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STATUTES OF LIMITATION FOR SECTION 10(b) AND RULE 10b-5: A NEW PROPOSAL FOR UNIFORMITY

Congress enacted the Securities Exchange Act of 1934 (Exchange Act) to regulate securities exchanges and over-the-counter markets operating in interstate commerce.¹ Through section 10(b) of the Exchange Act Congress prohibited any party from employing manipulative or deceptive devices in connection with the purchase or sale of securities.² Pursuant to section 10(b) of the Exchange Act, the Securities and Exchange Commission (SEC) promulgated rule 10b-5.³ Rule 10b-5 prohibits fraud or misstatement by any person in connection with the purchase or sale of securities.⁴ The SEC chose not to provide for a private cause of action under rule 10b-5.⁵ Similarly, Congress did not intend to create a private cause of action under section 10(b) of the Exchange Act.⁶ Numerous federal courts have held, however,

1. Securities Exchange Act of 1934, Pub. L. No. 291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. 78a et seq. (1982)). The Securities Exchange Act of 1934 provides for the regulation of securities exchanges and over-the-counter markets that operate in interstate commerce, foreign commerce, or through the mails. *See* 15 U.S.C. 78b (1982) (providing reasons for regulation of exchanges). In addition to regulating securities exchanges and markets, the Exchange Act provides for the prevention of inequitable and unfair practices on the securities exchanges and over-the-counter markets. *Id.* *See* *In Re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1547-48 (3rd Cir. 1988) (describing purpose of Exchange Act to prevent fraud and unfair practices on exchanges and markets).

2. *See* 15 U.S.C. 78j(b) (1982) (section 10(b) of Securities Exchange Act). Section 10(b) prohibits persons from using any manipulative or deceptive device in connection with the purchase or sale of any registered or unregistered security. *Id.* Congress granted the Securities and Exchange Commission (SEC) the power to prescribe regulations in the public interest to protect investors in securities. *Id.* Section 10(b) prohibits any person from employing deceptive devices or contrivances to contravene the rules promulgated by the SEC pursuant to section 10(b). *Id.*

3. 17 C.F.R. 240.10b-5 (1988).

4. *Id.* Rule 10b-5 prohibits any person from directly or indirectly using any means or instrumentality of interstate commerce, the mails, or any national securities exchange to defraud, misrepresent or omit material facts, or engage in activity that would defraud or deceive any person in connection with the purchase or sale of any security. *Id.*

5. *See* Garrett & Kennedy, *Conference on Codification of the Federal Securities Laws*, 22 Bus. LAW 793, 922 (1987) (general discussion of rule 10b-5 drafter Milton Freeman concerning SEC's intent to prevent fraud in securities transactions by promulgating rule 10b-5). Freeman explained the SEC's original purpose in adopting rule 10b-5 to the Conference on Codification of Federal Securities Laws. *Id.* Freeman explained that the SEC contemplated that only government agencies would use rule 10b-5 to prevent fraud on the securities exchanges and markets. *Id.* Freeman related that the SEC Commissioners did not anticipate that private parties would use rule 10b-5 in civil proceedings. *Id.*

6. *See* Note, *Statutes of Limitation For Rule 10b-5*, 39 WASH. & LEE L. REV. 1021 (1982) (recognizing that Congress could not foresee private actions under section 10(b) when enacting section 10(b)); *see also* Schulman, *Statute of Limitation in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635, 649 (1967) (discussing absence of congressional intent for private right of action under section 10(b)).

that a private right of action exists under section 10(b) and rule 10b-5.⁷ Because neither Congress nor the SEC anticipated private actions under section 10(b) and rule 10b-5, neither Congress nor the SEC created a statute of limitations for private actions under section 10(b) and rule 10b-5.⁸

Because neither Congress nor the SEC provided a limitation period for private actions under rule 10b-5, federal courts traditionally have borrowed limitation periods from state statutes that are analogous to rule 10b-5.⁹ The federal courts are split on which state statute of limitations applies to a cause of action under section 10(b) and rule 10b-5.¹⁰ The split among the federal circuits causes confusion for litigants, a tremendous waste of financial resources in litigation to determine a proper statute of limitation, an overburdening of the judiciary with unnecessary litigation, and forum shopping.¹¹ While all other circuits borrow state statutes of limitation for 10b-5 cases, the United States Court of Appeals for the Third Circuit borrows, instead, a uniform federal statute of limitations.¹² The Third Circuit's decision to borrow a federal statute of limitation offers a plausible solution

7. See *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946) (first court recognizing implied right of action under section 10(b) and rule 10b-5); see also *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972) (noting implied right of action under section 10(b) and rule 10b-5); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n. 9 (1971) (noting established practice of courts to recognize implied right of action under section 10(b) and rule 10b-5).

8. See D. Block & N. Barton, *Securities Litigation: Statutes of Limitation in Private Actions Under Section 10(b)- A Proposal for Achieving Uniformity*, 7 SEC. REG. L.J. 374 (1980) (noting judicial implication of private right of action under rule 10b-5 without concomitant federal limitation period).

9. See *Jensen v. Snellings*, 841 F.2d 600 (5th Cir. 1988) (borrowing Louisiana securities law limitation period for action under rule 10b-5); *Osterneck v. E.T. Barwick Indus.*, 825 F.2d 1521, 1535 (11th Cir. 1987) (applying Georgia common law fraud limitation period to action under rule 10b-5), *cert. granted*, 108 S. Ct. 2032 (1988); *Teamsters Local 282 Pension Trust Fund v. Angelos*, 815 F.2d 452, 455 (7th Cir. 1987) (borrowing Illinois securities law statute of limitations for action under rule 10b-5); *infra* notes 22-46 and accompanying text (discussing courts that have borrowed state law statutes of limitation for rule 10b-5).

10. See, e.g., *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 896 (5th Cir. 1979) (holding that fifth circuit courts should adopt limitation period from forum state's law on case by case basis); *Stull v. Bayard*, 561 F.2d 429, 431 (2nd Cir. 1977) (applying state common law fraud limitation period to rule 10b-5); *Janigan v. Taylor*, 344 F.2d 781, 783 (1st Cir. 1965) (applying two-year limitation period from Massachusetts's personal tort claims law to action under rule 10b-5).

11. See *infra* notes 68-71 and accompanying text (discussing problems created by lack of uniform statute of limitations for 10b-5 cases).

12. See *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1545 (3d Cir. 1988) (concluding that uniform limitation period from Securities Exchange Act of 1934 provides best limitation period for all actions under rule 10b-5); *infra* notes 76-118 and accompanying text (discussing Third Circuit's decision to borrow statute of limitation from federal securities law for 10b-5 cases); *infra* notes 22-46 and accompanying text (discussing Eighth, Seventh, and Fourth Circuits' practice of borrowing state securities fraud or blue sky limitation periods for 10b-5 cases); *infra* notes 52-66 and accompanying text (discussing Ninth, Second, and Tenth Circuits' practice of borrowing state fraud claim limitation periods for 10b-5 claims).

for eliminating the problems that have resulted from the split among federal courts over limitation periods for 10b-5 cases.¹³

While the Third Circuit borrows a uniform federal limitation period in 10b-5 cases, federal courts traditionally have chosen from a variety of state statutes of limitation.¹⁴ Courts often select a limitation period from state law by choosing the state law most similar in purpose to rule 10b-5.¹⁵ Still other courts choose the state statute that most closely matches rule 10b-5 by identity of elements.¹⁶ Federal courts typically choose the statute of

13. See *infra* notes 76-118 and accompanying text (noting Third Circuit's solution to problem of limitation period for 10b-5 claims).

14. See Beasley, *Report of the Task Force On Statutes of Limitation for Implied Actions*, ABA COMM. ON FED. REG. OF SECURITIES 13-20 & app. A (1985) [hereinafter *ABA Task Force Report*] (providing circuit by circuit and state by state breakdown on limitation periods that federal courts have applied to actions under rule 10b-5); see also BROMBERG & LOWENFELS, 4 SECURITIES FRAUD & COMMODITIES FRAUD 11:207-297 (1986) (providing survey of federal circuits' policies for adopting state limitation periods in 10b-5 cases).

15. See *ABA Task Force Report*, *supra* note 14, at 9 (noting that most courts with settled rules apply either state blue sky or common law fraud limitation periods for actions under rule 10b-5).

16. *Id.* at 10. Courts choosing a state law limitation period for actions under rule 10b-5 sometimes determine that a state law limitation period is appropriate for a rule 10b-5 claim because the substantive elements to the state law most closely resemble the substantive elements of rule 10b-5. *Id.* See *Wood v. Combustion Engineering*, 643 F.2d 339, 345-46 (5th Cir. 1981) (considering commonality of elements rather than commonality of purpose in choosing limitation period for action under rule 10b-5); *Robuck v. Dean Witter & Co.*, 649 F.2d 641, 644 (9th Cir. 1980) (applying state fraud limitation period to action under rule 10b-5 because of commonality of elements).

The Eighth Circuit applies a resemblance test that incorporates commonality of purpose and commonality elements for determining the appropriate state statute of limitation for a rule 10b-5 claim. See *In re Alodex Corp. Sec. Litig.*, 533 F.2d 372, 373-74 (8th Cir. 1976) (applying state blue sky limitation period to suit under rule 10b-5). The *Alodex* court developed a resemblance test that directed courts to compare the elements of various state statutes with the elements of rule 10b-5. *Id.* The *Alodex* court considered what state statute of limitations the court should borrow for a claim brought in Iowa under section 10(b) and rule 10b-5. *Id.* The Eighth Circuit noted that the Iowa blue sky law and rule 10b-5 both promoted the prevention of fraud and misrepresentation in the sale of securities. *Id.* The Eighth Circuit noted, further, that the defenses available under the Iowa blue sky law were identical to the defenses to an alleged rule 10b-5 violation. *Id.* Because the Eighth Circuit determined that the Iowa blue sky law and rule 10b-5 share a commonality of purpose and identical defenses, the Eighth Circuit determined that the Iowa blue sky law passed the resemblance test. *Id.* Consequently, the Eighth Circuit borrowed the statute of limitations of the Iowa blue sky law for application to the rule 10b-5 claim. *Id.*; see also Note, *Section 10(b): Statutes of Limitation in a Rule 10b-5 Implied Private Action*, 13 CREIGHTON L.R. 1445, 1446 (1980) (describing Eighth Circuit's application of resemblance test for determining statute of limitations for rule 10b-5). But see *ABA Task Force Report*, *supra* note 14, at 12-13. The ABA Task Force on Statutes of Limitation for Implied Actions explained that federal courts that consistently apply blue sky limitation periods to actions under rule 10b-5 often overlook technical distinctions between the state blue sky laws and rule 10b-5 because the courts perceive an overriding commonality of purpose between state blue sky laws and rule 10b-5. *Id.* Common technical differences between state blue sky laws and rule 10b-5 include proof of scienter—an intent to deceive, manipulate or defraud—an element required under rule 10b-5 but not essential under many state blue sky laws. *Id.* at 13. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185,

limitation from the forum state's blue sky or securities fraud law or the state's common-law fraud claim.¹⁷ Most federal courts consistently apply only one type of state statute of limitations to actions under rule 10b-5.¹⁸ Some courts, however, choose a state statute of limitations on a case by case basis depending upon the facts, circumstances, and legal theories in each case.¹⁹ Courts that choose statutes of limitation on a case by case basis suggest that no one state law proves most analogous to every 10b-5 claim.²⁰

The federal court that first applied a forum state's blue sky law statute of limitations in a 10b-5 case was the United States Court of Appeals for the Eighth Circuit in *Vanderboom v. Sexton*.²¹ In *Vanderboom* the Eighth Circuit considered whether sellers of securities in Arkansas aided, abetted, and conspired to defraud a group of South Dakota investors in violation of section 10(b) and rule 10b-5.²² The United States District Court for the Western District of Arkansas granted summary judgment for the defendants.²³ On appeal to the Eighth Circuit the *Vanderboom* court noted that if a federal law lacks a statute of limitations, a federal court should borrow a limitation period from an analogous law of the forum state.²⁴ The Eighth

193 (1975) (requiring proof of scienter to maintain cause of action for damages under rule 10b-5). Another distinction between many state blue sky laws and rule 10b-5 is that rule 10b-5 protects defrauded buyers and defrauded sellers of securities while state blue sky laws often protect only defrauded buyers of securities. *ABA Task Force Report*, *supra* note 14, at 13.

17. See *ABA Task Force Report*, *supra* note 14, at 9-12. The ABA Task Force on Statutes of Limitation for Implied Actions reports that courts that decide to apply blue sky or fraud limitation periods usually reach the decision by determining that the blue sky or fraud statute best effectuates the federal purpose of rule 10b-5. *Id.* at 11. The Task Force concluded, however, that courts perceive differently the federal purpose of rule 10b-5. *Id.*

18. See *ABA Task Force Report*, *supra* note 14, at 13 & app. A & B (noting that most circuits consistently apply either state common law fraud limitation periods or blue sky limitation periods to 10b-5 actions).

19. See *ABA Task Force Report*, *supra* note 14, at app. A & B (noting that Fifth and Sixth Circuits apply state limitation periods to actions under rule 10b-5 on case-by-case basis).

20. Compare *Marx v. Centran Corp.*, 747 F. 2d 1536, 1551 (6th Cir. 1984) (applying Ohio's fraud limitation period to action under rule 10b-5) with *Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981) (applying Kentucky blue sky law limitation period to action under rule 10b-5). See *BROMBERG & LOWENFELS*, *supra* note 14, at 11:241 (noting that Sixth Circuit applies different state limitation periods in different sixth circuit states because of wide variance among state laws).

21. 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970).

22. *Vanderboom v. Sexton*, 422 F.2d 1233, 1235-36 (8th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970). The Eighth Circuit considered a challenge by South Dakota investors in an Arkansas corporation, Investors Thrift Corporation (ITC) against sellers of securities in ITC. *Id.* The investors specifically alleged that Sam Sexton, Jr., an Arkansas attorney, and Jim Hall, a former Vice President of City National Bank of Fort Smith misrepresented the nature of the securities purchased by the South Dakota investors. *Id.*

23. *Id.* at 1236. The District Court granted summary judgment in *Vanderboom* for the defendants on the ground that the action was time barred by the two-year statute of limitations of the Arkansas Securities Act. *Id.* at 1235. See *Vanderboom v. Sexton*, 294 F. Supp. 1178, 1193 (W.D. Ark. 1969) (granting summary judgment for defendants on grounds that limitation period of Arkansas Securities Act barred plaintiffs' claim).

24. *Vanderboom*, 422 F.2d at 1237. In *Vanderboom* the Eighth Circuit cited *UWA v.*

Circuit explained in *Vanderboom* that a court considering a 10b-5 claim should adopt the limitation period from local law that best effectuates the federal policy of preventing securities fraud.²⁵ The *Vanderboom* court reasoned that the Arkansas law that best effectuated the policy of section 10(b) and rule 10b-5 was the Arkansas law that most closely resembles 10b-5.²⁶ The Eighth Circuit recognized that the Arkansas blue sky law closely resembled rule 10b-5 because at that time, unlike other state laws such as the common-law prohibition of fraud, neither the Arkansas blue sky law nor rule 10b-5 required the plaintiff to prove scienter by the defendant.²⁷ The *Vanderboom* court further recognized that both rule 10b-5 and the Arkansas blue sky law lacked specific defenses.²⁸ The Eighth Circuit concluded that the Arkansas blue sky law most closely resembled rule 10b-5 and, therefore, best effectuated the federal policy of rule 10b-5.²⁹ Thus, the *Vanderboom* court applied the two-year statute of limitations from the Arkansas blue sky law to the investors' rule 10b-5 action.³⁰

Like the Eighth Circuit, the United States Courts of Appeal for the Seventh and Fourth Circuits also apply the limitation period of the forum state's blue sky law to 10b-5 cases.³¹ The Fourth Circuit applied the Virginia blue sky law limitation period to a rule 10b-5 claim in *Gurley v. Documentation, Inc.*³² In *Gurley* the plaintiffs, sellers of securities in Documentation Inc., alleged that the defendants, Documentation Inc. and the law firm of Testa, Hurwitz, and Thibeault, violated section 10(b) and rule 10b-5 by misrepresenting the legal period in which the plaintiffs could sell securities.³³ The defendants in *Gurley* argued that Virginia's two-year blue sky law

Hoosier Cardinal Corp., 383 U.S. 696 (1966), to support the proposition that a federal court should apply a limitation period from state law, rather than federal law, when a federal law provides no limitation period. *Id. Cf. Agency Holding Corp. v. Malley-Duff & Assoc.*, 107 S. Ct. 2759, 2762 (1987) (holding that federal courts may look to state or federal law to borrow limitation period for a federal law that provides no limitation period).

25. *Vanderboom*, 422 F.2d at 1237.

26. *Id.* at 1237-38.

27. *Id.* at 1238-39. The Eighth Circuit noted that the requirement of scienter, not included in the Arkansas blue sky law, is the defendant's knowledge of the falseness of the impression produced by the defendant's statement or omission. *Id.* at 1239.

28. *Id.* at 1239-40. The Eighth Circuit noted that a defendant against an Arkansas fraud action may claim negligent misrepresentation as a specific defense. *Id.* at 1239. The Eighth Circuit explained, however, that under rule 10b-5 and Arkansas blue sky claims, negligence is not a defense. *Id.*

29. *Id.* at 1240.

30. *Id.*

31. See *Teamsters Local 282 Pension Trust Fund v. Angelos*, 815 F.2d 452, 455 (7th Cir. 1987) (applying state blue sky limitation period to rule 10b-5 action); *Suslick v. Rothchild Securities Corp.*, 741 F.2d 1000, 1004 (7th Cir. 1984) (applying limitation period from Illinois three-year blue sky statute to rule 10b-5 action); *Gurley v. Documentation, Inc.*, 674 F.2d 253, 254 (4th Cir. 1982) (applying state blue sky law limitation period to rule 10b-5 action); *O'Hara v. Kovens*, 625 F.2d 15, 18 (4th Cir. 1980) (applying Maryland's one-year blue sky statute of limitations to rule 10b-5 action), *cert. denied*, 449 U.S. 1124 (1981).

32. 674 F.2d 253 (4th Cir. 1982).

33. *Gurley v. Documentation, Inc.*, 674 F.2d 253, 254 (4th Cir. 1982).

limitation period applied to the plaintiffs' rule 10b-5 claim.³⁴ The plaintiffs in *Gurley* insisted, however, that the court should apply Virginia's five-year limitation period for common-law fraud to the plaintiffs' 10b-5 claim because Virginia's blue sky law only protects defrauded buyers of securities.³⁵ The United States District Court for the Eastern District of Virginia dismissed plaintiff's claim in *Gurley*.³⁶ On Appeal the Fourth Circuit noted that the Virginia blue sky law, unlike common-law fraud, shared with rule 10b-5 the purpose of prohibiting misinformation in securities transactions.³⁷ Because the Fourth Circuit found that the policy behind the Virginia blue sky law most closely paralleled the purpose of rule 10b-5, the Fourth Circuit applied the Virginia blue sky law limitation period to the rule 10b-5 claim in *Gurley*.³⁸ Consequently, the Fourth Circuit remanded the case to the district court to determine whether the two-year limitation period of the Virginia blue sky law barred the plaintiffs' rule 10b-5 claim.³⁹

The Seventh Circuit also regularly borrows the forum state's blue sky law limitation period in 10b-5 cases.⁴⁰ The Seventh Circuit considered whether the Illinois five-year statute of limitations for common law fraud or the three-year limitation period of the Illinois securities law applied to a rule 10b-5 claim in *Teamsters Local 282 Pension Trust Fund v. Angelos*.⁴¹ In *Angelos* the plaintiffs, trustees of a union pension fund, made a substantial loan from the pension fund to defendant bank and accepted shares of bank holding company stock as security for the loan.⁴² The plaintiffs alleged that the defendant bank and the bank's law firm misrepresented the financial status of the defendant bank, in violation of section 10(b) and rule 10b-5, when the bank offered the shares of stock as security for the

34. *Id.*

35. *Id.* at 258.

36. *Id.* at 254. The District Court dismissed plaintiff's claim under section 10(b) in *Gurley* because the District Court determined that plaintiff had no standing under section 10(b). *Id.*

37. *Id.* The Fourth Circuit determined that plaintiff had standing and thus reached the issue of which limitation period applied to plaintiff's rule 10b-5 claim. *Id.*

38. *Id.* The Fourth Circuit noted that Virginia's blue sky law ordinarily protects only defrauded buyers of securities while rule 10b-5 protects defrauded buyers and defrauded sellers of securities. *Id.* at 259. The Fourth Circuit concluded, however, that commonality of purpose rendered the Virginia blue sky law the most appropriate statute of limitation. *Id.* The Fourth Circuit, therefore, emphasized commonality of purpose above commonality of elements in choosing the proper limitation period for plaintiff's action under rule 10b-5. *Id.*

39. *Id.*

40. *Id.* See, e.g., *Teamsters Local 282 Pension Trust Fund v. Angelos*, 815 F.2d 452, 456 (7th Cir. 1987) (determining that state blue sky law limitation period applies to claim under section 10(b)); *Suslick v. Rothchild Sec.*, 741 F.2d 1000, 1004 (7th Cir. 1984) (applying state blue sky limitation period to rule 10b-5 claim); *Cahill v. Ernst & Ernst*, 625 F.2d 151, 153 (7th Cir. 1980) (applying state blue sky law limitation period to private action under rule 10b-5); *Parrent v. Midwest Rug Mills*, 455 F.2d 123 (7th Cir. 1972) (applying Illinois blue sky limitation period to claim under rule 10b-5).

41. 815 F.2d 452 (7th Cir. 1987).

42. See *Teamsters Local 282 Pension Trust Fund v. Angelos*, 815 F.2d 452, 453 (7th Cir. 1987).

loan.⁴³ The plaintiffs in *Angelos* argued that the Illinois statute of limitations period for common law fraud should govern the plaintiffs' rule 10b-5 claim.⁴⁴ On appeal from the United States District Court for the Northern District of Illinois, however, the Seventh Circuit emphasized that the forum state's securities law and rule 10b-5 shared the common purpose of prohibiting securities fraud.⁴⁵ Accordingly, the Seventh Circuit held that the three-year statute of limitations period of the Illinois securities law applied to plaintiffs' rule 10b-5 claim in *Angelos*.⁴⁶

Although the Fourth, Eighth, and Seventh Circuits apply similar reasoning in determining that state blue sky or securities fraud laws provide the best statutes of limitation for actions under rule 10b-5, the courts' decisions can produce uneven results.⁴⁷ State securities fraud or blue sky laws provide widely varying limitation periods.⁴⁸ The Illinois securities fraud law in *Angelos* provided a three-year statute of limitation while the Virginia blue sky law in *Gurley* provided a two-year limitation period.⁴⁹ Thus, although the Seventh Circuit in *Angelos* and the Fourth Circuit in *Gurley* applied similar reasoning in choosing a limitation period for 10b-5 cases, the courts' holdings resulted in different limitation periods for the respective plaintiff's rule 10b-5 claims.⁵⁰ Therefore, although the Fourth, Eighth, and Seventh Circuits uniformly apply statutes of limitation from state blue sky or securities fraud laws, the three courts have failed to create a uniform rule 10b-5 limitation period.⁵¹

43. *Id.* at 453-54.

44. *Id.* at 455.

45. *Id.* at 455-56. See *supra* notes 33-39 and accompanying text (discussing Fourth Circuit's reasoning in adopting Virginia blue sky law for actions under rule 10b-5).

46. See *Angelos*, 815 F.2d at 457 (determining that state blue sky law limitation period applies to claim under section 10(b) and rule 10b-5).

47. See *infra* notes 48-50 and accompanying text (noting that Fourth, Eighth, and Seventh Circuits uniformly apply blue sky limitation periods to 10b-5 claims but create different limitation periods for rule 10b-5 actions); see *supra* notes 22-46 and accompanying text (discussing reasoning behind Fourth, Eighth, and Seventh Circuits' rules for borrowing state blue sky and securities fraud limitation period for rule 10b-5 actions).

48. See *ABA Task Force Report*, *supra* note 14, at App. B. The ABA's 1985 report on statutes of limitation noted that state blue sky limitation periods range from one year in Maryland to two years in Arkansas, Connecticut, Georgia, Indiana, Iowa, Maine, Mississippi, Missouri, North Carolina, Virginia, and the District of Columbia to three years in Illinois, Kentucky, and Louisiana to a period of one year from discovery and three years from the actual misconduct in Wisconsin. *Id.* Therefore, even within circuits that uniformly borrow state blue sky limitation periods in 10b-5 cases, federal courts may apply widely disparate limitation periods depending on the state where plaintiffs bring the 10b-5 claim. *Id.*

49. See *supra* notes 32-46 and accompanying text (discussing holdings in *Angelos* and *Gurley*).

50. *Id.* Compare *Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000, 1004 (7th 1984) (applying Illinois three-year blue sky limitation period to rule 10b-5 claim) with *O'Hara v. Kovens*, 625 F.2d 15, 18 (4th Cir. 1980) (applying Maryland's one-year blue sky statute of limitations to claim under rule 10b-5), *cert. denied*, 449 U.S. 1124 (1981).

51. See *supra* notes 47-51 and accompanying text (discussing disparate limitation periods resulting from similar holdings of Fourth, Eighth and Seventh Circuits).

Unlike the Eighth, Seventh, and Fourth Circuits the United States Courts of Appeal for the Second, Ninth, and Tenth Circuits regularly apply limitation periods from state common law fraud statutes to actions under rule 10b-5.⁵² The United States Court of Appeals for the Ninth Circuit, for example, considered which of several state law limitation periods to apply to a rule 10b-5 claim in *United California Bank v. Salik*.⁵³ In *Salik* the plaintiff, United California Bank (UCB), claimed that it had purchased shares of the defendant bank's stock after the defendant previously had incurred a \$40,000,000 loss and purposely had failed to disclose the loss to UCB.⁵⁴ UCB filed an action under section 10(b) and rule 10b-5 against the defendant bank eighteen months after UCB discovered the defendant's deceit.⁵⁵ The United States District Court for the Southern District of California held that the statute of limitations of California's securities fraud statute barred UCB's claim.⁵⁶ UCB appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit.⁵⁷ On appeal, the Ninth Circuit considered whether California's securities law limitation period of one year or California's four year limitation period for common-law fraud applied to UCB's rule 10b-5 claim.⁵⁸ The Ninth Circuit reasoned that Congress intended a very expansive application of section 10(b).⁵⁹ The Ninth Circuit observed, further, that the longer limitation period for California common law fraud best served the broad remedial policies of the federal securities laws because the longer limitation period allowed harmed parties greater access to recourse against persons engaging in securities fraud.⁶⁰ Accordingly, the *Salik* court applied to UCB's claim the longer limitation period for California common-law fraud.⁶¹

52. See *Vucinich v. Paine, Webber, Jackson, & Curtis*, 739 F.2d 1434, 1436 (9th Cir. 1984) (applying California's three-year limitation period for fraud to rule 10b-5 claim); *Armstrong v. McAlpin*, 699 F.2d 79 (2nd Cir. 1983) (applying New York six-year limitation period for fraud to rule 10b-5 claim); *Loveridge v. Dreagoux*, 678 F.2d 870, 874-75 (10th Cir. 1982) (applying Utah's three-year fraud statute of limitations to rule 10b-5 claim); *United California Bank v. Salik*, 481 F.2d 1012, 1015 (9th Cir. 1973) (holding California three-year limitation period for fraud claims appropriate for rule 10b-5 claim); see *infra* notes 53-66 and accompanying text (discussing case holdings of federal circuits that borrow state common law fraud limitation periods for 10b-5 cases).

53. 481 F.2d 1012 (9th Cir. 1973).

54. See *United California Bank v. Salik*, 481 F.2d 1012, 1013-14 (9th Cir. 1973). The defendant bank in *Salik* incurred \$40,000,000 in debt by trading in high risk commodities futures. *Id.* UCB, the purchaser of the defendant bank's securities, alleged that the defendant bank breached a duty to disclose these losses to UCB. *Id.*

55. *Id.* at 1013.

56. *Id.* at 1013. The United States District Court for the Northern District of California held in *Salik* that California's securities fraud statute barred UCB's claim. *Id.* California's securities fraud statute provides that a claim must be filed within one year of discovering the alleged violation. *Id.*

57. *Id.*

58. *Id.* at 1014-15.

59. *Id.*

60. *Id.* at 1015. The Ninth Circuit refused to apply the California securities fraud

The United States Courts of Appeal for the Tenth and Second Circuits also regularly borrow the forum state's common law fraud limitation period for claims under section 10(b) and rule 10b-5.⁶² Like the Ninth Circuit, the Tenth and Second Circuits have adopted state common-law fraud limitation periods because the fraud limitation periods are longer than blue sky limitation periods.⁶³ Courts in the Tenth and Second Circuits recognize a congressional desire for broad application of rule 10b-5.⁶⁴ Other federal courts perceive significant technical differences between state securities laws

statute's limitation period in *Salik* because the Ninth Circuit reasoned that the one year limitation period did not serve the broad remedial purpose of the federal securities law. *Id.* The Ninth Circuit traditionally had applied the forum state's fraud limitation period to claims under section 10(b). *Id.* Therefore, the Ninth Circuit reasoned that applying the California securities fraud limitation period to UCB's claim would inject further uncertainty into the federal prosecution of claims under section 10(b). *Id.*

61. *Id.*

62. See *Armstrong v. McAlpin*, 699 F.2d 79 (2d Cir. 1983). In *Armstrong* shareholders in a Bahamian investment company sued the investment company, claiming that managers and trustees of the company fraudulently had concealed information concerning mutual fund investments and the financial status of the investment company in violation of section 10(b) and rule 10b-5. *Id.* at 82-86. The United States District Court for the Southern District of New York partially dismissed shareholders' complaint because New York's limitation period for common law fraud, two years from the wrongdoing or six years from the time the cause of action accrued, barred the plaintiffs' securities fraud claim. *Id.* at 86. The plaintiff appealed to the United States Court of Appeals for the Second Circuit. *Id.* On appeal the Second Circuit agreed that the New York statute of limitations for common law fraud customarily governs securities fraud cases in New York State. *Id.* Consequently, the Second Circuit held that New York's common law fraud limitation period applied to plaintiff's claim of securities fraud under section 10(b). *Id.* at 87.

See *Loveridge v. Dreagoux*, 678 F.2d 870, 873 (10th Cir. 1982). In *Loveridge* purchasers of debentures issued by a supposed commodities import corporation alleged that the incorporator, president, and secretary of the corporation misrepresented the actual existence of the corporation when selling the debentures. *Id.* The plaintiffs claimed that the defendants had violated section 10(b) and rule 10b-5. *Id.* at 873. The United States District Court for the District of Utah entered judgment for the plaintiffs because the defendants failed to answer plaintiff's complaint. *Id.* On appeal to the United States Court of Appeals for the Tenth Circuit, the defendants in *Loveridge* claimed that Utah's three year limitation period for fraud claims barred the purchasers' section 10(b) and rule 10b-5 claim. *Id.* The Tenth Circuit noted that tenth circuit courts traditionally apply the forum state's limitation period for fraud to 10b-5 claims. *Id.* at 874-75. The Tenth Circuit recognized that the Utah fraud statute provides that plaintiffs must bring a fraud claim within three years of discovery of the alleged wrongdoing. *Id.* at 874. Because the purchasers of the debentures filed their 10b-5 claim within three years of discovering the defendants' wrongdoing, the Tenth Circuit held that the Utah fraud limitation period did not bar the purchasers' 10b-5 claim. *Id.* at 875.

63. See *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 409 (2d Cir. 1975) (borrowing Texas blue sky limitation period for 10b-5 claim solely because Texas blue sky limitation period is longer than Texas fraud limitation period); *Clegg v. Conk*, 507 F.2d 1351, 1362 (10th Cir. 1974) (holding that longer state fraud limitation periods better effectuate broad remedial purposes of implied rights of action under section 10(b)); *supra* notes 53-61 (discussing Ninth Circuit's analysis in applying state fraud limitation period to action under rule 10b-5 in *Salik*).

64. See *supra* note 62 and accompanying text (noting reasoning of Second and Tenth Circuit in applying longer fraud limitation periods to 10b-5 claims).

and rule 10b-5.⁶⁵ Courts find that these differences render state securities law limitation periods inappropriate for rule 10b-5 claims.⁶⁶

Although most circuit courts consistently apply a statute of limitations from state securities law or common law fraud to rule 10b-5 claims, a confusing disarray of limitation periods exist among the circuit courts.⁶⁷ The particular limitation period often varies within a federal circuit because securities or fraud limitation periods vary from state to state.⁶⁸ Consequently, a potential plaintiff wishing to bring a securities fraud action may suffer substantial confusion in determining whether he even has a timely cause of action under rule 10b-5.⁶⁹ Commentators recognize the difficulties that arise from the lack of a uniform statute of limitations for section 10(b) and rule 10b-5 claims.⁷⁰ Judges, scholars, and attorneys observe that the state of the law concerning a limitation period for rule 10b-5 actions has caused confusion within and among the circuits, and has required courts and litigants to waste money and time to determine the timeliness of rule 10b-5 claims.⁷¹

65. See *Wood v. Combustion Eng'g Inc.*, 643 F.2d 339, 345 (5th Cir. 1981) (holding that Texas fraud statute's limitation period applies to 10b-5 claims because Texas fraud statute possesses elements more identical to rule 10b-5 than the Texas blue sky laws).

66. See *supra* note 65 and accompanying text (discussing Fifth Circuit's reasoning for borrowing state fraud claim limitation period rather than blue sky law limitation period for rule 10b-5 action). See also *ABA Task Force Report, supra* note 14, at 10-11 (discussing federal courts' reasoning in not applying states' securities law limitation periods to actions under rule 10b-5).

67. See, e.g., *Suslick v. Rothschild Sec.*, 741 F.2d 1000 (7th Cir. 1984) (continuing practice of consistently applying forum state's blue sky law to 10b-5 claims); *Buder v. Merrill Lynch*, 644 F.2d 690 (8th Cir. 1981) (continuing practice of consistently applying forum state's blue sky law to 10b-5 claims); *O'Hara v. Kovens*, 625 F.2d 15 (4th Cir. 1980) (continuing practice of applying consistently forum state's blue sky law to 10b-5 claims), *cert. denied*, 449 U.S. 1124 (1981). See *supra* notes 53-61 and accompanying text (discussing Ninth, Tenth, and Second Circuit's consistent application of common law fraud statutes of limitation to 10b-5 claims); *infra* notes 70-71 and accompanying text (noting confusing array of limitation periods resulting from courts borrowing state limitation periods for 10b-5 claims).

68. Compare *Vanderboom v. Sexton*, 422 F.2d 1233, 1240 (8th Cir. 1970) (applying two year Arkansas blue sky limit to 10b-5 case in Eighth Circuit) with *Burns v. Ersek*, 591 F. Supp. 837 (D. Minn. 1984) (applying three year Minnesota blue sky law limit to 10b-5 case in Eighth Circuit).

69. See D. Block & N. Barton, *Securities Litigation: Statute of Limitations in Private Actions Under Section 10(b)- A Proposal for Achieving Uniformity*, 7 SEC. REG. L. J. 374, 375 (1980) (noting aggravating disparities among state statutes of limitation). Block and Barton note that by attempting to incorporate the varied laws of the fifty states into federal law results in unfortunate consequences such as widely inconsistent limitation periods for actions under rule 10b-5. *Id.*

70. See *infra* note 71 (noting jurists, scholars, and attorneys observations of courts' chaotic practice of adopting state limitation periods for 10b-5 cases).

71. See *ABA Task Force Report, supra* note 14, at 5-6 (observing confusion, uncertainty, and wasteful litigation that result from lack of uniform statute of limitations for actions under section 10(b)); Block & Barton, *supra* note 69, at 375 (observing aggravating confusion that results from courts' incorporation of varying state statutes of limitation in 10b-5 actions); BROMBERG & LOWENFELS, *supra* note 14, at 11:294 (observing problems stemming from lack of uniform limitation period for section 10(b)); Martin, *Statutes of Limitation in 10b-5 Actions:*

Commentators have recommended various solutions.⁷² The most popular remedy among commentators is to encourage congressional action or a Supreme Court ruling adopting one uniform limitation period for section 10(b) and rule 10b-5 actions.⁷³ Neither the United Supreme Court nor Congress, however, has chosen to remedy the confusion resulting from the lack of a uniform statute of limitations for claims under section 10(b) and rule 10b-5.⁷⁴ Thus, parties wishing to seek redress for securities fraud under section 10(b) and rule 10b-5 continue to face a confusing array of limitation periods.⁷⁵

The United States Court of Appeals for the Third Circuit recently reexamined the practice of applying only state law limitation periods to section 10(b) and rule 10b-5 claims in *In Re Data Access Systems Securities Litigation*.⁷⁶ In *Data Access* the shareholders of Data Access Systems, Inc. sued Data Access as a certified class immediately after discovering possible fraudulent business and stock trading activities among Data Access and three affiliated companies: Marc Service Company, Transnet Corporation, and Olympic International Leasing Company.⁷⁷ The shareholders alleged in

Which State Statute is Applicable, 29 BUS. WK. 443, 457 (1974) (observing dismal failure of courts borrowing state limitation period for 10b-5 cases); Ruder & Cross, *Limitations on Liability Under Rule 10b-5*, 21 DUKE L. J. 1125, 1148 (1972) (observing problem with courts borrowing only state limitation period for 10b-5 cases); Note, *Section 10(b): Statutes of Limitation in a Rule 10b-5 Implied Private Action*, 13 CREIGHTON L. REV. 1455, 1459 (1980) (noting that courts' adoption of varying state limitation periods for 10b-5 cases prevents uniformity and promotes forum shopping); Note, *Statutes of Limitation for Rule 10b-5*, 39 WASH. & LEE L. REV. 1021, 1044-46 (1982) (observing that courts' practice of applying state law limitation periods to 10b-5 cases forces courts to make confusingly esoteric inquiries).

72. See *infra* note 73 and accompanying text (noting that popular solution among commentators is congressional or Supreme Court enactment of express limitation period for 10b-5 cases).

73. See Block & Barton, *supra* note 69, at 384-85 (recommending congressional enactment of express statute of limitations for section 10(b) actions); BROMBERG & LOWENFELS, *supra* note 14, at 11:294 (recommending congressional enactment of uniform limitation period for actions under rule 10b-5); *ABA Task Force Report*, *supra* note 14, at pp. 5-6 (recommending congressionally enacted uniform limitation period for 10b-5 cases); Martin, *Statutes of Limitation in 10b-5 Actions: Which State Statute is Applicable?*, 29 BUS. WK. 443, 459 (1974) (recommending congressional enactment of express statute of limitations for section 10(b) actions and criticizing Supreme Court's failure to provide limitation period for 10b-5 cases); Ruder & Cross, *supra* note 71, at 1148-49 (noting that best solution to limitation question for 10b-5 cases is for courts to look to federal rather than state law for limitation period); Note, *Section 10(b): Statutes of Limitation in a Rule 10b-5 Implied Private Action*, 13 CREIGHTON L. REV. 1455, 1459 (1980) (recommending that federal courts borrow limitation periods from analogous provisions in federal securities law for 10b-5 cases); Note, *Statutes of limitation for Rule 10b-5*, 39 WASH. & LEE L. REV. 1021, 1044-46 (1982) (recommending congressional enactment of express statute of limitations for section 10(b) actions).

74. See Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (noting that Supreme Court has not adopted one uniform limitation period for actions under rule 10b-5).

75. See *supra* notes 67-74 and accompanying text (discussing confusing state of law concerning limitation periods for section 10(b) and rule 10b-5 actions).

76. 843 F.2d 1537 (3rd Cir. 1988).

77. *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1538 (3d Cir. 1988). After filing

an amended complaint that Roger Tolins, a New York attorney, knowingly misrepresented the financial condition of Data Access to Data Access shareholders by disguising in financial disclosure papers the debts that Data Access owed to the three affiliate companies.⁷⁸ The shareholders alleged that Tolins' conduct violated section 10(b) and rule 10b-5.⁷⁹ The shareholders further alleged in the amended complaint that the I. Kahlowsky accounting firm conspired with principals of Data Access to defraud the shareholders by misrepresenting information to Data Access' auditors in violation of section 10(b) and rule 10b-5.⁸⁰ The defendants moved to dismiss the plaintiffs' amended complaint because the plaintiffs filed subsequent to the running of the two-year limitation period of New Jersey's blue sky law.⁸¹

The United States District Court for the District of New Jersey held in *Data Access* that New Jersey's six-year common law fraud statute of limitations applied to the shareholders' section 10(b) and rule 10b-5 claims.⁸² The defendants in *Data Access*, attorney Tolins and the I. Kahlowsky accounting firm, appealed the decision of the District Court to the United States Court of Appeals for the Third Circuit.⁸³ The defendants claimed that the two-year limitation period of New Jersey's blue sky law applied to the shareholders' section 10(b) and rule 10b-5 claims.⁸⁴ The Third Circuit traditionally had applied limitation periods from state fraud provisions or state blue sky laws to rule 10b-5 claims.⁸⁵ The Third Circuit convened en banc to consider, without the constraint of panel precedents, the effect of new United States Supreme Court decisions on the choice of a limitation period for claims under section 10(b) and rule 10b-5.⁸⁶ The Third Circuit in *Data Access* noted that recent Supreme Court decisions indicate that when Congress fails to include a limitation period in a federal law, federal courts may borrow limitation periods from analogous federal laws.⁸⁷ Ac-

claims against the affiliate companies in *Data Access*, the shareholders filed three amended complaints. *Id.*

78. *Id.* Data Access retained Tolins as counsel to assist Data Access in public offerings of stock and in filing of disclosure statements with the Securities and Exchange Commission regarding the public offerings. *Id.*

79. *Id.* The plaintiffs in *Data Access* specifically named Tolins and the I. Kahlowsky accounting firm as defendants in the third amended complaint. *Id.*

80. *Id.* at 1538-39.

81. *Id.* at 1538.

82. *Id.* at 1537.

83. *Id.*

84. *Id.*

85. *Id.* The Third Circuit traditionally chose a state limitation period for 10b-5 cases on a case-by-case basis depending on the facts and legal theories presented in each case. See Sharp v. Coopers & Lybrand, 649 F.2d 175 (3d Cir. 1981) (applying New Jersey six-year limitation period for common law fraud claims to action under rule 10b-5); Biggans v. Bache Halsey Stuart Shields, 638 F.2d 605 (3d Cir. 1980) (applying Pennsylvania common law fraud limitation period to action under rule 10b-5).

86. *Id.* at 1538.

87. *In re Data Access*, 843 F.2d at 1540. The Third Circuit in *Data Access* cited Agency Holding Corp. v. Malley-Duff & Assoc., 107 S. Ct. 2759 (1987) and DelCostello v. International

cordingly, the Third Circuit held that the proper limitation period for section 10(b) and rule 10b-5 claims is the limitation period from the most analogous federal law.⁸⁸

In concluding that the limitation period from the most analogous federal law applies to actions under section 10(b) and rule 10b-5, the *Data Access* court considered a new two-part procedure that the Supreme Court established in *Agency Holding Corp. v. Malley-Duff & Associates*⁸⁹ to determine whether to apply a federal or state statute of limitations to a federal law that provides no limitation period.⁹⁰ In *Malley-Duff* a local Pennsylvania insurance agency, Malley-Duff and Associates, claimed that a regional insurance company, the Crown Life Insurance Company, conspired with key Crown Life employees to acquire Malley-Duff's lucrative sales area by false and fraudulent means in violation of the Racketeering Influenced and Corrupt Organizations Act (RICO).⁹¹ Because no express limitation period for civil claims appears in RICO, the United States District Court for the Western District of Pennsylvania considered what statute of limitations should apply to the civil RICO claim.⁹² The District Court determined that the two-year limitation period for fraud actions in Pennsylvania barred Malley-Duff's RICO claim.⁹³ On appeal, the Third Circuit reversed the District Court and reinstated Malley-Duff's RICO claim.⁹⁴ The Third Circuit applied, instead, Pennsylvania's catchall six-year limitation period to plaintiff's civil RICO claim.⁹⁵ The United States Supreme Court granted certiorari to consider what statute of limitations courts should borrow for civil RICO claims.⁹⁶

On appeal the Supreme Court recognized in *Malley-Duff* that courts normally apply a state limitation period when a federal law provides no

Bhd. of Teamsters, 462 U.S. 151 (1983), to support the Third Circuit's choice to adopt an analogous federal statute of limitations to actions under section 10(b) and rule 10b-5. *Id.* See *infra* notes 98-107 and accompanying text (discussing Supreme Court's decision to apply federal limitation period to civil RICO claim in *Malley-Duff*); *infra* note 101 and accompanying text (noting Supreme Court's decision to apply federal limitation period to claim under federal labor law in *DelCostello*).

88. *Id.* at 1549.

89. 107 S.Ct. 2759 (1987).

90. See *Data Access*, 843 F.2d at 1542 (adopting Supreme Court test for determining appropriate limitation period for federal statutes lacking limitation period). See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 107 S. Ct. 2759, 2762 (1987) (creating two part analysis for adopting statute of limitations).

91. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 107 S. Ct. 2759, 2760 (1987).

92. *Id.*

93. *Id.* The United States District Court for the Western District of Pennsylvania granted summary judgment for respondents in *Malley-Duff* because the District Court determined that Pennsylvania's two-year statute of limitations for fraud barred petitioner's RICO claim. *Id.* The District Court reasoned that in the absence of a RICO limitation period, the Pennsylvania two-year statute of limitation for fraud provided the best state law analogy to RICO. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

limitation period.⁹⁷ The Supreme Court suggested, nevertheless, that courts may borrow federal law limitation periods for federal laws lacking limitation periods.⁹⁸ The Supreme Court held that courts must apply a two-step procedure to determine the proper limitation period to apply to a federal law that lacks a limitation period.⁹⁹ The Supreme Court stated that a court should determine, first, whether all claims arising out of a federal statute should be characterized in the same way or whether each claim should be characterized differently depending upon the factual circumstances and legal theories in the case.¹⁰⁰ The *Malley-Duff* Court explained that if the examining court determines that a uniform evaluation of all claims arising out of a federal statute is appropriate, the examining court should determine, second, whether a state or federal statute of limitations more properly would govern claims arising under the federal statute.¹⁰¹ The Supreme Court decided in

97. *Id.*

98. *Id.* at 2762.

99. *Id.*

100. *Id.* In announcing the first prong of the two-part *Malley-Duff* procedure for choosing a statute of limitation for a federal law lacking a statute of limitation, the Supreme Court cited its earlier decision in *Wilson v. Garcia*, 471 U.S. 261, 268 (1985). *Id.* In *Wilson* the plaintiff claimed under 42 U.S.C. 1983 (1982) (§ 1983) that a New Mexico State Trooper violated the plaintiff's constitutional rights by brutally beating the plaintiff during an arrest. *Wilson*, 471 U.S. at 261. The defendant moved to dismiss the plaintiff's claim, arguing that the two-year limitation period of the forum state's tort claims act barred the plaintiff's claim. *Id.* at 263. The United States District Court for the District of New Mexico held, instead, that the four-year residual state statute of limitations applied to the plaintiff's § 1983 claim and refused to dismiss the plaintiff's claim. *Id.* at 264. The defendant appealed the district court's decision to the United States Court of Appeals for the Tenth Circuit. *Id.* at 265.

On appeal the Tenth Circuit reasoned that an action under § 1983 is, in essence, an action for injury to personal rights. *Id.* Because the Tenth Circuit reasoned that 1983 claims are personal injury claims, the Tenth Circuit held that the appropriate limitation period was the forum state's statute of limitations for personal injury actions. *Id.* Consequently, the Tenth Circuit held that the forum state's three-year limitation period for personal injury actions did not bar the plaintiff's claim. *Id.* The Supreme Court granted certiorari to consider which statute of limitations applied to the plaintiff's § 1983 claim. *Id.*

In *Wilson* the Supreme Court reasoned that when choosing a statute of limitation for a federal law lacking a limitation period, courts must consider, first, whether state law or federal law best characterizes the plaintiff's claim. *Id.* at 268. Having concluded that the state personal injury statute of limitations is most appropriate for § 1983 claims, the Supreme Court considered whether to characterize all § 1983 claims in the same or on a case-by-case basis. *Id.* The Supreme Court in *Wilson* reasoned that courts uniformly should consider all claims under § 1983 in order to promote federal interests in uniformity, certainty, and economy in federal tort litigation. *Id.* at 275. Consequently, the Supreme Court upheld the Tenth Circuit's application of the New Mexico three-year statute of limitation to plaintiff's claim under § 1983. *Id.* The Supreme Court borrowed this part of the *Wilson* analysis for the first prong of the *Malley-Duff* two-part procedure. *Malley-Duff*, 107 S.Ct. at 2760.

101. *Id.* In announcing the second prong of the two-part *Malley-Duff* procedure for choosing an appropriate limitation period for a claim under a federal statute lacking a statute of limitation, the Supreme Court relied on its earlier decision in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1982). *Id.* In *DelCostello* an employee and union member alleged that the defendant union breached a duty of fair representation by mishandling grievance-and-arbitration proceedings in violation of federal labor law. *DelCostello*, 462 U.S.

Malley-Duff to adopt a uniform statute of limitations for all civil claims arising under RICO to avoid intolerable uncertainty and time consuming litigation in federal courts.¹⁰² After determining the need for a uniform limitation period for civil RICO actions, the *Malley-Duff* Court held that the statute most analogous to RICO was the federal Clayton Act.¹⁰³ The Supreme Court found the Clayton Act most analogous to RICO because the Clayton Act and RICO employ common civil enforcement mechanisms against, respectively, trusts and organized crime.¹⁰⁴ The Supreme Court noted that no state law employs civil enforcement mechanisms similar to those in RICO and the Clayton Act.¹⁰⁵ Consequently, the Supreme Court held that the Clayton Act's four-year statute of limitations applies to all civil RICO claims.¹⁰⁶

at 154. The federal labor law at issue in *DelCostello* provided no statute of limitation. *Id.* The defendant union asserted that Maryland's thirty-day statute of limitations for actions to vacate arbitration awards barred the plaintiff's claim. *Id.* at 156. The United States District Court for the District of Maryland applied the thirty-day state limitation period and granted summary judgment in favor of the defendant. *Id.* The plaintiff appealed the District Court's holding to the United States Court of Appeals for the Fourth Circuit. *Id.*

On appeal, the Fourth Circuit affirmed the District Court. *Id.* The United States Supreme Court granted certiorari to determine the appropriate limitation period for the plaintiff's claim. *Id.*

On appeal the Supreme Court noted that the choice of a limitation period for a federal cause of action is itself a federal question and that courts may consider both federal and state law in searching for the best limitation period for the federal law. *Id.* at 159 n. 13. The Supreme Court noted that when another federal statute clearly provides a closer analogy to the federal law lacking a limitation period than available state statutes and the federal policies at stake and the practicalities of litigation make the rule more appropriate for the claim in question, courts should adopt the statute of limitations from the federal statute. *Id.* at 172. The Supreme Court in *DelCostello* found that section 10(b) of the National Labor Relations Act (NLRA) proved more analogous to the plaintiff's claim than any available state law. *Id.* The Supreme Court observed that the limitation period for the NLRA is longer than typical limitation periods offered by state law. *Id.* at 166-67. The Supreme Court concluded in *DelCostello* that the longer NLRA limitation period allows unsophisticated laborers a better opportunity to realize the inadequacy of their union representation in arbitration, find counsel, determine whether a claim exists against the union representatives, and file suit against the union. *Id.* The Supreme Court concluded, further, that shorter state law limitation periods would discourage laborers from seeking relief from union wrongdoings. *Id.* Accordingly, the Supreme Court in *DelCostello* applied the statute of limitations from section 10(b) of the National Labor Relations Act. *Id.*

102. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 107 S.Ct. 2759, 2764 (1987).

103. *Id.* The Supreme Court reasoned in *Malley-Duff* that both RICO and the Clayton Act remedy injuries to a business or property by reason of a violation. *Id.* The Supreme Court examined the legislative history of RICO and determined that Congress had borrowed the purpose and concepts of federal antitrust law found in the Clayton Act for application in drafting RICO. *Id.* Accordingly, the Supreme Court determined that the Clayton Act was the most analogous law from which the court could borrow a limitation period for the plaintiff's civil RICO claim in *Malley-Duff*. *Id.*

104. *Id.* at 2764-65. See *infra* notes 157-58 and accompanying text (discussing specific circumstances that Supreme Court considered in determining that limitation period from Clayton Act applies to civil RICO claims).

105. See *Malley-Duff*, at 2764-65.

106. *Id.* Justice Scalia concurred in the Supreme Court's holding in *Malley-Duff* that the

Applying the two-part *Malley-Duff* test in *Data Access*, the Third Circuit determined, first, whether courts should apply a uniform statute of limitations to all rule 10b-5 claims or whether courts should choose a statute of limitations on a case by case basis depending on the facts and legal theories presented in each case.¹⁰⁷ The Third Circuit noted in *Data Access* that the Third Circuit previously had recognized the necessity for establishing a uniform limitation period for actions under section 10(b) and rule 10b-5.¹⁰⁸ The Third Circuit reaffirmed a desire to promote certainty, uniformity, and economical litigation under rule 10b-5.¹⁰⁹ Consequently, the Third Circuit decided to select one statute of limitations for all section 10(b) and rule 10b-5 claims.¹¹⁰

After explaining the need for a uniform limitation period for all section 10(b) and rule 10b-5 claims, the Third Circuit applied the second prong of the two-part *Malley-Duff* test and considered whether to borrow a federal or state limitation period.¹¹¹ The Third Circuit examined companion provisions to section 10(b) within federal securities law that govern liability for manipulation of security prices, misleading statements in stock disclosure statements to the SEC, and the buying and selling of securities within six months.¹¹² The Third Circuit observed that Congress established a limitation period of one year from discovery and in no event longer than three years from the actual violation for companion provisions to section 10(b).¹¹³ The Third Circuit reasoned in *Data Access* that section 10(b) and the companion

Clayton Act provided the best statute of limitations that the court considered for civil RICO. *Id.* at 2767. Justice Scalia argued, however, that when a federal law lacks a limitation period and a court can find no appropriate state limitation period because the policies of analogous state statutes run afoul of the underlying policy of the federal law, the court should borrow no statute of limitation for the claim. *Id.* at 2772. Justice Scalia noted the Court's long history of applying a limitation period from state law to federal statutes lacking a limitation period. *Id.* at 2766. Justice Scalia noted further that congressional silence on the limitations issue implies that Congress intends for courts to borrow state law limitation periods for federal statutes. *Id.* at 2771. Accordingly, Justice Scalia concluded that the Supreme Court's new policy of borrowing a federal limitation period for a federal law lacking a limitation period runs contrary to the intent of Congress. *Id.*

107. See *Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1542 (3d Cir. 1988).

108. *Id.* at 1543. See *Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir. 1986), *aff'd sub nom.*, 107 S.Ct. 2759 (1987).

109. See *Data Access*, 843 F.2d at 1543.

110. *Id.* at 1544. See *infra* note 117 and accompanying text (noting that Third Circuit held that the one and three limitation period from analogous federal securities law is one best limitation period for courts to borrow for all 10b-5 claims).

111. See *Data Access*, 843 F.2d at 1545.

112. *Id.* at 1545-46. The Third Circuit considered various provisions in federal securities law that the court found analogous to section 10(b). *Id.*; see 15 U.S.C. 78i(e) (1982) (prohibiting manipulation of stock prices); 15 U.S.C. 78p(b) (1982) (requiring broker to disgorge profits from purchase and sale of securities within six months); 15 U.S.C. 78r(a) (1982) (imposing liability for misleading statements in applications and documents filed with SEC).

113. See *Data Access*, 843 F.2d at 1546. See *supra* notes 113-115 and accompanying text (discussing one and three limitation period for provisions of federal securities law analogous to section 10(b)).

provisions to section 10(b) in the federal securities law share the common purposes of requiring full disclosure in the sale of securities, preventing fraud in the sale of securities, and compensating persons injured through fraudulent securities practices.¹¹⁴ The Third Circuit noted that state laws provide widely varying statutes of limitation and disparate statutory coverage, while remedies under the federal securities laws are uniform in all fifty states.¹¹⁵ Because the Third Circuit determined that section 10(b) and the companion provisions in federal securities law share common purposes not addressed in analogous state laws, the *Data Access* court held that the companion provisions are more analogous to section 10(b) than state laws.¹¹⁶ Consequently, the Third Circuit held in *Data Access* that federal courts in the Third Circuit uniformly should apply the federal securities law limitation period of one year from discovery and no more than three years from the violation in all section 10(b) and rule 10b-5 actions.¹¹⁷

While the Third Circuit's en banc opinion in *Data Access* adopts the Supreme Court's two-part *Malley-Duff* analysis for choosing statutes of limitation for federal laws that lack a limitation period, other federal circuits have refused to adopt the Supreme Court's *Malley-Duff* analysis in actions under section 10(b) and rule 10b-5.¹¹⁸ Like the Ninth Circuit, the United States Court of Appeals for the Eleventh Circuit refused to apply the two-part *Malley-Duff* analysis in *Durham v. Business Management Associates*.¹¹⁹ In *Durham* the Eleventh Circuit considered a securities fraud charge by investors in a limited partnership.¹²⁰ The plaintiffs alleged that sellers of securities in a limited partnership violated section 10(b) and rule 10b-5 by fraudulently misrepresenting the nature of a sham limited partnership to prospective purchasers.¹²¹ The United States District Court for the Northern District of Alabama refused to grant summary judgment in favor of the defendants because the District Court could not determine which statute of limitations applied to the plaintiff's claim under section 10(b) and rule 10b-5.¹²² On interlocutory appeal the Eleventh Circuit considered whether Alabama's two-year statute of limitations for state securities fraud applied to

114. See *Data Access*, 843 F.2d at 1548.

115. *Id.* at 1549.

116. *Id.* See *infra* notes 150-155 and accompanying text (discussing specific circumstances Third Circuit considered in deciding to borrow limitation period of companion provisions of federal securities law for claim under section 10(b)).

117. *Data Access*, 843 F.2d at 1548; see also *Hill v. Equitable Trust Co.*, No. 87-3575 slip op. (3d Cir. July 14, 1988) (deciding to retroactively apply new policy of borrowing federal limitation period for 10b-5 cases).

118. See *infra* notes 163-166 (discussing refusal of other federal courts to apply *Malley-Duff* analysis in actions under section 10(b) and rule 10b-5).

119. 847 F.2d 1505 (11th Cir. 1988). See *Durham v. Business Management Assoc.*, 847 F.2d 1505, 1507 (11th Cir. 1988) (applying Alabama two-year statute of limitation for securities fraud to action under rule 10-5).

120. *Durham v. Business Management Assoc.*, 847 F.2d 1505, 1507 (11th Cir. 1988).

121. *Id.* at 1507-8.

122. *Id.* at 1507.

the investors' claim under section 10(b) and rule 10b-5.¹²³ The *Durham* court recognized the Third Circuit's application of the two-part *Malley-Duff* procedure in *Data Access* but refused to break from the Eleventh Circuit precedent of applying the forum state's limitation period for the cause of action most resembling the federal claim.¹²⁴ The *Durham* court determined that the Alabama securities fraud statute most closely resembled the investors' claim under section 10(b) and rule 10b-5.¹²⁵ Consequently, the Eleventh Circuit held in *Durham* that the two-year limitation period applicable to Alabama's securities law applied to the plaintiff's claim under section 10(b) and rule 10b-5.¹²⁶ Thus, the Eleventh Circuit in *Durham* expressly declined to follow *Data Access* by refusing to apply the two-part *Malley-Duff* analysis to a claim under section 10(b) and rule 10b-5.¹²⁷

Recent federal courts' decisions do not indicate a trend toward a uniform statute of limitations for actions under section 10(b) and rule 10b-5.¹²⁸ While the Third Circuit reasoned in *Data Access* that the Supreme Court's *Malley-Duff* two-part analysis applies to 10b-5 cases, the Ninth and Eleventh Circuits as well as some district courts, have rejected the Third Circuit's reasoning.¹²⁹ Unless federal courts uniformly accept the Third Circuit's

123. *Id.* at 1508.

124. *Id.*

125. *Id.*

126. *Id.*

127. See *supra* notes 120-126 and accompanying text (discussing the Eleventh Circuit's holding in *Davis*).

128. *Id.* See *supra* notes 118-127 and accompanying text (discussing federal court holdings on rule 10b-5 statute of limitations subsequent to *Data Access*). Outside the Third Circuit, the limited number of reported federal district court opinions subsequent to *Data Access* reveal equal acceptance and rejection of the *Data Access* application of the Supreme Court's *Malley-Duff* decision. See *Bath v. Bushkin, Gaims, Gaines, & Jonas*, 695 F. Supp. 1156, 1160-62 (D.Wyo. 1988) (applying *Malley-Duff* two part test to section 10(b) and Rule 10b-5 claim); *Robin v. Doctors Officenters Corp.*, 686 F. Supp. 199, 206-7 (N.D. Ill. 1988) (refusing to follow *Data Access* adoption of federal limitation period for rule 10b-5).

129. See *Davis v. Birr, Wilson, & Co.*, 839 F.2d 1369 (9th Cir. 1988). In *Davis* the Ninth Circuit considered an action by an investor against a securities brokerage firm for alleged violations of section 10(b) and rule 10b-5. *Id.* The United States District Court for the Northern District of California granted summary judgment for the defendant brokerage firm. *Id.* On appeal to the Ninth Circuit, the *Davis* court considered whether the California three-year limitation period for fraud barred the plaintiff's action under section 10(b) and rule 10b-5. *Id.* The *Davis* court noted that the Ninth Circuit consistently had applied the state fraud limitation period to actions under section 10(b) and rule 10b-5. *Id.* at 1369-70. See *Robuck v. Dean Witter & Co.*, 649 F.2d 641, 643 (9th Cir. 1980) (applying state fraud limitation period to claim under rule 10b-5); *United California Bank v. Salik*, 481 F.2d 1012, 1013-14 (9th Cir. 1973) (applying state fraud limitation period to action under rule 10b-5). Consequently, the Ninth Circuit held in *Davis* that the California three-year limitation period for fraud applied to plaintiff's claim under section 10(b) and rule 10b-5. *Davis*, 839 F.2d at 1370.

While the majority in *Davis* strictly followed Ninth Circuit precedent, Senior Judge Aldisert of the United States Court of Appeals for the Third Circuit, sitting by designation on the Ninth Circuit, wrote a concurring opinion in favor of applying the *Malley-Duff* two-part procedure to determine the proper limitation period for plaintiff's rule 10b-5 claim. *Id.* at 1369-1376. Like his subsequent decision on the Third Circuit in *Data Access*, Judge Aldisert

reasoning in *Data Access*, little hope exists for a nationally uniform statute of limitations for section 10(b).¹³⁰ Therefore, only congressional legislation imposing a uniform limitation period for section 10(b) claims or a Supreme Court ruling applying a single statute of limitations to section 10(b) offers complete resolution to the present confusion among federal courts.¹³¹

Absent congressional action or a clear decision by the Supreme Court applying directly to section 10(b) and rule 10b-5, the Third Circuit's *Data Access* reasoning offers the most reasonable solution to the problem of choosing an appropriate statute of limitations for 10b-5 cases.¹³² The Third Circuit's opinion in *Data Access* has reduced wasteful litigation and brought certainty and uniformity to 10b-5 litigation in the Third Circuit.¹³³ All jurisdictions in the Third Circuit now uniformly apply the one and three limitation period in section 10(b) and rule 10b-5 actions.¹³⁴ Other Circuits could derive similar benefits by adopting the Third Circuit's *Data Access* reasoning in 10b-5 cases.¹³⁵

In addition to being very practical, the Third Circuit appropriately applied the *Malley-Duff* two-part test to a rule 10b-5 action in *Data Access*.¹³⁶ The Supreme Court introduced the two-part *Malley-Duff* analysis

reasoned that the Supreme Court's holding in *Malley-Duff* sends a strong signal encouraging federal courts to adopt federal limitation periods to bring uniformity to rule 10b-5 actions. *Id.* at 1373. Judge Aldisert insisted that the confusing array of state fraud limitation periods that the Ninth Circuit has applied to rule 10b-5 claims demonstrates a need for one uniform limitation period for section 10(b) and rule 10b-5 claims. *Id.* Additionally, Judge Aldisert reasoned that the companion provisions to section 10(b) in the Exchange Act better promote the federal policy of section 10(b) than state fraud statutes. *Id.* at 1374. Judge Aldisert argued, therefore, that the one and three limitation period found in most provisions of the Exchange Act should apply to actions under section 10(b) and rule 10b-5. *Id.* at 1376. Because the one and three limitation period did not conflict with the three years from discovery limitation period of California' fraud law, Judge Aldisert concurred with the majority's decision in *Davis*. *Id.*; see *supra* notes 119-127 and accompanying text (discussing Eleventh Circuits' refusal to apply *Malley-Duff* court's reasoning to actions under rule 10b-5).

130. See *supra* notes 118-129 and accompanying text (discussing Ninth and Eleventh Circuits' refusal to apply Supreme Court's two-part *Malley-Duff* procedure to 10b-5 cases).

131. See *supra* notes 72-74 and accompanying text (discussing recommendations of jurists and commentators for adoption of uniform limitation period for actions under rule 10b-5).

132. See *infra* notes 142-168 (noting Third Circuit's appropriate application of Supreme Courts *Malley-Duff* reasoning to actions under rule 10b-5).

133. See *Cohen v. McAllister*, 688 F.Supp 1040, 1044 (W.D. Pa. 1988) (following *Data Access* court's decision that all Third Circuit courts must borrow one and three limitation period for claims under 10b-5).

134. See *Data Access*, 843 F.2d at 1551 (setting rule in Third Circuit to apply uniform limitation period from federal securities law to all private actions under rule 10b-5).

135. See *supra* notes 133-134 and accompanying text (discussing results of *Data Access* opinion within Third Circuit); see also *Cohen v. McAllister*, 688 F.Supp. 1040, 1044 (W.D. Pa. 1988) (following Third Circuit's holding in *Data Access*). The United States District Court for the Western District of Pennsylvania easily concluded that the one and three limitation period applied to plaintiff's rule 10b-5 claim in *Cohen* by following the rule set by the Third Circuit in *Data Access*. *Id.*

136. See *infra* notes 137-141 and accompanying text (noting that Third Circuit appropriately applied two-part *Malley-Duff* procedure to 10b-5 case).

to guide courts in determining the appropriate limitation period for any federal statute that lacks a limitation period.¹³⁷ The Supreme Court did not restrict the applicability of the two-part procedure to the civil RICO statute at issue in *Malley-Duff*.¹³⁸ The Supreme Court, in developing the two-part procedure for borrowing statutes of limitation, relied on prior Supreme Court decisions in which the Court applied an identical analysis in cases as widely varying as a cause of action under a federal civil rights statute and a cause of action under a federal labor law.¹³⁹ The Supreme Court specifically determined in *Malley-Duff* that a court properly may borrow a limitation period from a federal law for a statute lacking a limitation period if the court finds a need for uniformity and federal law better promotes the policy interests of the statute than analogous state laws.¹⁴⁰ Consequently, the Third Circuit in *Data Access* appropriately applied the *Malley-Duff* two-part analysis in a context intended by the Supreme Court.¹⁴¹

In addition to appropriately applying the two-part *Malley-Duff* analysis to claims under section 10(b) and rule 10b-5, the *Data Access* court correctly applied the two-part *Malley-Duff* analysis to the specific facts and circumstances in *Data Access*.¹⁴² The *Malley-Duff* two-part procedure initially directs a court applying the procedure to a federal statute to determine whether courts should apply a uniform limitation period to the federal statute in question or choose a statute of limitations on a case-by-case basis.¹⁴³ In determining that a uniform limitation period should govern all claims under RICO the Supreme Court in *Malley-Duff* considered specific circumstances surrounding the federal RICO law.¹⁴⁴ The Supreme Court noted that most RICO cases involve interstate transactions.¹⁴⁵ The *Malley-*

137. See *Malley-Duff & Assoc. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir. 1986), *aff'd sub nom*, 107 S.Ct. 2759, 2762 (1987) (addressing general problem of federal statutes that lack limitation period).

138. See *id.*, 107 S.Ct. at 2762 (noting that two-part procedure for determining statute of limitation applies to any federal law).

139. See *id.* at 2762 (relying on prior Supreme Court precedent in developing two-part *Malley-Duff* analysis for determining appropriate limitation period for federal statute); *supra* note 101 and accompanying text (discussing Supreme Court's analysis in *Wilson*); *supra* note 101 and accompanying text (discussing Supreme Court's analysis in *DelCostello*).

140. See *Malley-Duff*, 107 S.Ct. at 2762 (announcing two-part *Malley-Duff* procedure for determining proper limitation period for federal statute lacking limitation period).

141. See *supra* notes 139-144 and accompanying text (discussing appropriate application of *Malley-Duff* two-part procedure to section 10(b) and Rule 10b-5 claim).

142. See *supra* notes 76-117 and accompanying text (discussing Third Circuit's holding in *Data Access*).

143. See *Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir. 1988), *aff'd sub nom*, 107 S.Ct. 2759, 2762 (1987) (instructing courts to consider whether all claims under federal statute lacking limitation period under consideration by courts should be considered uniformly or whether courts should analyze individual claims on case-by-case basis).

144. See *id.* at 2762-64 (noting factual circumstances that Supreme Court considered in determining whether limitation period from federal or state law applied to claims under federal statute lacking limitation period).

145. *Id.* at 2764.

Duff Court reasoned that because civil RICO claims usually are of a multi-state nature, plaintiffs often can bring civil RICO claims in one of several states offering different statutes of limitation.¹⁴⁶ The Supreme Court warned that the availability of multiple limitation periods in RICO cases might encourage forum shopping because plaintiffs naturally will seek the jurisdiction with the most favorable limitation period.¹⁴⁷ The *Malley-Duff* court reasoned, further, that multiple state limitation periods necessitate wasteful and expensive litigation simply to determine what statute of limitation applies to a civil RICO claim.¹⁴⁸ Thus, the Supreme Court in *Malley-Duff* considered the multi-state nature of RICO cases, the consequent danger of forum shopping, and the probability of expensive and wasteful litigation as specific circumstances that suggest a need for a uniform limitation period for civil RICO claims.¹⁴⁹

In applying the first prong of the two-part *Malley-Duff* analysis to the facts in *Data Access*, the Third Circuit considered circumstances analogous to the circumstances that the Supreme Court considered in *Malley-Duff* and, likewise, concluded that a uniform limitation period should govern all 10b-5 cases.¹⁵⁰ The Third Circuit noted that, like the RICO case that the Supreme Court considered in *Malley-Duff*, rule 10b-5 cases also are of an interstate nature.¹⁵¹ Like the Supreme Court in *Malley-Duff*, the *Data Access* court cautioned that the availability of multiple state limitation periods would lead to uncertainty among potential litigants in 10b-5 cases.¹⁵² The Third Circuit also noted in *Data Access* that the availability of multiple limitation periods promotes expensive, unnecessary litigation to determine what limitation period applies in section 10(b) and rule 10b-5 actions.¹⁵³ Consequently, like the Supreme Court in *Malley-Duff*, the Third Circuit in *Data Access* held that confusion among litigants and expensive, wasteful litigation necessitate one uniform limitation period for 10b-5 cases.¹⁵⁴ Thus, the Third Circuit in *Data Access* firmly relied on the reasoning of the Supreme Court in applying the first prong of the two-part *Malley-Duff* procedure and determining the need for a uniform limitation period for the federal law in question.¹⁵⁵

146. *Id.*

147. *Id.*

148. *Id.*

149. See *supra* notes 144-148 and accompanying text (noting circumstances that convinced Supreme Court of need for uniform limitation period for RICO claims).

150. See *infra* notes 151-155 and accompanying text (discussing circumstances considered by *Data Access* court in determining need for uniform limitation period for actions under section 10(b)).

151. See *Data Access*, 843 F.2d at 1549 (noting interstate nature of claims under rule 10b-5).

152. *Id.* at 1542-43.

153. *Id.*

154. See *supra* notes 147-158 and accompanying text (noting similarities between reasoning of Supreme Court in *Malley-Duff* and reasoning of Third Circuit in *Data Access*).

155. See *supra* notes 147-157 and accompanying text (discussing analogous consideration

After completing the first prong of the two-part *Malley-Duff* analysis, the Supreme Court considered specific circumstances to determine whether a state or federal law would provide the most appropriate limitation period for all civil RICO claims.¹⁵⁶ In determining that the federal Clayton Act provided the best statute of limitations for RICO claims, the Supreme Court considered the legislative history of RICO and determined that Congress relied on the civil enforcement aspects of the Clayton Act when it enacted RICO.¹⁵⁷ The Supreme Court observed, further, that RICO and the Clayton Act remedy similar types of injuries.¹⁵⁸ Because the Supreme Court determined that RICO and the Clayton Act share similar congressional design and redress similar economic injuries, the Supreme Court concluded that the Clayton Act limitation period should govern RICO claims.¹⁵⁹

In applying the second prong of the Supreme Court's *Malley-Duff* two-part analysis to the 10b-5 action in *Data Access*, the *Data Access* court again considered circumstances analogous to the circumstances that led the Supreme Court to apply a statute of limitation from federal law in *Malley-Duff*.¹⁶⁰ The Third Circuit in *Data Access* considered the legislative history of section 10(b) and analogous provisions in federal securities law and recognized that section 10(b) and the analogous provisions in the federal securities law share the common purpose of promoting full and fair disclosure of the character of securities sold in interstate commerce.¹⁶¹ The Third Circuit further noted that section 10(b) and analogous provisions in federal securities law share the common purpose of preventing fraud in the sale of securities.¹⁶² The Third Circuit considered, finally, that both section 10(b) and the analogous provisions in federal securities law redress injuries resulting from deceptive, fraudulent, and manipulative practices in issuing or transferring securities.¹⁶³ Because the Third Circuit determined that section

of circumstances by Third Circuit and Supreme Court in, respectively, determining need for uniform limitation period for rule 10b-5 and RICO actions).

156. See *Malley-Duff*, 107 S.Ct. at 2764 (considering whether courts should consider uniformly all claims under RICO or whether RICO claims should be considered on a case-by-case basis).

157. *Id.* at 2764-65.

158. *Id.* at 2764. See *supra* notes 104-105 and accompanying text (discussing similar injuries addressed in RICO and Clayton Act).

159. *Id.* at 2765.

160. See *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1544-45 (3d Cir. 1988) (considering facts and circumstances to determine whether federal or state law limitation period should apply to actions under rule 10b-5); *supra* notes 156-159 and accompanying text (discussing Supreme Court's consideration of whether limitation period from federal or state law applied to civil RICO cases); *infra* notes 161-164 and accompanying text (discussing Third Circuit's application of second prong of two-part *Malley-Duff* analysis in *Data Access*).

161. See *Data Access*, 843 F.2d at 1544-45 (discussing common purpose of rule 10b-5 and analogous securities law provisions).

162. See *id.* (considering whether federal or state law limitation period applies to all claims under rule 10b-5).

163. See *id.* at 1545-47 (noting that section 10(b) and analogous provisions of federal securities law redress same type of injury).

10(b) and the analogous provisions of federal securities law share a common congressional purpose and redress the same type of injury, the Third Circuit concluded in *Data Access* that the limitation period from the analogous provisions of the federal securities law should apply to private claims under section 10(b) and rule 10b-5.¹⁶⁴ Thus, the Third Circuit in *Data Access* closely followed the reasoning of the Supreme Court in applying the second prong of the two-part *Malley-Duff* analysis for choosing a limitation period for a federal statute lacking a limitation period.¹⁶⁵

Absent a congressionally enacted uniform limitation period or a controlling decision by the Supreme Court, the Third Circuit's decision in *Data Access* provides the best alternative solution to the problem of a limitation period for claims under section 10(b) and rule 10b-5.¹⁶⁶ The Third Circuit's *Data Access* decision promotes uniformity and certainty and minimizes expensive and wasteful litigation within the jurisdictions of the Third Circuit.¹⁶⁷ The Third Circuit appropriately applied the Supreme Court's two-part *Malley-Duff* analysis to the 10b-5 claim in *Data Access*.¹⁶⁸ Federal courts face a continually increasing volume of 10b-5 litigation.¹⁶⁹ The problem of finding a uniform statute of limitations for rule 10b-5 actions, therefore, is becoming more and more acute.¹⁷⁰ By accepting the Third Circuit's reasoning in *Data Access*, other circuits would bring some order to the present jumbled maze of possible statutes of limitation for 10b-5 actions.¹⁷¹

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164. *Id.* at 1549.

165. *See supra* notes 160-164 and accompanying text (discussing Supreme Court and Third Circuit's similar considerations in determining that federal law provides best limitation period for all RICO and rule 10b-5 actions).

166. *See supra* notes 142-165 and accompanying text (discussing Third Circuit's correct application of Supreme Court's *Malley-Duff* two-part procedure for choosing limitation periods to rule 10b-5 context).

167. *See supra* notes 133-134 and accompanying text (discussing results of *Data Access* decision within Third Circuit).

168. *See supra* notes 136-141 and accompanying text (discussing Third Circuit's appropriate application of *Malley-Duff* procedure to the rule 10b-5 claim in *Data Access*).

169. *See supra* note 71 and accompanying text (noting substantial number of cases merely addressing which limitation period is appropriate for rule 10b-5 actions).

170. *See supra* notes 69-71 and accompanying text (discussing problems associated with lack of uniform limitation period for private actions under rule 10b-5).

171. *See supra* notes 133-134 and accompanying text (noting elimination of confusion within Third Circuit from application of uniform limitation period for actions under rule 10b-5).

