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## The Move Toward Uniformity: The Statute of Limitations for Rule 10b-5

### INTRODUCTION

Rule 10b-5<sup>1</sup> is a federal antifraud provision relating to the purchase and sale of securities. Although 10b-5, as written by the Securities and Exchange Commission (SEC), was originally designed to eliminate a loophole in the SEC's own enforcement powers, for more than four decades federal courts have consistently held that it also gives rise to an implied private cause of action. The issue of the appropriate statute of limitations to be applied in private 10b-5 claims has been an abundant source of confusion and dispute. Rule 10b-5 itself, not contemplating private suits, is understandably silent on the subject. Before 1988, it had at least seemed clear that the controlling periods in these limitations controversies were to be determined by state law, and not by some analogous federal provision. The federal courts had become "so accustomed to turning to state periods of limitations that [they] did this on auto-pilot."<sup>2</sup> However, beginning in 1988 with the seminal case of *In re Data Access Systems Securities Litigation*,<sup>3</sup> some of the federal courts of appeal began applying a federal statute of limitations to 10b-5 claims.<sup>4</sup> Thus, there is currently a split among the federal circuits as to whether to apply a state or federal statute of limitations to 10b-5 claims.

The significance of the decision whether to apply a federal or state statute of limitations stems from the fact that the various state statutes of limitations which have been applied to 10b-5 actions range from one year in Maryland to ten years in Tennessee,<sup>5</sup> while the federal statute of limitations applied in *Data Access* was one year from discovery, but not longer than three years from the violation.<sup>6</sup> Thus, the resort to a federal rather than state statute of limitations can serve to eliminate a

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1. 17 C.F.R. § 240.10b-5 (1990) [hereinafter 10b-5].

2. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1387 (7th Cir.), petition for cert. filed, No. 90-526 (Sept. 26, 1990).

3. 843 F.2d 1537 (3d Cir.), cert. denied, 488 U.S. 849, 109 S. Ct. 131 (1988).

4. Currently, the Second, Third, and Seventh Circuits apply a federal statute of limitations while the remainder of the federal circuits apply a state statute of limitations.

5. Committee on Federal Regulation of Securities, Report of the Task Force on Statute of Limitations for Implied Actions, 41 Bus. Law 645, 648 (1986) [hereinafter Report].

6. 843 F.2d at 1550.

claim that would have been otherwise viable in some states, while in other states it can resuscitate a claim that would have expired under the otherwise applicable statute of limitations. Because of the uncertainty as to the proper statute of limitations, the time has come for the question to be definitively answered: what is the appropriate source of the statute of limitations to be applied to 10b-5 claims? The United States Supreme Court has recognized this need, and has recently granted certiorari in a 10b-5 statute of limitations case, *Reitz v. Leasing Consultants Associates*.<sup>7</sup>

The purpose of this comment is to determine whether a state or federal statute of limitations is the appropriate period to apply to 10b-5 litigation. This comment will examine the statutory and jurisprudential history of 10b-5, relevant federal statutes and United States Supreme Court cases, and the writings of numerous securities commentators. This comment suggests that a federal statute of limitations is the appropriate period to be applied to litigation under 10b-5. However, because there is currently no firm basis for the Courts of Appeals to apply such a federal statute of limitations, the United States Supreme Court, in lieu of legislative action, must announce a new standard which permits federal courts to borrow the statute of limitations set forth in section 13 of the 1933 Securities Act for application to 10b-5 claims.<sup>8</sup>

### *History and Development*

Rule 10b-5<sup>9</sup> was written in 1942 by the SEC under the authority of Congress granted by section 10(b) of the Securities Exchange Act of 1934.<sup>10</sup> The text of 10b-5 does not provide for an express, private cause

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7. 895 F.2d 1418 (table) (9th Cir. 1990), cert. granted, 111 S. Ct. 242 (1990).

8. This Act provides:

#### Limitations of Actions

No action shall be maintained to enforce any liability created under section 11 or section 12(2) 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 12(1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12(1) more than three years after the security was bona fide offered to the public, or under section 12(2) more than three years after the sale.

15 U.S.C. § 77m (1988).

9. 17 C.F.R. § 240.10b-5 (1990). For the interesting story of how Rule 10b-5 was formulated, see L. Loss, *Fundamentals of Securities Regulation* at 726-27 (2d ed. 1988).

10. 15 U.S.C. § 78j(b) (1988).

of action, as it was originally intended to serve as a means for SEC regulation of fraud with regard to securities.<sup>11</sup> Rule 10b-5 provides:

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 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.

However, beginning in 1946 with *Kardon v. National Gypsum Co.*,<sup>12</sup> courts have consistently recognized an implied private cause of action inherent in 10b-5. Although "Congress cannot be faulted for not providing a statute of limitations, because the . . . private cause of action . . . is a genie sired solely by the judiciary,"<sup>13</sup> the absence of a statute of limitations expressly applicable to 10b-5 private causes of action has been the source of a great deal of uncertainty.<sup>14</sup>

Prior to 1988, the issue of whether to apply a state or federal statute of limitations to the implied, private cause of action under Rule 10b-5 was well settled in the federal courts. The federal circuits unanimously applied state statutes of limitations to Rule 10b-5 claims, adhering to the principle, derived from the Rules of Decision Act,<sup>15</sup> that when federal law is deficient, state law should be consulted in order to fill the gap.<sup>16</sup>

The first issue raised by the resort to state law is which state's law ought to apply. This matter was resolved by applying the law of the

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11. L. Loss, *supra* note 9, at 727. "The Commission got what it wanted: a handle for investigating and obtaining injunctive relief against insiders who are buying their companies' stock. The writer can vouch that nobody at the Commission table gave any indication that he was remotely thinking of civil liability."

12. 69 F. Supp. 512, 513-14 (E.D. Pa. 1946).

13. *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1547 (3d Cir.), cert. denied, 488 U.S. 849, 109 S. Ct. 131 (1988).

14. L. Loss, *supra* note 9, at 997. With regard to statutes of limitations, of all the implied civil liabilities in securities law, "Rule 10b-5 has been by far the most prolific breeder of litigation."

15. 28 U.S.C. § 1652 (1948).

16. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1387 (7th Cir.), petition for cert. filed, No. 90-526 (Sept. 26, 1990). See also *M'Cluney v. Silliman*, 28 U.S. (3 Pet.) 270 (1830).

forum state to the claim.<sup>17</sup> Although it became settled among the federal jurisdictions that resort was to be made to the forum state's law for the statute of limitations for 10b-5, it was not clear which state statute should be applied. The alternatives considered by courts have included the statute of limitations for state blue sky laws<sup>18</sup> and common law fraud.<sup>19</sup> In order to make the determination, the courts have utilized a resemblance test, choosing the period of limitations for state actions that most closely resembles the substantive elements of 10b-5.<sup>20</sup> The results of the resemblance test have been inconsistent, with some courts applying one of the state's blue sky laws<sup>21</sup> and others applying the state's action based on fraud.<sup>22</sup>

### *Formulation of a New Theory*

The well settled rule among the federal courts prior to 1988 was that the applicable statute of limitations for a cause of action arising under 10b-5 was to be borrowed from state law. Criticism of the borrowing rule has come not only from the courts, but also from scholars and the bar.<sup>23</sup>

In *Norris v. Wirtz*,<sup>24</sup> for example, the Seventh Circuit voiced its displeasure with the borrowing of state periods. Judge Easterbrook, writing for the majority, termed the absence of a uniform statute of limitations under 10b-5 "one tottering parapet of a ramshackle edifice."<sup>25</sup> Judge Easterbrook opined that the courts ought to have been using an analogy with other federally created causes of action which have three year statutes of limitations:

Congress has not been silent about limitations for securities law in general, the usual problem that leads federal courts to turn to state law; it has been silent only with respect to rights of action it did not create. Whenever it created a federal right to

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17. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 211 n.29, 96 S. Ct. 1375, 1389 n.29 (1976).

18. *Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000 (7th Cir. 1984); *Kennedy v. Tallant*, 710 F.2d 711 (11th Cir. 1983); *Landry v. All Am. Assurance Co.*, 688 F.2d 381 (5th Cir. 1982).

19. *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434 (9th Cir. 1984); *Armstrong v. McAlpin*, 699 F.2d 79 (2d Cir. 1983).

20. *Martin, Statutes of Limitation in 10b-5 Actions: Which State Statute is Applicable?*, 29 *Bus. Law.* 443, 454 (1974).

21. See cases cited supra note 16.

22. See cases cited supra note 17.

23. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1389 (7th Cir.), petition for cert. filed, No. 90-526 (Sept. 26, 1990).

24. 818 F.2d 1329 (7th Cir.), cert. denied, 484 U.S. 943, 108 S. Ct. 329 (1987).

25. *Id.* at 1332.

sue, it also created a statute of repose no longer than three years. *That is what the courts should have used.*<sup>26</sup>

In spite of this belief, the court ultimately held that "it is too late for an inferior court to turn back the clock,"<sup>27</sup> and therefore reluctantly adhered to the doctrine of stare decisis by applying the borrowed state period.<sup>28</sup>

In 1986, the Committee on Federal Regulation of Securities issued the "Report of the Task Force on Statute of Limitations for Implied Actions."<sup>29</sup> The committee found that the inconsistent federal court decisions which necessarily result from the resort to state law for the statute of limitations for 10b-5 have promoted forum shopping, have reduced judicial efficiency, and have reduced predictability, all without advancing any countervailing public policy.<sup>30</sup> Thus, the committee concluded that the borrowing doctrine should be abandoned in favor of a rule requiring the application of a federal statute of limitations to federal causes of action lacking express periods of limitation.<sup>31</sup>

In 1988, the Third Circuit, sitting en banc, decided the time had come to reconsider whether to apply a state or federal statute of limitations to 10b-5 litigation. The court held that in light of several recent pronouncements by the United States Supreme Court in which the Court "directed us to apply the most analogous federal statute of limitations to certain federal causes of action,"<sup>32</sup> it was no longer clear that the lower courts were bound to borrow state law statutes of limitations. Relying on *Agency Holding v. Malley-Duff & Assoc.*,<sup>33</sup> the latest in a trilogy of Supreme Court cases on the subject of borrowed limitations periods,<sup>34</sup> the Third Circuit formulated a new test for determining whether to apply a state or federal statute of limitations to 10b-5 claims.

The Supreme Court had held in *Malley-Duff* that a federal statute of limitations should be applied to a federal Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>35</sup> claim. RICO, as is the case with

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26. *Id.* at 1333 (emphasis added).

27. *Id.*

28. It should be noted that three years later the Seventh Circuit overruled *Norris* in *Short*. The analysis used in *Norris* was helpful to the *Short* decision, as was the fact that the Third Circuit had previously broken ranks.

29. 41 *Bus. Law.* 645 (1986).

30. *Id.*

31. *Id.*

32. *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1540 (3d Cir.), cert. denied, 488 U.S. 849, 109 S. Ct. 131 (1988).

33. 483 U.S. 143, 107 S. Ct. 2759 (1987).

34. *Agency Holding v. Malley-Duff & Assoc.*, 483 U.S. 143, 107 S. Ct. 2759 (1987); *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281 (1983).

35. RICO, 18 U.S.C. § 1964 (1988).

10b-5, creates a federal cause of action but does not contain an express statute of limitations. In determining from which source to draw the statute of limitations for RICO claims, the Court drew from a test it had formulated in *DelCostello v. International Brotherhood of Teamsters*<sup>36</sup> and followed in *Wilson v. Garcia*:<sup>37</sup>

when 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.<sup>38</sup>

Thus, in order to apply a federal statute of limitations, two requirements must be fulfilled: 1) the federal statute must provide a clearly closer analogy, and 2) the policies and practicalities of litigation must favor application of the federal statute.

In *Malley-Duff*, the Court determined that the Clayton Act was more closely analogous to RICO than a state statute limiting fraud or a state "catchall" statute of limitations based on the textual similarities between the two federal acts, the legislative history of RICO which revealed that RICO was patterned after the Clayton Act, and the fact that there was no single state law which was comparable to RICO.<sup>39</sup>

Under the second element of the *DelCostello* test, the Court found that the multistate nature of RICO made a federal statute of limitations desirable. The application of state statutes of limitations to a cause of action which necessarily involves multiple states would open the door to undesirable forum shopping and would require complex and expensive litigation.<sup>40</sup> The application of a federal statute of limitations allows courts to avoid issues such as conflicts of laws and which state statute of limitations to apply.

Thus, the *Malley-Duff* court concluded that because "the Clayton Act clearly provides a far closer analogy than any available state statute, and . . . the federal policies that lie behind RICO and the practicalities of RICO litigation make the selection of the . . . statute of limitations for Clayton Act actions . . . the most appropriate limitations period for RICO actions," it is appropriate to borrow this federal statute of limitations for application to a federal RICO claim.<sup>41</sup>

The *Data Access* court found that the trilogy of Supreme Court cases, *Malley-Duff*, *DelCostello*, and *Wilson v. Garcia*, were sending a

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36. 462 U.S. 151, 103 S. Ct. 2281 (1983).

37. 471 U.S. 261, 105 S. Ct. 1938 (1985).

38. 483 U.S. at 148, 107 S. Ct. at 2763.

39. *Id.* at 150-54, 107 S. Ct. 2759, 2764-66.

40. *Id.* at 154, 107 S. Ct. at 2766.

41. *Id.* at 156, 107 S. Ct. at 2767.

“strong signal” that the Supreme Court favored uniform federal statutes of limitations for federal causes of action. Judge Aldisert, writing for the majority of the en banc panel in *Data Access*, stated that the “Supreme Court opened the door to borrowing relevant federal limitations statutes”<sup>42</sup> in cases such as *DelCostello*, *Wilson*, and *Malley-Duff*. Therefore, the *Data Access* court felt compelled to “return to the test decreed by the Supreme Court: borrow a state statute of limitations period if you can, but ‘when the federal policies at stake and the practicalities of litigation make [a federal] rule a significantly more appropriate vehicle for interstitial lawmaking’ . . . borrow the federal statute.”<sup>43</sup>

Applying this test to the facts of the *Data Access* case, the court found that this was just the kind of case where a federal statute provides a closer analogy than any available state statute.<sup>44</sup> Because there are other federal securities statutes which are aimed at the objectives of section 10(b) and Rule 10b-5, and since they all compensate the same type of injury, the court found that these federal securities statutes clearly provide a closer analogy to 10b-5 than the state blue sky laws or state common law fraud statutes. The state blue sky laws were not found to be more closely analogous because of their widely varying statutes of limitations as well as their disparate statutory coverage.<sup>45</sup> Similarly, the common law fraud statutes were found to be inapposite because of their lack of uniformity.<sup>46</sup> The court went on to hold that from a policy and practicality standpoint, it is preferable to draw from the Securities Act provisions that grant an express cause of action, because the “reference to state law makes for a great amount of utterly wasteful litigation.”<sup>47</sup> Therefore, the *Data Access* court held that the proper period of limitations for a 10b-5 claim is one year from the plaintiff’s discovery of the facts constituting the violation, but in no case more than three years after the alleged violation.<sup>48</sup>

The Seventh Circuit has also applied a federal statute of limitations to 10b-5 litigation. In *Short v. Belleville Shoe Manufacturing Co.*,<sup>49</sup> the court began by distinguishing federal securities statutes from other federal statutes in an effort to demonstrate that the general rule that requires borrowing of state limitations periods is not necessarily applicable to

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42. In re *Data Access Systems Securities Litigation*, 843 F.2d 1537, 1549 (3d Cir.), cert. denied, 488 U.S. 849, 109 S. Ct. 131 (1988).

43. Id. at 1548.

44. Id. at 1550.

45. Id. at 1549.

46. Id.

47. Id. at 1550.

48. Id.

49. 908 F.2d 1385 (7th Cir.), petition for cert. filed, No. 90-526 (Sept. 26, 1990).



securities law. Federal securities law was distinguished on three grounds. First was the fact that 10b-5 does not contain an express private cause of action. Since the cause of action was judicially, rather than legislatively, created,<sup>50</sup> "[f]ederal courts have an obligation to create stable periods of limitations."<sup>51</sup>

The second ground for distinguishing federal securities law is that Congress did in fact provide an express period of limitations for each securities cause of action which it expressly created. Congress intended and desired, therefore, to have its federal securities remedies regulated by a federal statute of limitations.<sup>52</sup>

The third distinguishing factor was that the securities statutes require transactions in interstate commerce, which necessarily implicates time consuming conflict-of-laws analysis. If resort is to be made to state statutes of limitations, the task becomes determining which state's limitations period to use.<sup>53</sup>

The court then observed that under the authority of *DelCostello* and *Malley-Duff*, the federal courts of appeals were no longer necessarily required to apply a state statute of limitations to 10b-5.<sup>54</sup> Applying the *DelCostello* two-prong test,<sup>55</sup> the court found that a federal statute, section twelve of the 1933 Securities Act,<sup>56</sup> was clearly more closely analogous to 10b-5 than any available state statute. The court also found that the statute of limitations applicable to section twelve, located in section thirteen of the 1933 Securities Act,<sup>57</sup> better served the policies and practicalities of litigation under 10b-5. These findings were based, in part, on the court's analysis in *Norris v. Wirtz*,<sup>58</sup> in which the court found that section 13 of the 1933 Securities Act provided the most appropriate statute of limitations for 10b-5, but refused to apply the section 13 statute of limitations because at the time federal courts lacked the authority to do so.<sup>59</sup>

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50. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 513-14 (E.D. Pa. 1946).

51. 908 F.2d at 1387.

52. *Id.* at 1387-88.

53. *Id.* at 1388.

54. *Id.*

55. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 171-72, 103 S. Ct. 2281, 2294 (1983).

56. 15 U.S.C. § 771 (1988).

57. 15 U.S.C. § 77m (1988). Not coincidentally, this is the same federal statute of limitations applied by the *Data Access* court. The *Short* court was influenced by the fact that selecting a federal statute of limitations other than section 13 of the Securities Act of 1933 would result in a fresh conflict among the circuits. 908 F.2d 1385, 1390 (7th Cir. 1990).

58. 818 F.2d 1329, 1332-33, cert. denied, 484 U.S. 943, 108 S. Ct. 329 (1987).

59. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1389 (7th Cir.), petition for cert. filed, No. 90-526 (Sept. 26, 1990). Relying on the *Norris* analysis that section 13 should apply.

The Second Circuit became the third federal jurisdiction to apply a federal statute of limitations to a 10b-5 claim in *Ceres Partners v. GEL Associates*.<sup>60</sup> In light of the fact that the Second Circuit has jurisdiction within the state of New York, the securities center, this case is of major significance. The *Ceres* court was persuaded by the logic of *Data Access* and *Short*. Judge Kearse, writing for the court, concluded that “[g]iven Congress’s enactment of national rules against securities fraud in the belief that national law ought to govern such multi-state transactions, the subjection of claims under those laws to a multiplicity of state-law statutes of limitations is inconsistent with the congressional purpose.”<sup>61</sup> Applying the *DelCostello* test, the court found that state statutes are inappropriate and that the policies and practicalities of litigation favor the application of a single statute of limitations.<sup>62</sup>

#### CONTROVERSY AMONG THE CIRCUITS

Although the Third Circuit has consistently followed its decision in *Data Access*<sup>63</sup> and the Second and Seventh Circuits recently adopted the same approach in *Ceres* and *Short*, respectively, the remainder of the circuits have not yet had the opportunity or have declined to follow the path toward a uniform federal statute of limitations for 10b-5 claims.

The Tenth Circuit, in *Bath v. Bushkin, Gaims, Gaines and Jonas*,<sup>64</sup> for example, recently reversed a federal district court’s application of the *Data Access* holding. The District Court had used the *Data Access* reasoning to find that the plaintiff’s cause of action under 10b-5 was time-barred.<sup>65</sup> However, the Court of Appeals concluded that “[w]hile we recognize the simplicity of having a single limitations period for all section 10(b) and Rule 10b-5 claims, the rule in this circuit is that such suits are subject to the appropriate limitations statute of the state in which the alleged violation occurred,”<sup>66</sup> stating that “we are unaware of any circuit court cases electing to follow *Data Access*.”<sup>67</sup>

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60. 918 F.2d 349 (2d Cir. 1990).

61. *Id.* at 359.

62. *Id.*

63. *Gatto v. Meridian Medical Assoc., Inc.*, 882 F.2d 840 (3d Cir. 1989), cert. denied, 110 S. Ct. 1136 (1990); *Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153 (3d Cir.), cert. denied, 110 S. Ct. 542 (1989); *Hill v. Equitable Trust Co.*, 851 F.2d 691 (3d Cir. 1988).

64. 913 F.2d 817 (10th Cir. 1990).

65. *Id.* at 818-19.

66. *Id.*

67. *Id.* Although the court was unaware, the Seventh Circuit in *Short* had previously elected to follow *Data Access*. *Short* was decided on July 30, 1990 while *Bath* was not decided until August 30, 1990.

Both the Ninth and Eleventh Circuits have similarly declined to take the *Data Access* approach. In *Nesbit v. McNeil*<sup>68</sup> and *Smith v. Duff and Phelps, Inc.*,<sup>69</sup> the Ninth and Eleventh Circuits, respectively, held that they were bound to follow their own prior panel decisions which used state limitations periods. The Ninth Circuit signaled its apparent willingness to adhere to its prior holdings by rejecting a request for an en banc review of its prior decisions which applied state statutes of limitations.<sup>70</sup>

The strikingly perverse result of the currently existing split among the circuits is to drastically reduce the intended benefits of *Data Access* and its progeny. The *Data Access*, *Short*, and *Ceres* holdings can be circumvented by a plaintiff when his 10b-5 claim involves a party or transaction not connected with the Second, Third, or Seventh Circuits. A plaintiff with a claim that is stale under the 1933 Act and which might be properly brought in the Second, Third, or Seventh Circuit can easily bring the claim elsewhere because of the venue provisions of the Exchange Act itself. Under those provisions, an action may be brought in any jurisdiction in which the defendant resides, is located, or conducts business. Therefore, until the application of a federal statute of limitations to 10b-5 claims becomes the rule in a substantial number of circuits, *Data Access*, *Short*, and *Ceres* only serve to increase forum shopping, uncertainty, and litigation, because plaintiffs will have still another option with regard to the statute of limitations for 10b-5.

### *Analysis*

One way or another, the split which currently exists among the federal circuits regarding the source upon which to draw for the appropriate statute of limitations for 10b-5 must be resolved. As the situation currently stands, several of the circuits apply the statute of limitations for a state blue sky statute,<sup>71</sup> others use the limitations period applicable to a common law fraud action,<sup>72</sup> while still others apply the statute of limitations prescribed in section 13 of the 1933 Securities Act.<sup>73</sup> At the same time, the Securities and Exchange Commission has

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68. 896 F.2d 380 (9th Cir. 1990).

69. 891 F.2d 1567 (11th Cir. 1990).

70. 896 F.2d at 384.

71. *Ceres Partners v. GEL Assoc.*, 918 F.2d 349, 354 (2d Cir. 1990) (citing cases applying these statutes of limitations).

72. *Id.*

73. See, e.g., *Ceres Partners v. GEL Assoc.*, 918 F.2d 349 (2d Cir. 1990); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir.), petition for cert. filed, No. 90-526 (Sept. 26, 1990); *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.), cert. denied, 488 U.S. 849, 109 S. Ct. 131 (1988).

advocated the use of the statute of limitations set forth in section 20A of the 1934 Securities Exchange Act.<sup>74</sup>

*Arguments For and Against Uniform Federal Statute of Limitation*

The borrowing of state statutes of limitations for 10b-5 litigation has been the source of a great deal of scholarly criticism. "With a unanimity unmatched in any other corner of securities law, everyone wants a simpler way—and to everyone that means a uniform federal statute of limitations."<sup>75</sup> Professor Thomas Hazen has stated that the "weight of scholarly authority favors the application of a federal limitations period in order to promote uniformity."<sup>76</sup> Professor Loss posed the following question in his examination of the 10b-5 statute of limitations issue: "with the 1933 and 1934 Acts so closely related [to 10b-5], why not look to *their* statutes of limitations by way of analogy rather than to a variant state law?"<sup>77</sup> Professor Loss concluded that it would be "eminently more consistent with the overall statutory scheme to look to what Congress itself did when it was thinking specifically of private actions in securities cases rather than to a grab-bag of more or less analogous" state provisions.<sup>78</sup>

Perhaps the strongest argument in favor of adopting a uniform federal statute of limitations is that doing so would be logically consistent with the overall federal scheme of the 1933 and 1934 Acts. Reading the two in *pari materia*, as they were intended to be read,<sup>79</sup> it is clear that the legislative intent was to require that all actions based on fraud arising under the Securities Acts be brought within one year from discovery of the violation and with an outside limit of three years from the violation or date of sale.<sup>80</sup> This legislative intent is frustrated by the application of state statutes of limitations to 10b-5 claims because the available state periods range from one to ten years.<sup>81</sup>

Professor Bloomenthal has noted that "[i]t is self-evident that Congress in adopting the Exchange Act did not intend that private remedies should depend upon the forum in which a private action is initiated,

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74. *Ceres Partners*, 918 F.2d at 352.

75. *Short*, 908 F.2d at 1389.

76. T. Hazen, *Treatise on the Law of Securities Regulation*, § 13.8, at 127-28 (2d ed. 1990).

77. L. Loss, *supra* note 9, at 995.

78. *Id.*

79. Martin, *supra* note 20, at 454.

80. H. Bloomenthal, *Securities Law Handbook* § 25.02(7), at 797 (1989-90 ed.). Note that section 16(b), 15 U.S.C. § 78p(b), is an exception, as it has a maximum period of two rather than three years, but this section applies only to insider trading.

81. Report, *supra* note 5, at 645.

but opted for a *national uniform system of regulation*.<sup>82</sup> The application of state statutes of limitations to 10b-5 claims clearly precludes this legislative decision from being carried out.

Not only did Congress desire a uniform system implicating a uniform rule for limitation of actions, it also specifically intended to apply a limitations period that is relatively short. The Securities Act of 1933<sup>83</sup> gave the purchaser two years from the date of discovery of the fraud, but in no case more than ten years after the sale, in which to bring the claim.<sup>84</sup> When Congress enacted the Securities Exchange Act of 1934<sup>85</sup> it added or amended provisions to allow suit to be brought no later than one year after discovery, and in no case more than three years after the transaction in question.<sup>86</sup> The application of state periods, which in many cases are longer than the period adopted by Congress for express securities causes of action,<sup>87</sup> defeats Congress' attempt to minimize not only the possibility of false claims, but also the adverse effects of lingering liability.

Application of state statutes of limitations to 10b-5 claims results in another undesirable effect: wasteful litigation.<sup>88</sup> Because every jurisdiction has at least two statutes which conceivably could be applied to 10b-5 claims (the state blue sky law or common law fraud statutes), every 10b-5 claim will necessarily involve a determination as to which state statute of limitations is applicable.<sup>89</sup> Additionally, because every 10b-5 claim necessarily involves interstate transactions, courts must apply conflict-of-laws principles in order to determine which state's statute should be used. The borrowing of state periods can lead to absurd results, as evidenced by a hypothetical situation posed by the court in *Ceres*:

if two suits are brought in different states seeking damages for a single act in violation of the federal securities laws, one suit may be barred while the other is not. Indeed, in a single such suit brought in a state whose law requires borrowing of the laws of an out-of-state plaintiff, the claims of some plaintiffs may be time-barred while those of other plaintiffs are not.<sup>90</sup>

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82. H. Bloomenthal, *supra* note 80, at 796 (emphasis added).

83. 15 U.S.C. §§ 77a-bbbb (1988).

84. *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), cert. denied, 484 U.S. 943, 108 S. Ct. 329 (1987).

85. 15 U.S.C. §§ 78a-kk (1988).

86. 818 F.2d at 1332.

87. Michigan, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, and Vermont all have applicable statutes of limitations which are longer than three years. 41 Bus. Law. 645, appendix B.

88. L. Loss, *supra* note 9, at 994.

89. *Id.*

90. *Ceres Partners v. GEL Assoc.*, 918 F.2d 349, 355 (2d Cir. 1990).

These difficulties can be avoided by simply adopting a uniform federal statute of limitations for 10b-5.

Another undesirable effect of the application of state statutes of limitations to 10b-5 is the lack of predictability which it breeds for defendants who cannot determine their contingent liabilities during the current state of uncertainty.<sup>91</sup> This will serve to increase the amount of litigation, reduce judicial efficiency, and harm businesses and investors.

Finally, state statutes of limitations are inappropriate for 10b-5 claims regardless of how closely analogous the substantive provision is to 10b-5 because none of the state provisions are designed to serve the federal policies which provided the impetus for the creation of 10b-5.<sup>92</sup> State statutes of limitations are designed to serve and promote the policies of that particular state. Federal statutes, however, are created with the intention of serving federal policies, which are often contrary to the policies favored by individual states.<sup>93</sup> For this reason, it makes no sense to apply a state statute of limitations to a federal cause of action, regardless of how closely analogous the substantive provisions are to each other.

There are two significant arguments which militate in favor of application of a state statute of limitations to 10b-5 claims. The first argument is that the courts must show some deference to the forty years of case law holding that state law should supply the statute of limitations for 10b-5. Normally, it would be appropriate to defer to such a long line of precedent in order to maintain predictability in the field. However, in this case, adherence to the rule of application of state statutes of limitations to 10b-5 would have the anomalous effect of reducing, rather than promoting, predictability. The only way to instill predictability with regard to the statute of limitations for 10b-5 would be to adopt a uniform federal statute of limitations.

Another argument in favor of the continued reliance on state law to supply the statute of limitations for 10b-5 is that Congress has taken no action to put an end to the use of state law even when it has amended the Securities Acts for other purposes. Congress' inaction with regard to the statute of limitations could be seen as tacit approval of the practice of the courts.<sup>94</sup>

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91. H. Bloomenthal, *supra* note 80, § 25.02(4), at 785.

92. Martin, *supra* note 20, at 454. "The fact that a state legislature may deem it appropriate to provide a one year or ten year statute of limitations for an action 'resembling' an action implied under section 10(b) tells us nothing about whether the Federal policy of that Section requires a short or long period of limitations."

93. *Id.*

94. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 241, 90 S. Ct. 1583, 1587 (1970). However, this argument is weakened by the pronouncement by the United States Supreme Court that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."

In light of the fact that nearly all of the federal policies tend to favor the application of a uniform federal statute of limitations, courts should not continue to apply state statutes merely because that is the longstanding practice. In the words of Judge Sloviter, "[h]abit and custom are not in themselves satisfactory bases for slavish adherence to a former practice if there is no other basis for support."<sup>95</sup> Rationality and practicality dictate that the longstanding custom should be abandoned in this instance in favor of a uniform federal statute of limitations.

### *Conclusion*

The current state of the law with regard to the statute of limitations for 10b-5 has been termed a "dismal failure."<sup>96</sup> It is clear that a uniform federal statute of limitations would better effectuate the policies which led to the creation of 10b-5. Presently we are caught in a period of limbo. Several circuits have seen the *Malley-Duff* trilogy of Supreme Court decisions as releasing them from earlier state borrowing precedents, which had received virtually unanimous condemnation from commentators in the field. These courts have adopted a uniform federal statute of limitations for 10b-5, while the majority of federal circuits have been unable or unwilling to put an end to the deleterious borrowing of state periods of limitations. Until this issue is settled in favor of a uniform federal period, forum shopping will continue and the congressional policies behind the enactment of uniform federal securities laws will remain unfulfilled.<sup>97</sup> In *DelCostello* and *Malley-Duff* the Supreme Court sent a signal that it favors the use of a uniform federal statute of limitations for certain federal causes of action; however, for several circuits this signal was not strong enough.<sup>98</sup> The Supreme Court, in the absence of legislative action, must expressly hold that resort should be made to federal, rather than state law for the statute of limitations for 10b-5.

*David Reisman*

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95. *Roberts v. Magnetic Metal Co.*, 611 F.2d 450, 457 (3d Cir. 1979) (Sloviter, J., concurring).

96. *Martin*, supra note 20, at 457.

97. The question of which federal statute of limitations to apply pales in significance to the question of whether to apply a uniform federal statute of limitations at all. See supra note 55.

98. The signal was obviously not strong enough, as only three circuits appear to have received it. Also, the test set out by the Supreme Court is not satisfactory for application to 10b-5, as it actually requires a case by case determination of whether there is a more closely analogous state statute or federal statute.