

H**Motions, Pleadings and Filings**

United States District Court, D. New Mexico.
 FEDERAL DEPOSIT INSURANCE
 CORPORATION, as Successor to the Resolution
 Trust
 Corporation, as Receiver for First American Savings
 Bank, Plaintiff,
 v.
 Bernard SCHUCHMANN, Defendant.
No. CIV. 93-1024 MV/RLP.

Sept. 16, 2002.

Predecessor in interest to Federal Deposit Insurance Corporation (FDIC), as receiver for failed financial institution and its successor, sued institution's director, seeking recovery for alleged breaches of fiduciary duty, negligence, and gross negligence. The District Court entered judgment on jury verdict in director's favor. FDIC appealed. The Court of Appeals, [235 F.3d 1217](#), affirmed in part and reversed and remanded in part. On remand, director moved for summary judgment. The District Court, [Vazquez, J.](#), held that: (1) cause of action against director accrued, for limitations purposes, when underlying loan was approved; (2) appointment of receiver did not revive expired cause of action against director; (3) the law of the case doctrine barred relitigation of issue of whether adverse domination doctrine applied to toll statute of limitations as to cause of action based on loan; (4) assertions of continuing wrongful conduct did not bring remanded claims within limitations period; and (5) fraudulent concealment doctrine did not apply to toll limitations period on remanded claims.

Motion granted.

West Headnotes

[1] Limitation of Actions  **11(1)****241k11(1) Most Cited Cases**

If state statute of limitations has expired before the government acquires a claim, claim is not revived by transfer to a federal agency.

[2] Limitation of Actions  **58(1)****241k58(1) Most Cited Cases**

Court must conduct a two-step analysis in determining whether Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) bars an action by government agency acting as receiver for failed financial institution, first considering whether claims brought by agency were viable under state limitations statute at the time agency became receiver, and, if so, whether FIRREA's statute of limitations has run. Federal Deposit Insurance Act, § 2 [11](d)(14)(A)(ii), (B)(i, ii), [12 U.S.C.A. § 1821\(d\)\(14\)\(A\)\(ii\), \(B\)\(i, ii\)](#).

[3] Limitation of Actions  **58(5)****241k58(5) Most Cited Cases**

Failed financial institution suffered loss or injury when its director approved loan that allegedly exceeded limitation of federal loans to one borrower, obligated financial institution to fund \$2,500,000 loan although entire net worth was approximately \$1,200,000, and violated state law by being secured with fourth lien, inasmuch as director's approval of such an extraordinarily imprudent and improper loan would be immediately injurious to institution; thus, under New Mexico law, negligence claims and claim for breach of fiduciary duty against director accrued, for statute of limitations purposes, when loan was approved. [NMSA 1978, § 37-1-4](#).

[4] Limitation of Actions  **58(1)****241k58(1) Most Cited Cases**

Appointment of Resolution Trust Corporation (RTC) as receiver for failed financial institution did not revive negligence cause of action against institution's director that had already expired under state law.

[5] Federal Courts  **950****170Bk950 Most Cited Cases**

On remand following appeal, the law of the case doctrine barred relitigation of issue of whether adverse domination doctrine applied to toll statute of limitations on claims asserted by receiver for failed financial institution against institution's director based on allegedly improper loan, inasmuch as issue had already been tried to jury, which explicitly found no adverse domination as to loan, and that finding was affirmed on appeal, notwithstanding Court of Appeals' "wholesale reversal" on loan transaction, which referred to jury's findings regarding issues of liability and damages.

[6] Limitation of Actions 58(4)
[241k58\(4\) Most Cited Cases](#)

"Adverse domination" is an equitable theory for tolling the statute of limitations applicable to claims of negligence.

[7] Courts 99(1)
[106k99\(1\) Most Cited Cases](#)

The "law of the case doctrine" posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.

[8] Federal Courts 917
[170Bk917 Most Cited Cases](#)

[8] Federal Courts 950
[170Bk950 Most Cited Cases](#)

When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal.

[9] Courts 99(1)
[106k99\(1\) Most Cited Cases](#)

Factual findings, like legal determinations, can establish the law of the case.

[10] Federal Courts 950
[170Bk950 Most Cited Cases](#)

Circumstances triggering exceptions to law of the case doctrine did not exist, so as to permit, on remand, relitigation of issue of whether adverse domination doctrine applied to toll statute of limitations on claims asserted by receiver for failed financial institution against institution's director, based on allegedly improper loan; no evidence was offered that was substantially different from evidence previously presented at trial on adverse domination issue, no controlling authority made contrary decision applicable to issue, and jury's finding of no adverse domination was not clearly erroneous and did not work manifest injustice.

[11] Federal Courts 952
[170Bk952 Most Cited Cases](#)

Following Court of Appeals' remand of claim asserted by receiver for failed financial institution against institution's director, receiver was free to raise new defenses to statute of limitations bar to claim that were not subject to, and thus barred by, the law of the case doctrine.

[12] Limitation of Actions 58(5)
[241k58\(5\) Most Cited Cases](#)

Assertions of continuing wrongful conduct by director for financial institution were insufficient to bring negligence and breach of fiduciary duty claims based on director's approval of allegedly improper loan within limitations period under New Mexico law, inasmuch as there was no evidence that director engaged in continuing wrongful conduct, except possibly the release of claims against guarantors and borrowers after loan went into default, which alone did not establish continuing wrongful conduct, and no explanation was given for failure to seek redress within limitations period, despite allegations indicating that institution suffered definite and discoverable injury at the time of loan approval.

[13] Limitation of Actions 43
[241k43 Most Cited Cases](#)

Under New Mexico law, damages may be awarded for successive injuries, and a new statute of limitations begins to run from the date of each injury.

[14] Limitation of Actions 95(1)
[241k95\(1\) Most Cited Cases](#)

For purposes of determining when the statute of limitations began to run for an injury that was of a continuing nature, under New Mexico law, the court is concerned only with the point at which plaintiff knew or should have known that it was damaged by the injury.

[15] Limitation of Actions 104(1)
[241k104\(1\) Most Cited Cases](#)

Fraudulent concealment doctrine did not apply, under New Mexico law, to toll statute of limitations for tort claims against director for failed financial institution arising out of allegedly improper loan when Federal Deposit Insurance Corporation (FDIC), as institution's receiver, made only bald allegations of concealment and never presented particular circumstances by which director successfully concealed his allegedly wrongful conduct, nor explained why it did not know, or could not have known by exercise of reasonable diligence, that cause of action had accrued. [NMSA 1978, § 37-1-7.](#)

[16] Limitation of Actions 104(1)
[241k104\(1\) Most Cited Cases](#)

Under New Mexico law, the fraudulent concealment doctrine is applicable to both actual fraud actions and constructive fraud in actions grounded in negligence. [NMSA 1978, § 37-1-7.](#)

[17] Limitation of Actions  **104(1)**
[241k104\(1\) Most Cited Cases](#)

To establish fraudulent concealment under New Mexico law, the proponent must demonstrate the following facts: (1) the use of fraudulent means by the party who raises the bar of the statute, (2) successful concealment from the injured party, and (3) that the party claiming fraudulent concealment did not know or by the exercise of reasonable diligence could not have known that he might have a cause of action. [NMSA 1978, § 37-1-7.](#)

[18] Limitation of Actions  **179(2)**
[241k179\(2\) Most Cited Cases](#)

The party asserting fraudulent concealment under New Mexico law must plead the circumstances giving rise to estoppel with particularity. [NMSA 1978, § 37-1-7.](#)

[19] Limitation of Actions  **179(2)**
[241k179\(2\) Most Cited Cases](#)

Bald allegations of concealment are not sufficient to make out a case of fraudulent concealment under New Mexico law. [NMSA 1978, § 37-1-7.](#)

***1335** [Harold D. Stratton, Jr.](#), [Stephen D. Ingram](#), Stratton & Cavin, Albuquerque, NM, [Antony S. Burt](#), Hopkins & Sutter, Three First National Bank, Chicago, IL, Jeffrey Ross Williams, Washington, DC, [J Scott Watson](#), Federal Deposit Insurance Corporation, Appellate Section, Washington, DC, [F. Thomas Hecht](#), [Claudette P Miller](#), Ungaretti & Harris, PC, Chicago, IL, for Federal Deposit Insurance Corporation, fka, Resolution Trust Corporation, plaintiff.

[Alice T Lorenz](#), Miller, Stratvert & Torgerson, Albuquerque, NM, VV Cooke, Kelley Drye & Warren, LLP, Washington, DC, [William M. Ravkind](#), Ravkind & Ravkind, PC, Dallas, TX, [Douglas P Lobel](#), Morgan, Lewis & Bockius LLP, McLean, VA, for Bernard Schuchmann, defendant.

MEMORANDUM OPINION AND ORDER

[VAZQUEZ](#), District Judge.

THIS MATTER comes before the Court on Defendant's Motion for Summary Judgment [**Doc. No. 554**]. The Court, having considered the motion, briefs, relevant law and being otherwise fully informed, finds that the motion is well taken and will be **GRANTED**.

BACKGROUND

First American Savings Bank of Santa Fe, New Mexico ("First American"), formerly Taos Savings and Loan Association of New Mexico, was a chartered state institution that was acquired by a group of Dallas investors, including Defendant Bernard Schuchmann, in February 1985. On August 30, 1990, the Resolution Trust Corporation ("RTC") was appointed Receiver of First American on the grounds that First American had engaged in numerous unsafe and unsound practices and was insolvent. On that same day, the Office of Thrift Supervision created First American Federal Savings Bank ("First American Federal"), which received certain assets of First American, including claims against former directors, officers and attorneys of First American, pursuant to a Purchase and Assumption Agreement, dated August 31, 1990. RTC was then appointed Receiver of First American Federal on November 29, 1990.

In 1993, RTC brought this action against certain former directors, officers, attorneys, and third party transferees of First American for breach of fiduciary duty, ***1336** gross negligence, negligence, and aiding and abetting. The claims against all of the defendants, except Bernard and Tara Schuchmann, were dismissed prior to trial. [\[FN1\]](#) On January 9, 1996, Plaintiff gave notice to the Court of the statutory succession and substitution by the Federal Deposit Insurance Corporation ("FDIC") for RTC as Receiver of First American Federal and as the plaintiff in this civil action [**Doc. No. 246**].

[\[FN1\]](#) All other co-defendants were dismissed as parties to this action pursuant to the Notice and Stipulation of Dismissal with Prejudice as to Defendant Steven R. Sloan [**Doc. No. 307**], Order granting RTC's motion to dismiss party Gary C. Bouty with prejudice pursuant to settlement agreement [**Doc. No. 241**], Order granting motion for leave to dismiss Defendants Joan and Gene Bouty without prejudice [**Doc. No. 88**], Order granting motion to dismiss complaint against Defendant Jon R. Likous [**Doc. No. 347**], Notice of Dismissal as to Richard Parker pursuant to Rule 41(a) [**Doc. No. 526**], and Order regarding stipulation dismissing Douglas C. Peter and Newman Davenport, P.C. with prejudice [**Doc. No. 258**].

On March 6, 1998, Defendants Bernard and Tara Schuchmann moved for partial summary judgment

[**Doc. No. 293**], arguing that certain transactions could not be included in Plaintiff FDIC's cause of action because they were time-barred by the applicable statute of limitations. In opposition to Defendant's motion, Plaintiff argued that the statute of limitations should be tolled under the doctrine of "adverse domination." In his December 2, 1998 Order [**Doc. No. 421**], Judge Bunton denied Defendant's motion because he found a genuine dispute over a material fact of whether there was "adverse domination." *FDIC v. Schuchmann*, CIV No. 93-1024, slip op. at 12 (D.N.M. Dec. 2, 1998).

This case then went to trial, and a jury returned a verdict on December 11, 1998, finding Defendant Bernard Schuchmann negligent only with respect to the Custer Road Loan and the Omni Real Estate Loan, but finding no proximate cause between Defendant's negligence and Plaintiff's damages. Therefore, the jury did not award any damages for the negligence regarding these loans. The jury also found no gross negligence or breach of fiduciary duties by Defendant Bernard Schuchmann, and specifically found no "adverse domination." The trial court also granted Defendant Tara Schuchmann's Motion for Judgment as a Matter of Law, dismissing all claims against Ms. Schuchmann with prejudice [**Doc. No. 478**].

The Tenth Circuit "reverse[d] the district court's judgment with regard to the Omni loan transaction and remand[ed] for further proceedings" due to a faulty jury instruction. *FDIC v. Schuchmann*, 235 F.3d 1217, 1227-28 (10th Cir.2000). The Tenth Circuit, however, affirmed all other aspects of the jury trial, including the jury's finding of no "adverse domination." *Id.* at 1229-30. Thus, Defendant Bernard Schuchmann is the only remaining defendant in this civil matter, and the sole claim against him pertains to the Omni loan transaction.

STANDARD

Summary judgment is an integral part of the Federal Rules of Civil Procedure, which are intended to "secure the just, speedy and inexpensive determination of every action." " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting *Fed.R.Civ.P. 1*). Under Rule 56(c), summary judgment is appropriate when the court, viewing the record in the light most favorable to the non-moving party, determines that "there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." *Thrasher v. B & B Chemical Co.*, 2 F.3d 995, 996 (10th Cir.1993).

*1337 The movant bears the initial burden of showing "there is an absence of evidence to support the nonmoving party's case." *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir.1991). Once the movant meets this burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Although the material submitted by the parties in support of and in opposition to the motion must be construed liberally in favor of the party opposing the motion, *Harsha v. United States*, 590 F.2d 884, 887 (10th Cir.1979), the burden on the moving party may be discharged by demonstrating to the district court that there is an absence of evidence to support the nonmoving party's case, see *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548. In such a situation, the moving party is entitled to judgment as a matter of law "because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 322, 106 S.Ct. 2548.

DISCUSSION

Defendant argues that he is entitled to summary judgment as a matter of law concerning the one remaining claim in this dispute--the Omni loan made in August 1985. With regard to the Omni loan, the jury made a finding of negligence, but no damages or proximate cause. This jury verdict was reversed by the Tenth Circuit and remanded for further proceedings due to a faulty jury instruction. However, the jury also made a finding of no adverse domination concerning the Omni loan, and this finding was affirmed by the Tenth Circuit. Thus, Defendant argues that even though the Omni loan claim has been remanded to the district court, summary judgment on that claim is, nevertheless, warranted under the doctrine of "law of the case" because Plaintiff's one defense against the statute of limitations bar--adverse domination--has been found not to exist by a jury, and this finding was subsequently affirmed by the Tenth Circuit.

Plaintiff, on the other hand, relies on the Tenth

Circuit's statement that "[w]holesale reversal on the Omni loan transaction is necessary because [it was] unable to speculate as to how a proper instruction would have affected the jury's findings with regard to the issues of gross negligence, breach of fiduciary duties, proximate cause and damages." [Schuchmann, 235 F.3d at 1228 n. 8](#). Plaintiff interprets the Tenth Circuit's directive to require a reversal of all findings pertaining to the Omni loan, including the finding of no adverse domination, thus mandating a new trial on that factual issue. Furthermore, Plaintiff asserts that the Tenth Circuit rejected a similar argument when the panel rejected Defendant's Petition for Panel Rehearing, and that numerous factual issues should be resolved at trial in order to determine whether or not the Omni loan falls within the statute of limitations.

I. Statute of Limitations

The parties have agreed that the statute of limitations for this action is governed by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which provides in pertinent part:

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought *1338 by the Corporation as conservator or receiver shall be ... the longer of ... the 3-year period beginning on the date the claim accrues; or ... the period applicable under State law.

[12 U.S.C. § 1821\(d\)\(14\)\(A\)\(ii\)](#) (West 2001). In this case, the applicable statute of limitations is four years pursuant to New Mexico state law. See [N.M.Stat. Ann. § 37-1-4](#) (Michie 1978).

[1][2] The FIRREA also provides that:

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later date of--

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

[12 U.S.C. § 1821\(d\)\(14\)\(B\)\(i\)-\(ii\)](#) (West 2001). However, "[i]f the state statute of limitations has expired before the government acquires a claim, it is not revived by transfer to a federal agency." [FDIC v. Regier Carr & Monroe, 996 F.2d 222, 225 \(10th Cir.1993\)](#) (quoting [FDIC v. Hinkson, 848 F.2d 432, 434 \(3d Cir.1988\)](#)). The Court must, therefore, conduct a two-step analysis "in determining whether [the FIRREA] bars an action by the RTC": first, "whether the claims brought by RTC ... were viable

under the state limitations statute at the time the RTC became receiver," and if yes, secondly "whether FIRREA's ... statute of limitations has run." [UMLIC-Nine Corp. v. Lipan Springs Dev. Corp., 168 F.3d 1173, 1177 \(10th Cir.1999\)](#) (footnote and citations omitted). In this case, RTC was appointed Receiver of First American on August 30, 1990; thus, the cause of action must have accrued within four years of that date.

[3] Pursuant to Judge Bunton's previous Order, New Mexico state law governs when Plaintiff's cause of action began to accrue. [FN2] Defendant contends that the statute of limitations began to accrue when the Omni loan was made; however, in support of his position, Defendant cites to cases relying on federal and Arizona state law. (Def's Br. at 8 n. 2) (citing [RTC v. Blasdel, 930 F.Supp. 417, 429 \(D.Ariz.1994\)](#); [Bryan, 902 F.2d at 1522](#)); Def's Reply at 9 (citing [Bryan, 902 F.2d at 1522](#); [FDIC v. Jackson, 133 F.3d 694, 697 & n. 2 \(9th Cir.1998\)](#); [FDIC v. Allison, No. 6-93-CV-59C, 1994 WL 245208, at **7-8 \(W.D.Tex.1994\)](#).) None of those cases address when the statute of limitations began to accrue under New Mexico state law.

[FN2] Judge Bunton recognized the Tenth Circuit's holding that federal law governed when a cause of action began to accrue in a case brought by the RTC. See [Farmers & Merchants Nat'l Bank v. Bryan, 902 F.2d 1520, 1522 \(10th Cir.1990\)](#), cited in [Schuchmann, CIV No. 93-1024, slip op. at 5](#). However, Judge Bunton further opined that the U.S. Supreme Court's decision in [O'Melveny & Myers v. FDIC, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 \(1994\)](#), and the Tenth Circuit's certifications of questions of state law to state supreme courts altered the law in this Circuit with regard to this issue. See [Schuchmann, CIV No. 93-1024, slip op. at 5-6](#). Thus, Judge Bunton applied state, not federal, law on the issue of when the statute of limitations began to accrue. *Id.* at 7. The Tenth Circuit expressly declined to resolve whether or not the *Bryan* decision remains good law. [Schuchmann, 235 F.3d at 1229](#).

The Court, on its own review of New Mexico law, has found one New Mexico Supreme Court case that briefly addressed this issue. In [Akre v. Washburn, 92 N.M. 487, 590 P.2d 635 \(1979\)](#), the New Mexico Supreme Court held that "where there is no specified time for the payment of loans, the action accrues

upon the date of such loans." Id. at 637 (citing Gentry v. Gentry, 59 N.M. 395, 285 P.2d 503, 506 (1955)). However, a New Mexico Court of Appeals *1339 has more recently distinguished Akre as relevant only to "money debts based on oral agreements." Nashan v. Nashan, 119 N.M. 625, 894 P.2d 402, 411 (N.M.App.1995). As a consequence, the Court does not find the Akre decision necessarily dispositive on this issue since the Omni loan was not an oral transaction.

More helpful to the Court is an opinion by Judge Campos of this District, in which he construed New Mexico common law to find a tort cause of action to accrue "once a plaintiff suffers loss or injury." RTC v. Foley, 829 F.Supp. 352, 354 (D.N.M.1993) (citing Bolden v. Village of Corrales, 111 N.M. 721, 809 P.2d 635 (N.M.App.1990)). [FN3] In the present case, Plaintiff suffered loss or injury on June 24, 1985, when Defendant approved the Omni loan, which allegedly exceeded the limitation of federal loans to one borrower, obligated First American to fund a \$2.5 million loan when the entire net worth was approximately \$1.2 million, and violated New Mexico law by being secured with a fourth lien. (Compl. at 16.) If Plaintiff's allegations are true, Defendant's approval of an "extraordinarily imprudent and improper loan" (*id.*) would be immediately injurious to Plaintiff, and the statute of limitations, thus, accrued at that time.

[FN3. Judge Campos also cited New Mexico statutory authority that makes an action not accrue "until an injury to or conversion of property is discovered by the plaintiff." Foley, 829 F.Supp. at 354 (citing N.M.Stat. Ann. § 37-1-7 (Michie 1978)). Yet, this statute applies only to "actions for relief, on the ground of fraud or mistake, and in actions for injuries to, or conversion of property," which are not claims in this action. N.M.Stat. Ann. § 37-1-7. This provision also applies to "constructive fraud," such as "fraudulent concealment" in an action based on negligence. See Ramsey v. Culpepper, 738 F.2d 1092, 1096 & n. 1 (10th Cir.1984) (citing N.M.Stat. Ann. § 37-1-7; Gaston v. Hartzell, 89 N.M. 217, 549 P.2d 632 (1976)). However, the "fraudulent concealment" doctrine is not applicable in this case as further explained later in this memorandum opinion.

[4] Under the New Mexico statute of limitations, First American should have initiated its state law

claims by June 24, 1989, to be within the four-year statutory period. N.M.Stat. Ann. § 37-1-4. However, because no such state law claim was filed by that deadline, this cause of action expired prior to the appointment of RTC as Receiver of First American on August 30, 1990. Pursuant to Tenth Circuit law, the appointment of Receiver did not revive the stale state law claim, see Regier, 996 F.2d at 225, and Plaintiff's action pertaining to the Omni loan is, therefore, barred.

II. Tolling of Statute of Limitations by "Adverse Domination" Doctrine

[5][6] Plaintiff contends that summary judgment should be denied because there continues to be a material factual dispute regarding whether or not the statute of limitations should be tolled by the "adverse domination" doctrine. [FN4] The Court finds Plaintiff's argument to be wholly without merit because the "law of the case" prevents the relitigation of the adverse domination issue, which has already *1340 been tried and subsequently affirmed on appeal.

[FN4. "Adverse domination is an equitable theory for tolling the statute of limitations applicable to claims of negligence." Schuchmann, 235 F.3d at 1229. In Schuchmann, the Tenth Circuit affirmed the trial court's jury instruction that "adverse domination" requires a finding that: there was no one with knowledge of facts giving rise to possible liability who could or would have induced First American to bring a lawsuit. To do this the plaintiff must show that the defendant had full, complete, and exclusive control of the institution and negate the possibility that any informed director or shareholder could have induced the corporation to institute a lawsuit. *Id.* (quoting I Appellant's App. at 425-26).

[7][8][9] "The law of the case 'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' " United States v. Monsisvais, 946 F.2d 114, 115 (10th Cir.1991) (quoting Arizona v. California, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)).

[W]hen a case is appealed and remanded the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal. This doctrine is based on

sound public policy that litigation should come to an end and is designed by preventing continued re-argument of issues already decided.

United States v. Alvarez, 142 F.3d 1243, 1247 (10th Cir.1998) (quotations and internal citations omitted). The Tenth Circuit has explicitly declined to "address under what circumstances findings of fact become the law of the case," Monsivais, 946 F.2d at 115 n. 2, but this Court believes that not adhering to the factual determinations of the jury would be contrary to the Tenth Circuit's admonition that "a litigant given one good bite at the apple should not have a second," Alvarez, 142 F.3d at 1247 (quoting Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 900 (Fed.Cir.1984)). Thus, this Court holds that factual findings, like legal determinations, can establish the law of the case.

It is incontrovertible that the jury explicitly found no adverse domination as to the Omni loan, and that the Tenth Circuit affirmed this finding. See Schuchmann, 235 F.3d at 1229-30. While the Tenth Circuit may have mandated "[w]holesale reversal on the Omni loan transaction," it was clearly referring to "the jury's findings with regard to the issues of gross negligence, breach of fiduciary duties, proximate cause and damages." Id. at 1228 n. 8. As Defendant correctly indicates, the Tenth Circuit at no time required a "wholesale reversal" of the adverse domination issue. Thus, the determination that Plaintiff did not establish adverse domination to toll the statute of limitations became the law of the case in this matter and cannot be revisited.

[10] The Tenth Circuit has also held that a court may not follow the law of the case in three narrow circumstances:

[When] the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

Monsivais, 946 F.2d at 117 (quoting White v. Murtha, 377 F.2d 428, 432 (5th Cir.1967)). However, none of those circumstances are applicable to the present case. Plaintiff has not presented any evidence that is substantially different from the evidence presented at trial, no controlling authority has made any contrary decision applicable to the issue of adverse domination, and the Court does not believe the jury's finding was clearly erroneous or would work a manifest injustice. As a consequence, the prior finding of no adverse domination with regard to the Omni loan cannot be relitigated and,

thus, must stand as the law of the case in this matter.

The Tenth Circuit's denial of Defendant's Petition for Panel Rehearing does not persuade the Court to reach a contrary conclusion. In his Petition, Defendant conceded that "ordinarily the procedure would be for this matter to be remanded to the trial judge so that he could enter his decision ... on the statute of limitations defense." (Appellee Bernard Schuchmann's *1341 Petition for Panel Rehearing at 11, FDIC v. Schuchmann (10th Cir.2001) (No. 99-2085).) Nevertheless, Defendant requested the Tenth Circuit to reconsider the reversal and remand pertaining to the Omni loan claim in the interests of "judicial economy" because any error with regard to the jury instruction for that claim would be "harmless error" if the claim is barred by the statute of limitations. (Id. at 9-10.) Therefore, when the Tenth Circuit denied Defendant's petition for rehearing, it chose not to address an issue that had not been considered by the lower court before the appeal. See Johnson v. Champion, 288 F.3d 1215, 1229 (10th Cir.2002) ("The general rule is that a federal appellate court does not consider an issue not passed upon below." (quotations omitted)); Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1232 n. 7 (10th Cir.2000) (declining to decide issue not raised on appeal despite undisputed evidence).

III. Tolling of Statute of Limitations on Other Grounds

[11] Because the Tenth Circuit reversed and remanded the Omni loan claim for further proceedings, Plaintiff is free to raise new defenses to the statute of limitations bar that are not subject to the law of the case doctrine. Plaintiff asserts that there are three factual disputes to be determined at trial that affect the statute of limitations issue: whether Defendant engaged in continuing conduct that extended past the statute of limitations deadline; whether the principles of equitable estoppel toll the statute of limitations; and whether a new jury would reach a different finding with regard to the adverse domination issue. As already explained, Plaintiff's third argument is without merit because the jury's finding of no adverse domination has become the law of the case. The Court will address the other two arguments in turn under New Mexico state law, which governs the tolling of the statute of limitations. See Schuchmann, CIV No. 93-1024, slip op. at 7.

A. Continuing Conduct

[12] RTC was appointed Receiver of First American

in August 30, 1990; thus, under the New Mexico statute of limitations, the cause of action must have accrued within four years of the appointment of Receiver--by August 30, 1986, at the latest. However, Plaintiff contends that Defendant continued to engage in wrongful conduct past the statute of limitations deadline, well into late 1986 and possibly 1987. The Court does not find Plaintiff's argument to be persuasive.

[13][14] Under New Mexico law, "damages may be awarded for successive injuries, and a new statute of limitations begins to run from the date of each injury." Valdez v. Mountain Bell Tel. Co., 107 N.M. 236, 755 P.2d 80, 83 (N.M.App.1988) (citations omitted). However, "[f]or purposes of determining when the statute of limitations began to run" for an injury that was of a continuing nature, the court is "concerned only with the point at which the [plaintiff] knew or should have known that [it] was damaged by" the injury. LaMure v. Peters, 122 N.M. 367, 924 P.2d 1379, 1383-84 (N.M.App.1996). The Tenth Circuit has similarly held that "[u]nder the continuing wrong doctrine, ... where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury," but that "the doctrine cannot be employed where the plaintiff's injury is definite and discoverable, and nothing prevented the plaintiff from coming forward to seek redress." Tiberi v. Cigna Corp., 89 F.3d 1423, 1430-31 (10th Cir.1996) (quotations omitted).

Plaintiff merely makes vague assertions of wrongful conduct by Defendant after the August 30, 1986 deadline. It claims *1342 that Defendant "released all claims against guarantors and borrowers for \$25,000" after the loan went into default, and First American "paid off all prior lien holders and increased the amount paid out on the loan to more than \$4 million." (Pff's Opp'n at 3.) Additionally, Plaintiff contends that "[i]n December, 1986 critical decisions were made on the loan and grossly improvident actions taken that were initiated and approved by Mr. Schuchmann," and that "[t]here may be additional Omni-related acts in the autumn of 1986 and into 1987 presented at trial that further emphasize that claims giving rise to damages in this transaction were well within the limitations period." (*Id.* at 10-11.)

Defendant has met his initial burden of showing that this remaining claim is barred by the statute of limitations. Yet, none of the arguments by Plaintiff satisfies its requirement to "go beyond the pleadings

and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324, 106 S.Ct. 2548. Plaintiff has not presented any tangible evidence, beyond speculative assertions, that Defendant engaged in any wrongful conduct within the statute of limitations period that would constitute continuing conduct, except perhaps the release of all claims after the Omni loan went into default, which does not alone establish a sufficient showing of continuing wrongful conduct. The lack of evidentiary support is particularly stark given the fact that a trial has already taken place on this very claim.

Moreover, from Plaintiff's own assertions, "[t]here were serious problems with the loan from the outset," including the "acceptance of a fourth lien as security, violations of federal and state law by exceeding loan-to-one borrower limits, the virtual nonexistence of underwriting of the loan, no review of the loan materials, and no formal approval of the loan." (Pff's Opp'n at 3.) Thus, Plaintiff itself seems to indicate that there was a definite and discoverable injury at the time Defendant approved the Omni loan and presents no reasons why it did not come forward to seek redress within the statute of limitations for that injury.

B. Equitable Estoppel

[15] Plaintiff further argues that the statute of limitations should be tolled under the doctrine of equitable estoppel "to the extent that Mr. Schuchmann is found to have failed to disclose to the Association and its representatives the suspect nature of the Omni loan or concealed the value of the land or the nature of the transaction, or otherwise breached his fiduciary duty of loyalty...." (Pff's Opp'n at 11.) Again, the Court finds that Plaintiff's arguments fall short of demonstrating that there is a genuine issue for trial.

[16][17] The New Mexico Supreme Court recognizes the principles of equitable estoppel, which may toll the statute of limitations, under the doctrine of "fraudulent concealment." See Garcia v. La Farge, 119 N.M. 532, 893 P.2d 428, 432 (1995). The fraudulent concealment doctrine has been codified in New Mexico statutes, [FNS] and is applicable to both actual fraud actions and constructive fraud in actions grounded in negligence. See Ramsey, 738 F.2d at 1096 & n. 1 (citing *1343 Gaston, 89 N.M. 217, 549 P.2d 632). In order to establish fraudulent concealment, the proponent must demonstrate the

following facts:

FN5. The New Mexico statute provides:
In actions for relief, on the ground of fraud or mistake, and in actions for injuries to, or conversion of property, the cause of action shall not be deemed to have accrued until the fraud, mistake, injury or conversion complained of, shall have been discovered by the party aggrieved.
N.M.Stat. Ann. § 37-1-7.

(1) the use of fraudulent means by the party who raises the bar of the statute; (2) successful concealment from the injured party; and (3) that the party claiming fraudulent concealment did not know or by the exercise of reasonable diligence could not have known that he might have a cause of action.

Continental Potash, Inc. v. Freeport-McMoran, Inc., 115 N.M. 690, 858 P.2d 66, 74 (1993) (citing Keithley v. St. Joseph's Hosp., 102 N.M. 565, 698 P.2d 435, 440 (N.M.App.1984)).

[18][19] The party asserting fraudulent concealment "must plead the circumstances giving rise to estoppel with particularity." *Id.* (citing Hardin v. Farris, 87 N.M. 143, 530 P.2d 407, 410 (N.M.App.1974)). "Bald allegations of concealment are not sufficient to make out a case of fraudulent concealment." *Id.* (citing SCRA 1986, 1-009(B) (Repl.Pamp.1992)).

[T]he party asserting estoppel must sustain the burden of showing not only that he failed to discover the cause of action prior to the running of the statute of limitations, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence.
Id. (citations omitted).

Plaintiff has not made a sufficient showing in support of any of the factors necessary to establish fraudulent concealment. All that Plaintiff has done is suggest vague evidence of fraudulent concealment that possibly may be demonstrated at trial. Plaintiff utterly fails to "plead the circumstances giving rise to estoppel with particularity," but rather makes "[b]ald allegations of concealment," contrary to the requirements set forth by New Mexico law. Continental Potash, 858 P.2d at 74 (citations omitted). After two summary judgment motions, a jury trial, and an appeal, Plaintiff has never presented the particular circumstances by which Defendant successfully concealed his allegedly wrongful conduct from Plaintiff.

Equally important, Plaintiff fails to explain why it "did not know or by the exercise of reasonable diligence could not have known" that a cause of action had accrued. *Id.* (citation omitted). This is particularly significant given Plaintiff's repeated assertions of blatant wrongful conduct by Defendant from the very onset of the Omni loan, including *inter alia* that the "Federal Home Loan Bank examinations were sharply critical of the appraisal and other underwriting practices at First American, including the practices with respect to the Omni loan." (Pff's Opp'n at 9 & Ex. J.) This examination is dated September 9, 1985, and Plaintiff provides no explanation as to why it did not have knowledge of this cause of action at that time.

CONCLUSION

In summary, the Court finds that the Omni loan claim is barred by the statute of limitations, which began to accrue under New Mexico law upon Defendant's approval of the Omni loan. Adverse domination cannot toll the statute of limitations because the jury's finding of no adverse domination has become the law of the case. Moreover, the statute of limitations cannot be tolled on the grounds of Defendant's alleged continuing wrongful conduct or fraudulent concealment because Plaintiff has not made a sufficient showing of a genuine issue for trial.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment [**Doc. No. 554**] is hereby **GRANTED**.

*1344 JUDGMENT

Having granted summary judgment in favor of the defendant by separate Memorandum Opinion and Order entered concurrently with this Judgment,

IT IS ORDERED that this action is hereby **DISMISSED WITH PREJUDICE**.

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