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The Absorption Doctrine's Continued Application In Section 10(b) and Rule 10b-5 Actions

Private civil causes of action brought pursuant to Section 10(b) and Rule 10b-5 of the 1934 Securities and Exchange Act are a judicial creation.¹ As a result, neither provision contains a statute of limitations.² Consequently, all federal courts, with the exception of the Third Circuit, use the absorption doctrine in determining the appropriate limitations period to apply to Rule 10b-5 actions.³ The absorption doctrine requires federal courts to look to state law for the applicable statute of limitations period when federal law is silent.⁴ The circuit courts, however, vary in their application of the absorption doctrine. These varying applications of the absorption doctrine promote potential forum shopping⁵ and create a lack of uniformity throughout the federal court system regarding the length of the limitations period applicable to Rule 10b-5 actions.⁶ The absence of

1. See Comment, *Securities Regulation: Statute of Limitations Applicable to 10b-5 Actions Arising in Pennsylvania*, 53 TEMP. L.Q. 70, 70-71 (1980) (both the Supreme Court and Congress have acquiesced in the implication of a private civil cause of action).

2. See Fletcher, *Learning to Live With the Federal Arbitration Act - Securities Litigation in a Post McMahon World*, 37 EMORY L.J. 99, 128 (1988); Schulman, *Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635, 636 (1966-67) (Congress did not provide a specific limitations period since there was a lack of Congressional foresight that an implied right would be created).

3. See Note, *Statutes of Limitations for Rule 10b-5*, 39 WASH. & LEE L. REV. 1021, 1040 (1982). See also Beasley, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645, 646, 659-61 (1986).

4. Bloomenthal, *Statutes of Limitations And the Securities Acts - Part II*, 7 SEC. & FED. CORP. L. REP. 25 (April, 1985).

5. Beasley, *supra* note 3, at 647; Block & Barton, *Securities Litigation: Statute of Limitations in Private Actions Under Section 10(b)—A Proposal for Achieving Uniformity*, 7 SEC. REG. L.J. 374, 378-80 (1979-80).

6. Beasley, *supra* note 3, at 646-47; Recent Decisions, *Statute of Limitations in 10b-5 Actions: White v. Sanders*, 34 ALA. L. REV. 131, 132 (1983).

uniformity results from disagreement as to which type of state statute to apply.⁷ Moreover, the length of the limitation periods vary among states using similar types of statutes, thus compounding the lack of uniformity.⁸

Recently, the Third Circuit Court of Appeals articulated a new approach to resolve the conflict between the circuits. In *In re Data Access Systems Securities Litigation*,⁹ the Third Circuit held that the 1934 Securities Exchange Act's analogous limitation periods for express causes of action should govern Section 10(b) and Rule 10b-5 actions.¹⁰ The *Data Access* court stated that three recent Supreme Court cases mandated this new approach.¹¹ This recent federal case gives rise to the question of whether the traditional "absorption doctrine" should still be the appropriate method of determining the applicable statute of limitations for Section 10(b) and Rule 10b-5 actions.

The purpose of this Comment is to discuss the likelihood of *Data Access* becoming the new federal standard for determining the appropriate statute of limitations in Rule 10b-5 actions. Additionally, this Comment will explore whether the Third Circuit's adoption of a new federal approach was mandated by recent Supreme Court decisions or whether *Data Access* merely reflects a permissible but non-mandatory solution to the statute of limitations problem in Rule 10b-5 actions.

Part I of this Comment will discuss the background of Section 10(b) and Rule 10b-5 causes of action in relation to the absorption doctrine and the implied civil cause of action.¹² Part II of this Comment will discuss the varying approaches the circuit courts have taken when applying the absorption doctrine including the state blue sky statute approach, the common law fraud approach, and the case-by-case approach.¹³ Part III of this Comment will discuss and evaluate the Third Circuit Court of Appeal's reasoning and rationale in *Data Access*.¹⁴ Part IV of this Comment will examine the status and future

7. Beasley, *supra* note 3, at 647-48; Comment, *supra* note 1, at 71; Block & Barton, *supra* note 5, at 374-75.

8. Beasley, *supra* note 3, at 648.

9. 843 F.2d 1537 (3d Cir. 1988).

10. *Id.* at 1545.

11. *Id.* See *infra* notes 119-21 and accompanying text.

12. See *infra* notes 18-52 and accompanying text.

13. See *infra* notes 53-114 and accompanying text.

14. See *infra* notes 115-88 and accompanying text.

of the absorption doctrine in light of the *Data Access* decision.¹⁵ Finally, Part V of this Comment will conclude that the *Data Access* decision is defensible because if more widely followed, this new approach would establish a uniform limitations period throughout the federal system for Section 10(b) and Rule 10b-5 actions.¹⁶ However, uniform application of a limitations period for Section 10(b) and Rule 10b-5 will not be forthcoming until either Congress or the Supreme Court addresses this specific issue.¹⁷

I. BACKGROUND OF 10B-5: IMPLIED CAUSE OF ACTION AND THE ABSORPTION DOCTRINE

Section 10(b) and Rule 10b-5 of the 1934 Securities and Exchange Act prohibit fraudulent and deceptive practices in connection with the purchase or sale of any security.¹⁸ The 1934 Securities and Exchange Act¹⁹ does not specifically provide for private civil causes of action²⁰ for violations of Section 10(b)²¹ and Rule 10b-5.²² A

15. See *infra* notes 189-210 and accompanying text.

16. Beasley & Chamberlain, *Statute of Limitations Under Rule 10b-5*, 20 REV. OF SEC. AND COMMODITIES REG. 197-98 (Nov. 16, 1988).

17. See *infra* notes 211-18 and accompanying text.

18. Comment, *Securities Regulation: Statute of Limitations Applicable to 10b-5 Actions Arising in Pennsylvania*, 53 TEMP. L.Q. 70, 71 (1980).

19. 15 U.S.C. §§ 78a-78u; 17 C.F.R. §§ 240.0-1.

20. See Beasley, *supra* note 3, at 645 (no indication exists that Congress contemplated a private civil remedy for violations of Section 10(b) when the Securities Exchange Act was adopted in 1934). See also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976) (Section 10(b) does not expressly create a civil remedy for securities violation, and there is no indication that Congress, or the Commission when adopting Rule 10b-5 contemplated such a remedy); Schulman, *Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635 (1966-67) (lack of Congressional thought about a private civil right is demonstrable of why even the most ardent defenders of implied civil liability under Rule 10b-5 can cite no persuasive authority).

21. 15 U.S.C. § 78j(b) (1989). Section 78j(b) provides in pertinent part that:

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.

Id.

22. 17 C.F.R. § 240.10b-5 (1985). Rule 10b-5 provides that:

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 any facility of any national securities exchange,

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

private civil cause of action for Section 10(b) and Rule 10b-5 was first allowed in *Kardon v. National Gypsum Co.*,²³ and courts now routinely recognize that a private civil cause of action exists for Section 10(b) and Rule 10b-5.²⁴ Because Congress has not expressly provided for a private cause of action for violations of Section 10(b) and Rule 10b-5, the statutes are not subject to a specific statute of limitations.²⁵ Therefore, a court must find an applicable statute of limitations when Section 10(b) and Rule 10b-5 claims are filed.²⁶

In the 1946 *Holmberg v. Armbrrecht*²⁷ decision, the Supreme Court promulgated the absorption doctrine requiring federal courts to look to state law for the applicable statute of limitations when federal law is silent.²⁸ All federal courts, with the exception of the Third

(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 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.

Id.

23. 69 F. Supp 512 (E.D. Pa. 1946) (judicially creating a private cause of action). Noting that Section 10(b) did not expressly allow civil suits, the court reasoned that a violation of a legislative enactment makes the actor liable for the invasion of another's interest. *Id.* at 513. Because Congress did not specifically deny or withhold a civil right under the statute by clear and plain language, the general law implied that a civil cause of action existed. *Id.* at 514.

24. *Basic, Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976) (existence of a private cause of action for violations of Section 10(b) and Rule 10b-5 is now firmly established). See also *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971) ("it is now established that a private right of action is implied under section 10(b)"); *Beasley*, *supra* note 3, at 645 (a judicially implied private right of action under Section 10(b) and Rule 10b-5 is settled beyond dispute); Note, *Defenses to the Statutes of Limitations in Federal Securities Cases: The Fraudulent Concealment Doctrine and the Investment Decision Doctrine*, 38 S.C.L. REV. 789, 792 (1987) (although neither the Rule nor the statute expressly grant a private cause of action, every court considering the question has implied a private right of action).

25. See 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5 (neither provision contains a limitations period). See also Martenet, *Statutes of Limitations on SEC Enforcement Proceedings*, 41 VA. L. REV. 59 (1955) (the Securities Acts of 1933 and 1934 contain no provisions limiting the time within which the SEC may institute proceedings for their enforcement); Fletcher, *supra* note 2, at 128; *Beasley*, *supra* note 3, at 646 n.7 (no limitations period is provided because the Securities and Exchange Commission itself is not subject to any limitations period in 10b-5 cases); A. JACOBS, 5C LITIGATION AND PRACTICE UNDER RULE 10B-5 § 235.01 n.7 (1988 rev. ed.).

26. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976) (generally, the law of the forum state is followed when a federal statute has no statute of limitations). See also *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946) (Congressional silence as to a limitations period in a federal statute permits judicial interpretation of the appropriate period).

27. 327 U.S. 392 (1946).

28. *Id.* at 395. Congressional silence is interpreted to mean that federal policy requires adoption of the local law of limitations. *Id.* (citing *Campbell v. Haverhill*, 155 U.S. 610 (1895)). The implied absorption of state statutes of limitation is a fashioning of remedial details where Congress has not spoken but left matters for judicial determination under familiar

Circuit, use the virtually unquestioned absorption doctrine in determining the applicable state statute of limitations period to apply to Section 10(b) and Rule 10b-5 actions.²⁹ However, the circuits are in conflict as to what kind of state statute to apply.³⁰ For example, the Second,³¹ Ninth,³² and Tenth³³ Circuits analogize Section 10(b) and Rule 10b-5 claims to fraud actions.³⁴ Consequently, these circuits apply the statute of limitations period for common law fraud.³⁵ The Fourth,³⁶ Seventh,³⁷ Eighth,³⁸ and Eleventh³⁹ Circuits analogize Section 10(b) and Rule 10b-5 claims to state blue sky statutes and, therefore, look to state securities statutes for the appropriate limitations period.⁴⁰ The Fifth⁴¹ and Sixth⁴² Circuits apply a case-by-case

legal principles. *Id.* Since no statute of limitations is provided for civil actions under Section 10(b), the law of limitations of the forum state is followed as in other cases of judicially implied remedies. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976).

29. *Beasley*, *supra* note 3, at 646 (federal courts apply the absorption doctrine despite the serious problems that are created by using this approach).

30. *Bloomenthal*, *supra* note 4, at 26 (discussing the conflict between the federal circuit courts); *Beasley & Chamberlin*, *supra* note 16, at 197 (the limitations periods vary from state to state between a minimum period of two years and a maximum of ten years).

31. *See Armstrong v. McAlpin*, 699 F.2d 79, 86 (2d Cir. 1983) (for actions alleging fraudulent violations of the federal securities laws the statute of limitations for common law fraud is customarily applied); *Freschi v. Grand Coal Venture*, 767 F.2d 1041, 1046 (2d Cir. 1985) (applying California's limitations period for fraud).

32. *See Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369, 1370 (9th Cir. 1988) (applying California's limitations period for fraud).

33. *Ebrahimi v. E.F. Hutton & Co., Inc.*, 852 F.2d 516, 520 (10th Cir. 1988) (this court generally has applied the three-year limitations period for general fraud rather than the antifraud provision of the state's blue sky law).

34. *Beasley*, *supra* note 3, at 659-61.

35. *See id.*

36. *See O'Hara v. Kovens*, 625 F.2d 15, 18 (4th Cir. 1980) (applying Maryland's one-year blue sky statute).

37. *See Teamsters Local 282 Pension Trust Fund v. Angelos*, 815 F.2d 452, 455 (7th Cir. 1987) (applying a three-year limitations period from Illinois' securities laws despite the Supreme Court's decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, which required proof of scienter in Rule 10b-5 actions). *See also infra* notes 73-75 and accompanying text (discussing the importance of the *Ernst & Ernst* decision).

38. *See Harris v. Union Elec. Co.*, 787 F.2d 355, 360-61 (8th Cir. 1986) (applying Missouri's two-year blue sky statute of limitations).

39. *See Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1534 (11th Cir. 1987) (citing *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1507-09 (11th Cir. 1986)) (for all federal securities cases the appropriate statute of limitations to borrow is that of Georgia's Securities Act).

40. *Beasley*, *supra* note 3, at 659-61.

41. *Compare Corwin v. Marney, Orton Invs.*, 788 F.2d 1063, 1066-67 (5th Cir. 1986) (applying Texas' general fraud statute) *with* *First Federal Sav. & Loan Ass'n of Miami v. Mortgage Corp. of the South*, 650 F.2d 1376, 1378 (5th Cir. 1981), *White v. Sanders*, 650 F.2d 627, 632 (5th Cir. 1981) (both applying the two-year limitations period from Alabama's blue sky statute); *and Hudak v. Economic Research Analysts, Inc.*, 499 F.2d 996, 998 (5th Cir. 1974) (applying a two-year limitations period from Florida's blue sky statute) *with* *McNeal*

approach in determining which state statute to apply to Section 10(b) and Rule 10b-5 based actions. Consequently, these circuits apply either the state's blue sky statute or the state's common law fraud provision depending on the surrounding circumstances.⁴³ Finally, the First Circuit analogizes and classifies all Section 10(b) and Rule 10b-5 claims to personal tort actions and, therefore, applies the limitations period applicable to those actions.⁴⁴

The inconsistent and diverse approaches taken by the federal circuits cause a lack of uniformity regarding the applicable limitation periods.⁴⁵ States compound this lack of uniformity by using different limitation periods for the same kind of action.⁴⁶ Moreover, the circuits have added to the confusion by applying the federal equitable tolling doctrine to Section 10(b) and Rule 10b-5 actions under which the running of the limitations period is not tolled until the aggrieved party knew or should have known of the violation underlying the claim.⁴⁷

Two approaches are used in determining which state statute of limitations applies.⁴⁸ One approach is the "resemblance" or "closer analogy" test which requires an inquiry into the various elements of each state statute to ascertain which statute is substantively closer and more analogous to the federal statute.⁴⁹ The second approach is the "commonality of federal policy and purpose" test which requires an inquiry into which state statute best effectuates the policies of the federal securities laws.⁵⁰ Regardless of the approach used, courts

v. Paine, Webber, Jackson, & Curtis, Inc., 598 F.2d 888, 892-93 (5th Cir. 1979) (applying a four-year limitations period from Georgia's general fraud statute).

42. Compare *Herm v. Stafford*, 663 F.2d 669, 677-78 (6th Cir. 1981) (applying a three-year limitations period from Kentucky's blue sky law) with *Goudin v. KDI Corp.*, 576 F.2d 708, 711-12 (6th Cir. 1978) (applying a four-year limitations period from Ohio's general fraud statute).

43. Beasley, *supra* note 3, at 659-61.

44. See *Maggio v. Gerard Freezer & Ice Co.*, 824 F.2d 123, 127 (1st Cir. 1987) (applying Massachusetts' statute of limitations for personal tort actions).

45. See Beasley, *supra* note 3, at 648. See also Fiebach & Doret, *Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania*, 25 VILL. L. REV. 851, 854 (1980) (the absorption doctrine has created inconsistent and disparate results).

46. See Beasley, *supra* note 3, at 648; Beasley & Chamberlin, *supra* note 16, at 197 (the limitation periods vary from state to state with a minimum period of two years and a maximum of ten years).

47. See Beasley & Chamberlin, *Statute of Limitations Under Rule 10b-5*, 20 REV. OF SEC. AND COMMODITIES REG. 197, 198 (Nov. 16, 1988).

48. See A. JACOBS, *supra* note 25, at § 235.02 (1988 rev. ed.). See also Note, *supra*, note 3 at 1021.

49. See A. JACOBS, *supra* note 25, at § 235.02.

50. *Id.*

examine many of the same factors.⁵¹ However, even courts using the same or similar language in formulating these guidelines differ both in their interpretations of federal policy and in their assessments of what features of a particular claim are most important for purposes of comparison to state-law remedies.⁵²

II. CIRCUIT COURT APPROACHES TOWARD THE APPLICATION OF THE ABSORPTION DOCTRINE

A. State Blue Sky Statute Approach

Some federal courts apply the state's blue sky statutes as the appropriate limitations period to Section 10(b) and Rule 10b-5 violations. Blue sky statutes are state securities laws that were enacted to regulate the distribution and sale of irregular securities.⁵³ The Eighth Circuit applies the individual states' blue sky statutes as the appropriate limitation periods to Section 10(b) and Rule 10b-5 actions.⁵⁴ This approach was first articulated in *Vanderboom v. Sexton*.⁵⁵

In *Vanderboom*,⁵⁶ the court held that Arkansas' blue sky statute should apply to Rule 10b-5 actions rather than the limitations period found in Arkansas' general common law fraud statute.⁵⁷ The Eighth Circuit stated that the state statute that best effectuated the federal policy involved should apply.⁵⁸ The state blue sky statute bore the

51. See Annotation, *Applicable State Limitations Period in Actions Under § 10(b) of Securities Exchange Act of 1934 and SEC Rule 10b-5*, 72 A.L.R. FED. 763, 768 (1985). These factors include the commonality of purpose between the two statutes, the similarity of the scienter requirement, the parties protected by each statute, the parties liable under each statute, the type of remedies available under each statute, the relative length of limitations periods under each statute, and the effect of continuity on federal law. *Id.* at 768-83.

52. See Bloomenthal, *supra* note 4, at 26. See also Beasley, *supra* note 3, at 659-61.

53. See J. LONG, BLUE SKY LAW §§ 1.01-1.02 (1988) (the name is derived from the fact that the state statutes were passed to control schemes which had no more substance than the blue sky); BLACK'S LAW DICTIONARY 157 (5th ed. 1979).

54. See Beasley, *supra* note 3, at 659-61.

55. 422 F.2d 1233 (8th Cir. 1970).

56. *Id.* Various investors in American Home Builders (AHB) stock brought an action against sellers of the stock for fraud in connection with their purchase of the stock. *Id.* at 1236.

57. *Id.* at 1237. The blue sky statute required a person to bring suit no later than two years after the relevant contract of sale. *Id.* The fraud statute required an aggrieved person to bring a cause of action within three years from the date of discovery of the fraud. *Id.*

58. *Id.*

closest resemblance to Rule 10b-5, because both Rule 10b-5 and Arkansas' blue sky statute applied to both negligent and intentional misrepresentations.⁵⁹ The court stressed the importance of this commonality of purpose between the state blue sky statute and Section 10(b) and Rule 10b-5.⁶⁰ Specifically, the court noted the similarity of the lack of defenses available under both statutes, and that both statutes were enacted to combat securities fraud.⁶¹ However, in contrast with the express language of the state blue sky statute, the court applied the federal equitable tolling doctrine and held that the limitations period began to run only from the date of the discovery of the fraud, or from the date the fraud reasonably should have been discovered.⁶²

The Eighth Circuit reaffirmed the state blue sky approach in *In re Alodex Corp. Sec. Litig.*⁶³ In *Alodex*, the court applied the limitations period from the state statute that best effectuated the federal policy underlying Rule 10b-5.⁶⁴ In determining which state statute best effectuated federal policy the court conducted a two-step inquiry.⁶⁵ First, the court inquired whether the state statute shared a common purpose with Rule 10b-5.⁶⁶ Second, the court questioned whether the state statute permitted the assertion of substantially the same defenses available under Rule 10b-5 actions.⁶⁷ At that time, the Eighth Circuit did not require proof of scienter in Rule 10b-5 cases; therefore, the plaintiffs argued that because scienter was not required for common law fraud actions, and was required under the blue sky statute, the limitation period from the fraud statute should apply.⁶⁸

59. *Id.* at 1238-39 (applying the statute even though the court acknowledged that the two statutes were not identical). At this time, the Eighth Circuit construed Rule 10b-5 as applying to negligent and intentional misrepresentations. *Id.* at 1239-40. Under Arkansas common law, however, recovery for fraud and deceit was possible only if the plaintiff could prove scienter or an intentional misrepresentation. *Id.* at 1239. See generally Comment, *A Cry for Help: The Ninth Circuit and the Statute of Limitations in Rule 10b-5 Actions*, 22 U.C.L.A. L. Rev. 947, 954 (1975) (discussing the *Vanderboom* decision).

60. *Vanderboom v. Sexton*, 422 F.2d 1233, 1240 (8th Cir. 1970).

61. *Id.* at 1239-40. On the contrary, a clear distinction exists between Rule 10b-5 and Arkansas' law of fraud since the former eliminates several available defenses to defendants. *Id.* at 1239.

62. *Id.* at 1240. The court felt that the remedial policy expressed by Congress would best be served by this equitable tolling principle. *Id.*

63. 533 F.2d 372 (8th Cir. 1976).

64. *Id.* at 373.

65. *Id.* (applying the two factors from *Vanderboom*).

66. *Id.*

67. *Id.*

68. *Id.* The plaintiffs argued that the five-year statute of limitations from the fraud provision applied and, therefore, their claim was not time barred. *Id.*

The *Alodex* court rejected plaintiffs' contention that scienter was not required for common law fraud actions,⁶⁹ and affirmed the district court's holding that Iowa's blue sky statute's two-year limitation period had a commonality of purpose with Rule 10b-5 because both statutes dealt expressly with the sale of securities.⁷⁰ Additionally, the court reasoned that the blue sky statute would more closely approximate the federal policy and proof requirements of Rule 10b-5 actions because the same defenses existed under the Iowa blue sky statute and Rule 10b-5.⁷¹ Accordingly, the court affirmed the application of Iowa's blue sky statute because the common law fraud statute required the plaintiffs to prove an intentional misrepresentation which allowed for a greater number of available defenses.⁷²

Subsequent to the decision in *Alodex*, the Supreme Court held in *Ernst & Ernst v. Hochfelder*,⁷³ that scienter is a necessary element in Rule 10b-5 causes of action.⁷⁴ This holding was in direct conflict with the then prevailing Eighth Circuit view. Therefore, the Eighth Circuit in *Morris v. Stifel, Nicolaus & Co., Inc.*⁷⁵ reexamined its prior case law in light of the *Hochfelder* decision to determine whether the state's blue sky limitations period should still be applied to Rule 10b-5 actions.

In *Morris*, the investor claimed that because of the decision in *Ernst & Ernst* requiring proof of scienter, the Missouri common law fraud statute of limitations applied since both the Missouri fraud statute and Rule 10b-5 required scienter and Missouri's blue sky statute did not.⁷⁶ The Eighth Circuit held, however, that the two-year statute of limitations in Missouri's blue sky statute still applied and barred plaintiff's claim.⁷⁷ The court reasoned that Missouri's blue sky statute bore the closest resemblance to Rule 10b-5 because both statutes expressly dealt with the sale of securities, both proscribed misrepresentations or omissions of material facts in connection with the sale of securities, and both encouraged the policy of

69. *Id.* at 373-74.

70. *Id.*

71. *Id.* at 373. Since the Eighth Circuit did not require proof of scienter in Rule 10b-5 causes of action, negligent misrepresentations were actionable. *Id.*

72. *Id.* at 373-74.

73. 425 U.S. 185 (1976).

74. *Id.* at 193.

75. 600 F.2d 139 (8th Cir. 1979).

76. *Id.* at 143. In *Morris*, an investor alleged fraud against a brokerage firm in connection with the handling of her securities account. *Id.* at 140 n.3.

77. *Id.* at 140. The court asserted the continued vitality of *Vanderboom*, applying the statute of limitations that best effectuated the federal policy at issue. *Id.* at 144.

full disclosure of information in registration statements.⁷⁸ In addition, the court noted that although *Ernst & Ernst* made available an additional defense that was not found in Missouri's blue sky statute, greater similarities of defenses alone did not require the court to overrule precedent.⁷⁹ Furthermore, the court noted that commonality of purpose of the two statutes weighed more heavily in the final balance than did an additional defense, as long as the two statutes did not result in two fundamentally different causes of action.⁸⁰

B. Common Law Fraud Approach

Some federal courts apply the limitations period from the state's common law fraud statute rather than the blue sky limitations period to Section 10(b) and Rule 10b-5 violations. The Ninth Circuit applies the limitations period of the individual states' statutes applicable to fraud for Section 10(b) and Rule 10b-5 actions.⁸¹ The early decisions were relatively simple since state blue sky statutes were not in existence.⁸² However, application of the absorption doctrine became

78. *Id.* at 143 (stressing that these concerns are critical in ascertaining a commonality of purpose).

79. *Id.* at 144 (the *Vanderboom* analysis requires a weighing of commonality of purpose together with the similarity in defenses). Because both Rule 10b-5 and Missouri's fraud statute required scienter to be proven, an additional defense existed that did not exist under Missouri's blue sky statute. *Id.*

80. *Id.* at 146. The court noted that although the blue sky statute was not identical to Section 10(b) and Rule 10b-5, the two statutes bore a marked resemblance in both purpose and substance. *Id.* The most recent Eighth Circuit case upholding the rationale of *Vanderboom* is *Harris v. Union Electric Co.*, 787 F.2d 355 (8th Cir. 1986). In *Harris*, a class of investors sued a utility company for fraud in connection with the issuance and proposed call of the Utility's first mortgage bonds. *Id.* at 360. The plaintiffs claimed that the prospectus for the bond series misrepresented and omitted material facts regarding the call protection provisions. *Id.* The utility company contended that the claims were time barred by the two-year limitations period covered by Missouri's blue sky law because the action was commenced five years after the bonds were sold and three years after the investors learned of a similar plan. *Id.* at 360. The court agreed that Missouri's blue sky limitations period applied, but reasoned that the two-year limitations period did not begin to run until actual or constructive discovery of the fraud, i.e. the federal equitable tolling doctrine. *Id.* Actual or constructive discovery occurs when the fraud is discovered, or upon reasonable inquiry, when the fraud should have been discovered. *Id.*

81. See Beasley, *supra* note 3, at 659-61.

82. For example, in *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953), the Ninth Circuit Court of Appeals stated that the proper statute of limitations for causes of action under Section 10(b) and Rule 10b-5 was Washington's statute for common law fraud, since the federal act did not provide one. *Id.* at 634. The court stated that to hold otherwise and use the limitations period created by statute instead of for fraud would result in a triumph of form over substance. *Id.* at 635. The Washington fraud statute provided a three-year limitations period which would not accrue until the aggrieved party discovered or reasonably should have

considerably more difficult after the enactment of varying blue sky laws by individual states in the Ninth Circuit.

For example, in *Douglass v. Glenn E. Hinton Invs.*,⁸³ the court decided the issue of whether *Fratt v. Robinson*⁸⁴ was still controlling or whether the limitations period in Washington's newly enacted blue sky statute should apply.⁸⁵ In determining the applicable limitations period to apply, the court looked to the objectives of the substantive federal statute and how those objectives could best be achieved.⁸⁶ In affirming the continued vitality of *Fratt*, and thus rejecting the application of Washington's newly enacted blue sky statute, the court held that the common law fraud statute was superior to the blue sky statute.⁸⁷ The court reasoned that the blue sky limitations period did not allow for an extension of the limitations period for a reasonable failure to discover the fraud, which conflicted with the policies of the equitable tolling doctrine.⁸⁸ In addition, the court felt that to change the limitations period with each change in the substantive elements of a claim under local securities law would add additional uncertainty to the Section 10(b) actions upon which aggrieved persons had come to rely.⁸⁹

The Ninth Circuit, in *United California Bank v. Salik*,⁹⁰ also declined to apply the limitations period specified in a newly enacted California blue sky statute.⁹¹ The court listed three reasons for

discovered the facts constituting the fraud. *Id.* Additionally, in *Turner v. Lundquist*, 377 F.2d 44 (9th Cir. 1967), the Ninth Circuit first applied California's state statute for common law fraud as the appropriate time period for causes of action under Section 10(b) and Rule 10b-5. *Id.* at 46. The court ruled that the three-year time period prescribed by section 338(4) of the California Code of Civil Procedure should apply. *Id.* See *Douglass v. Glenn E. Hinton Inv., Inc.*, 440 F.2d 912, 915 (9th Cir. 1971) (discussing the *Turner* decision).

83. 440 F.2d 912 (9th Cir. 1971). In *Douglass* an investor brought an action against his broker and the broker's employer to recover damages due to fraud and misrepresentation involved in the purchase of securities. *Id.* at 913.

84. 203 F.2d 627 (9th Cir. 1953).

85. *Douglass*, 440 F.2d at 914-15.

86. *Id.* at 915.

87. *Id.* at 916.

88. *Id.* at 915. The court stated that although valid reasons might exist for limiting the limitations period for state securities law, federal policy states that the limitations period should not be tolled until the aggrieved person had a reasonable opportunity to discover the wrongful acts. *Id.* See Comment, *supra* note 59, at 959-60 (noting that no circuit court at the time *Douglass* was decided had determined that the statute of limitations would begin to run immediately at the time the wrongful act occurred). The blue sky statute required the action to be brought no later than three years after the consumation of the contract. *Douglass*, 440 F.2d at 915.

89. *Douglass*, 440 F.2d at 916.

90. 481 F.2d 1012 (9th Cir. 1973). See Comment, *supra* note 59, at 959-63 (discussing *Salik*).

91. *United Cal. Bank v. Salik*, 481 F.2d 1012, 1014 (9th Cir. 1973). In *Salik*, a purchaser

retaining the common law fraud approach as the appropriate statute for Section 10(b) and Rule 10b-5 violations.⁹² First, the court concluded that changing the applicable limitations period would add an unnecessary uncertainty to the prosecution of federal claims under Section 10(b).⁹³ Second, the court noted that the broad remedial policies of the federal securities laws were best served by a longer and not a shorter statute of limitations.⁹⁴ Third, adoption of the new California statute would be piecemeal by necessity.⁹⁵ Finally, the court pointed out that California's blue sky statute, which required a suit to be filed within one year of discovery or within four years of the transaction, conflicted with the federal equitable tolling doctrine which provided that statutes of limitations should run only upon actual or constructive notice.⁹⁶

Since *Salik*, the common law fraud approach has been continuously followed.⁹⁷ The most recent Ninth Circuit opinion is *Davis v. Birr, Wilson & Co., Inc.*⁹⁸ The court concluded that the three-year limitations period set forth in California's general fraud statute barred the investor's cause of action.⁹⁹ However, in a concurring opinion,

of stock brought suit against a corporation's former shareholders for violations of federal securities laws. *Id.* at 1014.

92. *Salik*, 481 F.2d at 1014-15.

93. *Id.* at 1015 (citing the reasoning and rationale of *Douglass*).

94. *Id.* (citing *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 8 (5th Cir. 1967)).

95. *Id.* Since the blue sky statute did not coincide with federal policy, the court stated that it would be forced to judicially amend the four-year maximum or eliminate the one-year provision and amend the four year provision to commence upon discovery. *Id.* The court stated that to adopt a new statute under such circumstances would be piecemeal and not preferable to continued utilization of the older fraud statutes. *Id.*

96. *Id.*

97. See, e.g., *Volk v. Davidson*, 816 F.2d 1406 (9th Cir. 1987); *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873 (9th Cir. 1984); *Robuck v. Dean Witter & Co., Inc.*, 649 F.2d 641 (9th Cir. 1980). In *Mosesian*, the court stated that applying a period other than that in section 338 of the California Code of Civil Procedure to a securities fraud case arising in California would be contrary to the law of this circuit." *Mosesian*, 727 F.2d at 876 n.5. In *Robuck v. Dean Witter & Co.* and *Volk v. Davidson*, the court looked to the most similar state-law causes of action and upheld their policy of applying California's general fraud statute under section 338, subsection (4) of the California Civil Procedure Code in determining the appropriate limitations period for federal securities violations under Section 10(b) and Rule 10b-5 causes of action. *Robuck*, 649 F.2d at 644; *Volk*, 816 F.2d at 1411-12. The *Robuck* court reasoned that an action for violation of anti-fraud provisions of federal securities laws most resembles an action for fraud; to trigger liability both the federal and state cause of action must include a showing of intentional or reckless conduct. *Robuck*, 649 F.2d at 644 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976)).

98. 839 F.2d 1369 (9th Cir. 1988). In *Davis*, an investor brought an action for fraud against a securities brokerage firm five years after he became aware of the alleged fraud. *Id.* at 1370.

99. *Id.* The only significant question in the case was at what time the investor discovered or reasonably should have discovered the wrongful act. *Id.*

Justice Aldisert stated that analogous limitation periods found in the Securities and Exchange Act of 1934 should be applied to Section 10(b) and Rule 10b-5 causes of action.¹⁰⁰

C. *Case-by-Case Approach*

The Fifth and Sixth Circuits use a state-by-state analysis and have no settled approach throughout the circuit in determining the appropriate limitations period to apply in Section 10(b) and Rule 10b-5 causes of action.¹⁰¹ Before the *Data Access* decision, the Third Circuit used a case-by-case approach in determining the appropriate state statute of limitations to apply to Rule 10b-5 actions.¹⁰² This approach led to the application of either a state's common law fraud or blue sky statute's limitations period, depending on the varying factual circumstances of the case and the elements of either statute.¹⁰³ Using this analysis, the Third Circuit held that the blue sky statute of limitations was preferred over the common law fraud statute.¹⁰⁴ If an analogous blue sky statute could not be found, however, the state statute of limitations for fraud should apply.¹⁰⁵

For example, *Roberts v. Magnetic Metals Co.*¹⁰⁶ applied the New Jersey common law fraud statute which provided a six-year limitations period rather than New Jersey's blue sky statute which provided a two-year limitations period.¹⁰⁷ The court observed that the New Jersey Securities Act protected only buyers of securities and afforded no protection to sellers or tenderers of securities, such as the plaintiffs.¹⁰⁸ In addition, the court noted that the blue sky statute had nothing to do with fiduciary duties of officers, directors, or insiders, such as the defendants, nor with frauds perpetrated by buyers or tonderees in a merger.¹⁰⁹ Consequently, the state's blue sky statute

100. *Id.* at 1370.

101. *See* Beasley, *supra* note 3, at 659-69.

102. *See id.* *See also* Annotation, *supra* note 51, at 798-801.

103. *See* Beasley, *supra* note 3, at 659-69.

104. Annotation, *supra* note 51, at 798.

105. *Id.*

106. 611 F.2d 450 (3rd Cir. 1979).

107. *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 456 (3rd Cir. 1979). In *Roberts*, a stockholder brought an action against a corporation and others to recover for securities violations in connection with a merger transaction. *Id.* at 451-52.

108. *Id.* at 453. In reversing the District Court's decision to use the New Jersey blue sky statute, the Third Circuit inquired whether a state court would entertain an action for the relief sought. *Id.* at 452.

109. *Id.* Therefore, the court felt that whether a New Jersey court would apply the six-

was not analogous since the plaintiffs were unable to bring a cause of action under that statute in state court.¹¹⁰

Additionally, *Biggans v. Bache Halsey Stuart Shields, Inc.*,¹¹¹ applied the Pennsylvania statute of limitations for common law fraud rather than Pennsylvania's blue sky statute since the latter did not provide the plaintiff with a cause of action for the relief requested.¹¹² The court reasoned that the allegations of the complaint gave rise to a cause of action under both Section 10(b) and the Pennsylvania fraud statute.¹¹³ Moreover, the state blue sky statute expressly stated that the remedies supplemented rather than supplanted available common law remedies.¹¹⁴

III. A NEW FEDERAL APPROACH

A. *The Data Access Decision: Holding And Rationale*

In 1988, the Third Circuit in *In re Data Access Sec. Litig.*¹¹⁵ abandoned the traditional absorption doctrine approach for determining the appropriate statute of limitations period applicable to Section 10(b) and Rule 10b-5 causes of action.¹¹⁶ Sitting en banc, the Third Circuit held that the applicable limitations period should be

year limitations period governing actions for common law fraud was unclear. *Id.* The common law fraud statute is the closer analogy because the facts alleged in the complaint are actionable under both the 1934 Act and New Jersey's common law fraud statute. *Id.* at 454.

110. *Id.* at 453 (the transactions alleged in the complaint state a cause of action under state law for breach of fiduciary duty and for common law fraud).

111. 638 F.2d 605 (3rd Cir. 1980). In *Biggans*, an investor brought an action against a brokerage house for churning in violation of federal securities laws. *Id.* at 605. Churning occurs when a broker abuses a customer's trust and confidence for personal gain by inducing transactions in the customer's account which are excessive in size or frequency in view of the financial resources and character of the account. *Id.* at 607.

112. *Id.* at 609.

113. *Id.* at 610.

114. *Id.* The Third Circuit adhered to the reasoning and rationale of *Roberts* and *Biggans* in *Sharp v. Coopers & Lybrand*, 649 F.2d 175 (3rd Cir. 1981). In *Sharp*, the court applied the Pennsylvania common law fraud statute. *Id.* at 178.

115. 843 F.2d 1537 (1988).

116. *Id.* at 1151. In *Data Access*, purchasers of common stock brought a class action suit against the issuer of the stock and the corporate attorneys and accountants who assisted in the preparation and filing of the corporation's registration statement and 10-K Forms which allegedly contained misrepresentations of material facts. *Id.* at 1538-39. Plaintiffs contended that the limitations period for their Section 10(b) and Rule 10b-5 causes of action should be governed by New Jersey's six-year statute governing common law fraud actions. *Id.* at 1538. The defendants argued that New Jersey's blue sky law with a limitations period of two years should apply. *Id.*

borrowed from analogous limitation periods of express causes of action under federal law rather than from analogous state statutes of limitations.¹¹⁷ The court applied the prevailing limitations period from companion provisions of the 1934 Securities and Exchange Act which provided that a claim must be brought within one year after the plaintiff has discovered the facts constituting the securities violation, and in no event more than three years after the commission of the the illegal act.¹¹⁸ The Third Circuit Court relied on three Supreme Court cases to support this new approach: *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*,¹¹⁹ *Wilson v. Garcia*,¹²⁰ and *DelCostello v. International Brotherhood of Teamsters*.¹²¹

These cases instruct that when a federal statute does not contain a limitations period a court must first determine whether all of the claims arising under the federal statute should be characterized in the same manner, or whether a case-by-case approach should be used in light of all of the surrounding circumstances.¹²² Once this determination is made, courts should usually borrow the most closely analogous statute of limitations from state law.¹²³ However, state statutes of limitations, in certain circumstances, can be unsatisfactory vehicles for the enforcement of federal law.¹²⁴ In such circumstances, when another federal law would clearly provide a closer analogy, and the federal policies at stake and the practicalities of litigation would make the federal rule a significantly more appropriate vehicle than any state alternative, the limitations period from that rule should be borrowed.¹²⁵ This is the *Wilson* two-prong test.

117. *Id.* at 1550.

118. *Id.*

119. 483 U.S. 143 (1987).

120. 471 U.S. 261 (1985).

121. 462 U.S. 151 (1983).

122. *Wilson v. Garcia*, 471 U.S. 261, 268 (1985). In *Wilson*, the Supreme Court held that federal rather than state law governs the characterization of federal claims. *Id.* at 262. The Court held that section 1983 claims are best characterized as personal injury actions. *Id.* at 276.

123. *Agency Holding Corp. v. Malley-Duff & Assoc's.*, 483 U.S. 143, 147 (1987); *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 171-72 (1983).

124. See *Malley-Duff*, 483 U.S. at 147 (citing *DelCostello*); *DelCostello*, 462 U.S. at 161 (in those circumstances, adopting state rules that differ with the purpose or operation of federal substantive law may be inappropriate).

125. See *Malley-Duff*, 483 U.S. at 147 (citing *DelCostello*); *DelCostello* 462 U.S. at 172. In *Malley-Duff* the Supreme Court decided that the Clayton Act offered the closest analogy to civil RICO because of the similar purpose and structure between the two federal statutes and the clear legislative intent to pattern RICO's civil enforcement provision after the Clayton Act's provision. *Id.* at 150-53. In *DelCostello*, the applicable federal statute was actually designed to accommodate a balance of interests that were very similar to the interests in the labor dispute of the case. *DelCostello*, 462 U.S. at 169.

Initially, the Third Circuit Court of Appeals acknowledged that the Supreme Court had yet to rule on the applicable limitations period regarding Section 10(b) and Rule 10b-5 actions.¹²⁶ The Third Circuit described the practical difficulties and inadequacies of its present case-by-case approach, which resulted in the application of inconsistent limitation periods applying to Section 10(b) and Rule 10b-5 actions within the Third Circuit.¹²⁷ To deal with these problems of applying inconsistent limitation periods,¹²⁸ the *Data Access* court followed the “two-prong” test set forth in *Wilson v. Garcia*.¹²⁹

Using the first prong of the *Wilson* test, the Third Circuit recognized the necessity of establishing a uniform limitations period.¹³⁰ The Third Circuit reasoned that its present case-by-case approach did not promote the federal interests in uniformity, minimization of unnecessary litigation, and certainty.¹³¹ A single characterization of all Section 10(b) and Rule 10b-5 claims, on the other hand, would minimize uncertainty and time consuming litigation.¹³² Consequently, the court held that all claims arising under Section 10(b) and Rule 10b-5 should be characterized in the same manner, and the single most appropriate statute of limitations period should be selected.¹³³

Next, the Third Circuit applied the second prong of *Wilson* to determine whether to apply a state or a federal limitations period.¹³⁴ The court first compared New Jersey’s blue sky statute with Rule 10b-5 to determine whether the blue sky statute was a satisfactory vehicle for the enforcement of federal securities law. The court

126. *Data Access*, 843 F.2d at 1539.

127. *Id.* at 1539-42. Some of the difficult practicalities and inadequacies of the pre-*Data Access* approach include the difficult task of interpreting state limitation periods, examining each securities law claim with great particularity, the wasting of untold hours of court time, and the fact that no bright line exists to guide the district courts that comprise the Third Circuit. *Id.* Additionally, depending upon the nature of the securities violation that a plaintiff may choose to base his claim or claims upon, differing limitations periods might apply even though both claims would be brought under Section 10(b). *Id.* at 1541.

128. *Id.* at 1543. The court wanted to modify its prior decisions in *Biggans* and *Roberts* in order to be consistent with three subsequent Supreme Court cases. *Id.*

129. *Id.* at 1542. The two step approach of *Wilson* was explained in *Malley-Duff*. *Malley-Duff*, 483 U.S. at 146-47.

130. *Data Access*, 843 F.2d at 1543.

131. *Id.* The court wanted to discontinue the pattern of inconsistency which had begun in the *Roberts* decision where a seller of securities in New Jersey would have had six years to bring his suit under Section 10(b), but a buyer would have had only two years under the same statute. *Id.* at 1541.

132. *Id.* at 1543.

133. *Id.* at 1544. Uniformity is not accomplished by an approach when the limitations period for each federal claim depends on the particular facts or precise legal theory of each claim. *Id.* at 1543.

134. *Id.* at 1545 (using the *DelCostello* test that was followed in *Malley-Duff*).

reasoned that New Jersey's blue sky statute was unsatisfactory because a question existed as to whether non-sellers of securities, as in this case, could be held liable under the blue sky statute.¹³⁵

The court then compared the common law fraud statute with Rule 10b-5 to determine whether the two statutes were analogous.¹³⁶ The court declared that substantive differences existed between private causes of actions under Section 10(b) and Rule 10b-5 and available common law fraud actions.¹³⁷ The common law fraud statute required plaintiffs to establish their case by clear and convincing evidence, whereas Section 10(b) and Rule 10b-5 did not impose such an exacting burden of proof on plaintiffs.¹³⁸ In addition, the purpose of federal securities laws was to rectify the deficiencies and inadequacies of bringing a federal securities law cause of action under available state common law fraud theories.¹³⁹ The court concluded that far from being identical to or a reasonable facsimile of common law fraud, Section 10(b) and Rule 10b-5 causes of action were clearly *sui generis*.¹⁴⁰

Since neither of the state statutes provided a perfect analogy to Rule 10b-5, the court had to decide whether to look elsewhere in federal law to find an analogous limitations period. The Third Circuit acknowledged that in two prior Third Circuit cases, two justices had expressed a desire to adopt an analogous federal limitations period but had felt bound by the Supreme Court's long acquiescence in applying the absorption doctrine to Section 10(b) and Rule 10b-5 cases.¹⁴¹ The Third Circuit noted that after these two cases, the

135. *Id.* at 1544. If the state blue sky statute did not provide a cause of action against non-sellers of securities, and since Rule 10b-5 does, the blue sky statute would not be a satisfactory vehicle for the enforcement of federal securities laws. *Id.*

136. *Id.* at 1544-45.

137. *Id.*

138. *Id.* at 1544. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (a preponderance of the evidence standard allows both parties to "share the risk of error in roughly equal fashion").

139. *Data Access*, 843 F.2d at 1544. Other differences included the fact that the two causes of action are distinct breeds; that the classic tort of misrepresentations and deceit are completely different from the world of commercial transactions to which Rule 10b-5 is applicable, and finally that the antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud. *Id.*

140. *Id.* at 1545.

141. See *id.* at 1540. See also *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3rd Cir. 1979). In *Roberts*, Judge Gibbons expressed the opinion that much could be said in favor of adopting a limitations period from analogous federal causes of action, but noted that the rule of applying a state limitations period had been established for many years and that an inferior court was not free to change it. *Id.* at 454. Judge Seitz noted that several commentators had argued for the application of a limitations period from analogous federal statutes. *Id.* at 463.

Supreme Court applied limitation periods from analogous federal statutes to other federal statutes that did not contain limitation periods.¹⁴² Because the Supreme Court opened the door allowing federal courts to borrow limitation periods from federal law, the Third Circuit looked to the express provisions contained in the Securities and Exchange Act of 1934 to find an analogous limitations period.¹⁴³

The court compared Section 10(b) and Rule 10b-5 to the companion provisions of the 1934 Act in determining whether these provisions provided a closer analogy than available state statutes. The Court first pointed out five similarities in purpose and policy between Section 10(b), Rule 10b-5, and the companion provisions contained in the 1934 Act.¹⁴⁴ The court noted that Section 10(b) and its companion provisions were aimed at the same objectives,¹⁴⁵ reflected the same purposes as the original Securities Act of 1933,¹⁴⁶ were intended to compensate the same type of injury,¹⁴⁷ were enacted to fill a void in the common law,¹⁴⁸ and were created to provide remedies that would be uniform throughout the United States.¹⁴⁹ With respect to this last factor, the court stressed that the limitations periods found in the diverse body of state tort law and the plethora of state blue sky law did not promote national uniformity of enforcement of Section 10(b) and Rule 10b-5 actions.¹⁵⁰ Furthermore, the Third Circuit stated that the companion provisions of the 1934 Securities and Exchange Act reflected the federal policies at stake and the practicalities of litigation, including the need for national uniformity of limitations periods, the intent of Congress to create shorter and absolute limitations periods, and the strong federal interest for plaintiffs to file suit quickly.¹⁵¹ Consequently, the Third Circuit declared

Although he would have adopted this approach, he observed that since the Supreme Court had rarely deviated from the rule of applying a state limitations period, neither should the Third Circuit. *Id.*

142. *DelCostello*, 462 U.S. at 151-52 (applying the six-month limitations period of Section 10(b)); *Malley-Duff*, 483 U.S. at 152 (applying the four-year statute of limitations from the Clayton Act).

143. *Data Access*, 843 F.2d at 1549.

144. *Id.* at 1548-49.

145. *Id.*

146. *Id.* The Act's purpose is 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. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1549.

151. *Id.* at 1545-49.

that the companion provisions of the 1934 Securities and Exchange Act clearly provided a far closer analogy than available state statutes, and the policies and practicalities of litigation were better served by adopting the limitations period from federal law.¹⁵²

The Third Circuit concluded that since the Supreme Court had directed courts to apply the most analogous federal statute of limitations to certain federal causes of action, and in light of the similarities of purpose between Section 10(b) and the Securities and Exchange Acts of 1933 and 1934, continuing to borrow limitations periods from state law would be anomalous and bizarre.¹⁵³ Furthermore, any analogies to traditional state causes of action were bound to be imperfect.¹⁵⁴ In contrast, the federal scheme of limitations expressly set forth in the Securities and Exchange Act of 1934 clearly provided a closer analogy than available state statutes.¹⁵⁵ Therefore, the Third Circuit Court held that the limitations periods contained in the companion provisions of the 1934 Securities and Exchange Act¹⁵⁶ should be applied to all Section 10(b) and Rule 10b-5 actions arising in the Third Circuit.¹⁵⁷

B. *Critique of the Data Access Decision*

The *Data Access* court based its decision to borrow a federal limitations period rather than a state statute on three main premises: (1) All claims arising under Section 10(b) and Rule 10b-5 should be characterized in the same manner; (2) neither the state's blue sky statute nor common law fraud statute provided a perfect analogy to Section 10(b) and Rule 10b-5 and both were unsatisfactory vehicles for the enforcement of federal securities laws; and (3) the companion provisions of the 1934 Securities and Exchange Act clearly provided a far closer analogy than available state statutes because the policies and practicalities of litigation were better served by adopting the limitations period from federal law. This section will discuss the

152. *Id.* at 1545.

153. *Id.* at 1549.

154. *Id.* at 1550.

155. *Id.* at 1545.

156. See 15 U.S.C. §§ 9(e), 78i(e) (manipulation of security prices); §§ 16(b), 78p(b) (profits from purchase and sale of securities within six months); §§ 18(c), 78r(c) (liability for misleading statements in any application, report, or filed document); §§ 29(b), 78cc(b) (validity of contract provisions in violation of Act or regulations thereunder).

157. *Data Access*, 843 F.2d at 1545, 1548.

strengths and weaknesses of each premise comprising the court's conclusions.

1. Characterization of All Section 10(b) and Rule 10b-5 Claims

The Third Circuit correctly held that all claims arising under Section 10(b) and Rule 10b-5 should be characterized in the same manner. However, instead of applying the absorption doctrine under this new characterization approach, as nine other circuit courts do,¹⁵⁸ the court utilized the second prong of *Wilson*: whether a federal or state statute of limitations should apply to Section 10(b) and Rule 10b-5 actions.¹⁵⁹ The court could have solved the problem of applying inconsistent limitations periods, however, by adhering to the traditional absorption doctrine approach and borrowing a state statute. Since all claims arising under Section 10(b) and Rule 10b-5 would be characterized in the same manner, the case-by-case approach would be unnecessary; uniform and consistent limitations periods would then apply within each individual state.¹⁶⁰ Moreover, characterization of all claims will save time-consuming and unnecessary litigation.¹⁶¹ This approach alone, however, would not have achieved the result of applying uniform limitations periods throughout the United States because state limitations periods vary in length.

2. Reasons the Court Looked to Federal Law Rather than State Law

The court gave two reasons for concluding that the limitations period from federal law (i.e. the companion provisions of the 1934 Securities and Exchange Act) should be applied to Section 10(b) and Rule 10b-5 actions rather than available state statutes: Neither state statute provided a perfect analogy to Rule 10b-5, and both were

158. See *Beasley*, *supra* note 3, at 659-61.

159. *Data Access*, 843 F.2d at 1545. See *Wilson*, 471 U.S. at 267-68.

160. The Third Circuit was troubled that within a particular state, and particularly within a single case, two different limitation periods could be applied to claims brought under Rule 10b-5. See *Data Access*, 843 F.2d at 1541.

161. For example, in the Ninth Circuit all Section 10(b) and Rule 10b-5 claims are characterized in the same manner and, therefore, very few cases actually litigate the issue of which state statute of limitations to apply. See *infra*, notes 82-100 and accompanying text.

unsatisfactory vehicles for the enforcement of federal securities laws.¹⁶²

a. Unsatisfactory Vehicles for the Enforcement of Federal Securities Laws

The court properly held that New Jersey's blue sky statute was unsatisfactory since non-sellers of securities, as the defendants were, could not be held liable under the statute.¹⁶³ The Court's rationale in dismissing the common law fraud statute is somewhat less obvious; the facts of *Data Access* make it difficult to understand why Section 10(b) and Rule 10b-5 actions qualify as one of the few limited circumstances where the state's common law fraud statute is an unsatisfactory vehicle for the enforcement of federal securities law. The Third Circuit merely discussed the differences between the New Jersey common law fraud statute and Section 10(b) and Rule 10b-5 without stating why the plaintiffs would be unable to bring their claim under the state's common law fraud statute.

In contrast, the Supreme Court in *DelCostello* specifically stated that the state limitations period was unsatisfactory for the enforcement of federal law; since a large portion of the damages would remain uncollectible in almost every case,¹⁶⁴ the statute failed to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights.¹⁶⁵ Moreover, the Supreme Court in *Malley-Duff* specifically stated that there was a lack of any satisfactory state law analogue to RICO.¹⁶⁶ The reasons that persuaded the Supreme Court to abandon the traditional absorption doctrine and look to federal law in *DelCostello* and *Malley-Duff* do not appear to be present

162. Since the Supreme Court in *Malley-Duff* held that only in those limited circumstances where state statutes are unsatisfactory vehicles for the enforcement of federal law should courts look to federal limitations periods, the Third Circuit must have implicitly concluded that both of the state's statutory limitation periods were unsatisfactory vehicles for the enforcement of federal securities law. *Malley-Duff*, 483 U.S. at 147-48.

163. *Data Access*, 843 F.2d at 1544 (a substantial question exists whether non-sellers of securities could be held liable under the state's blue sky laws).

164. *DelCostello*, 462 U.S. at 168. The Supreme Court gave other examples of when a state statute has been declared unsatisfactory. *Id.* at 162. See *Oxidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (the Court declined to apply the state limitations period, reasoning that to do so "might unduly hinder the policy of the [1964 Civil Rights] Act by placing too great an administrative burden on the agency"). *Id.* at 367. See also *Holmberg v. Armbricht*, 327 U.S. 392 (1946) (the Court held that the state's limitations period would not apply because the federal cause of action was brought under equity principles only, which are hostile and adverse to the mechanical rules of statutes of limitations). *Id.* at 396.

165. *DelCostello*, 462 U.S. at 166.

166. *Malley-Duff*, 483 U.S. at 152.

under the circumstances of *Data Access*. Therefore, although differences appeared between the two statutes, the court's reasoning in concluding that the state's common law fraud statute was unsatisfactory for enforcement of federal securities law is unclear.

b. *No Perfect Analogy*

The court stated that the common law fraud statute did not provide a perfect analogy to Section 10(b) and Rule 10b-5.¹⁶⁷ However, *DelCostello* and *Malley-Duff* instruct that the mere fact that state law does not provide a perfect analogy to the federal cause of action is never in and of itself sufficient to justify the adoption of a federal statute of limitations period.¹⁶⁸ Moreover, the Supreme Court stated that the norm for borrowing limitation periods is to resort to state law unless no obvious state law choice for application to a given federal cause of action exists.¹⁶⁹ In *Data Access*, the state common law fraud statute was an obvious state law choice because the common law fraud statute would have provided the plaintiff with a cause of action as opposed to the state's blue sky statute.¹⁷⁰

The court in *Data Access* did conclude, however, that because of the differences between the state and federal statutes, Section 10(b) and Rule 10b-5 causes of action appeared to be sui generis.¹⁷¹ The Supreme Court used this language in *Malley-Duff* in concluding that RICO did not have any state law analogue.¹⁷²

167. *Data Access*, 843 F.2d at 1550.

168. See *Malley-Duff*, 483 U.S. at 147-48. See also *DelCostello*, 462 U.S. at 171. The Supreme Court stressed that its decision to borrow a limitations period from federal law under the particular circumstances of the case should not be taken as a departure from the normal practice of borrowing limitations periods from state law. *Id.* Furthermore, the Court stated that federal courts should not eschew use of state limitations periods any time state law fails to provide a perfect analogy. *Id.* See also *Wilson v. Garcia*, 471 U.S. 260 (1985) (although the Supreme Court held that federal rather than state law governs the characterization of federal claims, the length of the statute of limitations was to be borrowed from state law). *Id.* at 261.

169. *Malley-Duff*, 483 U.S. at 147-48; *DelCostello*, 462 U.S. at 171.

170. The state's common law fraud statute was an obvious choice because common law fraud statutes had been used to redress plaintiffs' claims in *Biggans* and *Roberts* and in other cases. See, e.g., *Ging v. Parker-Hunter Inc.*, 544 F. Supp. 49, 52 (1982) (applying Pennsylvania's six-year statute of limitations for fraud actions); *Fickinger v. C.I. Planning Corp.*, 556 F. Supp. 434, 439 (1982) (applying Pennsylvania's common law fraud limitations period); *Doflemeyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372, 379 (1983) (applying Delaware's three-year limitations period of common law fraud).

171. *Data Access*, 843 F.2d at 1545.

172. *Malley-Duff*, 483 U.S. at 153. The Supreme Court held that applying Pennsylvania's "catch-all statute of limitations would be wholly at odds with . . . the sui generis nature of RICO." *Id.*

3. *Reasons for Applying the Companion Provisions of the 1934 Securities and Exchange Act to Section 10(b) and Rule 10b-5 Actions*

a. *The Policies and Practicalities of Litigation Are Better Served by Applying a Federal Limitations Period*

The Third Circuit stated that the federal policies at stake and the practicalities of litigation would make the federal limitations period a significantly more appropriate vehicle than any state alternative.¹⁷³ First, the court placed great emphasis on the need for national uniformity of limitation periods for Section 10(b) and Rule 10b-5, since federal law provides for uniform remedies under the Securities Acts in all fifty states.¹⁷⁴ The court noted that almost all of the companion provisions have the same limitations period which would avoid intolerable uncertainty and time-consuming litigation.¹⁷⁵ Furthermore, the existing necessity for uniform federal remedies in security cases requires a concomitant necessity for a uniform federal statute of limitations.¹⁷⁶ Applying state tort limitations periods or blue sky limitations periods will not meet these goals.¹⁷⁷

Second, the Third Circuit concluded that because Congress had declared limitations periods of no longer than three years for expressly created securities actions, this same limitations period should be used for Section 10(b) and Rule 10b-5.¹⁷⁸ This is a curious statement since the Third Circuit voiced its displeasure with courts that formulate judicially-declared statutes of limitation and then suggest that this would have been the intent of Congress had Congress created the express cause of action.¹⁷⁹ Nevertheless, the Third Circuit used this same approach to support its newly stated position.

173. *Data Access*, 843 F.2d at 1545-49.

174. *Id.* at 1549.

175. *Id.* at 1548 (except for section 16(b)).

176. *Id.* at 1549.

177. *Id.*

178. *Id.* at 1546, 1550 (relying on *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.) *cert. denied*, 108 S. Ct. 329 (1987)).

179. *Data Access*, 843 F.2d at 1547 (describing courts that resort to this "political science fiction").

Third, the court held that the three-year limitations period was absolute. The court noted a strong federal interest in requiring plaintiffs to file suit quickly once they have notice of the misconduct.¹⁸⁰ The absolute three-year limitations period contradicts this interest and the principles of the equitable tolling doctrine that had previously been recognized in all Circuits.¹⁸¹ If a strong federal policy requires plaintiffs to file suits quickly after receiving actual or imputed notice, an unsophisticated plaintiff may fail to discover a highly sophisticated manipulative or deceptive act until after the absolute limitations period has run.¹⁸²

Fourth, the court reasoned that the prevailing three-year limitations period contained in the companion provisions of the 1934 Act reflected Congressional concern that a longer period of limitations would allow lingering liabilities to disrupt normal business operations and would encourage the filing of false claims.¹⁸³ The Third Circuit concluded that a shorter limitations period was the intent of Congress.¹⁸⁴ This conclusion is questionable since other circuits have expressed the view that a longer limitations period is coextensive with federal policy.¹⁸⁵ In fact, the Supreme Court in *DelCostello* chose to apply a longer statute of limitations period because the shorter time period would not allow the aggrieved party a satisfactory opportunity to vindicate his rights.¹⁸⁶

Notwithstanding the considerable amount of support for the *Data Access* decision to apply a uniform limitations period to Section

180. *Id.* at 1544 (citing Chief Judge Seitz in *Roberts*).

181. See Comment, *supra* note 1, at 82. See also Note, *Defense to the Statute of Limitations in Federal Securities Cases: The Fraudulent Concealment Doctrine and the Investment Decision Doctrine*, 38 S.C. L. Rev. 789, 810-812 (1986-87) (discussing the tolling of absolute limitations periods).

182. See Comment, *supra* note 1, at 82-83 (the equitable tolling doctrine allows plaintiffs to bring suit no later than the limitations period after the individual discovered or reasonably should have discovered the fraudulent act).

183. *Data Access*, 843 F.2d at 1546 (quoting *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.) *cert. denied*, 108 S. Ct. 329 (1987)).

184. See *Data Access*, 843 F.2d at 1546.

185. See, e.g., *U.C. Bank v. Salik*, 481 F.2d 1012, 1015 (9th Cir. 1973); *Nickels v. Koehler Management Corp.*, 541 F.2d 611, 614 (6th Cir. 1976); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 407, 409 (2d Cir. 1975). See also Comment, *supra* note 1, at 80 (a conflict exists as to whether a longer or shorter limitations period is better). Some courts have reasoned that the broad remedial policies of the federal securities laws are best served by a longer, not a shorter, limitations period. *Id.* However, courts have reasoned that a shorter limitations period is desirable because it is more analogous to the express limitations contained in other sections of the 1933 and 1934 Securities and Exchange Acts. *Id.* See also, Note, *supra* note 48, at 1040-41 (discussing the differing views of whether a longer or shorter limitations period best serves the broad remedial policies of federal securities laws).

186. *DelCostello*, 462 U.S. at 166.

10(b) and Rule 10b-5 actions,¹⁸⁷ the reasoning and rationale employed by the Third Circuit construes and interprets the three recent Supreme Court decisions in such a way as to arrive at a result that, although needed, is not judicially mandated nor directed.

IV. FUTURE OF THE ABSORPTION DOCTRINE AFTER THE DATA ACCESS DECISION

A. *All Federal Courts Should Follow the Data Access Decision*

The *Data Access* decision endorses the rationale that a national uniform limitations period should be adopted for Section 10(b) and Rule 10b-5 causes of action. A uniform limitations period will promote consistency in Section 10(b) and Rule 10b-5 cases throughout the United States and therefore will minimize time-consuming litigation concerning the appropriate statute of limitations. In addition, a uniform limitations period will promote certainty and consistency since plaintiffs will know the time period in which to file their Section 10(b) or 10b-5 claim. These goals have considerable support throughout the legal literature.¹⁸⁸ Whether or not the Supreme Court actually "mandated" the decision in *Data Access*, the result is an answer to a long overdue problem. Federal courts have been unwilling to adopt a limitations period from federal law because no other court has done so.¹⁸⁹ Now that the Third Circuit has opened the door and taken the initial step in breaking away from the anachronistic application of the absorption doctrine by applying a limitations period from federal law, all federal courts should adopt the *Data Access* approach.

B. *Likelihood of Other Federal Courts Following the Data Access Decision*

The law is settled in eight circuit courts of appeal as to the appropriate limitations period to be applied in Section 10(b) and

187. See A. JACOBS, *supra* note 25, at § 235.02; Beasley, *supra* note 3, at 657; Bloomenthal, *supra* note 4, at 25-26; Block & Barton, *supra* note 5, at 380-81.

188. See *supra* note 187 and accompanying text.

189. See *supra* note 141 and accompanying text.

Rule 10b-5 causes of action.¹⁹⁰ As a result, plaintiffs have come to rely on specific lengths of limitations periods in Section 10(b) and Rule 10b-5 actions. Since a circuit court opinion is only persuasive authority rather than binding authority on other circuits, district courts will be unlikely to follow *Data Access*. In fact, *Data Access* has been cited but not followed in three recent cases.¹⁹¹

In *TCF Banking & Savings v. Arthur Young & Co.*,¹⁹² the Minnesota district court rejected Arthur Young's argument that the limitations period should be borrowed from federal law, as in *Data Access*, and instead applied the state's blue sky statute, adhering to the rule in *Vanderboom*.¹⁹³ The Minnesota district court noted that at the time of the *Data Access* decision, the law in the Third Circuit concerning the limitations period under Section 10(b) was particularly confused and unsettled.¹⁹⁴ Under the old Third Circuit approach, no uniform limitations period existed even within the same state.¹⁹⁵ Furthermore, the Minnesota district court stated that the decision of *Malley-Duff*, on which *Data Access* relied, related only to civil RICO actions.¹⁹⁶ The district court also pointed out that nowhere in the *Malley-Duff* opinion did the Supreme Court intimate or suggest that lower federal courts should apply a federal limitations period to Section 10(b) and Rule 10b-5 claims.¹⁹⁷ In *Durham v. Business Management Assocs.*,¹⁹⁸ the Eleventh Circuit continued applying Alabama's two-year statute of limitations applicable to actions for the fraudulent sale of securities.¹⁹⁹ The court merely dismissed the *Data Access* decision as contrary authority and did not discuss it any further.²⁰⁰ In *Robin v. Doctors Offcenters Corp.*,²⁰¹ the court adhered to the Seventh Circuit's consistent approach of applying the forum state's blue sky limitations period.²⁰² The court noted that despite growing support for the adoption of a uniform limitations period,

190. See Beasley, *supra* note 3, at 659-661.

191. *TCF Banking & Savings, F.A. v. Arthur Young & Co.*, 697 F. Supp. 362 (D. Minn. 1988); *Durham v. Business Management Assocs.*, 847 F.2d 1505 (11th Cir. 1988); *Robin v. Doctors Offcenters Corp.*, 686 F. Supp. 199 (N.D. Ill. 1988).

192. 697 F.Supp. 362 (D. Minn. 1988).

193. *Id.* at 366.

194. *Id.* at 365.

195. *Id.* at 365-66 (noting that the law in the Eighth Circuit is clear and more settled than in the Third Circuit prior to *Data Access*).

196. *Id.* at 364.

197. *Id.*

198. 847 F.2d 1505 (11th Cir. 1988).

199. *Id.* at 1508.

200. *Id.*

201. 686 F. Supp. 199 (N.D. Ill. 1988).

202. *Id.* at 206.

courts have continued applying the relevant state statutes of limitation.²⁰³ The court further declared that the selection of a uniform federal statute of limitations is a legislative task,²⁰⁴ a view supported by other commentators.²⁰⁵

In light of these judicial decisions subsequent to *Data Access* and the fact that eight circuits have settled rules concerning the application of the absorption doctrine, circuit courts with settled rules are very unlikely to adopt the Third Circuit approach and apply a limitations period from analogous federal securities law in Section 10(b) and Rule 10b-5 cases. However, both the Fifth and Sixth Circuits still use a state-by-state approach similar to the approach the Third Circuit utilized before the *Data Access* decision.²⁰⁶ Therefore, these two circuits are likely candidates to adopt the new Third Circuit approach. Since both circuits utilize the state-by-state approach, adopting the Third Circuit approach would undoubtedly minimize uncertainty and time-consuming litigation within their respective circuits.

The question arises as to the likelihood of the Ninth Circuit adopting the Third Circuit *Data Access* approach because of a concurring opinion in *Davis v. Birr, Wilson & Co., Inc.*²⁰⁷ The concurring opinion articulated the same approach that was used in the *Data Access* decision and applied the limitations period found in the 1934 Securities Exchange Act to Section 10(b) and Rule 10b-5 actions.²⁰⁸ However, Judge Aldisert, the author of the concurring opinion in *Davis*, wrote the majority opinion in *Data Access*. Judge Aldisert is a Third Circuit Judge and was merely sitting by designation on the *Davis* case. Therefore, Judge Aldisert's concurring opinion in *Davis* is unlikely to have a significant impact on the application of the absorption doctrine in the Ninth Circuit.

C. Likelihood of the Data Access Decision Minimizing Time-Consuming Litigation

If all other federal courts follow *Data Access*, the problem of uniformity will be resolved and time-consuming and unnecessary

203. *Id.*

204. *Id.* at 206-07.

205. See Beasley, *supra* note 3, at 647; Block & Barton, *supra* note 5, at 384-85; Note, *supra* note 48, at 1046.

206. Beasley, *supra* note 3, at 659-61.

207. 839 F.2d 1369 (9th Cir. 1988). See *Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1442-44 (S.D. Cal. 1988) (citing Judge Aldisert's concurrence).

208. *Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369, 1370 (9th Cir. 1988).

litigation will be minimized.²⁰⁹ Since, however, other federal courts probably will not follow the *Data Access* approach, the *Data Access* decision may only exacerbate the problem rather than achieve the goal of minimizing uncertainty and time consuming litigation. For example, defendants in jurisdictions with settled rules concerning the application of the appropriate limitations periods will now use the *Data Access* decision to try obtaining a possibly more favorable limitations period: the absolute three-year bar. These attempts will only add time-consuming litigation to federal court dockets which until now would probably not have been filled with cases litigating the issue of which statute of limitations to apply in Section 10(b) and Rule 10b-5 actions. In addition, very few cases actually litigate the issue of which state statute to apply to Section 10(b) and Rule 10b-5 actions in the eight circuits that have settled absorption doctrine approaches. Therefore, an argument exists that the *Data Access* approach should be limited to the Third Circuit.

V. CONCLUSION

In *In re Data Access Sec. Litig.*, the Third Circuit court held that the proper limitations period for private civil causes of action under Section 10(b) and Rule 10b-5 was the limitations period found in express causes of action from companion provisions under the 1934 Securities and Exchange Act. Consequently, the Third Circuit no longer applies the traditional absorption doctrine. As a result, in the Third Circuit, an action must be brought within one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after the transaction.²¹⁰ The three-year maximum is an absolute bar and the equitable tolling doctrine does not apply.²¹¹

All federal courts should follow the *Data Access* approach since a nationwide uniform limitations period for Section 10(b) and Rule 10b-5 actions will promote consistency throughout the United States, minimize unnecessary and time-consuming litigation, promote cer-

209. See Beasley & Chamberlain, *supra* note 16 and accompanying text.

210. See *Data Access*, 843 F.2d at 1550.

211. Beasley & Chamberlain, *supra* note 16 and accompanying text. See also Comment, *supra* note 1, at 82-83 (stating that this approach severely shortens the period in which plaintiffs can validly file and bring a cause of action). Under the equitable tolling doctrine, the limitations period does not begin to run until the person discovered, or reasonably should have discovered, the wrongful act. *Id.*

tainty in which buyers and sellers on both sides of the transaction can rely, and prevent forum shopping.²¹² Contrary to the decision in *Data Access*, however, federal courts should continue to apply the equitable tolling doctrine to Section 10(b) and Rule 10b-5 actions,²¹³ since defendants often try to hide or conceal their wrongdoings.²¹⁴ Moreover, defendants that prevent plaintiffs from discovering the violation early enough to bring a timely suit should not benefit from an absolute limitations period from their own wrongdoing.²¹⁵

Other federal courts will not likely adopt the *Data Access* approach since eight circuits have settled rules as to the applicable limitations period to apply in Section 10(b) and Rule 10b-5 actions. In the eight circuits with settled rules, the confusion as to which state statute to apply, as was commonplace in the Third Circuit before the *Data Access* decision because of the case-by-case approach, does not exist. However, the Fifth and Sixth Circuits do not have clear settled approaches and therefore are likely candidates to adopt the *Data Access* approach. The ultimate goal of the *Data Access* decision is to establish national uniformity in Section 10(b) and Rule 10b-5 actions. Many commentators agree that national uniformity in Section 10(b) and Rule 10b-5 actions is needed. Since, however, other federal courts are unlikely to adopt the Third Circuit approach, the *Data Access* decision alone will not accomplish this goal. Therefore, the only answer to this problem is either for the Supreme Court to rule expressly on this issue or for Congress to enact a uniform limitations period for Section 10(b) and Rule 10b-5 claims.

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212. See generally Beasley & Chamberlain, *supra* note 16, and text accompanying note 16.

213. Comment, *Statutes of Limitations in 10b-5 Actions: A Proposal for Congressional Legislation*, 24 SYRACUSE L. REV. 1154, 1172 (1973) (any limitation period for 10b-5 actions which ignores the equitable tolling doctrine will negate the continued efficacy of 10b-5 civil suits).

214. Note, *Defense to the Statute of Limitations in Federal Securities Cases: The Fraudulent Concealment Doctrine and the Investment Decision Doctrine*, 38 S.C.L. REV. 789, 820 (1986-87).

215. *Id.* (the doctrine of fraudulent concealment, also known as the equitable tolling doctrine, and the investment decision doctrine should apply in these situations).

