CHOOSING A STATUTE OF LIMITATIONS IN FEDERAL SECURITIES ACTIONS

By HERBERT A. EINHORN* AND PAUL K. FELDMAN**

INTRODUCTION

The Supreme Court of the United States has recently declined to grant certiorari in *United California Bank v. Salik*.[1] Consequently, the contradictory results reached by the various federal courts in attempting to establish a limitations period for implied actions under the federal securities acts remain.

Numerous decisions reflect the attempt of the courts to fill the vacuum created by federal statutes providing rights without corresponding periods limiting the time during which suits to enforce those rights may be brought.[2] While this problem has not been confined to securities actions,[3] decisions fixing limitations periods for various sections of the federal securities acts where none is otherwise provided reflect confused and inconsistent results.[4]

The silence of Congress is uniformly held not to imply a right with an unlimited period of limitations, and the courts have thus recognized an affirmative duty to fashion a limitations period where none is provided.[5] Statutes of limitations are needed to assure fairness to defendants "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and wit-

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* Senior Partner in Aranow, Brodsky, Bohlinger, Benetar & Einhorn of New York City. A.B., Ohio University (1933); LL.B., Columbia University Law School (1935). Co-author with Edward Ross Aranow of PROXY CONTESTS FOR CORPORATE CONTROL (2d ed. 1968) and TENDER OFFERS FOR CORPORATE CONTROL (1973), both by the Columbia University Press.

** Associate of the above New York law firm; B.A., Union College (1964); J.D., New York University Law School (1967).

1. 481 F.2d 1012 (9th Cir.), *cert. denied*, 414 U.S. 1004 (1973).

2. Where the federal statute specifies the applicable limitations period, it must be followed. Herget v. Central Nat'l Bank & Trust Co., 324 U.S. 4 (1945).

3. Holmberg v. Armbrecht, 327 U.S. 392 (1946) (Federal Farm Loan Act); UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) (Labor Management Relations Act); McClaine v. Rankin, 197 U.S. 154 (1905) (liability of shareholders of national banks); O'Sullivan v. Felix, 233 U.S. 318 (1914) (action under civil rights laws); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) (anti-trust laws); Bertha Bldg. Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959) (anti-trust laws). For a more generalized discussion of the problem, apart from the specific application to securities cases, see Note, *Federal Statutes Without Limitations Provisions*, 53 COLUM. L. REV. 68 (1953).

4. Since the publication by Professor Schulman of *Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635 (1967), the confusion has increased and the need for either a judicial or legislative resolution of the problem has become more apparent. The general federal limitation period relating to penalties and forfeitures, 28 U.S.C. §2462 (1970), has not been applied in securities cases.

5. Campbell v. Haverhill, 155 U.S. 610 (1895); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961).

nesses have disappeared."[6] It is recognized that there comes a point when the defendant's right to be "free of stale claims in time comes to prevail over the right to prosecute them."[7]

When confronted with the dilemma of the missing statute of limitations in actions based upon the federal securities acts, the federal courts have established the principle that they will adopt the applicable limitations period of the forum state.[8] Thus, the federal court selects a limitations period from the state law of the state in which it is sitting.[9] It must be emphasized that the period to be selected is in furtherance of a federally created right. The court is constrained to select the state statute which best effectuates the policy and purposes of that federal statute.[10]

The decisions reflecting selection of statutes of limitations in actions relating to the major area of the securities law litigation—those based on Rule 10b-5[11]—have demonstrated divergent points of view.[12] This has been attributed to the history of Rule 10b-5 litigation and the recognition of an implied right of action under that rule.[13] Rule 10b-5 has been described as a "broad nine-line anti-fraud provision whose proscriptions and prescriptions must truly be said to be in the eyes of the beholder."[14] While the cases under Rule 10b-5 are more numerous and often more complicated than those dealing with other sections of the various securities acts lacking

6. Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965). For detailed analysis of statutes of limitations, see *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950).

7. 380 U.S. at 428.

8. Campbell v. Haverhill, 155 U.S. 610 (1895); Cope v. Anderson, 331 U.S. 461 (1947); Moviecolor Ltd. v. Eastman Kodak & Co., 288 F.2d 80 (2d Cir. 1961). *See also* Blume and George, *Limitations and the Federal Courts*, 49 MICHIGAN L. REV. 937 (1951).

9. It is assumed that venue is proper. If not, the applicable statute of limitations will be that of the forum in which venue would properly lie. If the actions were transferred for the convenience of the parties, however, the statute of limitations of the transferor forum would control. Van Dusen v. Barrack, 376 U.S. 612 (1964); Corey v. Bache & Co., 355 F. Supp. 1123 (S.D. W. Va. 1973); Lamb v. United Sec. Life Co., 59 F.R.D. 44 (S.D. Iowa 1973); Sargent v. Genesco, 352 F. Supp. 66 (M.D. Fla. 1972). It is also assumed that there is no conflict of laws problem. Under state borrowing statutes, a shorter limitations period of the state where the action arose will be applied by the forum court as in Cope v. Anderson, 331 U.S. 461 (1947).

10. This situation must be distinguished from the role of the court in a diversity action where in fixing a limitations period under a state statute, the court must reach the same result as a state court sitting in that state under the authority of Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Chevron Oil Co. v. Huson, 404 U.S. 97, 103 n.5 (1971), Charney v. Thomas, 372 F.2d 97 (6th Cir. 1967).

11. 17 C.F.R. §240.10b-5 (1973) promulgated under the authority of §10(b) of the SECURITIES EXCHANGE ACT of 1934, 15 U.S.C. §78j(b) (1970).

12. For a discussion, see Maxwell, *Statutes of Limitations in 10b-5 Actions*, 39 U. OF MO. K.C. L. REV. 283 (1970-71).

13. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946); A. T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); J.C. Case Co. v. Borak, 377 U.S. 426 (1964).

14. Stewart v. Bennett, 362 F. Supp. 605 (D. Mass. 1973).

specified limitations periods,[15] the fundamental problem of appropriate selection remains.[16]

It is well settled that

> when a state has established different periods of limitation for different types of actions, a federal court enforcing a federally created claim looks first to federal law to determine the nature of the claim and then to state court interpretations of the statutory catalogue to see where the claims fit into the state scheme.[17]

The federal court must examine the purposes of the statute and its view of the statute must control for purposes of fixing the relation to the state statutory scheme.[18] The purposes of the federal securities acts,[19] however, allow wide latitude in the choice of state periods of limitations, and frequently more than one state statutory period would satisfy the relevant policy.

The federal court, when faced with the responsibility of choosing the most appropriate state limitations period, finds periods relating to two or more of the following: (i) fraud; (ii) a liability created by statute when a limitations period is not prescribed by law; (iii) actions by a private party under a state penalty or forfeiture and no limitations period is provided; (iv) blue sky statutes; (v) general limitations periods for civil actions (with varying periods of time depending on the theory of the action—contract, action on a writing, etc.); or (vi) a more general catch-all or residuary statute.[20] Litigants will frequently stipulate to the inapplicability of several alternatives leaving the court to decide from those choices remaining.

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15. *E.g.*, section 10(b) of the 1934 Act, 15 U.S.C. §78j (1970); section 17(a) of the 1940 Act, 15 U.S.C. §80a (1970).

16. The attempt to provide by state statute, a limitations period for federal claims where no federal limitations period is provided which differs from the period set out for state residuary claims, was rejected. Trussell v. United Underwriters, Ltd., 228 F. Supp. 757 (D. Colo. 1969).

17. Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir. 1961).

18. "[W]hen considering federal questions, federal courts should not be bound by the state's interpretation of the statute, as they are in diversity cases, but should adhere only to the period of time provided by the statute, since only that portion of federal law is lacking." 70 HARV. L. REV. 566, 568 (1957).

19. *E.g.*, SECURITIES ACT of 1933, 15 U.S.C. §77 (1970): "To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent fraud in the sale thereof, and for other purposes."
SECURITIES EXCHANGE ACT of 1934, 15 U.S.C. §78 (1970): "To provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes."
INVESTMENT COMPANY ACT of 1940, 15 U.S.C. §80 (1970): "To provide for the registration and regulation of investment companies and investment advisers and for other purposes."

20. For a discussion rejecting various alternatives, as posed above, see Hoffert v. E. F. Hinkle & Co., 56 F.R.D. 395 (D. Ore. 1972).

THE FRAUD APPROACH

In the securities area, and particularly in relation to Rule 10b-5 actions, the courts have divided in selecting between limitation periods characterized as fraud and those relating to state securities laws. At this time the fraud decisions throughout the circuit and district courts are the more numerous by a substantial margin.[21] As a matter of general chronological

21. *Tenth Circuit*:
Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir. 1971) (Utah three-year statute); Richardson v. MacArthur, 451 F.2d 35 (10th Cir. 1971) (Utah three-year statute); Chiodo v. General Waterworks Corp., 380 F.2d 860 (10th Cir.), *cert. denied*, 389 U.S. 1004 (1967) (Utah three-year statute); Geo. H. McFadden & Bro. v. Home-Stake Prod. Co., 295 F. Supp. 587 (N.D. Okla. 1968) (Oklahoma three-year statute); Trussell v. United Underwriters, Ltd., 228 F. Supp. 757 (D. Colo. 1969) (Colorado three-year statute).
Ninth Circuit:
United Cal. Bank v. Salik, 481 F.2d 1012 (9th Cir.), *cert. denied*, 414 U.S. 1004 (1973) (California three-year statute); Douglass v. Glenn E. Hinton Inv., Inc., 440 F.2d 912 (9th Cir. 1971) (Washington three-year statute); Sackett v. Beaman, 399 F.2d 884 (9th Cir. 1968) (California three-year statute); Turner v. Lundquist, 377 F.2d 44 (9th Cir. 1967) (California three-year statute); Errion v. Connell, 236 F.2d 447 (9th Cir. 1953) (Washington three-year statute); Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953) (Washington three-year statute); Hecht v. Harris Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968) (California three-year statute); Hoffert v. E. F. Hinkle & Co., 56 F.R.D. 395 (D. Ore. 1972) (Oregon two-year statute); Smith v. Guaranty Serv. Corp., 51 F.R.D. 289 (N.D. Cal. 1970) (California three-year statute).
Seventh Circuit:
Morgan v. Koch, 419 F.2d 993 (7th Cir. 1969) (Indiana six-year statute); Butterman v. Steiner, 343 F.2d 519 (7th Cir. 1965) (Illinois five-year statute); Schaefer v. First Nat'l Bank of Lincolnwood, 326 F. Supp. 1186 (N.D. Ill. 1970) (Illinois five-year statute), *but* the preceding Illinois decisions were distinguished by Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972) which now represents the view of the federal courts applying Illinois law in favor of the blue sky statute.
Sixth Circuit:
Charney v. Thomas, 372 F.2d 97 (6th Cir. 1967) (Michigan six-year statute) (*see* note 37 *supra*); Connelly v. Balkwill, 174 F. Supp. 49, 63-64, *aff'd per curiam*, 279 F.2d 685 (6th Cir. 1960) (Ohio six-year statute); Denny v. Performance Systems, Inc., CCH FED. SEC. L. REP. ¶93,387 (M.D. Tenn. 1971) (Tennessee ten-year statute).
Fifth Circuit:
Bailes v. Colonial Press, Inc., 444 F.2d 1241 (5th Cir. 1971) (Alabama one-year statute); Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960) (Alabama one-year statute); Lamb v. United Security Life Co., *supra* note 8 (applying Alabama one-year statute); Dudley v. Southeastern Factor & Fin. Corp., 57 F.R.D. 177 (N.D. Ga. 1972) (Georgia four-year statute); Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1967) (Florida three-year statute); Beefy Trail, Inc. v. Beefy King Int'l, Inc., 348 F. Supp. 799 (M.D. Fla. 1972) (Florida three-year statute); *but see* Josef's of Palm Beach, Inc. v. Southern Inv. Co., 349 F. Supp. 1057 (S.D. Fla. 1972) (applying Florida blue sky statute); Aboussie v. Aboussie, 441 F.2d 150 (5th Cir. 1971) (Texas two-year statute); *but see* Richardson v. Salinas, 336 F. Supp. 997 (N.D. Tex. 1972) (following Texas blue sky law).
Fourth Circuit:
Baumel v. Rosen, 283 F. Supp. 128 (D. Md. 1968) (Maryland three-year statute).
Second Circuit:
All applying New York six-year statute—Fischman v. Raythcon Mfg. Co., 188 F.2d 783 (2d

development the earlier cases supported the fraud characterization while the more recent cases have tended to support the blue sky approach. Many of the blue sky provisions are of recent date, and consequently a substantial number of decisions adopting a "fraud" approach lacked a blue sky alternative. In such early Rule 10b-5 cases, however, the "fraud" view was adopted over the more general state options.

The arguments supporting the fraud rationale in Rule 10b-5 cases are numerous and may, for discussion purposes, be divided between those proposed before and after a possible blue sky alternative was available. It must be recognized that this factor alone does not limit the relevance of the pro-"fraud" rationale.

Cases Not Involving a Blue Sky Alternative

In choosing against the limitations period for violation of a statute and in favor of one based on fraud, it was determined that whatever statutory prescriptions existed, it was "the fraud that offends."[22] The argument running through the early cases was that the nub of the action was fraud. Furthermore, the characterization of a Rule 10b-5 violation as "fraud" did not strain the thrust of the language of the federal statute.[23]

This approach also allowed the court greater freedom to determine that suits were timely, as the fraud limitations periods were usually longer and ran from the time that the fraud was, or should have been, discovered.[24] The courts frequently strained to obtain the largest limitations period

Cir. 1951); Glickman v. Schweickart & Co., 242 F. Supp. 670 (S.D.N.Y. 1965); Weinberger v. New York Stock Exch., 335 F. Supp. 139 (S.D.N.Y. 1971); Saylor v. Lindsley, 391 F.2d 965 (2d Cir. 1968).

22. Fratt v. Robinson, 203 F.2d 447 (9th Cir. 1953).

23. REGULATION OF THE USE OF MANIPULATIVE AND DECEPTIVE DEVICES, section 10.

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.

Rule 10b-5 Employment of Manipulative and Deceptive Devices.

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

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

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in 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.

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

available, on the theory that it comported with the broad remedial purposes of the statute[25] or that a limitations defense was not favored under federal practice.[26] Other decisions focused on the closeness of the 10b-5 violation to common law fraud and on the principle that statutes in derogation of a common law right should be construed narrowly, to extend the limitations period.[27]

Cases Involving a Blue Sky Alternative

Courts have opted for the fraud approach at times where state blue sky statutes were offered as the proper source of the limitations period. One line of cases rejected the blue sky option primarily because of certain differences in the blue sky statutes while a second line of cases based its rejection on more generalized principles.

Deficient Blue Sky Statute

The limitations period provided under the Minnesota Securities Act[28] was rejected under the resemblance test discussed in *Vanderboom v. Sexton*[29] because it did not contain a substantive provision close to Rule 10b-5.[30] A similar approach was taken in an earlier decision which stated: "Although in some cases the local Blue Sky Law might be the more appropriate point of reference, in the present case, the Michigan law contains no provision similar to section 10(b) of the federal law."[31] Where the applicable blue sky statute provided only for rescission by a purchaser of securities, the limitation period thereunder was held inapplicable to a Rule 10b-5 claim.[32] The blue sky statute was also held inapplicable to a Rule 10b-5 claim based on "churning."[33]

Blue Sky Rejected on General Principles

Other lines of decision favoring the fraud approach have advanced the following arguments: that a federal rather than a state right was being considered;[34] that the blue sky statute provided an alternative remedy in

25. Batchelor v. Legg & Co., 52 F.R.D. 553 (D. Md. 1971), Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968).

26. Sargent v. Genesco, Inc., 352 F. Supp. 66 (M.D. Fla. 1972).

27. Batchelor v. Legg & Co., 52 F.R.D. 553 (D. Md. 1971); Charney v. Thomas, 372 F.2d 97 (6th Cir. 1967).

28. MINN. STAT. ANN. ch. 80 (1968).

29. 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970).

30. Klapmeier v. Peat, Marwick, Mitchell & Co., 363 F. Supp. 1212 (D. Minn. 1973).

31. Charney v. Thomas, 372 F.2d 97 (6th Cir. 1967).

32. Denny v. Performance Sys., Inc., CCH FED. SEC. L. REP. ¶93,387, *supra* note 21.

33. Stevens v. Abbott, Proctor & Paine, 288 F. Supp. 836 (E.D. Va. 1968). Yet the Virginia blue sky statute was applied to a non-churning Rule 10b-5 claim in Maine v. Leonard, 353 F. Supp. 968 (W.D. Va. 1973).

34. Douglass v. Glenn E. Hinton Inv., Inc., 440 F.2d 912 (9th Cir. 1971).

addition to that of fraud;[35] that the broad remedial purposes of the federal statute are best served by a longer period of limitations;[36] that it was desirable to follow precedent within a state or circuit for the stability of the law, particularly where such an approach was not in conflict with the purposes of the federal statute;[37] and finally that the applicable state law, as a matter of substance, was closer to the law of fraud, particularly in jurisdictions requiring scienter for Rule 10b-5 violations.[38]

THE BLUE SKY APPROACH

The decisions favoring a blue sky approach have utilized a "resemblance test" in selecting a state period of limitations from the state blue sky statute. In finding a limitations period for a Rule 10b-5 claim, for example, they feel the blue sky law would be a logical source.[39] The state securities laws deal specifically with securities, and may include a provision similar to Rule 10b-5. Thus, a recent decision in the Seventh Circuit found the three-year limitations period of the Illinois statute applicable, rather than the fraud statute, because of the close resemblance of language and purpose between Rule 10b-5 and the blue sky law.[40] Similar conclusions have been reached by other courts within[41] and outside the Seventh Circuirt,[42] and a recent article supports this approach.[43]

Arguments advanced in favor of the blue sky approach include the following: the nature of the action is closer to a securities action than to a fraud action by reason of subject matter and language;[44] it more closely

35. Charney v. Thomas, 372 F.2d 97 (6th Cir. 1967).

36. United Cal. Bank v. Salik, 481 F.2d 1012 (9th Cir. 1973); Smith v. Guaranty Serv. Corp., 51 F.R.D. 289 (N.D. Cal. 1970).

37. *Id.*

38. Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir. 1971), *distinguishing* Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir. 1970), because the 10th Circuit unlike the 8th Circuit required scienter in Rule 10b-5 actions.

39. 1 A. BROMBERG, SECURITIES LAWS: FRAUD §2.5(1) at 41-42 n. 105 (1969).

40. Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972).

41. Kramer v. Loewi & Co., 357 F. Supp. 83 (E.D. Wis. 1973) (Wisconsin blue sky statute); Saemann v. Everest & Jennings, Int'l, 343 F. Supp. 457 (N.D. Ill. 1972).

42. Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970) (following the Arkansas two-year blue sky statute); Corey v. Bache & Co., 355 F. Supp. 1123 (S.D. W. Va. 1973) (applying the two-year limitations period under the Indiana blue sky law); Maine v. Leonard, 353 F. Supp. 968 (W.D. Va. 1973) (applying the two-year statute of limitations in the Virginia blue sky laws); Josef's of Palm Beach, Inc. v. Southern Inv. Co., 349 F. Supp. 1057 (S.D. Fla. 1972) (using the two-year period in the Florida blue sky statute); Richardson v. Salinas, 336 F. Supp. 997 (N.D. Tex. 1972) (following the three-year period in the Texas blue sky laws); Dyer v. Eastern Trust & Banking Co., 336 F. Supp. 890, 905-06 (D. Me. 1971) (following the Maine blue sky statute, two years after the contract of sale).

43. Martin, *Statutes of Limitations in 10b-5 Actions: Which State Statute is Applicable?*, 29 BUS. LAW. 443 (1974). The writers disagree with this analysis; *see* note 23 *supra*.

44. Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970); Corey v. Bache & Co., 355 F. Supp. 1123 (S.D. W.Va. 1973); Maine v. Leonard, 353 F. Supp.

approximates the intent of Congress and purposes of the securities acts;[45] the period provided is closer to the limitations period found in other provisions of the securities acts;[46] decisions in favor of the fraud theory are based in part on consistency with earlier decisions rather than on the selection of the best alternative now available;[47] while fraud is the "gist" of a Rule 10b-5 action, the more specific (securities law) should govern the general;[48] and the period would be extended which would further the purposes of the statute.[49]

OTHER CONSIDERATIONS

The choice between a fraud or blue sky analogue is often not necessarily determinative of the statute of limitations problem. Frequently, the court must face the complication of equitable claims and subsidiary issues such as the date of accrual of the action and tolling of the limitations period.

Equity

Where the only claims advanced before the federal court based on a federally created right of action are equitable, state statutes of limitations do not control.[50] The court will apply the doctrine of laches,[51] which may have the effect of either shortening or lengthening the period available for suit from that otherwise provided by a statute of limitations in an analogous legal claim. Equity is also more flexible and avoids mechanical rules.[52]

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968 (W.D. Va. 1973). Note, however, that the language of the state blue sky statute is often modeled after section 2(1) of the Securities Act of 1933, 15 U.S.C. §77b(1) (1970), rather than Rule 10b-5 promulgated under section 10 of the Securities Exchange Act of 1934, 15 U.S.C. §78j (1970). *See* Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970).

45. Maine v. Leonard, 353 F. Supp. 968 (W.D. Va. 1973).

46. Kramer v. Loewi, 357 F. Supp. 83 (E.D. Wis. 1973). Note, however, that the attempt to utilize a limitations period from another section of the securities act has never been accepted. *See* Collins v. Rukin, 342 F. Supp. 1282 (D. Mass. 1972); Klapmeier v. Peat, Marwick, Mitchell & Co., 363 F. Supp. 1212 (D. Minn. 1973); Dudley v. Southeastern Factor & Fin. Corp., 57 F.R.D. 177 (N.D. Ga. 1972); Schaefer v. First Nat'l Bank of Lincolnwood, 326 F. Supp. 1186 (N.D. Ill. 1970).

47. Charney v. Thomas, 372 F.2d 97 (6th Cir. 1967).

48. Josef's of Palm Beach, Inc. v. Southern Inv. Co., 349 F. Supp. 1057 (S.D. Fla. 1972).

49. Richardson v. Salinas, 336 F. Supp. 997 (N.D. Tex. 1972). Note, however, Kramer v. Loewi, 357 F. Supp. 83 (E.D. Wis. 1973), broad liability makes a shorter period more appropriate.

50. Holmberg v. Armbrecht, 327 U.S. 392 (1946). This is to be contrasted with the holding in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), that when a state statute bars recovery in a suit in state court on a state-created right, it likewise bars recovery on such a suit on the equity side of a federal suit in a diversity action.

51. Royal Air Properties, Inc. v. Smith, 312 F.2d 210, 214 (9th Cir. 1962): "[W]here there is no applicable federal statute of limitations, as in a section 10(b) action, there is no evidence of any congressional intent to exclude the traditional doctrine of laches."

52. Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946).

Laches is based more on the plaintiff's knowledge of the wrong and opportunity to bring suit than the passage of a fixed period of time. Where the plaintiff seeks equitable relief based on fraud, therefore, an equitable doctrine is read into every federal statute of limitations that the period does not begin to run until the fraud is discovered though the defendant made no effort to conceal the fraud.[53]

At times, plaintiffs will seek to obtain the benefit of a longer period of limitations by joining with their legal claims a request for equitable relief, *e.g.*, rescission or an accounting.[54] The courts have uniformly refused to apply the longer equitable period where full relief can be granted at law.[55] In determining the adequacy of the relief that can be found at law, the standard is the legal relief that can be afforded at law by a federal court rather than by a state court of the forum state.[56]

Accrual

The accrual of the cause of action is determined as a matter of federal law[57] even if the period of limitations is obtained from the relevant state law.[58] The federal court will, however,

> follow state decisions to determine how far a cause of action must be "complete" to have "accrued" under state limitation statutes but will look to federal law to determine what needs to be done to advance a federally created right to the level so required.[59]

Thus, where a state blue sky statute is held to be the proper source of the limitations period and that statute states that the period is to run from the date of sale, the federal courts have, without exception, determined that the limitations period does not begin to run until the violation was or should have been discovered.[60]

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53. *Id.* at 397; Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874).

54. Plaintiffs have also joined claims based on Rule 10b-5 with other asserted securities violations in the hopes of benefiting from the more liberal limitations period allotted to their Rule 10b-5 claims. The foregoing is not the only reason for seeking relief under Rule 10b-5, however, as other sections of the securities acts have more restrictive damage and procedural limitations. Orn v. Eastman Dillon, Union Sec. & Co., 364 F. Supp. 352 (C.D. Cal. 1973). The issue of exclusiveness of remedy under the various provisions of the securities acts is not within the scope of this article.

55. Klein v. Bower, 421 F.2d 338 (2d Cir. 1970).

56. Russell v. Todd, 309 U.S. 280 (1940). Gilbert v. Meyer, 362 F. Supp. 168 (S.D.N.Y. 1973).

57. "Federal law" connotes the freedom from state law, sometimes referred to as "federal common law" or "a body of decisional law developed by the federal courts untrammeled by state court decisions." Lyons v. Howard, 250 F.2d 912, 915 (1st Cir. 1958). As this principle relates to accrual, it reflects a uniform approach rather than a uniform limitations period.

58. Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965).

59. Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir. 1961).

60. Kramer v. Loewi & Co., 357 F. Supp. 83 (E.D. Wis. 1973).

Tolling

The general principle referred to in *Bailey v. Glover*,[61] frequently referred to as the equitable tolling doctrine, has been carried over to actions at law.[62] Thus, the statute of limitations in fraud actions under the securities acts is tolled as a matter of federal law and does not arise until discovery.[63] Whether plaintiff exercised sufficient diligence in the circumstances is a matter for the trial court to determine.[64] However, the mere allegation in the complaint of fraudulent concealment of material facts is sufficient to withstand a motion to dismiss predicated on the statute of limitations.[65] The limitations period may also be tolled by the commencement of a prior related action.[66]

OBSERVATIONS

In choosing between the fraud or blue sky approach, the federal court often feels bound by precedent. This has been particularly true in the Ninth Circuit. In *Salik* and in *Smith* there were indications that if the issue were one of first impression, the blue sky approach might have been favored.[67]

The dilemma is even more troublesome where, as in California, a securities act is enacted after the earlier fraud line of decision has been well established. The courts have stated that fairness to litigants and the orderly development of the law would not be promoted by departure from such established lines of decision.

In states lacking a blue sky provision very close to Rule 10b-5, for example, the state fraud analogue is an obvious and logical choice for the federal court seeking an appropriate limitations period for a Rule 10b-5 claim. Fraud lies at the heart of the Rule 10b-5 action and better characterizes the claim than a general contract or residuary limitations period.

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61. 88 U.S. (21 Wall.) 342 (1874).

62. Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir. 1961); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968).

63. Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965). This established principle is criticized in a recent article promoting a fixed period of years under the blue sky approach. *See* Martin, *Statutes of Limitations in 10b-5 Actions: Which State Statute is Applicable?*, 29 BUS. LAW. 443 (1974). *See also Clear 10(b) Sailing under Blue-Sky Statutes*, 10 A.B.A.J. 748-49 (1974).

64. De Haas v. Empire Petroleum Co., 286 F. Supp. 809 (D. Colo. 1968).

65. Puttkammer v. Stifel, Nicolaus & Co., CCH FED. SEC. L. REP. ¶95,220 (N.D. Ill. 1973).

66. Hellerstein v. Mather, 360 F. Supp. 473 (D. Colo. 1973).

67. Were this court to resolve the question as a matter of first impression, it might well find the approach of Vanderboom v. Sexton persuasive. Unfortunately for Fidelity Savings, however, the Ninth Circuit has addressed itself (if not in depth) to this question on several occasions and has uniformly applied California's three-year statute of limitations for fraud rather than that applicable to state securities' violations. Smith v. Guaranty Serv. Corp., 51 F.R.D. 289, 295 (N.D. Cal. 1970).

The acceptance in a Rule 10b-5 action of a period of limitations from the state blue sky statute lacking a provision analogous to Rule 10b-5 must be condemned as simplistic. The courts frequently do not inquire into the nature of the state blue sky statute or its relation to the claim before it. State blue sky statutes often comprehend only registration of brokers and dealers and the qualification of various securities offerings. Any limitations period culled from such a statute, would be obviously inappropriate.

Where, however, a state blue sky statute contains a provision very close to Rule 10b-5, that period, provided it does not conflict with the purpose of the federal act in question, should control in the absence of new Congressional legislation or a Supreme Court pronouncement. Where there is such closeness of language, there can be no more appropriate state limitations period. The fact that the claim is not based on the state statute, but on a federal act, is irrelevant under the established principle of borrowing a state's statute which best effectuates the policy of the federal statute.

In any analysis of the selection of the appropriate limitations period, the theory and result (period of years available as a limitations period) must be discussed separately. Thus, in fitting the claim into the state scheme, the court should seek honest adherence to the closest state type of action, whether it be fraud or blue sky, disregarding the time period applicable thereto in the first instance. Only if the state time period so provided would violate the purpose of the federal statute, should it be modified or another theory or class of limitations period be selected.

As we have observed earlier, the outcome approach, whether the court was seeking a longer or shorter limitations period, has caused an unreasoned and inconsistent body of law to develop in the securities limitations area.

CONCLUSION

The foregoing discussion amply demonstrates the inability of the federal courts at the district and appellate levels to end the inconsistencies and general confusion prevailing in this significant area of the law. Although legal writers have for some time called for uniform limitations periods,[68]

68. "[I]s it not eminently more consistent with the overall statutory scheme to look to what Congress itself did when it was thinking specifically of private actions in securities cases, rather than to a grab bag of more or less analogous state statutes?" 1 L. LOSS, SECURITIES REGULATION 3899, 3900; Schulman, *Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635 (1967); Blume & George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 992 (1951); Note, *Federal Statutes Without Limitations Provisions*, 53 COLUM. L. REV. 68 (1953); Israels, Book Review, 77 YALE L.J. 1585, 1591-92 (1968). "[T]he court must decide what the nature of the implied action is. Apparently, this is a matter of state law, although whether it should be is doubtful." 1 A. BROMBERG, SECURITIES LAWS: FRAUD §2.5 at 42 n.105 (1969).

conflicts of theory and in results persist, not only between federal circuits, but even, in some instances, within the same circuit.

As was indicated at the outset, it was hoped that the Supreme Court by granting certiorari in *Salik* would resolve the conflict and establish a uniform rule of law in this sadly neglected area. The failure to do so leaves the existing divergent case law intact.

At present, peculiarities and differences of state law relating to fraud, blue sky statutes and periods of limitations thereunder, scienter and available defenses foster an inconsistent and disjointed administration of the federal securities acts. This conflict among the district and circuit courts should not be allowed to continue. While a uniform statute of limitations for all violations of the securities acts where none is otherwise provided would not be reasonable, the SEC and leading members of the securities bar could develop suitable limitations periods for each provision of the securities acts currently lacking such a provision. Congress has provided definite limitations periods under other sections of the securities acts[69] and should act with respect to claims under Rule 10b-5, section 17(a), and other provisions where no limitations period is incorporated into the statute.

The writers, therefore, urgently suggest that Congress proceed to adopt such meaningful legislation, establishing clear and reasonable statutes of limitations appropriate for the various types of civil securities actions arising from the implied rights of action created by the securities acts. Having created these private rights of action, Congress must recognize its responsibility to establish uniform rules for the ensuing litigation. Defendants and their counsel should not be left at the mercy of opposing litigants who can, under the broad venue provisions relevant to federal practice, shop for the most favorable forum.[70] Moreover, the case analysis set forth above reveals

69. As indicated in Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123, 125 n. 3 (7th Cir. 1972), the original Securities Act of 1933 provided a limitation of two years from discovery of the alleged misrepresentation for all civil actions under the Act, and a ten-year over-all limitation for all actions, except those under section 12(2), 15 U.S.C. §77*l*(2) (1970). The 1934 amendments to the Act reduced the periods to their present form—section 13 of the 1933 Act, 15 U.S.C. §77m (1970), requires actions brought under section 11 or 12(2) of the 1933 Act, 15 U.S.C. §§77k, *l*(2) (1970), to be brought within one year of discovery and actions under section 12(1), 15 U.S.C. §77*l*(1) (1970), within one year of the violation, but in no event may such actions be brought more than three years after the offering or sale. Sections 9(e), 18, and 29(b) of the 1934 Act, 15 U.S.C. §§78i(e), 78r, 78cc(b) (1970), contain substantially similar provisions.

70. In a recent decision, the court ordered an action transferred to the Eastern District of Pennsylvania from the Southern District of New York citing H. L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1968). "The federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretations of one federal court rather than that of another determine his case." The decision also stated "[p]laintiff's obvious forum shopping merely adds weight to the other considerations favoring transfer." Scheinbart v. Certain-Teed Prod. Corp., CCH FED. SEC. L. REP. ¶95,127 (S.D.N.Y. 1973).

an abundance of esoteric and tortuous reasoning indulged in by numerous courts in their individual efforts to promote a result which they may deem just and reasonable. The result, as we have seen, is a patchwork of contradictions.[71] Certainly, our federal securities law should have more well-reasoned, clearly defined, and uniform parameters, freed from the vagaries of the laws of each of the 50 states.

71. A recent article (*see* note 43 *supra*) which supports the blue sky approach would not provide for any uniformity as it is premised on the divergent blue sky statutes of the various states, many of which, as the writers have hereinabove observed, do not contain appropriate analogues to the federal securities acts.