

The Proper Statute of Limitations on a Rule 10b-5 Action

I. FEDERAL SECURITIES LAW PROVISIONS: BACKGROUND

The laws governing today's securities markets and transactions were, for the most part, passed shortly after the stock market crash of 1929. The first enactment was the Securities Act of 1933 ("1933 Act").¹ The purpose of this act was to provide investors with full disclosure of material information concerning public offerings of securities in commerce,² to protect investors against fraud³ and through the imposition of specified civil liabilities,⁴ to promote ethical standards of honesty and fair dealing.⁵ After passage of the 1933 Act, Congress recognized the need for more extensive regulation and refinement of the 1933 Act. As a result, Congress passed the Securities Exchange Act of 1934 ("1934 Act").⁶

The purpose of the 1934 Act was to supplement and expand the regulatory measures lacking in the 1933 Act. Principally, the purpose of the 1934 Act was to protect investors against manipulation of stock prices by regulating transactions on securities exchanges⁷ and in the over-the-counter markets,⁸ and imposing regular reporting requirements⁹ on companies whose stock is listed on national securities exchanges.¹⁰

Additionally, the 1934 Act contained section 10(b) which addressed the use of manipulative and deceptive devices.¹¹ Pursuant to section 10(b) of the 1934 Act, the Securities and Exchange Commission ("SEC")

1. Securities Act of 1933, 15 U.S.C. § 77a-bbbb (1988).

2. See 15 U.S.C. § 77j (1988).

3. See 15 U.S.C. § 77q (1988).

4. See 15 U.S.C. § 77k-1 (1988).

5. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). See also H.R. REP. No. 85, 73d Cong., 1st Sess. 1-5 (1933).

6. Securities Exchange Act of 1934, 15 U.S.C. § 78a-11 (1988).

7. See 15 U.S.C. § 78f (1988).

8. See 15 U.S.C. § 78k-1 (1988).

9. See 15 U.S.C. § 78m (1988).

10. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). See also S. REP. No. 792, 73d Cong., 2d Sess. 1-5 (1934).

11. 15 U.S.C. § 78j (1982). Part (b) of this section states:

It shall be unlawful . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

adopted Rule 10b-5 which proscribed various activities which, if engaged in, would result in civil and/or criminal liability.¹²

Even though the 1934 Act and SEC Rule 10b-5 both detail certain types of conduct in which people involved in securities transactions are prohibited from engaging,¹³ neither section 10(b) nor Rule 10b-5 created express rights of action for private parties.¹⁴ Nevertheless, not long after the adoption of Rule 10b-5,¹⁵ the courts began to recognize that an implied civil right of action exists under the rule and section 10(b).¹⁶ Also, in a private civil action, the Supreme Court recognized the implied right of action under Rule 10b-5 and section 10(b).¹⁷

Along with the recognition of an implied cause of action, there developed a new problem. The problem, the principal focus of this Note, is that when the judiciary recognizes an implied cause of action, as in the present case, there is usually no accompanying statute of limitations to govern the action. In other words, it is not clear how much time an

12. 17 C.F.R. § 240.10b-5 (1988). This rule states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility or of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

13. See *supra* notes 11-12.

14. Several other sections in the 1934 Act do create express rights of action. See, e.g., 15 U.S.C. § 77k (1988) (civil liabilities on account of false registration statements); 15 U.S.C. § 77l (1988) (civil liabilities arising in connection with prospectuses and communication); 15 U.S.C. § 77r (1988) (liability for misleading statements); 15 U.S.C. § 77t (1988) (liability for controlling persons).

15. See 13 Fed. Reg. 8183, Dec. 22, 1948, as amended at 16 Fed. Reg. 7928, Aug. 11, 1951.

16. One of the first cases to recognize a private right of action under section 10(b) and Rule 10b-5 was *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946). This was an action against a corporation to recover damages for fraudulently conspiring to induce the plaintiff to sell stock in two corporations for less than its true value.

17. See *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971) (action for fraud perpetrated by a purchaser who used assets of the company whose stock was being sold to purchase the very stock sold by the corporation. The Court stated that "[i]t is now established that a private right of action is implied under [section] 10(b)."). See also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976) (stating that "the existence of a private cause of action for violations of [section 10(b)] and [rule 10b-5] is now well established").

injured party has within which to bring a cause of action under section 10(b) or Rule 10b-5.¹⁸ This is different from a legislatively created right of action which is typically accompanied by an applicable statute of limitations.¹⁹

II. THE TRADITIONAL APPROACH WHEN A FEDERAL LIMITATIONS PERIOD IS LACKING

A. *Background on Limitations Periods*

Statutes of limitations serve many useful purposes. Importantly, the limitations period furthers the proposition that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."²⁰ Also, statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."²¹ Accordingly, the determination of the applicable statute of limitations in a federal action deserves important consideration.²²

When there is no federal statute of limitations expressly applicable to a federal claim, as frequently has been the case,²³ courts should not assume Congress intended that there be no time limit at all.²⁴ This is

18. As opposed to how long the action will be viable before it expires, another consideration is at what point does this time actually begin to run. This is frequently referred to as the Federal Equitable Tolling Doctrine. For a discussion on this, see *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645, 654 (1986).

19. See 15 U.S.C. §§ 77m, 78i(e), 78r(c), 78cc(b), and 78p(b). See also *infra* note 148.

20. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citing *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)).

21. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1973) (citing *Railroad Telegraphers*, 321 U.S. at 248-49, *reh'g denied*, 415 U.S. 952 (1974)).

22. For further discussion of various limitations periods and their importance, see Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. COLO. L. REV. 235 (1989). See generally Fischer, *The Limits of Statutes of Limitation*, 16 SW. U.L. REV. 1 (1986); Kaulbach, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CALIF. L. REV. 133 (1989).

23. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983) (Court adopted a limitations period from section 10b of the National Labor Relations Act to be applied to section 301 of the same Act since section 301 did not have an express limitations period). See 29 U.S.C. § 160(b) (1982). See also *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (adopting federal statute of limitations for EEOC enforcement action); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (federal limitations period applied to unseaworthiness action under general admiralty law).

24. *DelCostello*, 462 U.S. at 158.

because of the resounding importance of the limitations period.²⁵ Instead, the task of the court is to "borrow"²⁶ the most suitable statute or other rule of timeliness from some other source.²⁷ This other source has typically been the most analogous statute of limitations under the governing state law in which the district court is sitting.²⁸ This is frequently referred to as the "absorption" of a state statute.²⁹ Until the spring of 1988,³⁰ the district courts and the courts of appeals had, for the most part,³¹ determined that the most analogous statute of limitations was to be found in the common law fraud statute³² or the blue sky statute of the applicable state.³³

B. Common Law Fraud Approach

The Second,³⁴ Ninth,³⁵ and Tenth³⁶ Circuits consistently apply the common law fraud doctrine to section 10(b) and Rule 10b-5 claims for statute of limitations purposes. There are, however, two circuits, the Fifth³⁷ and the Sixth,³⁸ which are undecided as to which approach they

25. See *supra* notes 20-22 and accompanying text.

26. This is commonly referred to as the "absorption" doctrine. *DelCostello*, 462 U.S. at 158. When utilized in the present area, it frequently produces incongruous results among the various states. See *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645, 646 (1986).

27. *DelCostello*, 462 U.S. at 158.

28. *Id.* See also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 209 n.29 (1976) (stating that "[s]ince no statute of limitations is provided for civil actions under [section] 10(b), the law of limitations of the forum state is followed as in other cases of judicially implied remedies").

29. See *supra* note 26 and accompanying text.

30. See *infra* note 100 and accompanying text.

31. But see *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978) (applying Massachusetts' two-year personal injury statute as opposed to a blue sky or common fraud limitations period).

32. See *infra* notes 34-56 and accompanying text.

33. See *infra* notes 57-81 and accompanying text.

34. *Armstrong v. McAlpin*, 699 F.2d 79 (2d Cir. 1983) (applying New York's common law fraud statute).

35. *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434 (9th Cir. 1984) (applying California's three-year fraud statute). See also *Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369 (9th Cir. 1988) (applying California's three-year fraud statute) (Aldisert, J., concurred but, without reliance on *In re Data Access Securities Litigation*, 843 F.2d 1537 (3d Cir. 1988), suggested an approach similar to the one that was adopted by the Third Circuit).

36. *Loveridge v. Dreagoux*, 678 F.2d 870 (10th Cir. 1982) (applying Utah's three-year fraud statute).

37. *Breen v. Centex Corp.*, 695 F.2d 907 (5th Cir. 1983) (applying Texas' two-year fraud statute).

38. *Marx v. Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984) (applying Ohio's four-year fraud statute), *cert. denied*, 471 U.S. 1125 (1985).

will adopt (common law fraud or blue sky law), but have applied the common law fraud limitations period in at least one of the states included in their circuits.

Analysis of the case law³⁹ from the Second, Ninth, and Tenth Circuit Courts of Appeals indicates that these circuits have determined those common law fraud statutes which have been applied better effectuated the federal policies at stake than did their blue sky counterparts in the same jurisdiction.⁴⁰ One case which exemplifies the rationale for adopting the common law fraud statute is *Wood v. Combustion Engineering, Inc.*⁴¹

When considering which statute of limitations would apply, the *Wood* court had to decide between the Texas two-year general fraud statute⁴² and the Texas three-year blue sky statute.⁴³ At the onset of its analysis, the court stated that the "action under Rule 10b-5 today is essentially 'fraud like' in character."⁴⁴ The court supported this proposition by saying that a "10b-5 action today requires all the essential elements of common law fraud except privity, and arguably, . . . reliance."⁴⁵ Also, the *Wood* court noted that the Supreme Court had firmly established scienter as a requirement of a 10b-5 action,⁴⁶ further bolstering this position.

The *Wood* court concluded that the fraud action and the Rule 10b-5 action had two major common elements. The court first noted the element of reliance and stated that there was no requirement of reliance under the applicable blue sky law.⁴⁷ However, the court highlighted the fact that the Texas general fraud statute had an express requirement of reliance whereby the buyer must rely on a false representation made to him by the seller. Also, the court stated that "[w]hile the precise extent of the reliance requirement under 10b-5⁴⁸ is not entirely clear,"⁴⁹ the

39. See *supra* notes 34-36 and accompanying text.

40. See *Ebrahimi v. E.F. Hutton & Co.*, 852 F.2d 516, 520 (10th Cir. 1988). The court here adopted the Colorado general fraud statute and stated, "When borrowing a state statute of limitations, a court should look to the statute which most clearly addresses the same or similar policy considerations as those underlying the federal right." *Id.*

41. 643 F.2d 339 (5th Cir. 1981).

42. TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987).

43. TEX. REV. CIV. STAT. ANN. art. 581-33 (Vernon Supp. 1990).

44. *Wood*, 643 F.2d at 345.

45. *Id.*

46. *Id.* (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976)).

47. *Id.* at 345 n.19 (citing *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402 (2d Cir. 1975)).

48. See generally *Basic Inc. v. Levinson*, 485 U.S. 224 (1987).

49. *Wood*, 643 F.2d at 345 n.13 (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972) (in a non-disclosure case, the plaintiff's inability to prove reliance did not bar recovery)). Also, the Fifth Circuit decided later in *Simon v. Merrill*,

reliance requirement of Rule 10b-5 was more analogous to the explicit reliance requirement of the general fraud statute.

The second major consideration highlighted by the court was the element of scienter.⁵⁰ The court first noted that there was no scienter requirement under the state's blue sky law.⁵¹ The court stated that some Texas cases required scienter to establish actionable fraud,⁵² and that the Supreme Court had firmly established that scienter is required to prevail on a Rule 10b-5 action.⁵³

After establishing the strong similarities between actions under the Texas general fraud statute and actions based on Rule 10b-5 and section 10(b) violations, the *Wood* court suggested some additional considerations. First, the court noted that the Texas blue sky law is limited only to purchasers according to its express terms.⁵⁴ However, the Texas general fraud claims and Rule 10b-5 and section 10(b) actions are available to both sellers and purchasers.⁵⁵ Moreover, the court stated that the blue sky law requires a tender of security as a prerequisite to recovery, whereas section 10(b) and Rule 10b-5 actions and general fraud claims do not.⁵⁶

In conclusion, the *Wood* court held that actions under section 10(b) and Rule 10b-5 had much more in common with actions brought under the Texas general fraud statute than with the Texas blue sky statute. In support of its decision, the *Wood* court placed great weight on the fact that the fraud action and the Rule 10b-5 action were basically alike because the basic elements required to establish each action were substantially the same. Therefore, the court applied the two-year limitations period under the general fraud statute.

C. Blue Sky Approach

Until recently,⁵⁷ if the courts did not apply the common law fraud statute of limitations to the Rule 10b-5 or section 10(b) claim, then they

Lynch, Pierce, Fenner & Smith, Inc., 482 F.2d 880, 884 (5th Cir. 1973) that *Ute* did not do away with the requirement, and held that "some element of general reliance by plaintiff, even in non-disclosure cases, is essential to a Rule 10b-5 action." *Id.*

50. *Wood*, 643 F.2d at 345.

51. *Id.* (citing *Berry Petroleum*, 518 F.2d at 408). See also Bordwine, *Civil Remedies Under the Texas Securities Laws*, 8 Hous. L. Rev. 657, 674 (1971).

52. See *Susanoil, Inc. v. Continental Oil Co.*, 519 S.W.2d 230 (Tex. Civ. App. 1975).

53. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (held that an action will fail under section 10(b) or Rule 10b-5 if the plaintiff fails to show an intent to deceive, manipulate or defraud).

54. *Wood*, 643 F.2d at 346.

55. *Id.*

56. *Id.* (citing *Wolf v. Frank*, 477 F.2d 467, 475 (5th Cir.), *reh'g denied*, 478 F.2d 1403, *cert. denied*, 414 U.S. 975 (1973)).

57. See *infra* note 100 and accompanying text.

would apply the statute of limitations that was set forth in the most analogous state blue sky laws.⁵⁸ A majority of the circuits have adopted the blue sky approach. These circuits include the Fourth,⁵⁹ Seventh,⁶⁰ Eighth,⁶¹ and Eleventh⁶² Circuits. As noted above,⁶³ the Sixth Circuit has not adopted a unanimous position for the entire circuit, but this court recently applied the Kentucky blue sky statute, as opposed to the common law fraud statute,⁶⁴ to a Rule 10b-5 action, possibly suggesting that the circuit may be inclined to apply the blue sky limitations period as opposed to the common law fraud period in the future.⁶⁵

The rationale underlying the adoption of the blue sky statute of limitations in the various circuits is set forth in many cases. One case which clearly sets forth the principles justifying the use of the blue sky statute of limitations period is *O'Hara v. Kavens*.⁶⁶ In *O'Hara*, the court said that "[i]t is not necessary that the state statute operate in the same fashion as the federal scheme, nor is it necessary that the state statute describe a cause of action identical to the federal cause at issue."⁶⁷ The court recognized that the blue sky statute did not require scienter.⁶⁸ However, the court held that "this distinction does not warrant an adoption of the common law fraud statute of limitations."⁶⁹ More importantly, the court reasoned, there "simply must be a commonality of

58. State securities laws are commonly referred to as "Blue Sky" laws. For a primer in this area, see J. MOFSKY, BLUE SKY RESTRICTIONS ON NEW BUSINESS PROMOTIONS (1971).

59. *O'Hara v. Kavens*, 625 F.2d 15 (4th Cir. 1980) (applying Maryland's three-year blue sky statute), *cert. denied*, 449 U.S. 1124 (1981).

60. *Teamsters Local 282 Pension Trust Fund v. Angelos*, 815 F.2d 452 (7th Cir. 1987) (applying Illinois' three-year blue sky statute).

61. *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690 (8th Cir. 1981) (applying Missouri's two-year blue sky period).

62. *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986) (applying Georgia's two-year blue sky period).

63. *See supra* note 38.

64. *Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981) (applying Kentucky's three-year blue sky period).

65. *But see Carothers v. Rice*, 633 F.2d 7, 13 (6th Cir. 1980), *cert. denied*, 450 U.S. 998 (1981). The court applied the three-year Kentucky blue sky period but recognized the fact that the court had previously applied the common law fraud statutes in the other states in the circuit, Ohio and Michigan, as opposed to the blue sky statutes. Also, in reference to the holdings in Ohio and Michigan, the court said, "To change the statutes of limitations for federal 10b-5 claims would increase uncertainty." *Id.*

66. *O'Hara*, 625 F.2d 15 (4th Cir. 1980).

67. *Id.* at 18 (citing *Morris v. Stifel, Nicolaus & Co.*, 600 F.2d 139 (8th Cir. 1979); *Dupuy v. Dupuy*, 551 F.2d 1005 (5th Cir.), *reh'g denied*, 554 F.2d 1065, *cert. denied*, 434 U.S. 911 (1977)).

68. *O'Hara*, 625 F.2d at 17.

69. *Id.*

purpose between the federal right and the state statutory scheme so that it is reasonable to subject the federal implied right to the statute of limitations provided by state law."⁷⁰ The court emphasized that both federal and state securities laws promote the same policy of full disclosure in stock transactions, and this "commonality of purpose overrides lesser distinctions which may arise in the implementation of the regulatory schemes."⁷¹ Finally, the court stated that the shared purposes of section 10(b) and the common law fraud statute were generalized at best.⁷² Therefore, the court applied the blue sky statute of limitations.

Another case applying a blue sky statute was *Friedlander v. Troutman, Sanders, Lockerman, & Ashmore*.⁷³ The *Friedlander* court placed heavy reliance on a Supreme Court case, *Wilson v. Garcia*,⁷⁴ decided just before *Friedlander*. The *Friedlander* court, employing the rationale from *Wilson*,⁷⁵ stated that because of "the strong federal interests in uniformity, certainty, and minimization of unnecessary litigation in determining the appropriate statute of limitations for [section] 10(b) and Rule 10b-5 claims, we hold that the federal courts must select, in each state, one most appropriate statute of limitations. . . ." ⁷⁶ The court determined that the states should select the one most analogous statute as opposed to a case-by-case selection process, and noted that the blue sky law of Georgia was more analogous to the Rule 10b-5 action than was the common law fraud statute.⁷⁷ In arriving at this conclusion, the court based its reasoning on two factors.

The first factor noted by the *Friedlander* court was that the purpose of the Georgia Securities Act was the same as that of the 1933 and 1934 Acts.⁷⁸ The Georgia Act, like the federal acts, "promotes the full, accurate disclosure of information and protects against fraud in connection with the sales of securities" ⁷⁹ Second, the court found that "the language of the Georgia Securities Act substantially tracks [the] language of the

70. *Id.* at 18.

71. *Id.* The court here, presumably, meant the fact that scienter was required for the 10b-5 action and not required under the applicable blue sky laws.

72. *Id.*

73. 788 F.2d 1500 (11th Cir. 1986).

74. *Wilson v. Garcia*, 471 U.S. 261 (1985). See also *infra* note 126 and accompanying text.

75. 471 U.S. at 261-62. The Court concluded that "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored" the selection of one statute in each state to govern section 1983 claims as opposed to a case-by-case selection process. *Id.*

76. *Friedlander*, 788 F.2d at 1505.

77. *Id.* at 1507.

78. *Id.*

79. *Id.*

federal securities statutes,"⁸⁰ and "the case law in this circuit indicates that the Georgia blue sky law is more analogous to [section] 10(b) and Rule 10b-5 [actions] than the general fraud statute because of the closeness of purpose and language and some similarity in elements of the action."⁸¹

In conclusion, courts implementing the blue sky statutes of limitations rely on a slightly different approach than their common law fraud counterparts. The blue sky courts place heavy reliance on the underlying policies of the federal securities laws. The second consideration is whether the language of the blue sky statutes substantially tracks the language of the federal statutes. Finally, the blue sky courts interpret "most analogous" to mean that statute which best effectuates federal policies, as opposed to the common law fraud approach which defines "most analogous" to mean that statute which has common elements of proof.

D. Analysis of the Blue Sky and Common Law Approaches

The courts that have applied the common law fraud statutes of limitations⁸² and those that have applied the blue sky limitations periods⁸³ to the implied actions under Rule 10b-5 and section 10(b) have decided conclusively that their respective methods provide the best limitations period for the implied federal action. The courts applying the "absorption" doctrine⁸⁴ suggest several advantages to this approach.

In arriving at their decision to use either the common law fraud or blue sky statute, the courts emphasize two underlying considerations. The first premise on which both the blue sky circuits and the common law fraud circuits agree is that use of the "absorption" doctrine has long been recognized as the proper procedure in these types of actions.⁸⁵ After deciding that a state statute should be adopted, a conflict then arises as to which state statute is most analogous.

The conflict arises in the manner in which the particular circuit interprets "most analogous." The common law fraud circuits interpret this phrase to mean the statute which best resembles the Rule 10b-5

80. *Id.* See GA. CODE ANN. §§ 10-5-1 to -24 (1989). For the specific anti-fraud provisions, see GA. CODE ANN. § 10-5-12 (1989).

81. *Friedlander*, 788 F.2d at 1507 (citing *Kennedy v. Tallant*, 710 F.2d 711 (11th Cir. 1983); *Diamond v. LaMotte*, 709 F.2d 1419 (11th Cir.), *reh'g denied*, 716 F.2d 914 (1983)).

82. See *supra* notes 34-56 and accompanying text.

83. See *supra* notes 57-81 and accompanying text.

84. See *supra* note 26.

85. See *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946). See generally *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888 (5th Cir. 1979); *Vanderboom v. Sexton*, 422 F.2d 1233, 1237 (8th Cir. 1970).

or section 10(b) action⁸⁶ with regard to the elements required to establish the claim. The common law fraud courts frequently cite the requirement of scienter in Rule 10b-5 and section 10(b) actions as similar to the requirement in the common law fraud statutes. The common law fraud courts distinguish this requirement from the alternative blue sky approach which typically requires the defendant to prove "he did not know, and in the exercise of reasonable care could not have known of the untruth or omission."⁸⁷ Also, the common law fraud courts state that the Rule 10b-5 and section 10(b) claims are essentially fraud-like in character.⁸⁸ Thus, the common law fraud courts believe that these statutes better reflect the underlying federal action because they have similar requirements.

The blue sky courts differ on their interpretation of "most analogous." These courts emphasize that the statute selected should be the statute which best reflects the federal policy underlying the federal claim. The courts utilizing these statutes recognize the importance in having shorter, not longer, limitations periods as established by Congress for the expressed limitations provisions.⁸⁹ Additionally, the courts highlight the fact that the language in the blue sky statutes substantially tracks the language in the federal securities laws.⁹⁰ Finally, these courts stress that because the federal securities laws were enacted to correct perceived deficiencies in the common law fraud claim as it applied to securities transactions,⁹¹ the courts would best effectuate the federal policies at stake by applying statutes with similar language and underlying policies.⁹²

The "absorption" approach has several disadvantages. The first and most important problem created by the use of this particular method is the vast uncertainty that arises when Rule 10b-5 and section 10(b) actions are instituted.⁹³ Under the present state of the law, the limitations period applied to a Rule 10b-5 and section 10(b) claim under the "absorption" method can vary from one to ten years.⁹⁴ This

86. *Davis v. Birr, Wilson & Co.*, 839 F.2d 1369, 1372 (9th Cir. 1988).

87. *Wood v. Combustion Eng'g, Inc.*, 643 F.2d 339, 346 n.20 (5th Cir. 1981).

88. *Id.*

89. *Fox v. Kane-Miller Corp.*, 542 F.2d 915, 918 (4th Cir. 1976).

90. *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1506 (11th Cir. 1986).

91. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983).

92. *Herm v. Stafford*, 663 F.2d 669, 678 (6th Cir. 1981).

93. *See generally In re Data Access Sec. Litig.*, 843 F.2d 1537 (3d Cir. 1988); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 183 (1987).

94. *See Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645, 650 (1986).

can create many problems. Importantly, it disrupts normal business⁹⁵ and prevents auditors and attorneys for publicly held corporations from being able to assess the impact of possible litigation.⁹⁶

Consequently, neither buyers nor sellers in securities transactions can proceed efficiently if they are unsure as to when possible claims will become stale. Thus, the "absorption" approach creates uncertainty in an area of the law that is already complicated and in need of uniformity.

The second disadvantage of the "absorption" approach is that it encourages forum shopping.⁹⁷ Since the circuits are in disagreement, resulting in numerous limitations periods, the plaintiff may find it advantageous to elect not to sue in his resident state and instead bring suit in another available jurisdiction in which the suit would not be time-barred.⁹⁸ The detrimental effect of forum shopping is apparent. Even though a defendant is safe under the applicable statute of limitations applied in his state or the state in which the transaction occurred, he may still be subject to suit in other jurisdictions with longer periods.⁹⁹ Thus, the point at which the defendant's potential liability exposure will cease is unclear.

In conclusion, the "absorption" approach has the important advantage of having a large amount of supporting case law. However, this attribute is greatly, if not completely, diminished by the fact that the approach results in the application of federal securities laws which leads to incongruous results in the various jurisdictions. Surely this is not a result that was foreseen by the drafters of the 1933 and 1934 Acts.

III. THIRD CIRCUIT APPROACH

A. *In re Data Access Securities Litigation*

1. *Recognition of Uncertainty Surrounding This Issue.*—The newest approach to the statute of limitations problem for Rule 10b-5 and section 10(b) actions was set forth by the recent Third Circuit decision

95. *Norris v. Wirtz*, 818 F.2d at 1329, 1332 (7th Cir. 1987).

96. *See supra* note 94, at 647.

97. *Id.*

98. *See* Block & Barton, *Statute of Limitations in Private Actions Under Section 10(b) - A Proposal for Achieving Uniformity*, 7 SEC. REG. L.J. 374, 378 (1980).

99. *Feldman v. Pioneer Petroleum, Inc.*, 606 F. Supp. 916, 921 (W.D. Okla. 1985), *aff'd*, 813 F.2d 296 (10th Cir.), *cert. denied*, 484 U.S. 954 (1987) (court discussing the uncertainty surrounding the choice of the proper limitations period when there are multiple plaintiffs).

of *In re Data Access Securities Litigation*.¹⁰⁰ The district court determined that the limitations period to be applied was the New Jersey common law fraud statute.¹⁰¹ However, the defendants contended that the shorter statute of limitations under New Jersey's blue sky laws should have been applied.¹⁰² Thereafter, the defendants successfully moved for certification¹⁰³ of the district court's determination, and the Third Circuit granted a petition for review to resolve the issue.

From the beginning of the court's analysis, it recognized that the Supreme Court had failed to formally address the issue of what the proper statute of limitations should be on a section 10(b) or Rule 10b-5 action.¹⁰⁴ Furthermore, the court emphasized the fact that since the issue had not been affirmatively decided by the Supreme Court, the problem had caused great uncertainty throughout the circuits. The court quoted extensively from Judge Easterbrook's opinion in *Norris v. Wirtz*¹⁰⁵ as follows: "The absence of a uniform limitations period in such actions . . . [is] one tottering parapet of a ramshackle edifice. Deciding what features of state periods of limitation to adopt for which federal statutes wastes untold hours."¹⁰⁶ The *Norris* court continued by stating:

Never has the process been more enervating than in securities law. There are many potentially analogous statutes, with variations for different kinds of securities offenses and different circumstances that might toll the period of limitations. Both the bar and scholars have found the subject vexing and have pleaded, with a unanimity rare in the law for help [Finally,] the courts of appeals disagree on every possible question about limitations periods in securities cases. Only Congress or the Supreme Court can bring uniformity and predictability to this field.¹⁰⁷

100. 843 F.2d 1537 (3d Cir.), *cert. denied sub nom. Vitiello v. Kahlowsky and Co.*, 109 S. Ct. 131 (1988).

101. *See* N.J. STAT. ANN. § 2A:14-1 (West 1987). This provides for a six-year limitations period.

102. *See* N.J. STAT. ANN. § 49:3-71 (West 1989). This provides for a two-year limitations period.

103. *See* 28 U.S.C. § 1292(b) (1988).

104. *Data Access*, 843 F.2d at 1539 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976)). The Supreme Court recognized the absorption doctrine but failed to establish any definitive rule.

105. 818 F.2d 1329 (7th Cir. 1987).

106. *Data Access*, 843 F.2d at 1539 (quoting *Norris*, 818 F.2d at 1332).

107. *Id.* at 1540.

The *Data Access* court next reviewed its previous rulings on this issue, *Biggans v. Bache Halsey Stuart Shields, Inc.*¹⁰⁸ and *Roberts v. Magnetic Metals Co.*¹⁰⁹

2. *Previous Third Circuit Decisions.*—In *Biggans* and *Roberts*, the court concluded that the most closely analogous state statute is the common law fraud statute.¹¹⁰ However, the majority in *Roberts* alluded to foreseeable change, and stated that “[m]uch can be said . . . for a different rule in a different context directing a federal court to statutes of limitations governing analogous federal causes of action.”¹¹¹ Nonetheless, the court recognized that the rule established to use a state statute of limitations when a federal statute is absent was firmly established, and it would be improper for the court to change this rule.¹¹² Also, the dissent in *Roberts* stated, with reference to the suggested use of the most analogous federal action, “Were I writing on a clean slate, I would be inclined to adopt that approach.”¹¹³ After the court had set forth the strong interest in establishing a uniform statute, discussed the vast uncertainty that existed in the present state of the law, and reviewed its previous rulings, the court went on to analyze several recent analogous Supreme Court cases which were decided after the Third Circuit’s most recent decisions on the issue.¹¹⁴

3. *DelCostello v. International Brotherhood of Teamsters.*—The first case cited by *Data Access* was *DelCostello v. International Brotherhood of Teamsters*.¹¹⁵ In *DelCostello*, the Supreme Court decided what statute of limitations would apply where an employee sues an employer alleging the employer’s breach of a collective bargaining agreement and the union’s breach of its duty of fair representation by mishandling the ensuing grievances or arbitration proceedings.¹¹⁶ As the starting point for its analysis, the Court recognized the generally

108. 638 F.2d 605 (3d Cir. 1980).

109. 611 F.2d 450 (3d Cir. 1979).

110. See *id.* at 453. The *Roberts* court concluded that since the blue sky law in question only provided a cause of action for buyers, and a seller had brought the present action, the court would utilize the limitations period of the state that would allow the seller to bring such an action. This was the common law fraud statute.

111. 611 F.2d at 454.

112. *Id.*

113. *Id.* at 463.

114. See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987) (Court was presented with the question of what statute of limitations would apply to RICO claims, and held that the four-year Clayton Act limitation period would apply); *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151 (1983) (Court had to determine what the proper limitations period should be for an action brought by employees under the Labor Management Relations Act).

115. 462 U.S. 151 (1983).

116. *Id.* at 154.

accepted position that Congress intended that the courts apply the most analogous state law when a federal limitation period is lacking.¹¹⁷ However, the Court made note of an exception. The Court stated that "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law,"¹¹⁸ and "it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law."¹¹⁹

In *DelCostello*, the Court emphasized the importance of promoting federal policies:

The Court has not mechanically applied a state statute of limitations simply because a limitation period is absent from the federal statute. State legislatures do not devise these limitations periods with national interests in mind, and it is the duty of federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.¹²⁰

Instead, the Court posited that automatic application of a state period is not an absolute rule.¹²¹ Finally, the Court concluded that when a case involves those processes that federal labor law is designed to promote, then national uniformity in the law will be of more importance than if those processes were not in question.¹²²

4. *Agency Holding Corp. v. Malley-Duff & Associates*.—The *Data Access* court also placed reliance upon *Agency Holding Corp. v. Malley-Duff & Associates*.¹²³ There the Court was presented with the issue of what limitations period should be applied to civil RICO violations.¹²⁴ After recognizing that the majority in *DelCostello* rejected the single path approach of always applying a state limitations period,¹²⁵ the Court set forth a test to be applied when a federal limitations period is lacking. The first element of the test was whether the claims arising out of the federal statute "should be characterized, [for limitations purposes], in

117. *Id.* at 158.

118. *Id.* at 161.

119. *Id.*

120. *Id.* (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977) (quoting *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 465 (1975))).

121. *DelCostello*, 462 U.S. at 161.

122. *Id.* at 162-63. The Court here restated the rationale set forth in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

123. 483 U.S. 143 (1987).

124. *Id.* at 146. The action was brought alleging violation of federal antitrust laws and a state law claim for tortious interference with contract.

125. *Id.*

the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories in each case.”¹²⁶ The purpose of the first element is to determine if each claim brought under the federal act should be judged independently on its facts to determine which limitations period should be applied, or whether all actions brought under the specific act be governed by one limitations period.

The second element of this test is whether a federal or state limitations period should be used. As recognized in *DelCostello*, application of a state limitations period is generally appropriate¹²⁷ unless “a timeliness rule drawn from elsewhere in federal law should be applied.”¹²⁸ This required the court to inquire whether the particular case fell into one of those limited circumstances where the state statute is an “unsatisfactory vehicle for the enforcement of federal law,”¹²⁹ and if so, a federal period should be applied. When passing on the second element of the test, the Court stated:

[W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law-making, we have not hesitated to turn away from state law.¹³⁰

Additionally, the Court stressed that uncertainty can lead to problems whereby: “Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.”¹³¹

The application of this test led the Supreme Court to adopt the statute of limitations found in the Clayton Act for application in civil RICO actions.¹³² A final consideration of the Court was the nature of

126. *Id.* at 147 (citing *Wilson v. Garcia*, 471 U.S. 261, 268 (1985)).

127. This can be attributed to the Rules of Decision Act. See 28 U.S.C. § 1652 (1988). This act generally requires application of state law in a federal action where federal law does not “otherwise require or provide.” *DelCostello*, 462 U.S. at 159 n.13. However, the *DelCostello* Court stated that “neither *Erie* [*R.R. v. Tompkins*, 304 U.S. 64 (1938)] or the Rules of Decision Act can now be taken as establishing a *mandatory* rule that we apply state law in federal interstices.” *Id.* at 161 n.13 (emphasis in original).

128. *Malley-Duff*, 483 U.S. at 147 (citing *DelCostello*, 462 U.S. at 159 n.13).

129. *Id.*

130. *Id.* at 148 (citing *DelCostello*, 462 U.S. at 171-72).

131. *Id.* at 150 (citing *Wilson v. Garcia*, 471 U.S. 261, 275 n.34 (1985)).

132. 15 U.S.C. § 15b (1988). This section provides for a four-year statute of limitations.

the RICO statute and the various claims brought under it;¹³³ “a uniform statute of limitations is required to avoid intolerable ‘uncertainty and time consuming litigation.’”¹³⁴

5. *Application of the Supreme Court's Rationale.*—The *Data Access* court placed great reliance on the rationale in *Malley-Duff*.¹³⁵ The *Data Access* court stated that “although it has been suggested that federal courts should apply the state statute of limitations most analogous to each individual case, whenever a federal statute is silent on the proper limitations period . . . a clear majority of the court [in *DelCostello*] rejected such a single path.”¹³⁶ Next, the *Data Access* court reviewed the procedure set forth in *Malley-Duff* for determining the appropriate statute of limitations for a federal claim that is without an express limitations period. First, the court must determine whether all claims arising out of the federal statute should be characterized in the same way or should be evaluated differently depending on the various factual circumstances.¹³⁷ The claims being evaluated presently are those private civil actions brought under section 10(b) and Rule 10b-5. Second, the court must conclude whether a state or federal statute of limitations should be used.¹³⁸

The court first turned its attention to the issue of the characterization of the claim. It stated that “[a] factual, claim-based approach to characterizing the case for limitations purposes would not promote ‘the federal interests in uniformity, certainty, and the minimization of unnecessary litigation.’”¹³⁹ Thus, the court said that the “case-by-case” approach used in its prior holdings,¹⁴⁰ whereby the court selects the most appropriate statute in each case as opposed to one statute for all cases, would be in conflict with the recent Supreme Court holdings in *DelCostello*, *Wilson*, and *Malley-Duff*. Therefore, the court concluded that it had to

133. *Malley-Duff*, 483 U.S. at 149. The Court noted that “[e]ven RICO claims based on ‘garden variety’ business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relation, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods.” *Id.*

134. *Id.* at 150 (quoting *Wilson*, 471 U.S. at 272).

135. See *supra* notes 123-34 and accompanying text.

136. *Data Access*, 843 F.2d at 1542 (citing *Malley-Duff*, 483 U.S. at 146) (emphasis in original).

137. *Id.* See also *Malley-Duff*, 483 U.S. at 147; *Wilson*, 471 U.S. at 268.

138. *Data Access*, 843 F.2d at 1542.

139. *Id.* at 1543 (quoting *Wilson*, 471 U.S. at 275). The court cited *Wilson* for the proposition that characterizing all claims falling under a single statute in the same manner for limitations purposes would be the best approach for effectuating the federal statute’s remedial purposes. *Id.*

140. See *supra* notes 108-13 and accompanying text.

select the one most appropriate statute of limitations for all civil section 10(b) and Rule 10b-5 claims.¹⁴¹

The second and more important element of the *Malley-Duff* rationale that the *Data Access* court analyzed was what “the *one* most appropriate statute”¹⁴² would be for section 10(b) and Rule 10b-5 actions. The *Data Access* court distinguished section 10(b) and Rule 10b-5 actions from common law fraud actions. First, the Court emphasized that it had “refused to impose in the section 10(b) scheme the traditional common law requirements in state fraud proceedings that plaintiffs establish their case by clear and convincing evidence.”¹⁴³ Further, the court noted that “an important purpose of the federal securities statutes was to rectify the perceived deficiencies in the available common law protections by establishing higher standards of conduct in the securities industry.”¹⁴⁴ Thus, because the Supreme Court differentiated the common law fraud actions and those under either section 10(b) or Rule 10b-5,¹⁴⁵ the *Data Access* court concluded that it should select a statute of limitations from the federal statutes.

6. *Adoption of Federal Express Limitations Period.*—Summarily, the court stated that the “federal schema of limitations expressly set forth in the Securities Exchange Act of 1934 ‘clearly provides a closer analogy than available state statutes,’”¹⁴⁶ and “the federal policies at stake [in section 10(b) and Rule 10b-5 actions] and the practicalities of litigation make [the federal] rule a significantly more appropriate vehicle for interstitial lawmaking.”¹⁴⁷ Thus, after determining that the federal statute provides a better analogy, the court focused upon the various express actions in the 1934 Act which also define corresponding limitations periods.¹⁴⁸

141. *Data Access*, 843 F.2d at 1544.

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

143. *Id.* (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983)).

144. *Id.* (citing *Huddleston*, 459 U.S. at 389).

145. *Huddleston*, 459 U.S. at 389. The Court held that people seeking recovery under section 10(b) would only have to prove their case by a preponderance of the evidence as opposed to the clear and convincing requirement used in civil fraud actions. The purpose of this requirement was to make it easier to prove violations of section 10(b) which, in effect, imposed more stringent standards of conduct in the securities industry.

146. *Data Access*, 843 F.2d at 1545 (quoting *DelCostello*, 462 U.S. at 172).

147. *Id.* (brackets in original).

148. *Id.* at 1545-46. 15 U.S.C. § 77m (1988) states:

No action shall be maintained to enforce any liability created under section 77k or 77l(2) of this title unless brought within *one* year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(1) of this title, unless brought within one year

Aside from one exception,¹⁴⁹ all of the 1934 Act express actions contain the one-year-after-discovery and three-years-after-the-violation limitations periods. The *Data Access* court stated that the "legislative history in 1934 makes it pellucid that Congress included a statute of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims."¹⁵⁰ Moreover, "[i]t was understood that the three-year rule was to be absolute."¹⁵¹ Finally, the court stated:

[T]here is a strong federal interest in requiring [the plaintiff] to file suit quickly. First an early action will alert other shareholders to possible misconduct in the affairs of the corporation. Second, the shorter period permits the company's management to treat a given securities transaction as closed, allowing them to proceed more confidently with running the company.¹⁵²

The court then recognized that all of the companion provisions¹⁵³ to section 10(b) reflect the common purpose of the Securities Act of 1934.¹⁵⁴ Therefore, in adopting the one-year/three-year limitations period, the court concluded that "[i]t is difficult to consider a limitations statute that better reflects the 'federal policies at stake' and the 'practicalities of litigation' in a case based on the Securities Exchange Act of 1934

after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(2) of this title more than three years after the sale.

15 U.S.C. § 78i(e) (1988) states in part:

No action shall be maintained to enforce any liability created under this section, unless brought within *one* year after the discovery of the facts constituting the violation and within *three* years after such violation.

15 U.S.C. § 78r (1988) states:

No action shall be maintained to enforce any liability created under this section unless brought within *one* year after the discovery of the facts constituting the cause of action and within *three* years after such cause of action accrued.

149. See 15 U.S.C. § 78p(b) (1988). Also known as section 16(b) of the 1934 Act, this section sets a two-year statute of limitations for violations related to the profits from purchase and sale of securities within six months.

150. *Data Access*, 843 F.2d at 1546 (citing *Norris*, 818 F.2d 1329, 1332 (7th Cir. 1987)).

151. *Id.*

152. *Id.* (citing *Roberts*, 611 F.2d 450, 463 (Seitz, C.J., dissenting)).

153. See *supra* note 148 and accompanying text.

154. *Data Access*, 843 F.2d at 1548 (stating that the common purpose of the Act was to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent fraud in the state thereof, and for other purposes"). See also *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

than those provisions of the Act that explicitly and expressly state such a period."¹⁵⁵

B. *Analysis of the Third Circuit Approach*

As with the "absorption" approach utilized by the other circuits, the method exemplified by the Third Circuit in *Data Access* was thought to be the best method available for effectuating the policies underlying the federal securities laws.¹⁵⁶ The rationale set forth in the Third Circuit is persuasive and includes several advantages over the "absorption" approach.

The primary advantage is that the federal period is taken from the federal securities laws themselves, not a court-selected analogous state statute.¹⁵⁷ Congress intended that this period, the one-year/three-year period, would apply to those actions expressly created by the 1933 and 1934 Acts. Because Congress adopted a relatively short period for the expressed actions,¹⁵⁸ it can be argued that this time period should be applied to the implied action as well.

Moreover, the Third Circuit approach would completely eliminate any uncertainty among the circuits. Simply stated, the approach of the *Data Access* court requires the application of the express limitations period in the federal securities laws which is the flexible one-year/three-year period.¹⁵⁹ Therefore, it would no longer be important, for limitations purposes, to know where the action would be brought.¹⁶⁰ Along the same lines, the Third Circuit approach would eliminate the likelihood of forum shopping because the limitations period would be uniform. Accordingly, defendants would know exactly when their liability exposure was extinguished (three years after the violation) as opposed to the "absorption" approach which would require them to ascertain all of the potential plaintiffs and those forums in which the plaintiffs may bring a suit to accurately determine when their potential liabilities were eliminated.

When this argument has been suggested before,¹⁶¹ opponents of the Third Circuit approach have proposed that the three-year mandatory limitations period should not apply to Rule 10b-5 and section 10(b)

155. *Data Access*, 843 F.2d at 1549 (emphasis in original).

156. *Id.*

157. *Id.*

158. See *supra* note 148.

159. 843 F.2d at 1550.

160. See *Feldman v. Pioneer Petroleum, Inc.*, 606 F. Supp. 916, 921 (W.D. Okla. 1985), *aff'd*, 813 F.2d 296 (10th Cir. 1979), *cert. denied*, 484 U.S. 954 (1987).

161. See *supra* note 98.

claims because of the scienter requirement under these actions.¹⁶² The opponents emphasize the fact that the express actions set forth in the 1933 and 1934 Acts merely require negligence, and therefore a longer period should apply to the Rule 10b-5 and section 10(b) claims.¹⁶³ However, a flaw in this attack is apparent when one reviews section 9(e) of the 1934 Act. This section is expressly limited to willful violations. Nevertheless, it maintains the same limitations period as the express actions which are judged by a negligence standard.¹⁶⁴ Therefore, it is appropriate to apply this limitations period to the Rule 10b-5 and section 10(b) actions.

A drawback of this approach is that it disregards the long established precedent of the "absorption" doctrine. Although the argument is generally valid, the Supreme Court, as noted in *Data Access*,¹⁶⁵ has begun to recognize that the "absorption" doctrine is not to be applied automatically.¹⁶⁶ The holdings in *Malley-Duff* and *DelCostello* suggest that courts have grounds to inquire into whether there is an expressed federal limitations period that better effectuates the federal policies underlying the implied federal claim as opposed to the most closely analogous state statute under the "absorption" doctrine. Therefore, under the rationale set forth in the Supreme Court holdings, *Data Access* should survive an attack which purports that this approach is in defiance of a long standing line of precedent.

The approach exhibited by the Third Circuit has several merits. Promoting federal policies and eliminating uncertainties are important considerations which result from following this approach. Also, although the approach is not recognized in precedent, the existing precedent in the various circuits is wholly inconsistent. Therefore, one could conclude that incongruous precedent leading to completely inconsistent results is of no value because the purpose of precedent is to provide uniformity and consistency throughout the courts. Finally, prior Supreme Court decisions give the newer approach established by the Third Circuit a solid foundation upon which to stand.¹⁶⁷

IV. CONCLUSION

The federal securities laws provide important supervision and regulation of the national securities markets and transactions related therein.

162. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

163. See *Block & Barton*, supra note 98, at 382.

164. *Id.*

165. *Data Access*, 843 F.2d at 1548.

166. See *Malley-Duff*, 483 U.S. at 146.

167. See supra notes 115-34 and accompanying text.

Also, limitations periods serve many useful purposes. Nevertheless, the effectiveness of the securities laws is weakened when there are various limitations periods which are applicable to the same cause of action.

Several approaches have been implemented by the various circuits. These approaches utilize either the common law fraud limitations period of the state, the blue sky limitations period of the state, or the expressed limitations period of the federal securities laws.

The Third Circuit approach is best adapted to resolving the present problem. This conclusion is premised on several facts. First, the federal period completely reduces uncertainty, which is a problem under the "absorption" approach. Second, and more importantly, the Third Circuit approach effectuates federal policies by applying the period originally devised by Congress for similar actions. That period is one-year from the date of discovery and three-years from the actual violation.

Finally, this approach of deferring to express federal limitations periods has been approved by the Supreme Court in several of its recent holdings. Recognition by the Supreme Court that state statutes should not be used automatically provides foundation upon which the newer formulation exemplified by *Data Access* can stand. Therefore, adoption of the federal limitations period set forth for similar actions which are expressly defined in the 1934 Act would be the best limitations period for Rule 10b-5 and section 10(b) actions.

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