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Saul Levmore, "Strategic Delays and Fiduciary Duties," 74 Virginia Law Review 863 (1988).

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VIRGINIA LAW REVIEW

VOLUME 74

AUGUST 1988

NUMBER 5

ARTICLES

STRATEGIC DELAYS AND FIDUCIARY DUTIES

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IN chess, warfare, and courtroom battles, there is often an advantage in making the first move. Among the many advantages of the first mover in law is the ability to delay objecting to another's behavior in order to observe further developments. When is delay objectionable for this or other reasons? A comprehensive answer to this question must explore, among other things, the various advantages of delay, the effect of delay on other litigants whose successes and failures may be precisely what a delaying litigant awaits, the possibility that a potential adversary can avoid delay by forcing confrontation, and the degree to which the availability of prospective relief is a prerequisite for forcing early confrontations. I do not in this Article develop a comprehensive answer to this difficult question and, indeed, it is possible that the value (and the social cost) of delay in legal disputes—like the value of the first move in chess—is too difficult to measure.

I concentrate instead on claims brought against parties who invested on their own in projects that arguably should have been left to or shared with a partnership, corporation, previous employer, patentholder, or other beneficiaries. I show that one can learn a good

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deal about these cases by keeping one's eye on the possibility of strategic delay by beneficiaries, or plaintiffs, who "wait-and-see" whether particular investments proved profitable. This inquiry serves two functions. It provides a key to several areas of law that otherwise contain decisions that are very hard to predict. It also makes some preliminary inroads into the more general question of when delay is objectionable.

Part I begins with some general comments about strategic delay. Part II explores the published decisions involving claims that a partner has breached his fiduciary duty by taking an opportunity that belonged to the partnership. One reason for emphasizing "usurpation of partnership opportunity" cases is that these cases are (otherwise) relatively difficult to predict. Moreover, these published decisions often contain bits of information that are helpful in assessing whether there was strategic delay.¹ The discussion in Part III moves from partnership to other fiduciary cases and suggests other areas in which the presence or absence of delay may be a powerful predictor of the case law.

I. STRATEGIC DELAYS

A. *Wrongful Delays*

In law as in everyday life, foresight is useful only when real choices can be made—and hindsight is not useful at all. Thus, if *A* injures *B* in a manner that was entirely beyond *B*'s control,² and *A* later learns that *B* is unusually slow to heal or that the law in *B*'s jurisdiction is in the midst of a quick move toward the imposition of punitive damages on wrongdoers like *A*, then *A* may wish that he could have predicted these developments before injuring *B*. Regardless of whether the legal

¹ I am not wedded to a view of fiduciary law, or even of legal and moral responsibility in general, that takes categories such as partnership, corporation, agency, trust, and contract, terribly seriously. I note in passing the familiar and sensible idea that a legal system that makes these distinctions may lower transaction costs by offering parties a number of pre-specified arrangements from which to choose. The primary focus of this Article, however, is strategic delay by plaintiffs. The organization of the analysis around certain categories, such as partnership opportunity cases, is meant only to highlight the variables I wish to emphasize.

² I am not unaware that the victim's activity level is almost always within the victim's control so that in some sense it always takes two to tort. A purist might wish to understand the situation as one in which society is disinclined to devalue *B*'s freedom of movement.

system tries to control *A*'s behavior by linking *B*'s claim against *A*³ to the damage *B* actually experiences, it is relatively unimportant whether this claim is brought one minute or three years after *A* injures *B*. The legal system may want to force *B* to move quickly in order to keep memories and evidence fresh (although it may actually be *B*, as the bearer of the burden of proof, who loses the most when memories fade), but there is no reason to think that there is any general bias, in favor of or against *B*, generated by the passage of time. Sometimes, to be sure, accident-avoidance technology will have improved or *B*'s condition will have developed to be much worse or better than average by the time *B*'s claim is tried, and, regardless of what it is told, a jury may be swayed by *ex post* reality rather than by the facts that would have confronted a reasonable person in *A*'s position at the time that *A* injured *B*.⁴ But, again, there is no structural reason to think that this "error" works overwhelmingly in or against *B*'s interest.

B's ability, within the confines of any statute of limitations or laches defense potentially available to *A*,⁵ to wait-and-see before deciding whether or when to bring suit is worth little or nothing.⁶ This worthlessness derives from the fact that the activity that injured *B* normally does not advantage *B*. In contrast, consider the following three cases:

³ Of course, the legal system can use other claimants and claims, including criminal law, to deter or penalize *A*.

⁴ See *infra* note 33.

⁵ Short statutes of limitations may, of course, reflect judgments not only about the freshness of evidence but also about factfinders' abilities to go back and assess behavior much earlier in time.

Laches, which began as an equitable defense against a party who brings suit after waiting "an unreasonable time after gaining knowledge of material facts" and thus threatens prejudice to the defendant, can be seen as an alternative (or predecessor) to a statute of limitations, but it survives the development of (and coexists with) statutes of limitations. See *Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758, 767 (Alaska 1977); 5 C. Thompson & D. Jakala, *Cyclopedia of Federal Procedure* § 15.622, at 679 (3d rev. ed. 1985) ("In equity laches has been said to take the place of the statutes of limitation. However, unlike limitations, laches does not depend on mere lapse of a defined time. In general, laches is available as a defense only where an equitable right is sought to be enforced, and, otherwise, statutes of limitations determine when an action must be brought.").

⁶ Delay may be worth a good deal in tort cases, especially if damages are an increasing function of apparent injury. A jury may, for example, award millions of dollars to a plaintiff who has rather clearly been paralyzed for life but not to one who was injured within the last year and is still under the care of optimistic physicians. Delay may also be worth something to a plaintiff who perceives that his claim is a loser under contemporary legal doctrines, but who has some reason to think that the doctrines may change by the time his case is tried.

(1) As a result of some mistake, such as a mix-up of addresses, *C* begins to paint *D*'s house even though *D* has never discussed such a job with *C* or anyone else. *D* watches the work proceed for four days and when it is done not only does he refuse to pay *C* for the work but also he threatens to counterclaim for trespass.

A court would resolve this unrealistic hypothetical in *C*'s favor by declaring that *D* is "estopped" from raising lack of consent as a defense against *C*'s equitable claim for compensation.⁷ The result appears both efficient, because the homeowner *D* is probably the least-cost avoider, and fair, because *D* sought to exploit *C*'s honest mistake. Note that *C* has no incentive to wander around town painting strangers' houses because recovery will not be granted when the homeowner either does not see the work in progress or objects soon after *C*'s work begins.

(2) *E* and *F* are neighbors. *E* backs his automobile out of his driveway at 40 miles per hour each morning, frightening *F*'s family. *F* says nothing to *E*. In the third year of this pattern, *E* runs over *F*'s child.

F's tort suit against *E* is surely not weakened a bit by the three-year wait. One might note that the legal system is usually unwilling to grant prospective relief and that it encourages *F* to wait for an actual injury to take place⁸ (although I suppose *F* could have called the police and encouraged their monitoring for violations of the motor vehicle code), but I think it more useful to observe that *F*, unlike *D* in the previous example, gained nothing by waiting and that he continued to have every reason to want *E* to slow down.⁹

⁷ See *Ollig v. Eagles*, 347 Mich. 49, 78 N.W.2d 553 (1956) (defendant liable for value of mistakenly built house because he "silent[ly] acquiesc[ed]"); *Rhyne v. Sheppard*, 224 N.C. 734, 32 S.E.2d 316 (1944) (holding defendants liable for the value of permanent improvements mistakenly made by plaintiffs on a lot owned by defendants who lived nearby, knew of plaintiffs' actions, and did not protest). See generally 2 G. Palmer, *The Law of Restitution* § 10.9, at 454 (1978) ("No American case seems to have given relief to one who mistakenly repairs or improves the chattel of another."); *Levmore*, *Explaining Restitution*, 71 Va. L. Rev. 65, 84-87 (1985) (proposing positive theory of mistaken improver and other restitution cases).

⁸ See, e.g., *Mink v. University of Chicago*, 460 F. Supp. 713, 719 (N.D. Ill. 1978) (holding that women who were given DES in an experiment could not recover in a product liability claim based on "mental anxiety" and "emotional distress" in the absence of personal physical injury). See generally W. Prosser & W. Keeton, *The Law of Torts* § 12, at 55-56, § 54, at 361-62, § 91, at 653 (5th ed. 1984).

⁹ The only problem with hinging too much on this observation is that in some tort cases (but perhaps not those involving personal injury) it will be arguable that the victim might be

(3) The board of directors of a museum employs an investment adviser to manage its endowment as he sees fit, but only in assets that yield regular income and that are not "speculative." After a few years the adviser buys stock in a company that occasionally skips annual dividends and that generally rises 30% in value when the stock market rises 5%, and falls 30% when the market falls 5%. Quarterly reports to the board of directors regularly disclose the existence of this investment and its performance in the museum's portfolio. After six years and a particularly severe market downturn, the museum (as instructed by its directors) sues the investment adviser for breaching the contract and his fiduciary duty. It seeks damages that would put it in the position it would be in had this one investment never been made and had these funds been invested all along in blue-chip stocks.

The museum will (and I think should) lose this case, on the grounds that there was disclosure and that they therefore impliedly consented to a revised arrangement with their investment adviser.¹⁰ Had there been no disclosure, the case would be a close one. On the other hand, had the museum objected after the first or second report from its adviser, then it would surely win. And had there been no disclosure, with the directors discovering the nature of the investments only after the severe downturn in the portfolio's results, the claim would pose an altogether different question—one that would turn, I think, on a delicate calculation of damages.¹¹

This third hypothetical comes closest to highlighting what I have in mind as the critical variable in many fiduciary cases. The museum might enjoy an advantage by delaying its objection, since, when the market rises, the museum's portfolio greatly increases in value. Similarly, in the first hypothetical, *D* might gain from *C*'s painting his house, so long as *C* does not polish off the job with purple stripes or some other feature that will leave *D* disadvantaged and surely cause

waiting strategically for a more substantial offer from his neighbor to purchase a "property right." There is no need, however, to pursue this argument here. Not only does it take us further away from fiduciary law, but also it turns out, I think, to be not much of an argument. Tort law rules anticipate some bargaining that will reallocate rights and responsibilities; that this bargaining may take time is a small annoyance rather than a major obstacle to our understanding when consent will be implied, or delay will be tolerated.

¹⁰ See *Maser's Estate*, 21 Pa. D. & C. 559 (1934); *O'Brien's Estate*, 18 Pa. D. & C. 501 (1933) (eighteen years' knowledge of investments by beneficiary).

¹¹ My instinct is that if this investment had been very profitable in its early years, so that its net effect were positive, most courts would find some way to limit the museum's damages.

him to complain about *C*'s trespass. In contrast, one gains nothing from a neighbor's reckless driving. Consent is implied where the "consenting" party might have strategically delayed raising an objection.

I will continue to draw attention to a plaintiff's delaying his objection when there may be advantage in doing so. Indeed, the importance of such a delay is the central point of this Article. It is useful, however, to take a small precautionary detour in order to consider the behavior of the party that is the subject of this plaintiff's complaint. When this party has truly done wrong and there is no question that his behavior was undesirable, it becomes unimportant or even destructive to employ the few available legal tools to discourage the plaintiff from strategically delaying, or "waiting with advantage." There are a few ways to think about this point, but it should suffice simply to note that the more one is concerned with deterring a wrongdoer's behavior, the less one would want to shift any available deterrence from the wrongdoer to the victim simply because the latter delays with what might be intent to gain a relatively small advantage.¹²

(4) *G*, who lives near and is employed in factory *H*, determines that *H* causes pollution in a recklessly antisocial way. *G* hopes that someone else will blow the whistle and cause *H* to alter its methods because *G* fears that he will be regarded as a troublemaker by his employer. After two years, a class action is brought against *H*. *G* is among those members of the class whose property was damaged by *H*.

Although we might be disappointed that *G* did not rise up and correct a bad situation at his first opportunity, no one, I suspect, favors a rule that completely denies *G* recovery. Some readers (and courts) might reach this result by thinking it unfair and almost unprecedented to penalize *G*'s passivity, when it is *H* that is the primary wrongdoer.¹³ Others may reason that any approach that attempts to

¹² That this reads much like a critical discussion of contributory negligence is, of course, no accident. See generally Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 Yale L.J. 697, 721-27 (1978) (assessing conflicting fairness rationales in support of either system).

¹³ An unpromising line of argument *against G* is to analogize his behavior to that of a plaintiff who has "come to the nuisance." Given that *G* has been in the same physical location for some time, there is a sense in which he, like one who comes to a nuisance and files suit, has

encourage people like *G* to move faster in order to prevent harm to others threatens to underdeter *H*, since it is possible that *H* will count on the fears of *G* and similarly situated parties. Moreover, no factfinder will be able to determine with absolute certainty when *G* first learned of the wrong. Thus, victims who learn about a wrong may be *deterred* from coming forward under rules that allow them to freeride on other whistle blowers but penalize them if, upon coming forward, they appear to have delayed with advantage.¹⁴ Passivity may be the best strategy under such rules. Again, the more this prediction of *G*'s (and other victims') behavior is plausible, the more it will also occur to *H*, and the less will *H* be deterred from wrongdoing. Finally, we are unlikely to be influenced by the fact that *G*'s delay will have greatly increased the amount of damages *H* must pay, both because *H* may have been enriched by its (polluting) method of operation and because by the terms of the example there is little fear of overdetering *H*. Had the example involved a factory experimenting with innovative pollution-control technology so that it might have been uncertain whether it would be found liable in tort, *G*'s delay might well have prompted some doctrinal maneuvering that would have limited *H*'s damages.

On the other hand, when the behavior at issue seems unambiguously undesirable, as did *H*'s in the original illustration (4), it is easy to conclude that, in order to provide maximum deterrence against such misbehavior, strategic delay ought not and will not be discouraged. Such arguments are, of course, stronger when there are concerns about underenforcement. But the basic point is that even strategically delaying plaintiffs might be expected to win cases involving clear fiduciary breaches, or other unambiguously wrongful behavior, not only because to penalize their delay may be to underdeter clear wrongdoing, but also because their delay may be a desirable

enjoyed life (or at least employment) all along and now suddenly finds it advantageous to complain.

¹⁴ If *G*, in example (4), has waited one year, then he may think it better now to wait further and freeride on another victim's lawsuit than to speak up now and call attention to the question of whether he knew of *H*'s behavior earlier. While it is theoretically possible to avoid this undesirable deterrent by denying *G* (and other victims) the ability to freeride—that is, by eliminating class actions and even some remedies triggered by governmental action—such a “solution” obviously entails enormous and undesirable sacrifices in the deterrence of *H* and other tortfeasors.

weapon in the arsenal of deterrents against clear wrongdoers.¹⁵

Perhaps the most convincing argument for discouraging strategic delay when the defendant's behavior is not unambiguously wrongful is that such delay threatens to deter desirable behavior by potential defendants. If a factory owner knows that what he does now *might* be regarded later, in retrospect, as actionable, then the more plaintiffs can delay strategically and run up damages the more the factory owner will be disinclined to pursue his current plans. Of course, this is true even if, on average, the factory owner's plans will generate positive social value. Put differently, uncertainty about later judgments will deter desirable behavior if negative judgments yield large damages. And strategic delays can yield just such damages.¹⁶

¹⁵ This point goes to the question of optimal delay in general. There are, for example, contract cases and fraudulent conveyance cases in which delaying plaintiffs do very well. Of course, if underenforcement is a serious problem, then an argument can be made for *not* penalizing strategic delay even in cases involving behavior that is not clearly impermissible. There is some reason to think that fraudulent conveyance law fits this pattern, but an extensive inquiry into the subject is beyond the reach of this Article. For cases where there was clearly impermissible behavior and delay was not discouraged—and, indeed, where there is reason to think that it is an important tool in the fight against unambiguously wrongful behavior—see, e.g., *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3d Cir. 1986), cert. denied, 107 S. Ct. 3229 (1987) (fraudulent conveyance of mortgage in course of leveraged buyout); *Timko v. Useful Homes Corp.*, 114 N.J. Eq. 433, 168 A. 824 (N.J. Ch. 1933) (wrongfully sold lots ruled held in trust for plaintiff).

For the most part, however, I regard delay in much of contract law as raising somewhat different problems from those raised in the corporate opportunity area, perhaps because of the dominant aims of protecting efficient breach and minimizing transaction costs in contract law. In any event, I defer consideration of delay in most of contract law (and the interaction between delay and the choice among remedies for breach of contract) to another effort.

¹⁶ It may be useful to turn to a hypothetical case involving the possible usurpation of a business opportunity in order to illustrate this effect of strategic delay:

(5) *J* and *K* have been partners in a car rental business for some time. The business produces an average return of 20% on the capital invested in it, which equals the market rate of return. *J* now plans to start a truck repair business on his own. He projects that, if he invests \$8,000 in this new enterprise, it will grow to \$20,000 with 50% probability, but it will all be lost with 50% probability. Its expected value is thus \$10,000 and it appears to be a worthwhile project in the sense that these projections exceed the 20% market rate of return.

J does not want to share this idea with *K* for three reasons: (1) *J* feels that it is unrelated to the car rental business; (2) *J* exerted his own energies in learning about truck repairs; and (3) *J* fears that any disclosure to *K* may cause *K* to compete in the truck repair business or, in some other way, to lower the value of *J*'s idea. Seasoned lawyers tell *J* that *K* will probably object when he sees *J*'s truck repair business in operation, but that *K* has only a one-third chance of succeeding in court with a claim that *J* usurped a partnership opportunity.

This social cost of delay might be dealt with by *reducing* a delaying plaintiff's recovery rather than by barring such recovery.¹⁷ Put in the jargon of tort law, to the extent that this Article suggests that the law might sometimes find it beneficial to regard a delaying plaintiff as contributorily "negligent" (and therefore as undeserving or as in need of deterrence), it might instead adopt a comparative fault rule in which recovery is reduced and some deterrence is thereby placed on both parties.

This point, that strategic delay might be discouraged by a reduction rather than an elimination of recovery, leads to two observations. First, there is nothing markedly superior about a comparative or contributory deterrence system. If the law works through one system, one might note that it could have operated otherwise, but there is no

If *K* can delay, he will wait to see whether *J*'s enterprise is worthless or blossoms into a \$20,000 value. One-half the time the former will occur and *J* will suffer the entire \$8,000 loss alone. And when, one-half the time, *J* is left with \$20,000, there is an additional one-third chance that *J* will be required to share the \$20,000 with *K* who will, of course, be required to share in the original \$8,000 cost.

Ignoring litigating costs, *J*'s expected profit is therefore:

$$\begin{aligned} & \frac{1}{2} (\text{total proceeds} - \text{total costs}) + \frac{1}{2} (\frac{1}{3} (\text{share of proceeds} - \text{share of costs}) + \frac{2}{3} (\text{total proceeds} - \text{total costs})) \\ &= \frac{1}{2} (0 - 8,000) + \frac{1}{2} (\frac{1}{3} (10,000 - 4,000) + \frac{2}{3} (20,000 - 8,000)) \\ &= (-4,000) + \frac{1}{6} (6,000) + \frac{2}{6} (12,000) \\ &= 1,000. \end{aligned}$$

J would obviously prefer to lead a life of leisure and earn 20%, or \$1,600, on his \$8,000 investment as a passive investor in the market. It is, of course, *K*'s hypothetical ability to wait-and-see whether *J*'s investment thrives that causes *J* to forgo this project or to decline to invest initially in learning about truck repairs.

¹⁷ In the illustration in note 16, for instance, we should expect *K* to lose, or at least to lose often, if he delays after learning about *J*'s business. *J* will continue to be attracted to the truck repair business so long as *K* loses not two-thirds of the time but almost nine-tenths of the time, for then *J*'s expected profits will be:

$$\begin{aligned} & \frac{1}{2} (-8,000) + \frac{1}{2} (\frac{1}{10} (6,000) + \frac{9}{10} (12,000)) \\ &= (-4,000) + \frac{1}{2} (600) + \frac{1}{2} (10,800) \\ &= 1,700 \text{ (as compared to a market return of 1,600).} \end{aligned}$$

The law could, however, reach the same result not through a decrease in the likelihood of *K*'s winning but through a reduction in damages when (one-third of the time) *K* wins. If damages were reduced to (less than) 2,400 when awarded, *J* would again be inclined to invest in the truck repair business, for his expected profits would be:

$$\begin{aligned} & \frac{1}{2} (0 - 8,000) + \frac{1}{2} (\frac{1}{3} ((20,000 - 8,000) - 2,400) + \frac{2}{3} (12,000)) \\ &= (-4,000) + \frac{1}{6} (9,600) + \frac{2}{6} (12,000). \end{aligned}$$

In ordinary language, even if he loses the suit, *J* can keep \$9,600 of the project's \$12,000 total profits, instead of having to pay half of the total profits to *K* as damages. To continue:

$$\begin{aligned} &= (-4,000) + 1,600 + 4,000 \\ &= 1,600, \text{ which at least matches what is available in the market.} \end{aligned}$$

real puzzle when a contributory (all-or-nothing) rather than a comparative system is chosen.¹⁸ Second, as a practical matter courts might reduce delaying plaintiffs' recoveries, but unless they do so explicitly it will be very hard to discover this pattern.¹⁹ In the cases discussed in Part II, for example, it is easy to keep track of wins and losses but very hard to discern whether lost profits are underestimated (in order to deter delay). It is, in short, possible to uncover evidence of an implicit "contributory wrong" system, because one can compare cases in which plaintiffs lose and win, but it is very difficult to uncover a damage-reducing or "comparative wrong" system that is not made explicit.

B. *Social Benefits of Delay*

Our legal system prefers to decide most claims retrospectively rather than prospectively. Yet one can at least imagine that a solution to the uncertain factory owner's problem is to allow an early or even *prospective* determination of whether the factory's method of operation will generate liability. It is therefore instructive to note that in some circumstances there will be substantial costs to early litigation and, conversely, benefits to delay.

Consider the illustrative predicament of an innovative entrepreneur who is unsure whether his plans will be found to be a misappropriation of a trade secret possessed by his former employer. This innovator may genuinely—and correctly—believe that his idea is sufficiently different from that which he learned in the course of his previous employment that he ought to be able to develop it and even to prevent others from copying it. Nevertheless, assume that the innovator recognizes that a court may find his idea to be a wrongful adaptation of his ex-employer's trade secret. An early resolution of this uncer-

¹⁸ See Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 Tul. L. Rev. 235, 242-43 (1986) (behavioral effects of comparative and contributory fault rules difficult to assess and compare where factfinder has imperfect information).

¹⁹ This difficulty confronts potentially delaying plaintiffs as well as legal theorists. One could argue, therefore, that a contributory rule more effectively deters delay by punishing it explicitly. See also *infra* note 25 (discussing choice of contributory rule in patent infringement cases).

tainty—whether through bargaining or adjudication²⁰—almost necessarily reduces the incentive to innovate. It may have this undesirable effect because the innovator must disclose his idea and risk losing his economic control over it despite the legal system's attempts to protect trade secrets.²¹ Alternatively, it may also increase the likelihood of an imperfect resolution, and derivatively reduce the incentive to innovate, because the parties will not want to reveal much information prematurely (to each other and to the public) about their respective secrets.²²

The analogous situation in patent law is somewhat different because a party's willingness to file for a patent demonstrates, to a degree, a willingness to be nonsecretive about one's plans and an inclination to appeal for legal protection when there is infringement. Still, the ability of a patentholder to delay in bringing a claim against an alleged infringer could overdetter innovation by one who believes, but cannot be sure, that his plans are not covered by the earlier patent. Interestingly enough, excessive delay that "prejudices" the innovator—that is, laches—is a potent defense against a claim of patent infringement.

²⁰ Bargaining is likely to be more successful the more the parties reveal about their concerns and likely property rights. The innovator is unlikely to secure a waiver unless he specifies his plans.

²¹ I assume in this discussion that protection is incomplete and imperfect if only because of the expense of enforcing legal rights.

²² There are, in other words, two things one would want to know about cases in which an innovator invests on his own: (1) whether the information used or project pursued by the innovator was his former employer's property, and (2) whether there was strategic delay between the time the former employer learned of the innovator's investment and the time the employer offered (and demanded) to be included in this project. The decisions appear to collapse these two questions into one: "usurpation" is said not to have occurred when there has been strategic delay. Had there been no delay, the very same decisionmaker confronted with otherwise the same facts, might often have insisted that there was usurpation, or that there was a misappropriation or breach of a covenant.

A fair objection to the expectation about the actual decisions that is put forth in this Article is that it would be easy for the passive beneficiary, like *K* in note 16, to object without delay to the innovator's solo investment, but to do so *without* really intending to proceed with a lawsuit. One might, in other words, have difficulty discovering when a party really did offer to share in an investment. Fortunately, the cases examined in this Article do not appear to present this difficulty. I found no case, for example, where *K* demands a share of *J*'s investment, *J* agrees, and *K* then withdraws his "offer." To be sure, such cases may occur but, for obvious reasons, may not lead to litigation and to reports in the published decisions. But the absence of *any* evidence of this sort of strategic behavior leads me to think that at least for the present (while strategic delay is not an *explicit* basis of judicial decisions) the analysis can proceed with little concern about the nature of a foolproof rule for discouraging strategic delay. An optimistic positivist might say that this is *why* judges do not make explicit the effect of strategic delay.

ment.²³ One might expect delay to be penalized more readily when (a) the innovation is not clearly an infringement (for then overdeterrence may be a concern) and (b) there is reason to think that the patentholder might genuinely have feared that bringing a claim earlier (or even a claim for prospective relief) would have jeopardized proprietary information. The patent law decisions fulfill these expectations in part,²⁴ but I have chosen to focus on the decisions concerning

²³ The language of the decisions suggests that courts will decide whether delay was unreasonable or inexcusable—with six years serving as the (rule-of-thumb) dividing line, see *Maloney-Crawford Tank Corp. v. Rocky Mountain Natural Gas Co.*, 494 F.2d 401, 404 (10th Cir. 1974)—and whether defendant suffered injury or prejudice as a result of the delay. See *infra* note 24.

²⁴ It is difficult to extract from the decisions any sense of whether proprietary information was in jeopardy, but it is easy to see that the central thesis of this Article, that destructive delay is discouraged, holds true in patent cases. Indeed, it is in this area of law that the decisions come closest to stating that delay can be problematic for reasons other than the fading of memories and other evidence. Moreover, delay appears to be treated harshly in these cases, in the sense that one who waits with advantage may lose even though the infringement was rather clear. I could claim to have expected these outcomes inasmuch as there should be lower social benefits to delay in the patent area because the plaintiff's own intellectual property should, at least theoretically, itself be protected by patent or trade secret law. But I did not expect plaintiffs to lose when their patents were clearly infringed upon, and a more careful exploration of the topic and cases is necessary in order to justify a firm conclusion that these results are really best traced to the likely difference in optimal delay. It is possible, I suppose, that the area of uncertainty as to infringement in patent disputes is rather broad, perhaps because of potential claims that patents at issue are "invalid."

Recent patent cases in which the delaying party loses and the defendant's behavior appears to lie in the grey area include: *A.C. Aukerman Co. v. Miller Formless Co.*, 693 F.2d 697 (7th Cir. 1982) (eight years time said to prejudice the infringer where infringement question apparently a close one); *American Home Prods. Corp. v. Lockwood Mfg. Co.*, 483 F.2d 1120 (6th Cir. 1973), cert. denied, 414 U.S. 1158 (1974) (valid laches defense after ten years' delay despite plaintiff's preoccupations with other alleged infringers in hotly disputed cases); *Continental Coatings Corp. v. Metco Inc.*, 464 F.2d 1375, 1378 (7th Cir. 1972) ("unreasonabl[y]" long delay after notice of infringement); *Coleman v. Corning Glass Works*, 619 F. Supp. 950 (W.D.N.Y. 1985), aff'd without opinion, 818 F.2d 874 (Fed. Cir. 1987) (laches defense granted after more than six years delay, court noting defendant's large expenditures on its product). Cases in which the delaying party lost even though the defendant's behavior taken alone rather plainly amounted to an infringement include *Olympia Werke Aktiengesellschaft v. General Elec. Co.*, 545 F. Supp. 598 (W.D. Va. 1982), aff'd, 712 F.2d 74 (4th Cir. 1983) (noting that delay of more than six years was prejudicial for reasons of dimming memories, disappearance of evidence, and expenditures by defendant); *J.E. Ekornes Fabrikker A/S v. Charlton Co.*, 219 U.S.P.Q. 508, 513 (D. Mass. 1982) ("deliberate, calculated plagiarism" offset by finding of prejudice from delay of seven years).

Finally, cases in which the patentholder wins despite delay all seem to involve rather plain infringements and include: *Bott v. Four Star Corp.*, 807 F.2d 1567, 1576 (Fed. Cir. 1986) ("egregious" conduct of defendant prevented invocation of laches defense); *TWM Mfg. Co. v. Dura Corp.*, 592 F.2d 346 (6th Cir. 1979), cert. denied, 107 S. Ct. 183 (1986) (defendant's

business opportunities rather than patent infringement in this Article.

The tension between the costs and benefits of delay is obviously only present when the behavior that might be objected to is not clearly undesirable. When, as in illustration (2), one party (the "defendant") engages in socially undesirable behavior, the costs and benefits of delay in adjudication relate almost entirely to questions about the freshness of evidence, the ability to reconstruct events, and so forth. No social cost is incurred in discouraging the defendant's reckless driving by allowing the plaintiff to delay his objection because, almost by assumption, the defendant's behavior is completely undesirable. In contrast, allowing potential plaintiffs to wait with advantage in patent and trade secret cases may deter socially useful innovation as well as infringements and misappropriations. The problem of identifying optimal delay is thus in large part a problem only in "grey areas" where defendants' behavior may be desirable (so that delay by plaintiffs may overdeter defendants) but may, instead, be wrongful.²⁵

As implied at the outset, I am not prepared to formalize further the problem of optimal delay because, although it is possible to identify some costs and benefits of delay, I do not think it is possible to say much about many of the costs and benefits. Instead, the discussion in Part II analyzes one area of law in some depth in order to demon-

laches-based motion for summary judgment failed because of its deliberate copy-and-litigate strategy); *Jenn-Air Corp. v. Penn Ventilator Co.*, 464 F.2d 48, 49 (3d Cir. 1972) (delay of nine years apparently outweighed by defendant's "unconscionable infringement").

²⁵ This point may help explain areas of law where it is hard to see any social benefit of delay. After writing this Article I came across a recent article by Professor Landes and Judge Posner on trademark law. They make an interesting passing reference to the defense of laches in that field as applying when one party is slow to object to another's infringement and thus fails "to internalize . . . [the other's] . . . cost of duplication." Landes & Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & Econ. 265, 284 (1987). Trademark may be one such area where nothing is gained by delay, and where one might expect to find delay strongly discouraged. On the other hand, delay may be a tool of deterrence in cases of clear trademark violation. See *supra* note 16 and accompanying text.

It is interesting once again, see *supra* notes 17-19 and accompanying text, to wonder why delay is not discouraged incrementally, by reducing the plaintiff's recovery (especially where the infringement is clear), instead of completely denying it in what is apparently an all-or-nothing system. There is, of course, nothing obviously better about a gradual (comparative "negligence") system than a binary (contributory "negligence") approach. In one sense, the latter sends a clearer precedential message, for a seemingly deserving plaintiff gets nothing. See *supra* note 19. It is perhaps not surprising that an all-or-nothing (recovery or laches) system would send messages even in cases that lie outside the grey area.

strate the utility of a framework that is sensitive to the costs and benefits of delay.

II. STRATEGIC DELAYS AND PARTNERSHIP OPPORTUNITIES

Partnership disputes involve a great variety of transactions and developments that often were unanticipated when the partnership was formed. In large part the legal resolution of these disputes is more difficult at the level of application than at the level of theory. Potential partners *can* anticipate and resolve in advance some questions regarding liability for a partner's actions or for actions taken before becoming a partner, the obligation to disclose information to partners, the manner and consequences of dissolving partnerships, and other related matters. Even when unanticipated questions arise, it will sometimes be easy to imagine with some conviction the bargains that the partners would have entered into had they anticipated the issues in advance. Alternatively, the legal system may be able to state and publicize rules to which many or most partners would subscribe *ex ante*, and to allow others to contract out of the rules in advance.²⁶ Serious problems are likely to arise in valuing assets, discerning whether relevant information has been kept secret, setting compensation levels, and, in general, working out details among partners (or ex-partners) who planned carefully but who have become inclined to distrust one another. Nevertheless, I think it fair to say that experienced observers of the law are comfortable predicting judicial decisions in most of partnership law. These problems are, after all, similar in structure and difficulty to many that are regularly taken up in contract law.

One of the areas in which there are surprises is that occupied by disagreements over a partnership's business opportunities. Of course, those questions that *are* anticipated by the partners either implicitly, by their not tinkering with a well-known and easily-applied norm of partnership law, or explicitly, by formal agreement, *are* easily resolved at least in theory and often in practice. Thus, when a partnership deputizes a partner to acquire an asset, and the partner then

²⁶ This idea, that the law provides "preformulated," or "off-the-rack," rules that mimic rules that most people would have chosen and that can, therefore, eliminate the need for most parties to bargain out every detail of an agreement, is by now a familiar one. See, e. g., Goetz & Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 Va. L. Rev. 967, 971 (1983).

acquires the asset in his own name (or otherwise excludes his partner(s) from sharing in its value), the partnership will prevail in its claim that a partnership opportunity has been wrongfully usurped.²⁷ In order to redress usurpations of partnership opportunities, courts have held that damages must be paid to the wronged partners,²⁸ that the asset has been kept in constructive trust for the partnership,²⁹ or

²⁷ The point hardly requires illustration, except to give a sense of the kinds of cases that arise. See, e.g., *Dikis v. Likis*, 187 Ala. 218, 65 So. 398 (1914) (leasing in own name when agreement called for lease by partnership); *Fouchek v. Janicek*, 190 Or. 251, 225 P.2d 783 (1950) (taking of financing and investment opportunity to expand war surplus business).

²⁸ See, e.g., *Jennison v. Bierer*, 601 F. Supp. 1167 (D. Vt. 1984); *Jerman v. O'Leary*, 145 Ariz. 397, 701 P.2d 1205 (Ct. App. 1985) (compensatory and possibly punitive damages); *Leff v. Gunter*, 33 Cal. 3d 508, 658 P.2d 740, 189 Cal. Rptr. 377 (1983) (en banc); *Wright v. Ogle*, 283 Or. 505, 584 P.2d 737 (1978).

²⁹ See, e.g., *Yoder v. Hooper*, 695 P.2d 1182 (Colo. Ct. App. 1984), *aff'd*, 737 P.2d 852 (1987) (en banc); *Larin v. Ehrlich*, 80 Misc. 2d 247, 363 N.Y.S.2d 50 (Sup. Ct. 1974); *Huffington v. Upchurch*, 532 S.W.2d 576 (Tex. 1976).

An interesting question is whether, once a fiduciary breach has been found, a court will impose a constructive trust, as in the cases cited above, or award damages, or even punitive damages. The most common remedy for a fiduciary breach is money damages, with punitive damages occasionally awarded when the fiduciary's behavior seems particularly offensive. See *Jerman v. O'Leary*, 145 Ariz. 397, 402, 701 P.2d 1205, 1210 (punitive damages are based on "gross, wanton, malicious and oppressive conduct"). In contrast, in the subset of business opportunity cases, courts most often impose constructive trusts on those investments that are found to have been wrongly taken by the fiduciary. Quite plainly, these investments (such as a piece of undeveloped land bought by one partner in a real estate development partnership) are not easily valued so that the simplest method of putting the parties back where they would have been had no usurpation occurred is to impose a constructive trust.

Nevertheless, damages are sometimes awarded in opportunity cases, and a comparison of cases reveals certain critical factors that make the award of damages the likely remedy. The most important of these seems to be that there is little uncertainty as to the opportunity's value at the time of litigation. A subsidiary factor that leads to damage awards is that the opportunity may simply not be available to be held in constructive trust. In *Wright v. Ogle*, 283 Or. 505, 584 P.2d 737 (1978), for example, defendants were required to pay damages after usurping a real estate development plan. But since at the time of litigation they had already completed the sale of the developed property, *id.* at 510, 584 P.2d at 740, it was easy to determine the profit on the transaction and award damages. Similarly, in *Auld v. Estridge*, 86 Misc. 2d 895, 382 N.Y.S.2d 897 (Sup. Ct. 1976), *aff'd*, 58 A.D.2d 636, 395 N.Y.S.2d 769 (App. Div. 1977), damages were awarded after defendant had sold partnership assets and failed to disclose the amount actually received. Damages were simple to determine once the proceeds received by defendants were known.

In *Leff v. Gunter*, 33 Cal. 3d 508, 658 P.2d 740, 189 Cal. Rptr. 377 (1983) (en banc), plaintiffs and defendants had formed a joint venture to bid on a specific real estate project. Defendants then withdrew and, together with other, new coventurers, outbid the plaintiffs on the project. *Id.* at 512, 658 P.2d at 742-43, 189 Cal. Rptr. at 379-80. The court's award of damages may seem unpredictable under the guidelines just suggested because the value of the contract could not easily be measured. The imposition of a constructive trust, however, would

what is usually the equivalent of a constructive trust, that the asset (or a part of it) must be sold to the partnership at the price at which the offending partner was able to purchase it on his own behalf.³⁰ Each of these remedies deters such usurpations to some degree, because the partnership is unlikely to press its claim if the asset in question declines in value following its wrongful acquisition.

These partnership opportunity cases do not, it should be noted, reveal anything special about partnership law. A plain taking of a business opportunity by a corporate officer or by an agent from his principal leads to similar legal results.³¹

The questions raised by these cases are more difficult, and the results less predictable, when it is less clear that the partners understood that their agreement covered the sort of opportunity later pursued by one partner alone. There is, of course, no shortage of general observations about the fiduciary duties of partners—or of trustees and corporate officers, directors, and controlling shareholders. Every business lawyer learns to emphasize either the “punctilio of an honor the most sensitive”³² or the dangers of

have presented difficulties in fairly dividing the asset away from the innocent new coventurers who had joined the defendants in making the successful bid.

Finally, it is noteworthy that punitive damages rarely, if ever, attach to the imposition of a constructive trust. One exception may be *Interstate Properties v. Pyramid Co.*, 581 F. Supp. 982 (S.D.N.Y. 1984), where a constructive trust was granted and punitive damages were awarded against a defendant who converted to his own account funds from a mortgage held by a joint venture. But the court also awarded damages for several other fiduciary breaches, so that the award of punitive damages can be linked to those awards and separated from the constructive trust.

³⁰ See, e.g., *Bakalis v. Bressler*, 1 Ill. 2d 72, 115 N.E.2d 323 (1953) (holding that a partner in two-person partnership must transfer property to partnership and receive in return one-half of his acquisition cost).

³¹ See, e.g., *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 28 So. 199 (1900) (holding that corporate officers must convey land to the corporation, which had an interest in that land, for the price they paid); *Cain v. Cain*, 3 Mass. App. Ct. 467, 334 N.E.2d 650 (1975) (damages to corporation for usurpation of its opportunity); *Elco Shoe Mfrs. v. Sisk*, 260 N.Y. 100, 183 N.E. 191 (1932) (agent breached agreement by selling competing line of shoes); *Krzesko v. Gaudynski*, 207 Wis. 608, 242 N.W. 186 (1932) (constructive trust imposed on land purchased by agent who had been commissioned to purchase for plaintiffs). On the choice between awarding damages and imposing a constructive trust, see *supra* note 29.

³² *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (declaring, in a case involving coventurers, that a “trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”).

hindsight,³³ depending on whether his present client is objecting to or defending the actions of some fiduciary. And every lawyer learns to test claims of opportunism against familiar doctrinal standards. Thus, a doctrinal focus on a corporation's "line of business" allows one to predict correctly that if the president of a book publishing company purchased on his own the rights to a best-selling novelist's new work, the corporation, through a derivative suit perhaps, would have little trouble collecting the profits such a purchase generated.³⁴ There would be no recovery, however, for "usurpation of a corporate opportunity" if the president simply purchased a remote plot of land that later happened to fit the corporation's expansion plans.³⁵

Many cases, however, are more difficult than those just sketched. Suppose, for example, that the president struck out on his own to establish a retail chain or to market tape recordings of new books, and there was no evidence of prior agreements or expectations about such ventures. Only a lucky guesser would correctly predict the outcome of a business opportunity claim brought by the firm's shareholders. The discussion that follows explores such cases against the backdrop of the broader question of "optimal delay." It will prove useful, however, to consider first situations in which there is disagreement among partners or other coventurers about the very advisability of an opportunity.

³³ See, e.g., *Joy v. North*, 692 F.2d 880, 886 (2d Cir. 1982), cert. denied, 460 U.S. 1051 (1983) ("[C]ourts recognize that after-the-fact litigation is a most imperfect device to evaluate corporate business decisions. . . . The entrepreneur's function is to encounter risks and to confront uncertainty, and a reasoned decision at the time made may seem a wild hunch viewed years later against a background of perfect knowledge.").

³⁴ A court that preferred to use another formula as its "test" could reach the same result rather easily. It might use language of "fairness," "interest," "expectancy," or a mixture of these "tests." See, e.g., *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 502, 28 So. 199, 201 (1900) ("interest" and "expectancy" language); *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 280, 5 A.2d 503, 514 (1939) ("expectancy" language); *Durfee v. Durfee & Canning, Inc.*, 323 Mass. 187, 199, 80 N.E.2d 522, 529 (1948) (defendant held to "ethical standards of what is fair and equitable"). For further discussion, see W. Cary & M. Eisenberg, *Cases and Materials on Corporations* 594-600 (5th ed. 1980).

³⁵ A court might use a variety of routes, see *supra* note 34, to exonerate the defendant. See, e.g., *Johnston v. Greene*, 35 Del. Ch. 479, 487, 121 A.2d 919, 924 (1956) (no "interest" or "expectancy"); *Lancaster Loose Leaf Tobacco Co. v. Robinson*, 199 Ky. 313, 317-21, 250 S.W. 997, 999-1000 (1923) ("line of business" language).

A. Conflicts as to the Advisability of an Opportunity

Imagine that *A*, *B*, and *C* form a partnership to invest in real estate and that *C* is deputized to negotiate for the purchase of a certain parcel of land. The partners agree that *C* should spend no more than \$100,000 acquiring the land. *C* then acquires the land for *himself* for \$110,000, and tells *A* and *B* that, when the seller would not part with the land at a price below \$100,000, *C* decided to buy it on his own if it could be had for less than \$120,000.

In deciding whether any party should have a claim against *C* for taking a partnership opportunity, it is most useful to assume that, when the three partners first discussed the \$100,000 ceiling, *C* argued in favor of a higher limit. After all, if *C*'s voice encouraged the partners to offer no more than \$100,000 (or less), then one could infer from *C*'s later \$110,000 purchase that he breached his duty almost from the beginning, by counseling one path for the partnership in order to clear another for himself. *C* may on occasion be able to explain satisfactorily why he changed his view regarding the property's value. Still, it is easier to focus on the effect of disagreement over the advisability of an opportunity if one assumes that there was disagreement all along and that *C*'s questioned behavior is at least consistent with the views he expressed earlier. The alternative assumption about *C*'s earlier behavior makes the case against *C* too easy.

Although there are few reported cases on point,³⁶ this claim against *C* is likely to be successful for one simple reason. *C* should have contacted his partners, informed them of the seller's unwillingness to sell at \$100,000, and indicated that he planned to offer as much as \$120,000 on his own if the partnership did not raise its offer for the property.³⁷ *C*'s willingness to commit this amount of his own money might cause *A* and *B* to reassess their valuations and even to suspect

³⁶ See *Mitchell v. Allison*, 54 N.M. 56, 213 P.2d 231 (1949) (constructive trust imposed after real estate broker, acting also as seller's agent, purchased on his own at a price slightly higher than limit set by principal—but at a price below which seller would probably not have parted with property); see also *Funk v. Tift*, 515 F.2d 23 (9th Cir. 1975) (constructive trust imposed after broker outbid purchasers who had submitted through him an offer to purchase land, where broker failed to notify purchasers and purchasers could have bettered broker's offer).

³⁷ *Mitchell*, 54 N.M. at 60, 213 P.2d at 234 ("The defendant was under a duty to have informed plaintiff of this fact, and to inform him the price asked by the owner, and thus have given him an opportunity to purchase at the seller's price.")

knowledge or intuition possessed by *C* that earlier discussion had not revealed.³⁸ The rationale for requiring *C* to offer the property to the partnership at the price he paid for it³⁹ is not so much that by reconstructing the partners' decisionmaking process one can infer that, had they known *C* would have spent \$120,000 himself, they would have decided to go along with this assessment. Rather, it is that the legal system can avoid this difficult retrospective reconstruction entirely by encouraging *C* to disclose in advance so that the parties themselves, with knowledge of *C*'s intentions, can reach a decision.⁴⁰

This analysis has proceeded as if the only potential conflict is that the purchasing partner may insufficiently communicate his valuation of the asset in question. In plain terms, *C* may think something quite valuable but withhold his opinion as to its value in order to acquire it for himself at a price the partnership regards as unattractive. As just described, a rule that makes *C* disclose his intention to buy goes a long way toward eliminating this risk. There is, however, the further risk that the seller *would* part with the asset at a price that is below the limit set by the partnership, but that the agent bargains in a way that allows the price to rise above that limit so that he can purchase it for his own account. *C* may not discourage the seller from demanding a high price because he, *C*, thinks the land so attractive that he would rather purchase it alone for significantly more than \$100,000 than acquire a one-third interest for \$33,333. This danger is not avoided

³⁸ It is possible to imagine circumstances in which *C* is unable to reach *A* and *B* in the period before he must come to terms with the seller. Clues from the law of restitution suggest that no claim against *C* would succeed in such cases. See *Berry v. Barbour*, 279 P.2d 335 (Okla. 1954) (noncontractual provider allowed to recover for work done to defendant's fire-damaged premises, where defendant off in Germany at time of fire).

³⁹ See *supra* note 30 and accompanying text.

⁴⁰ To be sure, it is always possible that *C*'s disclosure would have turned out to be *false*. *C* might decline to purchase the property after *A* and *B* refused to raise their bid. *C* is unlikely to be liable for changing his mind, or even for false disclosure on his part, because *A* and *B* did not change their respective positions, nor (in a narrow sense) did they suffer any damage as a result of *C*'s original disclosure. See *W. Prosser & W. Keeton*, *supra* note 8, § 110, at 765 (plaintiff must have "suffered substantial damage" before stating claim of deceit). There may, of course, be extralegal sanctions against *C*.

In this case, however, there does not appear to be even a conflict of interest. *C* has declined to purchase the property, and only rarely will a partner think something a great investment for his partnership but not for himself. *C* would think the investment at \$120,000 a good one for the partnership (so that he will have invested \$40,000 in one-third of the property), but not for himself, only if he is sufficiently risk averse and undiversified in his own investments, or simply unsuited or disinclined to invest on his own.

by *C*'s contacting his partners near the end of his negotiations with the seller, disclosing his purchase plans, and asking for further instructions.

Only a rule forbidding *C* from purchasing the asset for himself at any price would seem to avoid *both* moral hazards, that *C* will encourage undervaluation by the partnership and that *C* will bargain badly. The very articulation of this rule suggests, I think, that it is unlikely to be applied to fiduciary claims in the partnership, corporate, or agency context. It is, after all, similar to the rule which applies to the paradigmatic trustee of an orphans' trust when true disclosure and a real bargain are absent.⁴¹ And there is reason to think that the costs of such a rule are rejected, and the advantages therefore sacrificed, by those who "choose" the partnership (or other business) form rather than the trust form of interaction.⁴² The partners must know, for example, that they could minimize *C*'s conflicts by agreeing that *C*, who places the highest value on the potential acquisition, will depute *A* and *B* to negotiate for the partnership. *A* and *B* might then inform *C* if the seller's price proved higher than *A* and *B*'s limit. But since such plans are costly to design and execute, one may infer that if *A*, *B*, and *C* knew at the outset that they would be forced to use such plans and to bear such costs or to refrain from individual investments in opportunities turned down by their partnership, each would hesitate to enter the partnership. My guess, shared no doubt by most observers of partnership and corporate law, is that just as corporate fiduciaries may generally place themselves on both sides of a transaction subject to review under an arm's length standard, so too may partners, after disclosing their intentions, take up business opportunities that were turned down by their partnerships—even though in either case the remaining conflict of interest would

⁴¹ See generally (and cases collected in) 2A A. Scott & W. Fratcher, *The Law of Trusts* § 170.1 at 316 & n.10 (4th ed. 1987) (noting that "the rule that a fiduciary cannot purchase for his own account property entrusted to him as a fiduciary" is in place not only in English common law but also in the civil law and that "[u]nder Roman law a guardian was not permitted to buy the property of his ward, and the same rule was applied to curators, agents, and persons who transacted the business of others.").

⁴² See J. Crane & A. Bromberg, *Partnership* § 5, at 43 (1968) (prominent feature of partnership law "is the extent to which partners may write their own ticket" and "override" common law and statutes by specifying things about their relationship in their partnership agreement); see also Levmore, *A Primer on the Sale of Corporate Control*, 65 *Tex. L. Rev.* 1061, 1069 n.19 (1987) (ability of corporate fiduciary, but not classical trustee, to "wear two hats" and prove existence of arm's length bargain explained by monitoring considerations).

make such behavior by a trustee unacceptable.⁴³ Coventurers who fear that their associates will bargain on their behalf with insufficient vigor must monitor one another closely or fashion an arrangement that is closer to a trust.

B. The Scope of Partnership Opportunities

This section returns to cases that involve not the advisability of pursuing a business opportunity but the question of whether the opportunity was indeed within the scope of the partnership agreement. Some relatively clear-cut cases, in which one partner takes an opportunity that is plainly within the scope of the partnership, have already been discussed.⁴⁴ It is easy to see that *ex ante* the partners would want a rule forbidding—and, through damages, discouraging—such takings because such a rule makes the pooling of efforts possible. One might think of this norm simply as a noncompetition agreement. If *D* and *E* form a real estate investment partnership, for example, it is normally because they think they can do better together than each could alone. If either knew that the other could invest on his own, there would be a great incentive not to share information and resources. Yet it is the prospect of just such sharing that led them to believe that becoming partners was worthwhile. *D* and *E* are most likely to intend that at least some real estate opportunities may not be pursued individually without the consent of the other.

Generally, then, partners are likely to believe that some opportunities belong to the partnership but others do not. If the latter set is interpreted too narrowly, the forced sharing of, or “partnership tax” on, ideas developed on one’s own will deter individuals from forming partnerships. And if the former set is interpreted too narrowly, so that few things not specified in advance are understood as belonging to the partnership, then each individual will again be deterred by the fear that after he shares his efforts any of his partners may exploit

⁴³ There are occasional decisions outside the trust area that opt for a stricter rule-of-thumb. See, e.g., *Irving Trust Co. v. Deutsch*, 73 F.2d 121, 124 (2d Cir. 1934), cert. denied, 294 U.S. 708 (1935) (espousing “the wisdom of a rigid rule forbidding directors of a solvent corporation to take over for their own profit a corporate contract on the plea of the corporation’s financial inability to perform”).

⁴⁴ See cases cited *supra* notes 27-30; *Stark v. Reingold*, 18 N.J. 251, 113 A.2d 679 (1955) (partner in an automobile rental business wrongly diverted a partnership business opportunity when he purchased for himself an automobile rental franchise).

them individually. Inasmuch as it is impossible to specify all possibilities in advance, hard cases will arise where it is unclear after the fact whether partners *ex ante* would have regarded given opportunities as within the scope of their agreements.

One should not expect a simple disclosure rule to govern these grey area cases. Under a disclosure rule, suggested earlier for the partner who wished to bid on an opportunity that his partners hoped to acquire at a lower price,⁴⁵ a partner would lose whenever he failed to disclose his intention to pursue an opportunity that a reasonable person *might* believe belonged to the partnership. There are two drawbacks to the use of this rule in resolving questions about the scope of an agreement. First, as suggested in Section B of Part I, there may be proprietary information, or "secrets," that are the product of hard work or investments made by one party. If the disclosure of a business plan gives away these secrets, then a mandatory disclosure rule will cause underinvestment in such secrets in the first place. Second, disclosure does not solve the problem of ambiguous or incomplete agreements. If, for example, *D*'s disclosure to his partner *E* is followed by *E*'s indication (or even his silence, perhaps) either that he does not believe *D*'s plans belong to their partnership or that he does not want to join in *D*'s venture, then, of course, there is no further problem (so long as *E* does not proceed to exploit any information revealed by *D*). *E*'s consent forecloses any later claim. But if *E* objects to *D*'s individual plans and expresses a willingness to allow the partnership to pursue the venture, then *D*, if he believes that his plans are outside the scope of the partnership agreement, has accomplished nothing by disclosure. In contrast, recall that when a partner *knows* that his partners are interested in the asset he now wishes to acquire at a price exceeding their stated limit—and there can be no doubt that it is their opportunity to pursue—disclosure is a useful tool.

In short, a disclosure rule threatens to deter exploration and other activities for which nondisclosure is crucial to success without necessarily avoiding litigation over the scope of a partnership agreement. It is therefore not surprising that fiduciaries who do not disclose their plans to their partners at the outset still win cases in which they pursued opportunities that a reasonable person might argue belonged to

⁴⁵ See *supra* notes 37-40 and accompanying text.

the partnerships and not to the fiduciaries as individual initiators.⁴⁶ A disclosure rule, then, cannot by itself resolve hard cases concerning the scope of partnerships.

Two examples of such hard, grey area cases are *Lipinski v. Lipinski*⁴⁷ and *Huffington v. Upchurch*.⁴⁸ In *Lipinski*, the defendant, a member of a partnership engaged in commercial fishing, purchased a tract of land adjacent to the partnership's normal fishing area. The partnership had hauled fish over this land, recognizing that one day its owner might sell the land or demand a fee from the partnership for its use.⁴⁹ At the time the case was decided, the purchasing partner had not interfered with the partnership's practice of using the land. Plaintiffs' claim that this purchase (financed out of partnership funds taken as an advance against defendant's share of the partnership profits) was a usurpation of a partnership opportunity failed. The court insisted that the partnership was explicitly set up as a four-year agreement about a *fishing* operation and that it was not entitled to any interest in the *land* that individual partners happened to purchase.⁵⁰ In *Huffington*, the defendant, a member of a partnership formed to pursue oil and gas ventures, negotiated a deal with the Indonesian government on behalf of his individually owned corporation. The court found that this opportunity belonged to the partnership and awarded the plaintiff a percentage share of the Indonesian deal, calculated according to the provisions of the partnership agreement.⁵¹

There are no doubt many ways of distinguishing *Lipinski* from *Huffington*, but I think it fair to say that only by chance would a lawyer (or any other citizen) predict correctly the results in these two cases. One might have expected *Lipinski* to be decided as it was because the explicit four-year partnership agreement covered fishing

⁴⁶ See, e.g., *DeSantis v. Dixon*, 72 Ariz. 345, 236 P.2d 38 (1951); *Science Accessories v. Summagraphics*, 425 A.2d 957 (Del. 1980).

⁴⁷ 227 Minn. 511, 35 N.W.2d 708 (1949).

⁴⁸ 532 S.W.2d 576 (Tex. 1976).

⁴⁹ The defendant had been unsuccessful some years earlier in convincing the partnership to acquire the land. See *Lipinski*, 227 Minn. at 521, 35 N.W.2d at 713. The decision cannot turn simply on this fact, however. The passage of time must obligate the defendant again to inform his partners of his plans and to offer them a share of the purchase contract, because each party's situation, as well as the price and the importance of the land, may have changed since they last discussed the matter.

⁵⁰ Id. at 520, 35 N.W.2d at 713.

⁵¹ *Huffington*, 532 S.W.2d at 580.

and marketing, but not landowning. On the other hand, a court may find that a fiduciary has breached his obligation when he plans ahead beyond the explicit term of the partnership and negotiates on his own account for an asset currently used by the partnership.⁵² And one could hardly doubt that plaintiffs would have prevailed in *Lipinski* if the defendant had indirectly brought the fishing operation to a halt through his control of the adjacent land which had "[f]or many years . . . been used as a 'haul' by [the fishermen]."⁵³ Similarly, in *Huffington*, one might have expected the plaintiff to win because the agreement was not limited to any particular venture, but rather anticipated that the partnership would "acquire, own, develop and operate oil, gas and mineral . . . properties and prospects . . ."⁵⁴ Yet one may question whether the defendant would have been required to share a new type of drilling bit or a technique for finding profitable oil fields he developed on his own.

I am not suggesting that poring over partnership agreements and other evidence in search of clues about the intended scope of a relationship is useless. Instead, I mean to emphasize that the evidence is often mixed and that there is an alternative method of understanding these cases. In particular, the discussion in Part I encouraged a careful reading of these cases with an eye toward the possibility that in *Lipinski*, where the plaintiffs lost, and not in *Huffington*, where the plaintiff recovered, the plaintiff(s) might have waited with advantage. Indeed, in *Huffington* the plaintiff inquired about the Indonesian deal early on and offered to pay his share of the costs, limited at that point to travel expenses, that the initiating partner had already incurred. In contrast, in *Lipinski*, although the court expressed its decision in a way that focused on the fact that the partnership was engaged in fishing and not in real estate operations, it noted two pieces of evidence that "at least some of the plaintiffs knew long before this action was commenced that [the defendant] had acquired this property."⁵⁵ There is no discussion in the opinion of what would have been decided had this not been so or had plaintiffs objected as soon as they

⁵² See *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

⁵³ *Lipinski*, 227 Minn. at 513, 35 N.W.2d at 709.

⁵⁴ *Huffington*, 523 S.W.2d 44, 53 (Tex. Civ. App. 1975), *aff'd* in relevant part, 532 S.W.2d 576 (1976).

⁵⁵ *Lipinski*, 227 Minn. at 521-22, 35 N.W.2d at 713-14.

knew about the defendant's land acquisition.⁵⁶

I think it useful for both normative and positive reasons to stress that in *Lipinski* there was waiting with advantage and in *Huffington* there was not. The normative reasons have been sketched in Part I. When the defendant's behavior is not patently wrong or at odds with the very purpose of the partnership, but rather is of the sort that is in danger of being overdeterred (one would hardly want a partner in a fishing or oil and gas venture to be forced to offer his partners a share in every other idea or investment that comes to mind), the plaintiff must decide whether he wants to be included in his partner's investment before he can see how it turns out. The plaintiff cannot be allowed to put himself in a better position than he would have been in had he been included at the outset when he would not, of course, have known what the future held in store.⁵⁷ Because it is too easy for the plaintiff in *Huffington*, like the museum directors in the illustration offered earlier,⁵⁸ to wait-and-see whether the investment in question will prove profitable, a rule that *at most* forces such plaintiffs to decide without the advantage of hindsight whether they want to share in the investment is sensible. If strategic delay were not prevented, then ex ante potential partners would be disinclined to join forces for fear that too many good opportunities would have to be shared—while those that fizzled would be left as a burden to the initiator.

⁵⁶ One may better understand the possibility for strategic delay by the plaintiffs in *Lipinski* by considering the position of a partner, *A*, when he first hears that his partner, *B*, has purchased land, adjacent to the partnership's fishing area, which up to that time the partnership had used (at no cost) in its fishing operations. *A* must be unsure whether *B*'s purchase is good news or bad news. He must certainly be pleased that some stranger did not purchase the land and suddenly either block the partnership's access to it or charge rent for its use. Perhaps *B* bought the land simply because the probability of an unfriendly purchase was greater in his estimation than in *A*'s, or because he was more risk averse than *A*; either way *A* may now freeride on the purchase. On the other hand, *A* must fear that *B* himself will prove to be a difficult associate because *B* knows exactly how much this land is worth to the partnership and therefore how much rent can be extracted from the partnership. To be sure, if such an extraction of rent is attempted, *A* can bring a lawsuit claiming that the rent demanded is unfair, compared perhaps with what a stranger would have known to charge, and that therefore a fiduciary duty has been breached. But, as I have already indicated and as the cases cited in this Article repeatedly make clear, no plaintiff can be certain of winning such a case, for the intended scope of virtually every partnership and other business enterprise is sufficiently unclear to make many business opportunity cases close ones.

⁵⁷ Again, the normative reason for this conclusion builds on the original voluntariness and innocence of the relationship. It is hard to imagine why people would want, ex ante, to form a partnership from which each would try to keep away the best opportunities that came along.

⁵⁸ See supra text accompanying notes 10-11.

The only normative argument *against* penalizing plaintiffs who behave strategically by waiting with advantage is that misbehavior by fiduciaries may be insufficiently deterred. This fear is especially well founded if many wronged partners⁵⁹ do not press their claims because of the financial or personal costs of litigating. This observation does not point to any precise, concrete rule, but it does lead to a normative conclusion (with inexact boundaries): the more clearly wrong a defendant's behavior, in terms of the best understanding of the partnership agreement, the less should a plaintiff's waiting with advantage interfere with his recovery. Needless to say, the *less* clearly wrong the defendant's behavior, the more should waiting with advantage cause plaintiff to lose even when defendant's behavior alone would be deemed wrong. To the extent that at least a great part of the normative foundation for this conclusion rests on the belief that *ex ante* (whether or not they can project the identity of the passive partner⁶⁰) most partners would wish such a rule to govern their future dealings, there is little reason not to allow well-informed partners to opt out of this rule by explicit agreement.

The *positive* reason to stress that in *Lipinski* there was waiting with advantage and in *Huffington* there was not is that an extensive study of the cases reveals that this distinction is a remarkably useful tool in analyzing partnership opportunity cases and other cases concerning fiduciary breaches.⁶¹ Once again, I do not mean to say that one need only look at plaintiff's timing to predict the result in a given case. When the defendant's behavior was unambiguously at odds with the

⁵⁹ The statement applies, of course, to similar beneficiaries outside of the partnership context. The discussion will often refer to the beneficiary as "plaintiff" and to the fiduciary as "defendant."

⁶⁰ *A*, for example, may not know *ex ante* whether it is more likely that he or his partner *B* will be the one to pursue an opportunity later and consequently wish for strategic delay to be penalized. But it does not follow that *A* would be indifferent about whether the law penalizes delaying plaintiffs (or about how it treats possible usurpations of partnership opportunities). If *A* is risk averse, he would reject a rule that allows strategic delay (or blatant usurpations) because, so far as he can tell, it is as likely to hurt him as it is to help him. Moreover, even if he is risk neutral, there are real costs to the partnership when each partner withholds information (for fear that the other will use it to exploit an opportunity). The potential net costs, which will interfere with the profitability of the partnership, must make the sharing-of-opportunity rules attractive even to risk neutral investors.

⁶¹ See *infra* text accompanying notes 70-106. Of course, I am unable to make a claim covering the large number of disputes and arrangements that are not found in the published opinions.

best interpretation of the partnership agreement so that underdeterrence can be said to be more of a concern than overdeterrence, it would be surprising to find that plaintiff's behavior made much of a difference. And when the defendant has rather clearly not violated legal norms or the expectations of his partners or other beneficiaries, then of course even the most unstrategic, nondelaying plaintiff will lose. There will be some subjectivity in deciding whether the fiduciary's behavior falls between these points and into the grey area. The discussion that follows confirms, I believe, that despite this inherent subjectivity, the waiting-with-advantage distinction is a powerful predictive tool.

What sort of evidence in favor of the waiting-with-advantage theory would be most convincing? Judges do not, of course, explicitly state that a given plaintiff loses because he waited, or wins because he did not.⁶² The very best evidence would consist of pairs of cases that allowed one to isolate the effect of a change in plaintiff's behavior. Thus, if cases *X* and *Y* presented identical facts and behavior by the fiduciary, but plaintiff waited with advantage in *X* and not in *Y*, then one should expect plaintiff to lose in *X* and lose only with some fractional probability—or never—in *Y*.⁶³ A reasonable number of such pairs would facilitate a test of the predictive power of the theory.

Unfortunately, there are no such convenient pairs. As it happens, it is very rare in a partnership case for a plaintiff to wait with advantage and win. But the dearth of such cases does not necessarily prove that delay is a critical factor, because it is possible that in these cases there had simply been no breach by the fiduciary and, indeed, that there may simply be very few clear fiduciary breaches in the recorded

⁶² But occasionally they come close. See *Mathis v. Meyeres*, 574 P.2d 447, 449 (Alaska 1978) (noting that plaintiff had knowledge and had not complained about related investments made by defendant); *Skone v. Quanco Farms*, 261 Cal. App. 2d 237, 241, 68 Cal. Rptr. 26, 29 (1968) ("In fact, it would be incongruous to hold that a partner who consented to a partnership transaction, with full knowledge of all the facts, may later complain and seek damages against the other partner simply because he benefited by the transaction"); *Head v. Lane*, 495 So. 2d 821, 825 (Fla. Dist. Ct. App. 1986) (discussing in a corporate opportunity case the use of laches where plaintiff delays unnecessarily).

⁶³ Even when plaintiff does not delay, he may lose simply because the fiduciary's behavior in the grey area is found to be acceptable. See, e.g., *Cude v. Couch*, 588 S.W.2d 554 (Tenn. 1979) (nondelaying plaintiff lost where fiduciary's not renewing lease to partnership and secretly using property on his own to conduct same kind of business that partnership had, was arguably, but not certainly, acceptable behavior).

disputes about partnership opportunities.⁶⁴ Similarly, the fact that there *are* cases in which a delaying plaintiff loses proves little, standing alone, because the defendant may simply be a nonbreaching fiduciary.⁶⁵ The best one can do is to accunulate cases like *Lipinski*, in which a losing plaintiff waited with advantage after the defendant acted in an arguably objectionable way, and lay these cases alongside some in which plaintiff wins (alas, with different facts). It will, I think, become evident that plaintiff's delay is an interesting, or even crucial, variable.

It is arguable that evidence *against* the waiting-with-advantage theory should include other theories that explain the cases. And, indeed, these cases are particularly easy prey for one straightforward approach, which I will call the "best evidence" approach to business opportunity cases. One might, under this approach, interpret a plaintiff's delay in objecting to his fiduciary's behavior as evidence of the plaintiff's own interpretation of the (ambiguous) original agreement. *Lipinski* and *Huffington*, for instance, both involve such agreements. The delay by some plaintiffs in *Lipinski* can be taken simply as evidence that they did not understand their partnership rights to include the opportunity to invest in adjacent land (or to be told that one partner was about to acquire this land). In contrast, plaintiff's immediate objection in *Huffington* to his partner's pursuing the Indonesian opportunity can be taken as the best evidence available of at least one party's understanding of the agreement.

There are three reasons to continue pursuing the waiting-with-advantage approach. First, the best evidence approach suggests that a delaying plaintiff should lose only when the agreement is ambiguous and his own delay is useful evidence in interpreting its scope. The

⁶⁴ See *infra* notes 89-92 and accompanying text (clear cases in corporate opportunity area).

⁶⁵ The simple idea that a nondelaying plaintiff who objects quickly to a fiduciary's behavior may lose because the fiduciary's behavior is found to be acceptable is obviously not limited to opportunity cases. See, e.g., *Cunningham & Co. v. Consolidated Realty Management*, 803 F.2d 840 (5th Cir. 1986) (majority of partners did not violate fiduciary duty to minority partner by selling partnership property); *Reed v. Robilio*, 273 F. Supp. 954 (W.D. Tenn. 1967), *aff'd*, 400 F.2d 730 (6th Cir. 1968) (surviving partner had no duty to disclose information about the firm to the estate of deceased partner while negotiating to purchase deceased partner's interest in the firm); *Covalt v. High*, 100 N.M. 700, 675 P.2d 999 (Ct. App. 1983), *ccrt. denied*, 100 N.M. 631, 674 P.2d 521 (1984) (Table No. 15,260) (partner not liable for failing to obtain a requested increase in rent for partnership property); *Burke v. Farrell*, 656 P.2d 1015 (Utah 1982) (partner who purchased his partner's interest in business had no duty to volunteer information about value of the partnership).

waiting-with-advantage approach suggests that strategic delay is always objectionable in grey area cases but that a delaying plaintiff might win in cases of clear breach in order to deter the misbehaving defendant. As noted below, plaintiffs virtually never delay and win. I take this to be weak evidence of the validity of the waiting-with-advantage approach. Second, an emphasis on strategic delay, rather than best evidence, will be transferable to other areas of law. Finally, there is reason to pursue a positive theory, like waiting-with-advantage, when another does (at least a good part of) the job. Two views of a phenomenon are more revealing than one, one may emerge as significantly more useful in the future, and, finally and most subjectively, I find the waiting-with-advantage idea interesting, and therefore worthwhile.

With these claims and alternatives in mind, it is instructive to move from *Lipinski* and *Huffington*, cases chosen almost at random from the set of opportunity cases that seem to fall into the grey area, to an examination of other such cases.⁶⁶ In *DeSantis v. Dixon*,⁶⁷ defendant, a partner in a used car business, purchased on his own a vacant lot to which the partnership's business eventually relocated. Plaintiff, who knew all along that defendant had purchased the land,⁶⁸ claimed that the property belonged to the partnership and that no rent was owed to his partner. This claim was not made until after the relocation and plaintiff lost.⁶⁹

In *Holmes v. Keets*,⁷⁰ the plaintiff and defendant formed a partnership for the purpose of operating one hotel. Keets then expanded an adjacent hotel onto neighboring property, both of which he owned individually.⁷¹ Holmes claimed that this was a breach of a fiduciary duty. This claim seems rather weak because he knew of Keets' inter-

⁶⁶ I have recorded at various points in this Article virtually all such cases I could find.

⁶⁷ 72 Ariz. 345, 236 P.2d 38 (1951).

⁶⁸ *DeSantis*, 72 Ariz. at 348, 236 P.2d at 40. Plaintiff's knowledge can be inferred from the fact that the partnership agreed to pay rent to the defendant for use of the property and that the defendant granted the plaintiff the right to buy the property upon the defendant's death. Id. at 347-48, 236 P.2d at 39-40.

⁶⁹ For a case similar to *DeSantis*, see *Mathis v. Meyeres*, 574 P.2d 447 (Alaska 1978). In *Mathis*, the defendant joined in an extra-partnership land acquisition. The partnership was formed solely to purchase specific property (not the property in question) and the plaintiff knew all along that the defendant had various land investments outside the partnership. Id. at 449.

⁷⁰ 153 F.2d 132 (D.C. Cir. 1946).

⁷¹ Id. at 133.

est in the neighboring hotel before entering into the partnership, and he could hardly expect Keets to ignore opportunities to improve the individually owned hotel's profits.⁷² On the other hand, Keets' expansion of his hotel may be thought wrong because of its impact on the partnership's hotel, much as a partner who now negotiates on his own to lease property in a year after his partnership agreement expires may be found to have breached his fiduciary duty.⁷³ In each case the behavior seems technically outside the explicit partnership agreement but may too clearly harm the partnership's interests. In any event, Holmes' waiting-with-advantage makes the result rather predictable; he brought his claim *after* the expansion was completed,⁷⁴ and it failed.⁷⁵

Finally, in *Skone v. Quanco Farms*,⁷⁶ Skone had agreed to harvest, pack, and market the potatoes grown by Quanco Farms. The parties were to share the profits and losses equally. Skone used these potatoes to fill contracts he had been and still was negotiating. Later, when the crop was ready and the price of potatoes had increased, Quanco complained that Skone had violated his fiduciary duty by using the crops to satisfy his own contractual commitments. The claim failed.⁷⁷

In this case, as in *Holmes* and others,⁷⁸ it is arguable that plaintiff lost because there simply had been no breach; Skone had disclosed his intentions to Quanco, and some officers of Quanco had reported to a bank that their crop was committed. But it is also arguable that such cases lie in the grey area in which the fiduciary's behavior is of debatable legality and morality, but in which plaintiff's waiting with advantage ensures that the fiduciary will prevail. Either way, by focusing on the plaintiff's behavior, as well as on the fiduciary's, one is able to explain the cases in a way that avoids relying entirely on the ability to

⁷² *Id.* at 134 ("constructive notice of probable improvements").

⁷³ See *infra* notes 85-87 and accompanying text.

⁷⁴ 153 F.2d at 133.

⁷⁵ *Id.* at 134.

⁷⁶ 261 Cal. App. 2d 237, 68 Cal. Rptr. 26 (1968).

⁷⁷ *Id.* at 241, 68 Cal. Rptr. at 29.

⁷⁸ In *Margeson v. Margeson*, 376 N.W.2d 269, 271-73 (Minn. App. Ct. 1985), the plaintiff in a marital dissolution case claimed that the defendant had mismanaged the parties' interest in a jewelry store. The plaintiff's loss in the case may reflect a judgment that there was no mismanagement, or at least none rising to the level of a fiduciary breach. On the other hand, plaintiff's loss may more accurately be traced to the fact that he waited until the dissolution of his marriage to complain about the behavior of his partner.

make a correct assessment of how the court will view the fiduciary's actions.

Thus when a delaying plaintiff sues a defendant who has (only) arguably breached his duty, one can expect that the plaintiff will lose. One cannot, however, distinguish among three possible reasons for this result: (1) that the plaintiff will be penalized for waiting with advantage; (2) that the court will view delay as evidence that the plaintiff accepted a narrow interpretation of the agreement; and (3) that the court simply will find the defendant's behavior unobjectionable.⁷⁹ Similarly, when a non-delaying plaintiff wins, one does not know whether (or how much) to credit the plaintiff's speed, the absence of evidence of a narrow agreement, or the defendant's misbehavior. One cannot be sure that had this winning plaintiff waited with advantage he would have lost, because it is possible that the court regards the fiduciary's behavior as sufficiently objectionable to require judicial intervention regardless of the details of plaintiff's behavior. Nevertheless, there are occasional cases in which one suspects that the plaintiff's behavior is critical.

One such case is *Marsh v. Gentry*,⁸⁰ a decision concerning two partners in a racehorse business. One of them, Marsh, insisted that the partnership sell two of its horses, and the other, Gentry, eventually purchased both. He acquired one at an auction—where Gentry himself seemed to have driven the price higher than would otherwise have been obtained—and the other through a private sale, after considerable time passed during which there were no offers to buy in response to an asking price comparable to Gentry's eventual purchase price.⁸¹ Marsh's successful suit followed the victory of one of the horses at a racetrack and the publication of its owner's (Gentry's) identity.

This case resembles in many ways the hypothetical situation discussed earlier in which a partner purchases an asset on his own account after failing to acquire it for his partnership at the price his partners were willing to pay.⁸² In *Marsh*, as in that case, so much of the possible conflict of interest would have been eliminated—and nothing beneficial would have been lost—had Gentry simply disclosed his intentions to Marsh, that it is sensible for the law to penalize the

⁷⁹ See *supra* notes 67-77 and accompanying text.

⁸⁰ 642 S.W.2d 574 (Ky. 1982).

⁸¹ *Id.* at 575.

⁸² See *supra* text accompanying notes 36-43.

nondisclosing party as a means of encouraging disclosure. Still, it is easy to be sympathetic with Gentry who, as the dissent in the case notes, felt pressured by Marsh to effect a sale and who almost surely enabled Marsh to get more for his share of the horses than he would have received had Gentry simply allowed a stranger to purchase the horses.⁸³ One gets the impression that this sympathy together with any strategic delay by Marsh would have been more than enough to have produced a different outcome. The court noted, for example, that although Marsh brought suit only after one horse won at Churchill Downs (no doubt causing the value of the horse to increase), it was only because of this horserace that Marsh first learned that it was his partner, Gentry, who purchased that horse.⁸⁴ It seems safe to guess that had Marsh truly delayed strategically, by waiting for a second victory at the racetrack before objecting, for example, then Marsh would have lost the case.

Finally, in the most famous of partnership and joint venture cases, *Meinhard v. Salmon*,⁸⁵ the managing partner, Salmon, negotiated on his own account and without disclosure⁸⁶ a long lease on a property that was then under lease to Meinhard and Salmon's joint venture. Although Justice (then Judge) Cardozo excoriated the defendant, it is likely that had plaintiff waited with advantage even Cardozo would have decided the case against him. Cardozo's opinion is careful to report that there was no delay between Meinhard's first learning of Salmon's lease and his demanding that the lease be an asset of the joint venture.⁸⁷

⁸³ 642 S.W.2d at 577 (Stephenson, J., dissenting).

⁸⁴ *Id.* at 575.

⁸⁵ *Meinhard*, 249 N.Y. 458, 164 N.E. 545 (1928). It may be useful to note the words of H. Reuschlein & W. Gregory, Handbook on The Law of Agency and Partnership § 188, at 277 (1979): "It should be noted that the *Meinhard v. Salmon* language . . . [which describes the] fiduciary duty standard of a partner involved not a partnership but a joint venture. The standard is the same, however, and the specific words of Justice Cardozo have been frequently quoted approvingly by courts involving partnerships."

⁸⁶ *Meinhard*, 249 N.Y. at 463, 164 N.E. at 546. Disclosure might have started a bidding war between the two partners for the lease in question. Of course, an interesting question is why the lessor did not seek to inform Meinhard—and why in general in these opportunity cases there is only rarely a self-serving disclosure by some third party to the beneficiary.

⁸⁷ *Meinhard* was not informed even of the bare existence of a project. The first that he knew of it was in February when the lease was an accomplished fact. He then made demand on the defendants that the lease be held in trust as an asset of the venture, making offer upon the trial to share the personal obligations incidental to the guaranty. The demand was followed by refusal, and later by this suit.

III. WAITING WITH ADVANTAGE OUTSIDE THE PARTNERSHIP AREA

A. *Strategic Behavior in Corporate Opportunity Cases*

The effect of plaintiff's strategic behavior in corporate opportunity cases is quite similar to its apparent significance in the partnership decisions. Unfortunately, there are too few cases involving public, as opposed to closely-held, corporations to generalize about the difference, if any, between the treatment of fiduciaries and the effect of strategic behavior in the two kinds of corporations. One might for several reasons expect plaintiffs to have *more* success in the public corporation cases. The fiduciaries of a public corporation are more often full-time employees who might be expected to share all their ideas with their employer.⁸⁸ Moreover, the business of most public corporations is not limited to specific ventures but rather encompasses virtually all profitable opportunities. Finally, insofar as the plaintiff in a public corporation case is likely to be a passive, outside shareholder whereas in a close corporation case he is more likely to be involved in the operation of the firm, it is most unlikely that a public corporation case will concern a plaintiff who has waited with advantage. After all, such plaintiffs are not ordinarily knowledgeable about either their corporation's investments or those pursued by the officers and directors of the corporation. These points may all be reflected in the fact that virtually all the reported corporate opportunity cases concern closely-held corporations.

In the corporate opportunity decisions that do involve waiting with advantage, the pattern follows that uncovered earlier in the partnership cases. There are some fairly predictable cases, outside the grey area, in which either the defendant's behavior is clearly wrong or it is clear, to the contrary, that the business opportunity pursued by the defendant was not one within the original ambitions or present abilities of the corporation. Apart from these cases involving clear breaches, when a plaintiff waits with advantage he loses, but it is impossible to say when this result is caused by the plaintiff's, as opposed to the fiduciary's, behavior. Similarly, a plaintiff who does

Id.

⁸⁸ See Brudney & Clark, A New Look at Corporate Opportunities, 94 Harv. L. Rev. 997, 1003 (1981) (seeking to link the full-time work of managers in most public corporations to a higher fiduciary standard).

not delay may win or lose depending on the court's assessment of the defendant's behavior.

As a matter of theory alone I would have been prepared for several corporate cases involving strategically delaying plaintiffs to be decided in the plaintiffs' favor, because the courts found the defendants' misbehavior rather clear.⁸⁹ Yet in fact I can find only one corporate opportunity case⁹⁰ in which a plaintiff wins after waiting with advantage. In this case, *Farber v. Servan Land Co.*,⁹¹ two officers of a corporation that ran a golf club and lodge purchased on their own some land near the golf course without disclosing their intentions and with-

⁸⁹ Imagine, for instance, that an officer of a close corporation that manufactures telephones gets an idea about converting rotary into push-button phones from a letter sent in by a customer, and proceeds to set up a (competing) corporation that makes such conversions. Plaintiff, a shareholder who notices these events, strategically delays and then asks that a constructive trust be imposed on what is now a profitable competitor. I have no doubt that if defendant also embezzled the money he used as seed for the new enterprise, a constructive trust would be imposed despite plaintiff's waiting with advantage. Had defendant not embezzled but affirmatively misrepresented the idea about conversions in order to keep it for himself, I would still wager (but I am not absolutely sure) that plaintiff would prevail. And if defendant neither embezzled nor lied, but simply usurped what is pretty clearly a corporate opportunity, I think plaintiff would be as likely to lose as to win. Finally, if the idea were not about converting telephones but about selling the rotary mechanisms as toys—and there was no embezzlement or misrepresentation—I think a delaying plaintiff would lose but a nondelaying plaintiff would be as likely to win as to lose.

⁹⁰ *Tlapek v. Chevron Oil Co.*, 407 F.2d 1129 (8th Cir. 1969), might be counted as a second case in which a delaying plaintiff wins. Tlapek had pressed his employer, Chevron, to search for oil in the manner suggested by a theory developed by Tlapek on the basis of confidential data given by Chevron to Tlapek in the course of his employment. *Id.* at 1130-31. Even after Tlapek's resignation (which came as no disappointment to Chevron, for he showed "lack of maturity and good judgment" in his enthusiasm for his theory and his impatience with Chevron and, perhaps, in other things as well) and his pursuit of his dream on his own, Chevron refused offers to become Tlapek's coventurer. *Id.* at 1131. Chevron sought the imposition of a constructive trust on Tlapek's oil leases after it learned of his intention to drill, but not yet of his success in the endeavor. *Id.* at 1132. The court found for Chevron, but allowed Tlapek to recover his costs of securing the oil leases, noting that Chevron was not guilty of laches and had not waited until oil had been discovered. *Id.* at 1136.

At one level the decision might simply be understood as allowing Chevron to claim the opportunity because it did *not* wait with advantage (inasmuch as oil had not yet been discovered). Indeed, Tlapek might be seen as successfully forcing Chevron to adopt his theory at no cost to himself. But even if this view of the facts is too generous to Chevron (and the court), one might simply recognize that had Chevron told Tlapek that it was not pursuing this theory presently but that it did intend to follow through in several years, no one could doubt that Tlapek would not be entitled to proceed on his own (because of Chevron's entitlement to its trade secrets) and even that Chevron might then *not* pursue Tlapek's theory. As such, the decision only gives Chevron what it could have had easily by responding to Tlapek differently.

⁹¹ 662 F.2d 371 (5th Cir. 1981).

out determining whether the corporation would have knowingly passed up the opportunity for such an acquisition. The ten stockholders of the corporation had discussed acquiring this land on several previous occasions but had not reached a final decision.⁹² Plaintiff had refused to ratify the executives' purchase but did allow three years to go by and then, when the corporation's assets and the land in question were sold as a package to an outsider, brought suit objecting to the taking of the opportunity in the first place.⁹³

Plaintiff's success in *Farber* should probably be traced to the fact that not only was this a clear corporate opportunity but also it would have been especially easy for the executives to offer a share in the purchase to each shareholder. Still, if a plaintiff can count on winning this sort of case, then there is truly an advantage to delay, for if the value of the land drops no objection is made and the fiduciary suffers the entire loss. Put differently, the "rule" in *Farber* provides substantial deterrence to the fiduciary's usurpation. On the other hand, had *Farber* gone the other way, it would have been easy to attribute the loss to the plaintiff's delay. It seems best, therefore, to conclude that when plaintiff waits with advantage he virtually always loses, and that only if he delays after a clear breach is there a possibility but not a certainty of defeat.⁹⁴ Again, it is noteworthy that this is the *only* corporate opportunity case I can find in which the plaintiff wins after behaving strategically.⁹⁵

There is not much point in reporting at length the corporate opportunity cases in which plaintiff does not delay. In some, the result, whether for or against the fiduciary, is rather clear.⁹⁶ Others do fall in

⁹² Id. at 373.

⁹³ Id. at 374.

⁹⁴ Every lawyer that I have questioned and given the facts of defendants' behavior in *Farber* predicts a win for plaintiff.

⁹⁵ The only condition that must be put on this finding is that, since courts rarely focus on plaintiffs' behavior, strategic delays must be inferred from clues dropped in the decisions, and often cases must simply be put aside because there is some chance, but not enough evidence, that plaintiff waited with advantage.

⁹⁶ See, e.g., *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 28 So. 199 (1900) (corporate officers liable to nonstrategic plaintiff after acquiring land with knowledge that the corporation had an option to purchase); *Knutsen v. Frushour*, 92 Idaho 37, 436 P.2d 521 (1968) (nondelaying plaintiff wins in suit against director who instead of acting as agent purchased land for himself); *Paulman v. Kritzer*, 74 Ill. App. 2d 284, 219 N.E.2d 541 (1966), aff'd 230 N.E.2d 262 (1967) (nondelaying plaintiff wins against corporate president who seized opportunities for his own benefit); *Schildberg Rock Prod. Corp. v. Brooks*, 258 Iowa 759, 140

the grey area in which it is only arguable that a corporate opportunity has been usurped, but many of these do not seem to be influenced by the plaintiff's behavior in any interesting way.⁹⁷ It is most helpful to examine those grey area cases in which the plaintiff loses after waiting with advantage.

In *Lancaster Loose Leaf Tobacco Co. v. Robinson*,⁹⁸ the president of a corporation formed for the purpose of owning and operating a tobacco warehouse secretly traded tobacco on his own account, but paid fees for its storage in the warehouse. There are some clues suggesting that plaintiff strategically waited,⁹⁹ and the plaintiff lost.¹⁰⁰ In *Robinson v. Brier*,¹⁰¹ a derivative suit by the shareholder of a luggage manufacturing corporation failed to recover profits from a director of the company who openly sold to the corporation wooden frames that he was able to produce and sell at a lower price to the corporation than had the previous supplier. The shareholder did not bring suit until after the parent of the plaintiff corporation had acquired the director's frame-making business.¹⁰² And in *A.C. Petters Co. v. St. Cloud Enterprises*,¹⁰³ the defendants, who were also stockholders of plaintiff corporation, purchased land adjacent to property owned by

N.W.2d 132 (1966) (defendant fiduciaries leased quarrying area that the corporation was actively considering and that they learned about because of their inside positions); *Cain v. Cain*, 3 Mass. App. Ct. 467, 334 N.E.2d 650 (1975) (clear usurpation, and victory for nonstrategic plaintiff).

⁹⁷ See, e.g., *Science Accessories v. Summagraphics*, 425 A.2d 957 (Del. 1980) (nonstrategic plaintiff corporation loses to defendant who left corporation to develop an instrument similar but superior to one used by the plaintiff corporation); *Johnston v. Greene*, 35 Del. Ch. 479, 121 A.2d 919 (1956) (nonstrategic plaintiff loses to fiduciary who, as president of corporation that financed aircraft and had liquid assets to invest, purchased on his own patents from a firm that manufactured aircraft parts).

I have tried to allocate several cases between note 96 and this note according to whether the breach seemed clear. Any misallocation should not detract from the central point that a key variable in predicting these cases is the presence or absence of strategic delay by the plaintiff.

⁹⁸ 199 Ky. 313, 250 S.W. 997 (1923).

⁹⁹ In its discussion of the commissions, or revenues, earned by the corporation from the defendant, the *Lancaster* court noted that "[t]hey were closely connected in business, and doubtless this plan was followed as a matter of convenience for them all." *Id.* at 315, 250 S.W. at 999.

¹⁰⁰ *Id.* at 321, 250 S.W. at 1000.

¹⁰¹ 412 Pa. 255, 194 A.2d 204 (1963).

¹⁰² *Id.* at 257, 194 A.2d at 206.

¹⁰³ 301 Minn. 261, 222 N.W.2d 83 (1974); see also *Burg v. Horn*, 380 F.2d 897 (2d Cir. 1967) (some suggestions that plaintiff, who lost on claim that defendant took a corporate opportunity by purchasing certain buildings, had waited with advantage).

plaintiff after plaintiff was unable to obtain funds to buy the land, and some time after the individual who controlled plaintiff corporation indicated that he was not individually interested in purchasing the land. Again, defendants prevailed, with the court noting only that defendants were not obliged to put up their personal funds to enable plaintiff corporation to make investments.¹⁰⁴

In each of these three cases it is possible that the defendant won because the court found no breach of the fiduciary duty. The warehouse operation in *Lancaster* was not obviously in the business of buying and selling tobacco so that its opportunity may not have been taken, the frames in *Robinson* appear to have been sold by the interested supplier-director at a fair price reflecting a mutually beneficial arm's length bargain,¹⁰⁵ and the plaintiff in *A.C. Petters Co.* truly seems to have been either unable to finance or uninterested in purchasing (or both) the land in question.¹⁰⁶ But it is also possible that in each of these cases the plaintiff would have prevailed—for the defendant might have been found to behave with less than “the punctilio of an honor the most sensitive”—had there been no hint of strategic delay on the plaintiff's part.¹⁰⁷ In *Lancaster* there is the possibility that the plaintiff, while enjoying the fees paid for warehousing, waited to see whether the defendant's trades proved profitable. In *Robinson* the plaintiff had been notified of the supply arrangement and may have hoped for inexpensive supplies followed by a recovery of profit from the supplier-director. The plaintiff in *A.C. Petters Co.* may at least have tried to freeride on the defendants' efforts and expenses in acquiring the land and may have hoped to wait-and-see any change in land values. I do not claim that plaintiffs' strategic behavior is worth watching because it explains cases that would otherwise inexplicably go in defendants' favor (although this may occasion-

¹⁰⁴ Id. at 267, 222 N.W.2d at 86-87.

¹⁰⁵ *Robinson*, 412 Pa. at 259-60, 194 A.2d at 207 (“record discloses” that defendant offered lowest prices on frames, that his dealings were “open” and “scrupulously honest,” and that they proved profitable to the corporation).

¹⁰⁶ *A.C. Petters, Co.*, 301 Minn. at 266, 222 N.W.2d at 86-87.

¹⁰⁷ My idea of behavior that is truly remarkable or even honorable for a fiduciary is that found in *Fliegler v. Lawrence*, 361 A.2d 218 (Del. 1976) (fiduciary pursued mining opportunity on his own while corporation was financially unable to do so, but fiduciary gave corporation option to buy back in and essentially share in good fortune should venture prove very profitable). Of course, such “honorable” standards might discourage one from entering partnerships, corporate employment, or other agency relationships in the first place.

ally be so). I do claim that it explains at least as many cases as does defendants' behavior, and that it is easier to assess whether a plaintiff has strategically delayed than whether a fiduciary has exploited an opportunity that truly falls within the unmarked boundaries of his corporation's business.

B. The Principal's Behavior in (Non-Partnership) Agency Cases

The reported decisions dealing with claims brought outside the partnership and corporate contexts by a principal alleging that an agent has usurped an opportunity indicate that the scope of most agencies is much clearer than that of a partnership or corporation.¹⁰⁸ Once one excludes the broad agency arrangements found in partnership and corporate law, there are few decisions involving a principal's usurpation claim against his agent that are not easily predicted by any experienced lawyer. Because the *reported* decisions happen not to involve principals who waited with advantage, it seems fairer to say that the central argument of this Article is not contradicted in agency law than it is to claim that plaintiffs' behavior is as powerful a predictive tool in this area of law as it is in partnership and corporate law.

*Strickland v. Arnold Thomas Seed Service*¹⁰⁹ presents a reasonably representative situation. The defendant, a dealer in alfalfa seed, was employed as a marketing agent by a pool of growers. The defendant commingled seed supplies and sold his own seed at higher prices than he obtained for the pool.¹¹⁰ The defendant-agent's breach is clear, for he could at least have disclosed his conflict of interest and surely should have shared the most favorable sales with the pool rather than accepted higher prices for his own seed.¹¹¹ There seems to have been no strategic delay by the plaintiffs; given that the agent's strategy was not to invest in opportunities that might or might not have turned out well but rather to take the best sales for himself, it is indeed hard to see how any delay by the plaintiffs could have had strategic value.

¹⁰⁸ Agents with very broad authority might simply rise to the level of, and be indistinguishable from, corporate fiduciaries or partners. Agency law is interesting as a separate but not, I think, fundamentally different field to the extent that it deals with relationships that are more limited than those normally judged by the norms of partnership and corporate law.

¹⁰⁹ 277 Or. 165, 560 P.2d 597 (1977).

¹¹⁰ *Id.* at 168-69, 560 P.2d at 598-99.

¹¹¹ *Id.* at 173, 560 P.2d at 602.

More generally, it is difficult to imagine a business opportunity case involving this agent that would be hard to decide. The agent's job was obviously to get as good a price for the principals' produce as possible. In the absence of an express prohibition in the agency agreement, the agent's selling some noncompeting type of seed, investing in a new warehouse, or speculating in grain options clearly would be permissible. Whereas partnership and corporate ventures are often broader than one task in scope, so that close questions arise as to each investor's claims on the ideas, investments, and efforts of coinvestors, simpler agency arrangements often leave little of a grey area. There is therefore less room in which strategic behavior can be a useful predictive tool.

Hard agency cases might arise where an agent's task leaves him time to pursue opportunities that may conflict with or enhance the principal's fortune. Suppose, for example, that a salesman employed on a commission basis by a shoe manufacturer as its agent visits retailers and shows them not only the manufacturer's line of shoes but also, on his own account and at his own expense, a variety of hosiery, shoe creams, and fixtures with which to display merchandise. The principal will almost surely have expressly either forbidden or allowed the agent to carry competing lines of shoes. If the principal failed to do so one might simply look to see whether the commissions available from the competing principals were equal or instead generated a serious conflict of interest.¹¹²

The agent's efforts with respect to shoe creams and the like are more difficult to assess. They may in the long run benefit the principal, distract the agent from the principal's shoes, or have no effect. If such a case should arise, I believe that the principal's waiting to see whether the agent's efforts increase or decrease shoe sales would and should play an important role. A similar situation is one in which a salesman whose selling costs are reimbursed by his principal decides to entertain customers lavishly or in some other way to increase his expenses dramatically. The salesman's strategy in either case might prove to benefit the principal, but one would expect the principal to

¹¹² See Goetz & Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1123-26 (1981) (discussing hypothetical case in which book publisher enters into a "best efforts" contract to promote a professor's book, but subsequently publishes another professor's competing book, and arguing that there is no real problem unless the publisher gains more from the sale of the new book, as it might if the royalty rates are different).

recover lost profits, or alternatively, to avoid liability for the extra expenses, the less he delayed after learning of the new sales strategy. Unpenalized delay would allow the manufacturer to enjoy any increase in sales—and get some indication of whether carrying a line of accessories or entertaining customers lavishly is a sound scheme for marketing shoes—without sharing the risk of loss concomitant with the experiment. I can, however, find no case on point and, in fact, the closest available case suggests that the principal and agent will explicitly agree in advance what the agent may and may not sell alongside the principal's wares.¹¹³

C. *From Trust to Contract*

It is worthwhile to contrast the important role played by the complaining party's strategic behavior in partnership and corporate law disputes with the very different roles such behavior plays in trust law, where the fiduciary duty is considerably more severe,¹¹⁴ and in contract law, where there is sometimes the duty to act in good faith, but not normally a duty that approaches the fiduciary level. There can be little doubt that if a beneficiary of a trust, knowing that his trustee had wrongfully usurped an investment opportunity, waits for the success of this investment to become apparent before complaining, then an otherwise perfect claim could fail. However, the need to deter misbehaving trustees suggests that even strategic plaintiffs will win. On the other hand, decisions against sophisticated trust beneficiaries who delayed with advantage and, more generally, occasional passing references in the opinions to (winning) plaintiffs' promptness in raising their objections make one think that even in trust cases delay could be fatal.¹¹⁵

Cases involving delay under more typical trust conditions do *not* arise, however, for two apparent reasons. First, since trust beneficiaries are often young, dispersed, or otherwise uninformed, they do not monitor the actions of their trustee. And a beneficiary who does not have full knowledge of the fiduciary's behavior can hardly be thought to have waited with advantage to see whether to object to the

¹¹³ *Elco Shoe Mfrs. v. Sisk*, 260 N.Y. 100, 183 N.E. 191 (1932) (agreement allowed agent to sell other lines of shoes so long as these lines did not compete with principal's line.)

¹¹⁴ See *supra* text accompanying notes 41-43.

¹¹⁵ See *supra* note 10.

fiduciary's actions.¹¹⁶ Second, because a trustee's behavior is by design more constrained than that of other fiduciaries,¹¹⁷ trustees naturally disclose more readily to their beneficiaries than do other fiduciaries. A partner may choose not to disclose his own dealings because he fears competition or demands to include coventurers, but a trustee may reason that he is so likely to lose when complaints are brought against him that he must disclose as he goes along and force the beneficiaries (if they are able) to object early on or to consent by implication. When there is full disclosure, (able) beneficiaries will indeed not be permitted to let things go and object later.¹¹⁸ It is immaterial whether one traces this result to "implied consent" by beneficiaries or to the possibility that they waited with advantage. Either way, the unsurprising point is that although trust beneficiaries are normally so ignorant that they are incapable of strategic behavior, delay is likely to be penalized when there *has* been disclosure and understanding.

When one turns to the other end of the spectrum and finds the highest of "duties" in contract cases,¹¹⁹ one must confront the following two questions: Is it not odd that waiting with advantage can be costly to a beneficiary who complains about a fiduciary breach, but that such strategic behavior by a contracting party would be regarded as normal bargaining behavior? And if the law does treat strategic behavior differently depending on whether it is in the context of a partnership (for instance) or a mere contract, is this not an odd elevation of form over substance given that many contractual arrangements could so easily be recharacterized as partnerships, and vice versa?

These questions are best considered in reverse order. It is *not* surprising for form to matter a great deal in private law. Private parties are generally able to customize the terms of their interaction as they like. The partnership, the corporation, and other legal forms can thus be viewed as off-the-rack packages that can be selected or rejected by

¹¹⁶ Shareholders of most publicly held corporations are similarly dispersed and uninformed. The dearth of opportunity cases involving strategic delay by shareholders of such corporations probably reflects the fact that they rarely have access to information about the private dealings of their beneficiaries.

¹¹⁷ See Levmore, *supra* note 42.

¹¹⁸ See *supra* note 10 and accompanying text.

¹¹⁹ Contracting parties are sometimes held to a "good faith" standard but only rarely to a "fiduciary" standard, and these expressions reflect real differences in legal rules. See *supra* notes 109-14 and accompanying text.

parties as they choose. By opting for one of them, parties will often greatly decrease their transaction costs. Forms *should* differ in their legal implications so that real alternatives are offered to parties.

Suppose *K* wants to invest in a real estate project that his colleague, *L*, has been discussing. *K* and *L* may agree that *K* will become *L*'s creditor, *L*'s partner in real estate development generally, or *L*'s partner in real estate development in a specific town or a single project. They may arrange that as *K*'s agent *L* will simply try to secure some shares for *K* in a real estate investment, or that *L* will be a trustee for funds that *K* advances to be invested in real estate for the benefit of *K*'s children.¹²⁰ Their choice among these forms will depend, to be sure, on concerns other than the rules governing or even preventing conflicts of interest and agency problems¹²¹ in general. But these rules, captured in the "duty" expression, will be an important component of their agreement and there is every reason to think that some choice in fashioning an agreement is desirable. It would, in short, not be surprising at all for there to be different expectations in the law about the behavior of trustees, partners, and contractual suppliers; the law sets out these different expectations so that parties can choose, through bargains, those they wish to apply.

One is left, then, to consider why the treatment of strategic behavior might vary according to the form of an arrangement. More particularly, why does the law sometimes seem to give the benefit of a doubt to a partner or other fiduciary and not to a mere supplier (or other party to a contract), when normally one who is *not* labeled a fiduciary is treated more leniently?

It may be helpful to present the issue in concrete examples. If *B* delays with advantage after learning that *A*, who owes *B* a fiduciary duty, has invested in a project that arguably should have been shared with *B*, then, as seen earlier, *B*'s chance of success is markedly diminished. Questionable behavior by the fiduciary, *A*, can be excused, in effect, by the (apparent desire to deter the) beneficiary's strategic behavior. In contrast, imagine that *C* finds it difficult to contact his landlord, *D*, about renewing a lease because *D* has strategically made

¹²⁰ Given that the parties can vary the legal scope (one project, all real estate, and so forth) as well as the legal form (partnership, trust, and so forth) the possibilities are endless.

¹²¹ I use the term "agency problems" here to refer not only to the problems that arise out of the divergence of interests between parties to a simple principal-agent relationship but also to other such problems inherent in all delegations of responsibility.

himself scarce in the hope that *C* will be drawn into a difficult bargaining position. *D*'s strategy may work. *C* may have to accept a renewal with a substantial rent increase because by the time *C* is able to complete negotiations with *D* attractive alternatives are no longer available to *C*. But *C* will hardly be able to convince a court to roll back his rent or otherwise relieve him from contractual terms.¹²² Here *D*'s strategic behavior does not trigger any less favorable legal treatment, whereas in the first example *B*'s strategic behavior did appear to trigger less favorable legal treatment of the delaying party, *B*, even though this reaction also benefited a fiduciary who had behaved in a questionable manner.¹²³

¹²² The result is so obvious that I can find no cases precisely on point. See *Bethlehem Steel Corp. v. Solow*, 63 A.D.2d 611, 405 N.Y.S.2d 80 (App. Div. 1978) (plaintiffs made it impossible for defendants to meet with them to discuss or accept an offer plaintiffs had submitted, but court finds in plaintiff's favor, holding that there was no duress and that, in any event, defendants had waived the duress defense).

¹²³ There appear to be a variety of doctrinal tools that could be used to deter a party from the severest forms of misbehavior in negotiating. If *D* affirmatively misrepresents the likelihood of his finding a new tenant willing to pay the higher rent, then *C* may prevail under a claim of fraud or misrepresentation. *Wojciechowski v. Amoco Oil Co.*, 483 F. Supp. 109 (E.D. Wis. 1980) (misrepresentation that franchise would be renewed where evidence showed present intention not to continue franchise even if performance was adequate). See, e.g., *Markov v. ABC Transfer & Storage Co.*, 76 Wash. 2d 388, 457 P.2d 535 (1969) (lessee collected reliance damages after proving case of fraud and misrepresentation by showing that lessor had represented that he would renew three-year lease at its expiration, and then failed to do so). *Markov* is discussed by Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 Colum. L. Rev. 217, 234 (1987), who notes that "few such actions have been brought," at least under a misrepresentation theory.

If *D* affirmatively encourages *C* to abandon alternatives or otherwise to rely on reaching a satisfactory agreement with *D*, then *C* may prevail under a promissory estoppel theory and be awarded damages or even specific performance. See *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948) (damages awarded when franchise was denied to potential franchisee who incurred expenses based on promise that it would be granted); *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965) (defendant, who refused to finance plaintiff's construction plans, after urging plaintiff to improve a building site and assuring plaintiff of financing, required to pay damages based on promissory estoppel theory); *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (damages awarded where plaintiff relied on defendant's repeated assurances that a franchise would be awarded, and then late in the process defendant demanded larger financial contribution); Restatement (Second) of Contracts § 34 comment d (1981) (availability of specific performance remedy).

Certainly if a party tries to force another to enter a particular contract by threatening harm or even by threatening to breach a separate agreement, the law will undo or modify the tainted contract after labeling it as one entered into under duress, see, e.g., *S.P. Dunham & Co. v. Kudra*, 44 N.J. Super. 565, 131 A.2d 306 (1957) (plaintiff entitled to return of payment made to defendant who threatened not to return fur coats belonging to plaintiff's customers unless plaintiff paid additional, unrelated debts of plaintiff's concessionaire); *Austin Instrument, Inc.*

There are three ways of explaining this puzzling contrast. The simplest is to insist on a careful chronology and to note that while the landlord may behave strategically with respect to the second, as yet unsigned lease, a fiduciary who has not yet been employed may also behave strategically. One who has not yet become an officer of a corporation, for example, hardly has fiduciary obligations. This resolution is imperfect, in that parties who are considering the renewal of a contract are not exactly like those who are first entering into one.

The second is an evolutionary point and draws on a recent suggestion by Professor Farnsworth that the law may be in the process of moving toward the imposition of a duty to behave nonstrategically in negotiating contracts.¹²⁴ Professor Farnsworth cites two pieces of evidence in favor of this evolutionary suggestion. First, a few civil law countries enforce a statutory good-faith duty in precontractual negotiations as well as in the performance of an already existing contract.¹²⁵ Second, one area of American contract law—labor law under the National Labor Relations Act—does require that parties engaged in

v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971) (holding subcontractor Austin liable for damages after it created "duress" by threatening not to fulfill an existing contract with Loral unless Loral agreed to substantial price increases and unless Loral awarded Austin a second contract), or undue influence, see *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App. 2d 123, 54 Cal Rptr. 533 (1966) (teacher's resignation found to be product of undue influence, and therefore possible to rescind, because obtained by school officials who came to his apartment and threatened him with public humiliation after he had been arrested); E. Farnsworth, *Contracts* § 4.20, at 268 (1982) ("The concept of undue influence developed in courts of equity to give relief to victims of unfair transactions that were induced by improper persuasion. In contrast to the common law notion of duress . . . undue influence was aimed at the protection of those affected with a weakness, short of incapacity, against improper persuasion, short of misrepresentation or duress, by those in a special position to exercise such persuasion.").

The puzzle, then, is why strategic behavior that falls short of duress, undue influence, fraud, misrepresentation, or articulated promises, such as *D*'s stalling tactics, is left unpunished in contract law but not in partnership and corporate opportunity cases. This puzzle is highlighted rather than resolved by noting that in the contractual context parties can incur a "general obligation of fair dealing" during negotiations by "accelerating the negotiation process" by entering into, for example, a formal preliminary agreement. Farnsworth, *supra* at 243-49, 285-86.

¹²⁴ Farnsworth, *supra* note 123, at 284-87 (confirming that strategic behavior alone is unlikely to bring on legal intervention in contractual contexts). Inasmuch as Professor Farnsworth does not compare contract and fiduciary cases, his article does not allude to or resolve the puzzle discussed within note 123.

¹²⁵ *Id.* at 239 n.84 (citing relevant provisions of the codes of Argentina, Israel, Italy, and Yugoslavia).

collective bargaining "confer in good faith."¹²⁶

I am inclined, however, to discount the idea that a duty to behave nonstrategically will one day develop and that the puzzle will disappear. There is no real evidence that the statutory good-faith duty found in a few civil law countries is in the process of spreading to other civil law countries, much less to jurisdictions in our country. And as Professor Farnsworth readily points out, labor law under the National Labor Relations Act is obviously not a typical area of contract law.¹²⁷

A third approach to understanding the law's treatment of strategic behavior in both contract and fiduciary law builds on the familiar distinctions, sometimes puzzling in themselves, between action and inaction, rights and privileges, and intervention and nonintervention.¹²⁸ Put simply, the law is more eager to do nothing than to intervene. This asymmetry, or disinclination to intervene if it can be called that, may reflect the costs associated with legal intervention, a philosophy that demands a higher standard for action than inaction, the potential demoralization costs of intervention that turns out to have been in error, an ongoing strategy or inherited atmosphere that protects and favors the status quo, simple inertia, or historical accident. Regardless of its origins, it is doubtless a recurring feature in the legal landscape. The fact that plaintiffs must normally bear the burden of proof is perhaps the simplest and strongest example of this bias against legal intervention.

It is now easy to see that the puzzling contrast between the treatment of strategic behavior in contract and fiduciary law can be understood as a product of the familiar bias against legal intervention. The law's disinclination to penalize a party to a contract such as the landlord, *D*, who delays strategically in dealing with his tenant, *C*, is an instance of the general unwillingness to intervene when something less than fraud, misrepresentation, and the like¹²⁹ is at issue. On the other

¹²⁶ *Id.* at 270-72 (discussing National Labor Relations Act, 29 U.S.C. § 158(d) (1982)).

¹²⁷ Farnsworth concedes that the analogy between labor law and general contract law is "less than perfect," albeit for reasons different from those other commentators might stress. *Id.* at 271.

¹²⁸ See, e.g., Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 *Va. L. Rev.* 879 (1986) (behavioral explanations of omission-commission distinction); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 *Harv. L. Rev.* 1439 (1968).

¹²⁹ See *supra* note 123.

hand, when a fiduciary has behaved questionably and a beneficiary, such as *B*, delays strategically, the law can penalize strategic behavior by withdrawing rather than intervening. Had *B* not behaved strategically, the law might have intervened because the improper taking of an opportunity by a fiduciary is one of those wrongs that is sufficient to bring on legal intervention. Strategic behavior by a plaintiff, however, "allows" the law to revert to its nonintervening posture. *B*'s strategic behavior can be deterred by legal nonintervention, allowing the fiduciary to escape, whereas *D*'s strategic behavior can only be deterred by legal intervention. And intervention and nonintervention are not equal.

Although the costs of legal intervention are quite real,¹³⁰ this explanation of the seemingly contradictory treatments of strategic behavior in contractual and fiduciary settings lends support, strangely enough, to the prediction that the law is "evolving" toward the stricter treatment of delay.¹³¹ No one can doubt that the long-term trend in American law has been toward more legal intervention; the asymmetry is still there but it is weaker as time passes. There is therefore reason to think that over time the law's inclination to deter strategic behavior—illustrated by the treatment of plaintiffs who wait with advantage in fiduciary suits, in the growth of the doctrine of promissory estoppel in contract law,¹³² and elsewhere—may extend to all contracting parties who delay strategically. Inasmuch as such an extension would not necessarily be wise, it is perhaps best simply to conclude that it is not always possible to predict when there will be legal intervention, but that when there is intervention it is most likely then to deal with strategic and other misbehavior by all involved parties. The rules that one expects in theory are thus quite similar to those that are found in fiduciary opportunity cases where the beneficiary delays with advantage, much as they are in tort cases involving negligent plaintiffs and in breach of contract cases involving plaintiffs who have not mitigated damages.

¹³⁰ It is, I think, a bit of a mystery that the law does not sometimes agree to intervene only if the complaining party pays all court costs, for then he alone would incur the costs of intervention. To be sure, court costs, however defined, may simply be a very poor proxy for the true costs of litigation.

¹³¹ See *supra* text accompanying note 124.

¹³² See *supra* note 123; E. Farnsworth, *supra* note 123, § 3.26, at 191 ("In recent decades courts have shown a willingness to allow the dealer [who made expenditures before receiving a franchise] to recover expenses incurred in preparing to do business.").

D. Strategic Delay Outside the Business Opportunity Area

The questions of strategic and optimal delay are interesting not only in business opportunity cases but also in other areas of law. Plaintiffs may regard delay as desirable or disastrous for all sorts of reasons pertaining to discovery, settlement pressures, and the like. Delay is almost surely advantageous when the plaintiff is considering whether to insist that he be allowed to participate in an investment that has not yet matured. The decision to penalize such delay is, of course, more interesting when there is a cost to overdetering the defendant's behavior; when the defendant's behavior is unambiguously undesirable, the precision of deterrence is relatively unimportant. Finally, the question of optimal delay is especially interesting when the problem of strategic delay cannot be resolved costlessly by demanding early disclosure or early adjudication.

A fair number of business opportunity cases combine these interesting ingredients because: (1) situations appear to arise quite often where it is possible, but not certain, that defendants have pursued opportunities in violation of the spirit of a coventure—but also possible that no violation has occurred and that it is desirable not to discourage their innovative pursuits; (2) if plaintiffs can wait-and-see whether profits materialize, defendants will hesitate to pursue worthwhile opportunities, and ultimately all potential defendants will be deterred from pooling efforts; and (3) if the law disadvantages those who do not disclose their plans early on, innovation will be discouraged to the extent that property rights in ideas and explorations cannot be perfectly protected. In short, the question of optimal delay is interesting in cases where delay entails social costs and benefits.

This review of ingredients suggests other areas in which the questions of how to treat strategic delay and to (identify and) encourage optimal delay might be pursued. This Article has already touched on claims of patent infringement¹³³ where not only does the law penalize "prejudicial" delay but also, interestingly enough, the law has been willing to resolve claims early on and to recapture the benefits of delay by keeping some things secret (if only because the first-to-invent can sometimes prevail over the first-to-file).¹³⁴ It is possible, of

¹³³ See *supra* notes 23-24 and accompanying text.

¹³⁴ Under U.S. patent law an applicant is entitled to a patent for his invention unless (1) others used or knew of the invention before invention (as opposed to application) by the

course, that this second feature should or will be found in the business opportunity area. Fiduciaries who plan to pursue opportunities individually might, for example, disclose all that they know and plan to impartial third parties, courts, or experts, whose approval might then be respected in later litigation. Such a prospective determination of the scope of an agreement would avoid the potential problem of insincere demands to participate in the venture by beneficiaries who wish to avoid the appearance of strategic delay while retaining its advantages.¹³⁵

Although I am attracted to such prospective relief or near-relief in the business opportunity area, it is not my aim here to insist that there is an easy solution to a substantial problem. Rather, I mean to emphasize that, since the question of optimal delay is at least in part a general question, it will be instructive in thinking about its resolution in one area of law to observe its presence, and consider its treatment, in other areas. Indeed, I believe that there are two strategies for confronting the questions taken up in this Article. The first is to develop a general model of the costs and benefits of delay and then to apply its lessons to the particular problems of business opportunities, patent infringements, and the like. The second, adopted in this Article for reasons noted at the outset, is to examine a particular problem that is likely to revolve around the question of optimal delay in the hope that from this focused approach something can be learned about the question of delay in general. The success of this second approach hinges in some part on confirmation that an inquiry into another area of law is made much easier by this first inquiry into business opportunity cases.

Inasmuch as this is hardly the place to impose on the reader another exploration of case law, this section will conclude with a note about the similarity of cases concerning noncompetition agreements to those involving business opportunities. Consider one basic set of circumstances in which a firm's employee receives a payment (or, ear-

applicant; (2) the invention was patented or published more than one year prior to the application; or (3) the same invention was made by another who did not conceal, abandon, or suppress it. In determining priority of invention under exception (3), the statute calls for consideration not only of the dates of conception and reduction to practice but also of the diligence of the one who was first to conceive and last to reduce to practice. 35 U.S.C. §§ 102(a), (b), & (g) (1982).

¹³⁵ The fact that evidence of this tactic cannot be found in the reported cases suggests that the problem is largely unrealized. See *supra* note 22.

lier in time, a job) in return for a promise not to compete with the firm. The employee then engages in a venture that may or may not be found to violate the agreement, and the firm files for damages, injunctive relief, or a share in his venture. A similar situation is one in which a business is sold with the promise that the seller will not compete with the buyer, and the buyer then sues the seller for engaging in a project that may or may not be found to be in violation of the promise. The party who has secured a noncompetition agreement will prefer to delay because the costs of litigation need not be incurred if the competition proves harmless. The promisor, needless to say, may prefer not to invest in the new venture if he will be required to pay damages to the promisee. But disclosure is not much of a solution because the promisor may not want to reveal his plans for fear they will be usurped. Nor is the promisor usually willing to allow the promisee to join in the new venture. Again, prospective adjudication may be ideal if there is no need for secrecy. But the point is that one might expect—and, indeed, one finds—that delay by promisees is penalized.¹³⁶ The costs of delay and the inadequacy of disclosure as a solution in this area of the law may be different in type and degree than in

¹³⁶ In the area of covenants associated with the sale of a business, compare *Arizona Chuck Wagon Serv., Inc. v. Barenburg*, 17 Ariz. App. 235, 496 P.2d 878 (1972) (finding breach where covenant not to compete attached to sale of catering business, and covenantor purchased new equipment and leased it to a competitor—with covenantee suing promptly); *Dowd v. Bryce*, 95 Cal. App. 2d 644, 213 P.2d 500 (1950) (covenantor's lease of building to competitor of covenantee found to be breach in declaratory action brought by covenantor); *Weaver v. Jordan*, 362 S.W.2d 66 (Mo. Ct. App. 1962) (covenantor held in breach after lease of building to competitor where covenantee objected promptly in counterclaim, as it happened, against covenantor's action for amount due on covenantee's note) and *Atlas Ready-Mix of Minot, Inc. v. White Properties, Inc.*, 306 N.W.2d 212 (N.D. 1981) (finding breach of covenant not to retail sand or gravel where covenantor allowed third party onto his land to extract gravel for his own use and where covenantee appears to have sued immediately) with *National Sec., Inc. v. Johnson*, 14 Ariz. App. 31, 480 P.2d 368 (1971) (seller of insurance business held not to have breached noncompetition covenant by selling insurance incidental to new activity as creditor—where acquiror's objection raised in a counterclaim more than four years after seller began activity in question); *Thomas v. Thomas Truck & Caster Co.*, 228 N.W.2d 52 (Iowa 1975) (seller of business who promised not to use his name or expertise to draw away old customers nor to impair goodwill and then gave gift of capital to his son to start up competitor held not to have breached where three years had gone by before purchaser took action) and *Buckingham Tool Corp. v. Evans*, 35 Mich. App. 74, 192 N.W.2d 362 (1971) (covenantor who promised not to compete nor to have financial interest in competitor, then built and rented a building to his son and guaranteed leases and loans for son's competitive business, but did not actively participate in the business, was held not to have breached covenant when covenantee sued nearly six years later). For a similar case, where delay may have been penalized not by the denial of recovery but by the extreme reduction of a damage award, see *Schnucks Twenty-*

the business opportunity area, suggesting both that sketching a formal theory of optimal delay would have been an extremely difficult way to begin, and that it is likely that legal decisions will be better understood if one observes the role of delay.

CONCLUSION

Although it may no longer be common or even respectable to think in terms of the equitable doctrine of laches, it is difficult to deny that the product of this exploration into strategic delays and fiduciary law has been to make a modern positive and normative claim that strongly resembles laches.¹³⁷ Indeed, the central thesis of this Article is in an important way nothing more than a claim that the doctrine of laches, although rarely articulated, is alive and well. I have tried to

Five, Inc. v. Bettendorf, 595 S.W.2d 279 (Mo. Ct. App. 1979) (five year delay, clear judicial language about validity of covenant, and one dollar award).

In the area of employment covenants, delay by employers in seeking to enforce noncompetition covenants entered into by ex-employees is more readily penalized. It has been suggested that this readiness, at least compared to the treatments found in sale-of-business cases, is related to the fact that covenants by employees are not only more suspect on grounds of unequal bargaining power but also that employers often have other, less restrictive means with which to prevent freeriding on their training expenses and investments in trade secrets. See K. Kelly, *They Who Hesitate Are Lost: The Role of Strategic Delay in Enforcing Covenants Not to Compete* (1987) (unpublished manuscript on file at University of Virginia Law Library). In *American Mut. Liab. Ins. Co. v. Kosan*, 635 F. Supp. 341 (W.D. Pa. 1986), aff'd without opinion, 817 F.2d 751 (3rd Cir. 1987), *Gorman Publishing Co. v. Stillman*, 516 F. Supp. 98 (N.D. Ill. 1981), and *Tower Oil & Technology Co. v. Buckley*, 99 Ill. App. 3d 637, 425 N.E.2d 1060 (1981), for example, damages seem to have been scaled down considerably where plaintiffs delayed after clear breaches. Two rare cases in which courts specifically noted employers' delays before reducing or denying recovery are *USAchem v. Goldstein*, 512 F.2d 163 (2d Cir. 1975) (three month delay) and *SCM v. Triplett Co.*, 399 S.W.2d 583 (Tex. Civ. App. 1966) (two month delay regarding six month noncompetition promise). And as for grey area cases involving noncompetition agreements by employers, compare *Hunter v. North Am. Biologicals, Inc.*, 287 So. 2d 726 (Fla. Dist. Ct. App. 1974) (employee works for ex-employer's competitor in very different role after promising not to engage in same or similar work—and prompt ex-employer wins) and *Flynn v. Murphy*, 350 Mass. 352, 215 N.E.2d 109 (Mass. 1966) (overruling lower court on existence of breach in ease where employer sued promptly) with *Murphy v. Gutfreund*, 583 F. Supp. 957 (S.D.N.Y. 1984) (several years delay before annuity payments halted to quasi-competing ex-employee) and *Karpinski v. Ingrassi*, 28 N.Y.2d 45, 268 N.E.2d 751, 320 N.Y.S.2d 1 (1971) (plaintiff-employer apparently able to see whether business dwindled after defendant set off on his own, before plaintiff claimed that defendant's solo dental practice breached noncompetition agreement).

In summary, courts appear to penalize delay in enforcing noncompetition agreements in both the sale of business and employment contexts. This pattern is most pronounced where the breach seems arguable rather than clear.

¹³⁷ See *supra* note 5.

show that in the business opportunity area and in other areas as well, it is a mistake to focus exclusively on the behavior of the fiduciary, just as it is to focus on the defendant alone in so many areas of law. Rather, it is sensible and productive to examine the plaintiff's behavior for signs of strategic delay. I have not, however, meant to suggest that there is one correct or predictable legal response to strategic behavior in fiduciary or other law. The problem of designing fair and efficient rules when multiple parties' behavior is at issue is far too complicated for simple solutions. Nonetheless, I suspect that once the role of delay in a number of areas of law has been scrutinized in both normative and positive terms, it will be possible to develop a more general theory of optimal delay.