difficult one to satisfy.[74] The courts have upheld a number of one-year contractual limitations periods.[75] The courts have even upheld limitations periods of less than one year. In *Johnson v. DaimlerChrysler Corp.*, for example, the District Court of Delaware dismissed racial discrimination claims against an employer based on language in an employment agreement that reduced the time for filing an action to six months after the date that the wrongful act occurred. In upholding the contract provision and dismissing the plaintiff's claims as untimely, the District Court relied on "well-settled" Delaware law that permits parties to contractually limit the time period for filing a cause of action.[76] In so holding, the court considered the plaintiff's argument that the contractual limitations period was unreasonable and against public policy. In particular, the plaintiff

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71. *See, e.g.,* Closser v. Penn Mut. Fire Ins. Co., 457 A.2d 1081, 1083 (Del. 1983) ("It is settled Delaware law … that a one year limitation on suit on an insurance contract it reasonable and binding on an insured."); Betty Brooks, Inc. v. Ins. Placement Facility of Del., 456 A.2d 1226, 1228 (Del. 1983) (holding that a "one-year period of limitations contained within an insurance contract is reasonable and binding on the insured" but noting that "an insurer can be deemed to have waived the limitation or be estopped from asserting it") (citing Ottendorfer v. Aetna Ins. Co., 231 A.2d 263, 265 (Del. 1967); Rumsey Elec. Co. v. Univ. of Del., 358 A.2d 712 (Del. 1976)); *Rumsey Elec.*, 358 A.2d at 714 (stating that a statute of limitations does not prevent shorter contractual limitations period); Wesselman v. Travelers Indemnity Co., 345 A.2d 423, 424 (Del. 1975) ("It is generally held that, in the absence of express statutory provision to the contrary, a statute of limitations does not proscribe the imposition of a shorter limitations period by contract."); *Ottendorfer*, 231 A.2d at 264 ("There is no doubt that a one-year period of limitation of suit contained in an insurance policy is reasonable and binding upon the insured."); Smith v. Mattia, C.A. 4498-VCN, 2010 WL 412030, at *3 (Del. Ch. Feb. 1, 2010) (noting the "apparent validity" of a one-year contractual limitations period, but holding that defendants were not protected by the period because they were not parties to or intended third party-beneficiaries of the contract); Rob-Win, Inc. v. Lydia Sec. Monitoring, Inc., C.A. No. 04C-11-276-CLS, 2007 WL 3360036 (Del. Super. Ct. Apr. 30, 2007) (holding that one-year contractual limitations period was reasonable); Fort Howard Cup Corp. v. Quality Kitchen Corp., C.A. No. 89C-DE-34, 1992 WL 207276 (Del. Super. Ct. Aug. 17, 1992) (recognizing that the contract at issue shortened the applicable statute of limitations to one year); Goodyear v. Fleece, 1988 WL 130470, at *1 (Del. Super. Ct. Nov. 16, 1988) (holding that a two-year contractual limitations period in insurance contract is reasonable); Nardo v. New Castle Mut. Ins. Co., C.A. No. 80C-FE-107, 1981 WL 377669 (Del. Super. Ct. July 30, 1981) (enforcing one year limitation period contained in insurance contract to bar plaintiff's claims).

72. Shaw v. Aetna Life Ins. Co., 395 A.2d 384, 386 (Del. Super. Ct. 1978).

73. Del. Code Ann. tit. 10, § 8121.

74. *See* Johnson v. DaimlerChrysler Corp., C.A. No. 02-69-GMS, 2003 WL 1089394 (D. Del. Mar. 6, 2003).

75. *See supra* note 71.

76. *Johnson*, 2003 WL 1089394, at *3 (citing *Shaw*, 395 A.2d at 386).

argued that because she was required by law to receive a notice of the right to sue from the Equal Opportunity Commission before proceeding with an action, the six-month limitations period was unreasonable. The court rejected this argument and noted:

> six months is ample time to investigate one's legal rights and obligations and to file an action. The time is not so short as to work a practical abrogation of [the plaintiff's] right of action, nor did it bar the plaintiff's right to sue before she was able to ascertain that a loss or damage had occurred.[77]

The courts have recognized that upholding the reasonableness of shortened limitations periods is consistent with Delaware law and the law of other jurisdictions. The courts have noted that "the very great weight of authority in the country is to the effect that provisions in insurance policies requiring actions for loss to be instituted within a time less than the period of limitations prescribed by statute are valid if the period provided for in the policy is reasonable."[78] The Delaware courts have upheld shortened contractual limitations periods even in certain consumer contracts, such as a contract for the purchase of a home.[79]

B. Lengthening The Statute Of Limitations By Contract

In contrast to the treatment of contractual provisions shortening the statute of limitations, under Delaware law, a contractual extension of the otherwise applicable statute of limitations is against public policy. The decision most often cited for this Delaware rule is *Shaw v. Aetna Life Insurance Co.*, a 1978 decision of the Delaware Superior Court.[80] In *Shaw*, the plaintiff had been injured in an employment-related accident and sought coverage under the employer's accident insurance policy. The insurance policy provided for a three-year contractual statute of limitations running from the date that notice of loss was required — a period longer than the otherwise applicable statute of limitations.[81] The defendant insurance company argued that the statute of limitations applied and that the three-year period provided for by contract was invalid. The court noted that, under Delaware law, a statute of limitations may be shortened by contract as long as the contractual limitations period is reasonable.[82] The court indicated that the shortening of the statute of limitations is

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77. *Id.*

78. Murray v. Lititz Mut. Ins. Co., 61 A.2d 409 (Del. Super. Ct. 1948) (holding that a one-year contractual limitation on the time period for bringing suit was reasonable); *Johnson*, 2003 WL 1089394, at *3 (citing *Shaw*, 395 A.2d at 386).

79. Masso v. Pulte Home Corp., C.A. No. 1998-10-314, 2000 WL 33653462 (Del. Com. Pl. Apr. 7, 2000). In *Masso*, the plaintiffs brought breach of contract claims against the builder of their home. The defendant corporation argued that the action was barred by a one-year contractual limitations provision. The court explained that it is "clear that where there are no conflicts with statutory authority, the parties may contract for a shorter limitation period." *Id.* at *2 (citing Ramsey Elec. Co. v. Univ. of Del., 358 A.2d 712 (Del. 1976)). However, because only some of plaintiff's claims would be barred by contract, the court determined that, at the motion to dismiss stage, it could not determine which claims were time-barred based on the record. *Id.*

80. Shaw v. Aetna Life Ins. Co., 395 A.2d 384, 386-87 (Del. Super. Ct. 1978).

81. *Id.* at 386.

82. *Id.*

consistent with the public policy reasons for the statute. As the court explained, however, a contractual provision extending the otherwise applicable limitations period is not consistent with the policy:

> [A] contractual period of limitations which attempts to lengthen or extend the period otherwise contained in a statute violates the aforesaid public policy interests set out [in *Keller*]. Two parties contracting between themselves cannot agree to circumvent the law as mandated by the legislature in its attempt to protect the public interests.[83]

The court noted that the legislature recognized this policy in Section 2-725 of Title 6, which expressly permits parties to a sales contract to shorten the limitations period but not to extend it.[84] The *Shaw* court found that the rationale behind the prohibition in § 2-275 was equally applicable to the contract at issue and, therefore, held that the contract provision was invalid."[85] As a result, the plaintiff's claims were time-barred.[86]

In decisions following *Shaw*, the courts have acknowledged that Delaware law does not permit a contractual lengthening of the statute of limitations.[87] In *Menefee v. State Farm Mutual Insurance Co.,* for example, the court rejected the plaintiff's argument that the ruling should be delayed until it could be determined whether the insurance policy provided

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83. *Id.* at 386-87.

84. *Id.* at 387. Section 2-725 provides as follows:

> (1) An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitations to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
>
> (3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within 6 months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
>
> (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this subtitle becomes effective.

DEL. CODE ANN. tit. 6, § 2-725.

85. *Shaw,* 395 A.2d at 387 (citing 1A CORBIN ON CONTRACTS § 218).

86. *Id.*

87. Hennegan v. Cardiology Consultants, P.A., C.A. No. 07C-02-015, 2008 WL 2943397 (Del. Super. Ct. July 15, 2008). In *Hennegan*, the court explained the rule with respect to lengthening the statute of limitations by contract in the context of determining the effect of a release in a wrongful death action:

> When a statute is in conflict with a contract provision, the statute will override the contract. Further, while parties can contract to limit rights, they cannot contract with each other to provide more rights than are offered by the statute. For example, the courts will enforce contract provisions which shorten a statute of limitations period. However, provisions attempting to lengthen statutes of limitations will not be enforced.

Id. at *4 (citing *Shaw*, 395 A.2d at 387; Thayer v. Tandy Corp., 533 A.2d 1254 (Del. 1987)). The court explained that a contractual attempt to circumvent the law is "invalid and unenforceable." *Id*.

for a longer limitations period than the statutory limitations period.[88] The court explained that "a contract provision for a longer period of limitation than provided by the applicable statute would be void as against public policy."[89] Despite subsequent statements by the Delaware courts acknowledging the prohibition, the courts have not rendered additional decisions applying the prohibition or provided any additional guidance with respect to the ongoing viability of the prohibition. Furthermore, the Delaware Supreme Court has not specifically addressed the issue.

C. The Mechanics Of Altering The Statute Of Limitations By Contract

Although Delaware law is clear that the statute of limitations may be shortened by contract, and may not be lengthened by contract, the words of the contract may not always be clear as to whether the parties intended to shorten the statutory period, conform to the statutory period, or lengthen the statutory period. One of the ways that this issue could arise in the commercial or corporate context is in the operation of provisions describing the "survival" of claims, rights, or representations and warranties for a certain period of time. The interpretation of contractual provisions that use the "survival" terminology is not entirely clear under Delaware law. Certain Delaware courts have construed clauses relating to the survival of rights or claims as creating a contractual statute of limitations and have permitted such clauses to cut short the period for filing claims, while other Delaware courts have held that clauses relating to the survival of representations and warranties create a period during which notice of claims must be given, but when such notice is timely given, do not necessarily shorten the applicable statute of limitations. Because it is not uncommon for contracts to provide that certain claims, rights or representations and warranties "survive" for some period of time in excess of the applicable statute of limitations, parties should be aware that such provisions may run afoul of Delaware's prohibition on lengthening the statute of limitations by contract. Furthermore, as the cases demonstrate, the term survival is imprecise and should be avoided where clear language demonstrating the parties' intent can be used.

For example, in *Hovde Acquisition, LLC v. Thomas*, the defendants alleged that the plaintiff's claims for breach of representation and warranty under a purchase agreement were time-barred.[90] To determine the applicable time period for filing claims, the Court of Chancery began its analysis with a review of the purchase agreement entered into on December 31, 1998. The purchase agreement at issue contained a "survival clause," which provided that the parties had the right to seek indemnification for breach of contract for two years from the date of closing.[91] Specifically, the agreement stated that "the right of the parties to seek indemnification … [for breach of any representation or warranty made in the purchase agreement] shall survive for two (2) years from the date of the Closing."[92] The court construed this clause as creating a contractual statute of limitations: "[o]bviously, to have been timely, any contractual claim for indemnification for breach of a representation or warranty needed to have been filed by December 31, 2000 [i.e., two years from the date of closing]."[93] Notwithstanding the limitation in that provision, the court found that a different section of the purchase

88. 1986 WL 253 (Del. Super. Ct. July 11, 1986).

89. *Id.* (citing Shaw v. Aetna Life Ins. Co., 395 A.2d 384 (Del. 1978)).

90. *See* Hovde Acquisition, LLC v. Thomas, C.A. No. 19032, 2002 WL 1271681 (Del. Ch. June 5, 2002) (Mem. Op.).

91. *Id.* at *5.

92. *Id.*

93. *Id.*

agreement granted the plaintiffs additional rights and remedies.[94] This provision provided that "[n]otwithstanding the foregoing right of indemnification, in the event of any default" the plaintiff "may avail itself of any and all rights or remedies available to it either at law or equity …."[95] The court found that, because an action for the breach of representations and warranties is also permitted by common law, not simply pursuant to the indemnification provision, the applicable statute of limitations was three years under Section 8106 of Title 10.[96]

Similarly, the *Certainteed* court noted that the asset purchase agreement at issue contained a clause stating that claims could not be brought after the second anniversary of the closing date, subject to certain exceptions.[97] One of the exceptions provided that certain claims would "survive indefinitely" subject to any applicable statute of limitations. The court found that the contract was governed by Delaware law and that, as a result, a three-year statute of limitations applied (by analogy) to claims covered by the exception. The court did not address whether the statute of limitations could be extended by contract (based on the survival clause) because the survival clause was expressly subject to the applicable statute of limitations. Nevertheless, the court appeared to construe the survival clause as creating a contractual limitations period.

In a more recent Superior Court decision, *Sterling Network Exchange, LLC v. Digital Phoenix Van Buren, LLC,* the court took a different approach to the interpretation of a survival clause.[98] The *Sterling* court, like the *Hovde* and *Certainteed* courts, characterized the survival period as a contractual statute of limitations, but ultimately construed the survival clause as creating a time period within which notice of a claim had to be brought (not as a period of time in which the claim had to be filed).[99] In *Sterling*, the parties entered into a number of contracts in connection with an acquisition. The first agreement, for the purchase of property (the "Property Agreement"), contained a clause limiting the survival of representations and warranties to six months from the date of closing. The second agreement, for the sale of a 350,000 square foot data center and the related entity which provided space and power to third party customers at the data center (the "SNS Agreement"), contained a clause that limited the survival of representations and warranties to one year from the date closing and another clause that required the defendant to dispute errors relating to the purchase price within sixty days of closing.[100] The parties also entered into an escrow agreement (the "Escrow Agreement") providing for $7 million to satisfy certain authorized claims for breach of the transaction agreements upon written demand. The demand had to be made within one year and had to contain a good faith estimate of the amount to be reserved for the claim and a reasonable description of the basis of such claim. The Escrow Agreement also gave the parties the opportunity to dispute the claim.

On the day prior to the one-year anniversary of the closing of the transactions, the defendants sent notice to the plaintiff and made a demand on the funds that the parties had placed in escrow based, in part, on breach of contract

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94. *Id.* at *5.

95. *Id.*

96. *Id.*

97. Certainteed Corp. v. Celotex Corp., C.A. No. 471-VCS, 2005 WL 217032 (Del. Ch. Jan. 24, 2005).

98. C.A. No. 07-08-050-WLW, 2008 WL 2582920 (Del. Super. Ct. Mar. 28, 2008).

99. *Id.*

100. *Id.* at *1, *4.

claims.[101] The court held that the defendants' claims under the Property Agreement and the portion of the SNS Agreement relating to the purchase price face "contractual time limitations restricting the time in which [the defendant] may bring claims. The limitations on both claims expired by the time [the defendant] provided written notice of their claim."[102] The court characterized such claims under the agreements as "expired" and described the survival clauses as contractual statutes of limitations: "because of the 60-day purchase price statute of limitation and the 6-month Property Agreement statute of limitation, [the defendants'] claims are barred."[103] The court found that the defendants, sophisticated parties, were bound by the time limitations and method of notice that they contractually agreed to.[104] However, with respect to the defendant's other claims under the SNS Agreement, the court noted that such other claims did not relate to the purchase price and, therefore, were not subject to the sixty-day limitation.[105] The court held that these claims were not barred by the survival clause because the defendant provided written notice to the plaintiff within the one-year survival period.[106] That is, despite the court's characterization of the survival clauses as creating a "statute of limitations," the court ultimately construed the survival clauses as notice periods under the contracts.

Accordingly, under the existing Delaware law, it is not clear whether a survival clause acts as a contractual statute of limitations to cut off claims that are not filed within that period, or whether such a clause creates a period of time during which notice of a claim must be given to the other party. The Delaware courts' interpretation of survival clauses suggests that parties seeking to shorten the period for filing claims should do so through clear contractual language, rather than through the use of a "survival clause." Similarly, where parties provide by contract that certain representations and warranties or claims "survive" for a period of time that extends beyond the otherwise applicable statute of limitations, the parties should be aware that such provisions may be unenforceable under either construction of a survival clause.[107]

IV. THE CASE FOR RECONSIDERATION

The Delaware courts (or the legislature) should reconsider the prohibition on extension of the statute of limitations by contract. Delaware law strongly values freedom of contract, particularly in contracts between sophisticated parties.[108] The Delaware courts have noted that:

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101. *Id.*

102. *Id.* at *5.

103. *Id.* at *5, *6.

104. *Id.*

105. *Id.*

106. *Id.*

107. As noted above, because it is not uncommon for contracts to provide that certain types of representations and warranties "survive" indefinitely (or for some period of time in excess of the statute of limitations) and because such provisions could be interpreted as creating a period of time during which notice must be given (or, alternatively, as a period of time during which claims for breach of representations or warranties must be brought), Delaware's prohibition of lengthening the statute of limitations by contract could invalidate such provisions.

108. *See* Abry Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1061-62 (Del. Ch. 2006).

> the common law ought to be especially chary about relieving sophisticated business entities of the burden of freely negotiated contracts. There remains much harshness in the world, and such entities are unlikely candidates to place at the head of the line for judicial protection, especially when the legislature is free to consider providing such relief.[109]

Accordingly, the courts have instructed,

> [w]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract. Such public policy interests are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligations.[110]

Despite this clear Delaware policy in favor of freedom of contract, the Delaware courts, by prohibiting the extension of the statute of limitations by contract, have essentially determined that the policy goals of the statute of limitations are more important than freedom of contract principles.[111] This preference for the public policy goals served by the statute of limitations over freedom of contract seems misplaced in the case of commercial contracts among sophisticated parties. With respect to commercial contracts among sophisticated parties, Delaware law ought to recognize the efficiency of permitting parties to contract for the ability to bring claims for breach of contractual representations and warranties beyond three years from the date of closing. In cases where the parties have negotiated for that ability, the parties are on notice of the longer limitations period and can preserve evidence, as many parties routinely do, as necessary to protect their interests. As noted above, the courts should be hesitant to "relieve sophisticated business entities of the burden of freely negotiated contracts."[112] Such judicial interference with freely negotiated contracts ought to be reserved for cases of fraud or other, stronger public policy concerns.

Furthermore, notwithstanding the statements in some of the cases to the contrary, the policy underlying the statute of limitations does not appear to be a particularly strong one, i.e., protecting parties from defending against stale claims and protecting courts from adjudicating disputes involving such claims. Delaware law permits parties to a contract to waive compliance with the statute of limitations and to enter into tolling agreements after the claim has accrued. Dela-

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109. *Id.*

110. Libeau v Fox, 880 A.2d 1049, 1056-57 (Del. Ch. 2005) (citation omitted), *aff'd in pertinent part,* 892 A.2d 1068 (Del. 2006). *See also* State v. Tabasso Homes, Inc., 28 A.2d 248, 252 (Del. Ct. Gen. Sess. 1942) ("Of course we appreciate the fact that the right to contract is one of the great, inalienable rights accorded to every free citizen. . . . [T]his freedom of contract shall not lightly be interfered with."); Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150, 172 (Del. Ch. 2005) (citing the "fundamental principle that parties should have the freedom to contract and that their contracts should not easily be invalidated"); Texas Instruments Inc. v. Tandy Corp., C.A. No. 12166, 1992 WL 200604, at *5 (Del. Ch. Aug. 13, 1992) (acknowledging a "powerful presumption in favor of freedom of contract"); Fleming v. U.S. Postal Service AMF O'Hare, 27 F.3d 259, 261 (7th Cir. 1994) (Posner, J.) ("[A] premise of a free-market system is that both sides of the market, buyers as well as sellers, tend to gain from freedom of contract.").

111. An argument can be made that the Delaware courts are without the power to permit parties to extend the statute of limitations by contract since the law has fixed the period of time for filing claims. However, in light of Delaware's blessing of waivers of the statute of limitation, the courts do not appear to be limited in this regard.

112. *Abry Partners*, 891 A.2d at 1061-62.

ware law, as discussed below, also permits parties to employ certain formalities to enter into a contract under seal, thereby creating a twenty-year limitations period. The fact that Delaware law permits parties to extend the limitations period for twenty years by following simple formalities — even where the parties may create such a limitations period unintentionally[113] — but will not allow parties who specifically desire an extended limitations period to do so by clear contractual language, demonstrates the weakness of the policy goals served by the statute of limitations. In either case, the defendant may be forced to defend against stale claims and the court may be required to adjudicate them.

There is another important policy reason that weighs in favor of eliminating the prohibition on extending the statute of limitations by contract. Delaware, through its legislature and its courts, seeks to promote efficient corporate and commercial laws.[114] Consistent with Delaware's goals in this regard, the courts seek to demonstrate a sophisticated understanding of business transactions in their decisions. A prohibition on the extension of the statute of limitations by contract is inconsistent with the promotion of efficient and sophisticated corporate laws because it prevents parties from allocating risk as they deem appropriate and, where the prohibition is recognized by the parties at the outset, could add significant transaction costs. For example, when parties enter into an agreement for the purchase of a business, the parties perform due diligence. In many cases, the parties do not have the resources to undertake unlimited due diligence and may rely on the representations and warranties of the other side to allocate risk in light of these practical limitations. Where parties cannot contractually seek a remedy for breach of those representations and warranties after the statutory limitations period, the parties may engage in greater due diligence and add unnecessary costs to the transaction that could be avoided if parties had the freedom to allocate risk as they determined, or the parties might avoid certain transactions altogether because of their inability to allocate risk beyond the statutory period.

Finally, it should be noted that no Delaware decision has analyzed the interplay between these competing policy goals (or Delaware's interest in promoting efficient corporate and commercial laws). The Delaware Supreme Court has not had the opportunity to decide the issue. Accordingly, although the statements in the cases suggest that the law in this area is "well-settled," there may be room for a Delaware court to reconsider Delaware's prohibition on contractual extension of the statutory limitations period.

V. PRACTICAL GUIDANCE

Where it is important to have a remedy for breach of contract for a period beyond the applicable statute of limitations, there are a number of different options that should be considered. One such option is to create a contract under seal, which, under the common law, has a twenty-year statute of limitations. The other options, which have not been well-tested in the Delaware case law, require the parties to structure the contract around the technical issue.

A. Contracts Under Seal

1. An Overview Of The Law

One possible method for extending the applicable statute of limitations is to execute a contract under seal — which if done properly, can extend the statute of limitations to twenty years. The act of creating a "sealed" instrument traces

113. That is, for a contract to be enforceable, the parties must intentionally enter into the contract under seal, but the parties need not be aware that a twenty year limitations period will apply to such a contract.

114. *See, e.g.,* Aspen Advisors LLC v. United Artists Theatre Co., 843 A.2d 697, 712 (Del. Ch. 2004) (observing "Delaware law's goal of promoting reliable and efficient corporate and commercial laws"), *aff'd,* 861 A.2d 1251 (Del. 2004).

back to English common law and has carried over into the common law of many states. As early as 1851, the Delaware Superior Court observed that "[i]t is well understood that when a seal is used, it imparts deliberation and solemnity in the transaction; that it imparts an importance and finality to it, which do not belong to instruments not under seal."[115] Today, Delaware remains one of the few states that have retained the concept, enabling it through both statutory[116] and common law mechanisms.[117] Over time, Delaware has developed a unique common law doctrine that defines the required elements and the resulting effect of executing a contract under seal.[118]

The only consistent requirement in the case law with respect to sealed contracts is that some form of symbolic "seal," whether printed or typed, be affixed near the signature line. Even clear language evidencing intent to affix a seal is insufficient absent the formulaic use of a "seal" in executing the document.[119] The traditional use of wax seals, however, has given way to printed recitals denoting a "seal."[120] Beyond the basic proposition that a seal is required for all sealed contracts, whether a sealed contract is otherwise properly executed is a mixed question of law and fact,[121] and depends on the nature of the contract at issue and the types of parties involved.

With respect to the nature of the contract at issue, the law has treated certain debt instruments — i.e., mortgages and promissory notes — differently from other contracts. For such debt instruments, both early and modern cases have been consistent in requiring only minimal evidence of the parties' intent to create a sealed instrument (also called a "specialty"). In fact, the case law has generally recognized that little, if anything, is required beyond a recital affixing the

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115. Armstrong v. Pearce, 5 Del. (5 Harr.) 351 (Del. Super. Ct. 1851).

116. The Delaware Code codifies the rules for debt instruments discussed above, expressly exempting "debt instruments" under seal, i.e., mortgages and promissory notes, from the three-year statute of limitations for contracts. Del. Code Ann. tit. 10, § 8106 (providing that "no action to recover a debt not evidenced by a record or by an instrument under seal … shall be brought after the expiration of 3 years from the accruing of the cause of such action"). This statutory recognition in the debt context, however, has no effect on the broader significance given to all contracts under seal under the common law rule. Notably, in *Newark v. NVF Co.*, C.A. No. 5176, 1980 WL 6367, at *4 (Del. Ch.) the Court of Chancery refused to assign a negative implication to the reference to sealed debt instruments in the statute, finding that a government services contract under seal was not subject to the statute of limitations.

117. *See* Monroe Park v. Metro. Life Ins. Co., 457 A.2d 734, 737 (Del. 1983) (noting that Delaware recognizes the "unique effect of sealed contracts, mortgages, and other instruments" under both common law and in certain statutes and that "the existence of a seal … exempts the contract from the applicable statute of limitations").

118. *See, e.g.,* Transbel Inv. Co. v. Venetos, 18 N.E.2d 129 (N.Y. 1938) (discussing New York law); In re Pirie, 91 N.E. 587 (N.Y. 1910) (same).

119. Some of the earliest references to instruments under seal in the case law, mostly involving promissory notes and mortgages, have noted this basic requirement. *See also* Connie v. Junction & Breakwater R. Co., 8 Del. (3 Houst.) 288 (Del. 1866) (holding that there was no need for a reference to a seal in a testimonium clause, but that there must be some "seal" affixed); Armstrong v. Pearce, 5 Del. (5 Harr.) 351 (Del. Super. Ct. 1851) (finding that a testimonium clause was not sufficient and requiring an actual "seal," even if merely hand printed.). More recently, the Supreme Court identified this essential element. Monroe Park v. Metro. Life Ins. Co., 457 A.2d 734, 737 n.5 (Del. 1983) (dismissing plaintiff's claim that language referencing a seal in the body of the agreement was sufficient absent some evidence of a "seal" in the document).

120. *See* Armstrong v. Pearce, 5 Del. (5 Harr.) 351 (Del. Super. Ct. 1851) ("A seal upon wax is not necessary; but something designed to answer the purpose of a seal is necessary. . . . It may seem absurd to give consequence to a mere scroll seal made by the flourish of a pen; but such a seal is as good at this day as the wax seal was formerly.").

121. *See* Consol. Rail Corp. v. Liberty Mut. Ins. Co., C.A. No. 97C-10-001-CHT, 2002 WL 32080503, at *4 (Del. Super. Ct. Sept. 6, 2002); Kirkwood Kin Corp. v. Dunkin' Donuts, Inc., C.A. No. 94C-03-189, 1995 WL 411319, at *5 (Del. Super. Ct. June 30, 1995); Smith v. Thau-Hsiung, C.A. No. 2004-09-128, 2005 Del. C.P. LEXIS 36 (Del. Com. Pl. Sept. 15, 2005).

seal.[122] In *American Telephone & Telegraph Co. v. Harris Corp.*, then Vice Chancellor Jacobs, sitting by designation on the Superior Court, first articulated that mortgages were special in this regard.[123] He observed that mortgages are "a special form of instrument that historically and customarily was made under seal" and, therefore, "[g]iven the peculiar nature of mortgages, it is not surprising that the Court has required less strict proof of intent to create a sealed instrument where a mortgage was involved than in the case of other instruments."[124] This distinction has subsequently carried through the case law.[125] Accordingly, in another Superior Court decision, *Dunn v. Avanti Corp.*, the court found that it was sufficient for a mortgage contract to have the word "seal" printed next to the signature line and a corresponding reference in a testimonium clause.[126] No additional evidence of the parties' intent was required, and, in fact, the court discounted testimonial evidence presented by one party that suggested they did not intend to create a sealed instrument.[127]

With respect to the types of parties involved, the rule for sealed contracts entered into by *individuals*, rather than entities, essentially replicates the rules for debt instruments. The Delaware Supreme Court made clear in the recent *Whittington v. Dragon Group, L.L.C.* decision that, for an individual, all that is necessary to create a sealed instrument is the presence of the word "seal" next to the individual's signature. The Supreme Court rejected the Court of Chancery's requirement that the parties show a clear intent to enter into a contract under seal. The Supreme Court explained that, at least in the case of individuals, it preferred a bright line rule that would be "easily applied" by the courts, and that the mere presence of the word "seal" next to an individual's name created a sealed instrument.[128] Accordingly, in the case of

122. *See*, *e.g.*, River Bank Am. v. Tally-Ho Assocs., L.P., C.A. No. 90L-JN-21, 1991 WL 35719 (Del. Super. Ct. Feb. 22, 1991) (holding that mortgage with a recital affixing a "seal" next to the signature line created a sealed instrument); In re Beyea's Estate, 15 A.2d 177, 180 (Del. Orphan's Ct. 1940) (finding that recital affixing "seal" was sufficient for a promissory note to be under seal "irrespective of whether there is any indication in the body of the obligation itself.").

123. 1993 WL 401864 (Del. Super. Ct. Sept. 9, 1993).

124. *Id.* at *7 n.6; *see also* Kirkwood Kin Corp. v. Dunkin' Donuts, Inc., C.A. No. 94C-03-189, 1995 WL 411319, at *5 (Del. Super. Ct. June 30, 1995) ("Mortgages are conveyances that typically involve an unequivocal debt secured by specific reality in a recorded instrument. Moreover, mortgages usually are operative for decades. Thus, claims arising out of mortgages are readily susceptible to proof even decades after their execution.") (citations omitted).

125. *See*, *e.g.*, Whittington v. Dragon Group L.L.C. (*Whittington I*), C.A. No. 2291-VCP, 2008 WL 4419075 (Del. Ch. Sept. 30, 2008) , *rev'd on other grounds*, 991 A.2d 1 (Del. 2009); Ryland Group, Inc. v. Santos Carpentry Co., C.A. No. 00C-09-056-SCD, 2004 Del. Super. LEXIS 87, at *6-9 (Del. Super. Ct. Mar. 26 2004); Consol. Rail Corp. v. Liberty Mut. Ins., C.A. No. 97C-10-001-CHT, 2002 WL 32080503 (Del. Super. Ct. Sept. 6, 2002). The treatment of promissory notes under seal has been less consistent. More recent cases clearly conflate promissory notes and mortgages as "debt instruments" that are subject to a lesser standard of proof. *Ryland Group,* 2004 Del. Super. LEXIS 87, at *6-7 ("It is clear from the cases construing § 8106 that documents of debt, such as mortgages *or promissory notes*, escape the three year limitation if they contain the most minimal reference to a seal.") (emphasis added); *Whittington I*, 2008 WL 4419075 (same). Earlier cases, however, are less clear on this point. *Compare* In re Beyea's Estate, 15 A.2d 177, 180 (Del. Orphan's Ct. 1940) (finding that recital affixing "seal" was sufficient for a promissory note to be under seal "irrespective of whether there is any indication in the body of the obligation itself") *with* First Trust Corp. v. Byers, C.A. No. 95-05-356, 1997 WL 1737103 (Del. Ct. Com. Pl. Feb. 25, 1997) (recognizing a lesser standard of proof for mortgage instruments under seal but finding that promissory note had to meet higher standard applying to other types of contracts).

126. C.A. No. 78C-AU-125, 1983 Del. Super. LEXIS 940, at *1-2 (Del. Super. Ct. Feb. 18, 1983).

127. *Id.* at *2.

128. Whittington v. Dragon Group L.L.C. (*Whittington II*), 991 A.2d 1, 14 (Del. 2009) ("[W]e hold that in Delaware, in the case of an individual, in contrast to a corporation, the presence of the word 'seal' next to an individual's signature is all that is necessary to create a sealed instrument, 'irrespective of whether there is any indication in the body of the obligation itself that it was intended to be a sealed instrument.'").

individuals, evidence of intent is not relevant where the contract contains the word "seal" in the signature line. Furthermore, the parties need not understand the consequence of creating a contract under seal.

On the other hand, agreements (other than mortgages and promissory notes) entered into by *entities*, rather than individuals, require a more exacting standard of proof. For such a contract entered into by an entity to be considered "under seal," it must contain: (1) a recital affixing the "seal"; (2) language evidencing a seal in the body of the agreement; and (3) additional extrinsic evidence of the parties' intent to create a sealed instrument.[129] The third element, requiring some additional extrinsic evidence of the parties' intent, forms the basis of the more exacting standard. The case law provides some guidance on this point.

In *Kirkwood Kin Corp. v. Dunkin' Donuts, Inc.*, the Superior Court stressed that "the simple use of formalities and boilerplate unaccompanied by substantive evidence of the parties' intent to seal it is not enough to turn an ordinary contract into a specialty."[130] There, the court considered whether a set of franchise and lease agreements were "sealed" and therefore exempt from the three-year statute of limitations. The court initially noted that the "only support" for a finding that the agreements were under seal was the presence of a corporate seal after the parties' signatures and language in the respective testimonium clauses in both agreements.[131] The court observed, however, that nothing in the body of

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129. Although the case law in this area is somewhat conflicted, there has been a noticeable shift within the past twenty years towards more restrictive requirements. Early cases outside of the mortgage/promissory note context applied a more lenient standard. *See*, *e.g.*, Peninsula Methodist Homes and Hospitals, Inc. v. Architect's Studio, Inc., C.A. No. 83C-AU-118, 1985 WL 634831 (Del. Super. Ct. Aug. 28, 1985) (finding that a recital affixing seal and language referencing a "seal" in a testimonium clause in a construction contract were sufficient to create a sealed instrument). Then, in *AT&T v. Harris Corp.*, 1993 WL 401864 (Del. Super. Ct. Sept. 9, 1993), then Vice Chancellor Jacobs relied on a Third Circuit Court of Appeals decision, *Aronow Roofing Co. v. Gilbane Building Co.*, 902 F.2d 1127 (3d Cir. 1990), in restating the relevant standard under Delaware law. The Vice Chancellor stated that:

> [F]or an instrument other than a mortgage to be under seal, "it must contain language in the body of the contract, a recital affixing the seal, and extrinsic evidence showing the parties' intent to conclude a sealed contract. . . . The mere existence of the corporate seal and the use of the word 'seal' in a contract do not make the document a specialty. . . ."

AT&T, 1993 WL 401864, at *7 (quoting *Aronow*, 902 F.2d at 1129).

Subsequent cases, however, have consistently applied the formulation provided in *AT&T* and *Aronow* to require some additional evidence of the parties' intent beyond the formalities used in the contract at least as to a signature by an individual. *Compare Whittington II*, 991 A.2d at 14 (holding that recitals affixing the "seal" next to the parties' signatures were sufficient to create a sealed instrument when the parties were individuals rather than corporations); Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC, C.A. No. 4119-VCS, 2010 WL 975581, at *2 (Del. Ch. Mar. 3, 2010) (finding that a testimonium clause alone was insufficient to create a sealed instrument); *Ryland Group,* 2004 Del. Super. LEXIS 87, at *8 (finding that a subcontractor agreement and accompanying addendum failed to show the "requisite intent to create a contract under seal" where the only references to a seal were in the testimonium clause in the subcontractor agreement and the word "seal" located to the right of the signature lines in an addendum); Kirkwood Kin Corp. v. Dunkin' Donuts, Inc., C.A. No. 94C-03-189, 1995 WL 411319 (Del. Super. Ct. June 30, 1995) (finding that the use of a corporate seal and language in the testimonium clauses in franchise and lease agreements was insufficient to create a sealed instrument).

In fact, in the *Consolidated Rail Corp. v. Liberty Mutual Insurance Co.*, C.A. No. 97C-10-001-CHT, 2002 WL 32080503 (Del. Super. Ct. Sept. 6, 2002), decision discussed more fully above, the Superior Court, in recognizing the inconsistencies in the case law and also declining to follow *Peninsula*, observed that "[i]n today's world, no purpose would be served by according the same archaic presumptions applicable to mortgages as sealed instruments to documents other than mortgages absent clear evidence of the parties intent to do so." *Id.* at *7. *But see Whittington II*, 991 A.2d at 14 (adopting the rule that all an individual need to do to create a sealed instrument is affix the word "seal" next to his signature, based on the court's preference for a bright line rule).

130. 1995 WL 411319, at *6.

131. *Id.* at *5.

the documents showed any "substantive intent" to create a sealed document.[132] Indeed, the court found that the available extrinsic evidence suggested otherwise, pointing to language in an accompanying guaranty suggesting that the parties intended to seal that document as evidence that the underlying commercial contracts at issue were not intended to be sealed.[133] Therefore, the court preliminarily found that the common law rule extending the statute of limitations for sealed contracts did not apply, and permitted discovery into whether there was extrinsic evidence to support the plaintiff's claim that the franchise and lease agreements were under seal.[134]

In the most detailed treatment in the Delaware case law of what is meant by "extrinsic evidence," in *Consolidated Rail Corp. v. Liberty Mutual Insurance Co.*, the Superior Court found that the plaintiffs failed to make the requisite showing that a construction contract was under seal.[135] The court initially stressed that "[t]here must … be substantive evidence of the intent of the parties to create a sealed document [and] [t]he absence of such evidence will deny sealed status to an ordinary contract."[136] While the agreement in question contained references to being under seal with phrases such as "signed, sealed and delivered" and "seal attest" printed next to the signature lines, the body of the agreement contained "no reference" to an intent to seal the document.[137] Nor was there any mention of an intent to create a seal in the related correspondence and other transaction documents. Moreover, the court went on to observe that there was no "evidence from any source" that suggested the parties intended to seal the contract, noting that extensive discovery conducted in related tort litigation as well as in the present suit failed to provide evidence on this point.[138] The court also considered the nature of the contractual obligations at issue. For example, the court pointed to the "limited duration" of the work, i.e., road construction work which was to be completed within 150 working days and to be followed by a release of any liability once the work was completed, as being distinct from the more familiar mortgage context.[139] The court also observed that "[t]here is no evidence, extrinsic or otherwise, which indicates, as is the case with mortgages, that such documents were customarily sealed."[140]

Recently, the Court of Chancery rejected a plaintiff's argument that, under the Supreme Court's decision in *Whittington*, a testimonium clause alone is sufficient to create a sealed document in a contract between two entities.[141] The word "SEAL" did not appear next to the parties' signatures, but the agreement contained a clause stating "IN WITNESS

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132. *Id.*

133. *Id.* at *5 n.8.

134. *Id.* at *6.

135. C.A. No. 97C-10-001-CHT, 2002 WL 32080503 (Del. Super. Ct. Sept. 2, 2002).

136. *Id.* at *5.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC, C.A. No. 4119-VCS, 2010 WL 975581 (Del. Ch. Mar. 3, 2010).

WHEREOF, the parties have set their Hand and Seal as of the day of the year first above written."[142] The Court of Chancery declined to construe *Whittington* as holding that a testimonium clause was by itself sufficient to create a sealed document.

Practitioners looking to seal an agreement between entities, rather than individuals, in order to extend the statute of limitations, should recognize that an inquiry into the "extrinsic evidence" of the parties' intent will be determinative. Therefore, parties should create a record of their intent to enter into an agreement under seal. Whichever set of rules may apply, the effect of a properly sealed instrument is clear, sealed documents will be subject to a twenty-year limitations period.[143]

2. Creating A Contract Under Seal

For parties to a commercial contract seeking to create a contract under seal, the agreement should contain: (1) a recital affixing the "seal"; (2) language evidencing a seal in the body of the agreement; and (3) additional extrinsic evidence of the parties' intent to create a sealed instrument. A contract properly under seal will be subject to a twenty-year limitations period. Nevertheless, parties may wish to specify a shorter period. The ability of parties to create a contract under seal that provides for a limitations period less than twenty years has not been addressed in the case law. However, because Delaware law permits parties to cut short the statute of limitations by contract, Delaware law should also permit parties to create contracts under seal that extend the otherwise applicable statute of limitations for less than the full twenty years.

B. Contracting Around The Prohibition

Although Delaware law prohibits a contractual extension of the statute of limitations, the law does not appear to limit the parties' ability to contract around accrual, i.e., to fix accrual at a certain time or upon the occurrence of certain events. Although no Delaware case has addressed the issue, the Fourth Circuit Court of Appeals, in a decision applying Maryland and Nebraska law, held that the parties to a contract can agree when claims will accrue, and therefore, when the statute of limitations would begin to run.[144] The court held that such a contractual provision was not against public policy even though Nebraska law did not allow contractual alteration of the statute of limitations. Accordingly, parties

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142. *Id.* at *1.

143. *See*, *e.g.*, State v. Regency Group, Inc., 598 A.2d 1123, 1129 (Del. Super. Ct. 1991) (recognizing a "common law limitation of twenty years" for contracts under seal) (citing Garber v. Whittaker, 2 A.2d 85 (Del. Ch. 1938)); DiBiase v. A & D, Inc., 351 A.2d 865, 867 (Del. Super. Ct. 1976) ("The common law rule provides that [a sealed] contract is actionable for twenty years.") (citing Garber v. Whittaker, 2 A.2d 85 (Del. Ch. 1938)); Garber v. Whittaker, 2 A.2d 85, 88 (Del. Ch. 1938) (noting that the common law "prescribes no absolute bar due to the lapse of time, but only a presumption of satisfaction after twenty years"); *see also* Aronow Roofing Co. v. Gilbane Bldg. Co., 902 F.2d 1127, 1129 (3d Cir. 1990) (applying Delaware law and noting that "[s]ealed contracts are subject to a twenty year statute of limitations period"). Delaware practitioners also should note that several Court of Chancery decisions have relied on the common law doctrine to bar claims based on laches. *See* Whittingon v. Dragon Group L.L.C., C.A. No. 2291-VCP, 2010 WL 692584, at *4-*9 (Del. Ch. Feb. 15, 2010) (holding that the common law doctrine on sealed instruments barred a claim under the analogous statute of limitations in deciding on laches claim); Leiter v. Carpenter, 22 A.2d 393, 397 (Del. Ch. 1941) (same); Garber v. Whittaker, 2 A.2d 85, 88 (Del. Ch. 1938) (noting that "[a]n obligation that arises out of a sealed instrument appears to be left by our statutory law, so far as limitations of action are concerned, to the common law" and therefore refusing to apply the doctrine of laches within that period absent a showing of extraordinary circumstances for doing so).

144. Harbor Court Assocs. v. Leo A. Daly Co., 179 F.3d 147 (4th Cir. 1999).

to a contract could, for example, agree that claims will not accrue until the wrongful act has been discovered or should have been discovered. The risk of such an approach under Delaware law is that a court would construe such a provision as against public policy.

Another possible approach to contracting around Delaware's prohibition on extension of the statute of limitations is to structure the agreement to cause the breach of contract to occur post-closing. The use of prospective warranties, where feasible, could achieve this result. For example, in *Krahmer v. Christie's Inc.*, the Court of Chancery explained that a six-year express warranty of a painting's authenticity "created a reasonable inference that [the auction house] put the [buyers] on inquiry notice that claims involving the authenticity of the painting could only be brought within six years from the date of purchase."[145] The court declined to toll the statute of limitations and explained that, given the "notice" the buyers had as a result of the express warranty, the court could not allow the buyers to bring a claim "after the expiration of both the applicable statute of limitations and the [auction house's] express warranty."[146] In addition, the court noted that the "six-year warranty provided protection to the [buyers] beyond the applicable three-year Delaware statute of limitations and the four-year UCC statute of limitations."[147] Such an approach may not be practical in certain situations where the subject matter of the contract does not lend itself to future warranties.

Another alternative, which draws on the concept of the future performance of covenants — so as to enable a party to seek a remedy beyond three years from the date of closing, is to draft the contract to avoid tying the reimbursement/indemnification obligations to a breach of representations and warranties. For example, a contract could provide that the seller will reimburse a purchaser for any losses caused by environmental conditions arising on the purchased property that were caused by the seller for 10 years from the date of closing. Such an obligation could be characterized as a covenant that contemplates future performance and, accordingly, the claim with respect to that obligation should not accrue, and the statute of limitations should not begin to run, until the purchaser discovers the loss. While in the absence of authority construing such a provision, there is inevitably some uncertainty with respect to the enforceability of this approach, it should avoid the issue raised by the Court of Chancery in the *Certainteed v. Celotex Corp.*,[148] where the court distinguished between reimbursement for claims for breach of representations and warranties and indemnification for third party claims, and held that claims for losses incurred as a result of a breach of representations and warranties accrue at closing.

VI. CONCLUSION

Practitioners entering into commercial and corporate contracts should be cognizant of the enforceability issues that arise in connection with provisions that attempt to lengthen the applicable statute of limitations by contract, and should note that such provisions may be drafted using "survival" or other vague terminology but without specific reference to the statute of limitations. In situations where the availability of a remedy beyond the statutory limitations period is important to a client, practitioners should consider the use of alternative approaches, such as a contract under seal and restructuring

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145. *Krahmer I*, 903 A.2d at 783.

146. *Id.*

147. *Id.* at 783 n.58.

148. *See* Section II.D, *supra*.

closing representations as either forward looking warranties or covenants, while keeping in mind, and advising the client of, any limitation or uncertainty associated with these approaches.

Finally, while practitioners may have the ability to create an enforceable contract that is aligned with the parties' commercial desires and expectations through creative lawyering, practitioners and their clients would be better served by a legal framework that permitted sophisticated parties to commercial and corporate agreements to contract for remedies and allocate risk as they deem appropriate and in connection therewith to extend by contract otherwise applicable statute of limitations periods. The availability in Delaware of such a legal framework would be attractive to parties negotiating corporate and commercial contracts and would bolster Delaware's well-earned reputation as a sophisticated jurisdiction with the flexibility and predictability that is critical to business transactions.