Form Over Substance: How North Carolina's Discovery Rule Misses the Mark on the Balance of Limitations Law*

The statute of limitations is designed to protect parties from delayed legal claims while maintaining the resolution of all claims on their substantive merits. However, in instances of fraud —where the plaintiff may be unaware of their injury when it occurs—the statute of limitations "clock" could start without the plaintiff's knowledge, ultimately blocking the resolution of her claim. It is crucial that courts account for this gap in the statute of limitations doctrine, upholding its spirit without prejudicing victims of fraud. In Taylor v. Bank of America*, the Supreme Court of North Carolina failed to strike this balance. The Court flippantly applied an objective test, disallowing several victims of mortgage fraud from resolving their claim. This Recent Development argues that the Court's holding fell short in two ways. First, the Court's reasonable person standard relied on an underbaked assumption: that all parties in the plaintiff's shoes would have discovered the especially deceptive mortgage fraud committed against the plaintiffs. Second, the Court failed to consider North Carolina case law which prescribes considerations of equity and fairness in statute of limitations analysis. The Court should consider changing its objective discovery rule into a three-part inquiry: (1) reasonable-person analysis; (2) assessment of unequal bargaining power and expertise; and (3) considerations of fairness. This change will give North Carolina courts the legal framework to apply the statute of limitations to fraud claims without sacrificing the victim's vindication in court.*

INTRODUCTION

The statute of limitations "clock" aims to balance two competing interests: extinguishing untimely legal claims and encouraging the resolution of all claims on their substantive merits.[1] Generally, the clock begins to run when the plaintiff's injury occurs.[2] This system tends to produce fair results, as the injury puts the plaintiff on notice of her need to bring a claim. But, in certain circumstances, a plaintiff may not have knowledge of her injury at all. In fraud cases, for instance, where plaintiffs often lack knowledge of the fraud as it occurs, the plaintiff's opportunity to resolve her claim in time may run out

1. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 454–55 (1997).

2. John P. Dawson, *Undiscovered Fraud and Statutes of Limitation*, 31 MICH. L. REV. 591, 591 (1933).

without her knowledge.[3] To remedy this gap in statute of limitations doctrine, most states apply the "discovery rule," where the statute of limitations is "tolled" until the plaintiff knew or should have known of the facts constituting fraud—a determination based on an objective standard.[4] However, if the nature of fraud is to convince a victim of its nonexistence, the "plaintiff should have known" inquiry has the potential to shortchange victims of elaborate fraud who do not fit a court's definition of a "reasonable person."

The application of this inquiry is the central issue in *Taylor v. Bank of America*,[5] where the Supreme Court of North Carolina barred plaintiffs' fraud claims on the grounds that a reasonable person would have discovered the fraud at the time of the injury.[6] The court reiterated the rule that the "inflexibl[e]" tolling mechanism is triggered when plaintiffs should have been put on notice of the defrauding defendant's unusual activity.[7] This Recent Development considers the accuracy of the court's holding under its own North Carolina precedent and argues that the inflexible test for limitations on fraud claims asks too much of defrauded plaintiffs.

This article's analysis takes place in three parts. Part I provides background information on the statute of limitations for fraud claims in North Carolina. Part II analyzes the court's holding in *Taylor* and evaluates whether it aligns with existing North Carolina precedent. Part III describes how North Carolina can adjust its discovery rule for fraud claims, ultimately arguing that North Carolina should amend its objective structure to include considerations of equity and fairness.

I. HISTORY OF THE STATUTE OF LIMITATIONS FOR FRAUD CLAIMS IN NORTH CAROLINA

In North Carolina, fraud claims are subject to a three-year statute of limitations.[8] Because fraud tends to leave parties unaware of their injury at the time of its accrual, the three-year period does not begin "until the discovery by the aggrieved party of the facts constituting the fraud."[9] But, if a plaintiff claims that they were unaware of the fraud entirely, the court will begin the three-year

3. *See id.* at 591–92.
4. Ochoa & Wistrich, *supra* note 1, at 487–88.
5. 385 N.C. 783, 898 S.E.2d 740 (2024).
6. *Id.* at 784, 898 S.E.2d at 742–43.
7. *See id.* at 791, 898 S.E.2d at 747.
8. N.C. GEN. STAT. § 1-52(9) (2025).
9. *Id.*

period "from the time when [the facts constituting fraud] should have been discovered in the exercise of proper diligence or reasonable business prudence."[10]

This principle is illustrated in *Latham v. Latham*[11]—a case cited throughout *Taylor*. In *Latham*, the plaintiffs, beneficiaries of their grandfather's will, brought a fraud claim against the defendant, the executor of said will.[12] The plaintiffs alleged that, in 1870, the defendant sold land entrusted to the plaintiffs to himself at a price far below fair market value.[13] In doing so, the defendant obtained a fee simple and deprived plaintiffs of the fair value of the land they were owed.[14] In 1922—more than 50 years after the injury—the Supreme Court of North Carolina held that the plaintiffs' claim was barred by the statute of limitations. The plaintiffs and their ancestors should have discovered the facts constituting the fraud at the time of the injury in the exercise of "proper diligence" and "reasonable business prudence."[15] The plaintiffs' ancestors were privy to the details of the defendant's fraudulent sale of the land in 1870—a fact that left the court unwilling to toll the statute of limitations for fifty years. Speaking to the grandchildren's circumstantial ability to sniff out the fraud, the court noted that "a man should not be allowed to close his eyes to facts observable by ordinary attention and maintain for his own advantage the position of ignorance."[16] The *Latham* court set a defendant-friendly precedent, rejecting the idea that the statute of limitations runs from the legal discovery of fraud, and affirming the standard that the statutory period begins when the defrauded party *should* have known of the fraud in the exercise of "reasonable business prudence."[17]

Despite the unforgiving nature of the precedent mentioned above, the Supreme Court of North Carolina has used considerations of equity to estop defendants from using the statute of limitations to nullify a plaintiff's claim.[18] In *Duke University v. Stainback*,[19] the defendant misled Duke Hospital by making false statements that his medical bills would be paid off once he recovered from

10. Latham v. Latham, 184 N.C. 55, 64, 113 S.E. 623, 627 (1922).

11. 184 N.C. 55, 113 S.E. 623 (1922).

12. *Id.* at 56, 113 S.E. at 624.

13. *See id.* at 57–58, 113 S.E. at 624.

14. *See id.* at 58–59, 113 S.E. at 624–25.

15. *Id.* at 64, 113 S.E. at 627 (citing *In re* Johnson's Will, 182 N.C. 522, 525, 109 S.E. 373, 375 (1921)).

16. *See id.*

17. *See id.*

18. *See* Duke Univ. v. Stainback, 320 N.C. 337, 341, 357 S.E.2d 690, 693 (1987).

19. 320 N.C. 337, 357 S.E.2d 690 (1987).

a lawsuit against his insurer.[20] This misrepresentation led to the expiration of Duke Hospital's claim.[21] When Duke Hospital sued, the court held that the defendant could not raise the statute of limitations as a defense because considerations of equity will deny this right when suit has been delayed by "acts, representation, or conduct, the repudiation of which would amount to a breach of good faith."[22] Because Duke Hospital was "lulled . . . into a false sense of security" by the defendant, the court bypassed the statute of limitations as a matter of equity.[23]

Again, while the court has created a seemingly inflexible construction of the statute of limitations for fraud claims, it has also held that statutes of limitations should be "construed broadly to comport with . . . fairness."[24] In *Black v. Littlejohn*,[25] the court considered the statute of limitations for a medical malpractice claim. The limitations law for medical malpractice mirrors that for fraud claims: the clock does not start ticking until the plaintiff knew or should have known of a latent injury.[26] In *Black*, the plaintiff received a hysterectomy to cure her endometriosis; her doctor promised that there were no plausible alternatives.[27] Two years later, the plaintiff learned of a medication that would have cured her disease without a hysterectomy and sued for medical malpractice.[28] The court found that the plaintiff's injury accrued not when the initial surgery took place, but when she discovered the alternative medication two years later.[29] Rather than using North Carolina's objective test to bar the plaintiff's claim, the court considered the natural power imbalance and professional trust inherent in doctor-patient relationships. The existence of these asymmetries between the layperson plaintiff and expert defendant led the court to toll the statute of limitations until the plaintiff actually learned of the doctor's malpractice—as opposed to when the malpractice itself occurred.[30]

In sum, North Carolina's default rule for fraud claims starts the statute of limitations clock when the defrauded party *should* have known of the facts constituting the fraud in the exercise of "proper diligence" and "reasonable

20. *See id.* at 339–40, 357 S.E.2d at 691–92.
21. *Id.* at 340, 357 S.E.2d at 692.
22. *Id.* at 341, 357 S.E.2d at 693.
23. *Id.*
24. Black v. Littlejohn, 312 N.C. 626, 645, 325 S.E.2d 469, 482 (1985).
25. 312 N.C. 626, 325 S.E.2d 469 (1985).
26. *Id.* at 637–38, 325 S.E.2d at 477.
27. *Id.* at 626–27, 325 S.E.2d at 471.
28. *Id.* at 627, 325 S.E.2d at 471.
29. *Id.* at 646, 325 S.E.2d at 482.
30. *Id.* at 646–47, 325 S.E.2d at 482–83.

business prudence."[31] However, as laid out in *Duke University* and *Littlejohn*, there is an established body of law that allows courts to side-step the statute of limitations when equity and fairness are concerned.[32] Despite this equity-forward body of law, North Carolina's "discovery rule" gives courts a silver bullet to deny a plaintiff's fraud claim—even when fairness would suggest otherwise. This silver bullet is used to great effect in *Taylor v. Bank of America*.

II. ANALYSIS AND CRITICISM OF THE *TAYLOR* DECISION

The court in *Taylor* failed on two fronts. First, it did not robustly apply the reasonableness standard demanded by North Carolina's discovery rule. Second, it did not adequately consider precedent like *Duke Hospital* and *Littlejohn*, which hold that the statute of limitations for fraud claims should be construed to comport with fairness.

A. *Facts and Analysis*

In *Taylor*, the plaintiffs' claims stemmed from a scheme of fraud committed by Bank of America in its application of the Home Affordable Modification Program (HAMP).[33] In the wake of the 2008 recession, the federal government implemented HAMP to help struggling homeowners restructure the terms of their mortgages to avoid foreclosure.[34] In theory, homeowners with documented financial hardship could submit an application for mortgage modifications to their loan servicer, and the federal program would subsidize any loss incurred by the servicer.[35] Bank of America used this modification process to coax homeowners into defaulting on their mortgages.[36] For example, when Plaintiff Chester Taylor contacted Bank of America about a HAMP modification, his loan representative advised him "to refrain from making his regular mortgage payments" for two to three months in order to qualify for HAMP.[37] When Taylor submitted his HAMP application, he was approved by Bank of America and asked to make three trial payments to receive

31. Latham v. Latham, 184 N.C. 55, 64, 113 S.E. 623, 627 (1922).

32. *Littlejohn*, 312 N.C. at 645, 325 S.E.2d at 482.

33. Taylor v. Bank of Am., 385 N.C. 783, 784, 898 S.E.2d 740, 743 (2024).

34. *See id.*

35. *Home Affordable Modification Program (HAMP)*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/data/troubled-assets-relief-program/housing/mha/hamp [https://perma.cc/5JG4-AUWE].

36. *See Taylor*, 385 N.C. at 784–85, 898 S.E.2d at 743.

37. *Id.* at 785, 898 S.E.2d at 743.

the permanent modification on his loan.[38] Over the next two years, Bank of America continued to collect Taylor's trial payments but repeatedly delayed the modification by telling Taylor that there "were problems with his application and requesting that he resubmit certain paperwork."[39] Specifically, Bank of America consistently told Taylor that his documents were "incorrect," "not current," and "missing."[40] This activity continued from 2010 until 2012, when Taylor defaulted on his loan, resulting in the foreclosure of his home by Bank of America—a windfall for the bank.[41] Taylor brought a fraud claim against Bank of America in 2019.[42] Each plaintiff in the class action experienced a similar pattern of factual circumstances between 2010 and 2014.[43] In fact, there were at least twenty-nine separate lawsuits from consumers who were similarly affected by Bank of America's bad-faith application of the HAMP program.[44]

Chief Justice Newby, writing the majority opinion for the Supreme Court of North Carolina, determined that the three-year statute of limitations could not be tolled to allow the plaintiffs' claims against Bank of America.[45] The court relied squarely on the precedent set in *Latham*: the statute of limitations clock begins when a plaintiff should have discovered the "facts constituting . . . fraud" in the exercise of proper diligence and reasonable prudence.[46] The court applied this rule stringently, finding that by the time the plaintiffs' homes were foreclosed on, a reasonable person would have been put "on notice that something was wrong."[47] To the court, these "frustrations" with the HAMP process should have prompted the plaintiffs to "investigate further."[48] Thus, according to the majority's application of North Carolina precedent, the statute of limitations began "ticking" on the day that their homes were foreclosed on and had run out by the time the plaintiffs brought their fraud claims.[49]

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 786, 898 S.E.2d at 744.
43. *Id.* at 785, 898 S.E.2d at 743.
44. Paul Kiel, *Bank of America Lied to Homeowners and Rewarded Foreclosures, Former Employees Say*, PROPUBLICA (June 14, 2013, at 5:44 PM), https://www.propublica.org/article/bank-of-america-lied-to-homeowners-and-rewarded-foreclosures [https://perma.cc/7S68-2WXA].
45. *Taylor*, 385 N.C. at 791, 898 S.E.2d at 747.
46. *Id.* at 788, 898 S.E.2d at 745.
47. *Id.* at 790, 898 S.E.2d at 746.
48. *Id.*
49. *Id.* at 790–91, 898 S.E.2d at 746–47.

Justice Riggs, dissenting, disagreed with the majority's choice and application of North Carolina precedent.[50] Justice Riggs chastised the court for failing to consider fairness and equity in its analysis.[51] Further, Riggs disagreed with the court's dismissive application of the reasonable-person standard.[52] She contended that the majority over-estimated a reasonable person's ability to detect fraud in the face of a complex bureaucratic financial system like Bank of America.[53]

B. *Flaws in the Majority's Reasoning*

The majority's decision rests on a flawed assumption. Namely, that a reasonable person in the plaintiffs' shoes would automatically equate the failure of the HAMP process with an intentional scheme of fraud devised by Bank of America—the second-largest commercial bank in the United States.[54] Large commercial banks, relative to other institutions, garner high levels of consumer trust despite low levels of consumer understanding.[55] In 2021, a Gallup poll found that Americans trust banks more than large technology companies, newspapers, big business, and the federal government trifecta of Congress, the Supreme Court, and the President.[56] A 2017 Cato survey further found that Americans are far more favorable toward their own banks than toward financial institutions in general.[57] Notwithstanding this level of confidence, Americans know little about how the banking industry works.[58] In 2011, the Harvard Business Review demonstrated that many consumers lack a basic understanding

50. *See id.* at 791–92, 898 S.E.2d at 747 (Riggs, J., dissenting).

51. *Id.* at 794, 898 S.E.2d at 749.

52. *Id.* at 795, 898 S.E.2d at 749.

53. *Id.*

54. FED. RSRV., INSURED U.S.-CHARTERED COMMERCIAL BANKS THAT HAVE CONSOLIDATED ASSETS OF $300 MILLION OR MORE, RANKED BY CONSOLIDATED ASSETS 1 (2025), https://www.federalreserve.gov/releases/lbr/current/lrg_bnk_lst.pdf [https://perma.cc/2S2J-UX62].

55. *See infra* notes 56–62 and accompanying text.

56. Jeffrey M. Jones, *Confidence in U.S. Institutions Down; Average at New Low*, GALLUP (July 5, 2022), https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx [https://perma.cc/68MG-MD6B].

57. EMILY EKINS, CATO INST., WALL STREET VS. THE REGULATORS: ATTITUDES ON BANKS, FINANCIAL REGULATION, CONSUMER FINANCE, AND THE FEDERAL RESERVE 3 (2017), https://www.cato.org/sites/cato.org/files/images/fin-reg-survey-report/financial_regulation_survey_report_updated.pdf [https://perma.cc/WP44-QSZD (staff-uploaded archive)].

58. *See* John Y. Campbell, Howell E. Jackson, Brigitte C. Madrian & Peter Tufano, *Making Financial Markets Work for Consumers*, HARV. BUS. REV., July–Aug. 2011, at 47, https://hbr.org/2011/07/making-financial-markets-work-for-consumers [https://perma.cc/46ES-AXRN (staff-uploaded, dark archive)].

of financial markets and products.[59] Further, large banks communicate with consumers through highly standardized processes rather than customized individual help.[60] When consumers have questions, they are likely to have to "navigate a phone tree" or search through highly irrelevant material on a website to find the requisite information.[61] These widespread concerns led the Consumer Financial Protection Bureau to issue an advisory opinion recommending that large banks comply with consumer requests in a timely manner, recognizing the difficulty consumers face in obtaining critical information about their accounts.[62]

Given this evidence of a high-trust, low-understanding relationship between consumers and large banks, the court was too decisive in its conclusion that the HAMP failure and subsequent foreclosure of the plaintiffs' homes would have alerted a reasonable person to fraud. It might be more plausible that the plaintiffs thought the HAMP process simply failed, understanding themselves to be victims of an inefficient and complex super-bank—not victims of serial fraud. If consumers trust their own banks more than the three branches of government,[63] it is at least reasonable, and at most probable, that the plaintiffs chalked the foreclosure of their homes up to a more innocuous cause than widespread mortgage fraud. Regardless of what the plaintiffs really believed about the HAMP process, the court overstated and under-analyzed its key piece of reasoning: it is not at all clear that a reasonable person would have suspected fraud in the plaintiffs' position.

Further, the circumstances surrounding this court's "reasonable person" analysis are different from those in *Latham*, the court's preferred precedent.[64] In *Latham*, there was evidence that the plaintiffs' grandparents, the original defrauded parties, were aware of and privy to the defendant's fraudulent sale of their own land below fair market value.[65] To some degree, the grandparents "closed their eyes" to the fraud—a fact that prevented the plaintiffs from recovering when they learned of the fraud over 50 years later.[66] In this case,

59. *Id.*

60. Consumer Information Requests to Large Banks and Credit Unions, 88 Fed. Reg. 71279, 71279 (proposed Oct. 16, 2023) (to be codified at 12 C.F.R. ch. X).

61. *Id.*

62. *See generally id.*

63. *See supra* note 57 and accompanying text.

64. Taylor v. Bank of Am., 385 N.C. 783, 787–90, 898 S.E.2d 740, 744–46 (2024).

65. Latham v. Latham, 184 N.C. 55, 64–65, 113 S.E. 623, 627–28 (1922).

66. *Id.*

there is no suggestion that the plaintiffs *knew* of the fraud at all.[67] Thus, the majority erred in relying on *Latham* to give lip service to a reasonableness standard without robustly analyzing what a reasonable person actually would have done in the plaintiffs' position.[68] This cursory analysis left out an alternative explanation: the plaintiffs attributed the HAMP failure to Bank of America's clerical error or their own mistakes, not to a widespread system of fraud committed by the country's second largest bank.

C. *Failure to Consider Fairness*

Throughout its analysis, the court fixed its eyes on what the plaintiffs knew or should have known about the fraud being committed against them.[69] In doing so, the majority failed to zoom out and consider the fairness analysis conducted in *Duke University* and *Littlejohn*, particularly with respect to the imbalanced power dynamic between Bank of America and the plaintiffs.

Like the plaintiff in *Duke University*, the plaintiffs in *Taylor* were "lulled" into a "false sense of security" by the repeated misrepresentations of Bank of America after the initial fraud occurred.[70] The facts are similar: both Bank of America and the defendant in *Duke University* knowingly made false promises regarding a financial benefit given to the plaintiff.[71] The difference lies in the outcomes. The court in *Duke University* gave the plaintiffs the benefit of the doubt, reasoning that it would be inequitable to bar Duke Hospital's claim when the defendant delayed payment to game the statute of limitations. On the other hand, the court in *Taylor* focused solely on the discovery rule inquiry, failing to consider whether Bank of America committed a similar manipulation of the statute of limitations by assuring that the plaintiffs would not discover the fraud.[72] Ironically, in *Duke Hospital*, a large hospital system was relieved of a statute of limitations bar for fraud committed by an individual consumer, while the circumstances in *Taylor* were reversed; an individual consumer *was not* given relief from a statute of limitations bar for fraud committed by one of the largest financial institutions in the world. If given the choice between which plaintiff to hold responsible for failing to realize fraud at the time of its occurrence, equity and common sense would point to the resourced, experienced, and

67. *See Taylor*, 385 N.C. at 790, 898 S.E.2d at 746.
68. *See id.*
69. *See id.*
70. Duke Univ. v. Stainback, 320 N.C. 337, 341, 357 S.E.2d 690, 693 (1987).
71. *See id.*; *Taylor*, 385 N.C. at 785, 898 S.E.2d at 743.
72. *Taylor*, 385 N.C. at 788–90, 898 S.E.2d at 745–46.

lawyered Duke Hospital—not to the common man plaintiffs in *Taylor*. The *Taylor* majority should have incorporated the fairness proposition set out by *Duke Hospital*, using these equity considerations to stretch its analysis beyond the fundamental discovery rule inquiry.

Tolling the statute of limitations when there is an imbalance of bargaining power and expertise is laid out even more explicitly in *Littlejohn*.[73] In that case, the plaintiff fell victim to malpractice on the day of her hysterectomy, but did not realize the injury until years later when an alternate treatment was discovered.[74] Surely the plaintiff experienced "frustrations"[75] at the fact that the doctor had provided her a single extreme option to treat her endometriosis.[76] Further, the plaintiff could have done her own independent research or sought a second opinion to push back on the doctor's narrow suggestion. Rather than concluding that the plaintiff should have known of the doctor's malpractice when it occurred—which would have started the statute of limitations clock at the first diagnosis—the court in *Littlejohn* based their holding on the vast imbalance of expertise in the doctor-patient relationship.[77] Like the relationship between doctor and patient, the fiduciary relationship between a mortgage lender and consumer is similarly dominated by the bargaining power and expertise of the banker. When Bank of America strung the plaintiffs along through the HAMP process, the plaintiffs likely relied on the expertise and legitimacy of the bank, just like the plaintiff in *Littlejohn*.[78] Moreover, the court in *Littlejohn* decided that the plaintiff should not be required to realize the injury on the day it occurred, even though the defendant doctor was merely negligent. When a defendant *intentionally* deceives a plaintiff through bad faith fraud practices, courts should place even less of a burden of discovery on the plaintiffs. Rather than following its precedent of fairness in *Littlejohn*, the court in *Taylor* gave no weight to the asymmetry of power and expertise, punishing the plaintiffs for trusting their blue-chip bank.[79]

D. *Inherent Inaccuracy of the Objective Test*

While the majority's reasonable-person analysis failed to adequately consider fairness, it did not grossly misapply North Carolina precedent. The

73. *See* Black v. Littlejohn, 312 N.C. 626, 646, 325 S.E.2d 469, 482 (1985).
74. *Id.*
75. *Taylor*, 385 N.C. at 790, 898 S.E.2d at 746.
76. *See Littlejohn*, 312 N.C at 626–27, 325 S.E.2d at 471.
77. *See id.* at 646, 325 S.E.2d at 482.
78. *Taylor*, 385 N.C. at 790, 898 S.E.2d at 746.
79. *See id.* at 785–86, 898 S.E.2d at 743.

primary test for tolling the statute of limitations for fraud claims is, after all, an objective one.[80] The court's underbaked reasonable-person analysis is exactly what the simple objective standard invites courts to partake in.[81] An objective test "must pass through th[e] subjective filter of the judicial mind," allowing a court to impose its own normative conception of what a party should or should not have done.[82] In this case, the justices of the Supreme Court of North Carolina likely had a stronger understanding of the banking industry than the average consumer. This preconceived knowledge could have created roadblocks inhibiting the court's ability to decide whether a reasonable consumer would have detected the fraud.

In the context of the statute of limitations for fraud claims, the risk of a cursory application of the reasonable-person test can be costly. As seen in *Taylor*, a statute of limitations bar can prevent recovery for life-altering acts of fraud.[83] Thus, in order to achieve the equity that the holding in *Taylor* lacks, North Carolina should amend its "discovery rule" for fraud claims, coupling the objective test with guardrails to ensure equitable consideration by the court. The following section will specifically address how North Carolina should make these changes.

III. RECOMMENDATION: AMEND THE BALANCING TEST

As discussed above, North Carolina's discovery rule for fraud claims needs an adjustment, not an overhaul. Most states have an objective discovery rule that, like North Carolina's, tolls the statute of limitations until the plaintiff discovered or should have discovered the injury.[84] The flaw in this test lies in its potential for overzealous application, as displayed in *Taylor*. A court may use the test to categorically prevent stale fraud claims.[85] And, because a reasonable-

80. *Id.* at 792, 898 S.E.2d at 747–48 (Riggs, J., dissenting).

81. *See* Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 294–95 (1996).

82. *Id.* at 295.

83. *See Taylor*, 385 N.C. at 790, 898 S.E.2d at 746.

84. Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 ARIZ. L.J. 1015, 1038 (1997). However, some states acknowledge additional exceptions to the statute of limitations for fraud claims. Georgia recognizes an exception in the case of a "continuing tort." *See* Everhart v. Rich's Inc., 194 S.E.2d 425, 428 (Ga. 1972). Where a tortious act is of a continuing nature and produces injury in varying degrees over a period of time, the limitations period runs only at the time the plaintiff should have known of the continuous tort. *Id.* This exception benefits plaintiffs by not starting the clock until the tort is continuous and obvious.

85. Ochoa & Wistrich, *supra* note 1, at 454.

person test passes through the "subjective filter of the judicial mind,"[86] courts might fail to accurately determine when a reasonable person would in fact discover the fraud.[87] Thus, North Carolina can better serve the purpose of the statute of limitations by adding judicial guardrails to its objective discovery rule for fraud claims. North Carolina should modify its discovery rule by introducing a three-part inquiry: (1) consider when a reasonable person would have discovered the injury; (2) address the difference in bargaining power and expertise between the two parties; and (3) account for general notions of fairness in deciding whether to bar or admit the plaintiff's claim.

A. *Factor 1: Objective Discovery of Injury*

The first piece of analysis, the reasonable-person standard, will allow the court to objectively consider when a plaintiff should have discovered the injury. The discovery rule used by the majority in *Taylor* is not all bad—objective analysis must be at least *a part* of the court's reasoning. If the statute of limitations analysis is dominated by subjectivity, victims of fraud might become incentivized to be dishonest about their knowledge of the injury in order to extend the statutory period. Further, the ability to deceptively skirt the statute of limitations would fail to promote justice, creating "surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[88] The court needs a mechanism to deter a plaintiff from sitting on her rights in this way.[89] The reasonable-person standard serves this purpose. In *Taylor*, the factual scenario presents a close call.[90] A reasonable person in the plaintiff's shoes could have taken Bank of America's failure to administer HAMP as a sign of corporate fraud—it was certainly unusual behavior. But, as discussed at length above, a perfectly reasonable plaintiff could just as easily have been overwhelmed by the complex bureaucracy of the mega-bank, chalking the HAMP failure and subsequent foreclosure up to a deficient administrative process. If it is unquestionably clear when a reasonable person should have discovered the fraud, this factor should overwhelm the three-part inquiry and the statute of limitations clock will start at that time. But, when fact patterns like *Taylor* do not clearly establish when a reasonable person would have discovered the fraud,

86. *See* DiMatteo, *supra* note 81, at 295.
87. Ochoa & Wistrich, *supra* note 1, at 454.
88. Richardson, *supra* note 84, at 1021.
89. *See id.*
90. *See* Taylor v. Bank of Am., 385 N.C. 783, 784–86, 898 S.E.2d 740, 743–44 (2024).

courts should also consider the second and third factors to determine how long to toll the statute of limitations.

B. *Factor 2: Power Dynamics*

The second factor the court should consider is the difference in bargaining power and expertise between the victim and the defrauding defendant. Unlike most legal mechanisms, the statute of limitations period for fraud claims does not start when the injury occurs.[91] This is due to the fact that fraud is often designed to deceive the plaintiff of the injury's existence.[92] Thus, in deciding when plaintiffs should reasonably discover the injury, we must account for the *degree* of deception of the fraudulent act. In other words: how likely is it that the plaintiff actually was deceived of the injury's existence until they brought the fraud claim? In cases like *Taylor*, where the positions of power and technical expertise between the parties are lopsided,[93] it is likely that the plaintiff is helpless to notice the defendant's deception. The plaintiffs in *Taylor* did not have knowledge about how the complicated HAMP process should be administered.[94] They were forced to rely on the advice of their mortgage broker.[95] Nor did they have any bargaining power with Bank of America—the plaintiffs simply submitted their modification applications and hoped that Bank of America would uphold its end of the bargain.[96] Further, Bank of America is a federally insured and widely trusted national bank, providing credibility to assuage any real concerns held by the plaintiffs.[97] These asymmetries suggest that the plaintiffs were handicapped in their ability to notice and investigate the fraud, even after their homes were foreclosed upon.

On the other hand, in cases where fraud occurs between two parties with equal bargaining power and expertise, this factor should weigh in favor of barring the claim and holding the plaintiffs responsible for discovery of the injury. If Bank of America had defrauded JPMorgan Chase Bank, rather than the plaintiffs in *Taylor*, equity and common sense suggest that Chase Bank has the resources and expertise to notice the fraud when it occurred. Further, Chase Bank would be in a better position to know the scope of the fraud for similarly situated victims, unlike the plaintiffs in *Taylor*. Under this hypothetical, it is

91. Ochoa & Wistrich, *supra* note 1, at 487.
92. *See supra* note 3 and accompanying text.
93. *Taylor*, 385 N.C. at 793–95, 898 S.E.2d at 748–49 (Riggs, J., dissenting).
94. *See id.* at 785, 898 S.E.2d at 743 (majority opinion).
95. *Id.*
96. *See id.*
97. FED. RSRV., *supra* note 54, at 1.

more likely that Chase Bank was sitting on their rights by bringing a delayed fraud claim.[98] This expertise and bargaining power analysis is critical to a court's ability to accurately balance the competing interests in deciding how long to toll the statute of limitations.

C. *Factor 3: General Fairness*

The third piece of analysis that the court should consider is a general fairness inquiry. The plaintiff-unfriendly nature of the discovery rule for fraud claims pulls attention away from the statute of limitation's ultimate purpose: a "delicate balance" between the plaintiff's interest in pursuing meritorious claims and the defendant's interest in avoiding the burden of stale claims.[99] When it is not overwhelmingly clear when a reasonable person would have discovered the fraud, the court should zoom out from its objective inquiry and consider whether fairness suggests that the plaintiff's interest in bringing the claim outweighs the defendant's interest in avoiding a stale claim, and vice versa.[100]

Notably, this fairness inquiry should not swallow the balancing test entirely; it should be given weight when the objective inquiry and bargaining power or expertise analysis present close calls. The fairness question is fact-intensive and will differ on a case-by-case basis. There are several sub-factors that a court can use to gauge which outcome fairness demands.

1. Time

First, the court should consider how much time has elapsed since the expiration of the defrauded victim's claim. When the victim of fraud brings her claim just slightly after the statute of limitations expires, it is less likely that the plaintiff has sat on her rights in a way that serves to diminish effective fact-finding. In such a case, the plaintiff might have truly discovered the fraud later than the court's idea of when a reasonable person would have done so. On the other hand, when a defrauded plaintiff brings a claim many years after its expiration, courts should be less willing to tip fairness in the plaintiff's favor—it is improbable that a plaintiff would go decades without discovering fraud. In *Taylor*, because the plaintiffs' claims were made just one year after the court deemed the statute of limitations closed, the court should let the fairness factor of the balancing test swing towards the plaintiffs.[101] The inverse is also true; if

98. *See* Richardson, *supra* note 84, at 1021.
99. *Id.* at 1016.
100. *Id.* at 1016–17.
101. *Taylor*, 385 N.C. at 790, 898 S.E.2d at 746.

the plaintiffs in *Taylor* had waited thirty years to bring their claims, the court would have less reason to permit the stale claims on fairness grounds. The purpose of the time subfactor is not to subvert the spirit of the statute of limitations, but to provide the court with a means to rectify instances where a defrauded plaintiff loses a claim because she was not in a position to discover the fraud at the time it occurred.

2. Gravity of Loss

When a court considers whether the fraud victim's claim should be extended on fairness grounds, it should also consider the gravity of the defrauded plaintiff's loss. As the gravity of the victim's loss rises, so does her entitlement and dependence on redress.[102] When the plaintiff's loss is great, it is unfair to let a court's conception of when a reasonable person would have discovered fraud be the sole factor barring the plaintiff's weighty claim.[103] The *Taylor* facts serve as an example of the heightened gravity of loss that court's should consider when assessing the statute of limitations for fraud claims. The plaintiffs were defrauded out of ownership of their homes—their most valuable asset.[104] This fraud wasn't a one-off mistake or corporate negligence—it was a widespread instance of fraud in which Bank of America induced the foreclosure of plaintiffs' homes through the misapplication of HAMP.[105] The dramatic financial cost of this loss, when coupled with the possibility that the plaintiffs did not know of the fraud until long after the foreclosure of their homes, should tip the fairness prong towards the plaintiffs. This consideration of gravity of loss allows a sense of controlled pragmatism to enter the equation in a productive and efficient manner when determining redress.

CONCLUSION

In *Taylor*, the Supreme Court of North Carolina fell short in two ways. First, the court based its analysis of the reasonable-person standard on an underdeveloped assumption: that any reasonable person in the plaintiff's shoes would have been put on notice of fraud by the failure of the HAMP process and the foreclosure of their homes. On the contrary, the average citizen's high trust and low understanding of large commercial banks suggests that the majority's formulation of the reasonable person in this circumstance is not, in

102. *Id.*
103. Ochoa & Wistrich, *supra* note 1, at 506.
104. *Taylor*, 385 N.C. at 784–85, 898 S.E.2d at 743.
105. *See* Kiel, *supra* note 44.

fact, reasonable. Second, the court failed to consider certain North Carolina case law which prescribes considerations of equity and fairness in statute of limitations decisions. However, despite the court's shortcomings, it did not abuse precedent. The antidote to the inequitable outcome in *Taylor* should ultimately lie in the amendment of North Carolina's discovery rule for fraud claims—not in chastising the majority. The court should consider changing its objective discovery rule into a three-part inquiry: (1) reasonable-person analysis; (2) assessment of unequal bargaining power and expertise; and (3) considerations of fairness. These adjustments will promote substance over form, giving the court the ability to protect against stale claims without sacrificing a victim's vindication in court.

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