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STATUTES OF LIMITATIONS APPLICABLE TO PRIVATE ACTIONS
UNDER SEC RULE 10b-5: COMPLEXITY IN NEED OF REFORM

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I. INTRODUCTION

In 1964 the landmark decision of the United States Supreme Court in *J.I. Case Co. v. Borak*¹ authoritatively established the availability of implied civil actions to redress injuries resulting from violations of SEC antifraud rules and became the springboard for an explosion of litigation based on SEC Rule 10b-5.² The result has been that the question is no longer whether an implied civil action exists for violations of Rule 10b-5,³ but rather the definition of the legal requisites for and the available remedies in civil actions under Rule 10b-5 in a kaleidoscopic variety of factual contexts. The great volume of cases has produced considerable confusion and many unresolved issues with respect to the substantive aspects of civil actions under Rule 10b-5.⁴

Inevitably, however, the clear availability of civil remedies for violations of Rule 10b-5 has focused greater attention in recent years on the procedural aspects of actions under Rule 10b-5. One of the more troublesome and enigmatic "procedural" issues in actions under Rule 10b-5 is the

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1. 377 U.S. 426 (1964).

2. 17 C.F.R. § 240.10b-5 (1973) [hereinafter cited as Rule 10b-5]. The mass of litigation has been paralleled by a volume of literature too extensive to cite here. The authoritative treatises are A. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10b-5* (1967 Supp. 1973) and 3 L. LOSS, *SECURITIES REGULATION*, 1445-74, 1757-97 (2d ed. 1961), with 6 L. LOSS, *SECURITIES REGULATION* 3558-3647, 3865-3925 (Supp. 1969). See also W. PAINTER, *FEDERAL REGULATION OF INSIDER TRADING* (1968), and R. JENNINGS & H. MARSH, JR., *SECURITIES REGULATIONS, CASES AND MATERIALS* 1052-1230 (3rd ed. 1972).

3. Technically, *Borak* did not decide the issue of whether an implied private action existed for violation of Rule 10b-5, since the case arose under Rule 14a-9, 17 C.F.R. § 240.14a-9 (1973). However, the broad policy-oriented basis of the Court's decision in *Borak* left little room for doubt that the same result would follow in a case under Rule 10b-5. The Court eliminated whatever theoretical doubt remained in *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969), *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971), and *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972).

4. Much of the prolific commentary on litigation under Rule 10b-5 referred to in note 2, *supra*, has been concerned with the substantive issues and with the many uncertainties resulting from the progressive expansion of the scope of liability under the rule. Perhaps the temper of the times was best described by Harold Marsh, Jr., then Professor of Law, University of California, Los Angeles, in Marsh, *What Lies Ahead under Rule 10b-5?*, 24 *BUS. LAW.* 69 (1968). His succinct answer to the question posed by the title of his article was: "The only prospect which I can see in all candor, is—More chaos." *Id.* at 76.

problem of the determination of the appropriate statute of limitations and its application in particular cases. The purpose of this article is to review the development of the law thus far with respect to this problem, to examine the issues presented, and to focus particular attention on the need and the prospects for reform.

II. THE GENERAL NATURE OF THE PROBLEM

An analysis of the problem of the statute limitations in private actions under Rule 10b-5 must begin with consideration of the essential nature of the implied action under Rule 10b-5 with its unusual blend of statutory and common law ingredients. In the statutory scheme of things under the federal securities laws, Rule 10b-5 is the fifth in a series of rules adopted by the SEC to implement section 10(b) of the Securities Exchange Act of 1934.⁵ The SEC promulgated the Rule pursuant to authority delegated to it by section 10(b),⁶ to prescribe rules and regulations "in the public interest or for the protection of investors" defining and prohibiting "manipulative or deceptive device(s) or contrivance(s)" in connection with the purchase or sale of any security by the use of jurisdictional means.⁷ Based on section 17(a) of the Securities Act of 1933,⁸ Rule 10b-5 broadly prohibits all forms of fraudulent or deceptive conduct in connection with the sale or purchase of any security by the use of jurisdictional means.⁹ Hence, conduct

5. 15 U.S.C. § 78j(b) (1970).

6. Section 10(b) provides:

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

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

7. The term "jurisdictional means" is commonly used to refer to the mails, instrumentalities of interstate commerce, and the facilities of national securities exchanges. The use of one of these jurisdictional means is the jurisdictional prerequisite for the applicability of § 10(b) and Rule 10b-5. Cases under Rule 10b-5 have interpreted the meaning of these jurisdictional means broadly. *See, e.g., Myzel v. Fields*, 386 F.2d 718 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

8. 15 U.S.C. § 77q(a) (1970). Rule 10b-5 was directly based on the broad antifraud prohibitions of § 17(a) of the 1933 Act, with relatively minor changes in the linguistic structure to make the prohibitions applicable equally to sellers and to buyers of securities. Rule 10b-5 was adopted in May, 1942, primarily to provide protection for defrauded sellers comparable to that already provided for defrauded buyers. *See* 3 L. Loss, *supra* note 2, at 1426-27.

9. Rule 10b-5 reads as follows:

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

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

(b) To make any untrue statement of a material fact or to omit to

which violates Rule 10b-5 thereby violates section 10(b) of the Securities Exchange Act of 1934, and the consequences of the violation should be determined accordingly.

Section 10(b) itself specifies no remedies or sanctions for violations, merely declaring that "[i]t shall be unlawful" to violate its prohibitions. Elsewhere the 1934 Act makes clear that the SEC may sue to enjoin violations of section 10(b),¹⁰ and criminal sanctions of the Act may apply to violations of the section.¹¹ The 1934 Act, however, includes no express provision creating a private civil action to redress violations of section 10(b), although private civil actions, with appropriate statutes of limitations and procedural provisions, are expressly created with respect to several other parts of the 1934 Act¹² and in the Securities Act of 1933.¹³ In the absence of an express statutory private action for violations of section 10(b), there is, of course, no provision in the 1934 Act which specifies the statute of limitations expressly applicable to private actions arising under section 10(b), although such actions are necessarily "statutory" in at least one respect.

In the absence of an express provision in the 1934 Act for private actions for violations of Rule 10b-5, the responsibility for fashioning a private action by implication to fill the need was left to the federal courts. The process began in 1946 in *Kardon v. National Gypsum Co.*¹⁴ and reached maturity over the past decade in the crescendo of litigation under Rule 10b-5 following the *Borak* decision. Thus, private actions under Rule 10b-5

state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

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

10. Section 21(e) of the 1934 Act, 15 U.S.C. § 78u(e) (1970), authorizes the SEC to sue to enjoin violations of the Act.

11. Section 32(a) of the 1934 Act, 15 U.S.C. § 78ff(a) (1970), specifies criminal sanctions for

[a]ny person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter

12. Express private civil actions are created in §§ 9(e), 16(b), 18 and 29(b) of the 1934 Act. 15 U.S.C. §§ 78i(e), 78p(b), 78r, 78cc(b) (1970). Sections 9(e), 18 and 29(b) involve private actions of a generally comparable nature, and each includes an express statute of limitations which is essentially the same in each case. Section 16(b) is the insider short-swing profit recapture provision and has a distinctive two-year statute of limitations.

13. Three express private civil actions are created in §§ 11, 12(1) and 12(2) of the 1933 Act. 15 U.S.C. §§ 77k, 77l(1), 77l(2) (1970). Each of these actions is subject to the statute of limitations provided by § 13 of the 1933 Act, 15 U.S.C. § 77m (1970), which is essentially the same as that provided for private actions under §§ 9(e), 18 and 29(b) of the 1934 Act. See statutes cited note 12 *supra*. Thus, all of the express private civil actions created in the 1933 and 1934 Acts, with the single exception of the rather distinctive action under § 16(b) of the 1934 Act, are subject to express statutes of limitations which are substantially identical.

14. 69 F. Supp. 512 (E.D. Pa. 1946).

inevitably combine both statutory elements with respect to the basic prohibition and common law elements with respect to the judicial interpretation of the prohibition and the creation of private remedies. This inescapable commingling of statutory and common law elements is intimately involved with many of the difficulties and uncertainties pertaining to Rule 10b-5 actions, including the problems related to the statute of limitations and its application.

Because the Rule 10b-5 action is based on a violation of section 10(b) of the 1934 Act, the important procedural provisions of section 27¹⁵ of the Act apply. This section applies to all actions under the 1934 Act and, with respect to private actions, provides exclusive jurisdiction in the federal courts, service of process on the defendant nationwide "or wherever the defendant may be found," and very flexible venue "in the district wherein any act or transaction constituting the violation occurred . . . or wherein the defendant is found or is an inhabitant or transacts business"¹⁶ Nevertheless, neither section 27 nor any other portion of the Act deals *expressly* with the problem of the statute of limitations applicable to implied private actions under Rule 10b-5. It has therefore been necessary for the courts to improvise using common law principles. The issues the courts have encountered in this process and the difficulties their efforts present are the subject matter of this article.

One of the first issues implicit in the question of determining the appropriate statute of limitations under common law principles is the legal characterization of the fundamental nature of the implied private action under Rule 10b-5. Unfortunately, this is something on which there has been considerable disagreement and which has not as yet been conclusively resolved. Logically, this issue is a question of federal law, since the basis of the action is the violation of a federal statute and the action is within the exclusive jurisdiction of the federal courts.¹⁷

In the original decision recognizing an implied private right of action,¹⁸ the district court relied primarily on the tort doctrine that

[t]he violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if; (a) the intent of the enactment is exclusively or in part is to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect¹⁹

Alternatively, the court relied on section 29(b) of the 1934 Act²⁰ which

15. 15 U.S.C. § 78aa (1970).

16. *Id.*

17. See A. BROMBERG, *supra* note 2, at § 2.4(1); 3 L. Loss, *supra* note 2, at 1757-63, 1771-77; Schulman, *Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635 (1967).

18. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946).

19. *Id.* at 513, quoting from RESTATEMENT OF TORTS § 286 (1934).

20. 15 U.S.C. § 78cc(b) (1970); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946).

declares void all contracts made in violation of any provision of the Act or any rule or regulation thereunder. Under either theory, the existence of the private action under Rule 10b-5 necessarily rested in part on judicial implication of congressional intent in the 1934 Act. Subsequent cases under Rule 10b-5 have supported both the tort theory and the voidable contract theory. Although there have been differing interpretations of congressional intent, most cases have accepted the tort theory as at least one basis for the private action.²¹ However, the courts have failed to resolve the dilemma and settle finally on either view.

The Supreme Court in *Borak*²² provided the first authoritative validation of the basic proposition that an implied private right of action does indeed exist for violation of an SEC rule under the 1934 Act. Importantly, the Court in *Borak* based the existence of the implied private action on a third theory with even broader implications:

The purpose of § 14(a) is to prevent management and others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section . . . was intended to 'control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders.' . . . These broad remedial purposes are evidenced in the language of the section. . . . While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result.

. . . Private enforcement of the proxy rules provides a necessary supplement to Commission action. . . .

We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose. . . . It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. . . .²³

Thus, according to the Supreme Court, the legal basis of the implied private action for violation of an SEC rule is the judicial implementation of congressional policy in the 1934 Act—a considerably broader and more inclusive proposition than either the tort theory or the voidable contract theory. Arguably, therefore, the authoritative stature of the *Borak* decision should cause this statutory policy theory to supersede both the tort theory and the voidable contract theory.²⁴ Nevertheless, subsequent cases under Rule 10b-5 have implicitly continued to rely in part on the two earlier theories in dealing with the elements of a Rule 10b-5 cause of action.

21. See A. BROMBERG, *supra* note 2, at § 2.4(1) (a) and (b).

22. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). See note 3 *supra*.

23. 377 U.S. 426, 431-33 (1964).

24. It is clear that this theory in its inherent breadth encompasses the others. Although it lacks the analytical precision of the tort theory or the voidable contract theory for some issues, it does seem significantly instructive with respect to the statute of limitations problem. Cf. A. BROMBERG, *supra* note 2, at § 2.4(1) (d).

Scholars have suggested still a fourth theory for the legal basis for private actions under Rule 10b-5, based on the implications of sections 27 and 29(b) of the 1934 Act.²⁵ This theory suggests that Congress, in amending section 29(b) in 1938 to add a statute of limitations for private actions under section 15(c)(1) and rule 15cl-2,²⁶ thereby recognized that implied private actions would arise for violations of SEC antifraud rules.²⁷ In many respects this is the most appealing theory, and it would neatly resolve the statute of limitations problem on a highly satisfactory basis, since the amendment to section 29(b) expressly included a statute of limitations for implied actions, which is parallel in substance to the statutes of limitations for the express private actions under the 1933 Act and the 1934 Act.²⁸ Unfortunately, the courts have not recognized this theory. Thus, the *Borak* statutory policy theory remains logically the most authoritative.

III. JUDICIAL DEVELOPMENT CONCERNING THE STATUTE OF LIMITATIONS

Analytically, there are four basic issues involved in the cases which have dealt with the problems concerning the statute of limitations in private actions under Rule 10b-5. (1) Should the court look to federal or to state law to find the most appropriate statute of limitations? (2) Which specific statute of limitations should the court select from the body of law deemed more appropriate? (3) How should the question of tolling of the statute be decided when the plaintiff is unaware of his rights? (4) Within the period of limitations should the court apply the doctrine of laches when the plaintiff is fully aware of his rights?

25. 15 U.S.C. §§ 78aa, 78cc(b) (1970).

26. 17 C.F.R. § 240.15cl-2 (1973). This is an antifraud rule similar to Rule 10b-5 but limited to activities of broker-dealers. Like Rule 10b-5 it prohibits certain conduct but provides no express remedy for the injured party. Nonetheless, the relevant part of section 29(b) of the Act added by amendment in 1938 reads:

Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) or subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 78o of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

15 U.S.C. § 78cc(b) (1970). This seems backhandedly to recognize the existence of private rights of action for violation of SEC rules under § 15c, although no express cause of action is created. Thus, arguably Congress accepted the notion of implied private actions for violations of the 1934 Act.

27. A. BROMBERG, *supra* note 2, at § 2.4(1)(c); 3 L. Loss, *supra* note 2, at 1759-60.

28. See note 26 *supra*.

A. *Should the Court Look to Federal or to State Law?*

It would seem most logical that because the private action under Rule 10b-5 is based on section 10(b) of the Securities Exchange Act of 1934,²⁹ governed by the procedural provisions of section 27 of that Act,³⁰ and intended under the *Borak* rationale to implement congressional policy as expressed in the Act, it would be subject to a statute of limitations derived from federal law in harmony with the nature of the private action and the policies of the 1934 Act. Nevertheless, the federal courts in cases under Rule 10b-5 have uniformly followed the principle, adopted in the earliest 10b-5 cases,³¹ that in the absence of a federal statute of limitations expressly applicable to actions under Rule 10b-5, the courts must apply the most appropriate state statute of limitations pursuant to the traditional rule of federal practice.³²

Professor Loss has for years advanced a cogent thesis, contrary to this tradition, to the effect that the most reasonable and appropriate analogy which the federal courts should adopt with respect to the statute of limitations in actions under Rule 10b-5 is the limitation period expressly provided in the Securities Act of 1933 and in the Securities Exchange Act of 1934 that governs most of the statutory private actions created in those Acts which is fairly uniform in the several instances where it is expressed.³³ This thesis has received wide support among the scholars writing on the subject³⁴ and has substantial merit. Nonetheless, it has failed to win the support of the courts in any of the decisions reported thus far.

B. *Which State Statute of Limitations Should Be Applied?*

This issue actually involves two interrelated problems: (1) Should the court look to the law of the forum state or to the law of another state where,

29. 15 U.S.C. § 78j(b) (1970).

30. 15 U.S.C. § 78aa (1970).

31. The earliest cases, in chronological sequence, were *Osborne v. Mallory*, 86 F. Supp. 869 (S.D.N.Y. 1949); *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951); and *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953). All of the cases cited and discussed, *infra*, have perpetuated the proposition that a state statute of limitations should be applied in an action under Rule 10b-5, often without any critical reconsideration.

32. This rule of federal practice was derived from the Rules of Decision Act, 1 Stat. 92 (1789), by the Supreme Court in *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Cope v. Anderson*, 331 U.S. 461 (1947); *McClaine v. Rankin*, 197 U.S. 154 (1905); *Campbell v. Haverhill*, 155 U.S. 610 (1895); *McCluny v. Silliman*, 28 U.S. (3 Pet.) 270 (1830). *But see* *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958).

33. 6 L. Loss, *supra* note 2, at 3898-900n.307 (Supp. 1969); L. Loss, SECOND ANNUAL INSTITUTE ON SECURITIES REGULATION 14 (1971). *See also* *Israels*, Book Review, 77 YALE L.J. 1585, 1592 (1968).

34. *Schulman, Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635 (1967); *Ruder & Cross, Limitations on Civil Liability Under Rule 10b-5*, 1972 DUKE L.J. 1142; *Israels*, Book Review, 77 YALE L.J. 1585, 1592 (1968).

perhaps, more of the events involved in the litigation occurred? (2) Once the appropriate state is determined, which of its statutes of limitations should the federal court apply? Both problems, and particularly the latter, have proven troublesome for the courts and have led to a wide variety of conclusions.

Frequently, the first problem does not present itself in the cases, since the forum state is often the state where most of the parties reside and most events occurred. However, the flexible venue provisions of section 27 often give the plaintiff a broad choice of states in which the suit may be brought. Where the facts of the case have suggested the presence of the first problem, the courts have generally assumed that the law of the forum state should be applied without careful analysis of the issues involved.

In choosing the applicable state statute most courts have considered the state fraud statute, or statutes applied to fraud causes of action by judicial decision,³⁵ or state catchall periods of limitations.³⁶ At least one court has applied the period of limitations for liability created by statute only to be reversed on appeal.³⁷ Recently some courts have applied state blue-sky laws statutes of limitations.³⁸ Most courts, however, have held the state fraud statute of limitations to be applicable.³⁹

In *Fischman v. Raytheon Manufacturing Co.*,⁴⁰ one of the first cases to determine the applicable state limitations statute, the Second Circuit held that proof of fraud was required in a 10b-5 cause of action. Recognizing that the 1933 Act and the 1934 Act expressly provided for short limitations periods, the court nevertheless applied the longer (six years) New York fraud statute of limitations.⁴¹

In a later case, *Fratt v. Robinson*,⁴² the Ninth Circuit also held that the forum state's fraud statute of limitations was applicable. The defendants

35. *E.g.*, *Bailes v. Colonial Press, Inc.*, 444 F.2d 1241 (5th Cir. 1971); *Charney v. Thomas*, 372 F.2d 97 (6th Cir. 1967); *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953).

36. *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

37. *Azalea Meats, Inc. v. Muscat*, 246 F. Supp. 780 (S.D. Fla. 1965), *rev'd*, 386 F.2d 5 (5th Cir. 1967). The court indicated in dicta that the fraud statute should apply rather than the period of limitations for liability created by a statute.

38. *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972); *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970), *subsequent appeal*, 460 F.2d 362 (8th Cir. 1972); *Corey v. Bache & Co.*, 355 F. Supp. 1123 (S.D. W. Va. 1973); *Maine v. Leonard*, 353 F. Supp. 968 (W.D. Va. 1973); *Richardson v. Salinas*, 336 F. Supp. 997 (N.D. Tex. 1972); *Josef's of Palm Beach, Inc. v. Southern Inv. Co.*, 349 F. Supp. 1057 (S.D. Fla. 1972).

39. R. JENNINGS & H. MARSH, JR., *SECURITIES REGULATION, CASES AND MATERIALS* 1061 (3d ed. 1972).

40. 188 F.2d 783 (2d Cir. 1951).

41. *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2d Cir. 1951). The Second Circuit also applied the New York fraud statute in *Klein v. Auchincloss, Parker & Redpath*, 436 F.2d 339 (2d Cir. 1971).

42. 203 F.2d 627 (9th Cir. 1953).

contended that the 10b-5 cause of action arose out of a statute and that the Supreme Court of Washington had held that actions based on liability created by statute were subject to a two-year limitations period. The court of appeals recognized that "in a sense . . . the instant action is based upon a statute,"⁴³ but said that it was also based on common law fraud, and consequently, the period of limitations for liability created by statute did not apply. The court held, using federal law to determine the nature of a 10b-5 action, that the three-year Washington fraud statute with its built-in tolling provisions was applicable. The Ninth Circuit has subsequently had several occasions to determine which statute of limitations to apply; it has consistently followed *Fratt v. Robinson*.⁴⁴

Other circuits have agreed with the Ninth Circuit and have applied the forum state's fraud statute of limitations. The First Circuit in *Janigan v. Taylor*⁴⁵ matter of factly applied the Massachusetts two-year fraud statute. The court was more concerned with whether the state or federal tolling provisions controlled because the Massachusetts statute required an affirmative act of concealment to toll the statute, whereas the federal doctrine did not require proof of concealment. The court applied the more liberal federal doctrine.

The Fifth Circuit in *Hooper v. Mountain States Securities Corp.*⁴⁶ has also applied the forum state's fraud statute. In that case the court applied the Alabama one-year fraud statute of limitations and held that the federal tolling doctrine applied because the suit was brought by a trustee under the Bankruptcy Act. In a later case the Fifth Circuit had occasion to decide between a fraud statute or a statute for liability created by a statute.⁴⁷ The district court had held that the Florida statute of limitations for liability created by a statute controlled even though the period was identical to the fraud statute of limitations. The Fifth Circuit said, gratuitously, that the gravamen of a 10b-5 cause of action "is fraud and . . . a state statute of limitations should not be permitted to narrow the filing time available under a broadly remedial federal act to a period less than the one available for commencing a similar common-law action."⁴⁸ In subsequent cases the court has consistently applied the forum state's fraud statute.⁴⁹

43. *Id.* at 635.

44. *Douglass v. Glenn E. Hinton Invs. Co.*, 440 F.2d 912 (9th Cir. 1971); *Hecht v. Harris, Upham & Co.*, 430 F.2d 1202 (9th Cir. 1970); *Sackett v. Beaman*, 399 F.2d 884 (9th Cir. 1968); *Turner v. Lundquist*, 377 F.2d 44 (9th Cir. 1967); *Errion v. Connell*, 236 F.2d 447 (9th Cir. 1956).

45. 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965).

46. 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

47. *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967).

48. *Id.* at 8.

49. *Bailes v. Colonial Press, Inc.*, 444 F.2d 1241 (5th Cir. 1971); *Aboussie v. Aboussie*, 441 F.2d 150 (5th Cir. 1971). In a 1973 case the Fifth Circuit indicated that the "federal courts borrow only the chronometric aspects and not the procedural or substantive nuances of the law of the forum." *Wolf v. Frank*, 477 F.2d 467, 475 (5th Cir. 1973).

The Tenth Circuit has also applied the forum state's fraud statute of limitations. In *Chiodo v. General Waterworks Corp.*⁵⁰ the Tenth Circuit, after noting that it must look to a Utah statute of limitations for a 10b-5 cause of action, applied the fraud statute, which required that the action be brought within three years after the fraud was discovered or when it should have been discovered. The Tenth Circuit has followed this decision.⁵¹

Recently several courts have deviated from the traditional concept that the state fraud statute applied and have applied instead the state blue-sky statutes of limitations. The concept was first seen, although not applied, in *Trussel v. United Underwriters, Ltd.*⁵² The defendants argued that the court should apply a shorter Colorado two-year statute applicable to actions based on liability created by a federal statute rather than the three-year Colorado fraud statute. To avoid the argument that the shorter statute was unconstitutionally discriminatory, the defendants analogized the shorter period to an identical period provided in the Colorado blue-sky laws. The court rejected the analogy because it viewed the blue-sky statute of limitations as restricted to the blue-sky laws. Consequently, the court applied the three-year fraud statute.

In 1967 the Sixth Circuit was faced squarely with the argument that the blue-sky statute of limitations should be applied to a 10b-5 cause of action. In *Charney v. Thomas*⁵³ the court rejected this argument and applied the six-year fraud statute. Although the court gave no specific reason for its decision, it appears that the court was reluctant to accept the argument because there was no provision in the Michigan blue-sky laws that was similar to section 10(b) of the 1934 Act. Of significance, however, was the court's suggestion that in some cases of the blue-sky statute might be more appropriate.⁵⁴

Several years later in *Vanderboom v. Sexton*⁵⁵ the Eighth Circuit agreed and applied the Arkansas blue-sky statute of limitations to a 10b-5 cause of action. A group of South Dakota investors, of which Vanderboom was a party, and Investors Thrift Corp. had purchased the stock of American Home Builders, Inc. The sale was completed by January 10, 1966. It was alleged that the defendants had represented that American Home Builders was financially sound and profitable.⁵⁶ The plaintiffs paid \$947,300 for the company. Upon completion of an audit in October, 1966, they discovered that the Company had a deficit of approximately \$500,000 at the time of purchase.⁵⁷ Suit was filed on July 18, 1968.⁵⁸ The defendants contended

50. 380 F.2d 860 (10th Cir. 1967).

51. *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90 (10th Cir.), cert. denied, 404 U.S. 1004 (1971).

52. 228 F. Supp. 757 (D. Colo. 1964).

53. 372 F.2d 97 (6th Cir. 1967).

54. *Id.* at 100.

55. 422 F.2d 1233 (8th Cir.), cert. denied, 400 U.S. 852 (1970).

56. *City Nat'l Bank v. Vanderboom*, 422 F.2d 221 (8th Cir. 1970).

57. *Id.*

58. 422 F.2d at 1236.

that the court should apply section 22 of the Arkansas Securities Act (section 410 of the Uniform Securities Act), which bars a cause of action two years after the contract of sale. Because the cause of action was filed approximately 30 months after the sale, the defendant said it was barred. The plaintiffs contended that the three-year Arkansas statute of limitations applicable to fraud actions was controlling and that the cause of action was not barred. The district court accepted the defendants' argument and applied the Arkansas blue-sky statute of limitations.⁵⁹

On appeal, the Eighth Circuit compared the 10b-5 cause of action with the Arkansas blue-sky provisions, which are taken from the Uniform Securities Act. The court recognized that 10b-5 was codified as section 101 of that Act,⁶⁰ and that it was intended that no private cause of action would arise under that section. The court noted that the only provision for a private cause of action was under section 410 of the Uniform Securities Act as enacted in the Arkansas statute, and that this section closely parallels section 12(2) of the 1933 Act which allows a cause of action for negligent misrepresentation. The court conceded that an Arkansas blue-sky suit and a 10b-5 suit are not identical, but noted that in the Eighth Circuit a 10b-5 cause of action is allowed for both intentional and negligent misrepresentations. The Arkansas blue-sky laws also allow suits for intentional and negligent misrepresentations. But, the Arkansas fraud action with its three-year statute of limitations requires scienter. Therefore, because the 10b-5 action was more akin to the Arkansas blue-sky laws than to an Arkansas fraud action the Arkansas blue-sky statute of limitations was more appropriate.⁶¹ The court reversed, however, because the district court had failed to apply the federal tolling doctrine, and it was not clear from the record when the alleged fraud should have been discovered.⁶²

The Seventh Circuit in *Parrent v. Midwest Rug Mills, Inc.*,⁶³ also applied the state blue-sky statute of limitations. Although the court had earlier applied fraud statutes it had not expressly considered the issue and the case was one of first impression.⁶⁴ The defendants argued that the Illinois Securities Law's three-year limitations period should be applied; the plaintiffs contended that the five-year general limitations period for fraud actions applied. In choosing between the two statutes the court applied the resemblance test. This test requires application of "the forum state statute of limitations which more closely resemble[s] Rule 10b-5."⁶⁵ The

59. *Id.* at 1237.

60. UNIFORM SECURITIES ACT § 101, Comment. *See also* UNIFORM SECURITIES ACT § 410(h), Comment.

61. *Vanderboom v. Sexton*, 422 F.2d 1233, 1240 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970).

62. *Id.* at 1240-41. On remand, the district court held the cause of action was barred and this was confirmed on appeal. *Vanderboom v. Sexton*, 460 F.2d 362 (8th Cir. 1972).

63. 455 F.2d 123 (7th Cir. 1972).

64. *Id.* at 125 n.4.

65. *Id.* at 126.

court held that the three-year limitations provision of the blue-sky laws applied because it "best effectuates the policy" of protecting the 'uninformed, the ignorant, the gullible.'⁶⁶ The court also noted that the three-year limitations period is closer to the express periods of limitations in the federal securities acts.

Since *Vanderboom* and *Parrent*, several district courts have also applied the blue-sky laws statute of limitations.⁶⁷ At least two circuit courts, however, have recently rejected the argument that they should apply the state blue-sky statute.⁶⁸

To summarize, most courts have applied the forum state's fraud statute of limitations, which have varied from six years⁶⁹ to one year.⁷⁰ More recently, however, several courts have applied the forum state's blue-sky statute of limitations, which have varied from two to three years.⁷¹ Consequently, there are considerable inconsistencies among the federal courts as to what constitutes a fair period of limitations. Because of these incon-

66. *Id.*, quoting from *Suowitz v. Hilton Hotels Corp.*, 342 F.2d 596, 602 (7th Cir. 1965).

67. Two district courts within the Fifth Circuit have applied the blue-sky statute of limitations. In *Richardson v. Salinas*, 336 F. Supp. 997 (N.D. Tex. 1972), the court, contrary to prior holdings of the Fifth Circuit, applied the three-year Texas blue-sky statute instead of the two-year fraud statute. Although the effect was to extend the period of limitations beyond that of the fraud statute the court believed that this was consistent with *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967), in which the Fifth Circuit said that the limitations period for 10b-5 actions should not be shorter than that allowed in common law fraud actions.

In *Josef's of Palm Beach, Inc. v. Southern Inv. Co.*, 349 F. Supp. 1057 (S.D. Fla. 1972), the court applied the two-year Florida blue-sky statute of limitations instead of the three-year fraud statute. The court held that since a Florida blue-sky law with a two-year period of limitations was almost identical to 10b-5, the two-year statute of limitations was more appropriate. The court distinguished the *Azalea Meats* dicta because the question of applicability of a blue-sky statute of limitations was not before the court.

Two district courts in the Fourth Circuit have also chosen the blue-sky statute of limitations. *Maine v. Leonard*, 353 F. Supp. 968 (W.D. Va. 1973); *Corey v. Bache & Co., Inc.*, 355 F. Supp. 1123 (S.D. W. Va. 1973).

68. In *Douglass v. Glenn E. Hinton Invs., Inc.*, 440 F.2d 912 (9th Cir. 1971), the court relied strongly on prior decisions and held that the Washington fraud statute with its tolling provisions was preferable to the blue-sky limitations period and the federal tolling rules.

The Tenth Circuit, in *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90 (10th Cir. 1971), distinguished *Vanderboom* as inapplicable because it was decided in a circuit that had abrogated scienter in a 10b-5 action while the Tenth Circuit still required it.

69. *E.g.*, *Klein v. Auchincloss, Parker & Redpath*, 436 F.2d 339 (2d Cir. 1971) (New York fraud statute of limitations—six years).

70. *Bailes v. Colonial Press, Inc.*, 444 F.2d 1241 (5th Cir. 1971) (Alabama fraud statute of limitations—one year).

71. *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir. 1970) (Arkansas two-year blue-sky statute of limitations); *Richardson v. Salinas*, 336 F. Supp. 997 (N.D. Tex. 1972) (Texas three-year blue-sky statute of limitations). For an overview of state blue-sky law statutes of limitations see Note, *Statutes of Limitations in 10b-5 Actions*, 39 U.M.K.C. L. REV. 283, 288-89nn.32 & 33 (1971).

sistencies and their attendant problems there is a need for a uniform 10b-5 period of limitations.

C. How Should the Question of Tolling the Statute of Limitations Be Decided When the Plaintiff is Unaware of His Right?

Once the court has determined the applicable statute of limitations it becomes necessary to determine when the cause of action accrued. Where the choice has been the fraud statute or the blue-sky statute the courts have used either the tolling provision of the state statutes⁷² or the federal tolling doctrine to determine the time of accrual.⁷³

Federal law has long held that where fraud is involved in an action, at law or in equity, the federal statute of limitations is tolled.⁷⁴ *Holmberg v. Armbrecht*⁷⁵ extended this doctrine to toll state statutes of limitations in equitable actions. *Moviecolor Ltd. v. Eastman Kodak Co.*⁷⁶ further extended the concept to apply to state statutes of limitations where the cause of action is federally created and cognizable only in federal courts whether the action was at law or in equity. Consequently, more courts are applying the federal tolling doctrine to 10b-5 actions.⁷⁷ This, along with the adoption of the state statute of limitations has resulted in inconsistent periods of limitations for 10b-5 actions among the circuits.

D. Within the Period of Limitations Is the Plaintiff Subject to the Doctrine of Laches?

This issue is essentially the converse of the question of tolling. Here we assume that the plaintiff is fully informed of his rights under Rule 10b-5 well within the applicable period of limitations. May he, to the possible detriment of the defendant, deliberately delay the filing of his suit until the last possible moment? The doctrine of laches and the concept of fairness implicit in the federal tolling doctrine would suggest a negative response. But the decisions under Rule 10b-5 are less definite.

Courts in cases arising under Rule 10b-5 have applied the doctrine of

72. *E.g.*, *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953).

73. *Vanderboom v. Sexton*, 442 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970). Under the federal tolling doctrine the statute is tolled so long as the plaintiff, using reasonable care, remains ignorant of the underlying facts.

74. *Barley v. Glover*, 88 U.S. (21 Wall.) 342 (1874).

75. 327 U.S. 392 (1946).

76. 288 F.2d 80 (2d Cir. 1961). The case involved the Clayton Act.

77. This was the principal issue which concerned the court in *Janigan v. Taylor*, 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965), and which the court resolved in favor of the federal tolling doctrine. *See also* *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); *Northern Trust Co. v. Essaness Theater Corp.*, 103 F. Supp. 954 (N.D. Ill. 1952); *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir. 1970). *But see* *Azalea Meats, Inc. v. Muscat*, 246 F. Supp. 780 (S.D. Fla. 1965); *Turner v. Lundquist*, 377 F.2d 44 (9th Cir. 1967).

laches to bar the claims of plaintiffs who were not reasonably diligent.⁷⁸ However, it has been pointed out that laches, unlike the federal tolling doctrine, is strictly a creature of equity jurisprudence and should, therefore, be applicable only to suits in equity under Rule 10b-5 and not to actions at law.⁷⁹ Thus, a plaintiff suing for rescission for violation of Rule 10b-5 would be subject to the defense of laches, but would not be if he sued instead for damages resulting from the same violation of Rule 10b-5.⁸⁰ The importance of the defense of laches in litigation under Rule 10b-5 is therefore limited at best, since usually either remedy is available to the plaintiff under Rule 10b-5 at his election.⁸¹

IV. THE FEDERAL SECURITIES CODE PROPOSAL

The project of the American Law Institute to develop a Federal Securities Code⁸² has received wide acclaim and, if completed and enacted as presently conceived, promises significant reforms in the structure of federal securities law.⁸³ Among many other features, the Federal Securities Code proposes to codify in Parts XIII and XIV⁸⁴ the deceptive and manipulative conduct prohibited by the Code and the civil actions arising under the Code for violations of its provisions. It is significant, therefore, to consider the Code's treatment of the subject under consideration.

The central provision in the Code dealing with the statute of limitations is section 1421.⁸⁵ Because this omnibus provision deals with all of the varied civil actions arising under the Code, which in turn relate to the

78. *Royal Air Properties Inc. v. Smith*, 312 F.2d 210 (9th Cir. 1962), 333 F.2d 568 (9th Cir. 1964); *Tobacco & Allied Stocks, Inc. v. Transamerica Corp.*, 143 F. Supp. 323 (D. Del. 1956), *aff'd*, 244 F.2d 902 (3rd Cir. 1957).

79. 3 L. Loss, note 2 *supra*, at 1777. See *Morgan v. Koch*, 419 F.2d 993, 996 (7th Cir. 1969). *But see Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757 (D. Colo. 1964) (dictum).

80. R. JENNINGS & H. MARSH, JR., *supra* n. 38, at 1062. See *Baumel v. Rosen*, 412 F.2d 571 (4th Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970).

81. See, Comment, *Applicability of Waiver, Estoppel, and Laches Defenses to Private Suits under the Securities Act and S.E.C. Rule 10b-5: Deterrence and Equity in Balance*, 73 YALE L.J. 1477 (1964).

82. The history and purposes of the Federal Securities Code project, which is currently in progress, is described by Professor Louis Loss, the Reporter for the Code, in *The American Law Institute's Federal Securities Code Project*, 25 BUS. LAW. 27 (1969). Drafting with the advice of a distinguished group of consultants and a larger group of advisers, he has produced FEDERAL SECURITIES CODE (Tent. Draft No. 1, 1972) (Parts II (part), III, IV, V and VI) and FEDERAL SECURITIES CODE (Tent. Draft No. 2, 1973) (Parts II (part), VI, XIII and XIV). [Hereinafter cited as CODE (Tent. Draft No. 1) and CODE (Tent. Draft No. 2)].

The latest installment has just appeared as FEDERAL SECURITIES CODE (Tent. Draft No. 3, 1974) (Parts II (part), III (part), V (part), XV, XVI and XVII).

83. The structural scheme and scope of the Code is explained in the "Reporter's Introductory Memorandum," CODE (Tent. Draft No. 1) xiii-xxviii.

84. CODE (Tent. Draft No. 2), Part XIII encompasses §§ 1301 to 1311, inclusive, and is titled "Deceptive and Manipulative Acts." Part XIV includes §§ 1401 to 1424, inclusive, and is titled "Civil Liability."

85. CODE (Tent. Draft No. 2) § 1421.

deceptive and manipulative acts prohibited in Part XIII and to other provisions of the Code, it is necessary to consider briefly the structure of the substantive provisions as they relate to private actions under Rule 10b-5.

In general, the Federal Securities Code in Part XIV undertakes to codify and to define by express statutory provisions substantially all of the civil actions which are currently specified in one or more of the federal securities statutes and those which are reasonably well established and defined by the courts in cases arising under Rule 10b-5, rule 14a-9, and similar rules.⁸⁶ In this scheme, section 1402 is the principal codification and refinement of most of the private rights of action currently recognized under Rule 10b-5.⁸⁷ This section expressly creates and defines private civil actions which arise with respect to violations of section 1301(a)(1)⁸⁸ or section 1303(a).⁸⁹

Notwithstanding the elaborate codification of most of the current area of implied civil liability under the federal securities laws, the Code expressly preserves, in section 1423, the possibility, subject to four important qualifications, of further judicial recognition of implied civil actions for violations of the Code.⁹⁰ Thus, to the extent that private actions under Rule 10b-5 are not codified in substance in the foregoing sections of the Code, section 1423(a) leaves open the possibility of further judicial development.⁹¹

86. CODE (Tent. Draft No. 2), Part XIV, Section 1401 deals with "Illegal Sales and Purchases" (generally, those in violation of registration requirements). Section 1402 deals with "Deceptive Sales and Purchases." Section 1403 covers "False Registration Statements, Offering Statements, and Reports." Section 1404 applies to "Registrants' False Filings Generally," § 1405 to "False Distribution Statements," and § 1406 to "False Publicity." Section 1408 covers "Manipulation and Stabilization," and §§ 1407 and 1409 deal respectively with "Principals and Agents" and "Proration of Damages." Section 1410 governs "Churning," and § 1411 applies to "Failure to Register on Demand." Section 1412 covers "Proxy Solicitations and Tender Requests." Section 1413 governs "Short-Term Insider Trading" and § 1414 covers "Credit Provisions." Section 1415 relates to "Breach of Fiduciary Duty with Respect to Investment Companies," and § 1416 applies to "Rules of Exchanges and Associations."

87. CODE (Tent. Draft No. 2) § 1402. This also includes those private actions now provided in § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2). Other aspects of private actions under Rule 10b-5 are reflected, in part, in §§ 1403-16 which also deal with many of the civil actions expressly created in various parts of the current federal securities acts.

88. CODE (Tent. Draft No. 2) § 1301(a)(1) prohibits deceptive conduct or misrepresentations in the sale or purchase of securities.

89. CODE (Tent. Draft No. 2) § 1303(a) prohibits insider trading on the basis of material undisclosed corporate information.

90. CODE (Tent. Draft No. 2) § 1423. The four qualifications on the judicial recognition of an implied private action are (1) that it is not inconsistent with any conditions or restrictions in any of the express actions, (2) that the plaintiff and his injury are within the intended protection of the provision on which the action is based, (3) that the remedy sought and the deterrent effect of recognition of the action would not be disproportionate to the violation, and (4) that in certain actions related to §§ 1402(f)(2)(B), 1403(g)(2) or 1408(d) a comparable limit is imposed on the measure of damages.

91. CODE (Tent. Draft No. 2) § 1423(a). The Reporter's *Comments* under this subsection discuss the possible areas for further judicial development of implied private actions, including "the 'outer limits' of Rule 10b-5," discussed in Comment (5).

With respect to the various private actions created and recognized by the foregoing scheme, section 1421 provides the applicable statute of limitations, which in most cases is two years after the cause of action accrues. Importantly for present purposes, section 1421(c) provides that no private action under section 1402 may be brought

(1) more than two years after discovery of the underlying facts, except that the period is tolled while a plaintiff (in the exercise of reasonable care) remains in ignorance of those facts, or (2) more than four years after the action accrued.⁹²

The date on which the private action accrues is defined in section 1421(d) in six subsections, the last of which applies to action under section 1402 (among others) and stipulates that the cause of action accrues "on the date of the last act constituting part of the violation or other conduct on which it is based."⁹³ To eliminate confusion such as now exists with respect to the statute of limitations applicable to implied private actions under Rule 10b-5, section 1421(e) expressly provides that

[a]n action recognized under section 1423(a) is governed by the most nearly analogous provisions in the foregoing portion of this section.⁹⁴

Thus, the courts should have no occasion to refer to state statutes of limitations in implied actions under the Code, and the result should be general uniformity, as well as consistency with the express private actions. Under section 1421(f) potential defendants may limit the duration of their exposure by a 30-day rescission offer to the potential plaintiffs, but this device, which is common in state blue-sky laws, is only appropriate in privity situations.⁹⁵ Finally, section 1421(g) provides that "[t]he doctrine of laches does not apply to an action for a money judgment."⁹⁶

The Federal Securities Code, if enacted in its present form, should eliminate the confusion and the lack of uniformity which now exists with respect to the statute of limitations in actions under Rule 10b-5. Generally, the plaintiff would have two years after discovery of the underlying facts, using reasonable care, to bring suit, with a maximum of four years after the action accrued. Even if the periods involved are altered in the final draft,⁹⁷ enactment of the Code would be a major improvement.

92. CODE (Tent. Draft No. 2) § 1421(c). This provision is also applicable to private actions under §§ 1403-16, except those under § 1413 (insider short-swing trading profits), which are governed by § 1421(b). Private actions under § 1401 are governed by § 1421(a). See note 85 *supra*.

93. CODE (Tent. Draft No. 2) § 1421(d)(6).

94. CODE (Tent. Draft No. 2) § 1421(e).

95. CODE (Tent. Draft No. 2) § 1421(f), Comment. See the Reporter's *Comments* under this subsection.

96. CODE (Tent. Draft No. 2) § 1421(g).

97. Professor Loss, in the Reporter's *Comments* under § 1421(a)-(d), explains that various periods and combinations of periods have been considered, and he raises the question whether there should be any maximum cutoff period in a "fraud" case while the facts are undiscovered by the plaintiff through the use of reasonable care. See pt. IV of this article.

V. CRITIQUE: THE NEED FOR REFORM

That the present situation with respect to the statute of limitations applicable to private actions under Rule 10b-5 is highly unsatisfactory and in serious need for reform seems obvious to all of the commentators, even if it is not always so apparent to the courts.⁹⁸ At a minimum the prevailing judicial approach produces uncertainty and unpredictability and fosters a serious lack of national uniformity, notwithstanding the inherently federal nature of the cause of action involved and its federal statutory source. The current practice also often produces time periods that have little or no relevance to the policies or purposes of the federal securities acts or to the nature of the securities transactions involved in the private actions. The result may be quite unfair to either party.

Furthermore, the application of the forum state's statute of limitations can lead to forum shopping. The 1934 Act provides that causes of action may be brought in the district "wherein any act or transaction constituting the violation occurred," or in the district where the defendants reside or transact business.⁹⁹ A large corporation that is traded publicly and does business in many states may be subject to suit in many districts. Consequently, a plaintiff who may not be able to prove he had been diligent in discovering the fraud may be able to bring his cause of action in a district where the initial limitations period is longer than in another district. In addition the longer state limitations periods may allow a plaintiff who is aware of a potential cause of action to wait up to six years, in some cases, to see if the purchase or sale of the securities was a financial gain or loss. Or the plaintiff may decide to bring a 10b-5 cause of action but, as a tactical maneuver, wait until the end of a six-year period.

Any measure for reform, therefore, should be developed on a basis that would produce both national uniformity and greater predictability in application in private actions under Rule 10b-5. A federal cause of action, derived from a federal statutory policy and within the exclusive jurisdiction of the federal courts should be governed by an appropriate federal statute of limitations. Reference to state law for the limitations period has been the source of most of the mischief.

Furthermore, any reform should strive to yield a statute of limitations which is consistent with the policies and purposes of the federal securities acts, and one that is appropriate to actions for "fraud" in securities transactions, which frequently involve rapidly changing circumstances for all parties. In this respect it is significant that all of the express private actions created in the 1933 Act and the 1934 Act are governed by express statutes

98. This is the conclusion reached by all of the authorities cited in notes 32 and 33 *supra*, and more recently in Martin, *Statutes of Limitations in 10b-5 Actions: Which State Statute is Applicable?*, 29 BUS. LAW. 443 (1974).

99. 15 U.S.C. § 78aa (1970).

of limitations,¹⁰⁰ which are relatively short and which, with a single exception,¹⁰¹ specify the same pattern—a limitations period of one year from the violation or, in "fraud" cases, from the plaintiff's discovery of the facts through the use of reasonable care, subject to an outer limit of three years from the transaction.

Finally, any solution should seek to achieve fairness under the circumstances to both plaintiff and defendant and some reasonable period of repose, beyond which fully consummated securities transactions could no longer be challenged by new litigation. These are essentially the policies underlying statutes of limitations generally.

The proposed Federal Securities Code presents an ideal solution in section 1421. This provides a limitations period of two years after the plaintiff's discovery of the underlying facts through the use of reasonable care, subject to a maximum of four years after the action accrues. This extends slightly the periods of one and three years common to the present acts but generally retains the pattern. The federal tolling doctrine is incorporated but is subject to the four-year outer limit, and the doctrine of laches is made inapplicable to an action for a money judgment. As reflected in the Reporter's *Comment*, this provision is based on a balancing of interests and views.¹⁰² Its provisions are quite even-handed as it stands.

Professor Loss in the Reporter's *Comment* to section 1421(a)—(d) raises the question whether in fraud cases there should be indefinite tolling without any maximum cutoff period. It is submitted that such proposal would unfairly tip the balance in favor of the plaintiff, in contrast to the present scheme of section 1421. This is due in large part to the fact that the federal tolling doctrine reflected in section 1421 favors the plaintiff, in contrast to a more conservative tolling doctrine based on the defendant's concealment of the underlying facts. Under the federal tolling doctrine the statute is tolled as long as the plaintiff, using reasonable care, remains ignorant of the underlying facts, regardless of the defendant's reasonableness, disclosure or efforts to exonerate himself. The defendant's conduct is relevant only to the plaintiff's reasonableness. Such an approach calls for an outer time limit or, at a minimum, some provision which would only prolong the tolling beyond such limit as long as the defendant is concealing the underlying facts. Whether the maximum limitation period is four years or five, as Professor Loss states was considered in an earlier draft, the device of a final cutoff period seems the most consistent with fairness to both parties and with the policy underlying statutes of limitations. As to the length of the cutoff period, the presently proposed four years seems preferable to five but the difference is not large.

100. See notes 12, 13 *supra*.

101. The single exception is in § 16(b) of the 1934 Act, which specifies a two-year limitations period. 15 U.S.C. § 78p (1970).

102. CODE (Tent. Draft No. 2) § 1421, Comment.

The major difficulty with the Federal Securities Code as a solution to the problem is, of course, that it has yet to be enacted and may be long in the process. Meanwhile, the problem remains with the courts and, in the absence of an interim amendment to the 1934 Act, must seek a judicial solution. Thus far the Supreme Court has not conclusively committed itself on the problems of statutes of limitations in private actions under Rule 10b-5. The opportunity exists, therefore, for the Court to provide a judicial solution. It is submitted that the Court should do so at the first opportunity in order to further the policies and purposes of the federal securities acts. The ideal judicial solution to the problems in this area would lie in the adoption by the Supreme Court of a nationally uniform statute of limitations applicable to private actions under Rule 10b-5, based on the obvious analogy to the pattern expressed in the 1933 and 1934 Acts, of a one-year period from discovery, subject to a three-year maximum, as has long been advocated by Professor Loss and most other commentators.

