Washington and Lee Law Review

Volume 41 | Issue 3 Article 10

Summer 6-1-1984

The Effect of a Defendant's Affirmative Concealment of his Securities Fraud on Section 10(b) Limitations Periods

THE EFFECT OF A DEFENDANT'S AFFIRMATIVE CONCEALMENT OF HIS SECURITIES FRAUD ON SECTION 10(b) LIMITATIONS PERIODS

Civil statutes of limitations prescribe definite time periods within which parties must present their claims in court to preserve their legal right to enforce those claims.[1] Statutes of limitations promote several policies.[2] Specifically, statutes of limitations protect the judicial system from the burden of stale actions,[3] stimulate potential plaintiffs to litigate viable claims,[4] and provide fairness for potential defendants.[5] Due to the importance of the policy considerations underlying statutes of limitations, federal courts will imply limitations periods to causes of action that do not have an expressly applicable statute of limitations provision.[6] A claim under section 10(b) of the Securities Exchange Act of 1934[7] ('34 Act) is an example of a cause of action that lacks an express statute of limitations.

Section 10(b) of the '34 Act and Securities and Exchange Commission rule 10b-5[8] prohibit fraudulent or deceptive behavior in conjunction with the

---

1. *See* United States v. Kubrick, 444 U.S. 111, 117 (1979) (statutes of limitations represent determination of legislature that specified causes of action become unenforceable after lapse of specified time).

2. *See* Wood v. Carpenter, 101 U.S. 135, 139 (1879) (statutes of limitations exist in all prudent judicial systems and are vital to society's welfare). *See generally*, Marcus, *Toward a More Disparate Standard?*, 71 GEO. L. J. 829, 836-38 (1983) (discussion of policies underlying statutes of limitations in relation to fraudulent concealment doctrine); Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1014-20 (1980) (discussion of nature and purposes of statutes of limitations) [hereinafter cited as *Time Bars*].

3. *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) (statutes of limitations relieve courts of burden of trying stale claims); Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 694 (10th Cir.) (statutes of limitations prevent untimely suits that involve stale evidence and absent witnesses from hampering adjudication process), *cert. denied*, 454 U.S. 895 (1981).

4. *See* Wood v. Carpenter, 101 U.S. 135, 139 (1879) (statutes of limitations stimulate litigation and punish delay); N.L.R.B. v. California School of Professional Psychology, 583 F.2d 1099, 1101 (9th Cir. 1978) (statutes of limitations are designed to encourage parties to file suit promptly); Campbell v. Upjohn Co., 498 F. Supp. 722, 732 (W.D. Mich. 1980) (statutes of limitations require plaintiffs to protect their own interests), *aff'd.*, 676 F.2d 1122 (6th Cir. 1982).

5. *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) (statutes of limitations are designed primarily to assure fairness to defendants); Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 694 (10th Cir.) (statutes of limitations relieve defendants of burden of prolonged litigation and uncertainty of contingent liabilities), *cert. denied*, 454 U.S. 895 (1981).

6. *See* Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir. 1961) (federal courts will borrow limitations period from forum state in federal actions lacking specified limitations provision because Congress could not have intended unlimited period for enforcement of federal right and judges lack authority to create limitations periods).

7. 15 U.S.C. § 78j(b) (1982).

8. 17 C.F.R. § 240.10b-5 (1983). Pursuant to § 10(b) of the Securities Exchange Act of 1934 ('34 Act), the Securities and Exchange Commission (SEC) promulgated its own fundamen-

sale of any security.[9] Neither section 10(b) nor rule 10b-5, however, expressly afford a private right of action for violation of section 10(b) or rule 10b-5.[10] Accordingly, federal courts have recognized an implied private right of action under section 10(b) of the '34 Act.[11] One result of Congress' failure to provide an express private right of action under section 10(b) is that federal courts have had to look outside of the '34 Act to ascertain the applicable time period within which the court will permit a plaintiff to bring an action under section 10(b).[12]

---

tal antifraud provision in SEC rule 10b-5. *See id. See generally* 1 A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD, § 2.2 (300)-(463), pp. 2:18-2:44.1 (1982) (discussion of history of § 10(b) and resultant rule 10b-5) [hereinafter cited as BROMBERG & LOWENFELS].

9. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128, 150-51 (1972) (protection of § 10(b) and rule 10b-5 extends to sellers of stocks to remedy purchasers' misrepresentations concerning selling price of stock); Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 9 (1971) (protections of § 10(b) and rule 10b-5 extend to creditors of defrauded seller of securities). *See generally* 1 BROMBERG & LOWENFELS, *supra* note 8, at § 1.1, pp. 1:3-1:6 (discussion of purposes of § 10(b) and rule 10b-5); A. JACOBS, THE IMPACT OF RULE 10b-5, § 1, at 1-3 to 1-5 (Securities Law Series vol. 5, rev. ed. 1980) (same)

10. *See* 1 BROMBERG & LOWENFELS, *supra* note 8, at § 2.4 (110), p. 2:59 (express private right of action exists under other fraud provisions of securities acts but not under § 10(b)); *cf.* Securities Act of 1933, § 11, 15 U.S.C. § 77k (1982) (holder of security has express private right of action when material omissions or misrepresentations exist in security registration statement); Securities Act of 1933, § 12, 15 U.S.C. § 77*l* (1982) (purchaser of security has express private right of action against seller who makes material omissions or misrepresentations in sale of security); Securities Act of 1933, § 15, 15 U.S.C. § 77*o* (1982) (persons with authority to control party who incurs express liability under §§ 11 and 12 of Securities Act of 1933 ('33 Act) are jointly and severally liable with controlled party unless controlling person had no knowledge of or reasonable ground be believe in existence of controlled party's securities violation); Securities Exchange Act of 1934, § 9(e), 15 U.S.C. § 78i(e) (1982) (purchasers or sellers of security have express private right of action against persons who willfully participate in manipulation of securities prices); Securities Exchange Act of 1934, § 16(b), 15 U.S.C. § 78(b) (1982) (issuer of securities has express private right of action to recover any profits realized by director, officer, or principal stockholder in first six months of director, officer, or principal stockholder's ownership of securities for purpose of preventing unfair use of inside information); Securities Exchange Act of 1934, § 18(a), 15 U.S.C. § 78r(a) (1982) (purchasers or sellers of security who have relied upon materially false statements in SEC filings have express private right of action against perpetrators of false statements).

11. *See, e.g.*, Herman & MacLean v. Huddleston, 103 S.Ct. 683, 687 & n.10 (1983) (defrauded purchaser of stock has implied private right of action under § 10(b) despite availability of express remedy under § 11 of '33 Act); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (actual sellers or purchasers of securities have implied private right of action under § 10(b)); Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 & n.9 (1971) (creditors of defrauded corporate seller of securities have implied private right of action under § 10(b)). In addition to the federal judiciary's recognition of an implied private right of action under § 10(b) of the '34 Act, federal courts also have recognized implied private rights of action under other provisions of the federal securities laws. *See, e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426, 430-31 (1964) (stockholders have implied private right of action under § 14(a) of the '34 Act for mergers obtained through false and misleading proxy solicitations); Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1978) (beneficiaries of municipal pension fund have implied private right of action under § 17(a) of '33 Act for securities fraud), *cert. denied*, 442 U.S. 909 (1979).

12. *See* Biggans v. Bache Halsey Stuart Shields, Inc., 638 F.2d 605, 611 (1980) (Weis, J., dissenting) (judiciary must borrow appropriate limitations period because no express time limita-

To determine the applicable time period within which a court will hear a section 10(b) action, federal courts will refer to the several statutes of limitations of the state in which the plaintiff filed his section 10(b) action.[13] In particular, federal courts will adopt the forum state's limitations period which best effectuates the policies that Congress pronounced in section 10(b).[14]

---

tion exists for § 10(b) actions). In contrast to the lack of a limitations provision expressly applicable to § 10(b) actions, the federal securities acts provide express limitations periods for the express private rights of action contained in the securities acts. *See* A. JACOBS, LITIGATION AND PRACTICE UNDER RULE 10B-5, § 235.02, at 10-7 n.3 (Securities Law Series vol. 5C, 2d rev. ed. 1983) (discussion of express limitations provisions contained in securities acts) [hereinafter cited as JACOBS]; *see also supra* note 10 (list of express private rights of action contained in securities acts). Not only does the '34 Act contain no statute of limitations provision expressly applicable to § 10(b) actions, but no general federal statute of limitations exists for federal civil actions such as those under § 10(b). *See* Hudak v. Economic Research Analysts, Inc., 499 F.2d 996, 999 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). Consequently, federal courts in § 10(b) actions have borrowed limitations periods from the state in which the federal court is located. *See infra* note 13 (discussion of federal judiciary's practice of borrowing limitations period from forum state in § 10(b) actions).

The limitation periods that federal courts have applied to § 10(b) actions establish specified lengths of time during which a party's cause of action will remain viable. *See Time Bars, supra* note 2, at 1012-13. The specified limitations period for § 10(b) actions normally will begin running at the time of the defendant's original violation of § 10(b). *See* Campbell v. Upjohn Co., 676 F.2d 1122, 1126 (6th Cir. 1982) (plaintiff's § 10(b) right of action accrued at time of defendant's last overt act causing injury to plaintiff); *cf.* Equilease Corp. v. State Fed. Sav. & Loan Ass'n, 647 F.2d 1069, 1073 (10th Cir. 1981) (cause of action accrues for limitations purposes when party possessing cause of action has legal right to sue). Under the "discovery rule," however, federal courts often will postpone the starting point of a § 10(b) limitations period until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the defendant's § 10(b) violation. *See, e.g.*, Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 877 (9th Cir. 1984); Herm v. Stafford, 663 F.2d 669, 682 (6th Cir. 1981); Vanderboom v. Sexton, 422 F.2d 1233, 1240 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970).

13. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n.29 (1975) (federal courts should borrow forum state's limitation law in § 10(b) actions); *cf.* Chevron Oil Co. v. Huson, 404 U.S. 97, 104 (1971) (general rule is that federal courts should apply analogous state statute of limitations to federal actions lacking particular statute of limitations). The rule that federal courts should adopt a limitations period from the forum state in § 10(b) actions is consistent with the Rules of Decision Act. *See* 28 U.S.C. § 1652 (1982) (federal courts must apply law of forum state absent congressional acts or constitutional considerations). At least one law review article, however, has suggested that the Rules of Decision Act does not compel federal courts to apply a forum state's statute of limitations to federal causes of action that lack express limitations periods. *See Time Bar, supra* note 2, at 1038-42. The article suggests that Congress left discretion with the judiciary to determine the applicable limitations period when a federal cause of action lacks an express statute of limitations provision. *See id.; see also* Roberts v. Magnetic Metals Co., 611 F.2d 450, 458 (3d Cir. 1979) (Sloviter, J., concurring) (primary reason that courts resort to state statutes of limitations when federal cause of action lacks express limitations period is principle of expedience).

14. *See* Gaudin v. KDI Corp., 576 F.2d 711 (6th Cir. 1978) (federal courts must apply state statute of limitations that best effectuates policy of § 10(b)); Hudak v. Economic Research Analysts, Inc., 499 F.2d 996, 999 (5th Cir. 1974) (same), *cert. denied*, 419 U.S. 1122 (1975). To determine which of a forum state's several statutes of limitations best effectuates the policies underlying § 10(b), federal courts ascertain the state cause of action that most closely resembles a private cause of action under § 10(b). *See* Cahill v. Ernst & Ernst, 625 F.2d 151, 153 (7th

Generally, federal courts will choose between the limitations period applicable to a state action for common-law fraud and the limitations period found in the antifraud provisions of the forum state's blue sky laws.[15] The federal courts in several circuits, however, disagree on whether to borrow a forum state's blue sky limitations period or common-law fraud limitations period for section 10(b) actions.[16] Additionally, the time period contained in each of one forum state's applicable limitations provision, regardless of the classification of that limitations provision as blue sky or common-law fraud, often will differ from the time period contained in another forum state's correspondingly applicable limitations provision.[17] Consequently, considerable disparity exists

---

Cir. 1980) (federal courts should apply limitations period that is applicable to most closely analogous cause of action under forum state's laws); Ferber v. Morgan Stanley Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,634, at p. 97,504-05 (E.D. Pa. Jan. 9, 1984) (in § 10(b) actions, federal courts must determine nearest appropriate limitations provision of forum state's laws). Upon ascertaining the forum state's cause of action that most closely resembles a § 10(b) action, the federal court will apply to the § 10(b) action the limitations period that is applicable to the analogous state action. *See* Cook v. Avien, Inc., 573 F.2d 685, 694 (1st Cir. 1978).

15. *See* Block & Barton, *Statutes of Limitations in Private Actions Under Section 10(b)—A Proposal for Achieving Uniformity*, 7 SEC. REG. L. J. 374, 375 (1980). Although federal courts most often choose between a forum state's common-law fraud limitations period and the forum state's blue sky limitations period when determining the limitations period to apply to a § 10(b) action, a federal court also may refer to the limitations period contained in the forum state's catch-all statute of limitations for civil actions. *See* Cunha v. Ward Foods, Inc., 501 F. Supp. 830, 837 (D. Hawaii 1980) (court applied Hawaii's general civil six-year statute of limitations to § 10(b) action). *See generally* Block & Barton, *supra*, at 375 n.8 (list of state limitations statutes, other than blue sky or common-law fraud limitations provisions, that federal court might apply to section 10(b) action).

16. *See* Hill v. Der, 521 F. Supp. 1370, 1379-80 (D. Del. 1981) (court discussed differences between federal circuits concerning selection of forum state's limitations periods in § 10(b) action). Currently, the Ninth and Tenth Circuits normally apply a forum state's common-law fraud statute of limitations in § 10(b) actions. *See* Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1041 (10th Cir. 1980) (court applied forum state's common-law fraud statute of limitations to federal § 10(b) action); Rochelle v. Marine Midland Grace Trust Co., 535 F.2d 523, 531 (9th Cir. 1976) (same). In contrast, some circuits have decided that the federal district courts should apply a forum state's blue sky statute of limitations to § 10(b) actions. *See* Cahill v. Ernst & Ernst, 625 F.2d 151, 154 (7th Cir. 1980) (court applied forum state's blue sky statute of limitations to federal § 10(b) action); Morris v. Stifel, Nicholas & Co., 600 F.2d 139, 146 (8th Cir. 1979) (same). Moreover, some circuits decide which of a forum state's limitations periods a federal court should apply in a § 10(b) action on a case-by-case basis. *Compare* Wood v. Combustion Eng'g, Inc., 643 F.2d 339, 342-46 (5th Cir. 1981) (court applied forum state's common-law fraud statute of limitations to federal § 10(b) action) *with* Hudak v. Economic Research Analysts, Inc., 499 F.2d 996, 1000 (5th Cir. 1974) (court applied forum state's blue sky statute of limitations to federal § 10(b) action), *cert. denied*, 419 U.S. 1122 (1975) *and* Campbell v. Upjohn Co., 676 F.2d 1122, 1125-26 (6th Cir. 1982) (court applied forum state's blue sky statute of limitations to federal § 10(b) action) with IDS Progressive Fund, Inc. v. First of Mich. Corp., 533 F.2d 340, 344 (6th Cir. 1976) (court applied forum state's common-law fraud statute of limitations to federal § 10(b) action).

17. *Compare* Armstrong v. McAlpin, 699 F.2d 79, 86-87 (2d Cir. 1983) (court adopted New York's six-year common-law fraud statute of limitations in § 10(b) action) *with* Militsky v. Merrill Lynch, Pierce, Fenner & Smith, 540 F. Supp. 783, 785 (N.D. Ohio 1980) (court adopted Ohio's four-year common-law fraud statute of limitations in § 10(b) action) *and* Diamond v. LaMotte, 709 F.2d 1419, 1422 (11th Cir. 1983) (court adopted Georgia's two-year blue sky statute

among the limitations periods that the federal courts apply to section 10(b) actions.[18]

The Third Circuit's decision in *Biggans v. Bache Halsey Stuart Shields, Inc.*[19] depicts the problems that can result from the uncertainty regarding a federal court's choice between disparate state limitations periods in section 10(b) actions.[20] In *Biggans*, the United States District Court for the Eastern

---

of limitations in § 10(b) action) *with* Pierson v. Dean, Witter, Reynolds, Inc., 551 F. Supp 497, 499 (C.D. Ill. 1982) (court adopted Illinois' three-year blue sky statute of limitations in § 10(b) action). Generally, state blue sky limitations provisions provide shorter limitations periods than state common-law fraud limitations provisions. Accordingly, whether a federal court borrows a forum state's blue sky limitations period or common-law fraud limitations period primarily depends upon whether the federal court believes that a longer or shorter limitations period best effectuates the policies underlying § 10(b). *See* Block & Barton, *supra* note 15, at 377. *Compare* Shelter Mut. Ins. Co. v. Public Water Supply Dist. No. 7, 569 F. Supp. 310, 321 (E.D. Mo. 1983) (court borrowed forum state's two-year blue sky limitations period and stated that Congress preferred short limitations periods for § 10(b) actions) *and* Bailey v. Piper, Jaffray & Hopwood, Inc., 414 F. Supp. 475, 483 (D. Minn. 1976) (court borrowed forum state's three-year blue sky limitations period and referred to federal policy favoring short limitations periods in § 10(b) actions) *with* IDS Progressive Fund, Inc. v. First of Mich. Corp., 533 F.2d 340, 344 (6th Cir. 1976) (court borrowed forum state's six-year common-law fraud limitations period and stated that longer § 10(b) limitations period better effectuates remedial policies of federal securities laws) *and* Campito v. McManus, Longe, Brockwehl, Inc., 470 F. Supp. 986, 993 (N.D.N.Y. 1979) (same).

18. *See* JACOBS, *supra* note 12, § 235.02, at 10-20 to 10-26 (fifty state survey of limitations periods applicable to § 10(b) actions). The great disparity that exists in the length of the limitations periods that the federal courts have applied in § 10(b) actions has caused some commentators to urge the federal judiciary to adopt a uniform national limitations period for § 10(b) actions. *See* Block & Barton, *supra* note 15, at 380-82 (federal courts should adopt uniform national statute of limitations for § 10(b) actions based upon express limitations provisions in other securities fraud provisions); Ruder & Cross, *Limitations on Civil Liability Under Rule 10b-5*, 1972 DUKE L. J. 1125, 1148-50 (1972) (same). One shortcoming that results from the disparity in § 10(b) limitations law is that dilatory plaintiffs can search for a federal court sitting in a state with the most liberal limitations period. *See* Block & Barton, *supra* note 15, at 378 (disparity in § 10(b) limitations law permits § 10(b) plaintiffs to engage in forum shopping for longer limitations periods for themselves and as class representatives for others); Note, *Laches in Federal Substantive Law: Relation to Statutes of Limitations*, 56 B.U.L. REV. 970, 984 (1976) (federal court reliance on state limitations law promotes forum shopping within the federal judicial system). Moreover, the fact that the federal securities laws afford considerable leniency to plaintiffs in their choice of venue for § 10(b) actions increases the potential for plaintiffs to search out favorable federal forums. *See* Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1982) (plaintiff may bring § 10(b) action in federal district court in any district where defendant is found or is inhabitant or transacts business).

19. 638 F.2d 605 (3d Cir. 1980).

20. *See* Biggans v. Bache Halsey Stuart Shields, Inc., 638 F.2d 605, 606-12 (3d Cir. 1980). Another case that depicts the confusion that can result from nonuniformity in federal court application of state limitations periods is *Ferber v. Morgan Stanley Co.*, [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,634 (E.D. Pa. Jan. 9, 1984). In *Ferber*, the United States District Court for the Eastern District of Pennsylvania held that both the three-year Pennsylvania blue sky limitations period and the shorter Pennsylvania limitations period for common-law actions in contractual misrepresentation applied to different portions of the same § 10(b) action. *See id.* at p. 97,505-06; *see also In re* Clinton Oil Co. Sec. Litig., [1977-1978 Transfer Binder] FED. SEC. L. REP. ¶96,015, p. 91,566-72 (D. Kan. March 18, 1977) (court held limitations periods from several different states applicable to § 10(b) class action).

District of Pennsylvania granted the defendant's motion for summary judgment on the grounds that Pennsylvania's three-year blue sky limitations period barred the plaintiff's section 10(b) action.[21] The district court judge believed that Third Circuit precedent supported this holding.[22] On appeal, the Third Circuit vacated the district court's decision to grant the defendant's motion for summary judgment.[23] The Third Circuit held that Pennsylvania's six-year common-law fraud limitations period, and not Pennsylvania's three-year blue sky limitations period, applied to the plaintiff's section 10(b) claim.[24] The dissenting judge in *Biggans* criticized the majority for creating a case-by-case test to determine the applicable limitations period in section 10(b) actions.[25] The *Biggans* dissent believed that the Third Circuit should have established a uniform rule requiring federal courts in the Third Circuit to apply a forum state's blue sky limitations period to section 10(b) actions.[26] In support of

---

21. *See* 487 F. Supp. 829, 831 (E.D. Pa.), *vacated*, 638 F.2d 605 (3d Cir. 1980). In *Biggans v. Bache Halsey Stuart Shields, Inc.*, a stockholder brought a § 10(b) action against the brokerage house that had handled the plaintiff's stocks. *Id.* at 829-30. The plaintiff alleged that the defendant's agent had practiced "churning," or excessive trading of the plaintiff's account. *Id.*

22. *See id.* at 830; *see also* Roberts v. Magnetic Metals Co., 611 F.2d 450, 456 (3d Cir. 1979) (court applied New Jersey's six-year common-law fraud limitation period to § 10(b) action). The district court stated that the Third Circuit, in *Roberts v. Magnetic Metals Co.*, established a principle for federal courts in the Third Circuit to apply the limitations period contained in the law of the forum state that covers a scope of activity analogous to the scope of § 10(b). *See* 487 F. Supp. at 830. The district court distinguished the *Roberts* court's decision to apply New Jersey's common-law fraud limitations period to a § 10(b) case by noting that Pennsylvania's blue sky antifraud provision embraced a broader range of securities fraud than New Jersey's corresponding blue sky antifraud provision embraced. *See id.*

23. 638 F.2d 605, 611 (3d Cir. 1980).

24. *See id.* at 610-11. In reversing the district court's application of Pennsylvania's blue sky limitations period in the *Biggans* case, the Third Circuit clarified its § 10(b) choice-of-limitations principle that was established in *Roberts*. *See id.* at 608-09; *see also supra* note 22 (discussion of *Roberts* principle). In *Biggans*, the Third Circuit ruled that a federal court must apply the limitations period from the forum state's law that would provide the plaintiff with a cause of action identical to the plaintiff's § 10(b) cause of action. *See* 638 F.2d at 608, 610. The *Biggans* court noted that Pennsylvania's blue sky antifraud provision did not provide the plaintiff with a cause of action identical to the plaintiff's § 10(b) claim for damages. *See id.* at 609-10. The *Biggans* court further noted that the plaintiff would have a claim for damages under Pennsylvania's common law. *See id.* at 610. Consequently, the *Biggans* court held that the plaintiff's § 10(b) claim was timely under Pennsylvania's six-year common-law fraud limitations period. *See id.* at 611.

25. *See id.* at 611-12 (Weis, J., dissenting).

26. *See id.* The dissenting judge in *Biggans* criticized the majority's approach of examining a forum state's laws for an exact duplicate of a plaintiff's § 10(b) remedy to determine the applicable limitations period for the plaintiff's § 10(b) action. *See id.* at 611. The dissenting judge believed that the majority's approach promoted disparity by having the determination of the applicable § 10(b) limitations period depend upon the form in which the plaintiff alleged his § 10(b) claim. *See id.* at 612. The dissenting judge maintained that the *Biggans* court should have followed the majority of federal circuits and applied the limitations period contained in the forum state's law possessing a common purpose with § 10(b). *See id.* at 611. The dissent noted that this "commonality of purpose" approach stressed the similar policy considerations between § 10(b) and the forum state's law. *See id.* The dissenting judge stated that under the commonality of purpose approach, the federal courts sitting in Pennsylvania would apply Pennsylvania's blue sky limitations period to all § 10(b) actions. *See id.* at 611-12.

his position, the dissenting judge noted that the preclusive effect that statutes of limitations have on a case mandates that the public should be capable of accurately predicting the limitations period that a court will apply to a particular cause of action.[27]

Another case which illustrates the problems that can result from the lack of uniformity existing in the choice of limitations periods for section 10(b) actions is *Campbell v. Upjohn Co.*[28] In *Campbell*, a plaintiff brought a section 10(b) action in the United States District Court for the District of Connecticut.[29] On stipulation of both parties, the Connecticut federal district court transferred the case to the United States District Court for the Western District of Michigan.[30] Applying Connecticut's two-year blue sky limitations period, the Michigan federal district court barred the plaintiff's section 10(b) action.[31] The Michigan federal district court noted, however, that the plaintiff could have availed himself of Michigan's six-year common-law fraud limitations period if the plaintiff had filed his section 10(b) action initially in Michigan.[32] Clearly, the disparity existing among the limitations periods that the federal courts apply to section 10(b) actions will promote the injustice of encouraging section 10(b) plaintiffs to select their forums based on the applicable limitations law.[33]

As both the *Biggans* and *Campbell* decisions demonstrate, a defendant's successful invocation of a statute of limitations defense will bar a plaintiff's cause of action absolutely.[34] Consequently, a number of federal courts have

---

27. 638 F.2d at 611 (Weis, J., dissenting); *see Time Bars, supra* note 2, at 1075-78 (policies underlying statutes of limitations require that parties be able to predict applicable limitations periods in potential causes of action).

28. 498 F. Supp. 722 (W.D. Mich. 1980), *aff'd*, 676 F.2d 1122 (6th Cir. 1982).

29. *See* 498 F. Supp. 722, 724 (W.D. Mich. 1980), *aff'd*, 676 F.2d 1122 (6th Cir. 1982). In *Campbell*, the plaintiff originally brought his securities fraud action in a Connecticut state court. *See id.* Due to the existence of a federal right of action under § 10(b), the defendant removed the plaintiff's action to the United States District Court for the District of Connecticut. *See id.; see also* 28 U.S.C. § 1441(a) (1982) (whenever United States district courts have original jurisdiction over cause of action that plaintiff files in state court, defendant may remove cause of action to United States district court located in place where state action is pending).

30. *See* 498 F. Supp. at 724.

31. *See id.* at 732.

32. *See id.* at 726 n.4.

33. *See supra* note 18 (discussion of forum shopping resulting from disparity in § 10(b) limitations law).

34. *See* Wood v. Carpenter, 101 U.S. 135, 139 (1879) (statutes of limitations conclusively bar late claims). Since a defendant's successful invocation of a statute of limitations defense will terminate a plaintiff's cause of action absolutely, federal courts have indicated that § 10(b) limitations issues are appropriate for summary disposition. *See* Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 877 (9th Cir. 1984) (defendant may raise statute of limitations defense on motion for judgment notwithstanding verdict); Shelter Mut. Ins. Co. v. Public Water Supply Dist. No. 7, 569 F. Supp. 310, 313 (E.D. Mo. 1983) (motion for summary judgment is appropriate method for raising statute of limitations defense); Campbell v. Upjohn Co., 498 F. Supp. 722, 729 (W.D. Mich. 1980) (defendant may raise statute of limitations defense on motion to dismiss for failure to state claim), *aff'd*, 676 F.2d 1122 (6th Cir. 1982); *see also* FED. R. CIV. P. 12(b)(6) (defendant may request federal district court to dismiss plaintiff's cause of action prior to defendant's answer

noted that the statute of limitations defense operates harshly against plaintiffs whose claims would be valid but for the statute of limitations defense.[35] Despite the insensitivity of the statute of limitations defense toward the merits of a plaintiff's cause of action, federal courts consistently will bar a plaintiff's claim when the plaintiff unjustifiably commences his action past the specified limitations period.[36]

To ameliorate the severity of the limitations statutes, the federal judiciary has developed a tolling[37] principle known as the equitable tolling doctrine.[38]

---

and on facts alleged in plaintiff's complaint alone); FED. R. CIV. P. 50(b) (judgment notwithstanding verdict operates to set aside jury verdict for winning party and enter judgment for party who lost on jury verdict); FED. R. CIV. P. 56 (court may enter judgment prior to presentation of evidence upon finding that no genuine issue as to any material fact exists). Some federal courts, however, have urged caution in summarily resolving section 10(b) limitations issues because plaintiffs often can raise factual issues at trial that thwart a defendant's statute of limitations defense. *See* Sperry v. Barggren, 523 F.2d 708, 711 (7th Cir. 1975) (court refused to grant defendants' statute of limitations motion for summary judgment because equitable tolling issues required resolution at trial and not by affidavit); Diener v. Beckley Coal Corp., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,663, p. 97,653 (D.D.C. Feb. 3, 1984) (federal courts should exercise care when evaluating defendant's statute of limitations motion to dismiss plaintiff's claim because plaintiff may raise counteracting factual issues); *see also infra* note 44 (discussion of fact finder's role in resolving equitable tolling issues).

35. *See* United States v. Kubrick, 444 U.S. 111, 125 (1979) (statutes of limitations often require courts to bar otherwise valid claims); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (statutes of limitations arbitrarily preclude claims without regard to merits of claim or unavoidability of plaintiff's delay); Campbell v. Upjohn Co., 498 F. Supp. 722, 732 (W.D. Mich. 1980) (statutes of limitations operate to preclude valid claims), *aff'd*, 676 F.2d 1122 (6th Cir. 1982); *see also* Marcus, *supra* note 2, at 873 (time periods specified in statutes of limitations are arbitrary and often hinder policies underlying plaintiff's right of action).

36. *See, e.g.*, United States v. Kubrick, 444 U.S. 111, 125 (1979) (courts should apply statutes of limitations with strict compliance to intent of legislative provision); Militsky v. Merrill Lynch, Pierce, Fenner & Smith, 540 F. Supp. 783, 787-88 (N.D. Ohio 1980) (same); Campbell v. Upjohn Co., 498 F. Supp. 722, 732 (W.D. Mich. 1980) (federal courts must abide by limitations provisions because statutes of limitations represent sound policy), *aff'd*, 676 F.2d 1122 (6th Cir. 1982).

37. *See* BLACK'S LAW DICTIONARY 1334 (5th ed. 1979) (tolling of limitations statute means suspension or temporary stoppage of running of limitations period). In contrast to accrual, which occurs when a plaintiff acquires a legal right to sue, a tolling doctrine presupposes the existence of a plaintiff's right to sue but postpones the actual running of the statutory limitations period. *See* Marcus, *supra* note 2, at 846 n.121 (discussion of distinction between accrual and tolling); *see also supra* note 12 (discussion of discovery rule of accrual). As a practical matter, the effects of accrual and tolling on a § 10(b) action are identical. *See* Marcus, *supra* note 2, at 846 n.121 (distinction between accrual and tolling is tenuous); *see also* Cook v. Avien, Inc., 573 F.2d 685, 695 (1st Cir. 1978) (tolling doctrine of fraudulent concealment is common-law counterpart of accrual discovery rule contained in express limitations provisions of securities laws); JACOBS, *supra* note 12, § 235.03, at 10-32 (federal equitable tolling doctrine controls issue of § 10(b) accrual discovery rule).

38. *See* Marcus, *supra* note 2 at 912 (equitable tolling doctrine mollifies statute of limitations defense); *see also infra* note 40 (discussion of purpose underlying equitable tolling doctrine). The United States Supreme Court first recognized the equitable tolling doctrine in *Bailey v. Glover*. *See* 88 U.S. (21 Wall.) 342, 349-50 (1874) (Court refused to apply limitations provision contained in bankruptcy act to bar plaintiff's action to set aside certain alleged fraudulent conveyances because defendant fraudulently concealed plaintiff's cause of action). In 1946, the Supreme Court extended the equitable tolling doctrine to include actions based on federal statutes that

The federal equitable tolling doctrine suspends the running of a limitations period whenever a reasonably diligent plaintiff fails to discover his right of action against a defendant due to the defendant's affirmative concealment of his wrongdoing from the plaintiff or due to the inherent undiscoverability of the defendant's original wrongful act.[39] The underlying purpose of the

---

lack specific limitations periods. *See* Holmberg v. Armbrecht, 327 U.S. 392, 395-97 (1946) (Court permitted plaintiff to bring federal cause of action beyond express limitations period contained in borrowed state statute of limitations due to defendant's fraudulent concealment of plaintiff's cause of action). Currently, federal courts unanimously recognize that the equitable tolling doctrine can suspend a borrowed state statute of limitations in § 10(b) actions. *See, e.g.*, Newman v. Prior, 518 F.2d 97, 100 (4th Cir. 1975) (equitable tolling doctrine suspended borrowed state limitations period in § 10(b) action); Hilton v. Mumaw, 522 F.2d 588, 602 n.13 (9th Cir. 1975) (same); Vanderboom v. Sexton, 422 F.2d 1233, 1240 (8th Cir.) (same), *cert. denied*, 400 U.S. 852 (1970). *See generally* Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875 (1933) (seminal article on equitable tolling doctrine premised on defendant's affirmative concealment of plaintiff's right of action) [hereinafter cited as *Fraudulent Concealment*]; Dawson, *Undiscovered Fraud and Statutes of Limitation*, 31 MICH. L. REV. 591 (1933) (seminal article on equitable tolling doctrine premised on inherent undiscoverability of defendant's original wrongdoing) [hereinafter cited as *Undiscovered Fraud*].

39. *See* Hochfelder v. Midwest Stock Exch., 503 F.2d 364, 375 (7th Cir.) (federal equitable tolling doctrine suspends statute of limitations when defendant conceals plaintiff's right of action or when defendant's wrongdoing inherently conceals itself), *cert. denied*, 419 U.S. 875 (1974). The distinction between the equitable tolling doctrine arising from a defendant's affirmative acts of concealment and the equitable tolling doctrine arising from a defendant's wrongdoing that is inherently undiscoverable admittedly is obscure. *See Fraudulent Concealment, supra* note 38, at 877-78 (discussion of similarity of purposes and duplication of functions between affirmative concealment and undiscovered fraud branches of equitable tolling doctrine). A simple formula for measuring whether an equitable tolling case involves a defendant's affirmative concealment or involves the undiscoverability of a defendant's original wrongdoing does not exist. *See id.* 881-82 (courts have defined the difference between affirmative concealment and undiscoverable fraud only with overworked generalities). One general rule that the federal judiciary has developed to clarify the distinction between affirmative concealment and undiscoverable fraud is that affirmative acts of concealment must postdate the defendant's original wrongdoing. *See* Dekro v. Stern Bros. & Co., 540 F. Supp. 406, 414-15 (W.D. Mo. 1982); Campbell v. Upjohn Co., 498 F. Supp. 722, 731 (W.D. Mich. 1980), *aff'd*, 676 F.2d 1122 (6th Cir. 1982). Absent a fiduciary duty, a defendant's mere denial of his original wrongdoing may not constitute affirmative concealment. *See* Campbell v. Upjohn Co., 498 F. Supp. 722, 728 (W.D. Mich. 1980), *aff'd*, 676 F.2d 1122 (6th Cir. 1982). Additionally, affirmative concealment only may include those actions that a defendant renders directly towards the plaintiff. *See* Ohio v. Peterson, Lowry, Rall, Barber & Ross, 472 F. Supp. 402, 409 (D. Colo. 1979) (defendant's destruction of memo did not constitute affirmative concealment because conduct was not act of misrepresentation directed personally towards plaintiff), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981). Generally, however, federal courts have recognized affirmative concealment in cases involving a defendant's act of tampering with business records pertaining to the defendant's § 10(b) securities fraud. *See* Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2d Cir. 1979) (defendant's alteration of accounting work papers and destruction of documentary evidence constituted affirmative concealment); Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975) (defendant's failure to keep business records, refusal to show business charters to primary investor, and failure to answer inquiries from investors constituted affirmative concealment). *But cf.* Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 118-19 (D. Conn. 1978) (plaintiff's allegations concerning defendant's careless record keeping did not establish affirmative concealment on part of defendant). Moreover, a defendant's failure to disclose the existence of an SEC action against the defendant for securities

equitable tolling doctrine is to prevent the injustice of barring a plaintiff's right to sue when the defendant's conduct was the cause of the plaintiff's failure to bring his claim within the specified limitations period.[40] In contrast to the federal judiciary's practice of referring to state law to determine the

---

fraud may constitute affirmative concealment. *See* Vogel v. Trahan, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶97,303, p. 97,081 (E.D. Pa. Jan. 11, 1980) (plaintiff's allegations concerning defendant's failure to obey a district court's order requiring defendant to disclose to plaintiff pendency of SEC securities fraud action against defendant sufficiently established affirmative concealment on part of defendant). In addition, federal courts have recognized affirmative concealment in cases in which a plaintiff inquires about a defendant's potential fraud and the defendant lulls the plaintiff into inactivity. *See* McConnell v. Frank Howard Allen & Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,538, p. 97,124 (N.D. Cal. Oct. 11, 1983) (defendant's repeated attempts to persuade plaintiffs not to pursue § 10(b) claim by lulling plaintiffs into false sense of security constituted affirmative concealment); Cunha v. Ward Foods, Inc., 501 F. Supp. 830, 836-37 (D. Hawaii 1980) (same). Finally, a federal court may recognize affirmative concealment in cases in which a defendant follows a pattern of conduct designed to prevent a plaintiff from discovering the defendant's original wrongdoing. *See* Trecker v. Scag, 679 F.2d 703, 708 (7th Cir. 1982) (defendants' alleged concealment of contract negotiations, creation of "smokescreen" around terms of contract, and continued misrepresentation concerning terms of contract constituted affirmative concealment).

Notwithstanding the uncertainty surrounding the federal judiciary's attempts to define affirmative concealment, federal court attempts to interpret the parameters of the inherent undiscoverability branch of the equitable tolling doctrine are virtually nonexistent. *See Undiscovered Fraud, supra* note 38, at 597-606 (discussion of early attempts of judiciary to establish limitations tolling doctrine in cases premised on fraud); *see also* Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 120 (D. Conn. 1978) (court noted lack of case law explaining meaning of inherently undiscoverable fraud). As a threshold matter, federal courts uniformly require § 10(b) plaintiffs to allege more than merely the failure to discover the existence of the § 10(b) claim to invoke the undiscoverable fraud branch of the federal equitable tolling doctrine. *See, e.g.*, Campbell v. Upjohn Co., 676 F.2d 1122, 1127 (6th Cir. 1982) (plaintiff's ignorance of his § 10(b) cause of action by itself will not suspend running of applicable limitations period); Hupp v. Gray, 500 F.2d 993, 996 (7th Cir. 1974) (plaintiff may not rely on own unawareness of facts to invoke equitable tolling doctrine); Dekro v. Stern Bros. & Co., 540 F. Supp. 406, 414 (W.D. Mo. 1982) (same). To constitute inherently undiscoverable fraud under the equitable tolling doctrine, the defendant's original wrongdoing must possess such a hidden nature that a plaintiff, even by the exercise of reasonable diligence, would be incapable of discovering the wrongdoing. *See* Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 120 (D. Conn. 1978); *cf.* Timmreck v. Munn, 433 F. Supp. 396, 404 (N.D. Ill. 1977) (fraudulent promises concerning future conduct constitute inherently undiscoverable § 10(b) fraud under federal equitable tolling doctrine).

40. *See* Marcus, *supra* note 2, at 874-75 (underlying purpose of equitable tolling doctrine is avoidance of unfair application of statute of limitations defense); *Time Bars, supra* note 2, at 1085 (equitable tolling doctrine promotes fairness and credibility of judiciary by protecting plaintiff's valid right of action from defendant's fraudulent conduct); *see also* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) (interests of justice will outweigh fairness-to-defendant policy of statutes of limitations and will preserve plaintiff's right of action against defendant when defendant has misled plaintiff); McConnell v. Frank Howard Allen & Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,538, p. 97,124 (N.D. Cal. Oct. 11, 1983) (equitable tolling doctrine prevents defendant from taking advantage of plaintiff's naivete or laxity).

The effect of the equitable tolling doctrine on a case is to extend the length of time during which a plaintiff's right of action against a defendant will remain viable. *See* Trecker v. Scag, 697 F.2d 703, 706 (7th Cir. 1982) (federal equitable tolling doctrine acts to extend applicable limitations period in § 10(b) actions). In contrast to the capacity of the equitable tolling doctrine

limitations period applicable to section 10(b) actions,[41] federal common law governs the circumstances that will suspend the running of borrowed state limitations periods under the equitable tolling doctrine.[42] Therefore, consis-

---

to suspend indefinitely the running of the borrowed limitations periods in § 10(b) actions, the equitable tolling doctrine cannot extend the lifespan of a plaintiff's claim beyond the time periods set out in the express limitations provisions of the federal securities acts. *See* Walck v. American Stock Exch., Inc., 687 F.2d 778, 792 (3d Cir. 1982) (equitable tolling doctrine does not apply to express limitations provision contained in § 9(e) of '34 Act), *cert. denied*, 103 S.Ct. 2118 (1983); Hill v. Equitable Trust Co., 562 F. Supp. 1324, 1344 (D. Del. 1983) (decided weight of authority dictates that equitable tolling doctrine is inapplicable in cases involving express limitations provisions contained in § 13 of '33 Act); *see also* JACOBS, *supra* note 12, § 235.02, at 10-7 n.3 (discussion of express limitations provisions contained in securities acts). *But see* Eaton v. Coal Par, Inc., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,675, p. 97,717-18 (S.D. Fla. Feb. 9, 1984) (court applied equitable tolling doctrine to express limitations provision contained in § 13 of '33 Act).

41. *See supra* notes 13-18 and accompanying text (discussion of federal court's reliance on state limitations periods for § 10(b) actions).

42. *See* Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (federal courts should apply federal equitable tolling doctrine to limitations periods borrowed from state law); Trecker v. Scag, 679 F.2d 703, 706-07 (7th Cir. 1982) (court applied federal principles of equitable tolling to borrowed limitations period of forum state's blue sky laws in § 10(b) action); McConnell v. Frank Howard Allen & Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,538, p. 97,123 (N.D. Cal. Oct. 11, 1983) (court applied federal law on equitable tolling to borrowed limitations period of forum state's common-law fraud statute of limitations in § 10(b) action).

Although federal courts uniformly apply federal principles of equitable tolling to the limitations periods that the federal courts have borrowed from the laws of the forum state, two recent civil rights decisions of the United States Supreme Court arguably require federal courts not only to adopt a forum state's limitations period when the federal cause of action lacks an express limitations provision, but to adopt the forum state's tolling principles as well. *See* Board of Regents v. Tomanio, 446 U.S. 478, 483-92 (1980) (plaintiff alleged that defendants violated due process clause of fourteenth amendment by denying plaintiff's application for waiver of chiropractic licensing examination without affording plaintiff evidentiary hearing or rendering statement of reasons for denial); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 457-67 (1975) (plaintiff alleged that defendants violated § 706 of Title VII of Civil Rights Acts of 1964 by practicing race discrimination with respect to seniority rules and job assignments). At least in civil rights actions after *Johnson* and *Tomanio*, federal courts that have borrowed a forum state's limitations period also have borrowed the tolling principle of the forum state. *See* Keating v. Carey, 706 F.2d 377, 382 (2d Cir. 1983) (court borrowed forum state's tolling rules as well as its limitations period in federal employment discrimination action); Moore v. El Paso County, Tex., 660 F.2d 586, 590 (5th Cir. 1981) (court applied state tolling rules to plaintiff's civil rights action), *cert. denied*, 103 S.Ct. 51 (1982). In securities fraud cases, however, confusion exists concerning whether a federal court may apply federal equitable tolling principles to § 10(b) actions or whether the federal court must defer to state tolling principles. *See, e.g.*, Hackbart v. Holmes, 675 F.2d 1114, 1120 (10th Cir. 1982) (court noted uncertainty concerning applicability of state or federal tolling principles to § 10(b) actions); Biggans v. Bache Halsey Stuart Shields, Inc., 638 F.2d 605, 607-08 n.3 (3d Cir. 1980) (court recognized possibility that federal courts should defer to state tolling principles in § 10(b) cases). *Compare* Armstrong v. McAlpin, 699 F.2d 79, 86-87 (2d Cir. 1983) (court applied forum state's tolling principles to § 10(b) action) *with* McConnell v. Frank Howard Allen & Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,538, p. 97,123 (N.D. Cal. Oct. 11, 1983) (federal law controls tolling principles in § 10(b) action despite existence of conflicting tolling law from forum state). A recent law review article suggests that federal courts should not follow the *Tomanio* rule for tolling limitations periods in federal implied private actions. *See* Marcus, *supra* note 2, at 847-55.

tent application of the federal equitable tolling doctrine to the borrowed limitations periods in section 10(b) actions serves to restore a modicum of uniformity to the uncertainty in the law governing limitations periods for section 10(b) actions.[43]

Although consistent application of the equitable tolling doctrine potentially would provide some certainty to section 10(b) limitations law, federal courts have invoked two seemingly inconsistent versions of the equitable tolling doctrine in section 10(b) actions. A majority of federal courts apply a traditional version of the equitable tolling doctrine in which the limitations period will remain suspended until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the existence of his right of action.[44] Under the traditional equitable tolling doctrine, a plaintiff who desires

---

43. *See Time Bars, supra* note 2, at 1030 (disparity among limitations periods that federal courts have borrowed in several federal forums is insignificant problem as long as uniform application of the various limitations periods enables claimants to predict lifespan of claims); *see also supra* note 18 and accompanying text (discussion of disparity among limitations periods that federal courts apply to § 10(b) actions). In their article, the authors of *Time Bars* argue that predictability of the length of time that a cause of action will remain viable is the most important factor for ensuring that statutes of limitations conform to their equitable purposes. *See id.* at 1075-78, 1089.

44. *See* Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348-49 (1874) (seminal decision in which Court recognized equitable measure of suspending statuses of limitations in cases in which plaintiff fails to timely discover fraud either because defendant concealed fraud or because defendant's fraud was undiscoverable); *see also* Hupp v. Gray, 500 F.2d 993, 996 (7th Cir. 1974) (equitable tolling doctrine will suspend running of § 10(b) limitations period in cases in which plaintiff fails to timely discover defendant's securities fraud despite plaintiff's reasonable diligence in attempting to discover securities fraud); Johns Hopkins Univ. v. Hutton, 488 F.2d 912, 917-18 (4th Cir. 1973) (federal courts will suspend running of § 10(b) limitations period until point when plaintiff actually discovers, or in exercise of reasonable diligence should have discovered, existence of defendant's securities fraud), *cert. denied*, 416 U.S. 916 (1974).

Unless no material issue of fact exists, courts will leave to the trier of fact the issue of whether a plaintiff should have discovered the existence of his right of action at a date beyond the scope of the applicable limitations period. *See* Kennedy v. Tallant, 710 F.2d 711, 716 (11th Cir. 1983) (district court correctly submitted question concerning plaintiff's diligent discovery of his § 10(b) action to advisory jury); Hill v. Der, 521 F. Supp. 1370, 1386-87 (D. Del. 1981) (court denied defendant's motion to dismiss plaintiff's claim on limitations grounds because factual issues concerning whether plaintiff should have discovered his § 10(b) action prior to extension of scope of applicable limitations period were for jury). *But see* Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 692-94 (10th Cir.) (court examined equitable origins of discovery rule and determined that courts need not submit questions concerning plaintiff's reasonable diligence in discovering his § 10(b) action to jury when court is able to decide matter on clear and convincing evidence), *cert. denied*, 454 U.S. 895 (1981). A number of factors can influence a fact finder's determination regarding whether a plaintiff should have discovered the existence of his § 10(b) right of action at a date beyond the scope of the applicable limitations period. *See, e.g.*, deHaas v. Empire Petroleum Co., 435 F.2d 1223, 1226 (10th Cir. 1970) (plaintiff's knowledge of related legal proceedings can influence fact finder's determination of whether plaintiff diligently discovered § 10(b) rights of action); Morgan v. Koch, 419 F.2d 993, 998 (7th Cir. 1969) (extent to which defendant's alleged violations of § 10(b) receive wide publication can influence fact finder's determination of whether plaintiff diligently discovered his § 10(b) right of action); Ohio v. Peterson, Lowry, Rall, Barber & Ross, 472 F. Supp. 402, 408 (D. Colo. 1979) (amount in controversy can influence fact finder's determination of whether plaintiff diligently discovered his § 10(b)

the court to suspend the running of a section 10(b) borrowed limitations period has the burden of establishing that he diligently safeguarded his rights.[45] The plaintiff must establish that any delay in the discovery of his section 10(b) claim resulted from the inherent undiscoverability of the defendant's original violation of section 10(b) or from the defendant's fraudulent concealment.[46]

---

right of action), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981). Some controversy exists concerning whether a plaintiff's subjective characteristics, such as his lack of investment sophistication, should affect a fact finder's determination of the point in time when the plaintiff should have discovered his § 10(b) claim. *Compare* Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168, 172 (10th Cir. 1974) (degree of sophistication of defrauded investor is important factor in fact finder's determination regarding investor's diligent discovery of his § 10(b) right of action) *and* JACOBS, *supra* note 12, § 235.03, at 10-38 to 10-39 (better reasoned cases charge plaintiff with discovery of § 10(b) right of action only if plaintiff, with all his individual characteristics, should have known right of action) *with* Armstrong v. McAlpin, 699 F.2d 79, 88 (2d Cir. 1983) (test concerning when plaintiff should have discovered § 10(b) right of action is premised on standard of reasonably prudent plaintiff) *and* Marcus, *supra* note 2, at 875-76 (courts should measure plaintiff's reasonable diligence in discovering § 10(b) cause of action in relation to person of ordinary intelligence).

45. *See, e.g.*, Herm v. Stafford, 663 F.2d 669, 683-84 (6th Cir. 1981) (§ 10(b) plaintiff must establish compliance with positive duty to exercise reasonable diligence to avail himself of equitable tolling doctrine); Hupp v. Gray, 500 F.2d 993, 996 (7th Cir. 1974) (same); Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 945 (D.N.J. 1978) (same), *rev'd on other grounds*, 611 F.2d 450 (3d Cir. 1979).

46. *See supra* note 45. In *Dayco Corp. v. Goodyear Tire & Rubber Co.*, the Sixth Circuit stated that a party must plead three elements to raise the fraudulent concealment branch of the equitable tolling doctrine. 523 F.2d 389, 394 (6th Cir. 1975) (antitrust action). Specifically, the Sixth Circuit required a plaintiff to establish that a defendant wrongfully concealed fraudulent acts from the plaintiff, that the plaintiff failed to discover the wrongdoing of the defendant within the applicable limitations period, and that the plaintiff exercised reasonable diligence in safeguarding his rights until the plaintiff's discovery of his right of action against the defendant. *Id.; cf.* Schaefer v. First Nat'l Bank, 509 F.2d 1287, 1297 (7th Cir. 1975) (plaintiff must demonstrate that defendant concealed plaintiff's § 10(b) claim and that plaintiff's failure to timely discover defendant's securities fraud was not fault of plaintiff for plaintiff to invoke equitable tolling doctrine), *cert. denied*, 425 U.S. 943 (1976); Osadchy v. Gans, 436 F. Supp. 677, 681 (D.N.J. 1977) (same).

Because the equitable tolling doctrine arises from fraudulent conduct on the part of a defendant, rule 9(b) of the Federal Rules of Civil Procedure dictates that a plaintiff specifically plead the facts underlying the equitable tolling doctrine. *See* FED. R. CIV. P. 9(b) (plaintiffs must aver with particularity circumstances constituting fraud, other than defendant's condition of mind). Based on the particularity requirement of rule 9(b), some federal courts have rejected the equitable tolling arguments of § 10(b) plaintiffs because the plaintiffs' complaints have failed to allege the elements underlying the equitable tolling doctrine with sufficient particularity. *See* Armstrong v. McAlpin, 699 F.2d 79, 88-89 (2d Cir. 1983) (plaintiffs' allegations of defendants' fraudulent concealment did not satisfy rule 9(b) particularity requirements); Hill v. Equitable Trust Co., 562 F. Supp. 1324, 1344 (D. Del. 1983) (court required plaintiffs to amend their complaint to include specific allegations to defendant's fraudulent concealment because plaintiff's conclusory complaint failed to raise equitable tolling doctrine with sufficient particularity). A few courts, however, have relaxed the plaintiff's burden to plead with particularity the circumstances underlying the applicability of the equitable tolling doctrine. *See* Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975) (§ 10(b) plaintiff need only aver facts sufficient to assure notice to defendants to raise issue of equitable tolling doctrine); Engl v. Berg, 511 F. Supp. 1146, 1151 (E.D. Pa. 1981) (same). Federal courts sometimes relax the particular pleading requirements of rule 9(b) in § 10(b) claims

Accordingly, the majority of federal courts will consider a defendant's affirmative concealment of his alleged violation of section 10(b) only to the extent that the affirmative concealment affects the point in time when a plaintiff, in the exercise of his reasonable diligence, should have discovered the existence of his section 10(b) right of action against the defendant.[47]

In contrast, a minority of federal courts often excuse a plaintiff who invokes the equitable tolling doctrine from the burden of establishing his reasonable diligence in safeguarding his section 10(b) rights.[48] These federal courts draw a distinction between cases in which a defendant affirmatively conceals his alleged section 10(b) violation from the plaintiff and cases in which the defendant took no affirmative steps to conceal his original act but the nature of the defendant's violation of his section 10(b) made the plaintiff's right of action inherently undiscoverable.[49] In those cases involving inherently undiscoverable securities fraud in which a defendant made no affirmative attempt to conceal his alleged section 10(b) violation, the minority courts will emulate the traditional equitable tolling doctrine and suspend the limitations period only until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, his section 10(b) right of action.[50] In cases involving a defendant's affirmative concealment of his alleged securities fraud, however, these federal minority courts will suspend the limitations period until the plaintiff actually discovers the existence of his section 10(b) right of action.[51] This

---

because much of the information concerning a defendant's concealment of a § 10(b) violation is often within the exclusive knowledge of the defendant. *See* Bastien v. R. Rowland & Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,114, p. 95,335-36 (E.D. Mo. Feb. 25, 1983).

47. *See, e.g.*, Hill v. Der, 521 F. Supp. 1370, 1387 (D. Del. 1981) (plaintiff's allegations concerning defendant's concealment of § 10(b) violations relate to plaintiff's reasonable diligence in discovering right of action); Campbell v. Upjohn Co., 498 F. Supp. 722, 727-28 (W.D. Mich. 1980) (evidence of defendant's fraudulent concealment bears heavily on issue of plaintiff's reasonable diligence in discovering defendant's fraud), *aff'd*, 676 F.2d 1122 (6th Cir. 1982); *cf.* Osterneck v. E.T. Barwick Indus., Inc., 79 F.R.D. 47, 52-53 (N.D. Ga. 1978) (fraudulent concealment is not tolling device but instead is factor for determining whether plaintiff could have discovered defendant's fraud); Maine v. Leonard, 365 F. Supp. 1277, 1283 (W.D. Va. 1973) (same).

48. *See infra* notes 53-55 (list of courts that have adopted modified equitable tolling doctrine).

49. *See* Trecker v. Scag, 679 F.2d 703, 708 (7th Cir. 1982) (court recognized distinction between affirmative concealment branch and inherently undiscoverable fraud branch of federal equitable tolling doctrine); McConnell v. Frank Howard Allen & Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,538, p. 97,123-24 (N.D. Cal. Oct. 11, 1983) (same); *Fraudulent Concealment, supra* note 38, at 877-82 (discussion of distinction between equitable tolling premised on undiscovered fraud and equitable tolling premised on affirmative concealment); Marcus, *supra* note 2, at 856-57 n.185 (same); *see also supra* note 39 (same).

50. *See, e.g.*, Goldstandt v. Bear, Stearns & Co., 522 F.2d 1265, 1268-69 (7th Cir. 1975) (court examined plaintiffs' exercise of reasonable diligence in determining whether to invoke equitable tolling doctrine because plaintiffs' complaint failed to allege defendants' affirmative concealment); Engl v. Berg, 511 F. Supp. 1146, 1151 (E.D. Pa. 1981) (absent defendant's affirmative concealment, equitable tolling doctrine suspends running of § 10(b) limitations period only until reasonably diligent plaintiff could have discovered defendant's wrongdoing).

51. *See, e.g.*, Robertson v. Seidman & Seidman, 609 F. 2d 583, 593 (2d Cir. 1979) (defendant's active concealment of § 10(b) violation suspended running of applicable limitations period

modified version of the equitable tolling doctrine excuses the plaintiff from having to establish his reasonable diligence in safeguarding his section 10(b) rights in cases involving the defendant's affirmative concealment.[52]

The United States Court of Appeals for the Seventh Circuit created the modified equitable tolling doctrine in three 1975 decisions.[53] Since 1975, Seventh

---

until plaintiff actually discovered defendant's § 10(b) violation); McConnell v. Frank Howard Allen & Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,538, p. 97,124 (N.D. Cal. Oct. 11, 1983) (same). The notion that a defendant's affirmative concealment of a plaintiff's § 10(b) claim will suspend the running of the applicable limitations period until the plaintiff actually discovers his § 10(b) claim derives from the common-law doctrine of equitable estoppel. *See* Campbell v. Upjohn Co., 498 F. Supp. 722, 728 n.6 (W.D. Mich. 1980) (courts that have held that defendant's affirmative concealment indefinitely tolls § 10(b) limitations periods until plaintiff's actual discovery of § 10(b) claim have determined that defendant's concealment operates to estop defendant from asserting limitations defense), *aff'd*, 676 F.2d 1122 (6th Cir. 1982); Vogel v. Trahan [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶97,303, p. 97,080 (E.D. Pa. Jan. 11, 1980) (same); *cf.* Portmann v. United States, 674 F.2d 1155, 1158 (7th Cir. 1982) (equitable estoppel prevents litigant from maintaining certain position in court when prior fraudulent statement or action of that litigant reasonably induced another party to rely detrimentally upon false position). The distinction between the equitable tolling doctrine and equitable estoppel of a defendant's statute of limitations defense is that equitable tolling applies in § 10(b) cases in which a federal court determines that the applicable limitations period has not and should not expire. *See* Trecker v. Scag, 679 F.2d 703, 706-07 n.7 (7th Cir. 1982) (discussion of distinction between equitable tolling doctrine and doctrine of equitable estoppel of defendant's statute of limitations defense). In contrast, equitable estoppel of a defendant's statute of limitations defense in § 10(b) cases applies only when the applicable limitations period already has expired. *See id. See generally* Dawson, *Estoppel and Statutes of Limitations,* 34 MICH. L. REV. 1, 23-24 (1935) (comparison of doctrine of estoppel to equitable tolling doctrine) [hereinafter cited as *Estoppel*]. In *Gieringer v. Silverman*, for example, the United States District Court for the Eastern District of Wisconsin held that the plaintiffs could not invoke the federal equitable tolling doctrine to prevent Wisconsin's three-year blue sky limitations period from barring the plaintiffs' § 10(b) claim. *See* Gieringer v. Silverman, 539 F. Supp. 498, 502-03 (E.D. Wis. 1982). The *Gieringer* court held that the plaintiffs' admission of their knowledge of the defendants' § 10(b) violation and the fact that the defendants did not conceal affirmatively their wrongdoing rendered the federal equitable tolling doctrine inapplicable. *See id.* at 503. The *Gieringer* court, however, indicated that the doctrine of equitable estoppel could save the plaintiff's § 10(b) claim. *See id.* Nevertheless, the *Gieringer* court determined that the doctrine of equitable estoppel did not prevent the defendants from barring the plaintiffs' § 10(b) claim under the statute of limitations defense. *See id.* The court reasoned that the defendants had not sufficiently induced the plaintiffs to relinquish their statute of limitations defense to permit the plaintiffs to avail themselves of the doctrine of equitable estoppel. *See id.* As a practical matter, any distinction between the effects of the federal equitable tolling doctrine and the doctrine of equitable estoppel of a defendant's statute of limitations is insignificant. *See Estoppel, supra*, at 24 (any distinction between the actual effects of doctrine of estoppel and equitable tolling doctrine on statute of limitations defense is artificial); Marcus, *supra* note 2, at 863 n.225 (federal equitable tolling doctrine and doctrine of equitable estoppel of defendant's statute of limitations defense are part of continuum of law excusing plaintiff's failure to sue within limitations period).

52. *See* Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975) (court excused plaintiff from duty to establish reasonable diligence in safeguarding his § 10(b) rights because defendants affirmatively concealed plaintiff's § 10(b) claim); *cf. infra* notes 114-27 and accompanying text (discussion of limits on plaintiff's freedom from duty to establish reasonable diligence in cases involving defendant's affirmative concealment under modified equitable tolling doctrine).

53. *See* Comment, *The Seventh Circuit's Reformulation of the Equitable Tolling Doctrine,*

Circuit courts consistently have permitted section 10(b) plaintiffs to avail themselves of the modified equitable tolling doctrine.[54] Moreover, several federal courts in the Second, Third, and Ninth Circuits have adopted the modified equitable tolling doctrine in section 10(b) actions.[55] A majority of federal courts, however, have refused to adopt the modified equitable tolling doctrine.[56]

1982 ILL. L. REV. 565, 569-71 (1982) (Seventh Circuit reformulated federal equitable tolling doctrine in three 1975 cases) [hereinafter cited as *Seventh Circuit's Reformulation*]; *see also* Tomera v. Galt, 511 F.2d 504 (7th Cir. Feb. 5, 1975); Goldstandt v. Bear, Stearns & Co., 522 F.2d 1265 (7th Cir. Aug. 29, 1975); Sperry v. Barggren, 523 F.2d 708 (7th Cir. Sept. 2, 1975); *infra* notes 57-91 and accompanying text (discussion of *Tomera, Goldstandt*, and *Sperry* decisions).

54. *See* Trecker v. Scag, 679 F.2d 703, 708 (7th Cir. 1982) (court invoked modified equitable tolling doctrine to prevent Wisconsin's three-year blue sky limitations period from barring plaintiff's § 10(b) action); Timmreck v. Munn, 433 F. Supp. 396, 404-05 (N.D. Ill. 1977) (court permitted plaintiffs to amend complaints to include allegations concerning defendants' affirmative concealment so that plaintiffs could rely upon modified equitable tolling doctrine to save § 10(b) claim from limitations preclusion); *see also* Board of Educ. v. Admiral Heating & Ventilation, Inc., 94 F.R.D. 300, 301-02 (N.D. Ill. 1982) (court recognized applicability of modified equitable tolling doctrine in antitrust cause of action); Smith v. Groover, 468 F. Supp. 105, 120 (N.D. Ill. 1979) (court recognized applicability of modified equitable tolling doctrine in commodities cause of action); American Civil Liberties Union v. City of Chicago, 431 F. Supp. 25, 28 (N.D. Ill. 1976) (court invoked modified equitable tolling doctrine to save plaintiff's civil rights action from limitations preclusion).

55. *See* Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2d Cir. 1979) (court invoked modified equitable tolling doctrine to save plaintiff's § 10(b) action from limitations preclusion); McConnell v. Frank Howard Allen & Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,538, p. 97,123-24 (N.D. Cal. Oct. 11, 1983) (court invoked modified equitable tolling doctrine to prevent California's three-year common-law fraud limitations period from barring plaintiffs' § 10(b) action); Engl v. Berg, 511 F. Supp. 1146, 1151 (E.D. Pa. 1981) (court invoked modified equitable tolling doctrine to prevent Pennsylvania's three-year blue sky limitations period from barring plaintiff's § 10(b) action); Cunha v. Ward Foods, Inc., 501 F. Supp. 830, 836-37 (D. Hawaii 1980) (court invoked modified equitable tolling doctrine to save plaintiff's § 10(b) action from limitations preclusion); Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 945 & n.2 (D.N.J.) (dictum) (court recognized applicability of modified equitable tolling doctrine in § 10(b) action), *rev'd on other grounds*, 611 F.2d 450 (3d Cir. 1979); *see also* Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250-51 (9th Cir. 1978) (Merrill, J., dissenting) (dissenting judge argued that modified equitable tolling doctrine saved plaintiff's antitrust action from limitations preclusion); Township of Susquehanna v. H. & M. Inc., 98 F.R.D. 658, 668 (M.D. Pa. 1983) (court recognized applicability of modified equitable tolling doctrine in antitrust action); Vogel v. Trahan, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶97,303, p. 97,080-81 (E.D. Pa. Jan. 11, 1980) (court invoked modified equitable tolling doctrine to save plaintiff's claim under § 12(2) of '33 Act from limitations preclusion); Foodtown v. Sigma Mktg. Sys., Inc. 518 F. Supp. 485, 492-94 (D.N.J. 1980) (court invoked modified equitable tolling doctrine to save plaintiff's breach of contract action from limitations preclusion); Husted v. Amrep Corp., 429 F. Supp. 298, 306-09 (S.D.N.Y. 1977) (court invoked modified equitable tolling doctrine to save plaintiff's claim under Interstate Land Sales Full Disclosure Act from limitations preclusion).

56. *See* Campbell v. Upjohn Co., 676 F.2d 1122, 1127-28 (6th Cir. 1982) (court expressly rejected modified equitable tolling doctrine in § 10(b) action); Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 694 (10th Cir.) (same), *cert. denied*, 454 U.S. 895 (1981); Brunner v. Bush & Co., No. 75-88-C5, slip op. (D. Kan. Sept. 29, 1977) (same); *In re* Clinton Oil Co. Sec. Litig., [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶96,015, p. 91,572 (D. Kan.

The Seventh Circuit's decision in *Tomera v. Galt*[57] represents the origin of the modified equitable tolling doctrine for section 10(b) actions.[58] In *Tomera*, a plaintiff purchased stock in the defendants' foreign and domestic corporations.[59] When problems arose concerning the financial well-being of the foreign corporations, the plaintiff and other investors sued the defendants for alleged violations of section 10(b).[60] The United States District Court for the Northern District of Illinois granted the defendants' motion for summary judgment on the ground that Illinois' three-year blue sky limitations period barred the plaintiff's section 10(b) action.[61] The district court ruled that the plaintiff had failed to allege the existence of the defendants' fraudulent concealment of the plaintiff's section 10(b) action sufficiently to invoke the equitable tolling doctrine.[62]

On appeal to the Seventh Circuit, the *Tomera* court reversed the district court's decision and held that the equitable tolling doctrine saved the plaintiff's section 10(b) claim.[63] The Seventh Circuit stated that two types of fraudulent behavior on the part of a defendant exist that will toll a limitations period under the equitable tolling doctrine.[64] The first type involves fraud that a plaintiff fails to discover even though the defendant does nothing to conceal the existence of his securities fraud beyond the original fraudulent act.[65] The

---

Mar. 18, 1977) (same); *see also In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1170 n.27 (5th Cir. 1979) (court expressly rejected modified equitable tolling doctrine in antitrust action); *cert. denied*, 449 U.S. 905 (1980); Hauptmann v. Wilentz, 570 F. Supp. 351, 397-98 n.48 (D.N.J. 1983) (dictum) (court expressly rejected modified equitable tolling doctrine in civil rights action). In addition to the federal courts that have expressly rejected the modified equitable tolling doctrine, the majority of federal courts implicitly have rejected the modified equitable tolling doctrine. *See, e.g.*, Shelter Mut. Ins. Co. v. Public Water Supply Dist. No. 7, 569 F. Supp. 310, 320-21 (E.D. Mo. 1983) (court required plaintiff to establish reasonable diligence under equitable tolling doctrine despite plaintiff's allegation of defendants' affirmative concealment); Byrne v. Gulfstream First Bank & Trust Co., 528 F. Supp. 692, 694-95 (S.D. Fla. 1981) (same), *aff'd*, 720 F.2d 686 (11th Cir. 1983); Hill v. Der, 521 F. Supp. 1370, 1387 (D. Del. 1981) (same).

57. 511 F.2d 504 (7th Cir. 1975).

58. *See Seventh Circuit's Reformulation, supra* note 53, at 571-73 (Seventh Circuit fashioned new law on federal equitable tolling doctrine in *Tomera v. Galt*).

59. 511 F.2d at 506-07.

60. *Id.* at 507.

61. *Id.* at 507-08. In addition to granting the defendants' motion for summary judgment on statute of limitations grounds, the *Tomera* district court also granted the defendants' motion for summary judgment based on the plaintiff's failure to aver circumstances underlying his § 10(b) right of action with sufficient particularity under rule 9(b) of the Federal Rules of Civil Procedure. *Id.* at 507; *see also* FED. R. CIV. P. 9(b) (plaintiffs must aver with particularity circumstances constituting fraud, other than defendant's condition of mind). On appeal, the Seventh Circuit reversed the district court's determination that the plaintiff's pleadings were insufficient under rule 9(b). 511 F.2d at 508-09. The Seventh Circuit reasoned that rule 9(b) requires a plaintiff to provide a defendant in a fraud case with only slightly more notice than the general pleading standards under rule 8 of the Federal Rules of Civil Procedure require. *Id.; see* FED. R. CIV. P. 8 (general rules of pleading).

62. 511 F.2d at 509.

63. *Id.* at 509-11.

64. *Id.* at 510.

65. *Id.*

Seventh Circuit stated that when a plaintiff alleges this first type of fraudulent behavior, the plaintiff must establish his reasonable diligence in protecting his rights from the defendant's fraud to suspend the applicable limitations period under the equitable tolling doctrine.[66] The second type of fraudulent behavior occurs when the plaintiff fails to discover the defendant's fraud because the defendant has taken positive steps to conceal the existence of the fraud from the plaintiff.[67] The Seventh Circuit held that when a plaintiff alleges this second type of fraudulent behavior, the equitable tolling doctrine will suspend the applicable limitations period until the plaintiff actually discovers the existence of the defendant's original fraud.[68] In *Tomera*, the Seventh Circuit held that the plaintiff's allegations that the defendants failed to keep investment records, refused to divulge corporation charters, leases, and agreements to primary investors, and refused to answer inquiries concerning corporation operations were sufficient to constitute affirmative concealment.[69] The *Tomera* court ruled that the plaintiff's complaint alleged facts which, if true, were sufficient to suspend the applicable limitations period until the plaintiff actually discovered the existence of her right of action against the defendants.[70]

The second Seventh Circuit decision to recognize the modified equitable tolling doctrine in a section 10(b) action was *Goldstandt v. Bear, Stearns & Co.*[71] In *Goldstandt*, two broker-dealers of securities brought a section 10(b) action against a retail securities business in the United States District Court for the Northern District of Illinois.[72] The broker-dealers' complaint alleged that the defendants had misrepresented the legality of a security sales procedure.[73] Relying upon the defendants' representations, the plaintiffs suffered damages when the securities sales procedure turned out to be illegal.[74]

---

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* Since the *Tomera* district court's summary judgment in favor of the defendants deprived the plaintiff of her opportunity to establish the defendants' affirmative concealment, the Seventh Circuit remanded the action for the district court to render these factual determinations. *Id.* at 510-11.

71. 522 F.2d 1265 (7th Cir. 1975).

72. *Id.* at 1267.

73. *Id.* at 1266-67. In *Goldstandt*, the defendants allegedly informed the broker-dealer plaintiffs that a securities sales procedure was legal. *Id.* at 1266. The securities sales procedure involved "short sales" of unregistered securities that had registration statements pending with the SEC. *Id; see* Provost v. United States, 269 U.S. 443, 450-51 (1926) (short sale is contract for sale of shares of stock that seller does not own or control but which seller plans to acquire for future delivery). Relying on the unprofessional legal advice of the defendants, the plaintiffs consummated thirty transactions involving the securities sales procedure suggested by the defendants. 522 F.2d at 1266.

74. 522 F.2d at 1266-67. As a result of the plaintiff's implementation of the securities sales procedure that the defendants had suggested to the plaintiffs, the National Association of Securities Dealers served the plaintiffs with a complaint alleging that the plaintiffs had violated certain rules of fair practice in securities transactions. *Id.* After a hearing, the National Association of Securities Dealers fined the plaintiffs $100,000 and permanently revoked the plaintiffs' membership in the Association. *Id.* at 1267.

The district court held that the three-year limitation provision of Illinois' blue sky laws barred the plaintiffs' section 10(b) action.[75] The district court further held that the plaintiffs could not invoke the federal equitable tolling doctrine because the plaintiffs had failed to sufficiently allege their diligence in attempting to discover the defendants' fraud.[76] On appeal, the Seventh Circuit endorsed the *Tomera* court's distinction between undiscovered fraud and affirmative concealment.[77] The *Goldstandt* court stated that in cases in which a defendant affirmatively conceals the existence of his fraud, the court should suspend the running of the limitations period until the plaintiff actually discovers the existence of the defendant's fraud.[78] Since the broker-dealers' complaint alleged no affirmative concealment on the part of the defendants, however, the *Goldstandt* court resolved the equitable tolling issue by examining the plaintiffs' diligent efforts to protect themselves from the defendant's securities fraud.[79] The *Goldstandt* court determined that the plaintiffs had failed to exercise reasonable diligence.[80] The *Goldstandt* court therefore affirmed the district court's decision to preclude the plaintiffs' section 10(b) action.[81]

In *Sperry v. Barggren*,[81] the Seventh Circuit invoked the modified equitable tolling doctrine once again. In *Sperry*, the plaintiff, an individual stockholder in the defendants' company, sold his stock in the company to the defendants for 200 dollars per share.[83] Upon learning that the defendants subsequently sold their company for 781 dollars per share of stock, the plaintiff brought a section 10(b) action against the defendants for failing to disclose facts relevant to the value of the shares of stock.[84] The United States District Court for the Eastern District of Wisconsin granted the defendants' motion for summary judgment.[85] The district court held that Wisconsin's three-year blue sky

---

75. *Id.*

76. *Id.*

77. *Id.* at 1268; *see supra* text accompanying notes 64-68 (discussion of *Tomera* court's recognition of distinction between equitable tolling premised on defendant's affirmative concealment and equitable tolling premised on inherent undiscoverability of defendant's wrongdoing).

78. 522 F.2d at 1268 (quoting *Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975)).

79. *Id.*

80. *Id.* at 1269.

81. *Id.* In ruling that the plaintiffs had failed to exercise reasonable diligence in discovering their § 10(b) claim that *Goldstandt* court characterized the plaintiffs as sophisticated investors. *Id.; see* supra note 44 (discussion of conflict among federal courts over issue of whether fact finder may consider plaintiff's subjective characteristics in determining when plaintiff should have discovered § 10(b) claim).

82. 523 F.2d 708 (7th Cir. 1975).

83. *Id.* at 709. The plaintiff in *Sperry*, a retired foreman from the defendants' company, owned 226 shares of the company's stock. *Id.* Following negotiations with the defendants, the plaintiff agreed to sell 26 of his shares of stock to the defendants for $200 per share and also agreed to give the defendants an option to buy the remaining 200 shares of stock for the same price. *Id.* Subsequently, the defendants agreed to sell their company to a third party for $781 per share of the stock. *Id.* The defendants thereupon exercised their option and purchased in a lump sum the plaintiff's remaining 200 shares of stock for $200 per share. *Id.*

84. *Id.* at 710.

85. *Id.*

limitations period barred the plaintiff's section 10(b) cause of action.[86] The district court further held that the existence of newspaper publicity of the defendants' subsequent sale of their company prevented the plaintiff from invoking the federal equitable tolling doctrine to save his section 10(b) claim.[87] The district court believed that the existence of three newspaper accounts provided the plaintiff with sufficient notice of the defendant's activities to warrant a holding that the plaintiff should have discovered his section 10(b) claim within the applicable limitations period.[88]

On appeal, the Seventh Circuit reversed the district court's decision and held that the modified equitable tolling doctrine suspended the running of the three-year limitations period.[89] The *Sperry* court stated that the issue of whether the defendants had exercised affirmative concealment of the plaintiff's section 10(b) claim was an issue for the trier of fact.[90] The *Sperry* court therefore remanded the action to the district court to determine whether the defendants' affirmative concealment of the plaintiff's section 10(b) claim was sufficient to suspend the running of the three-year limitations period until the plaintiff actually discovered his section 10(b) claim.[91]

Unlike the Seventh Circuit's adoption of the modified equitable tolling doctrine in section 10(b) actions, the United States Court of Appeals for the Sixth Circuit, in *Campbell v. Upjohn Co.*,[92] refused to distinguish between unconcealed but undiscoverable fraud and fraud that a defendant affirmatively concealed.[93] In *Campbell,* a shareholder in a small corporation brought a section 10(b) action against the defendants, a larger successor corporation, for fraudulently inducing the plaintiff to sign a merger agreement and for concealing the terms of the merger agreement from the plaintiff.[94] Under the merger

---

86. *Id.*

87. *Id.* at 711.

88. *Id.* In *Sperry,* the defendants' subsequent sale of their company to a third party received national and local newspaper publicity. *Id.* at 710. The national publicity consisted of a four-line account in a national financial publication. *Id.* The local publicity consisted of small articles in two Wisconsin newspapers. *Id.* In discussing the likelihood that the newspaper publicity would have notified the original plaintiffs of the defendants' securities fraud, the Seventh Circuit noted that none of the news accounts mentioned the price that the third party paid the defendants for each share of stock. *Id.* The Seventh Circuit also noted that the local Wisconsin publicity was unlikely to provide the original plaintiff with notice of the defendants' securities fraud because the original plaintiff was a resident of Florida. *Id.* at 711.

89. *Id.*

90. *Id.*

91. *Id.* The *Sperry* court did not specify what particular conduct of the defendants constituted potential affirmative concealment. Instead, the *Sperry* court only stated that the difficulty that the plaintiffs' attorney encountered in obtaining information pertaining to the defendants' alleged § 10(b) fraud indicated a possibility of the existence of affirmative concealment. *Id.* Consequently, the *Sperry* court remanded the plaintiffs' 10(b) action to the district court to determine whether the defendants affirmatively concealed their securities fraud and, if not, whether the plaintiff, in the exercise of reasonable diligence, should have discovered sooner the existence of his § 10(b) claim. *Id.*

92. 676 F.2d 1122 (6th Cir. 1982).

93. *Id.* at 1128.

94. 498 F. Supp. 722, 724-25 (W.D. Mich. 1980), *aff'd,* 676 F.2d 1122 (6th Cir. 1982).

agreement, the plaintiff relinquished his interest in the small corporation to the defendant.[95] The United States District Court for the Western District of Michigan held that the applicable two-year limitations period barred the plaintiff's section 10(b) cause of action.[96] On appeal, the Sixth Circuit affirmed the district court's decision to preclude the plaintiff's section 10(b) claim.[97] The *Campbell* court expressly rejected the *Tomera* court's holding that a defendant's affirmative concealment suspends the running of a section 10(b) limitations period until the plaintiff actually discovers his section 10(b) claim.[98] Instead, the *Campbell* court held that a plaintiff must establish his reasonable diligence in protecting his claim from the defendant's fraud to suspend a section 10(b) limitations period under the equitable tolling doctrine.[99]

Some courts have indicated that any actual differences between the traditional equitable tolling doctrine and the modified equitable tolling doctrine may be illusory.[100] As a practical matter, the most significant difference between the conflicting doctrines involves the issue of whether a court should require a plaintiff to establish his reasonable diligence in alertly protecting

---

In *Campbell v. Upjohn Co.*, the plaintiff alleged that the defendant induced the plaintiff to merge the plaintiff's interests in a small corporation with the defendant. *Id.* at 724. The plaintiff alleged that the defendant orally promised the plaintiff an employment contract and future bonuses in the preliminary negotiations to the merger agreement. *Id.* at 724-25. When the parties finalized the merger agreement, however, the defendant allegedly intimidated the plaintiff into signing a merger agreement that did not contain an employment contract or future bonuses. *Id.*

95. *Id.*

96. *Id.* at 730-32; *see supra* text accompanying notes 28-33 (discussion of *Campbell* court's choice of limitations period).

97. 676 F.2d at 1128.

98. *Id.*

99. *Id.*

100. *See* Campbell v. Upjohn Co., 676 F.2d 122, 1128 (6th Cir. 1982); Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 695 n.16 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981). In *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, the Tenth Circuit expressly rejected the Seventh Circuit's distinction between equitable tolling premised on a defendant's affirmative concealment and equitable tolling premised on the inherent undiscoverability of a defendant's wrongdoing. *See* 651 F.2d at 694-95; *see also supra* notes 57-70 and accompanying text (discussion of Seventh Circuit's formulation of modified equitable tolling doctrine in *Tomera v. Galt*). The *Peterson* court ruled that a defendant's affirmative acts of concealment only influence the determination of whether the plaintiff, in the exercise of reasonable diligence, should have discovered his § 10(b) claim. *See* 651 F.2d at 694-95. The *Peterson* court stated that the distinction of the modified equitable tolling doctrine between two tolling situations derives from a misconception that the traditional equitable tolling doctrine requires a plaintiff to establish reasonable diligence. *Id.* at 695 n.16. The *Peterson* court, however, failed to support the belief that the traditional equitable tolling doctrine permits plaintiffs to suspend the running of a § 10(b) limitations period without requiring the plaintiff to establish reasonable diligence. *See id.* Moreover, the *Peterson* court's statement seemingly contradicts the established case law underlying the traditional equitable tolling doctrine. *See supra* note 45 and accompanying text (discussion of requirement of traditional equitable tolling doctrine that plaintiff establish reasonable diligence in safeguarding his rights from defendant's fraud). In *Campbell v. Upjohn Co.*, the Sixth Circuit quoted the *Peterson* court's statement that the modified equitable tolling doctrine arises from a misconception that the traditional doctrine requires plaintiffs to establish reasonable diligence. 676 F.2d at 1128. The *Campbell* court, nevertheless, contradicted itself by requiring the plaintiff to establish reasonable diligence when invoking the traditional equitable tolling doctrine. *See id.* at 1126-27.

his rights from a defendant's fraud despite the defendant's affirmative actions to prevent the plaintiff from discovering the securities fraud.[101] Theoretically, the most significant difference between the two conflicting doctrines involves the differing emphasis that each doctrine places upon the policies underlying the statute of limitations defense. For instance, federal courts that have followed the traditional equitable tolling doctrine require a plaintiff to exercise reasonable diligence at all times have stressed the standard policies underlying statutes of limitations[102] such as a potential defendant's right to eventual ease of mind,[103] the protection of both defendants and courts from stale evidence,[104] and the punishment of idle plaintiffs.[105] Federal courts that have followed the modified equitable tolling doctrine and excused a plaintiff's obligation to exercise reasonable diligence in cases involving a defendant's affirmative concealment, however, have stressed the turpitude of the defendant's conduct[106] and the injustice of barring a victimized plaintiff on the technicality of a statute of limitations defense.[107] These practical and theoretical differences between the traditional and modified equitable tolling doctrines reflect an underlying difference in focus between the two doctrines.[108] The traditional equitable tolling doctrine always focuses upon the conduct of the plaintiff in exercising

---

101. *Compare* Cook v. Avien, Inc., 573 F.2d 685, 695 (1st Cir. 1978) (court required plaintiff to establish reasonable diligence) *with* Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2d Cir. 1979) (defendant's affirmative concealment excused plaintiff of reasonable diligence requirement).

102. *See supra* note 2 (authorities that have provided discussion of policies underlying statutes of limitations).

103. *See* Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 694 (10th Cir.) (statutes of limitations relieve defendants of uncertainty of contingent liabilities), *cert. denied*, 454 U.S. 895 (1981).

104. *See id.* (statutes of limitations protect defendants and courts from vexatious litigation based on stale evidence and absent witnesses).

105. *See* Campbell v. Upjohn Co., 498 F. Supp. 722, 732 (W.D. Mich. 1980) (statute of limitations acted to bar plaintiff who negligently failed to protect his own interests). *aff'd*, 676 F.2d 1122 (6th Cir. 1982).

106. *See* McConnell v. Frank Howard Allen & Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,538, p. 97,124 (N.D. Cal. Oct. 11, 1983) (court justified excusing plaintiff's obligation of reasonable diligence in case involving defendants' fraudulent concealment by noting injustice of permitting defendants to intentionally take advantage of naivete or laxity of plaintiff); Ohio v. Peterson, Lowry, Rall, Barber & Ross, 472 F. Supp. 402, 406-07 (D. Colo. 1979) (defendant's affirmative concealment will suspend running of applicable limitations period regardless of plaintiff's exercise of reasonable diligence), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981).

107. *See* Tomera v. Galt, 511 F.2d 504, 510-11 (7th Cir. 1975) (barring § 10(b) actions on account of statute of limitations defense controverts basic policies of § 10(b); *cf.* Rochelle v. Marine Midland Grace Trust Co., 535 F.2d 523, 532-33 (9th Cir. 1976) (interests protected by § 10(b) outweigh interests protected by statutes of limitations).

108. *See Fraudulent Concealment, supra* note 3, at 880 (defendant's affirmative acts of concealment in equitable tolling case will lead court beyond scrutiny of plaintiff's opportunities for discovery to scrutiny of means by which defendant obstructed plaintiff's discovery); *see also* Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 118 n.7 (D. Conn. 1978) (dictum) (trial judge rendered informative footnote discussing policy arguments in favor of both modified and traditional versions of equitable tolling doctrine).

reasonable diligence in bringing his section 10(b) claim.[109] The modified equitable tolling doctrine, however, shifts that focus to the conduct of the defendant in cases in which the defendant affirmatively concealed the existence of his section 10(b) securities fraud.[110]

Several courts and two commentators have criticized the modified equitable tolling doctrine for promoting confusion in the federal law of equitable tolling, creating indefinite liability for defendants, and providing a windfall for inactive plaintiffs.[111] The critics describe the modified equitable tolling doctrine as a means for idle plaintiffs to escape limitations preclusion in cases involving the defendant's affirmative concealment.[112] The critics of the modified equitable tolling doctrine believe that the constant focus of the traditional equitable tolling doctrine of the reasonable diligence of the plaintiff represents a more equitable test for determining the length of suspension of a section 10(b) limitations period.[113]

Although language from *Tomera v. Galt* seemingly affirms the belief that a plaintiff's mere allegation of a defendant's affirmative concealment automatically and indefinitely will suspend a section 10(b) limitations period under the modified equitable tolling doctrine,[114] post-*Tomera* cases that have adopted the modified doctrine demonstrate that the modified doctrine is capable of harmonizing the tensions between a plaintiff's exercise of diligence and a defendant's affirmative concealment.[115] In *Sperry v. Barggren*, for example, the Seventh Circuit determined that the existence of newspaper publicity surrounding the defendants' alleged section 10(b) violation did not prevent the

---

109. *See* Shelter Mut. Ins. Co. v. Public Water Supply Dist. No. 7, 569 F. Supp. 310, 318 (E.D. Mo. 1983) (equitable tolling doctrine focuses on knowledge that plaintiff had or should have had).

110. *See* Ohio v. Peterson, Lowry, Rall, Barber & Ross, 472 F. Supp. 402, 406-07 (D. Colo. 1979) (equitable tolling doctrine shifts focus from plaintiff's exercise of reasonable diligence to defendant's conduct in cases involving defendant's affirmative concealment), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981).

111. *See, e.g.*, Campbell v. Upjohn Co., 676 F.2d 1122, 1128 (6th Cir. 1982) (modified equitable tolling doctrine fosters injustice by permitting indefinite suspension of § 10(b) limitations periods causing evidence to stale); Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 694 (10th Cir.) (modified equitable tolling doctrine promotes confusion by maintaining indefinite liability for defendants), *cert. denied*, 454 U.S. 895 (1981); *see also* Marcus, *supra* note 2, at 878 (modified equitable tolling doctrine will add confusion to already confused area of law by requiring courts to determine parameters of affirmative concealment); *Seventh Circuit's Reformulation, supra* note 53, at 575-78 (modified equitable tolling doctrine creates indefinite liability for defendants and provides windfalls for indolent plaintiffs).

112. *See supra* note 111 (criticism of modified equitable tolling doctrine).

113. *See Seventh Circuit's Reformulation, supra* note 53, at 577 (at some point court must free defendant from liability).

114. *See* Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975); *see also supra* notes 57-70 and accompanying text (discussion of *Tomera v. Galt*). In *Tomera*, the Seventh Circuit stated that whether the plaintiff personally inquired into the defendants' conduct was unimportant to the classification of the defendants' conduct as affirmative concealment. 511 F.2d at 510.

115. *See infra* text accompanying notes 116-19 (discussion of Seventh Circuit's delimitation of modified equitable tolling doctrine).

plaintiff from invoking the modified equitable tolling doctrine.[116] The *Sperry* court noted that the sketchy nature and the limited circulation of the newspaper accounts made the publicity insufficient to put the average shareholder in the plaintiff's situation on notice of the defendants' section 10(b) violation.[117] The *Sperry* court's language raises the inference that more substantial publicity would have provided the plaintiff with sufficient notice for the Seventh Circuit to have affirmed the district court's decision to time bar the plaintiff's section 10(b) claim.[118] The *Sperry* decision therefore suggests that the modified equitable tolling does not disregard entirely a plaintiff's exercise of reasonable diligence in cases in which the plaintiff alleges affirmative concealment. Additionally, in *Goldstandt v. Bear, Stearns & Co.*, the Seventh Circuit stated that the modified equitable tolling doctrine provides an exception to a plaintiff's duty to exercise reasonable diligence only in cases in which the plaintiff "could not have known" of the defendant's securities fraud due to the defendant's affirmative concealment.[119] As in *Sperry*, the *Goldstandt* decision demonstrates that the modified equitable tolling doctrine permits a court to properly balance the separate effects of a plaintiff's exercise of diligence and a defendant's affirmative concealment.

In contrast, the traditional equitable tolling doctrine requires a section 10(b) plaintiff to exercise reasonable diligence both in cases in which the plaintiff delayed bringing suit merely because of the inherent undiscoverability of the section 10(b) fraud and cases in which the defendant's affirmative concealment caused the plaintiff's delay.[120] The modified equitable tolling doctrine, however, permits a federal court to consider the egregiousness of the defendant's affirmative concealment of his section 10(b) violation as an equitable tolling factor that is independent of the plaintiff's exercise of reasonable diligence.[121] The modified equitable tolling doctrine, therefore, provides greater flexibility and discretion to federal courts to determine whether the facts in

---

116. 523 F.2d 708, 711 (7th Cir. 1975); *see supra* notes 82-91 and accompanying text (discussion of *Sperry v. Barggren*).

117. 523 F.2d at 711; *see supra* note 88 (discussion of newspaper publicity in *Sperry*).

118. *See Seventh Circuit's Reformulation, supra* note 53, at 576 n.87 (implication arises from language in *Sperry* that greater newspaper publicity of defendants' conduct would have required plaintiff to timely discover § 10(b) action).

119. 522 F.2d 1265, 1269 (7th Cir. 1975); *see supra* notes 71-81 and accompanying text (discussion of *Goldstandt v. Bear, Stearns & Co.*). In *Goldstandt*, the Seventh Circuit ruled that the plaintiffs could not invoke the modified equitable tolling doctrine to save their § 10(b) claim from limitations preclusion. 522 F.2d at 1268-69. The *Goldstandt* court determined that the defendants' persistence in maintaining their § 10(b) misrepresentations did not constitute affirmative concealment even though the plaintiffs, on several occasions, had questioned the defendants expressly on this issue. *See id.* at 1266, 1268. In denying the misrepresentations of the defendants the status of affirmative concealment, the Seventh Circuit reasoned that the plaintiffs' reliance on the defendants' misrepresentations was unreasonable. *See id.* at 1269.

120. *See supra* notes 44-47 and accompanying text (discussion of operation of traditional equitable tolling doctrine).

121. *See supra* note 48-52 and accompanying text (discussion of operation of modified equitable tolling doctrine).

each particular case warrant suspension of the section 10(b) limitations period than the traditional doctrine provides. Although federal court adoption of the modified equitable tolling doctrine may complicate section 10(b) limitations law,[122] the flexibility that the modified doctrine provides federal judges to influence section 10(b) limitations issues effectuates the remedial purposes underlying section 10(b) better than the traditional equitable tolling doctrine.[123]

Section 10(b) of the '34 Act undertakes to promote high ethical standards in securities transactions.[124] Concomitant with this goal, the implied private right of action under section 10(b) operates to counteract securities fraud.[125] Preclusion of a section 10(b) action through the medium of the statute of limitations defense, however, contravenes the remedial purposes underlying section 10(b).[126] Accordingly, the federal judiciary has formulated the federal equitable tolling doctrine to save section 10(b) actions from limitations preclusion.[127] The federal equitable tolling doctrine operates by extending the length of time during which a plaintiff's section 10(b) right of action will remain viable.[128] Due to the inherent complexity of securities fraud actions[129] and the fact that securities claims are highly susceptible to concealment,[130] extension

---

122. *See supra* notes 18 & 111 and accompanying text (discussion of disparity existing in § 10(b) limitations law and concomitant criticism of modified equitable tolling doctrine).

123. *See* Securities & Exch. Comm'n v. American Real Estate Inv. Trust, 529 F. Supp. 1300, 1306 (C.D. Cal. 1982) (under federal securities laws, federal courts have broad powers and wide discretion to fashion appropriate remedy); Timmreck v. Munn, 433 F. Supp. 396, 399-400 (N.D. Ill. 1977) (courts should employ federal securities laws with flexibility to remedy diverse forms of investment fraud); *cf., e.g.,* Madison Consultants v. Federal Deposit Ins. Corp., 710 F.2d 57, 61 (2d Cir. 1983) (federal courts must interpret § 10(b) flexibly to effectuate its remedial purposes); Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 650 F.2d 342, 354 (D.C. Cir. 1980) (same), *cert. denied*, 452 U.S. 954 (1981); Duncan v. City of Oneida, 564 F. Supp. 425, 434 (E.D. Tenn. 1983) (same).

124. *See* Securities & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (discussion of fundamental purpose underlying securities acts); Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975) (same); *see also* Long v. Abbott Mortgage Corp., 424 F. Supp. 1095, 1098-99 (D. Conn. 1976) (purposes of § 10(b) are to deter securities fraud, protect integrity of securities market, and remedy securities violations).

125. *See supra* note 11 and accompanying text (discussion of federal judiciary's recognition of implied private right of action under § 10(b).

126. *See supra* note 107 (policies underlying § 10(b) outweigh policies underlying statute of limitations defense).

127. *See, e.g.,* Diener v. Beckley Coal Corp., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶99,663, p. 97,654-55 (D.D.C. Feb. 3, 1984) (court denied defendants' statute of limitations motion to dismiss plaintiffs' § 10(b) claim because federal equitable tolling doctrine extended viability of plaintiffs' claim); Rose v. Arkansas Valley Envtl. & Util. Auth., 562 F. Supp. 1180, 1196-97 (W.D. Mo. 1983) (same); *In re* N. Am. Acceptance Corp. Sec. Cases, 513 F. Supp. 608, 631-32 (N.D. Ga. 1981) (same).

128. *See supra* note 40 (discussion of capacity of federal equitable tolling doctrine to extend § 10(b) limitations periods).

129. *See* United States v. Naftalin, 534 F.2d 770, 774 (8th Cir.) (securities laws are complex and easily violated), *cert. denied*, 429 U.S. 827 (1976); Piel v. National Semiconductor Corp., 86 F.R.D. 357, 364 (E.D. Pa. 1980) (nature of securities laws is complex and litigation thereunder is expensive).

130. *See* Marcus, *supra* note 2, at 852.

of the length of limitations periods applicable to section 10(b) accommodates the character of section 10(b) as a catchall provision for securities fraud.[131] Consequently, the federal judiciary should follow the lead of the Seventh Circuit and adopt the modified version of the federal equitable tolling doctrine for implied private actions under section 10(b) of the '34 Act.

PETER G. ZEMANIAN

---

131. *See* Herman & MacLean v. Huddleston, 103 S.Ct. 683, 687 (1983) (§ 10(b) is catchall antifraud provision), Chiarella v. United States, 445 U.S. 222, 234-35 (1980) (same). The first federal court to imply a private right of action under § 10(b) noted the broad purpose of § 10(b) to eliminate all manipulative or deceptive practices in securities transactions. *See* Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) (§ 10 of '34 Act embodies broad purpose to eliminate deception in securities transactions). *But see* Trecker v. Scag, 679 F.2d 703, 711 (7th Cir. 1982) (Posner, J., concurring) (Judge Posner stated that § 10(b) no longer operates as catchall provision for securities deception but rather as mere jurisdictional ingress to federal court system to litigate essentially state claims).