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I. INTRODUCTION

Under the Securities Act of 1933[1] (SA) and the Securities Exchange Act of 1934[2] (SEA), a plaintiff is expressly provided with a private cause of action for violations of several different sections.[3] In addition to these express private rights of action, the courts have allowed implied private rights of action where

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1. 15 U.S.C. §§ 77a - 77ll (1982).

2. 15 U.S.C. §§ 78a - 78ll (1982).

3. There are several express provisions in the SA which allow for private causes of action. Section 11 provides for a private cause of action against certain persons in the event of materially false or misleading statements or omissions in an effective registration statement or prospectus. 15 U.S.C. § 77k (1982). Similarly, section 12(1) of the SA provides a private cause of action for violations of section five of the Act. It specifically provides:

> Any person who —
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> (1) offers or sells a security in violation of section 5 of this title, or
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> (2) offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading . . . shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Securities Act of 1933, 15 U.S.C. § 77k (1982). Finally, section 12(2) of the SA imposes general civil liability for fraud in the interstate offer or sale of securities. 15 U.S.C. § 77l (1982).

The SEA has similar provisions. Section nine provides a private cause of action for illegal manipulation of the securities market. 15 U.S.C. § 78i (1982). Section 18 provides for the liability of anyone making false or misleading statements in any document filed pursuant to the SEA or any rule or regulation adopted thereunder. Recovery is allowed for any person who bought or sold a security in reliance on such false statements at a price which was affected by the statement. Securities Exchange Act of 1934, 15 U.S.C. § 78r (1982).

none have been expressly provided by Congress. The most famous implied private right of action under the federal securities laws is for violation of section 10(b) of the Securities Exchange Act of 1934[4] or rule 10b-5 enacted pursuant thereto.[5]

Since Congress did not expressly provide a private cause of action under either section 10(b) or rule 10b-5, it naturally did not provide an applicable statute of limitations period for such actions. To remedy this, federal courts have consistently looked to the state laws and adopted the statute of limitations applicable to the analogous state securities law section.[6] This approach has created a broad range of limitation periods across the country.[7]

Recently, the Third Circuit in In re *Data Access Systems Securities Litigation*,[8] adopted a uniform statute of limitations period for violations of section 10(b) and rule 10b-5 in all the states within its jurisdiction.[9] In doing so, the Third Circuit suggested that the statute of limitations period should be uniform nationwide.[10] This casenote briefly describes the facts and holding of *Data Access Systems*, examine the current state of the relevant law in Utah, and finally, analyze the effect of the *Data Access Systems* holding in Utah.

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4. 15 U.S.C. § 78j(b) (1982).

5. 17 C.F.R. § 240.10b-5 (1985).

6. *See Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645, 646 (1986); Martin, *Statutes of Limitation in 10b-5 Actions: Which State Statute is Applicable?*, 29 BUS. LAW. 443, 443 (1974); Bateman & Keith, *Statute of Limitations Applicable to Private Actions Under SEC Rule 10b-5: Complexity in Need of Reform*, 39 MO. L. REV. 165, 171 (1974).

7. The application of state statutes of limitations to violations of 10(b) and 10b-5 actions is far from uniform.

> Four of the twelve federal circuits consistently apply the blue sky limitations period; three others consistently use the state common law fraud period. But even consistent application of the same kind of statute does not result in uniformity within each circuit. The state common law fraud statutes applied by the federal courts give periods ranging from two to ten years, and the state blue sky periods vary from one to three years. Thus, even when a uniform standard is applied by the federal courts, the absorption into federal securities fraud actions of state statutes of limitation frequently leads to unpredictable results.

Report of the Task Force on Statute of Limitations for Implied Actions, 41 BUS. LAW. 645, 650 (1986). *See also* Martin, *Statutes of Limitation in 10b-5 Actions: Which State Statute is Applicable?*, 29 BUS. LAW. 443, 457 (1974).

8. 843 F.2d 1537 (3d Cir.), *cert. denied*, Vitiello v. Kahlowsky & Co., 109 S. Ct. 131 (1988).

9. *Id.* at 1550.

10. *Id.* at 1549.

II. In re *Data Access Systems Securities Litigation*

The Third Circuit has recently decided several cases which may eventually change and unify statutes of limitations for section 10(b) and rule 10b-5 violations across the country. The major case is In re *Data Access Systems Securities Litigation*,[11] where the plaintiffs brought a class action suit on behalf of purchasers of Data Access Systems stock. The relevant stock purchases occurred between October 31, 1978 and June 22, 1981. Plaintiffs filed their initial complaint on June 23, 1981, "immediately following certain public disclosures of fraudulent business and stock trading activities involving Data Access."[12]

After learning more facts, the plaintiffs filed second and third amended complaints. The third amended complaint named a lawyer and his firm, along with an accountant and his firm as additional defendants. The complaints alleged that, in preparing the prospectus and other required forms necessary prior to issuing the stock, these defendants knew or should have known that many of the statements included in these documents were materially false. Thus, plaintiffs alleged that the defendants had violated section 10(b) of the SEA, and rule 10b-5, promulgated pursuant to section 10(b).[13]

The district court held that the applicable statute of limitations for section 10(b) and rule 10b-5 violations "should be borrowed from New Jersey's six year statute encompassing common law fraud actions."[14] The defendants insisted "that the shorter, two-year statute of limitations under New Jersey's blue sky law . . . should apply . . . ."[15] The defendants moved for certification on this question and the district court stayed its proceedings pending review by the Third Circuit.[16] The Third Circuit, sitting *en banc*, abandoned the prior practice of adopting an analogous state statute of limitations for violations of section 10(b) and rule 10b-5 and imposed a uniform one year after discovery/ three years after violation statute of limitations for all such violations within its jurisdiction.[17] The case was remanded

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11. *In re* Data Access Systems Securities Litigation, 843 F.2d 1537 (3d Cir.), *cert. denied*, Vitiello v. Kahlowsky & Co., ___ U.S. ___, 102 L.Ed.2d 103 (1988).
12. *Id.* at 1538.
13. *Id.*
14. *Id.*
15. *Id.* (citations omitted).
16. *Id.*
17. *Id.* at 1543-46.

to the district court and a subsequent petition for certiorari to the Supreme Court was denied.[18]

In the *Data Access Systems* case the Third Circuit read the Supreme Court cases *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*,[19] *Wilson v. Garcia*,[20] and *DelCostello v. International Brotherhood of Teamsters*,[21] as requiring them to abandon their prior case-by-case method for determining the appropriate state statute of limitations applicable to 10(b) or 10b-5 claims, and "adopt a uniform limitations period in these cases . . . ."[22]

Although admitting that the Supreme Court "has yet to rule on the applicable limitations period for a section 10(b) and Rule 10b-5 action,"[23] the Third Circuit decided that the Supreme Court had "provided us with a formula to approach [the statute of limitations problem]."[24] The appropriate method for determining the correct statute of limitations, according to the enlightened Third Circuit, is outlined as follows. First, the court should characterize the federal claim. This step involves determination of "whether all claims arising out of the federal statute should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case."[25] The second step involves determining whether a federal or state statute should be used. "The Supreme Court has held that the Rule of Decision Act, 28 U.S.C. section 1652, requires application of state statutes of limitations to federal statutory actions not covered by an express limitations period unless 'a timeliness rule drawn from elsewhere in federal law should be applied.' "[26]

In dealing with the first step in its analysis, the Third Circuit stated that "[t]his court has already recognized the necessity for establishing a uniform limitations period when we resort

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18. Certiorari was denied in Vitiello v. Kahlowsky & Co., 109 S. Ct. 131 (1988).

19. 483 U.S. 143 (1987).

20. 471 U.S. 261 (1985).

21. 462 U.S. 151 (1983).

22. *In re* Data Access Systems Securities Litigation, 843 F.2d 1537, 1545 (3d Cir.), *cert. denied*, Vitiello v. Kahlowsky & Co., 109 S. Ct. 131 (1988).

23. *Id.* at 1539.

24. *Id.* at 1542.

25. *Id.*

26. *Id.* at 1542 (citing DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 159 n.13 (1983)).

to 'borrowing' state law."[27] The Court went on to reject the case-by-case approach for determining the applicable statute of limitations. "A factual, claim-based approach to characterizing the case for limitations purposes would not promote '[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation.' "[28] The Court thus felt that the interests of uniformity and predictability required that all claims arising out of section 10(b) and rule 10b-5 should be characterized the same.

The second step in the court's analysis sought to determine whether a federal or state statute of limitations was most appropriate for application to 10(b) and 10b-5 claims. Although prior to this time commentators had suggested that federal statutes of limitations should be borrowed,[29] courts had unanimously searched through state statutes for analogous statutes of limitation.[30] However, the court in *DelCostello* "determined that when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking 'we have not hesitated to turn away from state law.' "[31]

In concluding that "the federal schema of limitations expressly set forth in [other areas of] the Securities Exchange Act of 1934 clearly provides a closer analogy than available state statutes,"[32] the Third Circuit selected a "general one-year-after-discovery and three-years-after-the-violation schema"[33] as " the *one* most appropriate statute of limitations for *all* civil [section 10(b) and Rule 10b-5] claims."[34]

The Third Circuit thus rejected the prior method of searching for an analogous state statute of limitations and applying it to a section 10(b) or rule 10b-5 claim, and established once and

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27. *Id.* at 1543.

28. *Id.* at 1543 (quoting Wilson v. Garcia, 471 U.S. 261, 275 (1985)).

29. *See, e.g.*, Bateman & Keith, *Statutes of Limitations Applicable to Private Actions Under SEC Rule 10b-5: Complexity in Need of Reform*, 39 Mo. L. Rev. 165, 171-81 (1974).

30. *See supra* note 6.

31. *In re* Data Access Systems Securities Litigation, 843 F.2d 1537, 1542 (3d Cir.), *cert. denied*, Vitiello v. Kahlowsky & Co., 109 S. Ct. 131 (1988).

32. *Id.* at 1545.

33. *Id.* at 1546.

34. *Id.* at 1544 (emphasis in original).

for all a uniform statute of limitations for all such claims.[35] Therefore, the current state of the law regarding the proper statute of limitations in all section 10(b) and rule 10b-5 actions in the Third Circuit seems to be the one year after discovery/ three years after violation rule. The only question left for courts to decide is whether, according to the *Chevron* standard, the new rule should be applied retroactively in their particular case.[36]

III. The Law in Utah

A. The Current State of Utah Law

Since the federal statute contains no statute of limitation for the implied private cause of action under section 10(b) and rule 10b-5, federal courts have consistently looked to analogous state statutes of limitations.[37] This has resulted in a diverse mix of limitation periods around the country.[38] In Utah, the federal courts have consistently applied the three year fraud statute of limitation to actions brought under section 10(b) and rule 10b-

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35. *See supra* notes 22-34 and accompanying text.

36. The only remaining question concerned the retroactive application of this new rule. While the *Data Access Systems* court expressly declined to decide the retroactivity issue, the Third Circuit soon had the opportunity to reexamine the point. In Hill v. Equitable Trust Co., 851 F.2d 691 (3d Cir. 1988), the court was squarely presented with the issue of prospective versus retrospective application of their new "uniform" statute of limitations. The court acknowledged "the general rule that a controversy is to be decided on the law as it exists at the time." *Id.* at 695. (In other words, it is most common for a new rule of law to be applied retrospectively, at least to the case from which it comes). According to the Third Circuit, prospective-only application of a decision will occur only when the three qualifications set out by the Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), are met.

These three qualifications are as follows:

> 1). The holding must establish a new principal 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;
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> 2). The merits and demerits in each case must be weighed by looking to the history of the rule in dispute, its purpose and effect, and whether retrospective operation will further or retard the rule's operation;
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> 3). Retrospective application must create the risk of producing substantially inequitable results.

Hill v. Equitable Trust Co., 851 F.2d 691, 696 (3d Cir. 1988) (quoting Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)).

Applying these criteria, the court found no reason to deviate from the general rule and therefore applied the rule retroactively. *Id.*, at 698-99. However, a subsequent decision by a district court located within the bounds of the Third Circuit used the *Chevron* factors to reach the opposite conclusion. *See* Gruber v. Price Waterhouse, 697 F. Supp. 859 (E.D. Pa. 1988).

37. *See supra* note 6 and accompanying text.

38. *See supra* note 7 and accompanying text.

5.[39] In each case, the federal courts have applied Utah's three year statute of limitations applicable to common law fraud.[40] Contrary to the Third Circuit's absolute three years after the violation cutoff, this limitations period does not begin to run until "the discovery by the aggrieved party of the facts constituting the fraud or mistake."[41] Therefore, the statute of limitation may not have expired even ten years after the actual violation if the defendant did not discover the fraud until seven or eight years after it took place.

B. Developments in the Third Circuit and Their Effect on Utah Law

While it is possible, and may even be desirable for consistency's sake, that the Third Circuit's approach will be followed by other Circuits in the future, the immediate impact of this decision will probably be minimal in Utah. This is so for several reasons. First, the Tenth Circuit has for many years been consistent in adopting Utah's state statute of limitations for fraud when dealing with section 10(b) or rule 10b-5 claims. Additionally, some courts and commentators have suggested, and with good reason, that only Congress or the Supreme Court can effectively clear up the confusion in this area. Finally, at least one federal district court in Utah has already refused to follow the Third Circuit in adopting the uniform one year after discovery/three years after the violation statute of limitations for 10(b) and 10b-5 actions. Thus, there is no particular reason to believe that the Tenth Circuit will immediately drop years of precedent and embrace the Third Circuit's new rule.

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39. *See e.g.* Marchese v. Nelson, 700 F. Supp. 522 (D. Utah 1988); Loveridge v. Dreagoux, 678 F.2d 870 (10th Cir. 1982); Clegg v. Conk, 507 F.2d 1351 (10th Cir. 1974); Richardson v. MacAuthur, 451 F.2d 35 (10th Cir. 1971); Mitchell v. Texas Gulf Sulfur Co., 446 F.2d 90 (10th Cir. 1971); Brown v. Producers Livestock Loan Co., 469 F. Supp. 27 (D. Utah 1978).

40. This statute requires certain actions to be brought within a three year period. Within three years:

> . . . .
>
> (3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

UTAH CODE ANN. § 78-12-26(3) (1987).

41. *Id.*

1. Consistency within the Tenth Circuit

Unlike the Third Circuit, where there has been a confusing lack of consistency for some time in this area of the law,[42] the law concerning the applicable statute of limitations for 10(b) and 10b-5 violations has long been settled in Utah.[43] The most recent case in Utah on the issue has stated, "[i]t is well-settled that federal courts sitting in Utah are required to apply the three year limitation found in U.C.A. [section] 78-12-26(3) to federal securities cases brought under Section 10(b) or Rule 10b-5."[44] Thus, the uncertainty and lack of consistency which were cited as major factors in the Third Circuit's decision to abandon their old practice and adopt the new uniform standard are not present in Utah.[45]

2. Supreme Court or congressional direction required

The sharp disagreement among the circuit courts as to how long the appropriate statute of limitations for section 10(b) and rule 10b-5 violations should indicate that a clear decision on the issue by the Supreme Court or a clear congressional solution will be necessary. The Third Circuit's attempt to piece together Supreme Court holdings from three different cases in order to come up with "a formula to approach our present problem," will probably not be strong enough to convince all the other circuits.

At least two courts and several commentators have suggested that either a Supreme Court decision or clear congres-

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42. The Court in *Data Access* admitted:

> Our present case law calls for difficult interpretations of state limitations periods.
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> We are required to examine each contention of a federal securities complaint with great particularity to determine whether the state blue sky statute tracks the particular federal claim, and if not, to determine claim-by-claim which other state limitations period will apply depending upon the resemblance between the precise federal claim and those based in state or common law actions. We are informed that our decisions have not provided bright-line guidance to our district courts in all section 10(b) and Rule 10b-5 cases.

In re Data Access Systems Securities Litigation, 843 F.2d 1537, 1541 (3d Cir.), *cert. denied*, Vitiello v. Kahlowsky & Co., ___ U.S. ___, 102 L.Ed.2d 103 (1988).

43. *See* Marchese v. Nelson, 700 F. Supp. 522, 524 (D. Utah 1988)

44. *Id.*

45. *See also* TCF Banking & Sav. v. Arthur Young & Co., 697 F. Supp. 362, 366 (D. Minn. 1988) (where the court used a similar argument against the adoption of the Third Circuit's rule).

sional direction will be necessary in order to solve this problem. In *Norris v. Wirtz*,[46] the court stated:

> Deciding what features of state periods of limitation to adopt for which federal statutes wastes untold hours. Never has the process been more enervating than in securities law. There are many potentially analogous state statutes, with variations for different circumstances that might toll the period of limitations. Both the bar and scholars have found the subject vexing and have pleaded, with a unanimity rare in the law, for help. . . . the courts of appeals disagree on every possible question about limitations periods in securities cases. Only Congress or the Supreme Court can bring uniformity and predictability to this field[.][47]

This language was also cited with approval in *Davis v. Birr, Wilson & Co.*[48] In *Robin v. Doctors Officenters Corp.*,[49] the court said, "[d]espite growing support for the adoption of a uniform federal limitations period, courts have continued to apply the relevant state statute of limitations. The selection of a uniform federal statute of limitations is a legislative task, or one more appropriately considered by federal courts superior to this one."[50]

Thus, the task of providing national uniformity in the appropriate statute of limitations for violations of section 10(b) and rule 10b-5 should be that of the Supreme Court, or the United States Congress. Any lesser court or legislative body does not have the strength to force the widely separated circuits together on this issue.

3. A Utah Federal District Court refuses to follow the Third Circuit

A final indication that the *Data Access Systems* case will not have an immediate impact on Utah law is the summary rejection of the Third Circuit's approach by a federal district court sitting within the state of Utah. In *Marchese v. Nelson*,[51] the plaintiffs filed an action against Main Street Securities (Main

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46. 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, ___ U.S. ___, 108 S. Ct. 329 (1987).

47. *Id.* (citations omitted).

48. 839 F.2d 1369, 1370-71 (9th Cir. 1988).

49. 686 F. Supp. 199 (N.D. Ill. 1988).

50. *Id.* at 206-07 (citations omitted).

51. 700 F. Supp. 522 (D. Utah 1988).

Street) alleging violations of section 10(b) of the SEA. Main Street filed a motion to dismiss, claiming that the action was time barred by the applicable statute of limitations.[52] While admitting that preceding case law on the issue in Utah was clearly against them, Main Street urged the court to adopt the one year after discovery/ three years after violation rule and the accompanying reasoning of the Third Circuit in *Data Access Systems*.[53]

> The court rejected Main Street's argument by stating, [a]lthough *Data Access* appears well-reasoned and, if adopted by most circuits, would indeed promote uniformity in the time period to bring a federal securities action, it is the first decision of any federal court that has varied from the general rule applying state limitations statutes to Section 10(b) and Rule 10b-5 cases.[54]

The court further stated that in light of the overwhelming unanimity of opinion against the *Data Access Systems* holding the court "will not *sua sponte* deviate from the practice of the Tenth Circuit and federal bench based on a recent decision by the Third Circuit."[55]

Therefore, at least the district courts in the state of Utah do not seem to be willing to ignore years of clear precedent by adopting the Third Circuit's holding in *Data Access Systems*. Short of a dramatic reversal by the Tenth Circuit, it is unlikely that the *Data Access Systems* case will have much of an immediate impact in Utah.

IV. Conclusion

When pursuing a claim under section 10(b) and rule 10b-5 of the Securities Exchange Act of 1934 in Utah, a plaintiff must bring the action within three years. The limitation period begins to run upon the discovery by the plaintiff of the facts constituting the violation. This is the statute of limitations for fraud in Utah, and it is the statute that the federal courts have consistently adopted when dealing with section 10(b) and rule 10b-5 cases within the state.

While they may add uniformity to the previously confusing

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52. *Id.* at 522.
53. *Id.* at 523.
54. *Id.* at 523-24.
55. *Id.* at 524.

state of the law in the Third Circuit, recent decisions in the Third Circuit which have established a uniform statute of limitations period for section 10(b) and rule 10b-5 actions will probably not affect the law in Utah. The law in Utah, in contrast to the law in the Third Circuit, has been well-settled and predictable on this issue for some time. Additionally, the sharp split among the circuits necessarily requires a Supreme Court decision or clear Congressional direction to solve the problem. Finally, at least one federal district court in Utah has already indicated its unwillingness to depart from years of precedent and adopt the Third Circuit's new one year/ three year statute of limitations. It seems unlikely that the Tenth Circuit, or any other circuit, will immediately accept and apply the Third Circuit's reasoning.

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