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## Securities Law - Statutes of Limitations - Limitations Period for Express Causes of Action under Securities Exchange Act of 1934 Applied to Implied Cause of Action under Section 10(b) and Rule 10b-5

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1989]

SECURITIES LAW—STATUTES OF LIMITATIONS—LIMITATIONS PERIOD  
FOR EXPRESS CAUSES OF ACTION UNDER SECURITIES EXCHANGE  
ACT OF 1934 APPLIED TO IMPLIED CAUSE OF ACTION UNDER  
SECTION 10(b) AND RULE 10b-5

*In re Data Access Systems Securities Litigation* (1988)

I. INTRODUCTION

In an effort to rebuild confidence and stability in the securities markets following the panic and devastation of the Stock Market Crash of 1929, Congress enacted the Securities Act of 1933 (1933 Act)<sup>1</sup> and the Securities Exchange Act of 1934 (1934 Act).<sup>2</sup> The use of manipulative and deceptive devices, including statements containing material misrepresentations or omissions in connection with the purchase or sale of securities are unlawful under section 10(b) of the 1934 Act<sup>3</sup> and under Rule 10b-5<sup>4</sup>, which was promulgated by the Securities Exchange Com-

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1. 15 U.S.C. §§ 77a-77bbbb (1982). The purpose of the 1933 Act was to "provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of special civil liabilities, to promote ethical standards of honesty and fair dealing." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (citing H.R. REP. NO. 85, 73d Cong., 1st Sess., 1-5 (1933)).

2. 15 U.S.C. §§ 78a-78kk (1982) (complete codification of Securities Exchange Act of 1934). The 1934 Act provides that "transactions in securities as commonly conducted upon securities exchanges and of over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions." *Id.* § 78b. *See Shores v. Sklar*, 647 F.2d 462, 482 (5th Cir. 1981) (en banc) (Randall, J., dissenting) (noting that securities laws enacted during 1930's were "largely in response to the paralyzing financial crises of the period"), *cert. denied*, 459 U.S. 1102 (1983).

3. 15 U.S.C. § 78j(b) (1982). Section 10(b) provides in pertinent part:

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

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

*Id.*

4. 17 C.F.R. § 240.10b-5 (1987). Rule 10b-5 provides in pertinent part:

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

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

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

mission (SEC) pursuant to its authority under the 1934 Act. Although neither section 10(b) nor Rule 10b-5 provides for an express private cause of action,<sup>5</sup> the federal courts have, for over forty years, recognized an implied civil remedy for violations of Rule 10b-5.<sup>6</sup>

One consequence of the absence of an express civil cause of action is that Rule 10b-5 does not have an express statute of limitations.<sup>7</sup> To fill this void, the federal courts have borrowed limitations periods from state law.<sup>8</sup> Each circuit has attempted to define the federal purpose underlying Rule 10b-5 actions to identify and apply the state statute of limitations that best effectuates this federal purpose.<sup>9</sup> The circuits, however, have interpreted the underlying federal policy differently, with the result that their decisions have produced a "confusing patchwork in the law [of limitations periods] of federal 10b-5 actions."<sup>10</sup> As of 1988, the

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ments made, in light of the circumstances under which they were made, not misleading, or

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

*Id.*

The Securities Exchange Commission (SEC) created Rule 10b-5 to supplement other antifraud provisions contained in the 1933 and 1934 Acts and to function as a catch-all provision. A. BROMBERG, *SECURITIES LAWS: FRAUD—SEC RULE 10B-5*, § 2.2, at 19-29 (1969) (10b-5 acts as gap-filler for other congressional antifraud rules).

5. Note, *Statutes of Limitation for Rule 10b-5*, 39 WASH. & LEE L. REV. 1021, 1021 (1982).

6. *Id.* *Kardon v. National Gypsum Co.* was the first case in which a court implied a civil remedy under Rule 10b-5. *Kardon*, 69 F. Supp. 512, 514 (E.D. Pa. 1946) (noting omission of express private right of action should not thwart purpose of section).

7. Doret & Fiebach, *A Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Action in Federal Courts Sitting in Pennsylvania*, 25 VILL. L. REV. 851, 852 (1980) (defining limitations of actions as "the designation of a definite period of repose beyond which acts or conduct may not be challenged by new lawsuits").

8. *Id.* at 853. See *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946) ("The implied absorption of State statutes of limitations within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles."). See also *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 158 (1987) (Scalia, J., concurring) (explaining that originally federal courts believed state statutes of limitations "applied of their own force," but modern approach suggests federal courts apply state statutes of limitations based on congressional intent).

The Rules of Decision Act, 28 U.S.C. § 1652 (1982), mandates application of state statutes of limitations only when federal law does not "otherwise require or provide." *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983). For a discussion of the application of the Rules of Decision Act to this area of the law, see *infra* notes 118-23 and accompanying text.

9. See Note, *supra* note 5, at 1040.

10. *Id.* at 1046. The circuits differ in their emphasis in determining the statute that bears the closest resemblance to Rule 10b-5. *Id.* For example, some circuits favor examining the commonality of purpose and usually favor adopting

First Circuit has applied state statutes of limitations for personal tort suits, while the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh and D.C. Circuits have held that state securities laws (blue sky laws) are most analogous to federal securities laws, because they regulate the same conduct.<sup>11</sup> The Ninth and Tenth Circuits, in contrast, have applied common law fraud statutes of limitations to Rule 10b-5 claims, on the ground that state blue sky laws are not always substantively similar to federal securities laws.<sup>12</sup> Until its recent decision in *In re Data Access Systems Securities Litigation*,<sup>13</sup> the Third Circuit's approach had been to examine each Rule 10b-5 action on a claim-by-claim basis in an attempt to "color-match" it to an analogous state action and then to borrow the appropriate state limitations period.

The need for a uniform limitations period applicable to all Rule 10b-5 actions has justifiably been referred to as an issue of national concern.<sup>14</sup> In *Norris v. Wirtz*,<sup>15</sup> Judge Easterbrook asserted, "[n]ever has the process [of deciding which state period of limitations to apply to federal statutes] been more enervating than in securities law. . . . Both the bar and scholars have found the subject vexing and have pleaded, with a

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the limitations period for state blue sky (securities) laws. *Id.* Circuits that apply state common law fraud time limitations often emphasize the substantive differences in remedies and defenses between state blue sky laws and Rule 10b-5. *Id.*

11. Brief for Appellants I. Kahlowsky & Co. and Peter Cunicelli at 28-29, *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.) (en banc) (No. 87-5385), *cert. denied*, 109 S. Ct. 131 (1988).

12. *Id.* at 29 (citing H. BLOOMENTHAL, *SECURITIES LAW HANDBOOK* at xiv) (1986-87) (noting general trend toward blue sky analogy, but continued disparity among the circuits). A blue sky law which did not provide a remedy for a seller of securities would be substantively dissimilar to Rule 10b-5 under the federal securities laws. *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1544 (3d Cir.) (en banc), *cert. denied*, 109 S. Ct. 131 (1988).

13. 843 F.2d 1537, 1540-42 (3d Cir.) (en banc), *cert. denied*, 109 S. Ct. 131 (1988). The practice in the Third Circuit was to choose the state statute which best comported with the substantive federal policies underlying Rule 10b-5, but to look first to state securities laws. *Id.* at 1541. If the state blue sky law did not afford the plaintiff a civil remedy, however, the common law fraud limitations period governed. *Id.*

The most recent examples of the Third Circuit's approach are *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980) and *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979). Both cases held that because state blue sky laws provided no protection to sellers of securities, implied actions under Rule 10b-5 were governed by state common law fraud statutes of limitations. *Biggans*, 638 F.2d at 608; *Roberts*, 611 F.2d at 454-55.

14. *See Data Access*, 843 F.2d at 1549 ("The necessity for uniform federal remedies in security cases would seem to demand recourse to a uniform federal statute of limitations."); *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.) ("[W]e must take into account the interests of uniform application and the plan of the securities acts."), *cert. denied*, 108 S. Ct. 329 (1987); Comment, *Statutes of Limitations in 10b-5 Actions: A Proposal for Congressional Legislation*, 24 SYRACUSE L. REV. 1154, 1164 (1973) (referring to need for simplicity and uniformity in Rule 10b-5 actions).

15. 818 F.2d 1329 (7th Cir.), *cert. denied*, 108 S. Ct. 329 (1987).

unanimity rare in the law, for help."<sup>16</sup>

Recent United States Supreme Court decisions have suggested a different approach for determining the proper limitations periods for implied federal causes of action. In *DelCostello v. International Brotherhood of Teamsters*,<sup>17</sup> *Wilson v. Garcia*<sup>18</sup> and *Agency Holding Corp. v. Malley-Duff & Assocs.*,<sup>19</sup> the Court emphasized the need to apply uniform time limitations to certain causes of action, and stated that in some circumstances a uniform statute of limitations borrowed from an analogous federal law best effectuates federal policy.<sup>20</sup>

In *In re Data Access Systems Securities Litigation*,<sup>21</sup> the United States Court of Appeals for the Third Circuit reexamined its prior decisions concerning the statute of limitations applicable to Rule 10b-5 civil actions in light of the recent Supreme Court decisions.<sup>22</sup> The court determined that borrowing state statutes was no longer appropriate and held that the federal statute of limitations for express actions under the 1934

16. *Data Access*, 843 F.2d at 1540 (quoting *Norris*, 818 F.2d at 1332) ("Only Congress or the Supreme Court can bring uniformity and predictability to this field.").

17. 462 U.S. 151 (1983). *DelCostello* involved an employee's action against an employer and union for alleged breach of a collective bargaining agreement by the employer and breach of duty of fair representation by the union at the ensuing arbitration proceedings. *Id.* at 154. The Supreme Court reversed the Fourth Circuit's holding that Maryland's 30-day statute of limitations for actions to vacate arbitration awards applied to the claim, and held that the six-month limitations period for making charges of unfair labor practices to the National Labor Relations Board under § 10(b) of the National Labor Relations Act should govern. *Id.* at 154-55. The Court stated that when the adoption of state law would be at odds with the purpose of operation of federal substantive law, it is permissible to draw a limitations period from federal law. *Id.* at 161.

18. 471 U.S. 261 (1985). In *Wilson*, a plaintiff brought suit under 42 U.S.C. § 1983 alleging deprivation of his constitutional rights in an unlawful arrest by New Mexico Police. *Wilson*, 471 U.S. at 263. The Supreme Court affirmed the Tenth Circuit's decision to apply a three-year personal injury statute of limitations to the action, instead of the four-year catch-all limitations period which the district court had imposed. *Id.* at 280. The Court called for an end to case-by-case analysis of § 1983 claims and emphasized a need for a simple, broad characterization of all such claims. *Id.* at 273.

19. 483 U.S. 143 (1987). *Malley-Duff* arose from a Racketeer Influenced and Corrupt Organizations Act (RICO) claim against an insurance company for fraudulent termination of an agency relationship. *Id.* at 145. The Supreme Court affirmed the Third Circuit's finding that the plaintiff's suit was not time-barred, but applied the federal statute of limitations applicable to the Clayton Act, 15 U.S.C. § 15b (1982), to actions arising under RICO, rather than the state's six-year catch-all statute of limitations. *Malley-Duff*, 483 U.S. at 156. The Court stated that there is a need for uniformity of limitations periods in civil actions under RICO, and that the Clayton Act provided "a far closer analogy than any available state statute." *Id.*

20. *Data Access*, 843 F.2d at 1549-50 (reviewing Supreme Court influence on its decision).

21. 843 F.2d 1537 (3d Cir.) (en banc), *cert. denied*, 109 S. Ct. 131 (1988).

22. *Id.* at 1537-38.

Act should be applied to implied causes of action under Rule 10b-5.<sup>23</sup> The combination of a "strong signal" gleaned from the Supreme Court's recent decisions, the vital federal policy of fostering predictability and uniformity in the area of securities law and a need to redirect and simplify the state of its Rule 10b-5 litigation compelled the Third Circuit to adopt the federal limitations period.<sup>24</sup>

This Casebrief will first review the procedural and factual history of *Data Access* and the reasoning behind the Third Circuit decision,<sup>25</sup> and then examine the substantive issues encompassed by *Data Access*.<sup>26</sup> The specific issues to be considered are: whether the Third Circuit properly followed Supreme Court precedent in reaching the *Data Access* decision;<sup>27</sup> whether *Data Access* violates the *Erie Railroad Co. v. Tompkins* doctrine;<sup>28</sup> whether the Third Circuit was correct in eliminating unlimited equitable tolling from Rule 10b-5;<sup>29</sup> whether the court should have addressed the question of "prospective-only" application of the holding;<sup>30</sup> and, if the court had addressed the prospectivity issue, whether the *Data Access* holding should have been applied on a prospective basis only.<sup>31</sup> In conclusion, this Casebrief will evaluate the potential impact of *Data Access* in the Third Circuit as well as in the other circuit courts.<sup>32</sup>

## II. DISCUSSION

*Data Access* was a class action suit brought in the United States District Court for the District of New Jersey on behalf of those who purchased Data Access Systems, Inc. (DASI) common stock between October 31, 1978 and June 22, 1981.<sup>33</sup> Plaintiffs alleged that DASI, a New

23. *Id.* at 1550.

24. *Id.* at 1548-49.

25. For a discussion of the procedural and factual history of *Data Access*, see *infra* notes 33-43 and accompanying text. For a discussion of the court's decision and reasoning in *Data Access*, see *infra* notes 44-99 and accompanying text.

26. For a discussion of the substantive issues involved in *Data Access*, see *infra* notes 100-53 and accompanying text.

27. For a discussion of the correctness of the *Data Access* decision, see *infra* notes 100-36 and accompanying text.

28. 304 U.S. 64 (1938). For a discussion of the effect of the *Erie* doctrine on the *Data Access* holding, see *infra* notes 118-23 and accompanying text.

29. For a discussion of the equitable tolling issue, see *infra* notes 131-36 and accompanying text.

30. For a discussion of whether the court should have addressed the question of prospective application, see *infra* notes 137-41 and accompanying text.

31. For a discussion of whether the Third Circuit should have applied the decision on a prospective basis, see *infra* notes 142-53 and accompanying text.

32. For a discussion of the potential impact of *Data Access*, see *infra* notes 154-55 and accompanying text.

33. *Data Access*, 843 F.2d at 1538. On September 20, 1984, Judge Stanley S. Brotman certified the plaintiff class as those persons "who purchased securities of [DASI] from October 31, 1978 until June 22, 1981 inclusive and who sustained damages as a result of such purchases." *In re Data Access Systems Securities Litigation*, 103 F.R.D. 130, 150 (1984).

Jersey-based corporation, released exceedingly optimistic information in its annual reports, audited by Touche Ross and Co. (Touche), for the fiscal years ending August 31, 1978, 1979 and 1980,<sup>34</sup> and that these estimates artificially inflated the price of the DASI common stock.<sup>35</sup> The plaintiffs also alleged that DASI released false and misleading information in its registration statement and prospectus in connection with a 1979 stock offering.<sup>36</sup> The first shareholder complaint was filed on June 23, 1981, in response to the withdrawal of Touche's audit reports on DASI's financial statements, after Touche concluded that the statements for the fiscal years in question were materially misstated.<sup>37</sup>

In the Third Amended Complaint, filed on January 7, 1986, the plaintiffs named the defendants relevant to the Third Circuit appeal: Roger Tolins, a lawyer who represented DASI in connection with the February 1979 offering; Tolins & Lowenfels, the New York law firm in which Tolins was a partner; Peter Cunicelli, an auditor for Mark Serv Company, an organization partially owned by DASI officers and directors; and I. Kahlowsky and Company, Cunicelli's accounting firm.<sup>38</sup>

After the Third Amended Complaint was filed, the defendants moved to dismiss on the ground that the claims were barred by the two year statute of limitations contained in the New Jersey blue sky law.<sup>39</sup>

34. *Data Access*, 103 F.R.D. at 135 (noting 1980 Annual Report described "meteoric rise" of company).

35. *Id.* Accordingly, DASI stock jumped radically from approximately \$3 to \$5 per share in the first quarter of 1978 to \$24 per share following the release of DASI's 1980 Annual Report. *Id.*

36. *Id.* On February 14, 1979, DASI announced an offering of 710,000 shares of common stock. *Id.* Judge Brotman created a subclass of shareholders within the plaintiff class for those persons "who purchased the 710,000 shares of DASI common stock . . . between February 14, 1979 and June 22, 1981 inclusive and who sustained damage as a result of such purchases." *Id.* at 150.

37. *Id.* at 135. After the February stock offering, the climate at DASI began to change dramatically. In late February, DASI's CEO and Chairman was indicted by a Federal Grand Jury on charges unrelated to this case. *Id.* He was later convicted and resigned from office on October 3, 1981. *Id.*

38. *Data Access*, 843 F.2d at 1538. The Third Amended Complaint stated that Tolins, in the Registration Statement and Form 10-Ks, represented that DASI had no potential liability regarding various "sales" to "affiliated" companies, including Mark Serv. *Id.* Plaintiffs asserted that Tolins knew or should have known that those representations were materially misleading and that Tolins "ignored or disregarded clear evidence that such representations were false." *Id.* The Third Amended Complaint also alleged that when Touche requested accounting information concerning Mark Serv's dealings with DASI, Peter Cunicelli advised Touche that Mark Serv's lending banks were in no way relying upon DASI as security for their loans to Mark Serv, even though Cunicelli and his accounting firm had reason to know DASI was contingently liable to certain creditors of Mark Serv. *Id.* at 1538-39. Plaintiffs contended that these accounting defendants "fraudulently and recklessly misrepresented and failed to disclose" these facts to Touche. *Id.* at 1539. Plaintiffs alleged that all defendants violated § 10(b) and Rule 10b-5 and committed common law fraud and negligence. *Id.* at 1538-39.

39. *Id.* at 1551.

The district court denied the motion, relying on two Third Circuit decisions, *Roberts v. Magnetic Metals Co.*<sup>40</sup> and *Biggans v. Bache Halsey Stuart Shields, Inc.*,<sup>41</sup> which required the application of New Jersey's six-year limitations period for common law fraud actions.<sup>42</sup> The district court certified the issue for immediate interlocutory review, which was granted by the Third Circuit on March 23, 1987.<sup>43</sup>

The Third Circuit, sitting *en banc*, held that the statute of limitations applicable to express actions under the 1934 Act governs implied causes of action under Rule 10b-5.<sup>44</sup> The court first addressed the basis and scope of its jurisdiction under the certification order, and asserted its authority to examine any ground "that might require reversal of the order appealed from."<sup>45</sup> The court then framed the two issues before it: first, whether the recent Supreme Court trend of borrowing federal statutes of limitations for federal causes of action required a reexamination

40. 611 F.2d 450 (3d Cir. 1979).

41. 638 F.2d 605 (3d Cir. 1980).

42. *Data Access*, 843 F.2d at 1538. *Biggans* and *Roberts* stand for the proposition that when New Jersey securities law provided no civil remedy for conduct that violated Rule 10b-5, the statute of limitations to be applied to the federal claim is the state common law fraud limitations period. *Biggans*, 638 F.2d at 610; *Roberts*, 611 F.2d at 460. In the instant case there was a question as to whether the accountant and attorney of a corporate seller of securities were included under New Jersey securities regulations. See *Data Access*, 843 F.2d at 1544 ("[T]here is a substantial question whether New Jersey's blue sky law creates liability for non-sellers in these circumstances.").

43. *Data Access*, 843 F.2d at 1538. The Third Circuit condensed the district court's three certified questions into two:

- (a) For the statute of limitations found in the New Jersey Blue Sky law to apply to plaintiffs' security claims herein, need plaintiffs' claims state a viable cause of action under said blue sky law?
- (b) If the answer to the foregoing question is in the affirmative, does plaintiffs' Third Considered Amended Class Action Complaint, alleging that defendants substantially participated and/or aided and abetted in the sale of securities to plaintiffs, state a viable cause of action against defendants as "sellers" under the applicable liability provision of the New Jersey Blue Sky law?

*Id.* at 1539.

44. *Id.* at 1550. The case had been argued before Circuit Judges Seitz, Hutchinson and Aldisert on November 19, 1987; but before an opinion could be issued, the court gathered *en banc* to hear reargument. *Id.* at 1537. Judge Aldisert wrote the opinion, joined by Judges Weis, Higginbotham, Becker, Greenberg, Hutchinson, Scirica and Chief Judge Gibbons. *Id.* Judge Seitz wrote a dissenting opinion, joined by Judges Sloviter and Mansmann, who dissented only with respect to the issue of retroactivity. *Id.* at 1551.

45. *Id.* at 1539 (citing *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 962 n.7 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984)). The scope of the court's jurisdiction generally arises from the controlling issues of law contained in the district court's order under 28 U.S.C. § 1292(b) (1982 & Supp. V 1987). *Data Access*, 843 F.2d at 1539. The court also stated that its decision was made without "constraint of panel precedent" due to the court's *en banc* status. *Id.* at 1538.



of the “color-match” approach set forth in *Roberts* and *Biggans*;<sup>46</sup> and second, what statute of limitations would be most appropriate for Rule 10b-5 actions if the issue were to be reexamined?<sup>47</sup>

The *Data Access* court stated that the then current approach to selecting a statute of limitations for Rule 10b-5 actions required the Third Circuit 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 on a claim-by-claim basis which other state limitations period will apply” according to its similarity to a state common law action.<sup>48</sup> The court examined the development of this approach in *Roberts*<sup>49</sup> and *Biggans*.<sup>50</sup> In *Roberts*, a selling shareholder brought suit alleging that the corporation’s solicitation of shareholder approval for a merger violated sections 10(b) and 14(a) of the 1934 Act.<sup>51</sup> The *Data Access* court noted that the *Roberts* court was inclined to choose an analogous federal statute of limitations, but ultimately borrowed a state statute, applying New Jersey’s six-year common law fraud limitations period rather than the state’s two-year blue sky statute of limitations after considering “whether the lawsuit would be time barred if brought in state court.”<sup>52</sup> The *Data Access* court also noted that then Chief Judge Seitz, dissenting in *Roberts*, would have applied a federal statute of limitations to Rule 10b-5 actions.<sup>53</sup>

46. *Id.* at 1537-38.

47. *Id.* at 1538.

48. *Id.* at 1541. The court quoted Chief Judge Latchum, who stated that Third Circuit law in this area adhered

to the rudimentary principle that . . . the court must select that state statute of limitations which best comports with the substantive federal policies advanced by Rule 10b-5. . . . [T]he Blue Sky statute of limitations [is] in most cases the logical candidate for regulating 10b-5 claims. . . . [But] [i]f the underlying state Blue Sky law does not afford a civil damage action to remedy the behavior challenged by the 10b-5 claim and the plaintiff would be relegated to a common law fraud action for state relief, the courts must apply the fraud limitations provision

. . . .  
*Id.* at 1541-42 (quoting *Hill v. Der*, 521 F. Supp. 1370, 1382-83 (D. Del. 1981) (citations omitted)).

49. *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979).

50. *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980); see *Data Access*, 843 F.2d at 1540-41.

51. *Roberts*, 611 F.2d at 451-52. The suit was against the corporation, its merger partner and their broker for making material misrepresentations in order to obtain shareholder approval of the merger. *Id.*

52. *Data Access*, 843 F.2d at 1540. The *Data Access* court quoted Judge Gibbons:

Much can be said, perhaps for a different rule [than that of the forum state] in a different context directing a federal court to statutes of limitations governing analogous federal causes of action. But the rule has been otherwise for many years, and an inferior [federal] court is not free to change it.

*Id.* (quoting *Roberts*, 611 F.2d at 454).

53. *Id.* (citing *Roberts*, 611 F.2d at 463 (Seitz, C.J., dissenting)).

The *Data Access* court observed that the *Biggans* court followed *Roberts* in its application of the state common law fraud limitations period where the blue sky law did not provide a cause of action analogous to an implied claim under Rule 10b-5.<sup>54</sup> The dissent in *Biggans*<sup>55</sup> flatly rejected the "exact match" approach, and instead advocated a uniform application of state blue sky law limitations periods in order to rescue this "confused and inconsistent body of law."<sup>56</sup>

The *Data Access* court then considered the Supreme Court's recent decisions in *DelCostello*, *Wilson* and *Malley-Duff* to determine whether those decisions compelled a reexamination of the Third Circuit's approach to limitations periods for Rule 10b-5 actions.<sup>57</sup> The court began its evaluation with *Malley-Duff*, which, like *DelCostello*, rejected the theory that federal courts must always apply a state statute of limitations when Congress has not provided a limitations period.<sup>58</sup>

In *Malley-Duff*, the Supreme Court formulated a two-step procedure to determine the appropriate statute of limitations for a federal claim.<sup>59</sup> The first step involves characterizing the federal claim, by using federal law to determine "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.'"<sup>60</sup> The second step involves a determination of whether a state or federal statute of limitations should be used.<sup>61</sup>

The *Data Access* court observed that in *DelCostello* the Supreme Court specifically held that the Rules of Decision Act of 1789<sup>62</sup> does not mandate application of a state statute of limitations.<sup>63</sup> Rather, in *DelCostello*, the Court recognized that

when a rule from elsewhere in federal law clearly provides a

54. *Id.* at 1541 (citing *Biggans*, 638 F.2d at 610). As noted by the *Data Access* court, the *Biggans* court stated that the common law limitations period applied because New Jersey framed its securities statute as a supplement to the common law. *Id.*

55. *Biggans*, 638 F.2d at 611-12 (Weis, J., dissenting).

56. *Id.* at 612 (Weis, J., dissenting). Judge Weis pointed out that the issue is so uncertain that two actions, both brought under § 10(b), could have different applicable statutes of limitations. *Id.*

57. *Data Access*, 843 F.2d at 1542-44.

58. *Id.* at 1542.

59. *Malley-Duff*, 483 U.S. at 147; see also *Wilson*, 471 U.S. at 268.

60. *Malley-Duff*, 483 U.S. at 147 (quoting *Wilson*, 471 U.S. at 268).

61. *Id.*

62. 28 U.S.C. § 1652 (1982).

63. *Data Access*, 843 F.2d at 1542 (citing *DelCostello*, 462 U.S. at 159 n.13). The Rules of Decision Act, 28 U.S.C. § 1652, requires that state statutes of limitations be applied to federal statutory causes of action not expressly assigned a limitations period, unless a federal limitations period should be applied. *Data Access*, 843 F.2d at 1542. For a discussion of the Rules of Decision Act as applied to *Data Access*, see *infra* notes 118-23 and accompanying text.

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, “we have not hesitated to turn away from state law.”<sup>64</sup>

The *Data Access* court underscored the trend in the Supreme Court by citing a recent Third Circuit decision that rejected the claim-by-claim approach required under *Roberts* and *Biggans* in civil RICO cases. *Malley-Duff & Associates v. Crown Life Insurance Co.*<sup>65</sup> was the Third Circuit decision later affirmed by the Supreme Court in *Malley-Duff*. In *Crown Life*, the Third Circuit, relying on strong direction from the Supreme Court in *DelCostello* and *Wilson*, held that “[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation” compelled it to apply the four-year statute of limitations governing civil actions under the Clayton Act to actions arising under civil RICO.<sup>66</sup> The *Data Access* court observed that, just as claims under RICO and the Clayton Act encompass a diverse range of topics, Rule 10b-5 claims “embrace a galaxy of actions.”<sup>67</sup> Thus, the court determined that the proper approach is to find the “one most appropriate statute of limitations for all civil [section 10(b) and Rule 10b-5] claims.”<sup>68</sup>

The court first rejected state blue sky laws as the “one most appropriate” time limitation, noting that Rule 10b-5 actions may be brought by sellers or purchasers of securities, yet state blue sky laws frequently do not provide a remedy to sellers of securities.<sup>69</sup> The court next rejected the analogy of Rule 10b-5 actions to common law fraud, because of direction from the Supreme Court<sup>70</sup> and because modern antifraud

64. *Data Access*, 843 F.2d at 1542 (quoting *DelCostello*, 462 U.S. at 171-72); see also *Malley-Duff*, 483 U.S. at 147 (four-year statute of limitations governing civil suits under Clayton Act applies to civil causes of action under RICO); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (federal limitations period applies to EEOC actions); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (adopting federal statute of limitations in general admiralty law); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946) (state statute of limitations not appropriate in action to enforce federally created equitable right).

65. 792 F.2d 341 (3d Cir. 1986), *aff'd sub nom.* *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987).

66. *Data Access*, 843 F.2d at 1543 (quoting *Wilson*, 471 U.S. at 275). The *Crown Life* court expounded on the multitude of actions that could arise under the umbrella of RICO, each of which carries its corresponding period of limitations. *Id.* (citing *Crown Life*, 792 F.2d at 348-49).

67. *Id.* The court found that the reasoning of *Crown Life*, if applied to § 10(b) and Rule 10b-5 actions, would help to attain the same goal of minimizing “uncertainty and time-consuming litigation.” *Id.* (quoting *Crown Life*, 792 F.2d at 348).

68. *Id.* at 1544 (quoting *Crown Life*, 792 F.2d at 349). See *Friedlander v. Troutman*, 788 F.2d 1500, 1505 (11th Cir. 1986) (holding uniform state statute of limitations applies to all § 10(b) and Rule 10b-5 actions).

69. *Data Access*, 843 F.2d at 1544 (citing *Roberts*, 611 F.2d at 453).

70. *Id.* The court cited to a number of Supreme Court cases which echo

provisions of the securities laws encompass far more complex actions than early common law fraud cases.<sup>71</sup>

After concluding that neither state blue sky nor state common law fraud statutes of limitations serve as adequate vehicles for the enforcement of claims under Rule 10b-5, the court turned to the question of whether a federal statute of limitations should be borrowed.<sup>72</sup> The *Data Access* court proceeded on the assumption that state borrowing is the norm "unless [the court] find[s] that state statutes of limitations are an unsatisfactory vehicle."<sup>73</sup>

The court then reviewed the federal limitations periods expressly provided in the 1934 Act.<sup>74</sup> The court pointed to the provisions of the 1934 Act which expressly provide for statutes of limitations and repose,<sup>75</sup> including: section 9(e),<sup>76</sup> which involves the manipulation of security prices; section 16(b),<sup>77</sup> which covers profits from the purchase and sale of securities within six months; section 18(c),<sup>78</sup> which creates liability for misleading statements in any application, report, or filed document; and section 29(b),<sup>79</sup> which controls the validity of contract provisions in violation of the 1934 Act or subsequent regulations thereunder. In each of these sections, the 1934 Act provides an express private right of action which carries a one-year-from-discovery statute of limitations, with an absolute three-years-from-violation statute of repose.<sup>80</sup> The court held this limitations period to be the most suitable for Rule 10b-5 claims.<sup>81</sup> The court noted that section 16(b), with its two

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this theory. *Id.* at 1544-45. See *Basic Inc. v. Levinson*, 108 S. Ct. 978, 990 n.22 (1988) (noting difference between actions under § 10(b) and common law deceit); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (refusing to impose traditional common law fraud standard of proof on § 10(b) actions); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (1976) (discounting theory that language of § 10(b) shows intent to create liability for mere negligence); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) (indicating common law notions of fraud involving tangible items of wealth not suited to scale of modern day intangibles).

71. *Data Access*, 843 F.2d at 1544-45. The court found that Rule 10b-5 actions are "far from being a mirror image or a reasonable facsimile of common law fraud" and that they "appear to be *sui generis*." *Id.* at 1545.

72. *Id.*

73. *Id.* (citing *Malley-Duff*, 483 U.S. at 147; *DelCostello*, 462 U.S. at 171-72).

74. *Id.*

75. *Id.*

76. *Id.* at 1546 (citing 15 U.S.C. § 78i(e) (1982)).

77. *Id.* (citing 15 U.S.C. § 78p(b) (1982)).

78. *Id.* (citing 15 U.S.C. § 78r(c) (1982)).

79. *Id.* (citing 15 U.S.C. § 78cc(b) (1982)).

80. *Id.* For example, § 9(e) states, "No action shall be maintained to enforce any liability [for manipulating security prices] unless brought within one year after discovery of the facts constituting the violation and within three years after such violation." *Id.*

81. *Id.* at 1545.

year limitations period, was the one exception to this pattern.<sup>82</sup> The court stated that this limitations period was not controlling nor even relevant because the purpose of section 16(b) was entirely distinct from the purpose of section 10(b).<sup>83</sup> The court noted that the purpose of the absolute limitation provided by the three-year period of repose was to dissipate fear that “‘lingering liabilities would disrupt normal business and facilitate false claims.’”<sup>84</sup>

The court then explained that implied Rule 10b-5 actions are creatures of judicial formulation rather than legislative enactment.<sup>85</sup> The court reviewed the stated purposes of both the 1933 and 1934 Acts in order to ascertain the federal policies which bore directly on the controlling issue under consideration.<sup>86</sup>

The *Data Access* court then stated that the Supreme Court’s decision in *Malley-Duff* was a strong signal that the federal judiciary has recognized the need for national statutes of limitation in certain instances.<sup>87</sup> In response to that signal, the court asserted that “[i]t is difficult to consider a limitations statute that better reflects the ‘federal policies at stake’ and the ‘practicalities of litigation’ in a case based on the Securities Exchange Act of 1934 than those provisions of the Act that explicitly

82. *Id.* at 1546.

83. *Id.* According to the court, § 16(b) of the 1934 Act was enacted to “prevent the unfair use of information . . . within any period of less than six months.” *Id.* (quoting 15 U.S.C. § 78p(b) (1982)). Therefore, the court found the outside period of limitations for § 16(b), which is only two years rather than three years, to be ill-suited for § 10(b) actions. *Id.*

84. *Id.* (quoting *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 108 S. Ct. 329 (1987)). See *Report of the Task Force on Statute of Limitations for Implied Actions by the Committee on Federal Regulation of Securities*, 41 BUS. LAW. 645, 655 (1986) [hereinafter *Report of the Task Force*]; see also 6 J.S. ELLENBERGER & E. MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, at 6565-66, 6718, 6993 (1973).

The court also cited the dissent of then Chief Judge Seitz in *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979). *Data Access*, 843 F.2d at 1546. Chief Judge Seitz offered two strong policies to support the shorter statutes of repose following notice of the violation to the shareholders: “First, an early action will alert other shareholders to possible misconduct in the affairs of the corporation. Second, the shorter period permits the company’s management to treat a given securities transaction as closed, allowing them to proceed more confidently with running the company.” *Id.* (quoting *Roberts*, 611 F.2d at 463 (Seitz, C.J., dissenting)).

85. *Data Access*, 843 F.2d at 1547. (“[I]t is a genie sired solely by the judiciary, and the genie having escaped from the bottle is not easily cabined.”).

The court reviewed the history of the creation of Rule 10b-5 private actions, which began over 25 years before the Supreme Court spoke on the issue. *Id.*

86. *Id.* at 1547-48. For the purposes of the 1933 and 1934 Acts, see *supra* notes 1-2.

87. *Data Access*, 843 F.2d at 1548. The court offered, as an example, the importance of applying the same statute of limitations to “[a] broker in New York, an issuer in Delaware, a purchaser in San Francisco, an accountant in New Jersey, and a lawyer in Pennsylvania.” *Id.* at 1549.

and expressly state such a period.”<sup>88</sup>

With respect to the application of the newly declared limitations period to the *Data Access* case itself, the court refused to consider the plaintiffs’ request that it be applied prospectively. In doing so, the Third Circuit held that the district court had not certified that question for review.<sup>89</sup>

In dissent, Judge Seitz supported the majority’s application of the federal statute of limitations governing express actions under the 1934 Act to claims arising under Rule 10b-5.<sup>90</sup> Judge Seitz expressed his concern, however, over the majority’s refusal to consider the plaintiffs’ request that the ruling be applied prospectively only.<sup>91</sup> Judge Seitz found it ironic that the court claimed it could not examine the prospective application issue because the issue was not certified by the district court, yet based its entire holding upon an issue that was not encompassed by the lower court’s certification order.<sup>92</sup> Judge Seitz concluded that existing caselaw and the federal policy underlying interlocutory appeals under section 1292(b) (specifically, the advancement of the termination of litigation) mandated consideration of the issue of prospective application.<sup>93</sup>

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88. *Id.* The court noted: “All [of the companion provisions of the 1934 Act] aim to compensate the same type of injury. All are designed to fill a void in the common law and to create remedies that would be uniform throughout our nation’s commercial universe, instead of being subjected to the vagaries of independent and diverse state statutory regulations.” *Id.* at 1548-49.

89. *Id.* at 1550. The court restricted its jurisdiction only to the order of the district court. *Id.* (citing *Link v. Mercedes Benz of N. Am., Inc.*, 550 F.2d 860, 863 (3d Cir.) (en banc), *cert. denied*, 431 U.S. 933 (1977)). Judge Aldisert intimated that this was a factual issue, better left to the determination of the district court. *Id.* at 1550-51 (citing *Miller v. Bolger*, 802 F.2d 660, 666-67 (3d Cir. 1986)).

90. *Id.* at 1551 (Seitz, J., dissenting).

91. *Id.* (Seitz, J., dissenting). Judge Seitz commented: “I believe the majority commits egregious error in not addressing and resolving plaintiffs’ argument that if a new limitations rule is adopted, it should not be applied to this case.” *Id.* (Seitz, J., dissenting).

92. *Id.* (Seitz, J., dissenting).

93. *Id.* (Seitz, J., dissenting). The dissent cited various Third Circuit cases which stand for the proposition that the power of review stems from the order of the district court. *Id.* (Seitz, J., dissenting). See *Miller v. Bolger*, 802 F.2d 660, 666 (3d Cir. 1986) (noting it is not isolated legal questions, but orders that appeals courts must review); *Link v. Mercedes Benz of N. Am., Inc.*, 550 F.2d 860, 863 (3d Cir.) (asserting orders must be capable of affirmance or reversal), *cert. denied*, 431 U.S. 933 (1977); *Johnson v. Alldredge*, 488 F.2d 820 (3d Cir. 1973) (directing that court must act on order appealed from under § 1292(b)), *cert. denied*, 419 U.S. 882 (1974).

The dissent then stated that in order to rule on the district court’s order the court had to determine its correctness. *Data Access*, 843 F.2d at 1551 (Seitz, J., dissenting). Judge Seitz asserted that in determining correctness “[t]he prevailing party may . . . assert in the reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.” *Id.* (Seitz, J., dissenting) (quoting *Consolidated Express, Inc. v.*

To resolve the question of prospective application, Judge Seitz turned to the three-part test developed in *Chevron Oil Co. v. Huson*<sup>94</sup> which requires that a new rule of law be applied prospectively when: (1) the decision establishes a new principle of law, either by overruling clear past precedent upon which litigants may have relied or by reaching an unforeseeable solution in a case of first impression; (2) retroactive application will retard the operation of the rule in question; and (3) retroactive application will produce substantially inequitable results.<sup>95</sup> Judge Seitz stated that *Data Access* satisfied the *Chevron* test because the court had created a new rule,<sup>96</sup> whose retroactive application would prevent the plaintiff from obtaining any relief at all,<sup>97</sup> and would result in substantial inequities because the plaintiffs had no way of knowing the new time limitation.<sup>98</sup> Judge Seitz concluded that because the new rule should not limit the rights of the plaintiffs in *Data Access*, and because New Jersey blue sky laws did not provide a remedy for these plaintiffs, the district court's decision to apply the six-year common law fraud limitations period should have been affirmed.<sup>99</sup>

### III. ANALYSIS

Since 1830, federal courts have looked to state law to supply limitations periods applicable to federal causes of action when Congress has

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New York Shipping Ass'n, 602 F.2d 494, 502 (3d Cir. 1979), *vacated and remanded*, 448 U.S. 902 (1980) (quoting *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)).

94. 404 U.S. 97 (1971).

95. *Data Access*, 843 F.2d at 1552 (Seitz, J., dissenting) (citing *Chevron*, 404 U.S. at 106-07). See also *Northern Pipe Line Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (applying *Chevron* test to new principle of law); *Cohn v. G.D. Searle & Co.*, 784 F.2d 460 (3d Cir.), *cert. denied*, 479 U.S. 883 (1986); *Ettinger v. Central Penn Nat'l Bank*, 634 F.2d 120 (3d Cir. 1980).

96. *Data Access*, 843 F.2d at 1553 (Seitz, J., dissenting). The dissent summarized the law of the circuit with respect to the statutes of limitations at the commencement of this action. *Id.* (Seitz, J., dissenting). According to Judge Seitz, the court was to apply the state's blue sky law, the most logical state statute, unless it did not provide a remedy for the plaintiff in which case the common law fraud limitations period was to be applied. *Id.* (Seitz, J., dissenting) (citing *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980); *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979), 611 F.2d 450 (3d Cir. 1979)).

97. *Id.* (Seitz, J., dissenting). While the dissent noted the substantial detriment imposed by the retroactive application of the new rule, it found that prospective application of the rule would not "further or retard the policies underlying" the general operation of the law. *Id.* (Seitz, J., dissenting).

98. *Id.* (Seitz, J., dissenting). Judge Seitz contended that the only way to preserve the plaintiffs' day in court was to apply the new rule prospectively only. *Id.* (Seitz, J., dissenting).

99. *Id.* at 1554 (Seitz, J., dissenting) ("appealing defendants did not sell securities to the plaintiffs and the defendants were outside the scope of liability imposed by the plain language of the blue sky law").

failed to provide them.<sup>100</sup> In *Ernst & Ernst v. Hochfelder*,<sup>101</sup> the Supreme Court stated that the implied actions arising under Rule 10b-5 have not escaped the application of this generally accepted principle.<sup>102</sup> Until *Data Access*, every circuit had upheld this long-standing practice and applied what it determined to be the most analogous state statute of limitations.<sup>103</sup>

Although firmly entrenched in the federal legal system, the practice of choosing a statute of limitations from state law for implied actions under Rule 10b-5 is fraught with complexities and inconsistencies.<sup>104</sup> Judge Easterbrook called it “one tottering parapet of a ramshackle edifice” and a process which “wastes untold hours.”<sup>105</sup> Justice Stevens referred to the process of matching specific factual analogies to particular cases as arbitrary and result-oriented, threatening to “undermine the

100. *UAW v. Hoosier Corp.*, 383 U.S. 696, 703-04 (1966) (breach of contract action under § 301 of Labor Management Relations Act); *see also* *Cope v. Anderson*, 331 U.S. 461, 463 (1947) (National Bank Act); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1870); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 397 (1906) (Sherman Act); *McClaine v. Rankin*, 197 U.S. 154, 158 (1905); *McCluney v. Silliman*, 28 U.S. (3 Pet.) 270, 276-77 (1830).

101. 425 U.S. 185 (1976).

102. *Id.* at 210 n.29 (“[S]ince no statute of limitations is provided for civil actions under § 10(b) [of the Securities Exchange Act], the law of the forum state is followed as in other cases of judicially implied remedies.”). This concept was more recently recognized in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384 n.18 (1983).

103. Brief for Petitioner at 19-20, *Data Access* (No. 88-54). *See, e.g.*, *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1509 (11th Cir. 1986) (state blue sky statute of limitations); *Andrews v. Heinold Commodities, Inc.*, 771 F.2d 184, 186 (7th Cir. 1985) (state blue sky statute of limitations); *Marx v. Centran Corp.*, 747 F.2d 1536, 1551 (6th Cir. 1984) (state “catch-all” statute of limitations); *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984) (state common law fraud statute of limitations); *Armstrong v. McAlpin*, 699 F.2d 79, 86-87 (2d Cir. 1983) (state common law fraud statute of limitations); *Breen v. Centex Corp.*, 695 F.2d 907, 910-11 (5th Cir. 1983) (state common law fraud statute of limitations); *Loveidge v. Dreagoux*, 678 F.2d 870, 874 (10th Cir. 1983) (state common law fraud statute of limitations); *O'Hara v. Kovens*, 625 F.2d 15, 17 (4th Cir. 1980) (state blue sky statute of limitations); *Morris v. Stifel, Nicolaus & Co.*, 600 F.2d 139, 146 (8th Cir. 1979) (state blue sky statute of limitations); *Cook v. Avien, Inc.*, 573 F.2d 685, 694 (1st Cir. 1978) (state statute of limitations for personal tort suits); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C. Cir. 1977) (blue sky limitations period).

104. *See* *Barton & Block, Securities Litigation: Statutes of Limitations in Private Actions Under Section 10(b)—A Proposal for Achieving Uniformity*, 7 SEC. REG. L.J. 374, 375 (1980) (“[I]nconsistency has resulted in significantly wider disparities than would otherwise be the case.”); *Report of the Task Force, supra* note 84, at 646 (“Application of the absorption doctrine in rule 10b-5 cases has resulted in myriad inconsistent federal court decisions.”); Note, *supra* note 5, at 1022 (referring to the condition of federal securities law as “patchwork of different rules resulting from various rationales”).

105. *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 108 S. Ct. 329 (1987).



appearance of neutral justice.”<sup>106</sup> Congress could not have intended the process of choosing a limitations period to be so complicated,<sup>107</sup> and commentators have called for a judicial solution, noting that “the time is ripe for the federal courts to devise a more uniform statute of limitations.”<sup>108</sup>

Despite the need for a change in the law, the Third Circuit’s radical break with this long-standing tradition could only be justified by the Supreme Court precedent provided by *DelCostello*, *Wilson* and *Malley-Duff*.<sup>109</sup> It is submitted that in fashioning a uniform federal limitations period in *Data Access*, the Third Circuit correctly interpreted the Supreme Court’s signals and overall direction.

*Wilson* unambiguously called for an end to case-by-case dissection of causes of action in a search for an appropriate state statute and mandated seeking out the “one most appropriate statute of limitations for all § 1983 claims.”<sup>110</sup> The Court stated that “federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach.”<sup>111</sup> While recognizing its power to apply a federal statute of limitations, the *Wilson* court ultimately decided that a state limitations period was most analogous to the federal action in question.<sup>112</sup> In *DelCostello*, the Court stated that “when the federal policies at stake and the practicalities of litigation make [a federal statute of limitations] . . . a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away

106. *Malley-Duff & Assocs. v. Crown Life*, 792 F.2d 341, 347 (3d Cir. 1986), *aff’d sub nom. Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987) (citing *Wilson v. Garcia*, 471 U.S. 261, 272 n.24 (1985)). The *Wilson* Court noted that analogies to state causes of action would necessarily be imperfect. *Wilson*, 471 U.S. at 272.

107. Brief for Appellants at 23, *Data Access* (No. 87-5385) (citing *Wilson*, 471 U.S. at 275; *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169 (1983)). “‘Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task . . .’ rather than a source of ‘unproductive and ever increasing litigation.’” *Id.* (quoting *Wilson*, 471 U.S. at 275).

108. *Barton & Block*, *supra* note 104, at 380; *see also Report of the Task Force*, *supra* note 84, at 656 (“The Supreme Court could solve the problem by fashioning a new, uniform standard that would be binding on the lower federal courts.”); Comment, *supra* note 14, at 1164 (noting that federal statute of limitations would solve characterization problems that both parties face).

109. Brief for Respondents Tolins & Lowenfels and Roger Tolins at 9, *Data Access* (No. 88-54) (explaining that Supreme Court cases “prescribed and refined the approach to be taken by lower courts” in borrowing cases). *See generally Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987); *Wilson*, 471 U.S. 261; *DelCostello*, 462 U.S. 151.

110. *Wilson*, 471 U.S. at 275. For a discussion of the facts and holding of *Wilson*, *see supra* note 18.

111. *Wilson*, 471 U.S. at 275.

112. *Id.* at 280 (applying state statute of limitations applicable to New Mexico personal injury action to federal § 1983 claim).

from state law.”<sup>113</sup> The *DelCostello* Court selected a federal statute of limitations because it had found an analogous federal law that was “designed to accommodate a balance of interests very similar to” the interests at stake in the case.<sup>114</sup> *Malley-Duff* selected a federal statute of limitations to avoid the potential for different courts applying different state limitations periods which would encourage forum shopping and complex, unnecessary and expensive litigation.<sup>115</sup> Although the Supreme Court emphasized that the normal procedure is still to borrow state statutes, each decision recognized that when the adoption of state limitations periods would be “at odds with the purpose or operation of federal substantive law,” statutes of limitations should be borrowed from federal law.<sup>116</sup> The concern for federal policies reflected in *Wilson*, *DelCostello* and *Malley-Duff* is equally applicable to Rule 10b-5 actions, and these actions should be included among the exceptions to the practice of borrowing state statutes of limitations.<sup>117</sup>

In addition to offering strong policy support for the *Data Access* decision, the Supreme Court’s decisions in *Malley-Duff* and *DelCostello* clearly recognize that the application of a federal statute of limitations to a federal cause of action where Congress has not provided a limitations period does not involve the creation of federal common law in contravention of the Rules of Decision Act as interpreted in *Erie Railroad Co. v. Tompkins*.<sup>118</sup> In *DelCostello*, the Court rejected the argument that

113. *DelCostello*, 462 U.S. at 171-72. For a discussion of the facts and holding of *DelCostello*, see *supra* note 17.

114. *DelCostello*, 462 U.S. at 169 (applying six-month limitations period for § 10(b) of the NLRA to hybrid action of § 301 of Labor Management Relations Act and action for breach of union’s duty of fair representation).

115. *Malley-Duff*, 483 U.S. at 154 (indicating that these policies illustrate “the desirability of a uniform federal statute of limitations”). For a discussion of the facts and holding of *Malley-Duff*, see *supra* note 19.

116. *DelCostello*, 462 U.S. at 161; see also *Malley-Duff*, 483 U.S. at 147; *Wilson*, 471 U.S. at 275.

117. *Data Access*, 843 F.2d at 1543-49 (discussing policies underlying Rule 10b-5).

118. 304 U.S. 64 (1938). In interpreting the Rules of Decision Act, *Erie* established the rule that federal courts are not permitted to create general federal common law. *Id.* at 78. There is a subset of federal common law that exists in modern federal jurisprudence, however, which is referred to as “specialized federal common law.” Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. PA. L. REV. 1447, 1451 (1988) (citing Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 405 (1988)).

If the right being sued upon is granted by state law, *Erie* controls and federal courts must apply the laws of the forum state; but, if the right is based upon the United States Constitution or a federal statute, the federal courts are empowered to make specialized federal common law. *Id.*

This federal decisional law usually arises in areas of national concern which demand uniformity where Congress has either explicitly delegated authority to the federal courts to fashion federal common law or, more commonly, has left statutory lacuna which force courts to create federal common law. *Id.* at 1458-59. The Supreme Court has referred to this interstitial federal lawmaking as “a

the Rules of Decision Act compelled the application of a state statute of limitations. The *DelCostello* Court explained that the Rules of Decision Act mandates the application of state law only in cases where federal law is not controlling.<sup>119</sup> The *DelCostello* Court effectively ended any question of an impermissible creation of federal common law by stating that

the choice of a limitations period for a federal cause of action is itself a question of federal law. If the answer to that question . . . is that a timeliness rule drawn from elsewhere in federal law should be applied, then the Rules of Decision Act is inapplicable by its own terms.<sup>120</sup>

Subsequent to *Erie*, the federal courts continued to apply state statutes of limitations to various federal causes of action when they deemed it appropriate, but the Court in *DelCostello* emphasized that they did so only “as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes, and not because the Rules of Decision Act or the *Erie* doctrine requires it.”<sup>121</sup>

The *Malley-Duff* Court followed suit, rejecting application of the *Erie* doctrine and applying a federal statute of limitations to a RICO action.<sup>122</sup> *Data Access* differs from *Malley-Duff* only in that an action arising under Rule 10b-5 has been implied by the federal courts, while Congress expressly provided for civil RICO claims. This distinction should have no bearing on the federal common law analysis. The *Malley-Duff* Court stated that Congress intended for federal courts to borrow state statutes of limitations for express causes of action, unless they were “unsatisfactory vehicles for the enforcement of federal law.”<sup>123</sup> This analysis is equally applicable to implied causes of action.

It is also important to note that Congress has never explicitly directed the use of state statutes of limitations for claims under Rule 10b-5, and that some courts and commentators have suggested that Congress has clearly expressed a preference for the use of federal limitations periods in the area of federal securities legislation.<sup>124</sup> A report of the

basic responsibility of the federal courts.” *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973).

119. *DelCostello*, 462 U.S. at 160 n.13.

120. *Id.* (“Since *Erie*, no decision of this Court has held or suggested that the Act requires borrowing state law to fill gaps in federal substantive statutes.”).

121. *Id.* at 159 n.13 (citing *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966)).

122. *Malley-Duff*, 483 U.S. at 156.

123. *Id.* at 147 (“[W]e can generally assume that Congress intends by its silence that we borrow state law.”).

124. See *Norris v. Wirtz*, 818 F.2d 1329, 1333 (7th Cir.), cert. denied, 108 S. Ct. 329 (1987) (“Congress has not been silent about limitations for securities law in general, the usual problem that leads federal courts to turn to state law.”); *Doret & Fiebach*, *supra* note 7, at 879 (“[T]hese express limitations periods re-

American Bar Association stated that “[n]either Congress nor the states intended state statutes of limitations to apply to federal actions for securities fraud.”<sup>125</sup> Because Congress has not eliminated implied private Rule 10b-5 actions<sup>126</sup> and because Congress carefully drafted the limitations provisions applicable to express actions under the 1934 Act,<sup>127</sup> Congress could have intended that all private causes of action under the securities laws, express or implied, be governed by the same federal policy of limitations.<sup>128</sup>

Additionally, it has been asserted that to permit a court to select a limitations period outside of state law is “a giant leap into the realm of legislative judgments.”<sup>129</sup> But judicial legislation also occurs when a court, according to its judgment of the merits of the case, engages in “statute of limitations shopping” to identify a state limitations period that will relieve the inequities of a particular circumstance.<sup>130</sup>

One of the strongest criticisms of the Third Circuit’s decision to apply an absolute limitations period is the assertion that this eliminates the possibility of equitable tolling. The *Data Access* court did not address this issue. Equitable tolling, which suspends or delays the running of a statute of limitations in fraud cases until the plaintiff has knowledge of the fraud, has been applied by federal courts since 1874.<sup>131</sup> By adopting an absolute three-years-from-violation statute of repose the *Data Access* court has eliminated the possibility of equitable tolling from implied Rule 10b-5 actions in the Third Circuit. It was argued that this rule not

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fect a considered federal policy of repose for private causes of action under the securities acts.”).

125. *Report of the Task Force, supra* note 84, at 656 (citing *Lowry v. Baltimore & Ohio R.R.*, 707 F.2d 721, 727 (3d Cir.), *cert. denied*, 464 U.S. 893 (1983)).

126. *Data Access*, 843 F.2d at 1547 (“[W]e conclude that by *post hoc* inaction, Congress must have intended *ante hoc* that this is what it desired.”).

127. *Doret & Fiebach, supra* note 7, at 879 (noting that Congress drafted those provisions with much care).

128. *Id.* The commentators noted that “these express limitations periods reflect a considered federal policy of repose for private causes of action under the securities acts,” and concluded that “absorption of state law would appear to be both unnecessary and contrary to federal policy.” *Id.* (citing Schulman, *Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635, 638 (1967)).

129. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 193, 157 (1987) (Scalia, J., concurring). See also *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 713 (1966) (White, J., dissenting) (referring to judicial creation of statute of limitations as “too bald an exercise of judicial innovation”).

130. Comment, *supra* note 14, at 1161-62 (“Seeking to do justice to a plaintiff with a meritorious claim which might be barred by a shorter statute of limitations, the courts frequently have interpreted that claim as one for which some longer statute of limitations has not run.”).

131. *Report of the Task Force, supra* note 84, at 654 (citing *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874)). With the *Homberg v. Albrecht*, 327 U.S. 392, 397 (1946) opinion, which applied the doctrine to borrowed state statutes of limitations, came the application of the doctrine to implied actions under the federal securities laws. *Id.*

only conflicts with the law of every other federal circuit but will encourage attempts to conceal fraud.<sup>132</sup>

Some commentators believe, however, that equitable tolling merely “compounds the complexity of the law of limitations in implied actions for securities fraud” and that Congress never intended the doctrine to apply to these types of actions.<sup>133</sup> The argument that section 10(b) should be treated differently because it requires scienter while the other sections of the 1934 Act require mere negligence is refuted by the fact that section 9(e) “is expressly limited to willful violations thereof and yet contains the identical limitations period found in the other express causes of action, one year from discovery and three years from the violation.”<sup>134</sup> Thus, Congress did not intend for unlimited equitable tolling, but incorporated within the federal securities laws a three-year statute of repose.<sup>135</sup>

The Third Circuit properly applied the federal statute of limitations, despite the fact that this necessarily results in the rejection of equitable tolling. In the words of Judge Easterbrook, referring to the caselaw surrounding the choice of state statutes of limitations for Rule 10b-5 actions prior to *Data Access*, “practitioners and scholars agree that the result is a mess, [and] they also believe that the courts missed a turn. Courts should have drawn the periods of limitations for the implied rights from the periods of limitations for the express rights.”<sup>136</sup>

The Third Circuit’s conclusion that it was unable to review the issue of prospective application because the question had not been certified by the district court’s order was unwarranted. As Judge Seitz pointed out in his dissent, the very heart of the court’s decision encompassed an issue that was not certified by the district court.<sup>137</sup> Indeed, the court opened its opinion with a statement that it had jurisdiction beyond the

132. Brief for Petitioner at 22-24, *Data Access* (No. 88-54) (citing one case from each of the 12 circuits which has held contrary to the *Data Access* view of equitable tolling).

133. *Report of the Task Force, supra* note 84, at 655 (noting “the inescapable conclusion that Congress did not intend equitable tolling to apply in actions under the securities laws”). The report explained that the doctrine originated outside of the context of federal securities legislation. *Id.*

134. Barton & Block, *supra* note 104, at 382 (noting that if express periods of limitations in 1934 Act were applied to implied actions under 1934 Act, desirable uniformity would be produced).

135. Brief for Respondents Tolins & Lowenfels and Roger A. Tolins at 12-13, *Data Access* (No. 88-54); Brief for Respondents I. Kahlowsky & Co. and Peter Cunicelli at 11, *Data Access* (No. 88-54).

136. *Norris v. Wirtz*, 818 F.2d 1329, 1333 (7th Cir.), *cert. denied*, 108 S. Ct. 329 (1987).

137. *Data Access*, 843 F.2d at 1551 (Seitz, J., dissenting). Judge Seitz stated: “[T]here is a special irony in the majority’s implied criticism of the dissent for reaching the retroactivity issue when it was not a certified question. The majority itself, in establishing a federal statute of limitations rule, is not answering the formal language of any certified question.” *Id.* (Seitz, J., dissenting).

certification order to cover "all grounds that might require reversal of the order appealed from."<sup>138</sup>

Although a court of appeals is free to elect not to review issues not raised below,<sup>139</sup> there is abundant caselaw upon which the Third Circuit could have based its consideration of a question not certified by the district court.<sup>140</sup> Furthermore, there is a strong federal policy in favor of considering and resolving the prospectivity issue. The stated purpose of section 1292(b) is to "materially advance the ultimate termination of the litigation."<sup>141</sup> It would have been in the best interest of all parties if the Third Circuit had agreed to consider the question of prospective application to avoid additional litigation in the future.

The prospective application of the *Data Access* decision will have a material impact on Third Circuit plaintiffs bringing Rule 10b-5 actions which accrued before *Data Access*. Although Judge Seitz concluded that the three-part *Chevron* test should have limited the majority decision to prospective application,<sup>142</sup> it is submitted that the facts of the case would have mandated retroactive application of the majority's holding had the issue been reached.

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138. *Id.* at 1539 (citing *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 962 n.7 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984)).

139. *Miller v. Bolger*, 802 F.2d 660, 666 (3d Cir. 1986) (noting that prudential limitations may cause court to refuse consideration under certain circumstances); *see also Dandridge v. Williams*, 397 U.S. 471 (1970) (stating that when attention has been focused on other issues, court may choose not to consider issue).

140. *See Dandridge*, 397 U.S. at 475 n.6 ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court."); *Miller*, 802 F.2d at 666 ("[W]e are free to consider all grounds advanced in support of the grant of summary judgment and all grounds suggested for sustaining its denial."); *Walsch v. Ford Motor Co.*, 807 F.2d 1000, 1002 & n.2 (D.C. Cir. 1986) (noting under § 1292(b), court must decide appeal, not single question of law), *cert. denied*, 482 U.S. 915 (1987); *Parks v. Parkovic*, 753 F.2d 1397, 1402 (7th Cir.) (explaining court may consider closely related order if more economical than postponing to subsequent appeal), *cert. denied*, 473 U.S. 906 (1985); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.) (en banc) (noting district court's "controlling question of law" includes "every order which if erroneous would be reversible error on final appeal"), *cert. denied*, 419 U.S. 885 (1974); *Johnson v. Alldredge*, 488 F.2d 820, 823 (3d Cir. 1973) ("[S]ince under the clear terms of § 1292(b) we are called upon not to answer the question certified but to decide an appeal, we do not find ourselves bound by the District Judge's statement of the issue."), *cert. denied*, 419 U.S. 822 (1974).

141. *Johnson*, 488 F.2d at 822 (citing 28 U.S.C. § 1292(b) (1970)). The court further referred to the purpose of § 1292(b) as a "decision of legal issues as to which there is considerable question without requiring the parties first to participate in a trial that may be unnecessary." *Id.* at 823. *See also Akerly v. Red Barn System, Inc.*, 551 F.2d 539, 543 (3d Cir. 1977) (noting purpose of § 1292(b) is "avoidance of unnecessary trials, and immediate review of all potentially reversible rulings").

142. *Data Access*, 843 F.2d at 1553-54 (Seitz, J., dissenting). For a discussion of the dissenting opinion and the *Chevron* test, *see supra* notes 90-99 and accompanying text.

The *Chevron* test provides an exception to the long-standing principle that a "general presumption of retroactivity" applies.<sup>143</sup> In *Hill v. Equitable Trust Co.*,<sup>144</sup> the Third Circuit addressed the issue of the retroactive application of *Data Access*. The *Hill* court held that the first prong of the *Chevron* test was not satisfied because there was no clear precedent upon which the plaintiffs could have relied.<sup>145</sup> In *Hill*, the court held that the plaintiffs had previously been put on notice as to the substantial degree of unpredictability that prevailed in the Third Circuit.<sup>146</sup> The district court in *Hill* had applied the Delaware blue sky statute of limitations to these plaintiffs just after *Roberts* and *Biggans* had reaffirmed the applicability of a state common law limitations period.<sup>147</sup>

The same rationale applies in *Data Access*, where even the majority conceded that its claim-by-claim approach had not provided the district courts with a bright-line rule.<sup>148</sup> In *Fitzgerald v. Larson*,<sup>149</sup> a post-*Data Access* case dealing with prospective application, the Third Circuit stated that where a precedent is too weakly established to warrant reliance, it is not inequitable to apply a new ruling retroactively to a plaintiff's claim.<sup>150</sup> Because no clear precedent applied to *Data Access*, there could have been no substantive inequity, and the third prong of the *Chevron* test, as well as the first, would not have been satisfied.<sup>151</sup> Therefore, the

143. *Hill v. Equitable Trust Co.*, 851 F.2d 691, 697 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 791 (1989). This principle arose as early as 1801. *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

144. 851 F.2d 691 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 791 (1989). *Hill*, which was decided by a unanimous panel, involved investors who, alleging fraud, brought an action under § 10(b) against the bank that provided letters of credit for purchasing interests in limited partnerships. *Id.* at 693. The court held that the *Data Access* rule would be applied retroactively. *Id.* at 698-99.

145. *Id.* at 697. The *Hill* decision traced the court's rulings in this area from the time of *Roberts*, in 1979, and concluded that "although . . . *Biggans* and *Roberts* were precedential, the factual situations in each case left considerable room for variation." *Id.* The Third Circuit additionally held that the third prong of the *Chevron* test was not satisfied because retroactive application of the *Data Access* decision would not produce substantially inequitable results. *Id.* at 698.

146. *Id.* at 697.

147. *Id.*

148. *Data Access*, 843 F.2d at 1541. Other courts have noted the circuit's lack of clarity. *See, e.g.*, *Cohen v. McAllister*, 673 F. Supp. 733, 737 (W.D. Pa. 1987) (referring to *Biggans* as tainted with ambiguity creating uncertainty as to timeliness of claims under § 10(b) and Rule 10b-5); *Steinberg v. Shearson Hayden Stone Inc.*, 598 F. Supp. 273 (D. Del. 1984) (noting disagreement among judges); *Goodman v. Moyer*, 523 F. Supp. 35, 37 (E.D. Pa. 1981) (describing *Biggans* as "confused and inconsistent body of law").

149. 769 F.2d 160 (3d Cir. 1985).

150. *Id.* The *Fitzgerald* court noted that the third prong of the *Chevron* test overlaps with the first. *Id.*

151. The first prong of the *Chevron* test is that the new rule of law will be applied prospectively only where the court has created "a new principle of law by overruling clear past precedent" upon which the plaintiff may have relied. *Data Access*, 843 F.2d at 1552 (Seitz, J., dissenting). The third prong of the *Chev-*

*Chevron* exception of prospective-only application was not warranted in *Data Access*, and had the majority reached the issue, it should have held that the federal statute of limitations applied retroactively.

The *Hill* decision indicates that it will be difficult for a plaintiff to be granted prospective-only application of the *Data Access* ruling. Of the eleven cases that have come before the district courts on the issue of retroactivity subsequent to *Data Access*, eight have resulted in retroactive application of the *Data Access* decision based on the absence of clear precedent upon which plaintiffs could have reasonably relied.<sup>152</sup> Therefore, unless a Rule 10b-5 plaintiff can specifically identify prior law upon which he has reasonably relied, it is likely that the plaintiff will be subject to the one-year/three-year federal statute of limitations of *Data Access*.<sup>153</sup>

#### IV. CONCLUSION

*Data Access* represents the first step toward achieving national uniformity in limitations periods governing implied Rule 10b-5 actions. However, its immediate impact remains uncertain. It is possible that the Supreme Court will choose, as Congress has chosen, not to address the issue, reflecting the belief that it is acceptable for some circuits to apply a state limitations period, while others apply federal statutes of limitations.

Within the Third Circuit, the parties in a particular case may attempt to manipulate various aspects of the holding to obtain the most favorable result. For instance, in situations which arguably also give rise to civil RICO claims, the plaintiff's attorney may be forced to include RICO counts to take advantage of the four-year statute of limitations. This situation may arise where there is dispute as to when the plaintiff should have reasonably discovered the Rule 10b-5 violation. Additionally, to avoid substantial inequities, judges may extend the short one-

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*ron* test is that the new rule will be applied prospectively only where substantial inequity would result from retroactive treatment. *Id.*

152. Brief for Appellees at 40-41, *McCarter v. Mitcham*, 693 F. Supp. 349 (W.D. Pa. 1988) (No. 88-3654). See *Maio v. Advanced Filtration Sys., Ltd.*, C.A. 86-0899 (E.D. Pa. Nov. 7, 1988); *Schwartz v. Philadelphia National Bank*, C.A. 88-2587 (E.D. Pa. filed Oct. 27, 1988); *Adelaar v. Lauxmont Farms, Inc.*, 695 F. Supp. 821 (M.D. Pa. 1988); *Bradford-White Corp. v. Ernst & Whinney*, C.A. 83-3372 (E.D. Pa. filed Sept. 12, 1988); *Ginsberg v. Blay-Miezah*, C.A. 87-7778 (E.D. Pa. filed Sept. 1, 1988); *McCarter v. Mitcham*, 693 F. Supp. 349 (W.D. Pa. 1988); *Prospect Purchasing Co. v. Weber, Lipshie & Co.*, 694 F. Supp. 1149 (D.N.J. 1988). *Contra* *Newfield v. Shearson Lehman Bros.*, C.A. 88-6467 (E.D. Pa. filed Nov. 25, 1988); *ITC, Inc. v. Price Waterhouse*, 697 F. Supp. 867 (E.D. Pa. 1988); *Gruber v. Price Waterhouse*, 697 F. Supp. 859 (E.D. Pa. 1988).

153. See *Newfield v. Shearson Lehman Bros.*, 699 F. Supp. 1124 (E.D. Pa. 1988) (plaintiff alleging "churning" could rely on prior precedent of two-year state statute of limitations); *Gruber v. Price Waterhouse*, 697 F. Supp. 859 (E.D. Pa. 1988) (purchaser plaintiff could clearly rely on past precedent); *ITC, Inc. v. Price Waterhouse*, 697 F. Supp. 867 (E.D. Pa. 1988) (purchaser plaintiff could clearly rely on past precedent).



year-from-discovery time period by allowing the plaintiff to bring suit within one year of the completion of his investigation rather than one year from the date he learned of the facts sufficient to place him on notice of the possible violation.

The initial impact on the other circuits may also be dramatic. Statute of limitations questions will be raised in every Rule 10b-5 action brought more than one year after the underlying transaction, with defendants arguing for application of the *Data Access* rule. It is ironic that until the Supreme Court or Congress acts upon this issue by providing national uniformity, *Data Access* may actually serve to increase forum shopping and complex, expensive and time-consuming litigation, exactly the evils the Third Circuit sought to eliminate.

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