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STATUTES OF LIMITATION FOR RULE 10b-5

Congress granted the Securities and Exchange Commission (SEC) the authority to promulgate rules under section 10(b) of the Securities Exchange Act of 1934¹ ('34 Act). Pursuant to the authority, the SEC in 1942 promulgated rule 10b-5.² Congress originally intended the SEC to have exclusive authority to enforce section 10(b) and any rules promulgated under section 10(b).³ Nonetheless, in 1946 the United States District Court for the Eastern District of Pennsylvania found an implied private cause of action under section 10(b) and rule 10b-5.⁴ Because Congress did not foresee a section 10(b) private cause of action before passage of the '34 Act,⁵ the '34 Act does not provide a statute of limitations applicable to private suits brought under section 10(b) or rule 10b-5.⁶

To determine limitation periods in federal actions where Congress

¹ 15 U.S.C. § 78j(b) (1976). Section 10(b) of the Securities and Exchange Act of 1934 ('34 Act) provides that use of any manipulative or deceptive device in connection with the purchase or sale of any nationally registered security is unlawful. *Id.* Section 10(b) liability requires that the device or contrivance be in contravention of the rules and regulations prescribed by the SEC for protection of investors. *Id.*; see Comment, *Statutes of Limitations in 10b-5 Actions: A Proposal for Congressional Legislation*, 24 SYRACUSE L. REV. 1154, 1154-56 (1973) [hereinafter cited as *Proposal for Congressional Legislation*].

² 17 C.F.R. § 240.10b-5 (1981). The Securities Exchange Commission (SEC) promulgated rule 10b-5 as a catch-all fraud provision to supplement other antifraud provisions scattered throughout the Securities Act of 1933 ('33 Act) and the '34 Act. See A. BROMBERG, *SECURITIES LAWS: FRAUD—SEC RULE 10b-5, § 2.2*, at 19-29 (1969) [hereinafter cited as A. BROMBERG] (10b-5 fills gap in otherwise comprehensive congressional antifraud rules); *Proposal for Congressional Legislation*, *supra* note 1, at 1156 & nn. 13-16.

³ See Doret & Fiebach, *A Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Action In Federal Courts Sitting in Pennsylvania*, 25 VILL. L. REV. 851, 852 (1980) (lack of congressional foresight of private remedy caused no 10b-5 statute of limitations) [hereinafter cited as Doret & Fiebach]; Schulman, *Statute of Limitation in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635, 635-37 (1967) [hereinafter cited as Schulman].

⁴ *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946); cf. *Fischman v. Raytheon Manufacturing Co.*, 188 F.2d 783, 787 (2d Cir. 1951) (implying civil remedy under rule 10b-5). In *Kardon*, where plaintiffs sold stock to corporate insider defendants, the court noted that the general purpose of the '34 Act was to regulate all transactions involving securities. 69 F. Supp. at 514. The court held that the mere omission of an express civil liability provision for violations of § 10(b) should not thwart the prohibitive purpose of the section. *Id.* The court thus implied a private right of action for damages under § 10(b) and rule 10b-5. *Id.*; see Comment, *Securities Regulation: Statute of Limitations Applicable to 10b-5 Actions Arising in Pennsylvania*, 53 TEMPLE L.Q. 70, 70 n.3 (1980) [hereinafter cited as *10b-5 Actions Arising in Pennsylvania*].

⁵ See Schulman, *supra* note 3, at 649; note 3 *supra*.

⁶ See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976); 5 A. JACOBS, *THE IMPACT OF RULE 10b-5 § 235.02*, at 10-5 (1980) [hereinafter cited as A. JACOBS]; Martin, *Statutes of Limitation in 10b-5 Actions: Which State Statute is Applicable?*, 29 BUS. LAW.

has not provided a limitation period, federal courts historically have looked to the most analogous law of the forum state.⁷ Thus, in 10b-5 actions, federal courts generally look to the forum state⁸ to determine which state limitation period will give best effect to a rule 10b-5 action.⁹ Because state statutory limitation periods vary greatly, federal securities law regarding 10b-5 limitation periods currently consists of a patchwork of different rules resulting from various rationales.¹⁰

To determine the limitation period of a 10b-5 action, federal courts usually choose between the forum state's statute of limitations for common law fraud and the securities fraud limitation period in the forum's blue sky law.¹¹ Most federal courts examine the state statutes in ques-

443, 443 (1974) [hereinafter cited as Martin]; Note, *The Defective Private Offering: A Comparison of Purchasers' Remedies*, 62 IOWA L. REV. 236, 265 (1976). No statute of limitation bars an SEC enforcement proceeding for § 10(b) and rule 10b-5 actions. See Martinet, *Statutes of Limitations on SEC Enforcement Proceedings*, 41 VA. L. REV. 59, 59 (1955) [hereinafter cited as Martinet].

Although private recovery under rule 10b-5 is an implied remedy and the rule thus contains no express affirmative defenses, courts have identified various defenses, including the statute of limitations defense. See, e.g., *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123, 125 (7th Cir. 1972) (Illinois as forum state provides appropriate limitation period for 10b-5 action); *Mitchell v. Texas Gulf Sulphur*, 446 F.2d 90, 103 (10th Cir. 1971) (Utah as forum state supplies limitation period); A. JACOBS, *supra* note 6, at § 234 (general discussion of affirmative defenses). In addition to the statute of limitation defense, other affirmative defenses to rule 10b-5 include laches, waiver, estoppel, ratification, in pari delicto (equal fault), unclean hands, res judicata and collateral estoppel. See *id.*, at 10-1.

⁷ See, e.g., *UAW v. Hoosier Cardinal Crop.*, 383 U.S. 696, 704 (1966) (state limitation period applies when Congress has provided no uniform period under National Labor Relations Act); *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946) (in absence of federal limitations period, forum state statute of limitation applies); *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 456 (3d Cir. 1979) (Sloviter, J., concurring); *Charney v. Thomas*, 372 F.2d 97, 100 (6th Cir. 1967) (interpreting *UAW* as mandate to look to forum state for 10b-5 limitation period); Schulman, *supra* note 3, at 640-41, 649 n.74 (discussion of *UAW* and *Charney*).

⁸ The forum state is the state where the court in which the action is brought sits.

⁹ See *Doret & Fiebach*, *supra* note 3, at 852-53 & n.12 (federal courts "absorb" limitation period from forum state); note 7 *supra*. The 1976 U.S. Supreme Court decision in *Ernst & Ernst v. Hochfelder* confirmed that courts should look to the forum state's law for the applicable 10b-5 limitation period. 425 U.S. 185, 210 n.29 (1976); cf. note 50 *infra*.

¹⁰ See, e.g., A. JACOBS, *supra* note 6, at 10-14 to 10-15 (different court tests); Barton & Block, *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) (wide disparities in federal law of 10b-5 limitation periods) [hereinafter cited as Barton & Block]; *10b-5 Actions Arising in Pennsylvania*, *supra* note 4, at 71 (considerable disagreement as to which state limitation period to choose); notes 42-130 *infra*.

¹¹ See text accompanying notes 16 and 32-44 *infra*. Common law fraud periods generally range from 1 to 6 years and average 4 years from discovery. See A. JACOBS, *supra* note 6, at 10-15 & n.42 to 10-20; Martin, *supra* note 6, at 446 n.28; Schulman, *supra* note 3, at 642 n.42 (state fraud limitation periods average 4 years). In some states, courts examine statutes other than common law fraud or blue sky statutes. These statutes include catch-all provisions, trespass statutes, and statutes for action on the case. See A. JACOBS, *supra* note 6, at 10-15 & nn.42-46.

Blue sky laws, enacted in every state, are state securities laws analogous in many

tion for similarities with rule 10b-5.¹² In decisions searching only for the state statute most similar to rule 10b-5, either the court compares the substantive elements of the two state statutes to find the closest resemblance to rule 10b-5,¹³ or the court looks for the state statute most common in purpose with 10b-5, usually the blue sky statute.¹⁴ Other

respects to the federal securities laws. *See 10b-5 Actions Arising in Pennsylvania, supra* note 4, at 71 n.9. Although federal securities laws focus on disclosure, state blue sky laws often focus on fairness. Blue sky law limitation periods typically average 2 years from sale and are generally of shorter duration than the state's corresponding common law fraud statute. *See Doret & Fiebach, supra* note 3, at 854 n.19; *Martin supra* note 6, at 446 & n.28; *cf. UNIFORM SECURITIES ACT § 410(e)* (providing no person may sue after 2 years from contract of sale).

The United States District Court for the Southern District of New York first addressed the issue of the applicable statute of limitations under section 10(b) in 1949, and the Second Circuit in 1951 was the first court of appeals to consider the statute of limitations question. *See Fischman v. Raytheon Manufacturing Co.*, 188 F.2d 783, 787 (2d Cir. 1951) (New York's 6-year fraud statute of limitations applied to 10b-5 cause of action); *Osborne v. Mallory*, 86 F. Supp. 869, 879 (S.D.N.Y. 1949) (New York's 6-year fraud statute of limitations applied to 10b-5 cause of action); *Martin, supra* note 6, at 443-44 (discussion of *Fischman*). Two years later and for the first time, a federal court chose between two state statutes to determine the appropriate limitation period for the § 10(b) action. *See Fratt v. Robinson*, 203 F.2d 627, 634-35 (9th Cir. 1953) (rejecting Washington's 2-year statute of limitations for liabilities created by statute in favor of 3-year fraud statute); *Martin, supra* note 6, at 445; *cf. Dack v. Shanman*, 227 F. Supp. 26, 29 (S.D.N.Y. 1964) (preferring New York's statute of limitations for liabilities created by statute instead of fraud statute of same length). The *Fratt* court treated the rule 10b-5 cause of action as an action arising under common law, not under statute. 203 F.2d at 635. The action was for fraud and therefore the court determined a fraud limitation period should apply regardless of whether the cause of action was embodied in a federal statute. *Id.* Since *Fratt*, federal courts have chosen between state statutes for the 10b-5 limitation period in every circuit court and in most district courts. *See, e.g., Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 414 (D.C. Cir. 1977) (applying District of Columbia blue sky statute); *Fox v. Kane-Miller Corp.*, 542 F.2d 915, 918 (4th Cir. 1976) (applying Maryland blue sky statute); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 407 (2d Cir. 1975) (applying Texas blue sky statute through New York borrowing statute); *Clegg v. Conk*, 507 F.2d 1351, 1353 (10th Cir. 1974); *cert. denied* 422 U.S. 1007 (1975) (applying Utah fraud statute).

¹² *See, e.g., Wood v. Combustion Engineering, Inc.*, 643 F.2d 339, 344-45 (5th Cir. 1981) (Texas fraud statute bears closer substantive resemblance to rule 10b-5 than Texas blue sky law); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 407 (2d Cir. 1975) (applying statute of limitation applicable to state cause of action most similar to federal cause of action under rule 10b-5); *Vanderboom v. Sexton*, 422 F.2d 1233, 1237-38 (8th Cir. 1970) (applying local statute bearing closest resemblance to § 10(b) and rule 10b-5), *cert. denied* 400 U.S. 852 (1971); text accompanying notes 13-14 and 27-39 *infra*.

¹³ *See, e.g., O'Hara v. Kovens*, 625 F.2d 15, 17-18 (4th Cir. 1980) (Maryland's blue sky law proscribed behavior challenged under § 10(b)), *cert. denied* 449 U.S. 1124 (1981); *Fox v. Kane-Miller Corp.*, 542 F.2d 915, 918 (4th Cir. 1976) (Virginia blue sky law proscribed same conduct as § 10(b)); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123, 126 (7th Cir. 1972) (commonality of purpose between Illinois securities laws and § 10(b)). Some courts, particularly when choosing the blue sky law, have used both rationales: commonality of purpose and closest substantive resemblance to rule 10b-5. *See Vanderboom v. Sexton*, 422 F.2d 1233, 1237-40 (8th Cir. 1970).

¹⁴ *See, e.g., Wood v. Combustion Engineering, Inc.*, 643 F.2d 339, 345-46 (5th Cir. 1981)

courts insist on choosing the statute which best effects the remedial federal policy of providing longer statutes of limitations.¹⁵ Often the federal policy rationale similarly accompanies a comparison of the state statutes with rule 10b-5 when the comparison bolsters the choice of the longer statutory common law fraud limitation period.¹⁶

In addition to determining which limitation period should apply, federal courts must determine when the limitation period should start to run. While the state law provides the length of the limitation period, federal law determines when that period begins.¹⁷ The federal or equitable tolling doctrine requires courts to toll the limitation period until the plaintiff discovers or reasonably should have discovered the fraud or violation.¹⁸ The federal tolling doctrine, however, is only one of two elements necessary to determine when the limitation period begins to

(comparison of Texas blue sky law with Texas fraud statute); *Carothers v. Rice*, 633 F.2d 7 (6th Cir. 1980) (examination of Kentucky blue sky and fraud statutes), *cert. denied* 450 U.S. 998 (1981); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 892 & n.9, 893 & n.10, 894-95 (4th Cir. 1979) (analysis of Georgia blue sky and fraud statutes). When a court analyzes a state statute for resemblance to rule 10b-5, the court focuses on the provision in the statute which creates liability, rather than the section of the statute prescribing the limitation period. *E.g.*, *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 453 (3d Cir. 1979) (subsection of New Jersey Uniform Securities Act creating liability for sellers of stock is different from subsection establishing 2-year time-bar applicable to liability section). Once the court determines, for example, that the state blue sky statute which expressly creates liability most closely resembles rule 10b-5, then the court will apply the limitation period corresponding to the blue sky's liability section. *E.g.*, *White v. Sanders*, 650 F.2d 627, 629 & n.3, 630-33 (5th Cir. 1981) (examining ALA. CODE § 8-6-19(e)).

¹⁵ *See, e.g.*, *IDS Progressive Fund, Inc. v. First of Michigan Corp.*, 533 F.2d 340, 344 (6th Cir. 1976) (broad remedial policies of federal securities laws are best served by longer statute of limitation); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 409 (2d Cir. 1975) (same); *United California Bank v. Salik*, 481 F.2d 1012, 1015 (9th Cir.), *cert. denied* 414 U.S. 1004 (1973).

¹⁶ *See United California Bank v. Salik*, 481 F.2d 1012, 1013 & n.1, 1014 & n.2 (9th Cir. 1973) (applying California fraud statute). In addition to the remedial policies of federal securities laws favoring longer statutes of limitation, courts also support the choice of common law fraud periods because changes in the law favoring newer blue sky statutes arguably would add unnecessary uncertainty to the law. *See id.* at 1015.

¹⁷ *See A. JACOBS, supra note 6*, at 10-21 to 10-24 (discussion of questions of federal versus state law); *Schulman, supra note 3*, at 640 (interpretation of state statutes of limitation is question of state law); *Proposal for Congressional Legislation, supra note 1*, at 1162 (same). In applying the federal tolling doctrine, courts have not settled the issue whether federal or state law should determine when the plaintiff discovered or should have discovered the fraud. *See A. JACOBS, supra note 6*, at 10-24; *note 11 supra. Compare Janigan v. Taylor*, 344 F.2d 781, 783-84 (1st Cir.), *cert. denied* 382 U.S. 879 (1965) (where state statutory period commenced at date of transaction, court adopted only time period from state statute) *with Klein v. Shields & Co.*, 470 F.2d 1344, 1346-47 (2d Cir. 1972) (state law controlled determination of when plaintiff discovered fraud where state statutory period commenced at discovery of fraud).

¹⁸ *See Holmberg v. Armbrrecht*, 327 U.S. 392, 396 (1946) (establishing tolling doctrine); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 409-11 (2d Cir. 1975) (Texas blue sky statute of limitation runs from time plaintiff should have discovered fraudulent scheme); *Martin, supra note 6*, at 444 (discussion of tolling doctrine); *Schulman, supra note 3*, at 639 & n.26; *Proposal for Congressional Legislation, supra note 1*, at 1160 (discussion of *Holmberg*);

run in a 10b-5 action.¹⁹ The other element is when the 10b-5 cause of action accrues. Accrual is the earliest time for the period to start. Although state law determines when the cause of action accrues, federal law determines if the 10b-5 claim has accrued according to the provisions of the state law in question.²⁰ In New York, for example, accrual is when the plaintiff first is entitled to bring suit.²¹ Using New York terms, federal law would determine at what point the rule 10b-5 plaintiff first became entitled to sue under rule 10b-5.²² At this point, the limitation period would begin to run, unless tolled by the federal tolling doctrine.²³ If the plaintiff knew or should have known of the fraud later than the accrual of the rule 10b-5 cause of action, then the federal tolling doctrine would delay the running of the limitation period accordingly.²⁴

When a federal court has chosen the shorter limitation period, the federal tolling doctrine helps to explain why the court disregarded the federal policy for providing longer limitation periods in federal actions.²⁵ A short limitation period will have the same effect as a longer period if the federal court applies the tolling doctrine to the shorter limitation period. The federal tolling doctrine, therefore, may counterbalance the choice of a shorter limitation period, since the doctrine delays all time periods.²⁶

The current trend in the federal circuit courts is to choose the state blue sky law over the state common law fraud statute.²⁷ The Fourth,²⁸ Sixth,²⁹ Seventh,³⁰ Eighth³¹ and District of Columbia³² Circuits favor the

text accompanying notes 17-24 *infra*. See generally A. JACOBS, *supra* note 6, at 10-23 to 10-35; Martin, *supra* note 6, at 452-54. While the limitation period does not start to run under the federal tolling doctrine, the doctrine does not operate to stop the period once running. See A. JACOBS, *supra* note 6, at 10-36. Other events not only may toll the commencement of the period but also may stop the period from running once the period has started to run, in which case the period stops running for the duration of the event. See *id.* Included in these events are a filing of a class action until the class becomes certified, certain suits brought by a trustee in bankruptcy, and the signing of tolling agreements where parties agree to extend the limitation period. See *id.* at 10-37.

¹⁹ See A. JACOBS, *supra* note 6, at 10-22 to 10-24; text accompanying notes 19-24 *infra*.

²⁰ See A. JACOBS, *supra* note 6, at 10-22.

²¹ See *id.*

²² See *id.*

²³ See *id.* at 10-22 to 10-24.

²⁴ *E.g.*, Morris v. Stifel, Nicolaus & Co., Inc., 600 F.2d 139, 145-46 (8th Cir. 1979) (equitable tolling doctrine mitigates effect of shorter limitation period); text accompanying note 26 *supra*.

²⁵ See text accompanying notes 17-18 & 25 *supra*.

²⁶ See Wachovia Bank & Trust v. National Student Marketing, 650 F.2d 342, 346 (D.C. Cir. 1980) (trend for federal courts to apply blue sky law for 10b-5 limitation period) *cert. denied* 452 U.S. 954 (1981); Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123, 124 n.4 (7th Cir. 1972); text accompanying note 66 *infra*.

²⁷ See text accompanying notes 68-73 *infra*.

²⁸ See text accompanying notes 74-81 *infra*.

²⁹ See text accompanying notes 59-61 *infra*.

³⁰ See text accompanying notes 40-50 *infra*.

³¹ See text accompanying notes 60-66 *infra*.

typically shorter blue sky limitation periods. The Second,³³ Ninth³⁴ and Tenth³⁵ Circuits, however, prefer the longer common law fraud periods. The Third Circuit has applied the common law fraud limitation period³⁶ but, like the First Circuit,³⁷ has not squarely addressed the 10b-5 statute of limitation question.³⁸ Finally, the Fifth Circuit has addressed the issue squarely, but has produced inconsistent results among the different states in the circuit.³⁹

I. CIRCUIT COURTS FAVORING BLUE SKY LIMITATION PERIODS

The Eighth Circuit was a forerunner in supporting blue sky limitation periods for 10b-5 actions.⁴⁰ In *Vanderboom v. Sexton*,⁴¹ the Eighth Circuit decided that the appropriate standard for selecting the 10b-5 statute of limitations period was the state statute which best served the federal policy involved.⁴² The court accordingly proposed a resemblance test to determine which state statute most closely comports with the federal policy underlying a 10b-5 cause of action.⁴³ The two-pronged *Vanderboom* test looks to the state statute bearing the closest resemblance to the federal statute at issue.⁴⁴ The first prong of the test establishes which state statute more closely coincides with the underlying purpose of 10b-5.⁴⁵ The second prong compares the substantive defenses in the state statutes with the defenses available in rule 10b-5 actions.⁴⁶ Applying the test, the *Vanderboom* court found that Arkansas' blue sky statute⁴⁷ shared a commonality of purpose with section 10(b).⁴⁸

³³ See text accompanying notes 98-108 *infra*.

³⁴ See text accompanying notes 92-98 *infra*.

³⁵ See text accompanying notes 92-98 *infra*.

³⁶ See text accompanying notes 111-112 *infra*.

³⁷ See text accompanying note 109 *infra*.

³⁸ See text accompanying notes 110, 113-18 *infra*.

³⁹ See text accompanying notes 119-30 *infra*.

⁴⁰ See *Vanderboom v. Sexton*, 442 F.2d 1233, 1240 (8th Cir. 1970); Martin, *supra* note 6, at 447-8; *Proposal for Congressional Legislation*, *supra* note 1, at 1161; text accompanying notes 41-51 *infra*.

⁴¹ 442 F.2d 1233 (8th Cir. 1970).

⁴² 422 F.2d at 1237; *cf.* *Charney v. Thomas*, 372 F.2d 97, 100 (6th Cir. 1967) (applying federal policy language to choice of fraud limitation period); Martin, *supra* note 6, at 447 (comparison of *Charney* with *Vanderboom*).

⁴³ 422 F.2d at 1237-38. In *Vanderboom*, the plaintiffs purchased securities and alleged that defendant sellers and others fraudulently induced the plaintiffs to invest. See *id.* at 1235-36. The court held that the blue sky limitation period applied to 10b-5 actions and remanded for determination of whether the two-year limitation period barred the action. See *id.* at 1243.

⁴⁴ *Id.* at 1237-38.

⁴⁵ *Id.* at 1239-40.

⁴⁶ *Id.* at 1240. The *Vanderboom* court noted that scienter was not required in 10b-5 actions, while the fraud statute did require scienter. *Id.* at 1238-39; see note 50 *infra*.

⁴⁷ See ARK. STAT. ANN. § 67-1256(e) (Replacement 1962) (2 year blue sky period).

⁴⁸ 422 F.2d at 1237, 1239-40. The *Vanderboom* court analogized a rule 10b-5 action to an

The court also found that the Arkansas common law fraud statute⁴⁹ did not create substantially the same defenses as did rule 10b-5.⁵⁰

In *Parrent v. Midwest Rug Mills, Inc.*,⁵¹ the Seventh Circuit, citing

implied federal blue sky cause of action. *Id.* at 1237. Therefore, the court held the blue sky law the most logical statute to provide a limitation period in rule 10b-5 actions. *Id.*

⁴⁹ See 422 F.2d at 1237; ARK. STAT. ANN. § 37-206 (Replacement 1962) (3-year limitation period applying to actions founded on contract or other liability). Arkansas courts have applied section 37-206 as the limitation period for common law fraud actions. See 442 F.2d at 1237.

⁵⁰ See 422 F.2d at 1238-39; cf. *Morris v. Stifel, Nicolaus & Co.*, 600 F.2d 139, 144 (8th Cir. 1979) (diminishing importance of *Vanderboom's* 'similarity of defenses' factor).

Since the *Vanderboom* decision was a pre-*Hochfelder* case, rule 10b-5, like the Arkansas blue sky statute, required no element of scienter. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (scienter is required for liability in private action for damages brought under rule 10b-5); *Morris v. Stifel, Nicolaus & Co., Inc.*, 600 F.2d 139, 142-44 (8th Cir. 1979). Thus, the second prong of *Vanderboom's* test was satisfied. The Eighth Circuit recently reaffirmed the support for the *Vanderboom* resemblance test in view of the *Hochfelder* scienter requirement of rule 10b-5. See *Morris v. Stifel, Nicolaus & Co., Inc.*, 600 F.2d 139 (8th Cir. 1979). In *Morris*, the Eighth Circuit decided that Missouri's two-year blue sky limitation period, and not the five-year common law fraud period applied to 10b-5 actions even though the Missouri blue sky law does not require scienter. *Id.* at 143 n.10, 146 (no scienter requirement in Missouri blue sky law); MO. REV. STAT. § 409.411(a)(2) (1969) (blue sky law); *id.* § 409.411(e) (1969) (blue sky limitation period); *id.* § 516.120 (1969) (common law fraud limitation period); cf. *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 692 (8th Cir. 1981) (applying without discussion 2-year blue sky period to rule 10b-5 action); *Garnatz v. Stifel, Nicolaus & Co., Inc.*, 559 F.2d 1357, 1363 (8th Cir. 1977) (not deciding which limitation period applies since longest would bar action but confirming general rule to apply blue sky period to 10b-5 actions), *cert. denied* 435 U.S. 951 (1978). Noting that the test survives *Hochfelder's* additional requirement of scienter in rule 10b-5 actions, the Circuit held that the two prongs of the test are not conjunctive prerequisites but should weigh together. 600 F.2d at 142, 144. Moreover, as long as the blue sky law is substantially congruent with rule 10b-5, the commonality of purpose factor outweighs any variance in defenses, and the second *Vanderboom* prong is a secondary factor. *Id.* at 144. Although the Eighth Circuit has not decided the issue in four states within the Circuit, the *Morris* decision supports the expectation that the Eighth Circuit will apply the blue sky period to 10b-5 actions. See *id.* at 142-145. The Eighth Circuit has not decided the 10b-5 limitation issue in Minnesota, Nebraska, North Dakota and South Dakota. See A. JACOBS, *supra* note 6, at 10-17 to 10-19; cf. *Bailey v. Piper, Jaffrey & Hopwood, Inc.*, 414 F. Supp. 475, 479-84 (D. Minn. 1976) (applying three year blue sky law).

In *Alodex Corporation Securities Litigation (Alodex)*, the Eighth Circuit in 1976 followed the *Vanderboom* resemblance test for commonality of purpose and similarity of defenses with rule 10b-5 to apply Iowa's two year's blue sky period to rule 10b-5 action. See 533 F.2d 372, 372-74 (8th Cir. 1976); IOWA CODE § 502.23 (1975). The court found a commonality of purpose between the blue sky law and rule 10b-5 since both provisions expressly dealt with securities sales. See 533 F.2d at 373. The court also examined the defenses allowed in the state statutes to determine the closest analogue to rule 10b-5. See *id.* at 373-74. As in *Vanderboom*, the *Alodex* court found the second requirement satisfied because the Iowa blue sky laws and rule 10b-5 did not require scienter at the time of the decisions. See 533 F.2d at 373-74; note 46 *supra*.

⁵¹ 455 F.2d 123 (7th Cir. 1972). In *Parrent*, plaintiffs were purchasers of stock who alleged that two defendant corporations fraudulently induced plaintiffs to buy stock. See *id.* at 124. The *Parrent* court held the applicable limitation period barred the federal securities claims. *Id.* at 130.

the Eighth Circuit *Vanderboom* approach, examined Illinois statutes for commonality of purpose with rule 10b-5.⁵² The *Parrent* court found that the Illinois blue sky law more closely resembled rule 10b-5 than the statutory common law fraud period.⁵³ The court reasoned that the three-year blue sky period⁵⁴ was closer to express limitation periods provided in other federal securities law than was the five-year fraud period.⁵⁵ The *Parrent* court additionally noted that the choice of a state security law not only promotes a more orderly development of the law⁵⁶ but also best effects the federal policy of protecting the uninformed and gullible.⁵⁷ Since the *Parrent* decision, the Seventh Circuit has applied the blue sky period for 10b-5 actions in each state within the Circuit.⁵⁸ The Seventh Circuit thus has firmly established itself as a "blue sky" jurisdiction.⁵⁹

Like the Seventh Circuit, the District of Columbia Circuit applies a blue sky limitation period to 10b-5 actions.⁶⁰ In *Forrestal Village, Inc. v. Graham*,⁶¹ the circuit emphasized similarities in purpose and substance

⁵² See 455 F.2d at 126-27; *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir. 1970).

⁵³ 455 F.2d at 127; see ILL. REV. STAT. ch. 121-1/2, § 137.13 (3-year blue sky period). The *Parrent* court found that the Illinois blue sky law more closely resembled rule 10b-5 even though the blue sky law, unlike the rule 10b-5, provided no remedy for buyers. See 455 F.2d at 126 n.7.

⁵⁴ See ILL. REV. STAT. ch. 121-1/2, § 137.13.

⁵⁵ 455 F.2d at 125 n.3 127; ILL. REV. STAT. ch. 83, § 16 (5-year common law fraud period).

⁵⁶ See 455 F.2d at 127.

⁵⁷ See *id.* at 126. Relying on *Parrent*, the Seventh Circuit in 1979 again held the three year blue sky period applicable to 10b-5 actions brought in Illinois. See *Memkov v. O'Hare Chicago Corp.*, 592 F.2d 351, 355 (7th Cir. 1979) (applying blue sky period to 10b-5 action); *cf. Baselski v. Paine, Webber, Jackson & Curtis*, 514 F. Supp. 535, 539 (N.D. Ill. 1981) (parties to 10b-5 action agreeing on *Parrent* as authority for applicability of 3-year Illinois limitation period).

⁵⁸ See *Cahill v. Ernst & Ernst*, 625 F.2d 151, 156 (7th Cir. 1980); *LaRosa Corp. v. Equitable Life Assurance Society*, 542 F.2d 990, 993 (7th Cir. 1976). In *LaRosa*, a defrauded seller sought damages against defendant corporation for fraudulent conduct in connection with causing the plaintiff to absorb a 25% share of partnership operating losses. See 542 F.2d at 990. The Seventh Circuit held that the 2-year blue sky period applied to sellers as well as purchasers, and that the 6-year fraud statute was not applicable. *Id.* at 993; see IND. CODE §§ 23-2-1-19(e) (blue sky period), 34-1-2-1 (fraud period). In *LaRosa*, the action by the seller accrued in 1970. See 542 F.2d at 990. The legislature amended the blue sky law in 1975 to provide a remedy for the seller. See *id.*; IND. CODE § 23-2-1-19(b).

Plaintiff in *Cahill* was a purchaser who alleged that the defendant accounting firm made false representations of financial status before the purchase of securities. See 625 F.2d at 152. The Seventh Circuit chose the Wisconsin blue sky period over both the 6-year common law fraud period and the 6-year catch-all period. See *id.* at 154; WIS. STAT. §§ 551.59(5) (blue sky law specifically providing that statute of limitation runs after earlier of one year following discovery of violation or three years after the act or transaction constituting violation), 893.19(7) (common law period), 893.14(4) (catch-all period).

⁵⁹ See *Block & Barton*, *supra* note 10, at 375 & n.11, 376, text accompanying notes 51-58 *supra*.

⁶⁰ See *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413-14 (D.C. Cir. 1977); text accompanying notes 61-64 *infra*.

⁶¹ 551 F.2d 411 (D.C. Cir. 1977). In *Forrestal Village, Inc.*, the plaintiff buyer of

between the District of Columbia blue sky law and rule 10b-5.⁶² The court reasoned that both provisions regulate or control the sale of securities in particular, rather than fraud in general.⁶³ In view of the commonality of purpose between the District of Columbia blue sky law and section 10(b), therefore, the District of Columbia Circuit applied the blue sky period.⁶⁴ Moreover, a recent District of Columbia Circuit decision⁶⁵ has affirmed that the circuit now follows the rule in *Forrestal Village, Inc.* to apply blue sky limitation periods to 10b-5 actions.⁶⁶

The Fourth Circuit also has focused on the commonality of purpose factor in choosing the blue sky period for rule 10b-5 actions.⁶⁷ In *O'Hara v. Kovens*,⁶⁸ the Fourth Circuit upheld the application of Maryland's blue sky limitation period⁶⁹ in a 10b-5 action brought by defrauded sellers of securities.⁷⁰ The court held that the blue sky statute proscribed the

securities sued a seller of securities for violations of § 10(b) and rule 10b-5. *See id.* at 414. The D.C. Circuit adopted the Eighth Circuit's reasoning in *Vanderboom v. Sexton* and affirmed the district court's holding that blue sky law period applied to the federal action. *See id.*; 422 F.2d 1233, 1237 (8th Cir. 1970); text accompanying notes 41-46 *supra*.

⁶² *See* 551 F.2d at 414.

⁶³ *See id.*

⁶⁴ *See id.* at 413-14; D.C. CODE ANN. § 2-2413 (1973) (2-year blue sky period). The *Forrestal Village, Inc. v. Graham* court refused to follow the Ninth and Tenth Circuit reasoning favoring longer limitation period and thus rejected the District of Columbia's 3-year fraud limitation period. *See* 551 F.2d at 413-14; D.C. CODE ANN. § 12-301(8) (1973) (3-year fraud period). The *Forrestal Village, Inc.* court found unimportant that rule 10b-5 requires scienter, while the D.C. blue sky law does not require scienter. 551 F.2d at 414; *see* D.C. CODE ANN. § 2-2413. In addition to the D.C. blue sky statute's negligence standard, the court noted that the statute provides a cause of action only for buyers. *See* 551 F.2d at 414; D.C. CODE ANN. § 2-2413. The action in *Forrestal Village, Inc.* involved a plaintiff buyer. Therefore, the fact that 10b-5 provided a cause of action for both buyers and sellers was immaterial. *See* 551 F.2d at 441. The D.C. Circuit has not addressed the issue whether D.C.'s blue sky law will govern a 10b-5 action when the plaintiff has no cause of action under D.C.'s blue sky laws. *See id.*

⁶⁵ *See* *Wachovia Bank & Trust v. National Student Marketing*, 650 F.2d 343 (D.C. Cir. 1980). In *Wachovia Bank & Trust*, the plaintiffs were purchasers of newly issued securities who brought a 10b-5 action against the issuing corporation and others. *See id.* at 345. The court examined whether the holding in *Forrestal Village, Inc. v. Graham* should govern 10b-5 actions prospectively or retrospectively. *See id.* at 346. The Tenth Circuit held that the *Forrestal Village, Inc.* decision should be applied prospectively only. *Id.* at 347-48, 359. Considering the applicability of the federal tolling doctrine, the prospective application of the *Forrestal Village, Inc.* decision could possibly have an impact on current 10b-5 proceedings, since the court could toll the accrual of a pre-*Forrestal Village, Inc.* decision. *See* text accompanying notes 19-24 *supra*.

⁶⁶ *See* 650 F.2d at 346.

⁶⁷ *See* text accompanying notes 68-73 *infra*.

⁶⁸ 625 F.2d 15 (4th Cir. 1980). In *Gurley v. Documentation, Inc.*, the Fourth Circuit recently followed *O'Hara v. Kovens* by applying Virginia's 2-year blue sky limitation period to a 10b-5 action. *Gurley v. Documentation, Inc.*, *slip. op.* No. 81-1684 (March 22, 1982); VA. CODE § 13.1-522(d) (Repl. Vol. 1977). The *Gurley* court found significant that both rule 10b-5 and the blue sky law address the problem of misinformation in securities transactions. *Slip op.* at 16.

⁶⁹ *See* MD. CORP. & ASS'NS CODE ANN. § 11-793(f) (Supp. 1979) (1-year blue sky period).

⁷⁰ *See* 625 F.2d at 18. Significantly, when the *O'Hara* action accrued, Maryland's blue

specific behavior challenged in the federal action because the blue sky law provided criminal sanctions supporting sellers' rights.⁷¹ Since the state legislature designed the blue sky law to achieve ends similar to the purposes of rule 10b-5, the Fourth Circuit reasoned that the blue sky statute appropriately provided the applicable limitation period.⁷² The *O'Hara* court found that the commonality of purpose is the overriding factor, and that the federal and state statutes need not be identical or even operate in the same fashion.⁷³

Although the Sixth Circuit has traditionally applied the common law fraud period to rule 10b-5 actions,⁷⁴ the circuit recently reversed the position and followed the trend in other circuits to apply the blue sky

sky laws provided no civil remedy for defrauded sellers. *See id.* at 17; MD. CORP. & ASS'NS CODE ANN. § 11-703(a)(2) (Supp. 1979) (blue sky law). Additionally, the blue sky law differed from rule 10b-5 because the blue sky law did not require scienter. *See* 625 F.2d at 17; MD. CORP. & ASS'NS CODE ANN. § 11-703(a); *cf.* *White v. Sanders*, 650 F.2d 627, 632-33 (5th Cir., Unit B 1981) (discussion of *O'Hara*).

⁷¹ 625 F.2d at 17-18; *see* MD. CORP. & ASS'NS CODE ANN. §§ 11-301, -417 (Supp. 1979) (criminal sanctions); note 72 *infra*. The *O'Hara* court examined the blue sky remedies existing when the action accrued rather than at the time of suit. *See* 625 F.2d at 17. At the time of the suit, an amendment to the blue sky law provided a civil remedy for defrauded sellers. *See id.*; note 70 *supra*. The *O'Hara* court decided that an amendment of the blue sky laws after the action accrued but before plaintiffs brought suit would not affect consideration of the statute existing at the time of accrual. *See id.*; *Wachovia Bank & Trust Co. v. National Student Marketing Co.*, 650 F.2d 342, 346-47 (D.C. Cir. 1980) (earlier decision to apply blue sky statute limitation period nonretroactively); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 892-93 n.9 (5th Cir. 1979) (looking to law existing when cause of action accrued). *But see* *LaRosa Building Corp. v. Equitable Life Assurance Society*, 542 F.2d 990, 991-993 (7th Cir. 1976) (applying blue sky limitation where amendment of blue sky laws after plaintiff-seller's cause of action accrued expressly provided remedy for defrauded sellers); notes 58 *supra* & 73 *infra*.

⁷² 625 F.2d at 18.

⁷³ *Id.* The *O'Hara* court left open the issue whether the blue sky period should apply to a federal cause of action when such action if brought in state court would result in no liability under the blue sky law. *See id.* at 18 n.3; *cf.* *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 453-55 (3d Cir. 1979). In addition to the issues decided in *O'Hara*, the Fourth Circuit has held that when the time plaintiffs knew or should have known about defendant's omission is one year after the legislative shortening of a blue sky limitation period, the revised, shortened blue sky period applied to the 10b-5 cause of action. *Fox v. Kane-Miller*, 542 F.2d 915, 917-18 (4th Cir. 1976) (applying Maryland's 1-year blue sky period enacted in 1968 instead of the prior 2-year period to cause of action accruing in 1969); note 71 *supra*. *See also* *O'Hara v. Kovens*, 625 F.2d 15, 18 (4th Cir. 1980) (discussion of *Fox*); *Mid-Carolina Oil, Inc., et al v. Klippel*, [1982] FED. SEC. L. REP. (CCH) ¶ 98,431 (D.S.C. March 19, 1981) (applying South Carolina's 3-year blue sky law rather than 6-year fraud period); *cf.* *Newman v. Prior*, 518 F.2d 97, 100 (4th Cir. 1975) (applying Virginia's 2-year blue sky period of limitation and not 5-year fraud period to cause of action brought under § 17 of the Securities Act of 1933).

⁷⁴ *See, e.g.*, A. JACOBS, *supra* note 6, at 10-14 to 10-15 n.42; Martin, *supra* note 6, at 448-49 & n.46; *Proposal for Congressional Legislation*, *supra* note 1, at 1161 & n.45. In *IDS Progressive Fund, Inc. v. First of Michigan Corp.*, plaintiffs were a class of purchasers who alleged that the selling corporation misled purchasers by issuance of a prospectus prepared by the defendant, First of Michigan. *See* 533 F.2d 340, 342 (6th Cir. 1976). The Sixth Circuit held that Michigan's six-year common law fraud limitation period, and not the two-year blue

limitation period.⁷⁵ In *Carothers v. Rice*,⁷⁶ the Sixth Circuit applied the shorter blue sky limitation period in a 10b-5 cause of action brought by

sky period applied to the 10b-5 action. *Id.* at 344; see MICH. STAT. ANN. §§ 19.776 (blue sky period), 27A.5813 (common law fraud period).

The *IDS Progressive Fund, Inc.* court addressed the same issue which the Sixth Circuit discussed in *Charney v. Thomas* in 1967. See 533 F.2d at 342; 372 F.2d 97, 100 (6th Cir. 1967). The court in *Charney* chose the common law fraud period over the blue sky period, because in 1967 the blue sky law did not contain a provision similar to § 10(b). See 372 F.2d at 100. Since the Michigan legislature repealed the blue sky law examined in *Charney*, the *IDS Progressive Fund, Inc.* court reevaluated the proper choice of state statutes under current blue sky laws in Michigan. See 533 F.2d at 342-44. In *IDS Progressive Fund, Inc.*, however, the court found the civil liability under current law to be virtually identical to the civil liability under the old blue sky laws examined in *Charney*. See *id.* at 343 & nn.1-2. The court reasoned that the new Michigan blue sky law, which contains virtually identical language as in rule 10b-5, carries only criminal liability. See *id.* at 342-43; MICH. STAT. ANN. § 19.776(101); cf. MICH. STAT. ANN. § 19.776(410(h)) (criminal liability is exclusive remedy for § 101). The court therefore found that the blue sky law creating civil liability was not a sufficient analogue to rule 10b-5. 533 F.2d at 343. The *IDS Progressive Fund, Inc.* court also reasoned that three characteristics of the blue sky law differentiated the law from rule 10b-5 actions. See *id.* Not only did the blue sky law more narrowly restrict misrepresentations to statements and omissions, but also the blue sky law limited liability to sellers only. See *id.*; MICH. STAT. ANN. § 19.776(401) (blue sky law). Additionally, the court noted that the Michigan blue sky law contained an express scienter requirement, where rule 10b-5 had no express scienter requirement. See 533 F.2d at 343; MICH. STAT. ANN. § 19.776(410); cf. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976) (scienter is an element of rule 10b-5 action). Moreover, the court found that any similarities would not warrant adding unnecessary uncertainty to federal claims by changing the limitation period established by an earlier decision. See 533 F.2d at 343; cf. *Charney v. Thomas*, 372 F.2d 97, 100 (6th Cir. 1967).

In a consolidated action, *Nickels v. Koehler Management Corp.*, the first plaintiff was a former shareholder who alleged fraudulent misrepresentation by the acquiring corporation in connection with a merger which involved the exchange of stock. See 541 F.2d 611, 612 (6th Cir. 1976), cert. denied 429 U.S. 1074 (1977). The other plaintiffs were shareholders of a merged corporation whose directors recommended the merger, sat on both sides of the merger, and allegedly withheld important financial information from plaintiffs. See *id.* at 612-13. The *Nickels* court applied Ohio's four-year common law fraud period rather than Ohio's two year blue sky limitation period. See *id.*; OHIO REV. CODE ANN. §§ 1707.43 (Page) (blue sky period), 2305.09 (Page) (common law fraud period); cf. *id.* § 2305.07 (Page) (6-year period for liability created by statute). After comparison of the blue sky law with the common law fraud statute, the *Nickels* court concluded that both statutes had a marked resemblance to rule 10b-5, but that application of the fraud statute better served the federal policy of continuing the limitation period applied by the Circuit in an earlier decision. See 541 at 613, 617-18; cf. *Connelly v. Balkwill*, 279 F.2d 685 (6th Cir. 1960) (affirming choice of 4-year Ohio fraud statute over 6-year statute for liability created by statute).

In addition to the importance of providing a limitation period on which the securities market can rely, the Sixth Circuit distinguished the 10b-5 action in *Nickels* as based on common law fraud theories, and not arising out of the blue sky law substantive provisions. See 541 F.2d at 616. The *Nickels* court held that the Ohio legislature did not intend the blue sky laws to apply to all securities law fraud. *Id.* Therefore, if an action brought in federal court under rule 10b-5 would be better brought in state court under the common law fraud statute, the blue sky statutory period would be inappropriate. See *id.*

⁷⁵ See text accompanying notes 76-81 *infra*.

⁷⁶ 633 F.2d 7 (6th Cir. 1980). Alleging that defendant tender offerors made fraudulent misrepresentations and omissions, the plaintiffs in *Carothers* sued under § 10(b) and rule

defrauded sellers.⁷⁷ Significantly, the Kentucky blue sky law applied in *Carothers* required neither scienter nor reliance and provided no remedy for sellers.⁷⁸ The court, however, held that the Kentucky state courts would imply a remedy for defrauded sellers.⁷⁹ The court in *Carothers* examined Sixth Circuit decisions applying statutory common law fraud periods in states other than Kentucky and yet held that the Sixth Circuit was not bound by a desire to avoid increasing uncertainty in the law.⁸⁰ The *Carothers* court noted that the relaxed requirements of the blue sky law when compared with rule 10b-5 were not objectionable for purposes of choosing the limitation period, because a shortened period compensated for the lack of strict requirements.⁸¹

II. CIRCUIT COURTS FAVORING COMMON LAW FRAUD LIMITATION PERIODS

The Ninth Circuit has consistently applied the common law fraud period to rule 10b-5 actions.⁸² In *United California Bank v.*

10b-5 for damages and alternatively, rescission. *See id.* at 9. The court reversed the lower court and held the 10b-5 action barred by the three year blue sky statute of limitations. *Id.* at 14.

⁷⁷ *Id.*, *see* KY. REV. STAT. ANN. § 292.480(3) (Baldwin) (3-year blue sky period); *cf. id.* § 413.120(12) (Baldwin) (5-year common law fraud period).

⁷⁸ *See* 633 F.2d at 10, 14; KY. REV. STAT. ANN. § 292.480(1). In addition to no requirement of scienter or reliance, the Kentucky blue sky law differs from 10b-5 because the blue sky law allows only a plaintiff who has tendered his shares to recover. *See* 633 F.2d at 10, 14; KY. REV. STAT. ANN. § 292.480(1) (blue sky statute).

⁷⁹ 633 F.2d at 14. The court reasoned that when the Kentucky legislature adopted the Kentucky blue sky law provisions from the Uniform Securities Act (U.S.A.), the legislature did not decide to adopt the subsection that prohibited implied remedies. *See id.* at 10-11. The court concluded that the legislature must have intended to imply remedies under the blue sky law to match the implied remedies of rule 10b-5. *See* 633 F.2d at 11.

⁸⁰ 633 F.2d at 13.

⁸¹ 633 F.2d at 14. The court was aware that previously the Sixth Circuit had supported the federal policy that longer limitation periods best serve federal securities laws. *See id.* at 14. The reason for this policy, however, is to provide a plaintiff that has a federal claim as long to sue as has the person with the state claim. *Id.* Since Kentucky courts held the blue sky law the exclusive remedy, the choice of the blue sky statute supports the federal policy. *Id.*; *see* *Owensboro v. First U.S. Corp.*, 534 S.W. 2d 789, 791 (Ky. 1975) (blue sky law is exclusive remedy for securities fraud).

The Sixth Circuit followed *Carothers* in 1981 in *Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981), where the court applied the shorter Kentucky blue sky period, holding the three year period applicable to a purchaser's 10b-5 action brought against the selling corporation that issued a misleading press release. *Id.* at 677-78. The Sixth Circuit currently has decided 10b-5 limitation period issues in all states within the Circuit except Tennessee. *See* *Denny v. Performance Sys. Inc.*, [1971-72 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,387, at 91,981 (M.D. Tenn. 1971) (10 year limitation period).

⁸² *See* text accompanying notes 89-90 *infra*. Most of the Ninth Circuit decisions dealing with the 10b-5 limitation period issue have been federal actions brought in California. *See, e.g.,* *Robuck v. Dean Witter & Co., Inc.* [1982] FED. SEC. L. REP. (CCH) ¶ 98,379, at 92, 295 (9th Cir. 1980); *Jablon v. Dean Witter & Co.*, 614 F.2d 667, 681 (9th Cir. 1980) (applying

Salik,⁸³ the Ninth Circuit held that California's common law fraud period⁸⁴ governed a 10b-5 action against a seller of securities.⁸⁵ The court refused to apply the state's shorter blue sky period⁸⁶ because such a change from established Ninth Circuit precedent applying the fraud period would have added unnecessary uncertainty to the availability of federal claims.⁸⁷ The *Salik* court also reasoned that the fraud period better served the federal remedial policy of providing longer rather than shorter limitation periods.⁸⁸ A later Ninth Circuit decision, *Robuck v. Dean Witter & Co., Inc.*,⁸⁹ applied the California fraud period, reasoning that the fraud statute substantively resembled rule 10b-5 more closely than did the blue sky statute.⁹⁰ The Ninth Circuit has thus established itself as a "common law fraud" jurisdiction.⁹¹

The Tenth Circuit also has firmly established itself as a "common law fraud" jurisdiction.⁹² In *Mitchell v. Texas Gulf Sulphur Co.*,⁹³ the Tenth Circuit applied Utah's common law fraud limitation period,⁹⁴ rejecting the blue sky period where sellers of stock brought a 10b-5 action against the issuing corporation.⁹⁵ The court reasoned that rule 10b-5

California 3-year common law limitation period); *Briskin v. Ernst & Ernst*, 589 F.2d 1363, 1365 (9th Cir. 1978) (same); *Rochelle v. Marine Midland Grace Trust Co.*, 535 F.2d 523, 531 (9th Cir. 1976) (parties agreeing that 3-year common law fraud period applies); *cf. Cameron v. Adams & Co.*, 547 F.2d 473, 477 (9th Cir. 1976) (parties agreeing that Oregon's 2-year common law fraud period applies); *Douglass v. Hinton Investments, Inc.*, 440 F.2d 912, 915-16 (9th Cir. 1971) (applying Washington's 3-year fraud limitation period instead of blue sky period).

⁸³ 481 F.2d 1012 (9th Cir. 1973). The plaintiffs in *Salik* purchased shares in a bank pursuant to a purchase agreement with defendants, former shareholders of bank stock. *See id.* at 1013. The plaintiffs alleged that the bank had undisclosed losses before the purchase agreement resulting in the insolvency of the bank. *See id.* The *Salik* court affirmed the lower court's holding that the fraud limitation period did not bar the 10b-5 action. *See id.* at 1013, 1015.

⁸⁴ *See* CAL. CODE CIV. P. § 338(4).

⁸⁵ 481 F.2d at 1015.

⁸⁶ *See* CAL. CORP. CODE § 25506. Section 25506 requires that an action under the blue sky law be brought one year from discovery of the violative act or four years from the act itself, whichever expires first. *See* 481 F.2d at 1013 n.1.

⁸⁷ *See* 481 F.2d at 1015; *Hecht v. Harris, Upham & Co.*, 430 F.2d 1202, 1210 (9th Cir. 1970); *Sackett v. Beaman*, 399 F.2d 884, 890 (9th Cir. 1968).

⁸⁸ *See* 481 F.2d at 1015.

⁸⁹ *See* [1982] FED. SEC. L. REP. (CCH) ¶ 98,379, at 92,295 (9th Cir. 1980). In *Robuck v. Dean Witter & Co., Inc.*, plaintiff sued his investment advisor after the defendant liquidated plaintiff's account when plaintiff failed to meet margin calls. *See id.* at 92,294-95. The court held that the three year fraud statute of limitations barred the 10b-5 cause of action. *Id.* at 92,295-96.

⁹⁰ *Id.* at 92,295. The *Robuck* court held that the state fraud action most resembles a rule 10b-5 action since both the federal and state actions require reckless or intentional conduct. *Id.*

⁹¹ *See* text accompanying notes 82-90 *supra*.

⁹² *See* *Barton & Block*, *supra* note 10, at 376, text accompanying notes 93-98 *infra*.

⁹³ 446 F.2d 90 (10th Cir. 1971).

⁹⁴ UTAH CODE ANN. § 78-12-26(3) (1953) (3-year common law fraud period).

⁹⁵ 446 F.2d at 104.

damage actions coalesce with fraud actions.⁹⁶ Three years after *Mitchell*, the Tenth Circuit again rejected Utah's blue sky period as applicable to a 10b-5 action on the sole ground that the Ninth Circuit has repeatedly held the longer common law period applicable.⁹⁷

Virtually all of the Second Circuit cases dealing with 10b-5 statute of limitation issues accrue in New York.⁹⁸ Other Second Circuit cases have applied New York's "borrowing statute".⁹⁹ A borrowing statute requires a court to apply the statute of limitations of the state where the action accrued if that state's limitation period is shorter than the period of the forum state.¹⁰⁰ When a 10b-5 action accrues in New York or when the

⁹⁶ See *id.* The *Mitchell* court distinguished the Eighth Circuit decision, *Vanderboom v. Sexton*, insofar as the Eighth Circuit did not have a scienter requirement for rule 10b-5 actions. 446 F.2d at 104; see 422 F.2d 1233, 1239 (8th Cir. 1970); text accompanying notes 48-50 *supra*. Since the Tenth Circuit has long favored requiring scienter in 10b-5 actions, the state common law fraud action which also required scienter was most analogous to 10b-5. 446 F.2d at 104. The *Mitchell* court followed the holding in *Chiodo v. General Water Works Corp.* that the common law fraud limitation period controlled private 10b-5 actions. *Id.*; see 380 F.2d 860, 867 (10th Cir. 1967) (applying Utah common law period).

⁹⁷ See *Clegg v. Conk*, 507 F.2d 1351, 1352 (10th Cir. 1974), *cert. denied* 422 U.S. 1007 (1975). In 1980, the Tenth Circuit applied Colorado's three year common law fraud period to a rule 10b-5 action after holding that suits brought under rule 10b-5 are analogous to state law fraud actions. *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 (10th Cir. 1980); see *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1225 (10th Cir. 1970) (applying Colorado fraud limitation period); *Layman v. McComb*, [1982] FED. SEC. L. REP. (CCH) ¶ 98,424, at 92,538 (D. Colo. October 19, 1981) (following *Aldrich* and *deHaas* when applying Colorado fraud period in 10b-5 action); COLO. REV. STAT. §§ 13-80-108 to -109 (1973) (fraud period).

⁹⁸ See, e.g., *IIT v. Cornfeld*, 619 F.2d 909, 928, (2d Cir. 1980) (applying New York common law fraud period); *Phillips v. Levie*, 593 F.2d 459, 460-61 (2d Cir. 1979); *Stull v. Bayard*, 561 F.2d 429, 431-32 (2d Cir. 1977), *cert. denied* 434 U.S. 1035 (1978); *Klein v. Bower*, 421 F.2d 338, 343-44 (2d Cir. 1970).

⁹⁹ NEW YORK CIV. PRAC. § 202 (McKinney 1972); see, e.g., *Industrial Consultants, Inc. v. H. S. Equities, Inc.*, 646 F.2d 746, 747 (2d Cir.), *cert. denied* 102 S. Ct. 145 (1981) (borrowing Oklahoma statute of limitations); *Robertson v. Seidman & Seidman*, 609 F.2d 583, 586 (2d Cir. 1979) (borrowing Alaska statute); *Arneil v. Ramsey*, 550 F.2d 774, 779 (2d Cir. 1977) (borrowing Washington statute); A. JACOBS, *supra* note 6, at 10-8 to -9 (1980 ed.); *Barton & Block*, *supra* note 10 at 374-80. *But see* *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 406 (2d Cir. 1975) (applying Texas statute of limitations); text accompanying note 100 *infra*. Other states also have enacted borrowing statutes. *E.g.*, KY. REV. STAT. ANN. § 413.320 (Baldwin); N.Y. CIV. PRAC. LAW § 202 (McKinney 1972); 42 PA. CONS. STAT. ANN. § 5521(b) (Purdon Supp. 1980).

¹⁰⁰ See, e.g., *Industrial Consultants, Inc. v. H. S. Equities*, 646 F.2d 746, 747 (2d Cir. 1981); A. JACOBS, *supra* note 6, at 10-8 to 10-9; *Barton & Block*, *supra* note 10 at 378. A typical borrowing statute requires a court to refer to the law of the state where the cause of action accrued in deciding the proper limitation period. See N.Y. CIV. PRAC. § 202 (McKinney 1972). In *Industrial Consultants, Inc. v. H. S. Equities, Inc.*, an Oklahoma corporation sued a New York Stock Exchange member firm for false and misleading representations of financial conditions. 646 F.2d 746, 747 (2d Cir. 1981). Appellant argued that New York's six-year statute of limitations should apply to the § 10(b) and rule 10b-5 cause of action. *Id.* The Second Circuit, however, following *Arneil v. Ramsey* and *Sack v. Low*, held that the action accrues in the state where the plaintiff sustains the loss caused by the misrepresentation. *Id.*; see *Arneil v. Ramsey*, 550 F.2d 774, 779-80 (2d Cir. 1977) (place of economic impact); *Sack*

New York borrowing statute does not apply, the Second Circuit has consistently applied New York's common law fraud period, because New York has no blue sky limitation period.¹⁰¹

In *IIT v. Cornfeld*,¹⁰² the Second Circuit defined New York's limitation period applicable to a rule 10b-5 action.¹⁰³ The *IIT* court established that the limitation period for a 10b-5 action governed by New York law is the longer of six years from the accrual of the cause of action,¹⁰⁴ or two years from when the injured party discovered or should have discovered the fraud.¹⁰⁵ Although the *IIT* court provided no reasoning for the decision,¹⁰⁶ an earlier Second Circuit decision applying Texas' blue sky period through New York's borrowing statute indicates that the Second Circuit will follow the federal policy to adopt longer limitation periods.¹⁰⁷ The

v. Low, 478 F.2d 360, 366-67 (2d Cir. 1972); N.Y. CIV. PRAC. § 202 (McKinney 1972); cf. *Robertson v. Seidman & Seidman*, 609 F.2d 583, 586 (2d Cir. 1979) (borrowing Alaska's two-year limitation for injuries to persons or rights not arising from contract). See, e.g., *IIT v. Cornfeld*, 619 F.2d 909, 928 (2d Cir. 1980) (applying New York common law fraud period); *Phillips v. Levie*, 593 F.2d 459, 460-61 (2d Cir. 1979); *Stull v. Bayard*, 561 F.2d 429, 431-32 (2d Cir. 1977); *Klein v. Shields & Co.*, 470 F.2d 1344, 1346 (2d Cir. 1972); *Klein v. Auchincloss, Parker & Redpath*, 436 F.2d 339, 341 (2d Cir. 1971); *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2d Cir. 1951) (fraud statute chosen without discussion); *Block & Barton supra* note 10, at 376 & 383 (no blue sky period in New York); cf. *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 408 (2d Cir. 1975) (applying Texas blue sky limitation period).

In addition to New York's six-year common law fraud limitation period, the Second Circuit has considered New York's three-year limitation for liability created by statute except otherwise provided and New York's ten-year period applicable to general equity actions occurring before 1962. See *Klein v. Bower*, 421 F.2d 338, 343 & n.4 (2d Cir. 1970) (applying 3-year limitation period to claim not stated as violation of rule 10b-5 and leaving issue open whether same limitation period might apply to 10b-5 action).

¹⁰¹ See text accompanying notes 102-08 *infra*.

¹⁰² 619 F.2d 909 (2d Cir. 1980). The appellant trust in *IIT* brought suit under rule 10b-5 against the issuer of publicly traded common stock and of a convertible note of a private corporation for aiding and abetting against the trust's security broker. 619 F.2d at 913. Although the district court never reached the statute of limitation issue, the Second Circuit held that the applicable statute of limitations had not run and thus did not bar the action. See *id.* at 929; text accompanying notes 103-04 *infra*.

¹⁰³ 619 F.2d at 928 (following *Stull v. Bayard*, 561 F.2d 429, 431 (2d Cir. 1977) and *Phillips v. Levie*, 593 F.2d 459, 462 (2d Cir. 1979)). In *Phillips v. Levie*, the Second Circuit accepted the lower court's determination that New York's fraud statute of limitations applied to a 10b-5 action. See 593 F.2d at 462 & n.12. Similarly, the *Stull v. Bayard* court did not analyze the reason for applying New York's fraud statute to an action brought under § 14 of the '34 Act other than to conclude summarily that the statute was most closely analogous to federal statute. See 561 F.2d at 431-32 & 432 n.3 (reference to rule 10b-5 cases).

¹⁰⁴ See N.Y. CIV. PRAC. LAW § 213(8) (McKinney) (six years from the discovery of fraud or from the time plaintiff could have discovered fraud with reasonable diligence).

¹⁰⁵ See N.Y. CIV. PRAC. LAW § 203(f) (McKinney) (two years from discovery of facts of action or from time when plaintiff could have discovered facts). The *IIT* court construed sections 203(f) and 213(8) to have the combined effect of alternative and separately timed limitations. 619 F.2d at 928-29; see *Phillips v. Levie*, 593 F.2d 459, 462 n.12; note 104 *supra*.

¹⁰⁶ See 619 F.2d at 928.

¹⁰⁷ See *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 408-09 (2d Cir. 1975). Appellants were a class of owners of certain stock who sued under rule 10b-5 alleging that of-

circuit reasoned that a statute with a longer limitation period best implements the goals of 10b-5, especially when the statute provides a broader cause of action for buyers than rule 10b-5 provides.¹⁰⁸

III. CIRCUIT COURTS PROVIDING NO CLEAR RULE

The First Circuit has never addressed the issue of which statute to apply for the limitation of 10b-5 actions.¹⁰⁹ Similarly, the Third Circuit

ficers and directors of the issuing corporation fraudulently caused shareholders to approve a merger. *Id.* at 405-06. The action in *Berry Petroleum Co.* originated in the Northern District of Texas, but the Judicial Panel of Multidistrict Litigation transferred the case to the Southern District of New York. *See id.* New York's borrowing statute thus required the Second Circuit to apply the appropriate state law of Texas since Texas was the forum. *See id.* at 406-09; NEW YORK CIV. PRACT. § 202. The *Berry Petroleum Co.* court attempted to determine which Texas state cause of action was most similar to the federal cause of action under rule 10b-5. *See* 518 F.2d at 407. The court in *Berry Petroleum Co.* compared the three-year Texas blue sky statute of limitations with the Texas statute of limitations for fraud by misrepresentation. *See id.*; TEX. REV. CIV. STAT. 1948, art. 581-33 (3-year blue sky limitation); TEX. REV. CODE ANN. tit. § 27.01(a) (Vernon) (court-defined 2-year limitation period for fraud).

Analyzing the differences between the blue sky statute and 10b-5, the Second Circuit found unimportant that the blue sky statute provided a right of action only for buyers because the plaintiffs were buyers. *Id.* The court also found unimportant that the blue sky statute imposed a duty of care on the purchaser since courts often have interpreted 10b-5 to include this duty. *See id.* Significantly, the court did not emphasize that the blue sky statute did not require scienter even though many courts required proof of some degree of scienter in 10b-5 actions. *See id.*; *cf.* *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (scienter required for 10(b) action). The blue sky statute additionally did not require reliance. *See* 518 F.2d at 409. Finally, both the blue sky statute and rule 10b-5 limited recovery to out-of-pocket or rescission damages.

The differences between the general business fraud statute and 10b-5 included a lack of an expressed scienter requirement in the Texas statute. *Id.* at 408. Since some Texas decisions have required common law fraud scienter or intent, however, the *Berry Petroleum Co.* court found the Texas fraud statute narrower than the blue sky statute. *Id.* at 409. The fraud statute required reliance by the purchaser, which the United States Supreme Court held not required in certain rule 10b-5 actions based on nondisclosure. *See id.*; *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972). The fraud statute also permitted a plaintiff to recover the difference between the represented and actual values. *See id.*

In view of the differences between the fraud statute and rule 10b-5, therefore, the court agreed with the district court that the Texas blue sky statute was more similar to the rule 10b-5 cause of action than the general business fraud statute. *See id.* at 408; TEX. REV. CIV. STAT. 1948, art. 581-33 (3-year blue sky period). Since the Texas general business fraud statute in *Berry Petroleum Co.* implied a two-year limitation period, the choice of such statute instead of the longer three-year blue sky period also would violate federal securities fraud policy in favor of longer limitation periods. *See id.* Furthermore, when a plaintiff satisfies the substantive elements of rule 10b-5 and also would have a timely cause of action under the state blue sky statute, federal policy should not support barring the plaintiff from federal court because of the applicable limitation period. *See* 518 F.2d at 409. This situation could result if the limitation period for 10b-5 were the shorter fraud period. *See id.*

¹⁰⁸ *See* note 107 *supra*.

¹⁰⁹ *See* *Barton & Block*, *supra* note 10, at 376 & n.17. In *Janigan v. Taylor*, sellers of stock alleged that the defendants made false representations at a directors' meeting concern-

has not clearly defined which state statutes will provide the 10b-5 statute of limitation.¹¹⁰ Although the Third Circuit recently has applied statutory common law fraud limitation periods in New Jersey¹¹¹ and twice in Pennsylvania,¹¹² no Third Circuit decision has squarely addressed the limitation issue in the situation where a buyer of securities has sued

ing future prospects of the company. See 344 F.2d 781, 783 (1st Cir. 1965). The First Circuit held that Massachusetts' personal tort statute applied to securities fraud, but the court failed to compare the state blue sky statute or any other statute with the personal tort statute. See *id.* at 783; Barton & Block, *supra* note 10, at 376 n.17. In 1978, the First Circuit followed *Janigan*, but did not discuss the decision. See *Cook v. Avien*, 573 F.2d 685, 694 (1st Cir. 1978) (applying Massachusetts 2-year personal tort statute to federal securities fraud actions). The fact that the personal tort limitation period and the blue sky period were both two years may explain the absence of discussion in *Cook* of the *Janigan* court's choice of limitation period statutes. See 573 F.2d at 694; *Dyer v. Eastern Trust and Banking Co.*, 336 F. Supp. 890, 906 n.22 (N.D. Me. 1971).

¹¹⁰ See text accompanying notes 111-18 *infra*.

¹¹¹ See *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979). In *Magnetic Metals Co.*, the plaintiff/seller of stock alleged material misrepresentations and omissions in connection with a freezeout merger proposed by defendant majority shareholder evaluated by defendant broker. *Id.* at 452-53. By a divided panel, the court held that New Jersey's six-year limitation for common law fraud, and not the state's two-year blue sky limitation period applied to the 10b-5 action. See 611 F.2d at 452, 456 (Gibbons, J., opinion of the court), 460 (Sloviter, J., concurring); N.J. REV. STAT. § 2A:14-1 (Supp. 1979) (6-year fraud period); N.J. REV. STAT. § 49:3:71(e) (1979 Supp.) (2-year blue sky period). Since New Jersey's blue sky statute afforded a remedy to buyers but not sellers, the *Magnetic Metals Co.* court reasoned that the general fraud statute would govern the seller's complaint if brought in state court, and that the same fraud statute should govern a 10b-5 action arising in New Jersey. 611 F.2d at 453-55; see N.J. REV. STAT. § 49:3:71(a) (1979 Supp.). See generally *Doret & Fiebach, supra* note 3, at 862-66.

The concurrence in *Magnetic Metals Co.* agreed with the opinion of the court to the extent that the blue sky law lacked a remedy for the seller, but urged that under other circumstances the New Jersey blue sky limitation period would best comport with federal policy. See *id.* at 458 (Sloviter, J., concurring). Chief Judge Seitz dissented, arguing that the court should first choose the state statute most analogous substantively to rule 10b-5, and apply the limitation period for that statute if the application would promote the federal policy against securities fraud. See *id.* at 461-63 (Seitz, C.J., dissenting). The dissent maintained the shorter blue sky period would promote federal policy by alerting other shareholders of the misconduct earlier, by permitting management to confidently proceed with the assurance that transactions are safe from attack, and by promoting greater stability in securities markets. See *id.* at 463. According to Seitz, the court should have applied the blue sky period since in addition to promoting federal policy, the blue sky statute, § 10(b) and rule 10b-5 all regulate the sale of securities and prohibit similar conduct. See *id.*

¹¹² See *Sharp v. Coopers & Lybrand*, 649 F.2d 175 (3d Cir.), *cert. denied* 102 S. Ct. 1427 (1981); *Biggans v. Bache Halsey Stuart Shields*, 638 F.2d 605 (3d Cir. 1980). In *Biggans*, the plaintiff maintained a discretionary trading account with defendant broker. See 38 F.2d at 606. Plaintiff alleged that his account executive excessively traded from plaintiff's account solely to create commissions in violation of § 10(b) and rule 10b-5. See *id.* at 606-07. The court applied the six-year statute applicable to common law fraud and breach of fiduciary duty actions, and not the one-year blue sky statute of limitations. 638 F.2d at 608, 610; see PA. STAT. ANN. tit. 12, § 31 (six-year common law fraud period), repealed by act of July 9, 1976, Act No. 142, 1976, Act No. 142, 1976 PA. LAWS 586 (codified at 42 PA. CONST. STAT. APP. § 5521-5536 (1978) (Judicial Code) (creating 2-year limitation period for taking, detain-

a fraudulent seller.¹¹³ All of the Third Circuit cases that did apply the common law period reasoned that the fraud statutes would govern the plaintiffs' causes of action if brought under state law.¹¹⁴ Since the blue sky laws would not have governed plaintiffs' causes of action if brought in state court, the common law fraud limitation periods governed the 10b-5 actions in questions.¹¹⁵ Recently, however, the Eastern District of Pennsylvania¹¹⁶ addressed the 10b-5 limitation issue of buyer suing seller and held the blue sky limitation period applicable notwithstanding the Third Circuit precedent applying common law fraud periods, since the plaintiff would have an action if brought under state law.¹¹⁷ The implication, therefore, is that the Third Circuit will apply the blue sky limitation period in 10b-5 actions where the buyer has sued the seller of securities,

ing, or injuring personal property, and 6-year catch-all provision); *id.* tit. 70, § 1-501 (Purdon Supp. 1980) (blue sky period of one year after actual or constructive notice and 3 years after the act or transaction). The *Biggans* court did not decide whether the newly created Judicial Code replaced the 6-year common law fraud period with a 6-year catch-all statute or with a 2-year statute for taking, detaining or injuring personal property. *See* 638 F.2d at 607 n.2. In the event the six-year period had been shortened to two years, an issue not yet decided by Pennsylvania courts, the transition section of the Judicial Code, § 25(a), permitted an extra year in addition to the repealed limitation period to bring the action. *See id.*; 42 PA. CONST. STAT. APP. § 25(a) (1978).

Since Pennsylvania's blue sky statute provided a remedy only for buyers and sellers, a divided panel in *Biggans* held that only buyers and sellers could sue under the blue sky law if the action was brought in state court. *See* 638 F.2d at 606, 609-10; PA. STAT. ANN. tit. 70, § 1-501 (Purdon). Section 1-501 of Pennsylvania's blue sky laws creates express liability for sellers and buyers and provides the only possible source of civil liability for any violation of the Pennsylvania blue sky laws encompassing churning. *See* 638 F.2d at 609; PA. STAT. ANN. tit. 70, §§ 1-401, -403, -404 (Purdon). Section 1-501, however, creates no liability for churning. Following *Magnetic Metals Co.*, the Third Circuit therefore held the common law fraud limitation applicable to the rule 10b-5 action since the same fraud statute would control the churning cause of action if brought under state law. 638 F.2d at 608, 610. The Third Circuit vacated the summary judgment granted to the defendant since the applicable limitation period of six years did not bar plaintiff's 10b-5 cause of action. *Id.* at 608, 611; *see* Doret & Fiebach, *supra* note 3, at 883 (editor's note).

In *Sharp v. Coopers & Lybrand*, plaintiff was a purchaser of limited partnership interests who invested on the basis of misleading accounting firm letters. *See* 649 F.2d 175 (3d Cir. 1981). The Third Circuit ruled that the six-year statute of limitation for common law fraud was applicable to the purchaser's 10b-5 cause of action. *Id.* at 191-92. Following *Biggans* and *Magnetic Metals Co.*, the court reasoned that the most analogous state action would be for common law fraud because the defendant was not a seller. *See id.* Hence the applicable limitation period from the common law fraud statute applied. *Id.*

¹¹³ *See* *Biggans v. Bache Halsey Stuart Shields*, 638 F.2d 605, 612 (3d Cir. 1980) (Seitz, C.J., dissenting) (recognizing inconsistent decisions in the Third Circuit); *Goodman v. Moyer*, 523 F. Supp. 35, 38 (E.D. Pa. 1981) (*Biggans* leaves no clear rule); notes 111-12 *supra*.

¹¹⁴ *See* notes 111-12 *supra*.

¹¹⁵ *See id.*

¹¹⁶ *See* *Goodman v. Moyer*, 523 F. Supp. 35 (E.D. Pa. 1981); text accompanying note 117 *infra*.

¹¹⁷ *See* 523 F. Supp. at 38 (E.D. Pa. 1981). In *Goodman*, the plaintiff shareholder alleged that the issuing corporation provided misinformation for the plaintiff so that plaintiff relinquished his right to purchase certain stocks at a favorable price. *See id.* at 36-37. The *Good-*

because such claims if brought in state court would be governed by the blue sky statutes in states within the Third Circuit.¹¹⁸

The Fifth Circuit applies a state by state approach in determining which limitation period applies to 10b-5 actions.¹¹⁹ In *Wood v. Combustion*,¹²⁰ the Fifth Circuit applied Texas' common law fraud limitation period¹²¹ rather than the unusually longer blue sky period.¹²² The *Wood* court refused to consider the federal policy of applying longer limitation periods to federal actions.¹²³ Rather, the Fifth Circuit looked only to the state cause of action bearing the closest substantive resemblance to 10b-5 actions.¹²⁴ In *White v. Sanders*,¹²⁵ however, the Fifth Circuit applied Alabama's blue sky limitation period¹²⁶ to a 10b-5 action.¹²⁷ The *White*

man court squarely decided the limitation issue where the plaintiff has a cause of action under the applicable blue sky statute were the action brought in state court. *See id.* at 38. The court found the elements of proof of the blue sky statute to be the same as the elements of a 10b-5 cause of action. *Id.* at 38-39; *accord*, *Ritt v. Thriving Enterprises Ltd.* No. 80-4953, slip op. at 15-16 (E.D. Pa. September 18, 1981). Thus the Pennsylvania blue sky statute was most analogous to rule 10b-5. 523 F. Supp. at 38; *see* 70 PA. STAT. ANN. §§ 1-401, -501, -504 (Purdon 1980). Accordingly, the *Goodman* court held Pennsylvania's one-year blue sky limitation period applicable and denied defendant's summary judgment motion, ruling that the limitation period did not bar the action. *See* 523 F. Supp. at 39.

¹¹⁸ *See* 523 F. Supp. at 39; *cf.* text accompanying notes 116-17 *supra*.

¹¹⁹ *See* text accompanying notes 120-30 *infra*.

¹²⁰ 643 F.2d 339 (5th Cir. 1981). In *Wood v. Combustion*, former shareholders of American Pole Structures Corporation exchanged their stock for Combustion Engineering, Inc. stock in a merger between a subsidiary of Combustion and American Pole. *See id.* at 341. Plaintiffs alleged that defendant Combustion fraudulently induced plaintiffs to make the exchange. *See id.* The court held that the three-year Texas common law fraud statute of limitations barred the 10b-5 action. *Id.* at 346-47.

¹²¹ *See* 643 F.2d at 342 n.5 (2-year period determined by court holding, not statute); TEX. BUS. & COMM. CODE § 27.01 (1968) (general business fraud).

¹²² *See* 643 F.2d at 342 n.6, 346; TEX. REV. CIV. STAT. 1948, art. 581-33 (1964) (3-year blue sky law); *cf.* 643 F.2d at 345 & n.12 (issue left open as to federal action accruing after 1977 amendment of blue sky law).

¹²³ *See* 643 F.2d at 344 & n.11 (court recognizing speculative process of choosing 10b-5 limitation period); *cf.* *Berry Petroleum Co. v. Adams, & Peck*, 518 F.2d 402, 409 (2d Cir. 1975); *Robert v. Magnetic Metals Co.*, 611 F.2d 450, 463 (3d Cir. 1979) (Seitz, C.J., dissenting).

¹²⁴ *See* 643 F.2d at 344. The *Wood* court specifically looked for the reliance and scienter elements in the state cause of action to determine which state statute most closely resembled a 10b-5 action. *See id.* at 345; TEX. BUS. & COMM. CODE § 27.01(1)(B). Since the Texas blue sky law does not require reliance or scienter, the *Wood* court applied the common law fraud limitations period. 643 F.2d at 345; *see* TEX. REV. CIV. STAT. 1948, art. 581-33 (1964).

¹²⁵ 650 F.2d 627 (5th Cir. 1981). In *White v. Sanders*, the defendant sold securities to plaintiffs without informing the purchasers that he received compensation for selling the securities. *See id.* at 628. Plaintiffs would not have sold but for the defendants activities. *See id.*; text accompanying note 127 *infra*.

¹²⁶ *See* ALA. CODE § 8-6-19(e) (1975) (2-year blue sky period); *cf. id.* § 6-2-39 (1975) (one-year catch-all provision, applicable to common law fraud, 650 F.2d at 629).

¹²⁷ 650 F.2d at 633. The Alabama blue sky statute in *White* did not require scienter. *See* 650 F.2d at 629 & n.3, 630; ALA. CODE § 8-6-19(a)(2). The court nonetheless found that the blue sky statute bore a closer resemblance to rule 10b-5 than did the catch-all statute. *See*

court placed primary importance on the commonality of purpose between rule 10b-5 and the state statute chosen to provide the limitation period.¹²⁸ The court distinguished *Wood v. Combustion* simply because the Texas fraud statute resembled rule 10b-5 more than the Alabama counterpart resembled 10b-5.¹²⁹ In view of *Wood* and *White*, the Fifth Circuit thus has provided no clear guidance regarding the proper limitation other than to predict a state by state analysis of which law bears the closest resemblance to rule 10b-5.¹³⁰

IV. UNSETTLED STATE OF THE LAW

All of the circuits try to choose the 10b-5 limitation period from the state statute which best effects the federal policy.¹³¹ Yet circuits differ in how to define the federal policy.¹³² Circuit courts favoring the statutory common law fraud period generally reason that the federal remedial policy of the securities laws favors longer not shorter statutes of limitation. Many circuits claim that choosing the state statute which most closely resembles rule 10b-5 best effects federal policy. These circuits also differ, however, in the emphasis of the analysis to determine the statute bearing the closest resemblance. Circuits favoring blue sky laws emphasize the commonality of purpose between the blue sky laws and rule 10b-5. Circuits favoring fraud periods often distinguish the blue sky laws from rule 10b-5 by emphasizing the substantive differences in defenses or remedies.

The Ninth Circuit, for example, has declared that longer, not shorter

650 F.2d at 630-31. The Fifth Circuit held that the blue sky statute of limitations bore a closer substantive resemblance to rule 10b-5, and thus applied to the action. *Id.* at 629; see note 121 *supra*.

¹²⁸ See 650 F.2d at 632.

¹²⁹ See *id.* at 632 n.6. The Fifth Circuit has decided several cases since *White* that touched on the 10b-5 limitation issue, but none have provided much guidance. See *Summer v. Land & Leisure, Inc.*, Nos. 79-2429, 80-5297, *slip. op.* at 13855, 13857 (5th Cir. December 28, 1981) (not deciding which Florida statute applies to 10b-5 action because the longest statute barred the action); *Putnam v. Williams*, 652 F.2d 497, 502 & n.4 (5th Cir. 1981) (applying Georgia's two-year blue sky limitation without discussion of fraud limitation period); *First Federal Savings and Loan v. Mortgage Corp.*, 650 F.2d 1376, 1378 (5th Cir. 1981); *McNeal v. Paine, Webber, Jackson & Webber, Inc.*, 598 F.2d 888, 892-93 (5th Cir. 1979) (applying Georgia's four-year fraud statute to 10b-5 cause of action alleging churning); *Nortek, Inc. v. Alexander Grant & Co.*, 532 F.2d 1013, 1015 (5th Cir. 1976) (applying Florida's 2-year blue sky statute to action brought under § 17 of '33 Act by purchaser of corporation against accounting firm hired by seller), *cert. denied* 429 U.S. 1042 (1977); *Byrne v. Gulfstream First Bank & Trust Co.*, [1982] FED. SEC. L. REP. (CCH) ¶ 98,392 at 97,372 (S.D. Fla. December 21, 1981) (applying Florida's 2-year blue sky limitation period to 10b-5 action brought by plaintiff bank customer against defendant to whom bank transferred plaintiff's securities).

¹³⁰ See text accompanying notes 120-29 *supra*.

¹³¹ See *Barton & Block*, *supra* note 10, at 375; *Doret & Fiebach*, *supra* note 3, at 854.

¹³² See text accompanying notes 7-10 and 13-16 *supra* & 133-164 *infra*.

limitation periods best effect federal securities law policies.¹³³ Accordingly, the Ninth Circuit has consistently applied the typically longer common law fraud limitation periods.¹³⁴ The Fourth Circuit, which has applied blue sky periods to 10b-5 limitation actions, places importance on Congress' preference for shorter limitations in private civil suits under the federal securities laws.¹³⁵ Similarly, the Third Circuit notes a strong federal interest in requiring a plaintiff to file suit quickly.¹³⁶ The Second Circuit, however, applied through its borrowing statute a blue sky period rather than an unusually shorter fraud statute and reasoned that longer limitation periods best serve the broad remedial policies of federal securities laws.¹³⁷ The Seventh Circuit has applied blue sky periods in each state within the Circuit, but has avoided consideration of federal policy.¹³⁸

The Sixth Circuit decisions illustrate the uncertainty regarding the proper federal policy for 10b-5 limitation periods. The *Nickels v. Koehler Management Corp.*¹³⁹ and *IDS Progressive Fund v. First of Michigan Corp.*¹⁴⁰ decisions both relied on the federal policy to apply longer limitation periods.¹⁴¹ In *Carothers v. Rice*,¹⁴² however, the Sixth Circuit explained that the real purpose behind the federal policy for longer limitation periods is to allow the plaintiff in federal court at least the same time to sue as that plaintiff would have in state court.¹⁴³ Moreover, since the requirements for both the blue sky statute and rule 10b-5 are relaxed compared to a common law suit for misrepresentation, the price exacted for the relaxed requirements is a shortened statute of limitation.¹⁴⁴ If the

¹³³ See *United California Bank v. Salik*, 481 F.2d 1012, 1015 (9th Cir. 1973); text accompanying notes 83-89 *supra*.

¹³⁴ See text accompanying notes 83-90 *supra*.

¹³⁵ See *Fox v. Kane-Miller*, 542 F.2d 915, 918 (4th Cir. 1976); text accompanying notes 68-73 *supra*.

¹³⁶ See *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 463 (3d Cir. 1979) (Seitz, C.J., dissenting); note 111 *supra*.

¹³⁷ See notes 107-08 *supra*.

¹³⁸ See text accompanying notes 55-63 *supra*. In *Parrent*, the Seventh Circuit described the federal policy of securities laws as protection for the gullible and uninformed. 455 F.2d at 126; see text accompanying notes 51-57 *supra*.

¹³⁹ 541 F.2d 611 (6th Cir. 1976); see note 74 *supra*. Some decisions have placed importance on the federal policy for continuing the application of the statutory period earlier established. This *stare decisis* notion allows the general investing public to rely on a previously established limitation period. See, e.g., *Nickels v. Koehler Management*, 541 F.2d 611, 618 (6th Cir. 1976); *Clegg v. Conk*, 507 F.2d 1351, 1353 (10th Cir. 1974); cf. *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 892-93 n.9 (5th Cir. 1979) (movement in 10b-5 limitation period up and down like a yo-yo is unavoidable side effect of applying state limitation periods).

¹⁴⁰ 533 F.2d 340 (6th Cir. 1976); see note 78 *supra*.

¹⁴¹ See 541 F.2d at 614, 618; 533 F.2d at 344.

¹⁴² 633 F.2d 7 (6th Cir. 1980); see text accompanying notes 76-81 *supra*.

¹⁴³ See 633 F.2d at 14.

¹⁴⁴ *Id.* But see *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 409 (2d Cir. 1975)

blue sky law provides the only state cause of action, therefore, the shorter blue sky limitation period would serve federal policy.¹⁴⁵

Just as some circuits disagree regarding the proper federal policy, other circuits differ with respect to analyses of substantive provisions contained in the state statutes at issue.¹⁴⁶ Typically the court chooses between the blue sky and common law fraud statutes, and the court must determine which statute most resembles rule 10b-5.¹⁴⁷ The analyses diverge, however, in determining which factors are important in the comparison. In *Forrestal Village, Inc. v. Graham*,¹⁴⁸ for example, the District of Columbia Circuit's analysis of the substantive provisions of D.C. and federal statutes placed emphasis on the commonality of purpose between rule 10b-5 and the D.C. blue sky law.¹⁴⁹ The *Forrestal Village, Inc.* court found unimportant that the D.C. blue sky law, unlike rule 10b-5, does not require scienter, since the blue sky law, like rule 10b-5, directly regulates the sale of securities.¹⁵⁰ Similarly, the Eighth Circuit has applied the blue sky limitation period even though the blue sky law does not require scienter.¹⁵¹ In *Morris v. Stifel, Nicolaus & Co., Inc.*¹⁵² the Eighth Circuit emphasized the important connection between the blue sky provisions and rule 10b-5 as the common purpose of regulating the sale of securities.¹⁵³ The Tenth Circuit, by contrast, emphasized the scienter requirement of a common law fraud action as reason for choosing the common law fraud period rather than the blue sky period.¹⁵⁴ Generally, the circuits favoring blue sky periods rely on the commonality of purpose rationale, while circuits favoring common law fraud periods often emphasize the substantive differences between blue sky laws and rule 10b-5.

Rather than relying on a rationale such as commonality of purpose or the importance of scienter or other elements in the state statute, some decisions emphasize whether the plaintiff would have a cause of ac-

(Second Circuit prefers to apply stricter statute with shorter limitation period); text accompanying note 117 *supra*.

¹⁴⁵ See 622 F.2d at 14.

¹⁴⁶ See text accompanying notes 147-54 *infra*. Compare *Wood v. Combustion*, 643 F.2d 339, 346 (5th Cir. 1981) (applying Texas common law fraud period) with *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 409 (2d Cir. 1975) (applying Texas blue sky period).

¹⁴⁷ See text accompanying note 10 *supra*; cf. A. JACOBS, *supra* note 6, at 10-14 to 10-15 (other statutes); text accompanying notes 126-27 *supra* (catch-all statute).

¹⁴⁸ 551 F.2d 411 (D.C. Cir. 1977); see text accompanying notes 61-65 *supra*.

¹⁴⁹ 551 F.2d at 414; note 150 *infra*.

¹⁵⁰ See 551 F.2d at 414. The *Forrestal Village, Inc.* court found that the commonality of purpose to outweigh the differences between the blue sky law and rule 10b-5. See *id.*

¹⁵¹ See *Morris v. Stifel, Nicolaus & Co., Inc.*, 600 F.2d 139, 146 (8th Cir. 1979); text accompanying notes 126-27 *supra* & 152-53 *infra*.

¹⁵² 600 F.2d 139 (8th Cir. 1979); see text accompanying notes 48-50 *supra*.

¹⁵³ See 600 F.2d at 144.

¹⁵⁴ See *Mitchell v. Texas Gulf Sulphur*, 446 F.2d 90, 104 (10th Cir. 1971); text accompanying notes 93-96 *supra*.

tion in state court under the state statutes at issue.¹⁵⁵ In *Roberts v. Magnetic Metals*,¹⁵⁶ the Third Circuit refused to apply the blue sky limitation period because the blue sky law did not provide a remedy for plaintiff sellers.¹⁵⁷ For the 10b-5 plaintiff to sue in state court, the plaintiff would need to bring action under the common law fraud statute.¹⁵⁸ Therefore the common law fraud limitation period applied to the 10b-5 action.¹⁵⁹ In *O'Hara v. Kovens*,¹⁶⁰ the Fourth Circuit regarded as unimportant the absence of any civil remedy for sellers in the blue sky law.¹⁶¹ The *O'Hara* court applied the blue sky limitation period since blue sky laws protect sellers' rights.¹⁶² In *Carothers v. Rice*,¹⁶³ the Sixth Circuit implied a remedy for sellers under blue sky laws and then applied the blue sky limitation period.¹⁶⁴ Normally, the circuits favoring statutory common law fraud periods for 10b-5 actions will support the choice of the fraud statute when possible by noting that the plaintiff could not bring action under the state's blue sky law.

The inconsistent results among the circuits provide no rational explanation for federal courts continuously comparing and contrasting state statutes with rule 10b-5. Aside from the esoteric comparisons of substantive statutory provisions, federal courts cannot agree on what the policy of rule 10b-5 is.¹⁶⁵ A comparison of the Second Circuit's *Berry Petroleum Co. v. Adams & Peck*¹⁶⁶ and the Fifth Circuit's *Wood v. Combustion*¹⁶⁷ decisions further demonstrates the lack of consistency in the process of selecting proper limitation periods for 10b-5 actions.¹⁶⁸ The issue in both decisions was whether the Texas blue sky statute or common law fraud statute would determine the limitation period of 10b-5 actions.¹⁶⁹ Through New York's borrowing statute, the Second Circuit in *Berry Petroleum Co.* applied the three year Texas blue sky period.¹⁷⁰ In *Wood*, however, the Fifth Circuit applied the two-year Texas common law fraud period.¹⁷¹

¹⁵⁵ See text accompanying notes 156-64 *infra*.

¹⁵⁶ 611 F.2d 450 (3d Cir. 1979); see note 111 *supra*.

¹⁵⁷ See 611 F.2d at 453, 455-56.

¹⁵⁸ See *id.* at 453.

¹⁵⁹ *Id.*

¹⁶⁰ 625 F.2d 15 (4th Cir. 1980), see text accompanying notes 68-73 *supra*.

¹⁶¹ See 625 F.2d at 17-18.

¹⁶² See 625 F.2d at 17-18. Although the blue sky law provided no civil remedy for the plaintiff, the *O'Hara* court supported the blue sky limitation because the blue sky law provided express criminal liability of defrauding buyers. See *id.*

¹⁶³ 633 F.2d 7 (6th Cir. 1980); see text accompanying notes 76-81 *supra*.

¹⁶⁴ See 633 F.2d at 12-14.

¹⁶⁵ See text accompanying notes 166-75 *infra*.

¹⁶⁶ 518 F.2d 402 (2d Cir. 1975); see text accompanying notes 107-08 *supra*.

¹⁶⁷ 643 F.2d 339 (5th Cir. 1981); see text accompanying notes 121-24 *supra*.

¹⁶⁸ See text accompanying notes 169-75 *infra*.

¹⁶⁹ See 643 F.2d at 342; 518 F.2d at 406.

¹⁷⁰ See 518 F.2d at 409; 643 F.2d at 346.

¹⁷¹ See 643 F.2d at 346; 518 F.2d at 409.

The factors the court chose to emphasize provided the primary difference in the analyses in *Berry Petroleum Co.* and *Wood*.¹⁷² Both the Second and Fifth Circuits engaged in a detailed inquiry of the specific language and substance of the statutes.¹⁷³ The Second Circuit, however, chose to emphasize the federal policies involved,¹⁷⁴ while the Fifth Circuit emphasized only the resemblance to rule 10b-5.¹⁷⁵ In *Berry Petroleum Co.*, the Second Circuit examined the substantive provisions of both Texas statutes, compared each statute to rule 10b-5, and found the blue sky law most similar to rule 10b-5.¹⁷⁶ The court recognized that the blue sky law had no reliance or scienter elements.¹⁷⁷ Since federal policy preferred longer limitation periods and since the language of the blue sky law more nearly approximated rule 10b-5, however, the court applied the blue sky period.¹⁷⁸ In *Wood*, the Fifth Circuit expressly refused to speculate on what the broad remedial purposes of rule 10b-5 are.¹⁷⁹ Instead, the court examined only the substantive provisions of the Texas statutes to determine which statute most closely resembled rule 10b-5.¹⁸⁰ The two major factors the *Wood* decision used to apply the common law fraud statute were that the Texas blue sky law did not contain the elements of scienter and reliance.¹⁸¹

As the Fifth Circuit in *Wood* recognized, the practice of looking to the law of the forum state to determine the limitation period for 10b-5 actions forces a court to make esoteric inquiries.¹⁸² The court noted the abstruseness of the questions involved and stated that the 10b-5 cases applying Texas statutes alone are entirely irreconcilable.¹⁸³ Moreover, the *Wood* decision recommended congressional enactment of a section 10 statute of limitation.¹⁸⁴

V. PROPOSED SOLUTION

Some courts have proposed the adoption of a one year from discovery limitation provision such as in the American Law Institute's Proposed Federal Securities Code¹⁸⁵ (Federal Securities Code). The

¹⁷² See text accompanying notes 173-75 *infra*.

¹⁷³ See 643 F.2d at 344-46; 518 F.2d at 407-09.

¹⁷⁴ See 518 F.2d at 409.

¹⁷⁵ See 643 F.2d at 344 & n.11.

¹⁷⁶ See 518 F.2d at 407-09.

¹⁷⁷ See *id.* at 409.

¹⁷⁸ See *id.*

¹⁷⁹ See 643 F.2d at 344 & n.11.

¹⁸⁰ See *id.* at 344-45.

¹⁸¹ See *id.* at 345; note 107 *supra*.

¹⁸² See 643 F.2d at 342.

¹⁸³ See *id.* at 343.

¹⁸⁴ See *id.* at 342.

¹⁸⁵ FEDERAL SECURITIES CODE, Proposed Official Draft (March 15, 1978); see *McNeal v. Paine Webber Jackson and Curtis*, 598 F.2d 888, 892 (5th Cir. 1979); note 129 *supra*.

Federal Securities Code integrates and arguably simplifies six federal statutes that Congress enacted between 1933 and 1940,¹⁸⁶ including the '34 Act.¹⁸⁷ Parts sixteen and seventeen of the Federal Securities Code gather all the fraud provisions from throughout the various federal statutes.¹⁸⁸ Part sixteen contains the substantive aspects of rule 10b-5, and part seventeen prescribes express liability for 10b-5 and other fraud violations.¹⁸⁹

Section 1727 of the Federal Securities Code provides a limitation period for the code's express private actions and for actions implied in the future.¹⁹⁰ Section 1727 proscribes actions one year from the date the plaintiff discovered or should have discovered the fraud.¹⁹¹ The section also implements an absolute five-year cut-off from the time the action accrued.¹⁹² Furthermore, a new provision unknown to existing securities laws permits a defendant to cut short the limitation period if under certain circumstances he offers to effect a rescission.¹⁹³

The section 1727 limitation was a compromise between the typically short limitation periods expressed in the Securities Act of 1933 and the longer state statutory periods which federal courts borrow from the forum state in rule 10b-5 actions.¹⁹⁴ Commentators, however, have criticized relying on the Federal Securities Code as a solution to the 10b-5 limitation issue.¹⁹⁵ The main criticism is that the Congress may not enact the Federal Securities Code regardless of how preferable section 1727 is for 10b-5 actions.¹⁹⁶ Congress is more likely to pass the Code, however, because the SEC has officially endorsed the Federal Securities Code.¹⁹⁷ Additionally, commentators have expressed concern that the federal tolling doctrine will conflict with the code's automatic cut-off date.¹⁹⁸ The federal tolling doctrine requires courts to toll the limitation

¹⁸⁶ See Cheek, *Federal Securities Code*, 7 SEC 163, 164 (1979) [hereinafter cited as Cheek].

¹⁸⁷ See ALI FED. SEC. CODE, at xvii (May 10, 1978) (Final Draft, as adopted by ALI) [hereinafter cited as ALI].

¹⁸⁸ See *id.* Introduction at xlii-liii; Cheek, *supra* note 186, at 169.

¹⁸⁹ See ALI, *supra* note 187, Introduction, at xlv-xlvi. The Federal Securities Code's commentators recognized that Congress gave no thought to civil liability under section 10(b). See *id.* Introduction, at xlv. Congress thus could not have anticipated a statute of limitations. The commentators also found the lack of a federal limitation period for section 10(b) a cause of the wasteful litigation. See *id.* Introduction, at xlv-xlvi.

¹⁹⁰ See *id.* Introduction, at xlvi; § 1727.

¹⁹¹ ALI, *supra* note 187, at § 1727(b)(1).

¹⁹² *Id.* at § 1727(b)(2).

¹⁹³ *Id.* at § 1727(g).

¹⁹⁴ See *id.* Introduction, at liii; Martin, *supra* note 6, at 456 & n.93.

¹⁹⁵ See Barton & Block, *supra* note 10, at 384-85; *Proposal For Congressional Legislation*, *supra* note 1, at 1168.

¹⁹⁶ See Barton & Block, *supra* note 10, at 385.

¹⁹⁷ See note 203 *infra*.

¹⁹⁸ See Barton & Block, *supra* note 10, at 385 n.65; *Proposal for Congressional Legislation*, *supra* note 1, at 1168.

period until the plaintiff discovers or reasonably should have discovered the fraud or violation.¹⁹⁹ The purpose of the federal tolling doctrine, however, should be to serve the federal policy.²⁰⁰ If Congress defines that policy in terms of the five-year absolute cut-off date, then courts should abandon the tolling doctrine in 10b-5 actions.²⁰¹

The confusing patchwork in the law of federal 10b-5 actions is unnecessary and wasteful. The simplest solution, of course, would be a congressional amendment to the '34 Act specifying a limitations period. Congress probably will not do this in the near future, however, because of the impending legislation in the form of the ALI Federal Securities Code.²⁰² The SEC support for the code in general is an important factor predicting the enactment of the code within the next few years.²⁰³ The express SEC support for the section 1727 statute of limitation scheme in particular suggests the likelihood for adoption of this Federal Securities Code section in the event that Congress enacts only a part of the code.²⁰⁴ If no part of the code becomes law, Congress should then consider separate enactment of a uniform limitation period for rule 10b-5. In view of the support in the circuits and of the SEC, that uniform limitation should track the section 1727 limitation scheme.²⁰⁵

The solution to the rule 10b-5 limitation issue is to wait for congressional approval of the Federal Securities Code. Admittedly, the section 1727 limitation period of one year with an absolute five-year cut-off is arbitrary, and there exists an infinite variety of possible limitation periods. The section 1727 period, however, is the product of years of study that many distinguished scholars devoted to synthesizing the Federal Securities Code. The SEC and scholarly backing of the Federal Securities Code gives credence to the one and five year limitation period and to the code in general. Therefore, the section 1727 period is currently the best choice for the rule 10b-5 limitation.

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¹⁹⁹ See *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *Proposal for Congressional Legislation*, *supra* note 1, at 1159-61.

²⁰⁰ See *Martin*, *supra* note 6, at 459.

²⁰¹ See *id.*

²⁰² See ALI, *supra* note 187.

²⁰³ See SEC Release Nos. 33-6242 (Sept. 18, 1980), 33-6377 (Jan. 21, 1982). Although no bill is currently pending in Congress, the SEC has twice officially recommended adoption of the code, recognizing that such an enactment would promote greater predictability and certainty in the interpretation of the federal securities law in general. See *id.* No. 33-6242.

²⁰⁴ See *id.* No. 33-6242. While the SEC recommended revisions in the ALI Final Draft of the code, the SEC expressly accepted as is the code's statute of limitation scheme. See *id.*

²⁰⁵ See text accompanying notes 184-93 *supra*.