

1-15-1992

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Recommended Citation

Anthony Michael Sabino *The New Uniform Statute of Limitations for Federal Securities Fraud Actions: Its Evolution, Its Impact, and a Call for Reform*, 19 Pepp. L. Rev. Iss. 2 (1992)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol19/iss2/2>

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The New Uniform Statute of Limitations for Federal Securities Fraud Actions: Its Evolution, Its Impact, and A Call for Reform

Anthony Michael Sabino*

PREAMBLE

As with most things in this world, timing is everything. So too in the law, where even the nascent law student becomes quickly acquainted with the matter of statutes of limitation.¹ Critical to the maintenance of any legal action, the resolution of the question of a lawsuit's timeliness either breathes life into the litigation or summarily terminates it for all time.

Very recently, the United States Supreme Court addressed this venerable issue in the realm of the comparatively youthful laws of securities regulation. In the context of the routinely tumultuous

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The author dedicates this writing to Michael A. James, with deepest thanks for providing the inspiration for this article.

1. See BLACK'S LAW DICTIONARY (5th ed. 1979), where a statute of limitations is defined as:

A statute prescribing limitations to the right of action on certain described causes of action or criminal prosecutions; that is, declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued. Statutes of limitation are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced. In criminal cases, however, a statute of limitation is an act of grace, a surrendering by sovereign of its right to prosecute.

Id. at 835.

arena of securities fraud litigation, the high Court pronounced for the first time that actions complaining of fraudulent activity in the stock market would be time-barred unless commenced either within one year from the date of the discovery of the fraud or three years from the operative date of the alleged fraud itself.²

By declaring this uniform one-year/three-year limentary period, the Justices broke with a practice nearly four-decades old of "borrowing" from analogous state statutes of limitation by the federal courts, a practice that led to disparate results, given the diversity in state statutes of repose. Indeed, this break with the traditional view was by no means a clean one.³ By itself, that very fact was sufficient to raise eyebrows in the securities bar.

Moreover, this decision on the timeliness of securities fraud actions seems to suffer itself from poor timing. It comes not long after the insider trading scandals of the late 1980s forced Congress to re-vamp the sanctions for such wrongful acts, wherein legislators not only cracked down on that particularly insidious variety of stock fraud, but provided for a statute of limitations far more liberal than the one just enunciated by the Court. This decision followed by mere months the congressional enactment of a "catch-all" limentary period of four years for federal actions lacking specific periods of repose. In effect, this again grants a larger window of opportunity before the federal bench for everyone except those alleging securities fraud. There is little wonder that this holding has incited further debate, and inspired proposals for remedial legislation.

The purpose of this article is to initially overview the antifraud section of the federal securities code at the heart of this debate, then explore some of the basic tenets that underlie the practice of borrowing state limentary periods where no congressionally enacted statute of limitations exists for a federal cause of action. This will be followed by an overview of the paramount circuit court decisions which preceded this limentary innovation, primarily the recent decision of the "mother court" of the federal securities law, a decision which rendered the high Court's opinion almost anti-climactic. Next, an analysis of the foregoing shall, among other things, contrast the newly minted limitation period for securities fraud with the aforementioned limitations of recent vintage, in light of the strong competing interests engaged in mortal combat over the desirability of this particular period, concluding thereupon with a note for potential legislative revision.

2. *Lampf, Pleva, Lipkind, Prupis and Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991).

3. Notably, the syllabus took a full paragraph of nearly 100 words simply to catalog which Justice joined in or dissented from which part of the opinion.

This will be followed by an examination of the apparent retroactive application to be given to the new uniform one-year/three-year limitation period, contrasted with the teachings of the Supreme Court that strongly favor only prospective application only for such breaks from precedent. The disharmony evident within the high Court on this crucial issue is exposed, and analyzed with a view towards its future resolution. This writing then concludes by discussing legislation, now pending before Congress, aimed at revising the uniform one-year/three-year rule to a construct the lawmakers consider more appropriate for securities antifraud litigation.

THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES
REGULATIONS—A "BASIC" REVIEW

Before commencing the journey in search of the correct liminary period for securities antifraud litigation, some elemental points are worthy of perusal. The quintessential statute underlying these proceedings is section 10(b) of the Securities Exchange Act of 1934, which declares:

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.⁴

As indicated, section 10(b) authorizes the Securities and Exchange Commission to promulgate rules and regulations to enforce the statute. The relevant rule, universally known as Rule 10b-5, is an extended version of the prohibitions enacted in title 15, and is used both in conjunction and interchangeably with the statutory provision.⁵

4. 15 U.S.C. § 78j(b).

5. Rule 10b-5 provides:

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

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

(b) To make any untrue statement of 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 of any security.

17 C.F.R. 240.10b-5 (1991).

By enacting section 10(b), "Congress meant to prohibit the full range of ingenious devices that might be used" to perpetrate securities fraud.⁶ To ensure that this protective device would be of maximum benefit to the investing public that it is ultimately intended to protect, the existence of an implied private right of action for damages pursuant to section 10(b) "has been consistently recognized for more than [at that time] 35 years" and "is simply beyond peradventure."⁷

In *Basic, Inc. v. Levinson*⁸, the Supreme Court began its most recent decision on this important subject by outlining the pertinent antifraud regulations and their legislative history. Writing for the Court, Justice Blackmun opined that Rule 10b-5 was designed to protect investors from manipulative devices and frauds foisted upon the stock exchanges by unscrupulous parties.⁹ To facilitate that vital task, a private cause of action grounded in section 10(b) has been implied by the federal courts.¹⁰

And as noted in Justice White's partial dissent in *Basic*, this action is grounded in the "common law doctrines of fraud and deceit."¹¹ For even where the court has extended civil liability under section 10(b) beyond the boundaries contemplated by the common law, "we have retained familiar legal principles as our guideposts."¹² Moreover, the learned Justice also pointed out that, by reason of the "scant legislative history" of section 10(b), the Court in the past has had to examine Congress' intent when "endeavor[ing] to discern the limits of private causes of action" under the antifraud statute.¹³

As this abridged history amply demonstrates, section 10(b) was designed with the intent to cut a wide swath through all manner of insidious devices that might be used to perpetrate fraud upon the securities marketplace. Ground in timeless principles of fraud and deceit, the antifraud statute has kept those common law traditions as guideposts, while still ranging far beyond their historical boundaries.

To be sure, the private cause of action implicitly arising from section 10(b) has long been recognized by the courts. However, as is nearly always the case with rights that arise by implication, the underlying statute is bereft of a legislatively enacted statute of limita-

6. *Santa Fe Industries v. Green*, 430 U.S. 462, 477 (1977).

7. *Herman & MacLean v. Huddleston*, 459 U.S. 373, 389 (1983).

8. 485 U.S. 224 (1988).

9. *Id.* at 230-31.

10. *Id.* at 231. See also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196, *reh'g denied*, 425 U.S. 986 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975); 6 Loss, *Securities Regulation* 3869-73 (1969); 3 Loss, *Securities Regulation* 1763 (2d ed. 1961); *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971).

11. *Basic*, 485 U.S. at 253 (White, J., dissenting in part and concurring in part).

12. *Id.* at 253.

13. *Id.* at 257.

tions. Just as the courts struggling to overcome this troublesome gap in the regulatory scheme have done, we now turn to the Supreme Court's teachings on the "borrowing" of appropriate liminary periods for federal statutes lacking that vital attribute.

THE "BORROWING" OF STATE STATUTES OF LIMITATION—THE
SUPREME COURT'S PARAMETERS

It has long been the strong direction of the Supreme Court that "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations."¹⁴ This objective is not served by an approach whereby the limitations period for each federal claim would "depend upon the particular facts or the precise legal theory of each claim."¹⁵ A factual, claim-based approach to characterizing a case for limitations purposes would not promote "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation."¹⁶

It is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court "borrows" or "absorbs" the local time limitation most analogous to the case at hand.¹⁷ This practice, derived from the Rules of Decision Act¹⁸, has enjoyed sufficient longevity that it is assumed that, in enacting remedial legislation, Congress ordinarily "intends by its silence that we borrow state law."¹⁹

The rule, however, is not without exception. The Supreme Court has recognized that a state legislature rarely enacts a limitations period with federal interests in mind,²⁰ and when the operation of a state limitations period would frustrate the policies embraced by the federal enactment, the Court has looked to federal law for a suitable period.²¹ These departures from the state borrowing doctrine have been motivated by the high Court's conclusion that it would be "inappropriate to conclude that Congress would choose to adopt state rules

14. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) ("Wilson"), quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting).

15. *Wilson*, 471 U.S. at 274.

16. *Id.* at 275.

17. *Id.* at 266-67.

18. 28 U.S.C. § 1652.

19. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 147 (1987).

20. *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 367 (1977).

21. See *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983).

at odds with the purpose or operation of federal substantive law.”²² Primacy must be given to the federal policies at stake, in order “to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.”²³

In modern times, the linchpin of the Supreme Court’s teachings on the “borrowing” of state statutes of limitation can be found in *DelCostello v. International Brotherhood of Teamsters*.²⁴ Lacking an express federal statute of limitations for the labor-related cause of action before it, the seven-two majority set forth its thesis on the subject as follows:

In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to “borrow” the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.²⁵

Indeed, Justice Brennan added in a footnote that this “fallback rule of thumb . . . rests on the assumption that, absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions.”²⁶

Yet, notwithstanding the force of this proposition, the Court held that where a state liminary period would be an unsatisfactory vehicle for enforcing a federal statute, “it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.”²⁷ The Court found that neither the *Erie* doctrine²⁸ nor the Rules of Decision Act²⁹ establishes “a *mandatory* rule that we apply state law in federal interstices.”³⁰

Rejecting the argument that the Rules of Decision Act mandates the application of state periods of repose, Justice Brennan found that argument begged the question. “[T]he choice of a limitations period for a federal cause of action is itself a question of federal law.”³¹ Should the policies of the underlying action demand a liminary period be drawn from the federal schema, then the Rules of Decision Act is inapplicable by its own prerequisite that state law can only be applied if the federal provision does not otherwise require or provide.³²

“[N]o decision of this Court . . . requires borrowing state law to fill

22. *Id.* at 161.

23. *Occidental Life Ins. Co. of Cal.* 432 U.S. at 367.

24. 462 U.S. 151 (1983).

25. *Id.* at 158.

26. *Id.* at 158-59 n.12.

27. *Id.* at 161.

28. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

29. 28 U.S.C. § 1652.

30. *DelCostello*, 462 U.S. at 161 n.13.

31. *Id.*

32. *Id.* at 159 n.13.

gaps in federal substantive statutes," declared Justice Brennan, contending further that the Court does so "as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes."³³

Having established the alternatives available to it under the "borrowing" doctrine, the Court rationalized its preference to apply a federal statute of limitations in the instant case by citing the availability of a federal limentary period "actually designed to accommodate a balance of interests very similar to that at stake here — a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels."³⁴

Notwithstanding that choice, the high bench struck this cautionary note:

We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods.³⁵

Reconciling the foregoing caveat to its instant choice of federal law, the Court held that "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking," the federal laws of repose must step ahead of state statutes of limitation.³⁶ To be sure, this credo was the benchmark established by the Supreme Court.

While clearly outnumbered, the dissenters did make brief, but nevertheless telling, points. Justice Stevens noted that the "borrowing" doctrine has held sway for the past century, not because it was merely an appropriate form of interstitial law making, but rather because it was mandated by Congress via the Rules of Decision Act.³⁷ "Congress," declared Justice Stevens, "has given us no reason to de-

33. *Id.* at 160 n.13. Such "interstitial federal lawmaking is a basic responsibility of the federal courts." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973).

34. *DelCostello*, 462 U.S. at 169.

35. *Id.* at 151.

36. *Id.* at 171.

37. *Id.* at 172-73 (Stevens, J., dissenting). Interestingly, Justice Stevens quoted the original enactment, § 34, Judiciary Act of 1789, Rev. Stat. § 721, 1 Stat. 92 (1789), exemplifying that it remains virtually unchanged in today's codification. *Id.* at 173 n.1.

part from our settled practice . . .”³⁸ In her separate dissent, Justice O’Connor also found that borrowing from state law, given both its longevity as the norm and a congressional awareness thereof, means that “in the absence of strong indications to the contrary, that Congress intends by its silence that we follow the usual rule.”³⁹

In *DelCostello*, we then have the Supreme Court validating the “borrowing” doctrine as to the application of state liminary periods to federal causes of action, while simultaneously establishing an option for the federal bench to bypass that practice and look to federal law for borrowing purposes, if the forum’s provisions prove to be inadequate. Just over four years later, *DelCostello* would provide much of the foundation for the second, key modern ruling on the “borrowing” doctrine.

In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*,⁴⁰ the Supreme Court decided to establish a uniform statute of limitations for federal civil RICO actions. In the Court’s view the most appropriate source for this particular borrowing exercise was the federal anti-trust laws. Justice O’Connor, speaking for the majority, delivered the opinion of the Court in a virtually unanimous decision.⁴¹

While citing to *Delcostello* extensively,⁴² the Court did vary the situation before it somewhat, stating that “the mere fact that state law fails to provide a perfect analogy . . . is never itself sufficient” to reject the forum’s limitation period for that of the federal scheme.⁴³ However, harking back to the alternative pathways created by *DelCostello*,⁴⁴ the court affirmed that it is correct to borrow from the federal law, and not the state provisions, where the former statutes provide a closer analogy, and federal policies and the practicalities of litigation are thereby better served.⁴⁵

38. *Id.* at 174.

39. *Id.* at 174 (O’Connor, J., dissenting) (footnote omitted).

40. 483 U.S. 143 (1987).

41. *Id.* at 144. Justice Scalia concurred in the judgment and filed a separate opinion.

42. *See id.* at 146-48.

43. *Id.* at 147.

44. *Id.* at 146 (citing to *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983)).

45. *Id.* at 147-48. *See also* *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355 (1977) (adopting federal statute of limitations for Equal Employment Opportunity Commission enforcement proceedings); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (same for unseaworthiness action under general admiralty law); *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946) (refusing to adopt state limitations period for federally created equity action). *Compare* Justice Scalia’s theory that there be no period of limitation at all where state law does not offer up an appropriate liminary span. “Such an approach would promote uniformity as effectively as the borrowing of a federal statute, and would do a better job of avoiding litigation over limitations issues Indeed, it might even prompt Congress to enact a limitations period that it believes ‘appropriate,’ a judgment far more within its competence than ours.” *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 170 (Scalia, J., concurring).

Apparently in the Court's foremost concerns were the federal policies and litigation practicalities at stake in RICO actions such as this one. Since RICO cases "commonly involve interstate transactions," thereby implicating the statutes of limitations of several states, the Court expressed concern for forum shopping and the resultant complications from litigation over what should be a direct matter.⁴⁶ In their calculus, the Justices held that the courts should accord particular weight to the geographic character of a claim in deciding whether a federal or state statute of limitations should be used:

The multistate nature of (the federal cause of action at issue) indicates the desirability of a uniform federal statute of limitations. With the possibility of a multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter. Moreover, application of uniform federal limitations period (for RICO) avoids the application of unduly short state statutes of limitations that would thwart the legislative purpose of creating effective remedy.⁴⁷

To be sure, the Court admitted that in borrowing from the anti-trust laws for a statute of repose, it was rejecting the five-year statute of limitations legislated for criminal RICO actions. Dismissing this as the "catch all" litymary period for federal crimes,⁴⁸ the high bench more importantly held that the five-year limitation "does not reflect any congressional balancing of the competing equities unique to civil RICO actions or, indeed, any other federal civil remedy."⁴⁹

We have then here the basic wisdom of the Supreme Court, espousing a doctrine of borrowing from state law to fill the abhorrent vacuum left in the federal schema when Congress fails to enact a corresponding statute of limitations for a substantive law. To be sure, the more recent decisions of the high Court indicate that the borrowing principle is not unyielding, especially where a closer fit may be obtained from the federal codes, as opposed to the forum's litymary provisions.

The aforementioned lack of a statute of repose for section 10(b) placed that provision squarely under the purview of the borrowing methodology provided by the high Court. And, as we shall see, it was the slow and steady liberalization of the state borrowing doctrine that provided the catalyst for the modern revolution in limiting the time for securities antifraud actions.

46. *Agency Holding*, 483 U.S. at 153.

47. *Id.* at 154, quoting *Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law* 392 (1985).

48. *Id.* at 155. See 18 U.S.C. § 3282 (1988).

49. *Id.* at 156.

THE CIRCUIT CASES

Prior to the Supreme Court's recent landmark decision, on the whole, the federal circuit courts of appeals' decisions regarding the appropriate liminary periods for antifraud actions were more or less evenly split between state limitation periods governing common law fraud,⁵⁰ the statute of limitations for state "blue-sky" securities law violations,⁵¹ and those establishing a uniform federal period of limitation.⁵²

It was left for today's Supreme Court to exercise the final option, and declare section 10(b) to be controlled by a uniform period of limitation. Obviously, the Court's decision was necessitated by the controversy among the circuits on this critical matter, and the promulgation of the new rule by the highest Court in the land is deeply rooted in the erudite opinions of the circuit courts which boldly preceded the Justices' venture into this uncharted territory. For these reasons, we shall commence by examining the appellate groundswell advocating a uniform rule on the proper liminary period for securities antifraud lawsuits.

LEADING THE WAY—THE THIRD CIRCUIT AND *DATA ACCESS*

"Follow me" is the well-publicized motto of the United States Army's Ranger battalions, typically deployed to lead the way into combat for regular units. In the warfare of federal securities litigation, it was the Court of Appeals for the Third Circuit that "took the point" in the battle for a uniform federal statute of limitations for antifraud cases. In so doing, that tribunal made the breakthrough that would lead to today's new rules of engagement.

From the outset, the court's decision in *In re Data Access Systems Securities Litigation*⁵³ attained greater significance because the Third Circuit assembled *en banc*, thus enabling it to "make this re-examination freely and without constraint of panel precedents."⁵⁴ The case itself was a certified class action lawsuit, brought by investors alleging violations of section 10(b) and Rule 10b-5 by various entities, including the lawyers and accountants involved in the

50. *Nesbit v. McNeil*, 896 F.2d 380 (9th Cir. 1990); *Bath v. Bushkin*, Gaims, Gaines and Jonas, 913 F.2d 817 (10th Cir. 1990).

51. *O'Hara v. Kovens*, 625 F.2d 15, 18 (4th Cir. 1980), *cert. denied*, 449 U. S. 1124 (1981); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411 (D.C. Cir. 1977); *See also* *Alton v. Prudential-Bache Sec., Inc.*, 753 F. Supp. 39, 41 (D. Mass. 1990) (*Mazzone, J.*) (citing First Circuit cases).

52. *In re Data Access Systems Sec. Litig.*, 843 F.2d 1537 (3d Cir. 1988) (*en banc*), *cert. denied*, *Vitiello v. I. Kahlowski & Co.*, 488 U.S. 849 (1988); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991); *Ceres Partners v. GEL Assoc.*, 918 F.2d 349 (2d Cir. 1990).

53. *Data Access*, 843 F.2d at 1537.

54. *Id.* at 1538.

underlying stock offering. The court below had determined it should borrow the New Jersey six-year statute of limitations for common law fraud as the proper yardstick for measuring the timeliness of the action.⁵⁵

Recognizing the lack of Supreme Court guidance on an appropriate liminary period for antifraud lawsuits, and the attendant confusion thereby created, the court harked back to its own precedents on this troublesome issue.⁵⁶ Previously, the Third Circuit had deferred to the forum state's common law policy of repose on this point,⁵⁷ but not without acknowledging the difficulties with utilizing a so-called exact-match approach.⁵⁸ However, a reconnaissance of "the teachings contained in recent relevant Supreme Court opinions"⁵⁹ led the tribunal to conclude that it was now compelled to adopt but one statute of limitations for section 10(b) claims.⁶⁰

In looking for that most appropriate liminary period, the Third Circuit first declared it would be erroneous to equate private causes of action under the securities antifraud laws with common law fraud actions.⁶¹ While the Court stated that section 10(b) does not impose the clear and convincing standard of evidence traditional to state common law fraud, said the court, the federal schema is nevertheless designed to establish tighter standards of conduct in the securities industry.⁶² Nonetheless, the Third Circuit cautioned it was bound to proceed on the assumption that Congress intended to borrow from state law; only if such provisions were inadequate for the task at hand would a period of repose be drawn from an analogous federal provision.⁶³ Apparently, the court found the state provisions "an unsatisfactory vehicle for the enforcement of this type of federal securities law," as it concluded the liminary periods expressly set forth in the Securities Exchange Act of 1934 made for a closer fit for a statute of limitations for section 10(b).⁶⁴

55. *Id.* at 1538-39.

56. *Id.* at 1539-40.

57. *Id.* at 1540-41, *discussing* *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979), and *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980).

58. *Data Access*, 843 F.2d at 1541, *quoting* *Roberts*, 611 F.2d at 612 (Weis, J., dissenting).

59. *Id.* at 1542.

60. *Id.* at 1544-45.

61. *Id.* at 1544.

62. *Id.* at 1544. *See* *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90 (1983) (discussing standard of proof requirement).

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

64. *Id.* at 1545.

Parsing the numerous enforcement provisions of the federal securities regulations, the Third Circuit found “the general one-year-after-discovery and three-years-after-the-violation” rule to be clearly the dominant period of repose, with any exceptions thereto so focused elsewhere as not to be germane to its analysis.⁶⁵ Interestingly, the court found the “obvious” source of its predicament was that Congress did not actually create the cause of action stemming from section 10(b), and “its nubile offspring, Rule 10(b)-5.”⁶⁶ Here Circuit Judge Aldisert opined in this evocative fashion:

Congress cannot be faulted for not providing a statute of limitations, because the section 10(b) private cause of action was not enacted by it; it is a genie sired solely by the judiciary, and the genie having escaped from the bottle is not easily cabined. So the courts resort to the political science fiction of formulating judicially-declared “statutes” of limitations, suggesting that this would have been the intention of Congress had it created an express cause of action. It is a sort of hermaphroditic process: the courts invent the remedy and the seek to determine what would have been the intention of Congress as to a statute of limitations had it expressly created the private damage action. Because Congress takes no action to legislate to the contrary after an implied cause of action has been judicially formulated, we conclude that by *post hoc* inaction, Congress must have intended *ante hoc* that this is what it desired.⁶⁷

Having thus expressed both the problem and its most likely solution, the court declared that “[t]he necessity for uniform federal remedies in security cases would seem to demand recourse to a uniform federal statute of limitations . . . [a]nd since uniformity is not to be found in the diverse body of state [law] limitations, we are impelled inexorably to look to federal limitations for borrowing purposes.”⁶⁸ Moreover, a uniform federal limiting period “better reflects” the federal policies at stake and the practicalities of litigation.⁶⁹

For all of these reasons, the Third Circuit adopted the one-year/three year statute of limitations for section 10(b) actions.⁷⁰ To be sure, the tribunal did not meet the issue of retroactive application for the rule it espoused herein.⁷¹

THE *SHORT* STORY OF THE SEVENTH CIRCUIT

As discussed above, the Third Circuit played the role of pioneer in forging a uniform one-year/three-year statute of limitations for securities antifraud actions. The prestigious Seventh Circuit was the next to add its influential voice in support of that proposition.

In *Short v. Belleville Shoe Manufacturing Co.*,⁷² the appellate

65. *Id.* at 1546.

66. *Id.* at 1546.

67. *Id.* at 1547.

68. *Id.* at 1549.

69. *Id.*

70. *Id.* at 1550.

71. *Id.* at 1550-51.

72. 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991).

bench faced what was essentially a family squabble. The plaintiff, Marian Short, redeemed her shares in a closely held, family corporation on the advice of her brother, an officer of the company.⁷³ Ms. Short claimed she was told the firm's outlook was gloomy; instead, after the sale of her stock, the business prospered.⁷⁴ Following a delay of several years, the plaintiff sued under section 10(b), claiming she was defrauded into selling what would eventually become valuable securities.⁷⁵ The defendants argued to the panel that it should reject Ms. Short's claim of equitable tolling, and borrow a three-year period of repose from elsewhere in the securities law.⁷⁶

Writing for the panel, Circuit Judge Easterbrook initially noted that the established practice of the Seventh Circuit for section 10(b) litigation was to impose limiting periods borrowed from state "blue sky" statutes, while adding "an overlay of tolling principles from state and federal law."⁷⁷ The tribunal did so because Congress had not enacted a statute of limitations for such causes of action, "and could hardly have been expected to—for the right . . . was created by the courts rather than Congress."⁷⁸ Indeed, the opinion frankly stated that "[f]ederal courts are so accustomed to turning to state periods of limitations that we (and our colleagues in other circuits) did this on auto-pilot, without discussing whether something differentiated securities laws from other statutes."⁷⁹

"Yet there are differences," opined Judge Easterbrook.⁸⁰ First, this lack of a statute of repose for section 10(b) was "a problem of the courts' creation," not attributable to a Congressional oversight.⁸¹ Second, Congress "jammed" the securities regulation title with statutes of limitation, even as recently as 1988.⁸² Third, because the securities laws themselves are not triggered unless the underlying transaction took place in interstate commerce, "[a]t least two state statutes therefore could be applied in any case."⁸³

73. *Id.* at 1386.

74. *Id.*

75. *Id.*

76. *Id.* at 1386-87. See also 15 U.S.C. § 77(m) (1988). Also known as Section 13 of the 1933 Securities Act, it establishes an absolute limit of three years on fraud actions brought thereunder. *Id.*

77. *Short*, 908 F.2d at 1387.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1388.

The panel took the first step committing itself to change at this juncture. Observing initially that all this “would be by the by if the Rules of Decision Act *requires* federal courts to use state law,” the court relied on *DelCostello* and *Agency Holding* to conclude that no such mandatory requirements exist.⁸⁴ The Seventh Circuit found the recent Supreme Court cases called for a “fresh examination” of the borrowing precept, and drawing further strength from the progressive thinking advanced in *Data Access*, concluded that the time was ripe for reconsideration of the borrowing issue as well.⁸⁵

As did the Third Circuit, this tribunal found that the closer analogy was to be drawn from federal law, and the practicalities of litigation justified borrowing from a federal, and not a state, liminary provision.⁸⁶ Moreover, the translation of state periods of limitation to the federal arena has historically led to troublesome questions involving tolling and estoppel doctrines: whether to apply “the state’s, the federal court’s, or both?”⁸⁷ Judge Easterbrook pragmatically stated:

[T]he situation is a nightmare. Lawyers and courts alike devote untold hours to identifying proper state analogies and applying multiple (conflicting or cumulative) tolling doctrines Loud calls for reform issue from scholars and the bar. With a unanimity unmatched in any other corner of securities law, everyone wants a simpler way — and to everyone that means a uniform federal statute of limitations.⁸⁸

Acknowledging that the Third Circuit had already “broke ranks in *Data Access*” to achieve that lofty goal, the tribunal found no need to shy away from the coming storm, and concluded it would apply a uniform federal statute of limitations to section 10(b) actions.⁸⁹ As did its brethren, this court did not address all questions regarding retroactive application of its decision, noting that they presented “a question of some subtlety,” depending on the parties’ reliance upon former law.⁹⁰

In establishing what that uniform federal liminary period should be, this panel varied its approach from the benchmark decision in *Data Access*. Here, the Seventh Circuit examined as options the one-year/three-year limitation on misrepresentation actions, as set out in section 13 of the Securities Act of 1933,⁹¹ and the newer five-year pe-

84. *Id.*

85. *Id.*

86. *Id.* at 1388. *See also Id.* at 1393 (Posner, J., concurring). In his concurring opinion, the erudite Judge Posner added his “small voice to the chorus,” classifying the entire issue of statute of limitations borrowing as “a matter of which round peg to stuff in a square hole,” and as an enterprise that “also runs the risk of applying one unprincipled legislative deal to a problem entirely outside the scope of the deal.” *Id.*

87. *Id.* at 1389.

88. *Id.*

89. *Id.*

90. *Id.* at 1389-90.

91. *Id.* at 1390, *citing* 15 U.S.C. § 77(m)(1988).

riod of repose for insider trading violations.⁹² The one-year/three-year rule was "attractive" because it antedated section 10(b), while the five-year span had the virtue of representing the lawmakers' latest insights, and permitted more time for plaintiffs to ferret out wrongdoing. In the end, the ever-practical tribunal, eager to foster a new uniform rule, but loath to create another intercircuit conflict, followed the Third Circuit and adopted the one-year/three-year limitation period, although upon a slightly different ground.⁹³

In addition, the court found another benefit favoring the one-year/three-year rule; its outer limit is a statute of repose, not limitation.⁹⁴ This makes for a substantial difference in securities litigation, declared the panel. "Prices of securities are volatile. If suit may be postponed . . . then investors may gamble with other people's money."⁹⁵ Congress extensively utilized the one year from discovery/three years from the event cap precisely to address that concern, and thereby "curtailed the extent to which the securities laws permit recovery based on the wisdom given by hindsight."⁹⁶

A truly prudent person "almost always can sniff out fraud," commented the court, whereas the three-year limitation would serve to cut off the claims of only "the most trusting or somnolent or the most wily" of plaintiffs.⁹⁷ To be sure, employing the five-year period from the unique insider trading prohibition would let the tail wag the dog, especially since the passage of time does not impact the measure of damages in such cases, where the harm perpetrated by the insiders is usually fixed "within days after the trading, sometimes within hours."⁹⁸

In sum, the Seventh Circuit applied its customary cogent legal reasoning and incisive practicality by borrowing from the federal securities regulation title, thereby adopting the one-year/three-year timeframe as a uniform statute of limitations for section 10(b). With the Third Circuit having given birth to the new uniform rule, and the Seventh Circuit lending paternalistic favor to it, the rapidly-growing rule needed one last champion to form the triad that would ensure its viability. The wait was not a long one.

92. *Id.* at 1390, *citing* 15 U.S.C. § 78t-1(a)(1988).

93. *Id.* at 1390-91.

94. *Id.* at 1391.

95. *Id.* at 1392.

96. *Id.*

97. *Id.*

98. *Id.*

CERES OF THE SECOND CIRCUIT

The appellate trilogy fittingly reached its zenith with a decision from the Second Circuit, the tribunal long acknowledged as the "mother court" of the federal securities laws.⁹⁹ In *Ceres Partners v. GEL Associates*¹⁰⁰, a panel of the Second Circuit added its voice to those advocating a one-year/three-year liminary period for antifraud actions under the federal securities laws.

The plaintiff Ceres, a New Jersey partnership engaged in risk arbitrage, filed a complaint alleging, *inter alia*, that the defendants had violated section 10(b) and Rule 10b-5 by failing to disclose their intention to extend a merger offer to a public company, where Ceres held a substantial equity position. Ceres brought this lawsuit to recover the premium it would have received, had it known of the merger plans and sold its shareholdings at the higher price subsequently offered by the defendants.¹⁰¹

On the defendants' motion to dismiss, the district court turned to the law of the forum on the question of timeliness. New York law required that the liminary period of the plaintiff's state of residence be controlling, and since Ceres was a New Jersey resident, the district judge concluded that the rule of law set by the Third Circuit in *Data Access* would govern. For that reason, he imposed the one-year/three-year statute of limitation, and granted the dismissal motion.¹⁰²

On appeal, the parties urged the tribunal to abandon its established practice of borrowing state statutes of limitation for determining the timeliness of section 10(b) actions. While both urged the adoption of a uniform federal period, Ceres contended that the span should be five years, and the defendants advocated the one-year/three-year period of repose.¹⁰³ Notably, the Securities and Exchange Commission filed an *amicus* brief siding with the plaintiff, while several major accounting firms joined the defendants in support of the lesser time period.¹⁰⁴

Writing for the panel, Circuit Judge Kearse began by postulating that the consistent tradition of the Second Circuit had been to adopt the pertinent laws of the forum state, including local law directing courts to borrow from other statutes of limitation.¹⁰⁵ In so doing, the tribunal had construed New York law to mean that, in antifraud litigation, the cause of action normally accrues at the plaintiff's resi-

99. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

100. 918 F.2d 349 (2d Cir. 1990).

101. *Id.* at 350-51.

102. *Id.* at 351-52.

103. *Id.* at 350.

104. *Id.* at 352.

105. *Id.* at 353.

dence. Thus, if the suit would be untimely in that jurisdiction, it would also be time-barred in a New York federal court.

In the instant case, the Third Circuit one year/three year rule as the controlling law in Ceres' home state of New Jersey applied, and the action would have to be dismissed.¹⁰⁶ However, the court did not halt its analysis there.

Considering whether a uniform federal period of limitations should govern section 10(b) actions, the circuit court acknowledged that the accepted rationale for referring to state law where Congress fails to specify a limiting period is derived from the Rules of Decision Act, which declares state law prevails unless the Constitution or federal law demands otherwise.¹⁰⁷ Nevertheless, the tribunal observed that "[t]he practice of looking to state law to determine the applicable statute of limitations for implied causes of action under the federal securities laws has been the target of considerable criticism."¹⁰⁸ Indeed, Judge Kearsse opined that application of the borrowing principle in antifraud litigation is diametrically opposed to the need for uniform rules in the national arena of federal securities regulation.¹⁰⁹

As evidence of that internecine conflict, Judge Kearsse noted a plethora of federal court decisions, all applying differing statutes of limitation borrowed from state forums.¹¹⁰ Moreover, "far from achieving any semblance of national uniformity, reference to state laws generally results in a lack of uniformity even within a given circuit."¹¹¹ The Second Circuit clearly expressed its dismay at this sad state of affairs, highlighting the obvious inequities of how identical suits, or even identical plaintiffs, could be time-barred in some states, but not others.¹¹²

At this juncture, the tribunal pointed out that while the Supreme Court has "noted the prevailing practice" of state law borrowing for

106. *Id.*

107. *Id.*, citing 28 U.S.C. § 1652.

108. *Id.* at 354 (citations omitted).

109. *Id.* at 354.

110. *Id.*

111. *Id.* In addition to partially cataloging the wide disparity vis-a-vis individual state statutes of limitation, the tribunal explicated the confusion rampant not only between the federal circuits, but within each circuit jurisdiction as well. The panel revealed the following diverse liminary periods were all employed by the appellate courts of the nation: First Circuit — two, three, and six years; Second Circuit — two, six, and six-plus years; Fourth Circuit — one, two, and three years; Sixth Circuit — three, four, and six years; Seventh Circuit — two, three, and one-year/three-years; Ninth Circuit — two and three years. *Id.* at 345-55.

112. *Id.* at 355.

section 10(b) claims, "it has not explicitly approved" such, and its recent discussions of such borrowing for other types of suits "appear to leave open the possibility that the courts should look to a federal statute instead."¹¹³ Encouraged by what it perceived to be a change in the prevailing winds, the panel made an extensive analysis of the high Court's current rulings on the subject,¹¹⁴ and concluded:

Among the themes to be distilled from the Supreme Court's recent borrowing discussions are that selection of a uniform federal limitations period may be warranted (1) where the statutory claim in question covers a multiplicity of types of actions, leading to the possible application of a number of different types of state statutes of limitation, (2) where the federal claim does not precisely match any state-law claim, (3) where the challenged action is multistate in nature, perhaps leading to forum shopping and inordinate litigation expense, and (4) where a federal statute provides a very close analogy.¹¹⁵

Against this "background of Supreme Court inroads into the traditional practice of borrowing from state law, and the crazy-quilt consequences of borrowing from state law for federal securities laws claims," this panel noted that its sister circuits had now abandoned the state law borrowing tradition.¹¹⁶ After scrutinizing the opinions of the Third and Seventh Circuits, the Second Circuit declared own agreement with its brethren.¹¹⁷

Here Judge Kearse first elaborated upon the aspects which materially distinguish section 10(b) claims from state law fraud actions. The court opined:

In some respects, the federal securities claim is narrower than a common-law fraud claim in that the challenged behavior must bear on securities having a nexus with interstate commerce. On the other hand, the goal of promoting full disclosure is broader than that of common-law principles relating to fraud, and leads to the imposition of a fiduciary-type level of disclosure on certain classes of individuals and institutions. Further, the fraud element of the federal claim may be established not only by proof of a materially misleading misstatement or omission, but also by proof of, *e.g.*, a device, scheme, or artifice to defraud, or of any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person. The types of claims that may be brought under these federal laws, and the theories developed to substantiate those claims, range far beyond those developed under common-law principles of fraud.¹¹⁸

The panel asserted that "the variety of claims" available under the federal securities laws, and "their lack of analogue in state law" renders state law borrowing "not particularly appropriate."¹¹⁹ Indeed, that conclusion is enhanced, said the tribunal, by the multistate nature of most of the challenged acts and the indisputably national

113. *Id.* at 355-56.

114. *Id.* at 355-57.

115. *Id.* at 357.

116. *Id.* at 357-58.

117. *Id.* at 360.

118. *Id.*

119. *Id.*

character of registered securities.¹²⁰ The circuit court therefore concluded that a uniform nationwide period of limitation for securities antifraud actions "is what Congress would have intended."¹²¹

The Second Circuit joined its peers in the view that the 1934 Act itself clearly provides an analogy that is significantly more appropriate than state law for a section 10(b) liminary period.¹²² Finding "common goals" between the prohibitions against the use of false and misleading statements in connection with the sale of securities,¹²³ willful participation in manipulative marketing practices,¹²⁴ and section 10(b), the court indicated that the one-year/three-year statute of limitations for the former provisions was the closest analogue to the antifraud statute.¹²⁵ Moreover, the panel contrasted the two-year limitation for actions compelling disgorgement by corporate insiders of profits made on "short-swing" sales,¹²⁶ and found the underlying statute dissimilar enough from section 10(b) to make the application of that liminary period "less appropriate."¹²⁷

As to the contention of both the plaintiff and the SEC that the five-year statute of limitations found in the Insider Trading and Securities Fraud Enforcement Act of 1988¹²⁸ provided a better analogy, Judge Kearse replied that Congress enacted a prolonged liminary period in order to, among other things, accommodate the "difficulties of ferreting out evidence sufficient to prosecute insider trading cases."¹²⁹ The tribunal lacked any indication that Congress intended the five-year period of repose to extend beyond the special purposes of the new statute, and therefore rejected the five-year limitation.¹³⁰

In sum, the Second Circuit concluded that it was "significantly more appropriate" to borrow the one-year/three-year statute of limitation from elsewhere in the scheme of federal securities regulations to be, than to apply available, inconsistent state statutes.¹³¹ Indeed, the court added that "the federal policies underlying [those laws] and

120. *Id.*

121. *Id.* at 360-61.

122. *Id.* at 361.

123. 15 U.S.C. § 78r(c)(1988).

124. 15 U.S.C. § 78(i)(e)(1988).

125. *Ceres*, 918 F.2d at 361-62.

126. 15 U.S.C. § 78p(b).

127. *Ceres*, 918 F.2d at 362.

128. Pub. L. No. 100-704, § 5, 102 Stat. 4677, 4681 (1988), (codified at 15 U.S.C. § 78t-1(b)(4)(1988).

129. *Ceres*, 918 F.2d at 362-63 (citations omitted).

130. *Id.* at 363.

131. *Id.*

the practicalities of litigation” call out for such a uniform rule.¹³² Since the application of the new rule would not alter the outcome of the present case, the order of dismissal was affirmed. More importantly, the tribunal left for another day “all questions concerning retroactive application of our ruling.”¹³³

Having now heard from the acknowledged leader of the appellate courts in matters of the federal securities laws, the proponents of a uniform limentary rule for section 10(b) could find great comfort in the trilogy of cases validating the standardized one-year/three-year period of repose. Yet, while the movement for uniformity in antifraud litigation had reached its strongest point up to that time, persistent voices in dissent ensured that the new rule was not beyond reproach.

TRADITION V. UNIFORMITY—THE CIRCUIT CONFLICT EMERGES

As discussed, the Third Circuit in *Data Access* was the leader in establishing a uniform limitations period for securities antifraud actions. Also examined were the Seventh and Second Circuits' applications of a uniform federal period in such matters.

However, not all of the circuit courts readily accepted the new uniform rule. Indeed, an equal number of tribunals either expressly rejected or refused to follow the teaching of *Data Access*. Instead, these courts chose to adhere to the traditional borrowing of state statutes of limitation for deciding the timeliness of section 10(b) lawsuits.

At the forefront of these proponents was the Court of Appeals for the Ninth Circuit. In *Nesbit v. McNeil*,¹³⁴ decided after *Data Access*, but prior to *Short* and *Ceres*, the Ninth Circuit was confronted with a widowed plaintiff, who claimed her stockbroker had generated excessive commissions by “churning” the securities account bequeathed to her by her late husband.¹³⁵

On appeal, the defendants attacked the long-standing precedents of the Ninth Circuit which required the court to borrow the forum state's limitations periods for securities antifraud actions.¹³⁶ Making short shrift of the Third Circuit's turn to a uniform federal rule, Judge Fernandez summarily declared that the *Data Access* opinion did not permit the panel “to adopt a different rule for this circuit.”¹³⁷ Moreover, the court found that recent Supreme Court cases did not compel a reassessment and reversal of their position.¹³⁸

132. *Id.*

133. *Id.*

134. 896 F.2d 380 (9th Cir. 1990).

135. *Id.* at 381-82.

136. *Id.* at 384.

137. *Id.*

138. *Id.*

In reaching its conclusion, the Ninth Circuit not only refused to follow its sister circuit, it simultaneously refuted the perspective of its brethren that the latest pronouncements of the high Court did not mandate a re-examination of the circuit's law on borrowing practices. In addition, Judge Fernandez noted the panel's plain reluctance "to apply such a determination retroactively in a manner that would cut off the rights of a plaintiff whose action was timely under our decisions which existed at the time the action was filed."¹³⁹

Ironically, the same result was obtained in the Tenth Circuit as well. Before the Tenth Circuit came the appeal of *Bath v. Bushkin, Gaims, Gaines and Jonas*,¹⁴⁰ where the plaintiff sought review of a judgment below that dismissed their claims as untimely.¹⁴¹

The question placed before the panel was whether the district court erred in adopting the one-year/three-year rule of *Data Access*. Writing *per curiam*, the tribunal declared "the rule in this circuit is that [section 10(b)] suits are subject to the appropriate limitations statute of the state in which the alleged violation occurred."¹⁴² Unwilling to deviate from its established position, the Tenth Circuit reversed and remanded the antifraud claims "for further proceedings under the most analogous state law limitations period."¹⁴³

Lastly, the Eleventh Circuit joined its immediate predecessors by retaining the state borrowing doctrine as the correct methodology for determining limitations on securities antifraud actions. In *Smith v. Duff and Phelps, Inc.*,¹⁴⁴ the defendant urged the appellate court to adopt the uniform rule espoused by the Third Circuit.

Writing for the panel, Judge Johnson reminded the litigants that in the Eleventh Circuit, "the statute of limitations for section 10(b) claims is the period that the forum state applies to the most closely analogous state claim."¹⁴⁵ Declaring itself powerless to overrule the cases that created this practice, the court refused to join in the revisionary approach of *Data Access*.¹⁴⁶ Significantly, in *Smith* the Eleventh Circuit noted parenthetically that the Supreme Court cases

139. *Id.*

140. 913 F.2d 817 (10th Cir. 1990).

141. *Id.* at 818.

142. *Id.* (citing *Hackhart v. Holmes*, 675 F.2d 1114, 1120 (10th Cir. 1982)). The court added it was "unaware of any circuit court electing to follow *Data Access*," a true statement at that time. *Id.* at 818-19.

143. *Id.* at 819.

144. 891 F.2d 1567 (11th Cir. 1990).

145. *Id.* at 1569-70.

146. *Id.* at 1570.

relied upon by the Third Circuit, in its ground-breaking opinion, did not directly apply to securities law actions. Apparently, the dissimilarity was potent enough to persuade this panel that a reversal of its existing doctrine was not required.¹⁴⁷

Against this backdrop, the controversy over a uniform liminary period for section 10(b) actions had reached its apex. While the trilogy discussed above propounded uniformity grounded upon the one-year/three-year rule, other tribunals resisted the change, and instead adhered to the tradition of borrowing from the forum state's closest analogue to determine a statute of limitations. Thus, the die was cast, and it was left to the Supreme Court to reconcile the opposing forces.

LIGHTING THE LAMPF

The New Rule — And a Disjointed Plurality

We now come to the penultimate decision in these matters, the opinion of the Supreme Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.¹⁴⁸ As referred to in the prologue, the opinion proved to be particularly divisive, with particularly vigorous dissents filed by Justices Kennedy and O'Connor, and a lukewarm concurrence by Justice Scalia.¹⁴⁹

The petitioner Lampf, Pleva was a New Jersey law firm that aided in the organization of seven Connecticut limited partnerships that failed. Subsequently, the Internal Revenue Service disallowed the tax shelter benefits that the entities had passed on to their investors. This motivated the investors to become plaintiffs in a securities fraud lawsuit against Lampf, Pleva and others.¹⁵⁰

In the proceedings below, the district court determined that the timeliness of the federal lawsuit would be governed by the forum state's two-year statute of limitations for fraud claims, the most analogous state cause of action available.¹⁵¹ Although that decision was revised and remanded on appeal, the circuit panel also advocated the borrowing of the forum state's two-year liminary period. "In view of the divergence of opinion" among the federal circuits on the proper limitations period for federal securities fraud claims, the high

147. *Id.* at 1570 n.6.

148. 111 S. Ct. 2773 (1991).

149. Divided into four enumerated sections, with the second further subdivided into three alphabetical parts, Justice Blackmun delivered the opinion of the Court with respect to Parts I, II-B, III and IV. Chief Justice Rehnquist, Justices White, Marshall, and Scalia joined therein. Justice Blackmun delivered an opinion with respect to Part II-A, in which Rehnquist, White, and Marshall joined. The Scalia opinion concurred in part and in the judgment. Justices Kennedy and O'Connor not only filed individual dissents, but each joined in the other's taking of exception. Justice Stevens was joined in his dissent by Justice Souter. *Id.*, 111 S. Ct. at 2776.

150. *Id.*

151. *Id.* at 2777.

Court granted certiorari "to address this important issue."¹⁵²

Three essential viewpoints on how best to resolve the controversy were provided to the high Court. First, plaintiff-respondents maintained that the longstanding borrowing practice was still valid. Second, the petitioner contended that a one year from discovery/three years from the violation span was appropriate as a uniform federal period, since such a limitation was consistent with related causes of actions under the securities laws.¹⁵³ Finally, the SEC argued for a uniform period of repose under federal law, but urged the Court to adopt the five-year statute of limitations employed in the Insider Trading and Securities Fraud Enforcement Act of 1988.¹⁵⁴ The agency submitted that such a period represented the most recent congressional pronouncement regarding the enforcement scheme for federal securities regulations.¹⁵⁵

In commencing the Court's analysis, Justice Blackmun posited that "it is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action a court 'borrow' or 'absorb' the local time limitation most analogous to the case at hand."¹⁵⁶ As with any rule, however, the caveat is that exceptions do exist. One pertinent exception is where the court examines federal law for a suitable limitations period because use of the state time of repose "would frustrate the policies embraced by the federal enactment."¹⁵⁷

Nevertheless, the high Court cautioned that the state borrowing doctrine "may not be lightly abandoned," and warned that the practice of federal borrowing is a closely circumscribed exception, proper only where federal law provides a tighter fit than the available state law.¹⁵⁸ "Predictably, this determination is a delicate one," acknowledged the high tribunal.¹⁵⁹

To accomplish this sensitive task, the Court looked to its "hierarchical inquiry for ascertaining the appropriate limitations period for a federal cause of action where Congress has not set the time within which such action must be brought."¹⁶⁰ First, and quite logically so, the court must determine whether a uniform statute of limitations is

152. *Id.* at 2776-77.

153. *Id.* at 2777.

154. *Id.* at 2777-78. *See supra*, note 128.

155. *Id.* at 2778.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 2778-79.

even appropriate. Where the federal cause is diverse, Justice Blackmun opined that “federal interests in predictability and judicial economy counsel the adoption of one source, or class of sources, for borrowing purposes.”¹⁶¹ The natural conclusion is the adoption of a single federal provision or a “single variety” of state actions to borrow from.¹⁶²

Once it is determined that a uniform statute of limitations is appropriate, the Court must decide whether to rely upon a state or federal source for the liminary period. Here, the multistate nature of a particular federal claim indicates a need for uniformity grounded in federal law. Lastly, even if the terrain points to federal borrowing, the strong presumption in favor of borrowing from the forum state “requires that a court determine that an analogous federal source truly affords a ‘closer fit’ with the cause of action at issue than does any available state-law source.”¹⁶³

Complicating the Court’s analysis were “the nontraditional origins of the section 10(b) cause of action,” specifically the fact that a private claim was purely a judicial creation out of whole cloth.¹⁶⁴ “It is therefore no surprise that the provision contains no statute of limitations.”¹⁶⁵ This left the high bench “with the awkward task of discerning what the limitations period Congress intended [the judiciary] to apply to a cause of action it never really knew existed.”¹⁶⁶

Fortunately, the Court did find that the progenitors of section 10(b) left some guidance for their descendants. Postulating that, where a claim is implied from a statute containing an express cause of action possessed of its own explicit time limitation, a court should look to that originating statute first in determining the liminary span for the implied action. Furthermore, if that parent law has “comparable express remedial provisions, the inquiry usually should be at end.”¹⁶⁷ Borrowing from state law should only be a last resort if no counterpart is available to the statute in question, since there is “no clearer indication” of how the lawmakers would have legislated “than the balance struck by Congress in limiting similar and related protections.”¹⁶⁸

Bringing this rationale to the instant case, the Court found that the provisions of the 1934 Securities Exchange Act include “a number of express causes of action, each [with] some variation of a 1-year period

161. *Id.* at 2779.

162. *Id.* at 2778-79.

163. *Id.* at 2779. The Court added that “commonality of purpose and similarity of elements will be relevant” to this inquiry. *Id.*

164. *Id.*

165. *Id.* at 2780.

166. *Id.*

167. *Id.*

168. *Id.*

after discovery combined with a 3-year period of repose."¹⁶⁹

Indeed, the opinion set forth the unmistakable nexus between those companion provisions and section 10(b), finding that they "target the precise dangers that are the focus" of the antifraud rule, each being "an integral element of a complex web of regulations," intended to facilitate the protection of investors and the honest functioning of the securities marketplace.¹⁷⁰

Taking comfort in the foregoing conclusions, the Court then found it must *per force* reject the SEC's contention that a five-year statute of limitations was appropriate.¹⁷¹ The five-year period was a surgical insertion, according to the Court, post-dating the original regulatory enactments by more than fifty years, and was specifically designed to address the problem of insider trading.¹⁷² The court reasoned that there was no indication that the drafters . . . intended to extend the enhanced protection elsewhere within the regulatory matrix.¹⁷³ Indeed, the Court found that the explicit disclaimer of any effect by the new insider trading prohibition on other securities laws was evidence that the five-year statute of limitations was strictly limited to its original statute.¹⁷⁴

In a similar vein, the Court discounted the argument that differing liminary periods for these interrelated prohibitions would subject much of the same conduct to two distinct periods of repose.¹⁷⁵ "There is no inconsistency" in this, held the Court, because "Congress sought to alter the remedies available in insider trading cases, and *only* in insider trading cases," via the longer statute of limitations.¹⁷⁶ Furthermore, the strengthened insider trading ban also implicitly overlaps other securities law provisions, including those already utilizing the one-year/three-year span.

The agency's final contention, that adoption of the shorter one and three-year period would "frustrate the policies underlying § 10(b)," was rejected.¹⁷⁷ Again harking to the aforementioned examples of liminary periods already at work in the federal securities laws, the

169. *Id.* Moreover, the Court pointed out that in 1934 the Congress also amended the 1933 Securities Act to conform to this one-year/three-year architecture. *Id.*

170. *Id.* at 2781.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* (emphasis in the original).

177. *Id.*

high bench concluded that Congress believed a three-year period was sufficient for the bringing of an action under section 10(b).¹⁷⁸

In closing this portion of the opinion, the Court rejected *a fortiori* that borrowing from state law was appropriate here. The Court stated, “[T]he analytic framework we adopt above makes consideration of state-law alternatives unnecessary where Congress has provided an express limitations period for correlative remedies within the same enactment.”¹⁷⁹

Winding down from this new landmark, the Court made an additional ruling, disturbing to some,¹⁸⁰ that it was going to put aside the “venerable doctrine” of equitable tolling as to these plaintiffs. The new one and three-year structure, explained Justice Blackmun, is “fundamentally inconsistent” with equitable tolling. “Because the purpose of the 3-year limitation is clearly to serve as a cutoff,” the Court held that tolling principles did not apply to that period.¹⁸¹

In conclusion, for its closing, the Supreme Court announced that:

Litigation instituted pursuant to § 10(b) and Rule 10b-5 therefore must be commenced within one year after the discovery of facts constituting the violation and within three years after such violation.¹⁸²

As there was no dispute that the instant actions were filed after the lapse of three years from the complained of acts, the claims were decreed to be untimely.¹⁸³

The Vocal Opposition

As previously noted, the plurality decision in *Lampf* was anything but the unified opinion of the Supreme Court. Of all the discordant voices, that of Justice Kennedy, the last to be heard from, spoke most eloquently for a different result. To be sure, Justice Kennedy agreed that a uniform federal statute of limitations for section 10(b) actions was appropriate, and even went so far as to assent to the one-year from discovery prong of the new liminary period.¹⁸⁴

However, in his dissent, joined in by Justice O'Connor, Justice Kennedy opposed the three-year period of repose now also adopted, arguing that “[t]his absolute time-bar . . . conflicts with traditional limitations periods for fraud-based actions,” frustrates the utility of the antifraud statute’s protections for investors, and “imposes fewer practical limitations” on cases prosecuted thereunder.¹⁸⁵

178. *Id.*

179. *Id.* at 2781-82.

180. *See infra*, notes 200-57 and accompanying text.

181. *Id.* at 2782.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 2788 (Kennedy, J., dissenting).

While disagreeing with the majority, Justice Kennedy did not criticize its methodology, finding it sensible to search for a limitations period among section 10(b)'s companion provisions.¹⁸⁶ However, the availability of that mode of analysis does not replace the concomitant obligation to carefully consider the avowed goal of the law and reject any possible rule that would impede the very policies behind the statute in question.¹⁸⁷

In the instant holding, Justice Kennedy noted that the plurality did not lock onto one statute and bind itself to its terms.¹⁸⁸ Rather, the Court referred to three liminary periods within the 1934 Act, rejected out of hand the one with a two-year statute of repose, and purported to follow the two others containing one-year/three-year liminary periods.¹⁸⁹ But of even greater importance to Justice Kennedy was the fact that neither of the latter two statutes related to a cause of action of the scope and coverage of section 10(b), nor did either rest on the common law fraud model behind the majority of federal antifraud suits.¹⁹⁰

Highlighting the "significant protections" for investors that section 10(b) embodies as a "comprehensive antifraud provision," the Kennedy dissent reminds us that private litigation thereunder is to be encouraged as supporting a Congressional policy of "combatting all forms of securities fraud."¹⁹¹ Even so, the complexity of modern securities markets make for significant obstacles to the bringing of such suits.¹⁹²

The real burden on most investors, concluded Justice Kennedy, is the initial matter of discovering the alleged fraud in the first place, as concealment of the fraud is a given for stock market pirates.¹⁹³ For this reason, "[t]he practicalities of litigation, indeed the simple facts

186. *Id.* at 2788 (Kennedy, J., dissenting).

187. *Id.* (Kennedy, J., dissenting).

188. *Id.* (Kennedy, J., dissenting). See *United Parcel Service v. Mitchell*, 451 U.S. 56, 68 n.4 (1988).

189. *Id.* (Kennedy, J., dissenting).

190. *Id.* at 2789 (Kennedy, J., dissenting). The plurality's rejoinder was that "the one- and-three-year scheme represents an indivisible determination by Congress as to the appropriate cutoff point" for section 10(b) claims. Any bifurcation thereof would be a disservice to that legislative decision, and, moreover, precedent did not support "borrowing only a portion of an express statute of limitations. Indeed, such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid." *Id.* at 2782 n.8.

191. *Id.* (Kennedy, J., dissenting).

192. *Id.* (Kennedy, J., dissenting).

193. *Id.* (Kennedy, J., dissenting).

of business life," are such that the newly minted rule is doomed to subjugate the Congressional intent for section 10(b) to be a viable weapon for the wronged investor.¹⁹⁴ Justice Kennedy opined:

By adopting a 3-year period of repose, the Court makes a § 10(b) action all but a dead letter for injured investors who by no conceivable standard of fairness or practicality can be expected to file suit within three years after the violation occurred.¹⁹⁵

Moreover, declared the Justice, "the Court also turns its back on the almost uniform rule rejecting short periods of repose for fraud-based actions."¹⁹⁶ Significantly, even those forums that do entertain abridged spans of repose "typically permit actions to be brought within at least five years."¹⁹⁷ In a somewhat barbed comment, Justice Kennedy pointed out that Congress had recognized such facts by mandating the five-year statute of limitations for insider trading, yet this Court failed to come to the same realization.¹⁹⁸

In summation, Justice Kennedy found that the three-year repose period "simply tips the scale too far in favor of wrongdoers."¹⁹⁹ He concluded:

The Court's decision today forecloses any means of recovery for a defrauded investor whose only mistake was not discovering a concealed fraud within an unforgiving period of repose. As fraud in the securities market remains a serious national concern, Congress may decide that the rule announced by the Court today should be corrected. But even if prompt congressional action is taken, it will not avail defrauded investors caught by the Court's new and unforgiving rule, here applied on a retroactive basis to a pending action. With respect, I dissent and would remand with instructions that a § 10(b) action may be brought at any time within one year after an investor discovered or should have discovered a violation.²⁰⁰

Notwithstanding Justice Kennedy's erudite dissent, Justice O'Connor felt compelled not only to join therein, but to memorialize her own differences with the plurality.²⁰¹ Interestingly, Mr. Justice Kennedy was moved to return the favor and joined in her dissent as well.²⁰²

Not surprisingly, Justice O'Connor agreed that "predictability and judicial economy counsel the adoption of a uniform federal statute of limitations" for section 10(b) actions.²⁰³ However, explicitly siding with Justice Kennedy, Justice O'Connor advocated adoption of only the one-year from discovery aspect of the new standard, and not the

194. *Id.* (Kennedy, J., dissenting).

195. *Id.* at 2790 (Kennedy, J., dissenting).

196. *Id.* (Kennedy, J., dissenting).

197. *Id.* (Kennedy, J., dissenting).

198. *Id.* (Kennedy, J., dissenting).

199. *Id.* (Kennedy, J., dissenting).

200. *Id.* (Kennedy, J., dissenting).

201. *Id.* (Kennedy, J., dissenting).

202. *Id.* at 2785 (O'Connor, J., dissenting).

203. *Id.* (O'Connor, J., dissenting).

three-year period of repose.²⁰⁴ Otherwise implying full accord with her fellow dissenter, Justice O'Connor stipulated she was only writing separately to "express my disagreement with the Court's decision . . . to apply the new limitations period *in this case*."²⁰⁵

Characterizing the instant decision as a drastic departure from established practice and, moreover, inflicting an injustice on the plaintiffs, Justice O'Connor took the Court to task for "declin[ing] to explain its unprecedented decision, or even to acknowledge its unusual character."²⁰⁶ In an almost mocking tone, the dissent comments that the opinion "shuts the courthouse door" on the parties "because they were unable to predict the future."²⁰⁷

Dispelling any notion that this retroactive application of the new rule constituted the Supreme Court's standard practice, Justice O'Connor remonstrated that:

This Court has, on several occasions, announced new statutes of limitations. Until today, however, the Court had *never* applied a new limitations period retroactively to the very case in which it announced the new rule so as to bar an action that was timely under binding Circuit precedent. Our practice has been instead to evaluate the case at hand by the old limitations period, reserving the new rule for application in future cases.²⁰⁸

This principle, Justice O'Connor pointed out, was based on "fundamental notions of justified reliance and due process," implemented to insure a party its day in court.²⁰⁹

Detailing why the Court was remiss in failing to apply that doctrine here, Justice O'Connor opined:

First, in adopting a federal statute of limitations, the Court overrules clearly established Circuit precedent; the Court admits as much. Second, the Court explains that "the federal interes[t] in predictability" demands a uniform standard. I agree, but surely predictability cannot favor applying retroactively a limitations period that the respondent could not possibly have foreseen. Third, the inequitable results are obvious. After spending four-and-one-half years in court and tens of thousands of dollars in attorney's fees, respondents' suit is dismissed for failure to comply with a limitations period that did not exist until today.²¹⁰

Doubting that the bench's "cursory treatment" was an oversight, Justice O'Connor criticized the Court for "visiting unprecedented unfairness" on the plaintiffs "for reasons unknown and unexplained" in

204. *Id.* (O'Connor, J., dissenting).

205. *Id.* (O'Connor, J., dissenting) (emphasis in the original).

206. *Id.* (O'Connor, J., dissenting)

207. *Id.* at 2785-86 (O'Connor, J., dissenting).

208. *Id.* at 2786 (O'Connor, J., dissenting) (emphasis in the original).

209. *Id.* (O'Connor, J., dissenting).

210. *Id.* at 2787 (O'Connor, J., dissenting) (citations omitted).

choosing to ignore the issue.²¹¹

Another note of disharmony was struck by Justice Stevens, who declared that the Court in this decision “has undertaken a lawmaking task that should properly be performed by Congress.”²¹² Joined by Justice Souter in his dissent, Mr. Justice Stevens found defective both the premise that section 10(b) causes were “created out of whole cloth by the judiciary,” and the concomitant belief that the bench “must also have the authority to fashion the time limitations applicable” thereto.²¹³

Taking a historical tack, Justice Stevens noted that for four decades, the federal courts had successfully administered securities fraud litigation by borrowing state statutes of limitations.²¹⁴ While admitting a uniform federal rule would be superior “to the often chaotic traditional approach of looking to the analogous state limitation,” Justice Stevens nevertheless declared that:

Congress, rather than the federal judiciary, has the responsibility for making the policy determinations that are required in rejecting a rule selected under the doctrine of state borrowing, long applied in § 10(b) cases, and choosing a new limitations period and its associated tolling rules . . . When the Court ventures into this lawmaking arena, however, it inevitably raises questions concerning the retroactivity of its new rule that are difficult and arguably inconsistent with the neutral, non-policy making role of the judge.²¹⁵

Moreover, this repudiation of the established state borrowing rule was not justified by the Court’s precedents.²¹⁶ Nothing in the securities acts provides a basis for a departure from that practice, found Justice Stevens.²¹⁷ Interestingly, his dissent viewed the controlling opinion as failing to find an intent by the legislators to pattern section 10(b) after the sections subject to the one-year/three-year limitations.²¹⁸

Justice Stevens summed up his disagreement with these words:

The policy choices that the Court makes today may well be wise — even though they are at odds with the recommendation of the Executive Branch — but that is not a sufficient justification for making a change in what was well-settled law during the years between 1946 and 1988 governing the timeliness of action impliedly authorized by a federal statute. This Court has recognized that a rule of statutory construction that has been consistently applied for several decades acquires a clarity that “is simply beyond peradventure.” *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983). I believe that the Court should continue to observe that principle in this case.²¹⁹

In contrast to the vociferous dissents discussed above, the concur-

211. *Id.* at 2787-88 (O’Connor, J., dissenting).

212. *Id.* (O’Connor, J., dissenting).

213. *Id.* at 2783-84 (Stevens, J., dissenting).

214. *Id.* at 2783 (Stevens, J., dissenting).

215. *Id.* at 2784 (Stevens, J., dissenting) (footnote omitted).

216. *Id.* (Stevens, J., dissenting).

217. *Id.* (Stevens, J., dissenting).

218. *Id.* at 2784-85 (Stevens, J., dissenting).

219. *Id.* at 2785 (Stevens, J., dissenting).

ring opinion of Justice Scalia was relatively mild in asserting its viewpoint. Nevertheless, in concurring in part and concurring in the judgment, Justice Scalia was no less firm in the position he expressed.²²⁰

The gist of the Scalia opinion was that while accepting the existing precedents of the Court, he "continue[d] to disagree with the methodology" employed.²²¹ Justice Scalia asserted that "absent a congressionally created limitations period state periods govern, or, if they are inconsistent with the purposes of the federal act, no limitation period exists."²²² Finding the present case particularly troublesome because "it involve[d] one of those so-called 'implied' causes of action," Justice Scalia disdainfully observed that such functions were not the proper domain of federal tribunals.²²³

With this *fait accompli*, however, the question arises as to what liminary period applies. Congress has not had an opportunity to consider whether the state limitation is adequate or if it would prefer to craft its own rule, observed Justice Scalia.²²⁴ "That lack of opportunity is particularly apparent in the present case, since Congress *did* create special limitations periods for the Securities Exchange Act causes of action that it actually enacted."²²⁵

Finding it "too lawless to be imagined" to imply twofold a statute of limitations for a likewise implied cause of action, Justice Scalia opined that the more responsible approach, where the enactment occasioning the creation of an implied right contained a limitations period for an analogous cause, would be to use that limitations period.²²⁶ Agreeing that "[w]e are imagining here," Mr. Justice Scalia joined in the plurality's decision to borrow from the liminary periods of related provisions of the federal securities acts.²²⁷

In conclusion, in *Lampf* the Supreme Court shed new light on the issue of limiting the time in which to bring an action pursuant to section 10(b). Verifying the correctness of the circuit trilogy's choice in

220. *Id.* at 2785 (Stevens, J., dissenting).

221. *Id.* at 2783 (Scalia, J., concurring in part and concurring in judgment).

222. *Id.* (Scalia, J., concurring in part and concurring in judgment).

223. *Id.* at 2783 (Scalia, J., concurring in part and concurring in judgment).

224. *Id.* (Scalia, J., concurring in part and concurring in judgment).

225. *Id.* (Scalia, J., concurring in part and concurring in judgment) (emphasis in the original) (citations omitted).

226. *Id.* (Scalia, J., concurring in part and concurring in judgment).

227. *Id.* (Scalia, J., concurring in part and concurring in judgment). Justice Scalia refused to join in the portion of the opinion setting forth the anti-state borrowing analysis. *Id.*

selecting the one-year/three-year liminary period from elsewhere in the federal securities laws, the Court reconciled its traditional state borrowing doctrine with the exceptions thereto that recent holdings had developed and utilized as necessary. Without a doubt, the Supreme Court has added a note of finality (for the moment) to the limitations controversy, endowing stability and fairness to the confusing matter of discerning the appropriate statute of limitations for securities antifraud actions.

However, *Lampf* does not represent the last word on such matters. Still open for debate and adjudication is the possible apparent retroactive application of the new rule. Already the trial courts are fraught with disarray on this point. Initiatives for remedial legislation are presently under way to address that concern, as well as the basic question of the desirability of the one-year/three-year limitation period as a statute of repose for the vitally important antifraud statute. This article's analytical segment shall commence with the latter controversy, after an examination of one final point on modern liminary periods that went virtually overlooked in *Lampf*.

THE NEW GENERAL FEDERAL STATUTE OF LIMITATIONS—AN OVERLOOKED REMEDY OR A CASE OF TOO LITTLE, TOO LATE?

As the foregoing has exemplified, the *raison d'être* of this writing is to address the longstanding quandary of providing a workable statute of limitations for securities antifraud actions. To be sure, the problem of interstitially selecting an appropriate liminary period for a statute ranges far and wide throughout the many codifications of federal law. For that reason, Congress recently enacted a new omnibus statute to help alleviate that difficulty. While the cases discussed herein have essentially overlooked that new alternative, it may yet be helpful in resolving this modern dilemma.

Congress recently passed into law the Judicial Improvements Act of 1990,²²⁸ which made a number of changes to title 28, the federal Judicial Code. The focus was on the promulgation of a new general federal statute of limitations within the judiciary title.²²⁹ The eminent Professor Siegel critiqued the new provision as follows:

Section 1658 is the new limitations provision enacted by the 1990 Judicial Improvements Act. It adopts a uniform and general statute of limitations for federal causes of action not governed by any special one, settling on a period of four years. This could be quite a gift to the federal lawyer and just as much so to the federal bench, which has spent many unnecessary hours hunting for appropriate time provision to apply to a variety of federal claims. But this

228. Judicial Improvements Act of 1990, Pub. L. No. 101-650 (codified at 28 U.S.C. § 1653 (1990)).

229. *Id.*

statute turns out to be hardly any gift at all for the reason that it applies only to causes of action or claims created by Congress after December 1, 1990, the effective date of the Judicial Improvements Act. The myriad of pre-existing claims, recognized by either statutory or decisional law, continue to be governed by whatever is outside of § 1658, and the ground outside § 1658 is often hostile territory.²³⁰

Expressing dismay with the shortcomings of this otherwise long-awaited revision, the commentary viewed this "halting step of enacting a uniform general period for future-created claims" as inadequate for its failure to address existing claims.²³¹ Nevertheless, the daunting Professor Siegel went on to offer that "it may sometimes be appropriate to argue that § 1658 and its four-year period, while not directly applicable, should be the statute applied anyway."²³² In doing so, it would appear that the learned academician is promoting an expansive use of the new general federal liminary period, in order to facilitate the very kind of interstitial lawmaking that so many federal courts have wrestled with in the absence of express federal statutes of limitation.

To be sure, Justice Blackmun dismissed the new section 1658 as "obviously [having] no application" in *Lampf*.²³³ It is perplexing to find that the Supreme Court brusquely dismissed that recent enactment in an incidental footnote to *Lampf*. Considering that the Court was confronted with the difficult task of selecting an appropriate liminary period for a uniquely federal statute, it is hard to understand why the plurality would virtually ignore the efficacy of a new provision, so readily available to it, without a further explanation of the basis for its decision.

One could presume that the Court believed its own revised borrowing doctrine would not allow it to borrow a general catch-all statute such as the new section 1658. To be sure, the Court's modern teachings, as set forth *infra*, require that, if borrowing from the forum state's periods of repose is inappropriate, the next venue to be perused is the analogous federal law. As this implies looking first within the same regulatory scheme before embarking on a journey throughout the federal statutes at large, the plurality may have felt constrained to delimit its venture into the securities acts alone. No doubt satisfied with the one-year/three-year rule found in adjacent

230. Siegel, "The Statute of Limitations In Federal Practice, Including The New "General" One in Federal Question Cases," 134 F.R.D 481, 482 (1991).

231. *Id.* at 484.

232. *Id.* at 487.

233. *Lampf*, 111 S. Ct. at 2782-83.

portions of the securities regulation title, the Court ended its search there, thereby never approaching the four-year statute of limitation codified later in the judicial title.

Moreover, Congress did nothing to advance the cause of its new creation, declaring it was applicable to new rights of action only. By reason of this almost self-defeating omission, the legislators precluded the general statute of limitations from being used to solve many of the troublesome liminary questions plaguing the congested federal system. The instant case of section 10(b) is probably the most glaring example of the negative ramifications of this oversight. Had Congress mandated a wider application for section 1658, it may very well have provided sufficient latitude for the Supreme Court to entertain additional thought as to the propriety of a four-year statute of repose, either in place of or in conjunction with a variation of the one-year/three-year rule it ultimately adopted.

At the end of the day, the fact remains that the *Lampf* Court put to one side the general four-year statute of limitations, enacted only months before the Justices adopted the one-year/three-year rule. Nevertheless, the efficacy of the former liminary period cannot be overlooked. It will ultimately remain for Congress to decide what it thinks is best for antifraud actions.

IS ONE-AND-THREE TOO SHORT FOR SECTION 10(B)?

Before landing any criticism upon the one-year/three-year rule that has now devolved upon the federal securities code, one should bear in mind the Solomonic-like wisdom required for the herculean task of propounding such a provision in the first place. In overviewing the process of selecting a liminary period for section 10(b) actions, Judge Posner pointed out the tremendous difficulties inherent therein, stating:

The considerations bearing on the suitability of one limitations period compared to another include the difficulty of investigating potential violations, the possibility that the consequences of wrongdoing will be delayed, the opportunities for wrongdoers to conceal the wrong, the rate at which evidence of wrongdoing and also evidence pertinent to the alleged wrongdoer's defenses is likely to decay, the sophistication of the relevant tribunals in handling stale evidence, the desirability of freeing court time for fresh claims, the interest of potential defendants in repose — that is, in knowing after a definite period has passed that they no longer have to worry about being sued — and the effect on the deterrence of statutory violators of reducing the time for bringing suit.²³⁴

Obviously, the measurement of these factors is best left to the legislative branch, as so correctly noted by Justice Stevens in his concurrence in *Lampf*. But in advancing to the next evolutionary level for the nascent liminary rule, let us look to these conflicting tensions.

234. *Short*, 908 F.2d at 1394 (Posner, J. concurring).

Certainly, the competing interests on the limitations issue are indeed sharply defined. Taking the view of prospective plaintiffs first, it is beyond cavil that the courts, especially the Supreme Court, have historically viewed private antifraud litigation as a vital corollary to regulatory enforcement, as prosecuted by the Securities and Exchange Commission. Undoubtedly cognizant of the limited resources of the SEC and its state counterparts in the vast securities marketplace, and the overwhelming need to provide defrauded investors with a formidable remedy, the jurisprudence of section 10(b) can only be viewed as encouraging private litigants to enforce their rights against the pirates and buccaneers of the stock exchanges. Indeed, the events of modern times have served only to reinforce, if not totally renew, that dogma.

Viewed from that perspective, one quickly appreciates the need for a liminary period that provides an adequate, if not generous, time frame in which litigants may commence an action. Parenthetically, it should be said that the imposition of a uniform liminary rule need not be a concern to potential plaintiffs. While it is true that in the past certain fora have granted plaintiffs a more expansive allotment of the time in which to sue, it would seem to this commentator that the liminary sword often cuts the other way, acting in a less favorable forum to banish a complaint as time-barred. Putting the calendar aside, a uniform rule serves to remove one more substantive roadblock to the lawsuit, a matter ultimately beneficial to the prosecuting party.

Returning to what a representative plaintiff would contend is the most appropriate period, no doubt such a party would argue that the very "antifraud" object of section 10(b) demands a maximum allocation of time to sue. After all, fraud is unquestionably a bad thing; its *malum in se* nature is indisputable. Moreover, such fraud must forever be guarded from in the stock exchanges, as those marketplaces represent the very lifeblood of our economic system. One can even argue persuasively that a prime remedy to prevent such fraud upon the securities marketplace must be available at virtually *any time* as the key weapon to oust such wrongdoing from our capital markets. After all, are not these vandals of Wall Street a clever lot? Could they not, as history has shown, conceal their fraud for many years, before some private or governmental inquiry exposes it to the light of justice?²³⁵

235. See 3 BROMBERG & LOWENFELS, *Securities Fraud and Commodities Fraud* § 7.3

Simply put, proponents of the foregoing would say that section 10(b) must be relatively unfettered, its longevity virtually unlimited, in order to deter and defeat the barbarians at the very gates of the exchanges. A statute of limitation or repose, they say, should range as far and as wide as possible, in order to deny evildoers any comfort from the passage of time. By mandating a short and intractable period of repose, any liminary period may very well punish the hapless investor "whose only mistake was not discovering a concealed fraud within an unforgiving period of repose."²³⁶

Clearly, the foregoing goes to the upper limitation, if any, on the overall time in which to commence an antifraud suit. It also serves as the natural segue into the companion question of imposing a liminary period commencing from the date of the discovery of the fraud. Here the prospective plaintiff's argument loses some steam. After all, once the fraud is discovered, why hasten to bring suit? But their contentions regain speed somewhat quickly.

Consider first Rule 11,²³⁷ which requires a good faith basis upon which to bring a lawsuit. Litigants and their counsel are dutybound to investigate the propriety of the contemplated action before commencing it. A failure to act in accordance with the rule could mean the imposition of sanctions and penalties. Likewise, a short distance down the litigation trail is the requirement that allegations of fraud be pled with particularity.²³⁸ Similar to the requirements under Rule 11, the anticipating plaintiff must have, at the very least, something of substance upon which to ground her pleadings. The lack of a firm foundation upon which to allege fraudulent conduct condemns the lawsuit to a quick and certain dismissal.

Indeed, even if an amendment to the pleadings is permitted, the lack of a guarantee of that opportunity makes the "file first, amend later" option a foolhardy risk, and potentially a costly one under Rule 11. Moreover, to be totally Machiavellian, it alerts the opposition to storm clouds on the horizon, permitting the defendants to batten down, while serving no useful purpose for the plaintiffs.

Thus, it becomes patently obvious to even the most casual observer that haste is not only waste, it may very well mean an abrupt and final conclusion to the litigation. For reason of the strictures of the Federal Rules and cases thereunder, a prospective plaintiff should not rush headfirst into filing a lawsuit. Rather, some deliberation is an absolute necessity, and, of course, that takes some time. Investigation, research, contemplation, and the myriad other tasks that go into

at 220-27, (informative catalog of the diverse and innovative artifices conceived by stock market pirates).

236. *Lampf*, 111 S. Ct. at 2790 (Kennedy, J., dissenting).

237. FED. R. CIV. P. 11.

238. FED. R. CIV. P. 9(B).

the deliberative process are necessary precursors to commencing the lawsuit, and the limitation period measuring from the time the fraud is discovered must per force accommodate these demands.

Part and parcel of this aspect is the definition of what constitutes "discovery" of the fraud. To be sure, even under pre-existing standards, that point was hotly contested more often than not, especially in securities cases. Pinning down the date the alleged fraud was or, more importantly in some cases, should have been discovered is at its best an inexact science.

Rarely are the crossroads clearly mapped out; in most instances, the terrain is uncertain, the borders fuzzy. Any number of or type of event may at the time seem inconspicuous, nonthreatening or an insufficient basis upon which to initiate litigation. Yet, with the benefit of 20/20 hindsight, the defendants will surely point to such as the day the clock began to tick and counter that the allotted time from discovery to the filing of suit has expired. Even where a tax audit, SEC inquiry or other such independent event transpires, the ultimate result is usually not readily apparent. Having suspicion but little else at that time, the wronged investor watches helplessly as time runs out before evidence substantial enough to commence suit accumulates from the time of the first inkling of fraud.

Lastly, if nothing else, all of this potential for controversy provides wrongdoers with fertile ground for tactical maneuvering in court. Undoubtedly, the most guilty of defendants will stalwartly utilize this bone of contention as astutely as possible. At best, it could provide a basis for forever disposing of the litigation. At worst, it wears down the opposition, consumes time and money, and may even discourage more ardent pursuit.

It is no wonder plaintiffs argue for the most expansive time frame possible as measured from the date of discovery of the fraud. Their points are well taken. A liberal time-from-discovery rule fosters less haste, and ergo less waste, by permitting parties to adequately, if not exhaustively, investigate the merits of their claims. To be sure, one could argue with a straight face that in the first instance baseless suits would need not even be brought, for reason of the thorough investigation that such liberal rules of time would allow, thereby saving precious judicial resources. After all, a plaintiff benefitting by a generous post-discovery period to prepare his lawsuit could and should be harshly dealt with by a court, if one demonstrates that the plaintiff whiled away her time, doing nothing to bring the best-prepared case to court. And litigation later proven an inflammatory "strike

suit" could not hide behind the excuse of a hurried filing made to get in "under the wire" of a liminary provision.

In sum, we have all the rationales offered by plaintiffs in support of the most lengthy uniform statute of limitations possible for litigation pursuant to section 10(b). In all fairness, said arguments do not lack merit. But before any reader succumbs to the notion that the instant writing is biased towards the suitors' side, let us turn to the equally cogent, equally erudite arguments made by the defendants' camp, in favor of the shortest possible liminary period for securities antifraud lawsuits.

Understandably, putative defendants, typically the securities and financial firms, lawyers, and, especially in these times, the major accounting firms, have sought to minimize their exposure to securities fraud suits by arguing in favor of the shortest liminary period possible for such actions.²³⁹ To be sure, this author would be one of the last to favor a rule of limitation that would expose the already-beleaguered financial, legal, and accounting professions to even more broadside litigation, as commenced by disgruntled investors in search of a deep (and solvent) pocket.²⁴⁰ These essential elements of the business world are already besieged, and in many cases unjustly, with enough securities litigation to last for years. Their call for relief therefrom is certainly worthy of heed. As with the flip side of a newly minted coin, their arguments to foreshorten the liminary period shine just as brightly and are just as persuasive.

The essential *raison d'être* of those who have or may occupy the defendants table in a section 10(b) lawsuit begins with the old adage that the business of America is business. With that as a given, business then needs the law to shield it from the protracted threat of disruptive litigation. Business cannot function properly or efficiently, say the captains of industry (and rightly so) if the time for commencing litigation against them is oppressively long. The shortest possible liminary periods, they contend, assures free enterprise that it can move forward without fear of past history coming back to haunt it.

The "litigation risk," like any other component of economics, is something the modern business entity measures on a cost-effective basis. To be sure, this writer does not speak here in defense of blatant perpetrators of securities fraud. Rather, the object of the instant

239. Several major accounting firms filed a brief as amici curiae in *Ceres* supporting the one-year/three-year period. See *supra* note 104 and accompanying text.

240. See Anthony M. Sabino, "Big Eight" Beware: *Multinational Accounting firms and The Increasing Scope of Subject Matter Jurisdiction Under the Federal Securities Laws*, 63 ST. JOHN'S L. REV. 467, 502-10 (1989). The author addresses the quandary the now "Big Six" accounting firms and others confront as they expand their international network. While these organizations seek to benefit from business opportunities in the international forum, they also face significant exposure to litigation under American securities laws and regulations.

discussion is the company financial advisor or professional who bears at least some risk of a section 10(b) suit merely by participating in the capital market in some capacity. For them the potential to be a defendant is not necessarily a function of wrongdoing; it may instead be grounded upon various and sundry things, such as a deleterious change in the economic or legal environment, mistakes in business judgment, misplaced optimism in forecasting the future or the mere fact that it is the "deep pocket" targeted by disgruntled investors or, worse yet, "quick-buck" artists out to scam a settlement in lieu of a costly lawsuit. This, then, is the risk of litigation that every business, and especially those involved in the stock markets, must take measure of, and accordingly guard against.

No wonder then that those imperiled by that risk seek to minimize its harmful effects. One highly effective way to do so is to circumscribe the time in which the risk is viable. Statutes of limitation, because of the finality they impose upon causes of action, accomplish precisely that. Obviously, if the time for suit has passed, the erstwhile defendant can raise the expiry of the limitation period as an affirmative defense. On balance, that should lead to a quick and inexpensive disposition of the suit.

Conveniently for our purposes, here the thinking of potential defendants forks into two branches. First, let the statute limit the time in which to sue, as measured from the discovery of the alleged violation. This achieves a number of worthwhile goals. It assists those who may be defendants in identifying a beginning (and, of course, an endpoint) of the period of potential exposure. Parenthetically, it sometimes may assist in quantifying the measure of damages that may be sought, thus allowing the entity to reserve accordingly.

Furthermore, a liminary span running from a point of discovery warns potential suitors to be alert. An affirmative burden is placed on the plaintiff to demarcate a definitive moment when she gained enough knowledge to enable her to bring suit. This assures that the plaintiff will do a little work to earn her place in court, while it simultaneously punishes lazy parties who procrastinate over commencing litigation. Apropos to the problem of the slothful plaintiff, the additional matter of establishing when the suitor *should* have discovered the purported injury layers another protection upon the defendant. Plaintiffs are thereby compelled to be nimble as well as intelligent, and defendants take comfort in knowing that some constructive duty is imposed as a control over prospective litigants.

The other branch of the trail takes us to the issue of a period of

repose. More than the liminary statute discussed above, a provision for repose provides an absolute limit on the time to sue. Beyond its expiration, a suit cannot be maintained. This is just as essential, if not more so, says the business community, because every prospective defendant must know without doubt that the danger of litigation is past and gone forever. Harking to the other old adage that "there must be an end to litigation," proponents of a statute of repose point to the inherent limitations of a limitation statute attuned solely to the event of discovery.

Conceivably, they argue, even in the best of circumstances, the time of discovery could be years far beyond the purported violation. And if nothing else, enormous expenditures could be made merely litigating the issue of the proper time for discovery of the alleged fraud. A statute of repose, proponents contend, solves that problem.

By proscribing an immutable limit of time, arduous debate over the discovery date may be avoided. More importantly, given a period of repose, businesses could take stock of the event giving rise to the litigation risk, and mark off the calendar from there, adjudging the burden of the assumed risk accordingly.

At the end of the day, the arguments of the business community for statutes of limitation and repose for section 10(b) lawsuits boil down to one thing: the fact that business needs and demands a legally enforceable standard by which to measure the time the business community is exposed to the risk of litigation over matters regarding federal securities laws. Knowing when and for how long it shall be at risk is the only way a business can allocate its resources in self-defense. And since it cannot forever continue in a siege mentality, an enterprise, in order to prosper, nay, even to survive, must know when the danger has passed. Anything else would surely choke the life out of any commercial entity, no matter its size.

Given the litigious nature of modern America, the business community only seeks protection in order to maintain some semblance of order. Indeed, it is inarguable that business asks for something that is nothing more than inherently fair and just.

WHAT CHANGE TO BE WROUGHT?

In sum, there we have all the many urgent needs of each side on the question of an appropriate liminary period for section 10(b) litigation. To solve this puzzle wrapped in an enigma, a court or legislature would have to use profound wisdom indeed to select a time span that finely balances the myriad of considerations as exposted hereinabove. Certainly, they would not lack for a multitude of choices in

arriving at a decision.²⁴¹

However, the salient point is that, no matter how painstakingly thoughtful the process is, the ultimate end is a somewhat arbitrary selection of an appropriate statute of repose. Parsing a liminary span between, say, a three or four year period, is inherently tinged with subjectivity. Since this exercise does not necessarily lend itself to principled decisionmaking, it is a choice best arrived at by consensus. In that regard, such interstitial lawmaking is best left to the popular representatives of the citizenry, and any hint of judicial legislation is to be scrupulously avoided.

That is not to say the Supreme Court commenced from an improper premise in promulgating the one-year/three-year rule. Rather, the high Court promoted justice by embracing a uniform rule, and chose the one-and-three limitation from elsewhere in the federal securities code. The Court acted with the best of intentions, to be certain. What is left for debate is whether it made the best possible choice.

Many of the available options discussed at one time or another are drawn from pre-existing law, borrowed primarily from state statutes of limitation. Still in play, notwithstanding its rejection by the appellate tribunals and *Lampf*, is the five-year statute of limitations borrowed from the insider trading sanctions. The aforesaid opinions viewed that lengthy span as essentially flawed for purposes of the section 10(b) discussion. Perceiving the statute as exclusively targeted to correct the heinous act of trading on non-public information, the courts believed its liminary period was extended because of the precise need to address this criminal act.

The foregoing reasoning does have some merit. However, it neglects to account for the similarity, often exceedingly close in certain cases, between insider trading and securities fraud. Lawsuits often proceed on these parallel tracks, sometimes converging on the allegations, particularly as to the conduct in issue. Inarguably, section 10(b) actions and insider trading cases are not the same. Nevertheless, the shared attributes of the two justify paying greater heed to the propriety of the five-year limitation.

241. Past proposals have suggested a one-year from constructive discovery/five-year absolute period of repose, while another suggests a two-year from discovery/six years from the fraudulent act standard (based on New York law). Moreover, reformists suggest the abandonment of equitable tolling in favor of inflexible termination dates. See Committee on Federal Regulations of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUSINESS LAWYER 645, 656-57 (1986).

Next is the matter of the recent enactment of the general federal four-year statute of limitations. The merits and demerits of that provision have already been discussed at length *infra*. While there is no need to repeat those points here, the bottom line is that the existence of this statute should have some input into the selection process. Like the five-year insider trading limitation period, it does represent a recent codification of legislative will. As such, it deserves something more than the cursory treatment accorded it in *Lampf*.

A PROPOSAL FOR CHANGE

Wholly acknowledging the unavoidably arbitrary nature of any selection, this writer advocates a reformation of the new uniform liminary role to a two-years-from-discovery/four-years-from-the-violation period of repose. Upon weighing the many competing interests detailed hereinabove, it is believed that such a timeframe represents the fairest compromise of the varying demands of those antagonistic forces, balancing the relative harms and benefits to each in just proportion.

Taking first the statute of limitations running from discovery, it is submitted here that the present one-year period is woefully short. The good faith and investigative demands of Rule 11 and the pleading of securities fraud with particularly requirement of Rule 9(b) place dual burdens upon a prospective plaintiff, who is already tasked with uncovering what is usually a complicated and well-concealed fraud in the first place. A slight extension of the rule to two years from the date of discovery provides greater equity to the hapless investor, while not demonstrably undercutting the prospective defendant's right to fair treatment. To be sure, the latter still retains in its arsenal the aforementioned procedural devices as a means of deterring spurious lawsuits.

Having advocated the addition of a year to the first leg of the new uniform rule, this commentator likewise advises that the period of repose should be extended for an identical twelve month period, bringing the second half of the rule to limiting the commencement of actions to within four years from the date of the violation. However, the rationale here is not pro-plaintiff; rather, it truly is pro-defendant, as it represents a superior choice over even the lengthier periods that have been proposed.

To be sure, the plain and simple fact is that this writing suggests the present three-year period of repose be transformed to a four-year span. While obviously longer than the newly adopted rule of *Lampf*, it is, more importantly, shorter than the six-year statute of repose found in some states, and less than the insider trading liminary period of five years. Because the five-year period co-exists alongside section

10(b) within the 1934 Act, it bears greater mention here than the explicit rejection afforded it by the courts.

Certainly, it is undeniable that many similarities exist between antifraud litigation and insider trading cases. Yet a call to equalize the liminary periods for the two causes of action is ameliorated by their differences, specifically that the sanctionable conduct of trading on non-public information was the ground zero of Congress' attack in enacting the insider trading prohibition. The conclusion to be drawn is that the five-year statute of repose represents the outer limit of time in such matters, and a liminary period for section 10(b) should approach, but not equal, that span. As the four-year period of repose accomplishes precisely that, its adoption is urged herein.

Lastly, one additional reason exists for adopting four years as the appropriate statute of repose for securities antifraud cases. It is respectfully submitted that the high Court erred in the short shrift it gave to the recently enacted four-year general statute of limitations for federal actions. To be sure, Congress enacted this long awaited provision in order to avoid the conundrum of interstitial lawmaking that the federal judiciary has long confronted. Additionally, by its own terms the new statute is inapplicable to existing controversies, such as that surrounding section 10(b). Nevertheless, it is the most recent expression of legislative will on the limitations issue and has great value here in that respect. Moreover, its chosen timeframe represents an allocation that, if applied to antifraud litigation, eases the burden of besieged defendants, while still maintaining adequate fairness to plaintiffs.

For all of these reasons, this article concludes that the one-year/three-year liminary period selected in *Lampf* is not the best-suited period of repose for section 10(b). In its place, a two-year/four-year statute of limitation is proposed for enactment, such spans of time representing a more equitable resolution of the conflicting tensions that exist between plaintiffs and defendants in securities antifraud litigation.

RETROACTIVITY AND *LAMPF*—BACK TO THE FUTURE?

While most members of the bench and the securities bar agree at the least that the uniform one-year/three-year liminary rule provides some stability to an otherwise unpredictable area, the next issue looming darkly on the horizon is the question of the retroactive application, if any, of the new uniform federal limitation. Here the

coming storm could prove to have a great destructive impact on a broad scale. To be sure, the thoughts of the Supreme Court have not yet coalesced on this issue, making it even more fraught with peril.

The Principles of Retroactivity

Before examining the specifics of the instant question, a review of the tests for retroactivity as established by the high Court is essential. The general rule is that a controversy is to be decided on the law as it exists when the appellate court decides it.²⁴² Whether a ruling shall apply only prospectively depends upon a weighing of the "merits and demerits" in each case by examining the rule at issue, its purpose and effect, and "whether retrospective operation will further or retard its operation."²⁴³ Indeed, "short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them."²⁴⁴

The litmus test was postulated in *Chevron Oil Co. v. Huson*,²⁴⁵ where the Court was asked to determine whether its own decision in *Rodrigue v. Aetna Casualty & Surety Co.*,²⁴⁶ which adopted state law instead of federal common law as the basis for computing the limitations period for claims under the Lands Act, should be applied retroactively, or prospectively only. The *Chevron* Court cited three factors to consider in deciding whether to choose prospective application:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . , or by deciding an issue of first impression whose resolution was not clearly foreshadowed Second, it has been stressed that "we must . . . weight the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighted the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."²⁴⁷

In that case, the Court elected not to apply the new rule retroactively when to do so would have barred the plaintiff's claim.

More recently, the Court applied the same principles in two cases, *Saint Francis College v. Al-Khazraji*,²⁴⁸ and *Goodman v. Lukens Steel*

242. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981) (citing *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 281 (1969)).

243. *Linkletter v. Walker*, 381 U.S. 618, 629 (1965).

244. *United States v. Estate of Donnelly*, 397 U.S. 286, 295-97 (Harlan, J., concurring).

245. 404 U.S. 97 (1971).

246. 395 U.S. 352 (1969).

247. *Chevron*, 404 U.S. at 106-07 (citations omitted).

248. 481 U.S. 604 (1987).

Co.,²⁴⁹ with differing results. In *St. Francis College*, the Court upheld the Third Circuit's decision to apply prospectively only a newly adopted and shorter statute of limitations for cases arising under 42 U.S.C. § 1983. The Court reasoned that the new rule overruled clearly established precedent upon which the plaintiff there was entitled to rely, that retroactive applications would deserve the remedial purpose of the underlying statute, and that barring plaintiff's claim by a retroactively applied rule would be "manifestly inequitable."²⁵⁰

In *Goodman*, on the other hand, the Court upheld the Third Circuit's retroactive application of a newly adopted limitations period under 42 U.S.C. § 1981 because, prior to the new decision in question, there had been "no clear precedent on which plaintiffs could have relied."²⁵¹ Absent such precedent, and the inequity inherent in failing to follow it, the purposes of repose served by a limitations period were held to govern.²⁵²

Prior analyses of the high bench have always shown great distaste for the inherent unfairness of retroactivity in statutes of limitation cases. To be sure, a retroactive application of the new liminary period would be markedly out of step with the Court's mainstream of holdings. As Justice O'Connor noted with such clarity in *Lampf*:

Chevron Oil and *Saint Francis College* are based on fundamental notions of justified reliance and due process. They reflect a straightforward application of an earlier line of cases holding that it violates due process to apply a limitations period retroactively and thereby deprive a party arbitrarily of a right to be heard in court. Not surprisingly, then, the Court's decision in *Chevron Oil* and *Saint Francis College* not to apply new limitations periods retroactively generated no disagreement among members of the Court: the opinion in *Chevron Oil* was joined by all but one Justice, who did not reach the retroactivity question; *Saint Francis College* was unanimous.²⁵³

Furthermore, the Justice pointed out that only recently "eight Justices reaffirmed the common-sense rule that decisions specifying the applicable statute of limitations apply only prospectively" in *American Trucking Associations, Inc. v. Smith*.²⁵⁴ While the actual question there was the retroactive application of a prior Court decision striking down a state taxation scheme, the plurality opinion analogized to limitation statute controversies by confirming that "[w]here

249. 482 U.S. 656 (1987).

250. *St. Francis College*, 481 U.S. at 608-09.

251. *Goodman*, 482 U.S. at 662.

252. *Id.* at 663-64.

253. *Lampf*, 111 S. Ct. at 2786-87 (O'Connor, J., dissenting) (citations omitted).

254. 110 S. Ct. 2323 (1990) (O'Connor, J., joined by Rehnquist, C.J., White, J., and Kennedy, J.)

a litigant filed a claim that would have been timely under the prior limitation period, the Court has held that the new statute of limitation would not bar his suit.”²⁵⁵

Adhering to *Chevron*, Justice O'Connor said the nonretroactivity doctrine demands consideration of the equities and gives “great weight to the reliance interests” of all parties affected.²⁵⁶ The Court went on to find that the “harsh and disruptive effect[s] upon parties who relied on prior law compelled prospective application only.” According to Justice O'Connor, “If the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct. If the operative conduct or events occurred after the decision, so that any reliance on old precedent would be unjustified, a court should apply the new law.”²⁵⁷ To be sure, the plurality saw no reason to abandon the foregoing principles, as embodied in *Chevron*,²⁵⁸ and rejected the dissent’s “proposal that we *sub silentio* overrule *Chevron Oil*.”²⁵⁹

Even within the *American Trucking* dissent, continued support for *Chevron* and its progeny came to the fore. Justice Stevens, in a dissenting opinion joined by Justices Brennan, Marshall, and Blackmun, recognized the Court has “declined to give ‘retroactive effect’ to decisions announcing ‘new’ rules of law.”²⁶⁰ Those cases typically arise from statute of limitations controversies,²⁶¹ “an area over which the federal courts historically have asserted *equitable* discretion,” a discretion which implicitly includes the power to refuse to apply a law retroactively.²⁶² *Chevron*, *St. Francis College*, and others establish “a principle particular to the exercise of [that] equitable discretion.”²⁶³

Pausing at this juncture, it is clear that *Chevron* still represents the dominant theory of the Supreme Court on retroactivity/prospectivity issues. *American Trucking* is merely the latest in a string of high Court reaffirmations of the former’s statement of principle. Notably, the constituency of the opinions, especially the recent *American Trucking*, demonstrates that a solid block of the Justices are aligned in favor of *Chevron*’s continued viability, with Justice O'Connor playing a pivotal leadership role once again. At the end of day, the inescapable conclusion is that *Chevron* still rules.

255. *American Trucking*, 110 S. Ct. at 2339.

256. *Id.* at 2334.

257. *Id.*

258. *Id.* at 2342-43.

259. *Id.* at 2337.

260. *Id.* at 2347 (Stevens, J., dissenting).

261. *Id.* (Stevens, J., dissenting).

262. *Id.* at 2354 (Stevens, J., dissenting) (emphasis supplied).

263. *Id.* at 2355 (Stevens, J., dissenting).

RETROACTIVITY AND CERES—A PROSPECTIVE VIEW

Once again, the wisdom of the Second Circuit, the matriarch of our federal securities case law, is most illuminating on this controversy. As aforesaid, *Ceres* explicitly left the retroactivity question for another day. That day came a few months later in *Welch v. Cadre Capital*.²⁶⁴

Circuit Judge Newman posited the issue squarely before the panel as "whether the new limitations rule of *Ceres* should be applied retroactively, an issue *Ceres* did not resolve."²⁶⁵ The Second Circuit concluded the instant case fell within "the exception to the general practice of applying new judicial decisions retroactively."²⁶⁶

Looking to the three-part test promulgated by the Supreme Court in *Chevron*,²⁶⁷ the tribunal acknowledged a narrow exception in civil actions to the general presumption favoring the application of the law as it stands when the appeal is heard. Outlining the test, the circuit court stated that to qualify for prospective use only, a new precedent must first establish a new rule of law, either by overturning existing holdings or deciding an issue of first impression. Next, weighing on a case-by-case basis must be made as to whether retroactive application would conflict with the goals of the new holding. Finally, the Court must determine whether unfair results would obtain from such retroactive application.²⁶⁸ To be sure, the *Welch* tribunal made it clear that the Second Circuit applies the test consecutively, in that the proponent of prospective application only must satisfy fully the first prong at the outset. Only then do the balancing tests of the second and third factors come into consideration. In other words, complete satisfaction of the first factor is mandatory, while the other two requirements may be balanced.²⁶⁹

Turning to the first prong, that of overruling existing precedent, the panel found the new uniform one-year/three-year rule met the

264. 923 F.2d 989 (2d Cir. 1991), vacated and remanded sub. nom., *Northwest Savings Bank, Pa.SA v. Welch*, 111 S.Ct. 2882, 2882-83 (1991).

265. *Welch*, 923 F.2d at 990.

266. *Id.* at 991.

267. *Id.* at 993.

268. *Id.* In consecutive footnotes, the panel found it "worth emphasizing" that the first prong of the *Chevron* test requires only the existence of a prior rule that the plaintiffs "may" have relied upon. Actual reliance is not the benchmark, continued the court. *Id.* at 993 n.5. Next, the panel questioned whether *Chevron* even "retains validity" for retroactivity disputes "outside the context of statutes of limitation." *Id.* at 993 n.6, citing *American Trucking*.

269. *Welch*, 923 F.2d at 994 (citations omitted).

threshold requirement for nonretroactive application. Since the fresh mandate changed the established practice, which was clear at the time this lawsuit was commenced, and since the revision of the liminary period was not so obviously foreshadowed that plaintiffs would have no trouble with its determinations, the first hurdle for nonretroactive application was cleared.²⁷⁰

Judge Newman then reviewed the second *Chevron* factor — the effect of retroactive application upon the rule in issue. This was “more problematical.”²⁷¹ The tribunal opined:

In the pending case, the application of a new and shorter limitations period (one year after discovery of the fraud) cannot affect the conduct of the plaintiffs where the new rule is announced after expiration of that period. As with all statutes of repose, the one-year/three-year limitations period advances the remedial and deterrent purposes of the particular cause of action and preserves the defendant's interest in repose by simultaneously giving notice to potential plaintiffs of the time within which suit must commence and to potential defendants of the time beyond which exposure to liability ceases. Because they serve primarily individual, rather than institutional, interests and do so by giving potential litigants prior notice of their rights, application of a limitations period not yet in existence at the time suit was commenced clearly does not further either of the competing interests.²⁷²

This inquiry satisfied the second test in favor of prospective application for the new uniform rule. Indeed, the circuit panel concluded that the objectives of the federal securities laws “will not be impaired by continuation of a handful of lawsuits filed within the longer time limits of previously applicable state law.”²⁷³

Lastly, according to the circuit court, the equity test embodied in the third prong of *Chevron* favors these plaintiffs. The Court found that the complaining parties had acted properly in view of the defendants' allegedly active concealment of the fraud. The court saw no reason to fault the plaintiffs for making use of the then-controlling state liminary period to determine whether they had grounds for suit. Accordingly, retroactive application of the rule in *Ceres* would deny the plaintiffs their day in court, and the Second Circuit refused to allow such a draconian result.²⁷⁴ At that point, the holdings of the Second Circuit permitted only prospective application of the one-year/three year rule of *Ceres*, and hence *Lampf*.

270. *Id.*

271. *Id.*

272. *Id.* at 995.

273. *Id.*

274. *Id.*, followed by *Levine v. NL Industries, Inc.*, 926 F.2d 199, 202 (2d Cir. 1991) (“As in *Welch*, we decline to give *Ceres* retroactive application here.”). See also *Finkel v. The Stratton Corp.*, 754 F. Supp. 318, 332 (S.D.N.Y. 1991) (“It would be inequitable to apply *Ceres* retroactively so as to transform an action timely when filed into one barred forever by the statute of limitations.”).

MIXED SIGNALS FROM THE DATA ACCESS COURT

In counterpoise to *Welch*, the Third Circuit, champion of the one-year/three-year rule in *Data Access*, applied its decision retroactively. However, there the salient point was evidence of a preordained outcome, as application of the new liminary period changed nothing.

In *Hill v. The Equitable Trust Co.*,²⁷⁵ Circuit Judge Weis emphasized that, at the trial below, the jury found the plaintiffs were aware of the alleged fraud nearly three years before they filed suit.²⁷⁶ Since the *Data Access* limitations period was "identical" to the state provision applied by the district judge, the "plaintiffs fare the same."²⁷⁷ Under both scenarios, their unexplained delay rendered the lawsuit untimely.²⁷⁸ So while the Third Circuit did conduct the full range of analysis mandated by Supreme Court precedent, and purported to apply the one-year/three-year rule retroactively, in truth the *Hill* decision is not dispositive, for its result was unchanged. Therefore, *Hill* does not stand as a true measure of the propriety of the retroactive application of *Data Access*, but merely indicates the willingness of the Third Circuit to apply the rule retroactively.

Moreover, one must also look to the dissenting opinion filed in *Data Access* itself. Writing for the contrarias on the *en banc* panel, Circuit Judge Seitz, joined by Judges Sloviter and Mansmann, believed "the majority commit[ted] egregious error in not addressing and resolving" the retroactivity question.²⁷⁹

Convinced that the issue of retroactive application must be addressed in deciding if the Third Circuit's new liminary rule should be imposed on the litigants before it, Judge Seitz commenced his analysis from "the established legal principle that this court has the power to apply a rule of law prospectively only." As could be expected, the dissent relied almost exclusively on the *Chevron* analysis, and had no doubt that the principles therein applied fully here.²⁸⁰

275. 851 F.2d 691 (3d Cir. 1988).

276. *Id.* at 697.

277. *Id.* at 698.

278. *Id.* This was the last point made by the panel in favor of retroactive application, as taken from the third *Chevron* criterion, the prevention of inequitable results. *Id.* To be sure, the tribunal first found that the plaintiffs could not have reasonably relied on any prior ruling of the court because the law of the Third Circuit was "uncertain," "in ferment," and "less settled," thus overcoming the initial prong of *Chevron*. *Id.* at 697-98. The second-whether retroactively would further or retard the rule's function-was "neutral." *Id.*

279. *Data Access*, 843 F.2d 1537, 1551 (3rd Cir. 1988) (*en banc*) (Seitz, J., dissenting).

280. *Id.* at 1552.

That test, opined the dissenters, “mandates that the rule announced today not be applied to this case.” Apparently key to this position was the concern that a prospective application of the new liminary period “[would] preserve the plaintiffs’ opportunity to have a day in court,” while a retroactive administration of the holding would “foreclose that opportunity.”²⁸¹

The divergence and uncertainty in the Third Circuit on the retroactivity issue is best exemplified in *Gruber v. Price Waterhouse*.²⁸² Notably, the opinion of the unanimous panel was written by Circuit Judge Mansmann, one of the dissenters on the retroactivity question in *Data Access*.²⁸³ Presented with a certified question as to the retroactive or prospective application of the one-year/three-year rule, the tribunal relied upon *Chevron* to find that the *Data Access* rule should apply prospectively here.²⁸⁴

Acknowledging that the Third Circuit had applied the new liminary rule retroactively in *Hill* and elsewhere,²⁸⁵ the panel emphasized, “the determination of retroactivity *vel non* involves a balancing which must be done on a case by case basis.”²⁸⁶ That task, wrote Judge Mansmann, must be performed in accordance with *Chevron*.²⁸⁷

In brief, the *Gruber* court found that the first and third components of *Chevron* mandated prospective application of *Data Access*, whereas the second prong of *Chevron* was neutral here.²⁸⁸ For that reason, the Third Circuit refused to apply the one-year/three-year rule retroactively to these litigants.²⁸⁹

The Court of Appeals for the Seventh Circuit, which had followed *Data Access* in charting this new limitations ground, parted company with its sister circuit on the issue of retroactivity. In *Robin v. Arthur Young & Co.*,²⁹⁰ the plaintiffs alleged that the defendant accounting

281. *Id.* at 1553.

282. 911 F.2d 960-61 (3d Cir. 1990).

283. *Id.* See *Data Access*, 843 F.2d at 1537.

284. *Gruber*, 911 F.2d at 961.

285. *Id.* at 964. See *McCarter v. Mitcham*, 883 F.2d 196 (3d Cir. 1989); *Gatto v. Meridan Medical Assoc., Inc.*, 882 F.2d 840 (3d Cir. 1989).

286. *Gruber*, 911 F.2d at 965.

287. *Id.*

288. *Id.* at 968.

289. *Id.* at 969. See *K.B. Equities, Inc. v. Price Waterhouse*, 764 F. Supp. 1005, 1006 (E.D. Pa. 1991) (Ditter, J.) (refusing to apply *Data Access* retroactively, but nevertheless dismissing the action as time-barred under the forum’s common law statute of limitations of two years). For retroactive application cases, see *McCarter v. Mitcham*, 883 F.2d 196 (3d Cir. 1989); *Gatto*, 882 F.2d 840 (3rd Cir. 1989) *cert. denied*, 493 U.S. 1080, (1990); *Panna v. Firstrust Savings Bank*, 749 F. Supp. 1372 (D.N.J. 1990). Compare *In re National Smelting of New Jersey*, 722 F. Supp. 152, 160 (D.N.J. 1989) (*Data Access* not applied retroactively).

290. 915 F.2d 1120 (7th Cir. 1990). The Seventh Circuit did not reach the retroactivity question in several other cases. See *generally* *Radiology Center v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1217 (7th Cir. 1990); *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Co.*, 910 F.2d 1540, 1544 (7th Cir. 1990).

firm was guilty of aiding and abetting section 10(b) violations. Because the plaintiffs failed to properly state such a claim, however, the appellate court dismissed the action, and explicitly did not reach the question of whether it should apply retroactively its own decision in *Short* to adopt a one-year/three-year liminary period for antifraud actions.²⁹¹ Clearly then, the Seventh Circuit is at worst neutral, and, at best, indicates an unwillingness to apply its new limitations rule retroactively.

Reviewing the foregoing appellate cases, it is evident that the same tribunals which formed the critical nucleus of support for the uniform one-year/three-year rule are in disharmony over its application. The Seventh Circuit has not addressed the issue, but has implicitly avoided a retroactive application of the rule. The Second Circuit advocates prospectivity only, while the rule's originator, the Court of Appeals for the Third Circuit, wears the two faces of Janus in simul-

291. *Robin*, 915 F.2d at 1122-23. See *Reshal Associates, Inc. v. Long Grove Trading Co.*, 754 F. Supp. 1226, 1241 (N.D. Ill. 1990) (Rovner, J.) ("Because all three of the *Chevron* factors are satisfied, the *Short* holding shall be applied prospectively only."). See *Kayne v. PaineWebber Inc.*, 703 F. Supp. 1334, 1343-44 (N.D. Ill. 1989) (Duff, J.) (refusing to apply *Data Access* retroactively). Compare *In re VMS Sec. Litig.*, 752 F. Supp. 1373, 1383-88 (N.D. Ill. 1990) (Conlon, J.) (applying *Short* retroactively where section 10(b) claims were accompanied by other securities law causes of action clearly controlled by one-year/three-year statutory liminary periods).

In addition, *Polansky v. PaineWebber Inc.*, 762 F. Supp. 768 (N.D. Ill. 1991), is singular in its hairpin twists and turns to apply the one-year/three-year liminary rule retroactively in a non-retroactive scenario. In moving for dismissal, the defendant argued that retroactivity was not an issue because the Seventh Circuit had decided *Short* "almost four months before the plaintiff filed his complaint." *Id.* at 770. As point in fact, District Judge Duff repeatedly and explicitly pointed out that the plaintiff had sufficient time to discover the appellate holding and still file his complaint on a timely basis. *Id.* at 770-72, nn.3-4.

Nevertheless, the district court insisted retroactive application of the uniform liminary period at issue, and proceeded to make a *Chevron* analysis. Judge Duff, to his credit, unequivocally held against the procrastinating plaintiff on each of the three *Chevron* factors. *Id.* at 770-72. Declaring that "[t]he plaintiff cannot have his cake and eat it, too," *Id.* at 771, the court made its most stinging criticism in analyzing the last two *Chevron* factors, those of uniformity and fairness, by stating:

Allowing the plaintiff to pursue this action nearly four months after the seventh circuit decided *Short*, would undermine the goals of uniformity and certainty. . . . How many months can a plaintiff wait after this decision and still expect prospective treatment?

* * *

Again the plaintiff can not avoid the fact that he field his action nearly four months after the *Short* decision. . . . There is no inequity in applying a decision to a complaint that was filed more than three months after the decision was decided.

Id. at 772. As observed by District Judge Rovner in *Reshal Assoc.*, *supra*, "The retroactivity issue has itself spawned a cottage industry of litigation particularly in the Third Circuit." 754 F. Supp. at 1239 n.1.

taneously embracing both retroactive and solely prospective applications. In this author's view, the Second Circuit's reasoning, largely because of its proper grounding upon the *Chevron* test, is correct. Thus, the better view of the circuits favors prospective application only for the one-year/three-year rule.

JAMES BEAM—DANGER AHEAD

An alarming turn of events occurred just recently when the Supreme Court vacated and remanded *Welch*²⁹² for further consideration of the retroactivity issue, in light of *Lampf* and another new holding, *James B. Beam Distilling Company v. Georgia*.²⁹³

By remanding *Welch* with the explicit command that the Second Circuit reconsider it in light of the Court's most recent rulings on retroactivity, the Supreme Court introduced into the admixture its highly controversial ruling in *James Beam*, as well as a similarly disputed portion of the *Lampf* holding. To be certain, *James Beam* brings to light a pronounced schism on the high bench, a divergence of opinion that has yet still to draw final lines of opposing forces.

In brief, the case itself pertained to the validity of Georgia's excise tax on imported liquor. A similar law in Hawaii was struck down as unconstitutional under the Commerce Clause in *Bacchus Imports, Ltd. v. Dias*.²⁹⁴ The precise question before the Court in *James Beam* was whether it should apply *Bacchus* retroactively. In answering in the affirmative, the high bench once again fragmented into disjointed cells of opinion.²⁹⁵

Critical to this analysis is the remarkably short shrift given by Justice Souter to the oft-cited *Chevron* analysis. The plurality commences from the point that the Court has, "albeit infrequently, resorted to pure prospectivity," pursuant to *Chevron*, in applying a rule of law.²⁹⁶ Notwithstanding that the parties in *James Beam* had assumed *Chevron* controlled, the Court replied that it has "never em-

292. *Welch*, 923 F.2d at 990.

293. 111 S. Ct. 2439 (1991).

294. 468 U.S. 263 (1984).

295. *James Beam*, 111 S. Ct. at 2441. This time, Justice Souter delivered the opinion and was joined by Justice Stevens. Justices White and Blackmun filed opinions separately to concur in the judgment. Justice Scalia joined Justice Blackmun, but nevertheless filed his own opinion concurring in the judgment. Justice Blackmun then joined in Justice Scalia's opinion, and Justice Marshall joined in both the Blackmun and Scalia concurrences. Justice O'Connor filed the dissenting opinion, and was joined therein by Chief Justice Rehnquist and Justice Kennedy. The obvious comparisons to the *Lampf* matrix of opinions, need not be agonized over here. Suffice to say, the similarities and differences in composition between the two can lead to endless speculation as to what the future holds on this issue. *Id.* See *Lampf*, Pleva, Lipkind, Prupis & Petigrow v. Gilbert, 111 S. Ct. 2773 (1991).

296. *James Beam*, 111 S. Ct. at 2443-44.

ployed *Chevron Oil* to the end of modified civil prospectivity."²⁹⁷

For this reason, the high bench held that principles of equality and *stare decisis* prevail over any claim based on a *Chevron* analysis. The equality precept, "that similarly situated litigants should be treated the same," demands retroactive application where, as done in *Bacchus*, the Court applied the rule to the very case that gave birth to the pronouncement.²⁹⁸ Retroactivity in civil cases also depends upon the need for finality, continued Justice Souter. "[O]nce suit is barred by *res judicata* or by statutes of limitation or repose, a new rule cannot reopen the door already closed."²⁹⁹

Lastly, the Court disclaimed the notion that litigants are to be distinguished on the particular equities of their claims to prospectivity. "It is simply in the nature of precedent," as a component of fairness and equality, that substantive law shall not "shift and spring on such a basis."³⁰⁰ To some extent, Justice Souter admitted the Court delimited the possible applications of *Chevron*, however irrelevant *Chevron* might otherwise have been to the instant case. *Chevron*, said the plurality, "cannot determine the choice of law by relying on the equities of the particular case."³⁰¹

However, seeming to salvage the *Chevron* analysis it had only just maligned, the Court cautioned that "nothing we say here precludes consideration of individual equities when deciding remedied issues in particular cases."³⁰² Declaring this decision to lie on narrow ground, the Court paradoxically affirmed that a rule of law applied to litigants in one case must be imposed with respect to all others not barred by procedural requirements or *res judicata*. In the same breath, the Court steadfastly refused to "speculate as to the bounds or propriety of pure prospectivity."³⁰³ On that enigmatic note, the Court's opinion came to a halt.

Justice White concurred in the judgment of the Court, but indeed clearly joined in the result alone. To be sure, Justice White did not see the *Chevron* doctrine implicated, first, because its decision herein did not create a new or unforeseeable rule in light of *Bacchus*, and second, that "the Court may have thought that retroactive applica-

297. *Id.* at 2445.

298. *Id.* at 2446.

299. *Id.*

300. *Id.* at 2447.

301. *Id.*

302. *Id.* at 2448.

303. *Id.*

tion was proper” even pursuant to *Chevron*.³⁰⁴

Paramount was Justice White’s declaration that nothing in his concurring opinion “[was] meant to suggest that [he] retreat[ed] from those opinions . . . holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively.”³⁰⁵ Recognizing *Chevron* and reaffirming his commitment to the decision in *American Trucking*, Justice White stated that no one could “sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system,” without first overruling *Chevron*, its antecedents, and its progeny.³⁰⁶ Indeed, this led Justice White to state his inability to comprehend why the plurality opinion made references to the Court’s cases on prospective operation, yet claimed it need not speculate as to pure prospectivity.³⁰⁷ Justice White in fact closed by noting he was “unpersuaded by this line of reasoning” in Justice Scalia’s opinion.³⁰⁸

Once again, Justice O’Connor found herself a dissenter, but the clarity and strength of her opinion leads one to believe that the end of the day has not yet arrived on this issue. Immediately taking the offensive, Justice O’Connor found the principles of equality and *stare decisis* cited by Justice Souter in favor of retroactivity “lend to precisely the opposite result.”³⁰⁹

Justice O’Connor noted that the Supreme Court “has refused repeatedly to apply new rules retroactively in civil cases.”³¹⁰ Citing to *American Trucking*, Justice O’Connor found “no need to repeat that discussion here.”³¹¹ When the high Court promulgates new law, it must then determine whether the new law is to apply to controversies occurring before the innovation. *Chevron*, said the dissent, describes the procedure for making that inquiry.³¹²

Faulting *Bacchus* for applying its new rule retroactively without engaging the *Chevron* test, Justice O’Connor held that the lack of that examination in *James Beam* repeated the same blunder.³¹³ Neither equality or *stare decisis* is served if the *Chevron* doctrine is not followed, stated Justice O’Connor.³¹⁴ Indeed, referring to Justice Souter’s concern for fairness, Justice O’Connor chided the plurality

304. *Id.* (White, J., concurring).

305. *Id.* at 2449.

306. *Id.* (White, J., concurring).

307. *Id.* (White, J., concurring).

308. *Id.* (White, J., concurring).

309. *Id.* at 2451 (White, J., concurring).

310. *Id.* (O’Connor, J., dissenting).

311. *Id.* (O’Connor, J., dissenting) (citing *American Trucking Ass’n v. Smith*, 110 S. Ct. 2323, 2327-43 (1990)).

312. *Id.* (O’Connor, J., dissenting).

313. *Id.* (O’Connor, J., dissenting).

314. *Id.* (O’Connor, J., dissenting).

for ignoring the very test vital "to determine the equities of retroactive application of a new rule."³¹⁵

Likewise, Justice O'Connor criticized the plurality opinion for justifying its retroactive application by reason of *stare decisis*:

This is not a proper application of *stare decisis*. The Court in *Bacchus* applied its rule retroactively to the parties before it without any analysis of the issue. This tells nothing about how this case: where the *Chevron Oil* question is squarely presented — should come out.

* * *

At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them. A decision *not* to apply a new rule retroactively is based on principles of *stare decisis*. By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law.³¹⁶

According to Justice O'Connor, under the *Chevron* analysis, retroactively applying the new rule in the instant case "would unjustly undermine settled expectations." Justice O'Connor further declared "*stare decisis* dictates strongly against the Court's holding."³¹⁷

Justice O'Connor then expressed grave concern for the future of the longstanding *Chevron* analysis. "Justice Souter purports to have restricted that test only to a limited extent," noted Justice O'Connor, but she added that the effect "appears to me far greater."³¹⁸ Disagreeing with the plurality, which distinguished between the narrow issue of retroactivity to parties before the Court from the broader question of retroactive application to all litigants, the dissent contended:

But it is precisely in determining general retroactivity that the *Chevron Oil* test is most needed; the broader the potential reach out of a new rule, the greater the potential disruption of settled expectations. The inquiry the Court summarized in *Chevron Oil* represents longstanding doctrine or the application of nonretroactivity to civil cases. Justice Souter today ignores this well-established precedent, and seriously curtails the *Chevron Oil* inquiry. His reliance upon *stare decisis* in reading this conclusion becomes all the more ironic.³¹⁹

Decrying the fact that the instant decision in *James Beam* will ultimately burden "blameless and unexpecting citizens . . . by imposing widespread liability on parties having no reason to expect it,"³²⁰ the

315. *Id.* at 2451-452 (O'Connor, J., dissenting). Justice O'Connor stated, "The equitable analysis of *Chevron Oil* places limitations on the liability that may be imposed on unsuspecting parties after this Court changes the law." *Id.* at 2455.

316. *Id.* at 2452 (O'Connor, J., dissenting).

317. *Id.* (O'Connor, J., dissenting).

318. *Id.* (O'Connor, J., dissenting).

319. *Id.* (O'Connor, J., dissenting).

320. *Id.* (O'Connor, J., dissenting).

dissent salvaged its final criticism at the plurality opinion, forcefully concluding:

This decision is made in the name of "equality" and "*stare decisis*." By refusing to take into account the settled expectations of those who relied on this Court's established precedents, the Court's decision perverts the meaning of both those terms.³²¹

With but a short passage of time having elapsed since *James Beam* was decided, it is difficult to say whether that ruling represents an incidental deviation from the *Chevron* rule or something more fateful. Whatever *James Beam* eventually proves to be, for now it would be very risky indeed to think the *Chevron* doctrine has been outmoded. The ongoing support *Chevron* enjoys from the *St. Francis College*, *Goodman*, and recent *American Trucking* decisions testifies to its durability as embodying the controlling doctrine on prospectivity. Most important, the absence of even a mild consensus in *James Beam* makes it unlikely that its viewpoint could withstand another onslaught from its critics within the high Court itself. In the end, resort to *Chevron* is by far the best path.

THE TRIAL COURTS IN TURMOIL

To date, the fallout at the trial level on the matter of retroactivity is still inconclusive. In *Block v. First Blood Assoc.*,³²² District Judge Sweet operated without the restraints of *Lampf* and *James Beam*, but decided the case under the rubric of the one-year/three-year rule adopted by the Second Circuit.³²³

To be sure, the plaintiffs' action was at risk from its inception. Judge Sweet wryly commented that "[o]nce the *Ceres* issue had drawn First Blood's attention to the limitations question, it recognized that even under pre-*Ceres* law there was a question of the timeliness of the investors' claims."³²⁴ As was the practice in the Second Circuit prior to *Ceres*, this court, pursuant to the law of the forum, undertook to borrow statutes of limitation from the plaintiffs' home states.³²⁵ Notwithstanding a choice of the laws of ten states, the district court found the action time-barred under each and every liminary statute from which a New York court might borrow.³²⁶

321. *Id.* (O'Connor, J., dissenting).

322. 763 F. Supp. 746 (S.D.N.Y. 1991).

323. 918 F.2d 349 (2nd Cir. 1990). As movie fans and hard-boiled litigators alike might have guessed, the lead defendant was indeed the ownership entity for "First Blood," the first of action star Sylvester Stallone's film characterizations of "Rambo." *Block v. First Blood Assoc.*, 743 F. Supp. 194, 196 (S.D.N.Y. 1990). For the record, Mr. Stallone was not a named defendant. One can only speculate as to the tenor of the litigation had he been a party. 763 F. Supp. at 747.

324. *Block*, 763 F. Supp. at 747.

325. *Id.* at 750.

326. *Id.* at 751.

Alternatively, the court considered whether to apply *Ceres* retroactively, a determination it found must be made purely on a *sui generis* basis.³²⁷ With reference to the *Chevron* inquiry, Judge Sweet found that the plaintiffs before him failed the reliance prong of that test.³²⁸ As the action was untimely even under the formerly prevailing law, these plaintiffs could not possibly have relied upon the pre-existing rule. Thus, the court was free to impose the new rule of *Ceres*.³²⁹

In conclusion, this district court made a distinction without a difference. Under the old law of borrowing state liminary periods for section 10(b) actions, it found the lawsuit time-barred. Applying the new uniform rule did not change the result. *Block* neither adds nor subtracts to the equation of retroactivity.³³⁰

327. *Id.*

328. *Id.* In a footnote, the Court pointed out that plaintiffs "have at least tacitly admitted that they relied on a mistaken belief that New York's statute of limitations period applied to their claims." *Id.* at 752 n.4.

329. *Id.* at 752.

330. In *Glick v. Berk & Michaels, P.C.*, 6 Fed. Sec. L. Rep. [CCH] ¶ 96,134 at 90, 746 (S.D.N.Y. 1991), District Judge Haight refused to apply the one-year/three-year rule retroactively, declaring that *Lampf* "expressly left open the question of whether [it] applied retroactively." *Id.* at 90, 748 n.6. Compare *Duke v. Touche Ross & Co.*, FED. SEC. L. REP. (CCH) P. 96, 121. No. 90 Civ. 5610 slip op. (S.D.N.Y. July 24, 1991) (Keenan, J.) After the defendant accounting firm moved to dismiss on the basis of *Lampf*, the plaintiffs sent a letter to the court stating that "although we will not voluntarily dismiss such [section 10(b) claims, we will not oppose defendant's brief to dismiss on the grounds of the statute of limitations." Slip op. at 2. Given such an utter lack of opposition, what real choice did Judge Keenan have but to grant the motion? Truly, *Duke* is a non-event, with no import on the retroactivity issue. See also *Brumbaugh v. Princeton Partners*, 766 F. Supp 497, (S.D.W.Va. 1991). Less than two weeks after *Lampf* was issued, Chief Judge Haden dismissed a section 10(b) claim as untimely under the new one-year/three-year rule. *Id.* at 500. Simultaneously, a state "blue sky" cause was also time-barred, pursuant to the West Virginia law imposing a three-year statute of repose on such actions. *Id.* at 499-500. Given the identity of the forum's period of repose to that of *Lampf*, it cannot be said that the Supreme Court's rule was dispositive in this case either.

Likewise, the cursory references to retroactivity found in *Haggerty v. Comstock Gold Co., L.P.*, 770 F. Supp. 216 (S.D.N.Y. 1991), are meaningless to this discussion. There, the precise controversy before District Judge Leisure was a motion for reargument of an order entered on May 29, 1991. In that decision, the court dismissed the federal securities fraud causes of action, but "found it unnecessary to consider the Moving Defendants' argument that the claim is barred by the statute of limitations." *Id.* at 218 n.3 (emphasis supplied). Indeed, the plaintiffs did "not seek reargument of that part of the May 29 Order." *Id.* See also *Barr v. McGraw-Hill*, 770 F. Supp. 855 (S.D.N.Y. 1991) (Conboy, J.) (dismissing section 10(b) claims as time-barred, and "conclud[ing] that the use of a *Chevron* analysis here would be inappropriate and impermissible," in light of "the fact the Supreme Court, without any consideration of the *Chevron* factors, applied its new rule to the litigants in *Lampf*"). See *Haggerty v. Comstock Gold Co.*, 765 F. Supp. 111 (S.D.N.Y. 1991) (the May 29th order).

THE PORTENTS OF LAMPF AND JAMES BEAM

If one were to momentarily take a quite narrow view of the retroactivity of the new one-year/three-year rule, as guided by the decisions in *Lampf* and *James Beam* and the remand of *Welch* in light of the former two rulings, one would probably conclude that the retroactive application of the new uniform liminary period is a virtual certainty. However, this writer submits that such a vision would be not seeing the forest for the trees. Indeed, the strident voices heard in both of the aforementioned decisions of the Supreme Court lend great credibility, if not probability, to the belief that the rule of *Lampf* will be adjudged to apply prospectively only.

Consider first, that to presently justify a retroactive application of the one-year/three-year standard, reliance would have to straddle the pluralities of *Lampf* and *James Beam*. No mean feat that, as the hotly contested rationalizations of each provide only treacherous ground underfoot. Even combined, the very protestations raised in the concurring opinions, let alone the dissents, do not make the slope any less slippery.

Turning to *Lampf*, the plurality of Justice Blackmun inflicts the most damage unto itself, by way of its vague and almost passing reference to its retrofitted application. Moreover, it can even be fairly said that the retroactive application of the new rule emerges from *Lampf* primarily by implication, and not by cogent legal analysis. Taking this a bit further, one might even respectfully ponder if the application of the new rule to the parties before it was a mere hap- penstance, as opposed to a well-reasoned choice to bring the new edict to life in the instant proceeding.

James Beam adds no strength to the proponents of retroactivity; the weaknesses inherent in the plurality opinion cause only more discomfiture, not less. Justice Souter's opinion, while theoretically intriguing, seems to be misplaced. Although its thesis is not necessarily incorrect, it lacks the focus of other high Court pronouncements on the subject. Its effect, if any, on the general doctrine of retroactivity vis-à-vis prospectivity, is not discernible. To be sure, it apparently proceeds on a tangent away from *Chevron*, yet it does not overrule that longstanding landmark. While *James Beam* seems to be a variation of *Chevron*, it would seem hasty and unwise to pull the shroud over the remains of a supposedly defunct *Chevron*.³³¹

331. Indeed, Justice Souter has drawn significant criticism for his authorship of the plurality opinion in *James Beam*. In a recent issue of the *ABA Journal*, noted legal commentator Bruce Fein mercilessly excoriated the Justice, considering *James Beam* as "betray[ing] a mundane and sluggish mind that frequently pivots on maverick facts and deprives cases of precedential significance." Bruce Fein, *A Court of Mediocrities*, 77 A.B.A. J. 74, 78 (October, 1991). Mr. Fein continued his attack by stating:

Souter was just as timid about clarifying whether the remedy for a constitu-

Lastly, *James Beam* suffers, as does *Lampf*, from sheer lack of consensus. *James Beam* is most at risk here, as Justices Souter and Stevens stand alone. The O'Connor dissent therein places that Justice, the Chief Justice, and Justice Kennedy toe-to-toe against the plurality on the retroactivity question.³³² Little else can be added here, given the analysis made *ante*. Suffice to say these dissenters shall not yield on retroactivity without a titanic battle. Likewise, Justice White made it perfectly clear that he would not give ground on the validity of *Chevron* or its progeny.³³³ He, too, is clearly an advocate of prospective application only in such cases. The other Justices, while caught between the lines in *James Beam*, would not necessarily be so ambivalent in the next confrontation. It would seem they found little of appeal in the plurality's writing, leaving them just as likely to ally themselves with the advocates championing prospective application only for the new uniform limitary rule.³³⁴

Indeed, such a notion finds its strongest support in nothing less than the *Lampf* decision itself. Once again, Justice O'Connor derided the prevailing opinion for what she viewed as an aberrational imposition of the new rule.³³⁵ Justice Kennedy joined his colleague, while Justice Scalia maintained his independence, and ergo his seeming neutrality.³³⁶ Yet while those Justices would seem to constitute a minority in *Lampf*, it is debatable how the full Court, in light of both the indecisiveness of the *Lampf* discussion on the issue, and the dissension so readily apparently in *James Beam*, would decide the retroactivity question in some future proceedings.

If *Lampf* were to be applied in the manner seemingly intended by the plurality, then it would appear Justice Kennedy rightly predicted "the Court's new and unforgiving rule," applied retroactively to pending actions, would catch defrauded investors in a procedural snare, while foreclosing to them any means of recovery against per-

tional violation might vary among litigants that benefitted from retroactivity based on individual equities or the reliance interests of the government.

Indeed, he [Justice Souter] conspicuously advertised to lower courts the inconsequential[] teaching of *James Beam* . . .

In sum, *Beam* added virtually nothing to the store of constitutional knowledge governing civil retroactivity questions that bedevil the judiciary.

Id. at 78-79.

332. See *supra* note 295 and accompanying text.

333. See *supra* notes 293-96 and accompanying text.

334. See *id.*

335. See *supra* notes 200-11 and accompanying text.

336. See *supra* notes 190-200 and accompanying text.

THE BETTER RULE OF CHEVRON

Up to this point, we have examined the intrinsic unreliability of the retroactivity analyses employed in *Lampf* and *James Beam*. In contrast stand the very positive arguments in favor of solely prospective application for the new one-year/three-year liminary period. Our analysis begins, of course, with *Chevron*. Clearly, the majority of voices heard in *James Beam*, including that of the plurality, tell us that the Justices have not jettisoned the *Chevron* doctrine. For that reason, its edict must still be obeyed.

That was the explicit verdict of the Second Circuit applying *Lampf* only prospectively in *Welch*.³³⁸ The Seventh Circuit's hesitancy to decide the issue in *Short*³³⁹ implies a similar view. While the Third Circuit lacks clear direction either for or against prospectivity, it must be noted that where its panels made a retroactive application of the one-year/three-year rule, other mitigating factors came into play, and provided an alternative basis for the same result.³⁴⁰ To date, the decisions of the trial courts have followed in that vein. As we have seen, even where district judges have dismissed actions as untimely pursuant to *Lampf*, the rationale employed generally finds equal if not firmer footing in something other than a retroactive application of the one-year/three-year rule.

Adherence to *Chevron* is not burdensome in any event. Few would argue against the proposition that *Chevron* represents a well-reasoned standard that leads to principled decisionmaking. Little more can be asked of a doctrine with such conclusive impact on the sensitive question of the timeliness of a specific action.

To be sure, the viability of *Chevron* has often been reaffirmed by the high Court, as evinced most recently by *American Trucking*.³⁴¹ Indeed, notwithstanding the modified analysis introduced by Justice Souter in *James Beam*, *Chevron* remains largely unscathed. Courts should thus feel unrestrained in applying the *Chevron* test to the retroactivity question for limiting the time in which to commence section 10(b) actions.

Thus in conforming the new uniform statute of limitations for securities antifraud actions to the *Chevron* analysis, this writer contends that the infant rule lands upright and squarely within all the

337. *Lampf*, 111 S. Ct. at 2790 (Kennedy, J., dissenting).

338. *Welch v. Cadre Capital*, 923 F.2d 989 (2d Cir. 1991).

339. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2887 (1991).

340. See *supra* notes 54-58 and accompanying text.

341. See *supra* notes 254-65 and accompanying text.

requirements of the high Court's precedents for prospective application only. The one-year/three-year mandate represents an innovation in the measurement of the timeliness of section 10(b) actions. While the contours of the new rule were explored at an earlier point by the circuit triumvirate, the sharp disagreement among the appellate courts has led to a marked lack of consensus. By no means was the one-year/three-year standard all powerful, until the Supreme Court had the last word. Cast in that light, *Lampf* for the first time clearly established a new principle, circumventing the established protocols of borrowing state statutes of limitation. To be sure, the reliance of litigants on the old ways is painfully evident in the post-*Lampf* cases, and will become more pronounced as parties and courts agonize over the retroactivity issue.

Next is the matter of whether retroactive application of the one-year/three-year edict will further or retard the new rule's operation. A carefully conservative observer would probably find this factor neutral, as the courts generally have also found to date. This is probably the correct, and indeed the more expedient view, as it eliminates this aspect from the *Chevron* calculus. However, this commentator would venture that a retroactive application of *Lampf* would hinder the courts, if not the rule itself, as it would undoubtedly engender protracted and contentious litigation, as plaintiffs attempt to fend off dismissal motions by forcing the complained of acts into the constrained time span the new rule allows. Strict prospective application would further advance the rule by avoiding the cacophony of divergent opinions that such a fracas would produce.

Lastly, but most significantly, the equities must be weighted. And here the interests of fairness and justice cry out for prospective application only. It is submitted here that *Lampf* demarcates such a turning point in the law that it would beyond question work an injustice and a hardship on parties who relied on its predecessors in bringing their respective actions. By and large, the reliance of litigants on the state borrowing doctrine is very acute in section 10(b) cases. The Court's decree that the borrowing shall henceforth be from an analogous federal provision (one usually shorter than that of the forum) shatters the rightful expectations of existing plaintiffs. One would be hard-pressed to imagine a greater injustice than that suffered by a defrauded investor, who having honestly relied upon the law as it once was, is then told that the action is time-barred, while the stock market vandals who caused the injury are left free to attempt to sack and pillage yet another day. Such hardship should not be visited

upon the hapless suitor, and securities pirates should not have the good fortune of such a judicial reprieve.

This writer, however, is not turning a deaf ear to the embattled defendants, whose pleas for help have finally been answered by virtue of the new uniform rule. It seems clear that while a retroactive application of *Lampf* would of course be greatly beneficial to them, such a windfall is not really necessary to their well-being. That is not to say that victimized defendants, particularly in the financial community and its professions, do not deserve such a reward of sweeping retroactivity; rather, as alluded to earlier herein, as astute business people they have already made provision for the "litigation risk."

The wise financial professional, accountant or attorney has been circumspect in analyzing the exposure of antifraud suits, meritorious or otherwise, and reserved accordingly. Excepting the foolhardy, they have measured the risk of litigation by standards of pre-existing law. As a means of discarding troublesome suits, a retroactive application of *Lampf* is a bonus. Having prepared for much worse, defendants will suffer no ill effect from a prospective application only of the new rule, as compared to a worthy plaintiff totally foreclosed if retroactivity becomes the order of the day.

In sum, beleaguered defendants do not need a retroactive application of *Lampf*; they may take their greatest comfort by knowing that the future will be a safer one, as new litigation shall be governed by a rule that is uniform across the land and prescribes a lesser and more definitive period of exposure. By thereby decreasing the litigation risk, the interests of business and finance are well served, and their smooth, unburdened functioning is assured. For these reasons, the courts should apply the new uniform litymary period prospectively only, and measure pending suits by pre-*Lampf* standards.

THE CALL FOR LEGISLATIVE REFORM

While the uniform litymary period established in *Lampf* has been welcomed for the mere fact that it does now provide for national uniformity, the Supreme Court's selection of the one-year from discovery/three-years from the act rule of limitation for securities antifraud suits has been soundly criticized. Indeed, almost immediately after the high Court's pronouncement, efforts were launched to introduce remedial legislation to impart a Congressionally enacted statute of repose in place of the time span utilized in the *Lampf* uniform rule.³⁴²

In hearings before the United States Senate, Securities and Ex-

342. See Kevin G. Salwen, "Breedon Calls SEC Supervision of Advisers Poor," WALL ST. J., July 26, 1991, at C1.

change Commission Chairman Richard Breeden endorsed a proposal for a two-years-from discovery/five-years-after-the-violation statute of limitation for section 10(b) causes of action.³⁴³ Citing the fact that the intrinsic nature of securities fraud makes detection difficult, and most likely only after the fraud has collapsed, Chairman Breeden faulted *Lampf* as promulgating an "unrealistically short" limentary period that would harm the viability of the private lawsuits so essential to the antifraud statute's enforcement function.³⁴⁴ Furthermore, SEC investigations, IRS tax audits, and other such inquiries, often the catalyst for exposing the fraud in the first place, frequently take years to complete. The incompatibility of the new Supreme Court ruling with the realities of policing securities fraud "will sharply limit the number of cases that will be brought," contended the watchdog agency's chairman.³⁴⁵

The proposed bill, now before the Senate Securities Subcommittee, was introduced by Senator Bryan and co-sponsored by Senator Riegle, chairman of the full Banking, Housing, and Urban Affairs Committee of the upper house.³⁴⁶ The bill would also eliminate the retroactive application of *Lampf*, permitting lawsuits now pending to be adjudged by the two-year/five-year limentary period contemplated therein.³⁴⁷ Mr. Bryan added that his remedial legislation is indeed based upon the *amicus* brief filed by the SEC in *Lampf*, and that all implied rights to suit under the federal securities laws would be included under the penumbra of the new two-year/five-year rule.³⁴⁸

The bill itself, "The Securities Investor Protection Act of 1991," calls for the addition of a new section at the end of the codification of the Securities Exchange Act. The proposed statute provides that "any private right of action arising from a violation of [the 1934] Act" be governed by a two-years-from discovery/five-years-from-the-violation limentary rule. "Discovery" is defined as the actual revelation itself or when discovery should have occurred "through the exercise of reasonable diligence."³⁴⁹

Moreover, if enacted the new provision "shall apply to all proceed-

343. *Id.*

344. *Id.*

345. *Breeden Endorses Bill to Reverse Decision on § 10(b) Limitations Period*, 23 SEC. REG. L. REP. (BNA) 1141 (July 26, 1991).

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

ings pending on or commenced after June 19, 1991.”³⁵⁰ As for its effect on dismissed causes of action, the proposed amendment explicitly commands that for any cause of action 1) “dismissed as time-barred subsequent to June 19, 1991,” 2) which would have been timely filed under applicable law on that date, the day before *Lampf* was decided, and 3) which would have been timely under this new two-year/five-year statutory rule, “may be refiled within 60 days from the date of enactment” of this law.³⁵¹

When introducing his proposal, Senator Bryan criticized *Lampf* as borrowing “arbitrary time limits” from elsewhere in the securities law, time periods that “simply do not reflect the complexity and importance” of antifraud cases.³⁵² “Even more alarmingly,” said the Senator, it appears that the Court’s decision will apply retroactively, nullifying thousands of section 10(b) securities fraud cases currently underway, “cases filed in a timely manner in good faith reliance on the then existing rule.”³⁵³

Beckoning the Congress “to step forward and make these policy determinations,” Mr. Bryan pointed out that “perpetrators of securities fraud can go undetected for years, and will not be exposed until their fraudulent investment schemes ultimately collapse [P]utting the pieces . . . together to form the basis for a lawsuit can take an enormous amount of time,” giving ample reason to enlarge the one-year/three-year rule propounded by the Supreme Court.³⁵⁴

Notwithstanding those facts, the Senator was evenhanded in his approach, and addressed the concerns of potential defendants in this way:

Of course, the securities industry needs to be protected as well. An unlimited time limit for filing section 10 suits would expose securities firms to unreasonable and unpredictable liabilities. The legislation I am introducing today recognizes the concerns of both the securities industry and the individual investors.³⁵⁵

Senator Bryan contended that left unchecked, the *Lampf* decision will force the termination of “a great number of legitimate cases”

350. *Id.*

351. S. 1533, 102nd Cong., 1st Sess. (July 23, 1991). Senator Bryan has also offered up the substance of S. 1533 as an amendment to the Senate Banking Committee’s comprehensive banking reform bill, and a House of Representatives counterpart to the Bryan measure was introduced by Representative Markey, chair of the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce. *Senate Bank Reform Bill Would Revise Decision On § 10(b) Limitations Period*, 23 FED. SEC. & CORPORATE DEVELOPMENTS 1291 (August 30, 1991). Indeed, the Markey proposal goes even further, allowing plaintiffs “to bring suits within either five years of the alleged violation or three years from the time the alleged violation was discovered.” *Id.*

352. 137 *Cong. Rec.* S10691 (daily ed. Jul. 23, 1991) (remarks of Sen. Bryan).

353. *Id.*

354. *Id.*

355. *Id.*

filed in good faith because of the impossible standards of time now imposed by the high Court, and declared that the decision's shortcomings compelled "a great deal of urgency."³⁵⁶ In closing, the Senator stated that the unprecedented level of activity in the stock markets in the last decade "provided equally unprecedented opportunities for securities fraud."³⁵⁷ While acknowledging that the excesses of the profligate Eighties are now largely behind us, nevertheless "there will always be something new on the horizon We have a responsibility to ensure that investors have enough time to seek legal redress."³⁵⁸

Indeed, the SEC's support for the Bryan bill has had significant political repercussions. It was reported that no less than Vice President Dan Quayle requested that Chairman Breeden review his testimony in support of the measure, as the proposal to expand the liminary period "is being opposed by a powerful coalition of accountants, lawyers and Wall Street firms."³⁵⁹ Nevertheless, in his testimony "Mr. Breeden strongly endorsed the measure, saying that lawsuits brought by individuals, and not his agency, 'performed a critical role in preserving the integrity of our securities market.' "³⁶⁰

The SEC head pointed out that "uncovering sophisticated securities fraud was difficult and time-consuming," and, had the *Lampf* rule been in effect at the time, "about 'one-half of the case against Drexel Burnham, a large part of the Equity Funding case and all of the case against E.F. Hutton for check-kiting would have been barred.' "³⁶¹ Chairman Breeden added that the present one-year/three-year liminary period could threaten shareholder suits against the Bank of Commerce and Credit International and Salomon Brothers in those respective scandals.³⁶² Notably, it was separately reported that both Executive Life of California, the seized insurer, and imprisoned junk bond king Michael Milken have begun to seek dismissals in their individual cases based upon the Supreme Court's holding in *Lampf*.

356. *Id.*

357. *Id.*

358. *Id.* Senator Riegle, the Chair of the Senate Banking Committee, commented that "the individual investor is the key to the strength and liquidity of our securities markets." *Id.* at 10692 (remarks of Senator Riegle). The proposed bill would protect such parties by granting them sufficient time in which to assemble a case to fight any stock fraud, thereby ensuring "that the securities markets are accessible and fair." *Id.*

359. Leslie Wayne, *Breeden Backs Investors on Fraud Suits*, N. Y. TIMES, October 3, 1991, at 10.

360. *Id.*

361. *Id.*

362. *Id.*

Moreover, Chairman Breeden's comments at public forums demonstrate his continued strong support for a statutory two-year/five-year liminary period.³⁶³

Senator Bryan's proposal could very well be the precise remedy that the federal securities laws need in the wake of *Lampf*. While unmistakably a good thing overall, the harmful side effects of *Lampf*, as well as the apparent retroactive applications of the Court's decision, are still doing damage to the system. As previously explicated in detail, this apparent retroactivity has had serious ramifications, ones not necessarily helpful to the proper functioning of the regulatory scheme. Moreover, it would be gratifying if Congress were to exercise its will, if it thinks the somewhat restrictive one-year/three-year parameter now in place should be expanded, in order to better accommodate the necessities of securities antifraud litigation.

In sum, legislative intervention on this issue is as necessary as it is welcome at this time. While the pending bill discussed above may not be the one ultimately enacted into law, it does represent a very positive step in the right direction. From this perspective, such remedial lawmaking by Congress is the very tonic needed to restore the balance and fairness that the uniform liminary rule seeks above all else.

CONCLUSION

From the time the courts first implied a private cause of action arising from section 10(b), the antifraud provision of the federal securities law, the application of that statute has suffered from the lack of a legislatively enacted statute of limitations.

Judges endeavored to fill that critical gap by applying the long-standing doctrine of "borrowing" the liminary periods of the forum for federal actions lacking a statute of repose. However, the disunity resulting from the borrowing of divergent state limitation periods only served to complicate matters.

In recent years, the modifications made by the Supreme Court to the principles of state borrowing have encouraged certain appellate courts to instead look within the federal securities regulations for a closely analogous statute of repose for uniform application to section 10(b). The Third Circuit was the first to borrow a one-year-from-discovery/three-years-from-the-act liminary span from elsewhere in the securities codification. Followed by the Seventh Circuit, and capped by the same holding from the pre-eminent Court of Appeals for the Second Circuit, the uniform one-year/three-year rule gained the ap-

363. *Breeden Urges Changes to Limit Baseless Securities Allegations*, 23 SEC. REG. & LAW REP. 1524 (BNA) (October 18, 1991) (reiterating support for S. 1533 in a speech delivered before the Corporate Counsel Institute on October 16, 1991).

proval of these tribunals, winning out over, *inter alia*, the five-year statute of limitations for insider trading prosecutions and the new general federal four-year liminary period.

In *Lampf* the Supreme Court has finally promulgated a uniform liminary period for securities antifraud litigation, adopting the one-year/three-year rule popularized by the progressive circuits. The consistency granted by this decision is, of course, welcomed. However, the plurality decision was gravely questioned by the dissenting Justices, who thought the one-and-three span inadequate for the singularly vital purposes of the antifraud statute.

This article respectfully joins the critics of the Court's selection, and proposes remedial legislation to enact a two-years-from discovery/four-years-from-the violation statute of limitation for section 10(b). This best serves both the interests of the injured investor as plaintiff and the concerns of the business community subject to the risks of litigation. In any event, *Lampf* has, at the least, finally achieved the uniformity long sought after by the courts compelled into interstitial lawmaking.

Nevertheless, a serious problem remains in the application of *Lampf*. Given this wholly new precedent, the Supreme Court dogma tells us such innovations demand prospective application only. Yet *Lampf* apparently imposes itself retroactively, and a companion holding by the high Court raises the specter of unexpected retroactivity. Truly, this is counter to the prior teachings of the Supreme Court, and has been soundly criticized by the dissenters in both of the high Court's recent cases. To be sure, the courts below have been inclined to be only forward-looking for the new rule.

The problem is indeed a serious one, as a retroactive application of *Lampf* would condemn to death numerous actions filed in a good faith reliance upon then-existing precedent. It is suggested here that a retroactive application of the new one-year/three-year rule would be an egregious error, inflicting an injustice and hardship that the majority of the Justices would no doubt oppose. For that reason, prospective application only of *Lampf* is urged herein.

Lastly, the outcry against *Lampf*, on both the propriety of its chosen time period and the retroactivity issue, has reached the halls of Congress. Legislation is now pending to expand the liminary period and decree only prospective application for the new uniform rule. Putting aside a mild disagreement with the legislators' choice of an appropriate timeframe, this article favors such a remedial enactment, not merely because it resolves the foregoing defects found in *Lampf*,

but it represents a proper exercise of the lawmaking function by the persons elected to do so. The onus of judge-made law is thereby eradicated from this critical area.

It is an old saying that where there is light, there is also shadow. The Supreme Court has lit the *Lampf*, so to speak, and shone the brightness of a uniform limitation for section 10(b) actions where the dark confusion of borrowing from state law once reigned. Yet the light inevitably brings with it the countervailing darkness, here primarily in the form of the apparent retroactive application of the one-year/three-year rule, as well as the gray question of whether the one-year/three-year rule is indeed the best span for determining antifraud actions. While the shadows can never be completely eliminated, this article urges the courts and the lawmakers to minimize the blackness by applying the new rule only prospectively, and by widening the limitations period to a two-year/four-year span. In closing, let *Lampf* shine forever bright, and let plaintiffs and defendants alike in section 10(b) actions enjoy its benefits, while avoiding its shadows.

AUTHOR'S NOTE

As this article went to print, President Bush signed into law the 1991 banking reform bill, which, *inter alia*, eradicated the retroactive effect of *Lampf*. S. 543, the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, was signed by the chief executive on December 19, 1991, and evinced the will of Congress to undo the damage already done by the retroactive application of the new uniform statute of limitations to securities fraud actions. Amendments to the 1934 Act restore the applicable liminary periods to actions that commenced pre-*Lampf*, and permit plaintiffs to reinstate any antifraud actions dismissed subsequent to *Lampf* by reason of the new rule. Pub. L. No. 102-242, § 101, — Stat. —, at § 476 (1991). Indeed, the legislative reform confirms the propriety of the portion of this analysis calling for prospective application only for *Lampf*, and, as advocated here, harkens the beginning of fresh debate over any appropriate modification of the new one-year/three-year liminary period.