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## A QUARTER CENTURY LATER—THE PERIOD OF LIMITATIONS FOR RULE 10b-5 DAMAGE ACTIONS IN FEDERAL COURTS SITTING IN PENNSYLVANIA

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### I. INTRODUCTION

**F**RAUD IN CONNECTION WITH THE PURCHASE AND SALE OF SECURITIES was made unlawful by section 10(b) of the Securities Exchange Act of 1934 (1934 Act)<sup>1</sup> and Securities and Exchange Commission (SEC) rule 10b-5 promulgated thereunder.<sup>2</sup> Private enforcement of the statutory prohibition is, however, not ex-

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1. 15 U.S.C. § 78j(b) (1976). 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.*

2. 17 C.F.R. § 240.10b-5 (1977). Rule 10b-5 provides:

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

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

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

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

*Id.*

pressly provided for, and it was not until a number of years later that the federal courts first implied a private cause of action for damages under rule 10b-5.<sup>3</sup> Apparently due to the lack of congressional foresight that such private civil remedies would be recognized, the 1934 Act fails to specify a period of limitations for actions brought under section 10(b).<sup>4</sup> Significantly, there is no general federal limitations provision applicable to violations of the 1934 Act,<sup>5</sup> or for civil actions based on other federal statutes.<sup>6</sup>

The limitation of actions—*i.e.*, the designation of a definite period of repose beyond which acts or conduct may not be challenged by new lawsuits—is an issue particularly suited to legislative policy judgment.<sup>7</sup> In situations where Congress, having explicitly afforded a statutory remedy, abdicated its policy-making function by neglecting to provide a corresponding period of limitations, the federal courts have typically applied the doctrine of “absorption.”<sup>8</sup> In the absence

3. See *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). The *Kardon* court maintained that, although it is

true that there is no provision in Sec. 10 or elsewhere expressly allowing civil suits by persons injured as a result of violation of Sec. 10 or of the Rule. . . . “[t]he violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if: (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect.”

. . . . Where, as here, the whole statute discloses a broad purpose to regulate securities transactions of all kinds and, as a part of such regulation, the specific section in question provides for the elimination of all manipulative or deceptive methods in such transactions, . . . the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies.

*Id.* at 513-14, quoting RESTATEMENT OF TORTS § 286 (1939).

4. See 15 U.S.C. §§ 78a-78hh-1 (1976). No federal statute limits civil actions brought under section 10(b) “since at the time the [1934] Act was passed there was little indication that the courts would imply a private cause of action based upon it.” *Klapmeier v. Peat, Marwick, Mitchell & Co.*, 363 F. Supp. 1212, 1214 (D. Minn. 1973). Indeed, one commentator suggests “that the congressional intent regarding § 10(b) was to provide the [SEC] with a regulatory tool for its own use” and not to provide private enforcement of the antifraud provisions. Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 NW. U.L. REV. 627, 654-58 (1963).

5. See 15 U.S.C. §§ 78a-78hh-1 (1976). Individual sections do, however, set forth their own express limitations periods. See note 10 and accompanying text *infra*.

6. 5A A. JACOBS, THE IMPACT OF RULE 10b-5 § 235.02 & n.2 (rev. ed. 1978).

7. See *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 458 (3d Cir. 1979) (Sloviter, J., concurring).

8. The absorption doctrine, whereby a federal court adopts a limitations period from the law of the forum state when none exists in the federal statute, results from a combination of doctrine and expediency:

This “practical solution to a practical problem” was developed in part on the rather weak doctrinal basis of the Rules of Decision Act, and in part by default, after all apparently reasonable alternatives had been examined and rejected: the use of laches would be an added nuisance to try in every case, judicial creation of a limitation period is “not . . . the kind of thing judges do,” and the failure to make any choice results in a period of infinity.

Schulman, *Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635 (1967). For a discussion of the doctrine of absorption, see note 9 and accompanying text *infra*.

of an express limitations period applicable to the statutory remedy, a federal court will adopt, or "absorb," a limitations period from the law of the forum state.<sup>9</sup>

Because the civil remedy under rule 10b-5 is judicially implied rather than statutorily prescribed, it cannot be said that the legislature intentionally abdicated its traditional role in establishing a limitations period.<sup>10</sup> Indeed, by contrast, in those sections of the securities acts which expressly provide a private remedy, Congress explicitly and deliberately provided a corresponding statutory period of limitations.<sup>11</sup> Nevertheless, for actions under section 10(b) and rule 10b-5, federal courts have consistently resorted to the absorption doctrine, applying the limitations period of state statutes.<sup>12</sup> As observed by one court:

it might have been expected that [the courts] would have borrowed the limitations periods which accompany those sections of the [federal securities acts] which set forth their own express liability clauses and limitations periods.

Instead, courts followed the well-settled principle of *Holmberg v. Armbrrecht*. . . . that "the timeliness of an action under the federal securities laws is to be determined by reference to the appropriate state statute of limitations."<sup>13</sup>

9. See, e.g., *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946); *Rawlings v. Ray*, 312 U.S. 96 (1941); *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979); *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1974) (en banc). See generally *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 229 (1958) (Brennan, J., concurring); H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 825-29 (2d ed. 1973); 2 J. MOORE *FEDERAL PRACTICE*, ¶ 3.07[2] (2d ed. 1974); Note, *Federal Statutes Without Limitations Provisions*, 53 COLUM. L. REV. 68, 74-75 (1953).

10. Schulman, *supra* note 8, at 649.

11. Martin, *Statutes of Limitations In 10b-5 Actions: Which State Statute Is Applicable?*, 29 BUS. LAW. 443 (1974). See, e.g., 15 U.S.C. § 77k(a) (Supp. 1979) (false registration statement); *id.* § 77l(1)-(2) (prospectus and communications); *id.* § 78i(e) (manipulation of prices of securities); *id.* § 78p(b) (short sale transactions); *id.* § 78r (misleading statements); *id.* § 78cc(b) (prohibited contracts). In each of these sections, civil liability is expressly established and a period of limitations provided. Ruder, *supra* note 4, at 680.

12. See, e.g., *Forrestal Village, Inc. v. Graham*, 551 F.2d 411 (D.C. Cir. 1977); *Nickels v. Koehler Management Corp.*, 541 F.2d 611 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Nortek v. Alexander Grant & Co.*, 532 F.2d 1013 (5th Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402 (2d Cir. 1975); *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972); *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90 (10th Cir.), *cert. denied*, 404 U.S. 1004 (1971); *Janigan v. Taylor*, 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965); *Errion v. Cornell*, 236 F.2d 447 (9th Cir. 1956).

13. *O'Hara v. Kovens*, 473 F. Supp. 1161, 1163-64 (D. Md. 1979), *aff'd*, 625 F.2d 15 (4th Cir. 1980), *quoting* *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946) (other citations and footnote omitted). The absorption doctrine has clearly been embraced by the Third Circuit in the rule 10b-5 context. See *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 454 (3d Cir. 1979); *Kubik v. Goldfield*, 479 F.2d 472, 477 n.12 (3d Cir. 1973); *Premier Indus. v. Delaware Valley Financial Corp.*, 185 F. Supp. 694, 696 (E.D. Pa. 1960); *Tobacco & Allied Stock, Inc. v. Transamerica Corp.*, 143 F. Supp. 323, 326 (D. Del. 1956), *aff'd*, 244 F.2d 902 (3d Cir. 1957). Indeed, the

Although it is generally accepted that the period of limitations in section 10(b) cases is governed by "analogous" state statutes of limitations,<sup>14</sup> there is often more than one colorably applicable state statute form which to choose. The courts have been in general agreement as to the standard for making the choice, selecting the state statute which most closely resembles the federal statute and which best effectuates the federal securities antifraud policies.<sup>15</sup>

Prior to the proliferation of state blue sky legislation designed to provide defrauded purchasers or sellers of securities with a state cause of action for damages, this forum-by-forum selection produced little difficulty. The courts could absorb either a longer general fraud limitations period, the shorter limitations period applicable to statutorily created liabilities, or the catch-all limitations period for actions as to which no limitations period is specifically designated.<sup>16</sup> Those courts addressing the issue universally selected the longer fraud period of limitations,<sup>17</sup> intending to effectuate the remedial nature of the securities statutes by allowing complainants greater opportunity for redress or finding a parallel in that both causes of action sounded in fraud.<sup>18</sup>

Since the adoption of state blue sky remedies which largely mirror the federal securities antifraud remedies, courts customarily choose between common law fraud limitations periods and the typically shorter blue sky limitations periods applicable to private anti-fraud actions<sup>19</sup>—a process which has created inconsistent and dispar-

Supreme Court has all but placed its seal of approval on this approach in rule 10b-5 cases. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976), citing *Holmberg v. Armbrrecht*, 327 U.S. at 395.

14. See notes 12-13 and accompanying text *supra*.

15. See, e.g., *Hudak v. Economic Research Analysts*, 499 F.2d 996, 999-1000 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123, 125-27 (7th Cir. 1972); *Vanderboom v. Sexton*, 422 F.2d 1233, 1237-40 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970); *Charney v. Thomas*, 372 F.2d 97, 100 (6th Cir. 1967). As one court has stated: "[A] federal court must apply that limitation period of the forum state which governs the state cause of action bearing the closest substantive resemblance to Rule 10b-5 and which best effectuates the policies of Rule 10b-5." *Bronstein v. Bronstein*, No. 75-2336, slip op. at 2 (E.D. Pa. May 13, 1976).

16. See *Martin*, *supra* note 11, at 445; *Schulman*, *supra* note 8, at 641. It was in *Fratt v. Robinson* that this choice of limitations issue was first addressed. See *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953). Thereafter, several cases in the Third Circuit also confronted the problem. See *Livingston v. Weis, Voisin, Cannon, Inc.*, 294 F. Supp 676, 680 (D.N.J. 1968); *Lorenz v. Watson*, 258 F. Supp. 724, 734 (E.D. Pa. 1966); *Premier Indus. v. Delaware Valley Financial Corp.*, 185 F. Supp. 694, 696 (E.D. Pa. 1960).

17. Note, *Statutes of Limitations In 10b-5 Actions*, 39 U.M.K.C.L. REV. 283 (1971).

18. See *Charney v. Thomas*, 372 F.2d 97, 98-99 (6th Cir. 1967) (blue sky period had never been applied before and it did not "best [effectuate] the federal policy at issue").

19. The state blue sky periods of limitations average two years from sale, while state fraud periods of limitations average four years from discovery. *Martin*, *supra* note 11, at 446 & n.28; *Raskin & Enyart, Which Statute of Limitations In a 10b-5 Action?*, 51 DEN. L.J. 301, 316 &

ate results.<sup>20</sup> While a series of decisions recognizing the state blue sky statutes as controlling has emerged,<sup>21</sup> courts continue to disagree sharply as to the applicable limitations period, "despite the fact that the state blue sky statutes being considered are generally alike."<sup>22</sup>

It was not until after the adoption of the Pennsylvania Securities Act of 1972 (1972 Act)<sup>23</sup> that federal courts sitting in Pennsylvania were confronted with the choice between the general fraud provision and the limitations period contained in the state blue sky law. Prior to that time, the Pennsylvania blue sky laws<sup>24</sup> did not afford a private antifraud remedy,<sup>25</sup> and the courts uniformly applied the six-year limitations period applicable to actions for fraud and deceit.<sup>26</sup> The

nn.93-94 (1974). See also UNIFORM SECURITIES ACT § 410 (e). Section 410(e) provides in pertinent part: "No person may sue under this section more than two years after the contract of sale." *Id.* A majority of the states have adopted the Uniform Securities Act. See note 154 *infra*.

While blue sky statutes generally have shorter limitations periods than those applicable to common law fraud, there are exceptions. See, e.g., *Dupuy v. Dupuy*, 551 F.2d 1005, 1023-24 n.31 (5th Cir.), *cert. denied*, 434 U.S. 911 (1977), citing LA. REV. STAT. ANN. § 51:715E (West Supp. 1980); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 407 (2d cir. 1975), citing TEX. REV. CIV. STAT. ANN. art. 581-33 (Vernon Supp. 1980).

20. Compare *Forrestal Village, Inc. v. Graham*, 551 F.2d 411 (D.C. Cir. 1977) and *Nortek v. Alexander Grant & Co.*, 532 F.2d 1013 (5th Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977) with *Nickels v. Koehler Management Corp.*, 541 F.2d 611 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) and *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90 (10th Cir.), *cert. denied*, 404 U.S. 1004 (1971). See also notes 21-22 & 33-35 and accompanying text *infra*.

21. See, e.g., *Hudak v. Economic Research Analysts*, 499 F.2d 996 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972); *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970). For a compilation of current authorities recognizing the blue sky statute as controlling, see 5A A. JACOBS, *supra* note 6, § 235.02.

22. *Martin*, *supra* note 11, at 454. Compare *Hudak v. Economic Research Analysts*, 499 F.2d 996 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) and *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972) with *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90 (10th Cir.), *cert. denied*, 404 U.S. 1004 (1971) and *Douglass v. Hinton Inv., Inc.*, 440 F.2d 912 (9th Cir. 1971). See generally Note, *A Cry for Help: The Ninth Circuit And The Statute of Limitations in Rule 10b-5 Actions*, 22 U.C.L.A. L. REV. 947, 955-56 (1975).

23. PA. STAT. ANN. tit. 70, §§ 1-101 to -704 (Purdon Supp. 1979-1980) (effective Jan. 1, 1973).

24. Law of June 24, 1939, § 1, 1939 Pa. Laws 748 (reenacted as Law of July 10, 1949, § 1, 1941 Pa. Laws 317 (repealed 1978)).

25. See *Kroungold v. Triester*, 407 F. Supp. 414, 419-20 (E.D. Pa. 1975); *Kobil v. Forsberg*, 389 F. Supp. 715, 717, 720 (W.D. Pa. 1975). The early blue sky statutes, including Pennsylvania's statute, were intended to protect the public through registration and licensing procedures; no private rights of action were conferred to deter or redress fraudulent conduct. See, e.g., PA. STAT. ANN. tit. 70 § 31 (Purdon 1965) (current version at PA. STAT. ANN. tit. 70, § 1-501 (Purdon Supp. 1979-1980)). For a summary of different state approaches to regulating sales of securities, see, e.g., LOSS & COWETT, BLUE SKY LAW 17-42 (1958). These commentators stated: "There are three distinct types of regulatory devices: (1) anti-fraud provisions; (2) provisions requiring registration or licensing of certain persons engaging in the securities business; and (3) provisions requiring the registration or licensing of securities." *Id.* at 19.

26. PA. STAT. ANN. tit. 12, § 31 (Purdon 1958) (repealed 1978). As part of the 1978 revision of the Pennsylvania Judicial Code, periods of limitations were codified. Although the authors believe that the new six year "catch all" limitations period, 42 PA. CONS. STAT. ANN. § 5527(6) (Purdon 1979), would continue to govern actions in fraud, the matter is not entirely free from doubt as the statute is strangely ambiguous and too little time has elapsed since its enactment to

1972 Act, however, adopted, virtually verbatim, the antifraud language of rule 10b-5,<sup>27</sup> and expressly created a state private cause of action for securities fraud.<sup>28</sup> The 1972 Act also provided a two-tiered, one-year/three-year limitations period,<sup>29</sup> which bars actions

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have an appellate decision resolving the issue. The alternative to the "catch all" statute is the two year limitations period contained in § 5524(3) of the Judicial Code which is applicable to actions "for taking, detaining or injuring personal property, including actions for specific recovery thereof." *Id.* § 5524(3) (emphasis added). The oblique reference to injuries to personal property in § 5524(3) hardly seems to be a reference to fraudulent conduct and, in the context of actions for taking and detaining personal property, § 5524(3) would seem to embrace only wrongful actions involving some physical or tangible impact. This view is reinforced by the fact that the legislature, in codifying the limitations period, did not make clear an intention to shorten the period for fraud. Comment, *Statute of Limitations Applicable to 10b-5 Actions Arising in Pennsylvania*, 53 TEMPLE L.Q. 70, 81 (1980). The commentary to the revised Judicial Code prepared by the Special Committee on the Judicial Code of the Pennsylvania Bar Association and the Committee on the Judicial Code of the Pennsylvania Conference of State Trial Judges, each state:

[T]he periods applicable to conversion of or injury to personal property and waste or trespass to real property are reduced from six to two years to conform to the modern principle that claims based on conduct, and hence heavily relying on unwritten evidence, should have relatively short statutes of limitations, so as to bring them to trial (after allowance for trial delays) before memories have faded.

SPECIAL COMMITTEE ON THE JUDICIAL CODE OF THE PENNSYLVANIA BAR ASSOCIATION, EXPLANATORY MEMORANDA RELATING TO THE PROPOSED JUDICIAL CODE 17 (1973). The authors submit that this language can best be understood in terms of the desire to impose short limitations where a tangible manifestation of the wrongful action, giving notice of injury, has occurred. This is consistent with the principle that accident cases, in all likelihood the principal kind of action to which this section was directed, do not leave a "paper trail" of evidence. Although a number of federal courts have considered the choice of limitations after enactment of the new Pennsylvania limitations statute, those courts were persuaded as to the applicability of the blue sky limitation and did not therefore address which limitations period controlled the fraud alternative. *See* notes 37-73 and accompanying text *infra*. In view of the absence of evidence of legislative intent to change the fraud statute, the authors will assume for purposes of discussion that the six year statute is applicable, mindful that certain of the considerations underlying the adoption of the two year statute are consonant with their policy reasons for recommending adoption of the blue sky limitations period for 10b-5 actions requiring scienter. *See* note 191 *infra*.

27. *See* PA. STAT. ANN. tit. 70, § 1-401 (Purdon Supp. 1979-1980). Section 401 provides: It is unlawful for any person, in connection with the offer, sale or purchase of any security in this State, directly or indirectly:

- (a) To employ any device, scheme or artifice to defraud;
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of circumstances under which they are 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.

*Id.* For the pertinent text of rule 10b-5, *see* note 2 *supra*.

28. PA. STAT. ANN. tit. 70, § 1-501(a)-(b) (Purdon Supp. 1979-1980). Section 1-501(a)-(b) expressly provides a private right of action to redress any injury that results from a violation of § 1-401. *Id.*

29. *See id.* § 1-504(a). Section 504 provides in pertinent part:

- (a) No action shall be maintained to enforce any liability created under section 501 (or section 503 in so far as it relates to that section) unless brought before the expiration of three years after the act or transaction constituting the violation or the expiration of one year after the plaintiff receives actual notice or upon the exercise of reasonable diligence should have known of the facts constituting the violation, whichever shall first expire.

*Id.* (footnotes omitted).

"unless brought before the expiration of three years after the act or transaction constituting the violation or the expiration of one year after the plaintiff receives actual notice or upon the exercise of reasonable diligence should have known of the facts constituting the violation, whichever shall first expire."<sup>30</sup> Thus, federal courts sitting in Pennsylvania were presented with the limitations issue previously faced by other federal courts.

More than thirty years after the seminal decision implying a private cause of action under rule 10b-5,<sup>31</sup> the issue concerning which limitations period governs rule 10b-5 damage claims in federal courts sitting in Pennsylvania remains hotly contested. Although the federal district courts have uniformly applied the Pennsylvania blue sky period of limitations since the adoption of the 1972 Act,<sup>32</sup> the United States Court of Appeals for the Third Circuit has yet to resolve the question.<sup>33</sup> Recently, however, a divided Third Circuit panel applying New Jersey law in *Roberts v. Magnetic Metals Co.*<sup>34</sup> held that the state's general fraud statute, rather than its blue sky statute, was applicable.<sup>35</sup> In light of the possible precedential impact of *Magnetic Metals*, prior decisional law in Pennsylvania must be reconsidered.<sup>36</sup>

30. *Id.*

31. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). See note 3 and accompanying text *supra*.

32. See notes 37-73 and accompanying text *infra*.

33. See *Gelman v. Westinghouse Elec. Corp.*, 556 F.2d 699 (3d Cir. 1977), *aff'd*, 612 F.2d 799 (3d Cir. 1979) (en banc) (by an evenly divided court). In *Gelman*, the Third Circuit assumed, without deciding, that the limitations period prescribed in § 1-504(a) of the 1972 Act governs rule 10b-5 claims for damages. 566 F.2d at 701. For a brief discussion of *Gelman*, see notes 70-72 and accompanying text *infra*.

At the time of this writing, the Third Circuit has *sub judice* *Biggans v. Bache Halsey Stuart Shields, Inc.*, No. 80-1281 (3d Cir., filed Feb. 29, 1980), which may provide significant insight regarding the question presently under discussion. The case was submitted on briefs on September 18, 1980, and a decision is currently pending before the panel of Judges Gibbons, Weis, and Sloviter. The district court's opinion in *Biggans* is discussed in notes 73-74 & 109-10 *infra*. It is noteworthy that two of the judges on the *Biggans* panel also participated in the Third Circuit's decision in *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979). See note 81 *infra*. For a discussion of the relevance of *Magnetic Metals*, see notes 34-35 & 74-112 and accompanying text *infra*.

34. 611 F.2d 450 (3d Cir. 1979). Because the Pennsylvania and New Jersey blue sky statutes are not identical, *Magnetic Metals* is not necessarily dispositive concerning which Pennsylvania statute of limitations will be found appropriate in actions under rule 10b-5. See notes 106-07 and accompanying text *infra*.

35. 611 F.2d at 456. Until *Magnetic Metals*, the Third Circuit was the only circuit which had not decided whether or not a blue sky statute should be applied in rule 10b-5 cases. See, e.g., *Forrestal Village, Inc. v. Graham*, 551 F.2d 411 (D.C. Cir. 1977) (blue sky); *Nickels v. Koehler Management Corp.*, 541 F.2d 611 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) (fraud); *Nortek v. Alexander Grant & Co.*, 532 F.2d 1013 (5th Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977) (blue sky); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402 (2d Cir. 1975) (blue sky); *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975) (blue sky); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972) (blue sky); *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90 (10th Cir.), *cert. denied*, 404 U.S. 1004 (1971) (fraud); *Vanderboom v. Sexton*, 422 F.2d



## II. DECISIONS APPLYING PENNSYLVANIA LAW FOLLOWING ADOPTION OF THE 1972 ACT

The first case addressing the statute of limitations issue in the post-1972 Act environment was *Oberholtzer v. Scranton*.<sup>37</sup> There, however, the Court did not resolve the issue since it held that the 1972 Act was inapplicable because suit had been commenced prior to the effective date of the statute and the statute itself disclaimed retroactive application.<sup>38</sup> It was not until mid-1975, in *Benetz v. Photon, Inc.*,<sup>39</sup> that a federal court sitting in Pennsylvania evaluated the impact of the adoption of the 1972 Act, when District Judge Weiner ruled that the limitations provisions contained in the blue sky statute, rather than the statutory period applicable to fraud, was controlling.<sup>40</sup>

The threshold question for the *Photon* court was the availability of the 1972 Act as a source of law. In *Photon*, the underlying transaction and alleged violation had occurred in 1971, prior to the effective date of the 1972 Act.<sup>41</sup> All parties agreed that the alleged fraud was not disclosed and could not have been discovered until, at the earliest, 1973, after the effective date of the 1972 Act.<sup>42</sup> Suit was commenced on March 7, 1975.<sup>43</sup> Holding that the question of when

1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970) (blue sky); *Janigan v. Taylor*, 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965) (fraud); *Errion v. Cornell*, 236 F.2d 447 (9th Cir. 1956) (fraud).

The Supreme Court recently adverted to, but did not resolve, the issue in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976). Since *Hochfelder*, the Court has declined each opportunity to review the conflict among the circuits. See, e.g., *Nickels v. Koehler Management Corp.*, 429 U.S. 1074 (1977), *denying cert. to* 541 F.2d 611 (6th Cir. 1976); *Nortek v. Alexander Grant & Co.*, 429 U.S. 1042 (1977), *denying cert. to* 532 F.2d 1013 (5th Cir. 1976).

36. For a detailed discussion of this problem of establishing an appropriate period of limitations for the judicially implied private remedy under rule 10b-5, see R. JENNINGS & H. MARSH, *SECURITIES REGULATION* 859 (4th ed. 1977); Bateman & Keith, *Statutes of Limitations Applicable to Private Actions Under SEC Rule 10b-5: Complexity in Need of Reform*, 39 MO. L. REV. 165 (1974); Erwin, *Securities Fraud and the Statute of Limitations: The Strange Case of the "Modified Uniform" Securities Act*, 10 CREIGHTON L. REV. 324 (1976); Jacobs, *Affirmative Defenses to Securities Exchange Act Rule 10b-5 Actions*, 61 CORNELL L. REV. 857 (1976); Martin, *supra* note 11; Raskin & Enyart, *supra* note 19; Schulman, *supra* note 8; Comment, *supra* note 26; Comment, *Statutes of Limitations In 10b-5 Actions: A Proposal for Congressional Legislation*, 24 SYRACUSE L. REV. 1154 (1973); Note, 4 N. KY. L. REV. 175 (1977); Note, *supra* note 22; Note, *supra* note 17.

37. No. 70-3310 (E.D. Pa. Feb. 11, 1974).

38. *Id.* slip op. at 3. The court relied on § 1-704(a) of the 1972 Act which expressly prohibits retroactive application of its limitations provision. *Id.* Section 1-704(a) provides in pertinent part that "prior law exclusively governs all suits, actions, prosecutions or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of this act." PA. STAT. ANN. tit. 70, § 1-704(a) (Purdon Supp. 1979-1980).

39. No. 75-674 (E.D. Pa. July 21, 1975).

40. *Id.* slip op. at 4.

41. *Id.* slip op. at 2.

42. *Id.* slip op. at 5.

43. *Id.* slip op. at 3.

state statutes of limitation begin to run is one of federal law, Judge Weiner applied the well-established federal doctrine of "equitable tolling" which dictates that, unless otherwise statutorily prescribed, statutes of limitations do not begin to run in cases involving fraud until the fraud is, or should have been, discovered.<sup>44</sup> In a departure from the approach taken by the court in *Oberholtzer*,<sup>45</sup> Judge Weiner found that, although the violation had occurred prior to the effective date of the 1972 Act,<sup>46</sup> the "date of accrual," or discovery, or the fraud was in 1973;<sup>47</sup> because, under federal law, statutes of limitations in fraud cases run only from the date of actual or imputed discovery, Judge Weiner held that the 1972 Act was applicable.<sup>48</sup> With this predicate, the court, apparently persuaded by the resemblance between rule 10b-5 and the Pennsylvania blue sky antifraud remedy, held that the blue sky limitations period, rather than the general statutory period applicable to fraud, was controlling.<sup>49</sup>

Having settled upon the applicable limitations period, the *Photon* court turned to the defendants' motion for summary judgment. The actual date of discovery, although admittedly subsequent to the 1973 effective date of the 1972 Act, was factually disputed.<sup>50</sup> The defendants contended that the alleged fraud was "discoverable" by mid-1973<sup>51</sup> and that the suit, commenced over a year later,<sup>52</sup> should therefore be dismissed.<sup>53</sup> The plaintiffs, on the other hand, main-

44. *Id.* slip op. at 5. See generally 5A A. JACOBS, *supra* note 6, at § 235.03; Note, *The Tolling of State Statutes of Limitations in Federal Courts*, 71 COLUM. L. REV. 865 (1971). The Seventh Circuit has stated:

The equitable tolling doctrine provides that where a fraud which is the foundation of the suit has actively been concealed or is of such a nature as to conceal itself, the statute of limitations is tolled until the plaintiff has obtained knowledge of the fraud or in the exercise of due care should have obtained knowledge of the fraud.

*Hochfelder v. Midwest Stock Exch.*, 503 F.2d 364, 375 (7th Cir.), *cert. denied*, 419 U.S. 875 (1974). The doctrine derives from the Supreme Court's decision in *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874). See also *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946); *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir.), *cert. denied* 368 U.S. 821 (1961).

Equitable tolling was first applied to a rule 10b-5 action in *Tobacco & Allied Stocks, Inc., v. Transamerica Corp.*, 143 F. Supp. 323 (D. Del. 1956), *aff'd*, 244 F.2d 902 (3d Cir. 1957). It is applicable in rule 10b-5 litigation because the question of when the cause of action accrues is determined by reference to federal law. *Holmberg v. Armbrrecht*, 327 U.S. at 397. See also notes 136-56 and accompanying text *infra*.

45. See notes 37-38 and accompanying text *supra*.

46. *Benetz v. Photon, Inc.*, No. 75-674, slip op. at 2 (E.D. Pa. July 21, 1975).

47. *Id.* slip op. at 5. For a discussion of when a cause of action accrues, see 5A A. JACOBS, *supra* note 6, § 235.03, at 10-20 to -21.

48. *Benetz v. Photon, Inc.*, No. 75-674, slip op. at 4 (E.D. Pa. July 21, 1975).

49. *Id.* slip op. at 5.

50. See text accompanying notes 51-54 *infra*.

51. *Benetz v. Photon, Inc.*, No. 75-674, slip op. at 5 (E.D. Pa. July 21, 1975).

52. *Id.* slip op. at 3.

53. *Id.* slip op. at 2.

tained that the fraud was not discoverable until August, 1974, and argued that the action had been properly begun within the applicable one-year time period.<sup>54</sup> Judge Weiner found that the question of when the fraud should have been discovered was a question of fact to be reserved for trial and denied the motion for summary judgment.<sup>55</sup> In its discussion, the court did not consider the interplay between the one-year and three-year tiers of the Pennsylvania limitations period and simply assumed that the statutory instruction to use the shorter of the two time periods was applicable.<sup>56</sup>

Shortly after denying summary judgment in *Photon*, Judge Weiner again confronted the limitations issue in *Miller v. Farrow*.<sup>57</sup> In *Miller*, suit had been initiated in June, 1975.<sup>58</sup> The defendants, contending that the plaintiff knew or should have known of the fraud no later than May, 1974,<sup>59</sup> asserted that the one-year limitations period of the 1972 Act was applicable and mandated dismissal of the claim.<sup>60</sup> The plaintiff argued that he should not be charged with knowledge of the fraud until one month prior to commencement of the suit—well within the one-year time limitation of the 1972 Act.<sup>61</sup> Once again avoiding consideration of the impact of the three-year provision, but implicitly reiterating the view expressed in *Photon* that the blue sky limitations period was applicable, Judge Weiner denied the defendants' motion for summary judgment after determining that the question of when the plaintiff knew or should have known of the fraud was a triable question of fact.<sup>62</sup>

Two weeks later, Judge Weiner again considered the issue on the defendants' motion for summary judgment in *Guarantee Bank v. Laventhol, Krekstein, Horwath & Horwath*.<sup>63</sup> Once again, the transaction involved had occurred prior to the January 1, 1973 effective date of the 1972 Act, but all parties agreed that the fraud was not discoverable until after that date.<sup>64</sup> While the defendants contended that the fraud was discoverable by late 1973, that the one-year limitations period of the 1972 Act was applicable, and that the action should, therefore, be dismissed because suit had not been com-

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54. *Id.* slip op. at 5.

55. *Id.* slip op. at 6.

56. *Id.* See note 88 *infra*.

57. No. 75-1801 (E.D. Pa. Sept. 16, 1975).

58. *Id.* slip op. at 2.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* slip op. at 3.

63. No. 75-1842 (E.D. Pa. Oct. 3, 1975).

64. *Id.* slip op. at 10.

menced until June 26, 1975, the plaintiff asserted that, if the 1972 Act was applicable, the fraud could not have been discovered through the exercise of reasonable diligence until June 28, 1974, within one year of the filing of suit.<sup>65</sup> Alternatively, the plaintiff argued that, if the blue sky statute was applicable, and if the court further found that the fraud was discoverable earlier than June 26, 1974, the three-year period from the time of the violation, rather than the one-year period from the time of discovery, should be applied.<sup>66</sup>

The *Guarantee Bank* court, relying on the principles set forth in the *Photon* opinion, held that "the provisions of the Securities Act of 1972 limits [sic] the period of time [within] which suit may be instituted."<sup>67</sup> Applying the principles recently enunciated in its decisions in *Photon* and *Miller*, the court also reiterated that the question of when the fraud was discoverable was a question of fact not to be decided on a motion for summary judgment.<sup>68</sup> Thus, the court declined to determine the interplay between the one-year and three-year provisions of the Pennsylvania statute. In view of the fact that the plaintiff's counsel had raised the issue, however, the court noted that *Photon* was not to be construed as having in any way determined the significance of the blue sky three-year limitation: "At this juncture we believe it appropriate to point out that our decision in *Photon* . . . relates only to the one-year limitation contained in [Section] 1-504 and is not intended to explore the legal significance to be placed upon the three-year limitation encompassed in the Act."<sup>69</sup>

In *Gelman v. Westinghouse Electric Corp.*,<sup>70</sup> the Third Circuit was presented with its first opportunity to consider the applicable limitations period in a 10b-5 case commenced in a federal court sitting in Pennsylvania. In *Gelman*, the court "assumed, without decid-

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65. *Id.*

66. Brief for plaintiff Guarantee Bank at 35, *Guarantee Bank v. Laventhol, Krekstein, Horwath & Horwath*, No. 75-1842 (E.D. Pa. Oct. 3, 1975).

67. *Guarantee Bank v. Laventhol, Krekstein, Horwath & Horwath*, No. 75-1842, slip op. at 9 (E.D. Pa. Oct. 3, 1975).

68. *Id.* slip op. at 10.

69. *Id.* Subsequent to Judge Weiner's three decisions, several judges in the Eastern District of Pennsylvania indicated in dictum that they too would apply the 1972 Act limitations period but held that, because the transactions involved had occurred prior to the effective date of the 1972 Act, the Act did not apply in the cases before them. See *Boehm v. Butcher & Singer*, 427 F. Supp. 355, 357 (E.D. Pa. 1977) (Hannum, J.); *Bronstein v. Bronstein*, No. 75-2336, slip op. at 3 (E.D. Pa. May 13, 1976) (Huyett, J.); *Frankel v. Schmertz*, No. 74-1605, slip op. at 9 (E.D. Pa. March 18, 1976) (Cahn, J.). *Accord*, *Blumenthal v. Great Am. Mort. Inv.*, No. C76-10A (N.D. Ga. June 2, 1976) (applying Pennsylvania limitations period). The issue of whether the 1972 Act is inapplicable by reason of the timing of the transaction becomes increasingly academic with the passage of time.

70. 556 F.2d 699 (3d Cir. 1977), *aff'd* 612 F.2d 799 (3d Cir. 1979) (en banc) (by an equally divided court).

ing," that the blue sky statute of limitations is applicable in such cases.<sup>71</sup> The court further assumed that the one-year portion of the statute would be applicable.<sup>72</sup>

Since *Gelman*, many judges in the Eastern District of Pennsylvania have held the blue sky statute of limitations to be applicable to federal securities fraud actions.<sup>73</sup> However, no court has as yet considered the effect of the state's three-year outside limitation.

This unbroken string of decisions, having all the appearance of settled authority, must now be reconsidered in light of the Third Circuit's 1979 opinion in *Roberts v. Magnetic Metals Co.*<sup>74</sup> A detailed discussion of that decision is therefore appropriate.

### III. MAGNETIC METALS: THREE APPROACHES

*Magnetic Metals* involved a squeeze-out merger involving a small public corporation.<sup>75</sup> The plaintiffs alleged that, in soliciting favora-

71. 556 F.2d at 701.

72. *Id.* Judge Gibbons, writing for the court, stated:

Appellants point out that claims under § 10(b) are governed by the analogous state statute of limitations. . . . They suggest that the most likely applicable Pennsylvania statute of limitations is § 504(a) of the Pennsylvania Securities Act of 1972. . . . Section 504(a) provides for a time bar in securities fraud actions of three years after the transaction constituting the violation or one year after actual notice of the facts constituting it, whichever is shorter. *Assuming, without deciding, that § 504(a) is the applicable statute of limitations*, the facts suggest that the limitations period would run for one year as of August 12, 1975, the date on which appellants learned of the facts constituting the violation.

*Id.* (emphasis added) (citation omitted).

73. See, e.g., *Stringer v. White*, No. 76-2466 (E.D. Pa. April 18, 1980) (Pollack, J.) (supplementing opinions dated February 27, 1980 and Oct. 30, 1979); *Rankl v. Elkins, Stroud, Suplee & Co.*, No. 79-3187 (E.D. Pa. Jan. 29, 1980) (Van Artsdalen, J.); *Biggans v. Bache Halsey Stuart Shields, Inc.*, 487 F. Supp. 829 (E.D. Pa. 1980) (Cahn, J.), *appeal docketed*, No. 80-1281 (3d Cir. Feb. 29, 1980); *Vogel v. Trahan*, No. 78-2724 (E.D. Pa. Jan. 11, 1980) (Green, J.); *Bowers v. Adam Management Corp.*, No. 78-3898 (E.D. Pa. Nov. 26, 1979) (Weiner, J.); *Abetti v. Sheftel*, No. 78-4259 (E.D. Pa. Nov. 21, 1979) (Hannum, J.); *Burstein v. Rolling Hills of Ocala, Ltd.*, No. 78-2869 (E.D. Pa. June 24, 1979) (McGlynn, J.). See also *Hoover v. E.F. Hutton & Co.*, [1980] FED. SEC. L. REP. (CCH) ¶ 97,654 (E.D. Pa. June 24, 1980) (Cahn, J.); note 69 *supra*.

74. 611 F.2d 450 (3d Cir. 1979). The courts in *Stringer v. White*, No. 76-2466 (E.D. Pa. April 18, 1980 & Feb. 27, 1980); *Biggans v. Bache Halsey Stuart Shields, Inc.*, 487 F. Supp. 829 (E.D. Pa. 1980), *appeal docketed*, No. 80-1281 (3d Cir. Feb. 29, 1980); *Vogel v. Trahan*, No. 78-2724 (E.D. Pa. Jan. 11, 1980); and *Bowers v. Adam Management Corp.*, No. 78-3898 (E.D. Pa. Nov. 26, 1979) have held, in opinions dated subsequent to *Magnetic Metals*, that the blue sky statute of limitations governs rule 10b-5 actions arising in Pennsylvania. See also *Hoover v. E.F. Hutton & Co.*, [1980] FED. SEC. L. REP. (CCH) ¶ 97,654 (E.D. Pa. June 24, 1980). Only *Biggans* discussed *Magnetic Metals* in the context of the limitation issue, and that court distinguished the authority. See note 109 *infra*. In *Hoover*, however, Judge Cahn noted that his decision in that case, holding that the remedies provided under the 1972 Act and under rule 10b-5 are not identical, might render his earlier decision in *Biggans* incorrect. See note 109 *infra*. The *Biggans* case was submitted on briefs to the Third Circuit on September 18, 1980, and a decision is currently pending. See note 33 *supra*.

75. 611 F.2d at 452. It is well established that a "forced seller" has standing to assert fraud in the context of section 10(b) and rule 10b-5. See *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d

ble shareholder action, the defendants failed to disclose material facts and made material misrepresentations in violation of sections 10(b) and 14(a) of the Securities Exchange Act of 1934, the regulations promulgated thereunder, and the common law.<sup>76</sup> Because suit had been commenced in the District of New Jersey, New Jersey limitations law was applicable.<sup>77</sup>

Unlike most cases, in which the plaintiffs are buyers, the plaintiffs in *Magnetic Metals* were sellers of stock.<sup>78</sup> Significantly, the New Jersey blue sky statute, as do many such statutes, provides a civil cause of action to buyers only.<sup>79</sup> The district court dismissed the complaint, holding that the plaintiffs' federal claims were time barred by the New Jersey blue sky statute,<sup>80</sup> notwithstanding the fact that plaintiff-sellers could not have sued under the blue sky statute in state court. On appeal, the Third Circuit reversed, over a dissent,<sup>81</sup> and held that the New Jersey fraud statute<sup>82</sup> was controlling.<sup>83</sup>

The issue of which statute to apply spawned three separate opinions.<sup>84</sup> Together, these opinions undertake an exhaustive analysis of the basis for choosing the appropriate state limitations period to "absorb."

540, 545-47 (2d Cir. 1967); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 632-35 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967).

76. 611 F.2d at 452. As was done with respect to § 10(b), a private right of action has been implied under § 14(a) of the 1934 Act. *See* J.I. Case v. Borak, 377 U.S. 426 (1964). However, in contrast to rule 10b-5 actions, scienter is not required under § 14(a). *See, e.g.*, *Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 761, 777-78 (3d Cir. 1976); *Gerselte v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1300-01 (2d Cir. 1973).

77. 611 F.2d at 452.

78. *See id.* at 453.

79. *See* N.J. STAT. ANN. § 49:3-71(a) (West 1970). Section 49:3-71(a) provides in pertinent part:

- (a) Any person who
  - (1) offers or sells a security in violation of sections 8(b), 9(a) or 13 of this Act, or
  - (2) offers or sells a security by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission) is liable to the person buying the security from him .

*Id.* (emphasis added) (footnote omitted). The New Jersey provision is modeled after § 410(a) of the Uniform Securities Act. 611 F.2d at 452. Other state blue sky statutes are similarly limited to buyers' remedies. *See, e.g.*, D.C. CODE ANN. § 2-2413 (1973); MISS. CODE ANN. § 75-71-31 (1922); W. VA. CODE § 32-4-410 (1974).

80. 463 F. Supp. 934, 941 (D.N.J. 1978), *rev'd* 611 F.2d 450 (3d Cir. 1979). *See* N.J. STAT. ANN. § 49:3-71(e) (West 1970) (two-year limitation).

81. The case was heard by Chief Judge Seitz and Judges Gibbons and Sloviter. Judge Gibbons wrote the opinion of the court, Judge Sloviter wrote a concurring opinion, and Chief Judge Seitz wrote a dissent.

82. N.J. STAT. ANN. § 2A:14-1 (West Supp. 1970).

83. 611 F.2d at 456.

84. *See* note 81 *supra*. Not only was the *Magnetic Metals* panel split, but five of the eleven active Third Circuit Judges voted in favor of rehearing en banc. *Roberts v. Magnetic Metals Co.*, No. 79-1326, slip op. at 1 (3d Cir. Dec. 14, 1979) (denial of rehearing).

Opting for the state fraud statute, Judge Gibbons<sup>85</sup> chose to identify and accommodate the "state policy of repose,"<sup>86</sup> reasoning that "[t]he starting point . . . for determining applicable state statutes of limitations is to inquire whether, assuming the operative facts alleged in the complaint, a state court would entertain an action for the relief sought. . . ."<sup>87</sup> If there exists a remedy in state court, the federal courts must apply that statute of limitations which the state courts would apply to the state law analogue of the federal claim.<sup>88</sup> Because the New Jersey securities antifraud statute provides a remedy only for buyers, Judge Gibbons concluded that a seller's complaint would be heard in the state courts under the general fraud statute.<sup>89</sup> Under the longer limitations period for general fraud, "[l]itigation over the transaction alleged would, in a New Jersey Court, be alive, not in repose."<sup>90</sup>

In a concurring opinion, Judge Sloviter considered, instead, which state statute of limitations best comported with the federal sub-

85. It is interesting to note that Judge Gibbons authored the *Gelman* opinion in which the court "assumed, without deciding" that the Pennsylvania blue sky statute of limitations governed rule 10b-5 actions. See notes 70-72 and accompanying text *supra*.

86. 611 F.2d at 452. Judge Sloviter, distinguishing her approach from that of Judge Gibbons, explained that she was "not persuaded that the selection must begin with the inquiry 'whether the state would entertain an action' or that the decision must be made on the basis of 'accommodat[ing] a state policy of repose.'" *Id.* at 456 (Sloviter, J., concurring). For further discussion of Judge Sloviter's position, see notes 91-96 and accompanying text *infra*.

87. 611 F.2d at 452. *But see id.* at 461 (Seitz, C.J., dissenting); notes 97-104 and accompanying text *infra*.

88. 611 F.2d at 453. It is doubtful whether, in a resemblance-based approach such as that of Judge Gibbons, the federal court would incorporate the entire panoply of rights, remedies, defenses, and judicial interpretations under the applicable state statute since a federal court does not normally adopt the "absorbed" state statute's procedural or substantive nuances. 5A A. JACOBS, *supra* note 6, § 235.02, at 10-11 & n.25. Rather, "the state supplies only the measuring period—i.e., specific number of years." *Id.* at 10-11. As one commentator has noted: "[W]hen considering federal questions, federal courts should not be bound by the state's interpretation of the statute, as they are in diversity cases, but should adhere only to the period of time provided by the statute, since only that portion of federal law is lacking." 70 HARV. L. REV. 566, 568 (1957).

Nevertheless, in choosing which of the forum state's limitations periods controls, a federal court can consider the state's interpretation as to the kinds of actions to which its statutes apply. See *Powell v. St. Louis Dairy Co.*, 276 F.2d 464 (8th Cir. 1960). Similarly, where the applicable statute of limitations of the forum provides that the law of another jurisdiction is to be "borrowed," a federal court, in applying the state limitation, incorporates the borrowed law as interpreted by the foreign jurisdiction. See, e.g., *Cope v. Anderson*, 311 U.S. 461 (1947); *Skouras Theatres Corp. v. Radio-Keith Orpheum Corp.*, 179 F. Supp. 163 (S.D.N.Y. 1959); *Banana Dist. v. United Fruit Co.*, 158 F. Supp. 153 (S.D.N.Y. 1957); *Bertha Bldg. Corp. v. National Theatres Corp.*, 140 F. Supp. 909, 912 (E.D.N.Y. 1956), *rev'd on other grounds*, 248 F.2d 833 (2d Cir. 1957).

Conversely, the classification of the nature of the federal right is a matter for federal law. See 65 HARV. L. REV. 1457, 1458 (1952).

89. 611 F.2d at 453-54. Judge Gibbons stated: "[T]he very transactions giving rise to the section 10b and section 14(a) claims would be cognizable in New Jersey courts." *Id.* at 453.

90. *Id.*

stantive policy behind the federal cause of action.<sup>91</sup> Under her policy-oriented approach, the state statute chosen must, in its "utilization and application . . . conform with the federal policy reflected in the substantive right being enforced as well as substantive federal policies which inhere in the operation of an independent federal system."<sup>92</sup>

In contrast with Judge Gibbons' concern for state policy,<sup>93</sup> Judge Sloviter emphasized that, should there be more than one state statute of limitations to consider, "the selection of the one appropriate to use must be made by considerations which comport with federal policy. The state policy of repose is relevant only if, and to the extent to which, it is consistent with the underlying federal claim."<sup>94</sup> Although concluding that, under "ordinary circumstances," the New Jersey blue sky limitations would be "most consonant with and complimentary . . . to the federal scheme,"<sup>95</sup> Judge Sloviter agreed with the application of the general fraud statute because the blue sky law lacked a remedy for the *Magnetic Metals* plaintiff-seller.<sup>96</sup>

In his dissenting opinion, Chief Judge Seitz propounded a third approach.<sup>97</sup> For those instances in which a federal court must look to a state statute of limitations, Judge Seitz outlined a "two-step inquiry": "First, the court should determine which state substantive remedy is the most analogous to the federal statute in question. Second, the court should ask whether the statute of limitations applicable to that remedy best effectuates federal policy."<sup>98</sup>

Acknowledging that the New Jersey blue sky statute differs from rule 10b-5 in that it does not provide a remedy for sellers or cover the use of manipulative or deceptive devices and is more restrictive concerning damages, Chief Judge Seitz found such a comparison "helpful," but not "decisive."<sup>99</sup> According to Chief Judge Seitz, of

91. *Id.* at 458 (Sloviter, J., concurring).

92. *Id.*

93. See notes 85-87 and accompanying text *supra*.

94. 611 F.2d at 458 (Sloviter, J., concurring). Characterizing Judge Sloviter's approach as "identifying the state statute of limitations which best comports with the federal substantive policy advanced by the federal cause of action," Judge Gibbons emphasized that he did not disagree with her analysis. *Id.* at 456.

95. *Id.* at 459 (Sloviter, J., concurring).

96. *Id.* at 459-60 (Sloviter, J., concurring).

97. *Id.* at 461 (Seitz, C.J., dissenting).

98. *Id.* Elaborating on the nature of the inquiry, Chief Judge Seitz stated:

A surer guide to proper analogy of state and federal substantive law in this context is the relationship of the state statute of limitations to the underlying substantive claim . . . . The question is whether the state statute of limitations addresses itself to the same kind of conduct (and the problems that such conduct creates) that is covered by the federal claim.

*Id.*

99. *Id.*



primary importance is the fact that both statutory schemes regulate information in the sale of securities.<sup>100</sup> The state statute, he concluded, "addresses the same regulatory area" and "the same kind of conduct" as does rule 10b-5.<sup>101</sup> As did the district court,<sup>102</sup> the dissent would have borrowed the New Jersey blue sky limitations period,<sup>103</sup> notwithstanding the fact that, unlike the federal cause of action, the blue sky statute provides no remedy for defrauded sellers.<sup>104</sup>

Against this background, we turn to a consideration of the impact which *Magnetic Metals* may have with respect to the determination of the appropriate Pennsylvania limitations period.

#### IV. AN EVALUATION AND ANALYSIS OF THE ISSUES INVOLVED IN BORROWING A PENNSYLVANIA STATUTE OF LIMITATIONS IN LIGHT OF *MAGNETIC METALS*

In *Magnetic Metals*, the Third Circuit, deciding the issue for the first time, declined to apply the state blue sky statute of limitations to the federal rule 10b-5 cause of action.<sup>105</sup> An obvious and necessary question concerns the effect of this decision, made with regard to New Jersey law, on rule 10b-5 cases brought in federal courts sitting in Pennsylvania.

At first blush, the unbroken string of district court decisions applying the Pennsylvania blue sky limitations period would appear to remain intact.<sup>106</sup> On their face, the Pennsylvania and New Jersey statutes are distinguishable: unlike the New Jersey law, the Pennsylvania securities statute provides a remedy to *both* buyers and sellers.<sup>107</sup> Clearly, the fact that the *Magnetic Metals* plaintiff-seller could not have sued in state court under the blue sky statute was a

100. *Id.* at 462 (Seitz, C.J., dissenting).

101. *Id.* at 461 (Seitz, C.J., dissenting).

102. See 463 F. Supp. at 940-41.

103. 611 F.2d at 463 (Seitz, C.J., dissenting).

104. See note 79 and accompanying text *supra*.

105. See notes 81-90 and accompanying text *supra*.

106. See notes 37-69 and accompanying text *supra*.

107. Compare N.J. STAT. ANN. § 49:3-71(a) (West 1970) with PA. STAT. ANN. tit. 70, §§ 1-501(a) (b) (Purdon Supp. 1979-1980). The Pennsylvania statute provides in pertinent part:

(a) Any person who: . . . (ii) offers or sells a security in violation of sections 401, 403, 404 or otherwise by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the purchaser not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of the untruth or omission, shall be liable to the person purchasing the security . . . .

decisive—and divisive—factor.<sup>108</sup> Inasmuch as Pennsylvania's anti-fraud provision is virtually identical to rule 10b-5,<sup>109</sup> the blue sky statute would appear analogous to the federal statute, and the blue sky limitations period would continue to govern federal claims.<sup>110</sup>

On closer examination, however, the answer may not be so simple. If Judge Gibbons' approach of matching the state and federal remedies<sup>111</sup> prevails, a closer comparison of the elements of the statutes is required. So, too, under Judge Sloviter's federal policy analysis, the federal policy behind the securities antifraud provisions must be identified and measured against the several arguably applicable Pennsylvania limitations laws.<sup>112</sup>

(b)Any person who purchases a security in violation of sections 401, 403, 404 or otherwise by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, shall be liable to the person selling the security to him. . . .

PA. STAT. ANN. tit. 70, §§ 1-501(a)-(b) (Purdon Supp. 1979-1980) (footnote omitted). For the pertinent text of the New Jersey provision, see note 79 *supra*.

108. See notes 89, 96 & 99-104 and accompanying text *supra*.

109. Compare 17 C.F.R. § 240.10b-5 (1977) with PA. STAT. ANN. tit. 70, § 1-401 (Purdon Supp. 1979-1980). For the text of these provisions, see notes 2 & 27 *supra*. In *Hoover v. E.F. Hutton & Co.*, [1980] FED. SEC. L. REP. (CCH) ¶ 97,654 (E.D. Pa. June 24, 1980), however, Judge Cahn held, in a customer suit against a broker-dealer, that the Pennsylvania blue sky statute did not confer a private antifraud remedy under § 401 absent compliance with what the court held to be a requirement of § 501—privity between the plaintiff and defendant. *Id.* slip op. at 7-8. See also *Lord v. E.F. Hutton & Co.*, No. 79-3573, slip op. at 4-5 (E.D. Pa. July 3, 1980) (Green, J.). Judge Cahn then went on to note the "interesting intellectual problem" created by his decision insofar as it found the remedies afforded by rule 10b-5 and the 1972 Act to be noncongruent. *Hoover v. E.F. Hutton & Co.*, No. 79-3475, slip op. at 8-9 n.9 (E.D. Pa. June 24, 1980). Since such a lack of congruence was the precise basis for the Third Circuit's holding in *Magnetic Metals*, Judge Cahn opined that his earlier decision in *Biggans v. Bache Halsey Stuart Shields, Inc.*, 487 F. Supp. 829 (E.D. Pa. 1980), *appeal docketed*, No. 80-1281 (3d Cir. Feb. 29, 1980), holding the Pennsylvania blue sky limitations period applicable to rule 10b-5 actions in Pennsylvania, might have been incorrect. *Hoover v. E.F. Hutton & Co.*, [1980] FED. SEC. L. REP. (CCH) at 98,486 n.9 (E.D. Pa. June 24, 1980). Judge Cahn further maintained that

Pennsylvania law remains distinguishable from New Jersey law as it relates to the central arguments in [*Magnetic Metals*]. Buyers and sellers may bring actions in Pennsylvania, only buyers may sue in New Jersey. The Pennsylvania securities statute is broader in scope than the New Jersey statute, and remains, in my opinion, on the whole, more analogous to § 10(b). The court of appeals could adopt one of two methods of determining the statute of limitations for an action under § 10(b): one action most analogous to § 10(b) in each state can be chosen, and the statute of limitations applicable to that action will be applicable to every § 10(b) action in that state; or, each § 10(b) action can be separately analyzed on its facts to see which state action would be more applicable to § 10(b) actions, and in various § 10(b) actions in each state the statute of limitations would vary. If the latter theory is the correct law, and if my opinion in *Biggans* may have been incorrect. . . . No party in this case has referred to my *Biggans* opinion. However, I find it better to identify this problem now rather than let my quandry pass unnoted.

*Id.* (emphasis in original) (citation omitted). *Biggans* is currently on appeal before the Third Circuit. See note 33 *supra*.

110. *Accord*, *Biggans v. Bache Halsey Stuart Shields, Inc.*, 487 F. Supp. 829, 830 (E.D. Pa. 1980), *appeal docketed*, No. 80-1281 (3d Cir. Feb. 29, 1980). But see note 109 *supra*.

111. See notes 85-90 and accompanying text *supra*.

112. See notes 91-96 and accompanying text *supra*. Under Chief Judge Seitz's approach, however, adoption of the blue sky statute would appear to follow *a fortiori*, since the Pennsyl-

The divergent approaches in *Magnetic Metals*, we submit, provide no clear guidelines to apply to a choice of Pennsylvania limitations alternatives. When compounded by certain features of the Pennsylvania blue sky statute which are not present in the New Jersey statute, the choice of which limitations period to apply in Pennsylvania is particularly uncertain. It is to a consideration of the issues presented by the Pennsylvania alternatives that we now turn.

A. *The Impact of the Supreme Court's Decision*  
in *Ernst & Ernst v. Hochfelder*

In following the approach suggested by Judge Gibbons, it is necessary first to determine which state remedy most closely resembles the rule 10b-5 claim and then to consider Pennsylvania's policy of repose with respect to that claim.<sup>113</sup> Judge Sloviter, too, would apparently require a "matching" of the statutes.<sup>114</sup> Consequently, a more exhaustive comparison of the elements of the state and federal causes of action is warranted than that which has been undertaken by those Pennsylvania district courts which have considered the question. In particular, it is necessary to decide whether the federal and Pennsylvania statutes require comparable degrees of culpability and, if not, whether the absence of a scienter requirement in the blue sky law renders it inapplicable for purposes of supplying a limitations period for rule 10b-5 purposes.<sup>115</sup>

In *Ernst & Ernst v. Hochfelder*,<sup>116</sup> the Supreme Court clarified the type of culpability necessary to support a rule 10b-5 cause of action: "mere negligence" was found to be insufficient;<sup>117</sup> rather, sci-

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vania law contains the same salient features which persuaded Chief Judge Seitz as to the applicability of the New Jersey statute in *Magnetic Metals* and, in addition, provides a remedy for both buyers and sellers. For a comparison of the Pennsylvania and New Jersey statutes, see notes 79 & 107 and accompanying text *supra*.

113. See notes 85-88 and accompanying text *supra*. By rejecting the applicability of the New Jersey blue sky statute because it does not provide a remedy for sellers, Judge Gibbons avoided further comparison between the federal and state securities laws and did not have to discuss the state's policy of repose under the blue sky laws. If Judge Gibbons' approach is adopted, a more detailed resemblance analysis will be necessary to determine the applicability of the Pennsylvania blue sky statute in that, because §§ 1-501(a)-(b) of the Pennsylvania statute provide a remedy for both buyer and seller, they are not as readily distinguishable from rule 10b-5 as is the New Jersey statute. See note 107 and accompanying text *supra*.

114. See 611 F.2d at 459 (Sloviter, J., concurring) (rejecting the blue sky statute on the ground that it provided no remedy for sellers).

115. *Id.* at 461 (Seitz, C.J., dissenting), citing *Morris v. Stifel, Nicolaus & Co.*, 600 F.2d 139, 144-46 (8th Cir. 1979) (absence of scienter requirement in blue sky law does not require rejection of blue sky limitations period).

116. 425 U.S. 185 (1976).

117. *Id.* at 214.

enter, defined by the court as an "intent to deceive, manipulate, or defraud," is required.<sup>118</sup> Although the *Hochfelder* court declined to decide whether recklessness was sufficient,<sup>119</sup> the Third Circuit has subsequently imposed liability under section 10(b) and rule 10b-5 for reckless conduct.<sup>120</sup>

Since no reported Pennsylvania appellate decision has yet considered, let alone charted, the elements of a blue sky cause of action under the somewhat opaque provisions of the 1972 Act, it is impossible to state definitively whether the Pennsylvania state courts would similarly require scienter, or whether they would construe the act as providing a broad remedy for negligence. The statutory language, however, strongly suggests that the 1972 Act contemplates actions for negligence.<sup>121</sup> Admittedly, the language of section 401 is virtually identical to that of rule 10b-5,<sup>122</sup> suggesting, at first glance, that the state legislators intended to provide relief coextensive with that afforded by the federal provision.<sup>123</sup> More careful consideration, however, reveals that unlike the federal scheme where the private cause

118. *Id.* at 193.

119. *Id.* at 193 n.12.

120. See, e.g., *McLean v. Alexander*, 599 F.2d 1190, 1197 (3d Cir. 1979); *Coleco Indus., Inc. v. Berman*, 567 F.2d 569, 574 (3d Cir. 1977); *Sharp v. Coopers & Lybrand*, 457 F. Supp. 879, 888-89 (E.D. Pa. 1978); *Walsh v. Butcher & Sherrerd*, 452 F. Supp. 80, 85 (E.D. Pa. 1978).

121. See PA. STAT. ANN. tit. 70, § 1-401 (Purdon Supp. 1979-1980). For the text of § 401, see note 27 *supra*. Interestingly, the New Jersey blue sky statute considered, and rejected, in *Magnetic Metals*, unlike Pennsylvania's and most other states' blue sky statutes, requires scienter as an element of the cause of action. See N.J. STAT. ANN. § 49:3-71(a)(2) (West 1970). The New Jersey statute provides in pertinent part that "the person buying the security must sustain the burden of proof that the seller *knew* of the untruth or omission and *intended to deceive* the buyer." *Id.* (emphasis added). For a discussion of whether the Pennsylvania securities statute requires scienter, see notes 122-29 and accompanying text *infra*. For a discussion of the applicable policy of repose, see notes 130-32 and accompanying text *infra*.

While no Pennsylvania appellate court has considered the impact of the 1972 Act upon the statute of limitations controversy, the lower court opinion in *Brown v. Erie Compressor Co.*, 59 Erie 134 (C.P. Erie Co. 1976), contains observations on the 1972 Act antifraud remedies. In finding recklessness to be a sufficient predicate to liability, the *Brown* court emphasized § 401 and its similarity to rule 10b-5 rather than § 501 and its similarity to § 12(2). *Id.* at 136-37. Similarly, the courts in *Lord v. E.F. Hutton & Co.*, No. 79-3573 E.D. Pa. July 3, 1980) and *Hoover v. E.F. Hutton & Co.*, [1980] FED. SEC. L. REP. (CCH) ¶ 97,654 (E.D. Pa. June 24, 1980), addressed the privity element of the 1972 Act antifraud remedy. See note 109 *supra*. In addition to the lack of definitive interpretation of the elements of the antifraud remedy, including whether scienter is a requisite to recovery, there is no reported decisional law on which limitations period applies to fraud. See note 26 *supra*. These uncertainties complicate any attempt at "matching", notwithstanding the apparently limited degree to which the resemblance approach borrows from state law. See note 88 *supra*.

122. Compare 17 C.F.R. § 240.10b-5 (1977) with PA. STAT. ANN. tit. 70, § 1-401 (Purdon Supp. 1979-80). For the text of these provisions, see notes 2 & 27 *supra*.

123. Cf. *Burstein v. Rolling Hills of Ocala, Ltd.*, No. 78-2869, slip op. at 2 (E.D. Pa. June 24, 1979) (state remedy bearing closest resemblance to rule 10b-5 is that afforded by Pennsylvania Securities Act of 1972); *Bronstein v. Bronstein*, No. 75-2336, slip op. at 3 (E.D. Pa. May 13, 1976) (action under § 401 of the 1972 Act most closely resembles federal cause of action under rule 10b-5).

of action is judicially implied, Pennsylvania has expressly created a private right in a separate provision from that which proscribes the unlawful conduct.<sup>124</sup> Civil liability, imposed under section 501,<sup>125</sup> rather than section 401, of the 1972 Act arguably sounds in negligence since a defendant will be liable if he is not able to "sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of the untruth or omission."<sup>126</sup>

A further clue as to how the Pennsylvania state courts will interpret the 1972 Act is found in the directions provided by the legislature suggesting that the Act be construed so as to effectuate uniformity among those states which adopt the Uniform Securities Act.<sup>127</sup> More than half of the states have adopted the Uniform Securities Act<sup>128</sup> and the great majority of jurisdictions which have considered the question have decided that their respective state acts permit recovery for negligent conduct.<sup>129</sup>

124. See notes 125-26 and accompanying text *infra*. Under the Pennsylvania scheme, liability is imposed under § 401 of the 1972 Act while the private right of action for its enforcement is provided, and limited, by § 501. See *Hoover v. E.F. Hutton & Co.*, [1980] FED. SEC. L. REP. (CCH) ¶ 97,654 (E.D. Pa. June 24, 1980); note 109 *supra*. See also *Lord v. E.F. Hutton & Co.*, No. 79-3573 (E.D. Pa. July 3, 1980).

125. PA. STAT. ANN. tit. 70, § 1-501 (Purdon Supp. 1979-1980). For the text of § 501(a), see note 107 *supra*.

126. PA. STAT. ANN. tit. 70, § 1-501 (Purdon Supp. 1979-1980).

127. *Id.* § 1-703(a).

128. Martin, *supra* note 11, at 454 n.77.

129. See, e.g., *Alton Box Bd. Co. v. Goldman, Sachs & Co.*, 560 F.2d 916 (8th Cir. 1977); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402 (2d Cir. 1975); *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970); *Lane v. Midwest Bancshares Corp.*, 337 F. Supp. 1200 (D. Ark. 1972). Many state blue sky remedy provisions are fashioned after § 410(a) of the Uniform Securities Act. See, e.g., ALA. CODE § 8-6-19 (1975); ARK. STAT. ANN. § 67-1256 (1947); KAN. STAT. ANN. § 17-1268 (Supp. 1975); KY. REV. STAT. § 292.480 (1970); N.J. REV. STAT. § 49:3-71 (1937); OKLA. STAT. ANN. tit. 71, § 408 (West 1971); WASH. REV. CODE § 21.20.430 (1974). Section 410(a) is, in turn, modeled after § 12(2) of the 1933 Act. 3 L. LOSS, SECURITIES REGULATION 1643 (2d ed. 1961). See *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 472 F. Supp. 402, 405 n.6 (D. Colo. 1979). Section 12(2) imposes liability for negligence. See *Ernst & Ernst v. Hochfelder*, 425 U.S. at 208-09. Section 501 of the 1972 Act is based upon § 401(a) of the uniform Securities Act. The 1972 Act provision, however, was altered to provide a remedy to both a seller and a purchaser and, unlike the Uniform Act whose antifraud remedy is exclusively criminal, see *IDS Progressive Fund, Inc. v. First of Mich. Corp.*, 553 F.2d 340, 343 (6th Cir. 1976), specifically incorporates its antifraud provisions by reference in its private enforcement provisions. See Comment, *supra* note 26, at 76.

In view of their § 12(2) ancestry, it is not surprising that blue sky statutes do not generally require intent to mislead or actual knowledge of falsity. Martin, *supra* note 11, at 446 & n.27. See 3 A. BROMBERG & L. LOWENFELS, SECURITIES LAW AND COMMODITIES FRAUD § 8.4, at 204.1 (1979). Even subsequent to *Hochfelder*, a number of courts have construed state blue sky statutes, modeled upon the federal antifraud language of rule 10b-5, as not requiring intent. See *Felts v. National Acct. Sys. Ass'n, Inc.*, 469 F. Supp. 54 (N. D. Miss. 1978); *Plunkett v. San Francisco*, 430 F. Supp. 235 (N.D. Ga. 1977); *People v. Terranova*, 38 Colo. App. 476, 563 P.2d 363 (1977).

Thus, insofar as the § 703 legislative dictate of uniformity is determinative, a negligence approach is applicable. However, § 703 also reflects the express legislative policy that the 1972 Act be interpreted to coordinate with related federal regulation. See PA. STAT. ANN. tit. 70, §

Following a “matching” approach, and assuming that the 1972 Act is construed as providing an action for negligent securities misconduct—in contrast to the federal remedy which, it has been definitively determined, does not—federal actions should arguably be governed by the general fraud statute and not by the shorter blue sky limitations period.<sup>130</sup> While there is no clear equivalence between the elements of either common law fraud or blue sky misconduct and that conduct prohibited under rule 10b-5, it has been held that reckless conduct, sufficient for a rule 10b-5 action in the Third Circuit, “comes closer to being a lesser form of intent than merely a greater degree of ordinary negligence.”<sup>131</sup> If culpability is the determinative factor in “matching” the federal and state statutes, it would appear that the general fraud statute would most resemble rule 10b-5 and

1-703(a) (Purdon Supp. 1979-1980). The *Hochfelder* scienter standard required under federal law would, therefore, arguably suggest that the Pennsylvania statute be interpreted as requiring scienter. See text accompanying note 127 *supra*.

130. See PA. STAT. ANN. tit. 70, § 1-506 (Purdon Supp. 1979-1980). The “savings clause” provided in § 506 establishes that the 1972 Act was not intended to supersede or displace existing remedies: “Nothing in this act shall limit any liability which might exist by virtue of any other statute or under common law if this act were not in effect.” *Id.* Arguably, application of the blue sky limitations period to rule 10b-5 securities fraud claims would curtail a cause of action otherwise governed by the longer fraud limitations period, an application disclaimed by the 1972 Act.

131. *Cook v. Avien, Inc.*, 573 F.2d 685, 692 (1st Cir. 1979), quoting *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir. 1977). The scienter required for fraud actions in Pennsylvania appears to be similar to the Third Circuit’s interpretation of scienter for purposes of rule 10b-5. Cf. *Shane v. Hoffman*, 227 Pa. Super. Ct. 176, 182, 324 A.2d 532, 536 (1974) (requiring actual knowledge or reckless ignorance of falsity). The Third Circuit has also expanded the *Hochfelder* definition of scienter to include recklessness. See notes 119-20 and accompanying text *supra*. For general discussions of the level of scienter required for general fraud actions, see W. PROSSER, LAW OF TORTS § 107 (4th ed. 1971); Keeton, *Fraud: The Necessity for an Intent to Deceive*, 5 U.C.L.A. L. REV. 583, 588-92 (1958).

Significantly, however, the elements of a tort cause of action for deceit in Pennsylvania may be more restrictive than those of the antifraud provisions contained in the federal securities laws. The black letter elements of a deceit action in Pennsylvania are: “(1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention that another person will thereby be induced to act, or to refrain from acting; (4) justifiable reliance by the recipient; and (5) damage to the recipient.” *United States Gypsum Co. v. Schiavo Bros., Inc.*, 450 F. Supp. 1291, 1312 (E.D. Pa. 1978). See *Savitz v. Weinstein*, 395 Pa. 173, 178, 149 A.2d 110, 113 (1959); *Newman v. Corn Exch. Nat’l Bank & Trust Co.*, 356 Pa. 442, 450, 51 A.2d 759, 763 (1947).

In contrast, the federal securities laws have been deemed to cover all varieties of securities fraud. For example, the Second Circuit has stated “that § 10(b) and rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase and sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception.” *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967) (emphasis added). Thus, for example, various non-representational types of conduct embraced under the federal statute may be excluded from the reach of the common law fraud remedy. So, too, a rule 10b-5 plaintiff need not prove reliance. *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) (reliance is presumed from a showing of materiality). As the Fifth Circuit has observed, rule 10b-5 “greatly expands the protection frequently so hemmed in by the traditional concepts of common law misrepresentation and deceit.” *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195, 201 (5th Cir. 1960). See also *Ruder*, *supra* note 4, at 650-51.

the longer statute of limitations would most accurately reflect the state's policy of repose with respect to the claim.

However, many, if not a majority, of the federal courts considering blue sky statutes which allow an action in negligence have rejected the contention that intent is of primary importance in finding a resemblance between the state and federal securities laws.<sup>132</sup> Applying the blue sky limitations period despite the fact that the standards of culpability may differ, at least one such court has reasoned that the most appropriate source of a limitations provision is nevertheless the statutory scheme which addresses the same conduct and has as its purpose the regulation of the same evils:

Although scienter is now required as an element of a 10b-5 offense, it is only partially relevant to picking the appropriate limitations period. The presence or absence of negligence as a permissible element in an offense seems unrelated to the limitations question in a situation where there is a State statute clearly resembling the federal policy and containing a limitation's [*sic*] period which, on the basis of this resemblance, is thereby more compelling.<sup>133</sup>

Chief Judge Seitz adhered to this view in his *Magnetic Metals* dissent and applied a topical test of resemblance:

Where a state statute of limitations is a part of a regulatory scheme that is addressed to misinformation in the sale of securities and uses similar federal statutes as its model, then the claims covered by that statute of limitations are more analogous to rule 10b-5 than are those falling under a catch-all provision that has slowly evolved to cover a wide variety of disparate conduct. To give decisive weight to the presence or absence of particular elements of a cause of action misperceives the function of analogy in this context, which is to find proximity not congruity.<sup>134</sup>

132. See, e.g., *Morris v. Stifel, Nicolaus & Co.*, 600 F.2d 139, 144-46 (8th Cir. 1979); *Dupuy v. Dupuy*, 551 F.2d 1005, 1023 n.31 (5th Cir.), cert. denied, 434 U.S. 911 (1977); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 414 (D.C. Cir. 1977); *O'Hara v. Kovens*, 473 F. Supp. 1161, 1165 (D. Md. 1979), *aff'd* 625 F.2d 15 (4th Cir. 1980).

133. *O'Hara v. Kovens*, 473 F. Supp. 1161, 1165 (D. Md. 1979), *aff'd*, 625 F.2d 15 (4th Cir. 1980). The statutes which govern fraud are, in most instances, "catch alls" embracing a wide variety of conduct. *Martin*, *supra* note 11, at 457 n.100. As was the case with its predecessor, Pennsylvania's current statute of limitations governing fraud is not even limited to actions for fraud, controlling "any civil action or preceeding which is [not] subject to another limitation specified in this subchapter." 42 PA. CONS. STAT. ANN. § 5527(6) (Purdon 1979). Prior to the present codification, this was clearly true. See note 26 *supra*.

Interestingly, the lower courts in Pennsylvania appear to have followed the "topical" approach, and accorded little weight to the scienter issue, since the authorities both prior and subsequent to *Hochfelder* express their preference for the blue sky statute, notwithstanding the "negligence" remedy afforded by § 501. Indeed, none of the cases appear to make a matching of the requisite levels of culpability an issue for extended analysis. See notes 37-73 and accompanying text *supra*.

134. 611 F.2d at 462 (Seitz, C.J., dissenting).

*B. The Conflict Between the Blue Sky Outside  
Limitation and Federal Equitable Tolling*

A potential difficulty created by the use of the Pennsylvania blue sky limitations period not faced by the *Magnetic Metals* court is the conflict between the state's two-tiered, one-year/three-year provision<sup>135</sup> and the federal equitable tolling doctrine.<sup>136</sup> The state blue sky limitation bars suit after the *shorter of* the one-year period from the date of discovery of the fraud or the three-year period from the date of the transaction.<sup>137</sup> Under the 1972 Act, therefore, if a securities fraud is discovered more than three years after the transaction, the Pennsylvania statute will have run notwithstanding the fact that the plaintiff may have commenced suit within one year of discovering the fraud. Applying federal principles of equitable tolling, however, the period of limitations would not begin to run until the fraud was or could have been discovered.<sup>138</sup>

Thus, a plaintiff who initiates suit in federal court more than three years after the questioned transaction, but within one year of the time when, by reasonable diligence, the fraud could have been discovered, would be able to pursue a federal remedy even though he would be time barred from pursuing a similar action in state court under the blue sky laws.<sup>139</sup> Although not having to discuss this precise asymmetry with regard to the New Jersey securities laws, the *Magnetic Metals* majority did refuse to apply the limitations period of a blue sky law which would not have governed the plaintiff's suit in state court.<sup>140</sup>

The Ninth Circuit, in *United California Bank v. Salik*,<sup>141</sup> resolved a conflict between a similar two-tiered state blue sky limitations period and the federal equitable tolling principles by adopting the longer statute of limitations of the state fraud statute.<sup>142</sup> The *Salik*

135. See notes 29-30 and accompanying text *supra*. The New Jersey statute involved in *Magnetic Metals* provided a flat two years. See note 80 *supra*.

136. See notes 44-48 and accompanying text *supra*.

137. PA. STAT. ANN. tit. 70, § 1-504(b) (Purdon Supp. 1979-1980).

138. See 5A A. JACOBS, *supra* note 6, at § 235.03; Note, *supra* note 44; notes 29-30 & 42-44 and accompanying text *supra*.

139. Martin, *supra* note 11, at 458; Note, *supra* note 22, at 960. See also Vanderboom v. Sexton, 422 F.2d 1233, 1240 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970) (without equitable tolling, suit barred in state court although still actionable in federal court).

140. See 611 F.2d at 453.

141. 481 F.2d 1012 (9th Cir.), *cert. denied*, 414 U.S. 1004 (1973).

142. 481 F.2d at 1015. The California blue sky statute required suit to be brought within one year of discovery of the fraud, but in no event more than four years after the transaction. CAL. CORP. CODE § 25506 (West Supp. 1980). As in Pennsylvania, California had, for many years, applied the limitations period of its general fraud statute to actions under rule 10b-5. See, e.g., Hecht v. Harris, Upham & Co., 430 F.2d 1202, 1210 (9th Cir. 1970); Sackett v. Beaman, 399



court noted that federal law determines the accrual date of the rule 10b-5 cause of action and that, under the "equitable tolling" doctrine, the limitations does not begin to run until the plaintiff obtains knowledge, or should have obtained knowledge, of the fraud.<sup>143</sup> Recognizing that the application of federal law to determine the accrual date of the federal cause of action would effectively read out the four-year outside limit in the California blue sky statute,<sup>144</sup> the Ninth Circuit found that use of the general fraud statute of limitations was preferable to judicial modification of the blue sky limitations period.<sup>145</sup> Declining to judicially amend the state blue sky statute by eliminating that portion offensive to federal tolling principles, the *Salik* court commented: "[P]iecemeal adoption of the new [securities] statute is hardly preferable to continued utilization of the older fraud statutes. Therefore, . . . we adhere to our prior decisions . . . and hold that [the general fraud statute of limitations] is the statute applicable to section 10(b) actions in California."<sup>146</sup>

The Ninth Circuit avoided this knotty problem by ignoring the blue sky statute and applying the California fraud statute of limitations. Other courts have simply disregarded the outside date prescribed by the statute.<sup>147</sup> The third alternative—use of the blue sky statute's three year provision as the appropriate period of limitations—is without precedent although the issue was presented to District Judge Weiner of the Eastern District of Pennsylvania, who, when confronted with the lack of symmetry between the tolling of the state and federal securities statutes and the Ninth Circuit's resolution of the conflict, maintained that the blue sky statute of limitations applies to rule 10b-5 actions but emphasized that he had not ad-

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F.2d 884, 890 (9th Cir. 1968); *Turner v. Lunquist*, 377 F.2d 44, 46 (9th Cir. 1967). The California legislature then amended the state securities law, providing a statute of limitations for the blue sky rule 10b-5 analog. See CAL. CORP. CODE § 25506 (West Supp. 1980) (original version at 1968 CAL. STATS. 282, ch. 88, § 2 (1969)).

The two-tiered statute of limitations departs from that provided in § 410(e) of the Uniform Securities Act which establishes a two-year period. Martin, *supra* note 11, at 446 n.28. Only nine of the 44 states which have enacted express limitations periods applicable to blue sky actions have adopted the two-tiered configuration. See 1 BLUE SKY L. REP. (CCH) ¶¶ 3861-95 (1980). See note 164 *infra*. Because Pennsylvania and California are among the few states which share the two-tiered statute of limitations, the *Salik* court's reasoning is particularly instructive. For a detailed discussion of the *Salik* court's decision, see Note, *supra* note 22.

143. 481 F.2d at 1015.

144. *Id.*

145. *Id.* The *Salik* court observed: "To obviate [the] inconsistency [between the state outside limitation and] federal policy, we could judicially amend the California statute by eliminating the four-year maximum. Alternatively, we could eliminate the one-year provision but amend the four-year provision to commence upon discovery." *Id.*

146. *Id.*

147. *Turner v. First Wis. Mort. Trust*, 454 F. Supp. 899 (E.D. Wis. 1978); *Kramer v. Loewl & Co.*, 357 F. Supp. 83, 87 (E.D. Wis. 1973).

dressed himself to the interplay between the three-year outside limitation and the federal tolling doctrine.<sup>148</sup> As one commentator has stated, in the event the blue sky provision were selected

an argument might then be made for the Blue Sky limitation to be applied as a three-year statute, based upon the usual shortness of the one-year limit, the dicta of the *Salik* court that it could have applied California's Blue Sky limitation as a four year statute, and the way courts have treated limitations that were worded as a fixed number of years commencing from the date of the transaction.<sup>149</sup>

It might be argued that federal example indicates that the federal tolling doctrine need not be a concern in limiting rule 10b-5 actions. Section 13 of the Securities Act of 1933,<sup>150</sup> which governs the remedy afforded purchasers for oral misrepresentation or false statements in a prospectus,<sup>151</sup> provides a one- and three-year limitation provision virtually identical to that of the Pennsylvania blue sky law.<sup>152</sup> The equitable tolling doctrine, however, has been found to have been statutorily precluded by the three-year outside limitation period of section 13.<sup>153</sup>

A similar construction of rule 10b-5, however, is arguably unwarranted. The refusal of the federal courts to apply the equitable tolling doctrine to causes of action governed by section 13 is the result of their conclusion that Congress, by explicitly providing a contrary provision, had intended the cut-off date to be applied regardless of the

148. See *Guarantee Bank v. Laventhol, Krekstein, Horwath & Horwath*, No. 75-1842 (E.D. Pa. Oct. 3, 1975). No other case has addressed this issue. For a discussion of *Guarantee Bank's* treatment of the problem, see notes 67-69 and accompanying text *supra*.

149. Comment, *supra* note 26, at 86.

150. 15 U.S.C. § 77m (1976).

151. *Id.* § 77l(2).

152. See *id.* § 77m. Section 13 provides:

No action shall be maintained to enforce any liability created under section 77k or 77l(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(2) of this title more than three years after the sale.

*Id.* Pennsylvania's two-tiered limitations provision appears to have been lifted substantially *in haec verba* from § 13. See PA. STAT. ANN. tit. 70, § 1-504(a) (Purdon Supp. 1979-1980). For the pertinent text of § 504(a), see note 29 *supra*.

153. A. BROMBERG & L. LOWENFELS, *supra* note 129, § 8.4, at 204.15; 5A A. JACOBS, *supra* note 6, § 3.01(b) n.15.01. Except where the defendant's active concealment creates an estoppel, the federal tolling doctrine is unavailable in § 12(2) cases. *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1055 (2d Cir. 1969) (estoppel to plead the statute may be an exception to the hard and fast rule); *Bowers v. Adam Management Corp.*, No. 78-3898 (E.D. Pa. Nov. 26, 1979); *In re Resources Co. Sec. Litigation*, 420 F. Supp. 610, 619 (D. Colo. 1976).

time of discovery.<sup>154</sup> It is unlikely, however, that Congress intended to prevent litigants suing under section 10(b) and rule 10b-5 in Pennsylvania, and in the five other states which have similar two-tiered statutes of limitations,<sup>155</sup> from enjoying the advantages of equitable tolling while litigants elsewhere could claim its benefits.<sup>156</sup>

### C. The Absorption Doctrine Promotes Neither Uniformity Nor Symmetry

In the absence of a controlling and uniform federal statute of limitations, courts have been instructed to look to comparable state statutes.<sup>157</sup> Because the state legislatures have adopted different statutes of limitations depending upon their individual policy judgments concerning repose, the absorption doctrine makes it impossible to obtain uniform results in the federal courts.<sup>158</sup> Unfortunately, such a situation encourages forum shopping.

It has long been considered desirable to eliminate forum shopping so as to prevent the choice of forum from dictating the result in a case.<sup>159</sup> It is especially desirable in securities litigation to try to eliminate forum shopping, since the provisions of the securities laws allowing nationwide service of process and broad venue will usually give plaintiff's counsel a wide variety of forums from which to choose.<sup>160</sup> Moreover, even if the defendant successfully moves for a

154. See *Brick v. Dominion Mort. & Realty Trust*, 442 F.Supp. 283, 291 (W.D.N.Y. 1977); *Martin*, *supra* note 11, at 453.

155. See *Martin*, *supra* note 11, at 456 n.93.

156. Most of the 30 or so states adopting the Uniform Securities Act follow the Act's outside limitation period of two years from the date of the transaction. See *Note*, *supra* note 22, at 961 n.82. See also note 19 *supra*.

157. See notes 7-13 and accompanying text *supra*.

158. See, e.g., MD., CORP. & ASS'NS CODE ANN. § 11-703 (1976) (blue sky limitation for fraud is one year after discovery); MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1976) (three-year limitation on common law fraud action); OHIO REV. CODE ANN. § 1707.41 (Page 1978) (blue sky limitation for fraud is two years); *id.* § 2305.09 (four-year limitation for common law fraud).

159. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1939).

160. See 15 U.S.C. § 78aa (1976). Section 27 of the 1934 Act allows extremely wide venue for plaintiffs asserting securities violations. *Id.* While the effects of an inconvenient forum may be mitigated by the defendant's ability to change venue, 28 U.S.C. § 1404(a), at least in non-class action cases, courts recognize that the liberal venue provisions of the securities acts militate against disturbing the plaintiff's choice of forum. See, e.g., *Altman v. Deramus*, 342 F. Supp. 72, 77 (S.D.N.Y. 1972); *Herbst v. Able*, 278 F. Supp. 644, 666 (S.D.N.Y. 1967); *Zorn v. Anderson*, 263 F. Supp. 745, 749 (S.D.N.Y. 1966); *Ferguson v. Ford Motor Co.*, 89 F. Supp. 45 (S.D.N.Y.), *appeal dismissed sub nom.* *Ford Motor Co. v. Ryan*, 182 F.2d 329, 330 (2d Cir.), *cert. denied*, 340 U.S. 851 (1950). *But see* *Freiman v. Texas Gulf Sulphur Co.*, 38 F.R.D. 336, 339 (N.D. Ill. 1965). See generally *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

transfer, present case law allows the plaintiff to take advantage of the limitations period of the original forum.<sup>161</sup>

New Jersey and, apparently, Pennsylvania presently apply six-year statutes of limitations to actions for general fraud<sup>162</sup> and, to the extent that regional conformity is desirable, adoption of the general fraud limitations period might achieve a measure of uniformity. However, in view of the widespread adoption of the Uniform Securities Act,<sup>163</sup> greater uniformity might result if, for all jurisdictions, the federal courts applied the applicable blue sky limitations period of the forum state.<sup>164</sup>

Not only does the absorption doctrine defeat the achievement of uniformity among the states, but it also promotes a lack of symmetry within a jurisdiction. As illustrated in *Magnetic Metals*, the remedies afforded by the blue sky and federal statutes are often not parallel,<sup>165</sup> so that plaintiffs suing under the same federal statute may be subjected to different state statutes of limitations depending upon whether they are buyers or sellers and upon the nature of the claim. For example, as *Magnetic Metals* suggests, in those jurisdictions in

161. See, e.g., *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Sargent v. Genesco, Inc.*, 492 F.2d 750, 758-59 (5th Cir. 1974); *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652-53 (2d Cir. 1962), cert. denied, 372 U.S. 928 (1963); *In re Clinton Oil Co. Sec. Litigation*, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,015, at 91,567 (D. Kan. 1977); *Blumenthal v. Great Am. Mort. Investors, No. C76-10A*, slip op. at 3 (N.D. Ga. June 2, 1976); *Corey v. Bache & Co.*, 355 F. Supp. 1123, 1125 (S.D. W. Va. 1973); *Lamb v. United Sec. Life Co.*, 59 F.R.D. 44, 46 (S.D. Iowa 1973). At least one recent decision has held that the dismissal of a suit on the ground that the statute of limitations has run bars a second action on the same claim in a different forum having a more liberal limitations statute. *Wachovia Bank & Trust Co. v. Randell*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,771 (S.D.N.Y.).

162. N.J. STAT. ANN. § 2A:14-1 (Supp. 1979-1980); 42 PA. CONS. STAT. ANN. § 5527(6) (Purdon 1979). *Contra*, DEL. CODE ANN. tit. 10, § 8106 (Supp. 1978) (three-year limitations period for actions for deceit).

163. See notes 19 & 154 *supra*.

164. With some exceptions, notably Pennsylvania and California, those states which have adopted the Uniform Securities Act have also adopted its two-year statute of limitations. *Id.* For a brief discussion of Pennsylvania's and California's atypical blue sky statutes of limitations, see note 142 *supra*. The other exceptions are as follows: ARK. STAT. ANN. § 67-1256 (1966) (five years from date of contract of sale); IDAHO CODE § 30-1446 (1967) (three years after contract of sale); ILL. REV. STAT. § 137.13 (Smith-Hurd 1960) (three years from date of sale); IOWA CODE ANN. § 502.504(2) (West Supp. 1979) (shorter of two years after discovery of five years after sale); IND. CODE § 23-2-1-19 (1979) (three years after discovery); KY. REV. STAT. ANN. § 292.480 (Baldwin 1970) (three years after sale); MD. CORP. & ASS'NS CODE ANN. § 11-703 (1975) (one year after discovery); N.D. CENT. CODE § 10-04-17 (1960) (three years after contract date or one year after discovery); OHIO REV. CODE ANN. § 1707.41 (Page 1978) (shorter of two years after discovery or four years after purchase); OKLA. STAT. ANN. tit. 71, § 408 (West 1971) (three years after sale or two years after discovery); TENN. CODE ANN. § 48-16-122 (Supp. 1979) (shorter of two years after transaction or one year after discovery); TEX. REV. CIV. STAT. ANN. art. 581-33 (Vernon Supp. 1980) (five years after sale or three years after discovery); WASH. REV. CODE § 21.20.430 (1976) (three years after contract date or discovery); W. VA. CODE § 32-4-410 (Supp. 1980) (three years after sale); WIS. STAT. ANN. § 551.59 (West 1977) (shorter of three years after sale or one year after discovery).

165. See notes 89 & 96 and accompanying text *supra*.

which the blue sky law provides a cause of action only for buyers but does not preclude sellers from pursuing other remedies, a defrauded seller suing in federal court may have the benefit of a longer fraud statute of limitations period, whereas a defrauded buyer, seeking to redress the identical wrong, might be limited to a shorter blue sky period of limitations.<sup>166</sup> Of lesser importance, but nevertheless contributing to the lack of symmetry between plaintiffs' and defendants' remedies for securities fraud, are the federal tolling principles which may result in a situation where claims brought in state courts under blue sky laws might be time-barred, whereas the same claims brought in federal court under rule 10b-5 might yet be viable.<sup>167</sup> The real problem is that selection of a statute of limitations should be governed by federal policy considerations, including that of uniformity, while the absorption doctrine forces the courts to look to what are largely irrelevant factors.<sup>168</sup>

#### D. In Search of Federal Policy

The courts and commentators are in agreement that federal policy should control the resolution of the limitations issue.<sup>169</sup> They disagree, however, on which policy considerations are relevant, what the substantive policy is, and what place these considerations should occupy in the final analysis.<sup>170</sup> Like Ceasar's wife, "policy" in this context means "all things to all men."

166. See text accompanying notes 89-90 *supra*. Other courts have been willing to allow what the defendants in *Magnetic Metals* termed "disorderly applications of the securities laws" and apply different limitations provisions for buyers and sellers. See, e.g., *Kirk v. First Nat'l Bank*, 439 F. Supp. 1141, 1146 (M.D. Ga. 1977); *Rude v. Campbell Square*, [1976] FED. SEC. L. REP. (CCH) ¶ 95,691 (D.S.C.); *Toledo Trust Co. v. Nye*, 392 F. Supp. 484, 491 (N.D. Ohio 1975). See also note 109 *supra*. Interestingly, in many ways the cases raising the issue of the applicable statute of limitations for buyers in New Jersey, and for all plaintiffs in Pennsylvania (with the possible exception of brokerage customers), present the same question for decision since the blue sky statute would be applicable to either. The *Magnetic Metals* court, however, left the question of the limitations period applicable to buyers for another day.

167. See notes 135-39 and accompanying text *supra*.

168. Martin, *supra* note 11, at 454. As one commentator has suggested:

The principal difficulty with the resemblance test is not, however, in its application, but in the fact that it has little, if anything, to do with 10b-5. Statutes of limitations are a significant part of the legal rules which determine the outcome of litigation. The fact that a state legislature may deem it appropriate to provide a one year or ten year statute of limitations for an action "resembling" an action implied under Section 10(b) tells us nothing about whether the Federal policy of that Section requires a short or long term period of limitations. This question must be answered by reference to the Act itself.

*Id.* (footnotes omitted).

169. See, e.g., *Roberts v. Magnetic Metals Co.*, 611 F.2d at 458 (Sloviter, J., concurring); *Charney v. Thomas*, 372 F.2d 97, 100 (6th Cir. 1967); Martin, *supra* note 11, at 447, 454; Schulman, *supra* note 8, at 641.

170. See Schulman, *supra* note 8, at 641. For example, two contrary substantive theories have been advanced in defining the rule 10b-5 claim. *Id.* One requires proof of fraud while the other imposes strict liability for any misstatement or omission. *Id.*

In analyzing the federal policy considerations in the limitations area, it is important to note that Congress supplied an express limitations period wherever it expressly created civil liability.<sup>171</sup> Congress was deeply concerned about the limitations question and drafted these provisions with great care.<sup>172</sup> Therefore, these express limitations periods reflect a considered federal policy of repose for private causes of action under the securities acts. Significantly, all of the federal limitations periods are uniformly short.<sup>173</sup> Moreover, the provisions are not limited to actions for negligence or strict liability, having been provided for actions involving fraud as well.<sup>174</sup> Thus, as one commentator has remarked, absorption of state law would appear to be both unnecessary and contrary to federal policy: "As a result of the clear expression of Congressional policy on the subject, it would seem to one innocent of current learning that the search for a limitations period in 10b-5 actions should be short-lived and satisfactorily terminated by adoption of the periods provided in the express liability sections."<sup>175</sup>

One federal court was similarly prompted to comment that "common sense and logic dictate that application of the period of limitation contained in the 1933 and 1934 Acts to 10b-5 claims would be preferable as a matter of Federal Securities Law policy."<sup>176</sup> That court, however, declined to adopt this approach, observing Judge Learned Hand's admonition that "it is not 'desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time but whose birth is distant.'"<sup>177</sup>

Admittedly, the federal courts have refused to apply the federal statutes of limitations in other sections of the securities acts to private actions under rule 10b-5, choosing, instead, among the state stat-

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171. See note 11 and accompanying text *supra*.

172. See Martin, *supra* note 11, at 455; Ruder, *supra* note 4, at 650, 681; Schulman, *supra* note 8, 637.

173. Compare 15 U.S.C. § 77m (§ 13 of the 1933 Act, governing §§ 11 and 12(2) and *id.* §§ 78i(e), 78r(c), 78cc(b) (1934 Act) (one and three-year limitations periods) with *id.* § 78p(b) (1934 Act) (two-year limitations period). See generally Roberts v. Magnetic Metals Co., 611 F.2d at 463 (Seitz, C.J., dissenting); Martin, *supra* note 11, at 455; Ruder, *supra* note 4, at 680; Schulman, *supra* note 8, at 637-38.

174. See note 11 *supra*.

175. Schulman, *supra* note 8, at 638. See also Ruder, *supra* note 4, at 680-81.

176. Mittendorf v. J.R. Williston & Beane, Inc., 372 F. Supp. 821, 830 n.4 (S.D.N.Y. 1974). See also Newman v. Prior, 518 F.2d 97, 100 (4th Cir. 1975); 6 L. Loss, *supra* note 129, at 3898-900 (2d ed. Supp. 1969); Ruder & Cross, *Limitations on Civil Liability Under Rule 10b-5*, 1972 DUKE L.J. 1125, 1149-50. Most courts, however, refuse to adopt this position. 5A A. JACOBS, *supra* note 6, § 235.02 n.5.

177. Mittendorf v. J.R. Williston & Beane, Inc., 372 F. Supp. 821, 830 n.4 (S.D.N.Y. 1974), quoting Spector Motor Serv. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944) (L. Hand, J., dissenting). See also Bader v. Fleschner, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,726, at 94,868 n.10 (S.D.N.Y.).

utes.<sup>178</sup> To the extent that consideration of a federal policy is applicable in resolving the absorption problem, however, it is the congressional policy expressed in the limitations provisions of the securities acts—the *federal limitations policy*—which should be relevant. In analogous causes of action where Congress expressly provided for a civil remedy, it expressly provided short statutes of limitations.<sup>179</sup> In almost every instance, the policy of a short limitations period will suggest selection of the state blue sky statute of limitations rather than its fraud counterpart.<sup>180</sup> It is worth noting that, since state securities antifraud legislation enacted in the past twenty years has been patterned after section 12(2) of the 1933 Act<sup>181</sup>—a federal securities antifraud statute—absorption of state statutes of limitations might well result in the backhanded effectuation of a measure of *federal* limitations policy.

Finally, with regard to federal policy, *Hochfelder* may be significant, not only for its interpretation of the elements of a rule 10b-5 cause of action, but also for its elucidation of the Supreme Court's understanding of congressional policy behind the remedy. In this respect, *Hochfelder*, its cousins and progeny, may be the policy polestars which dictate a limitations result consonant with a *restrictive* application of rule 10b-5.<sup>182</sup> Only recently, the Third Circuit cautioned that, in view of recent Supreme Court decisions in the securities area, a liberal approach to securities laws remedies did not appear to be in order: "In interpreting liability provisions of the [securities] acts, we must respect recent Supreme Court teachings that militate

178. The Supreme Court may have foreclosed the alternative of applying the federal statutes of limitations found in the securities acts. See *Ernst & Ernst v. Hochfelder*, 425 U.S. at 210 n.29. Chief Judge Seitz, however, recently indicated that, were he "writing on a clean slate," he would prefer the use of the express federal periods of limitations. *Roberts v. Magnetic Metals Co.*, 611 F.2d at 463 (Seitz, C.J., dissenting).

179. See notes 171-73 and accompanying text *supra*.

180. See note 19 and accompanying text *supra*. Several courts have noted that a short blue sky statute would appear to be most consistent with congressional intent on the precise question of the length of the limitations periods appropriate with respect to securities laws violations. See, e.g., *Fox v. Kane-Miller Corp.*, 542 F.2d 915, 918 (4th Cir. 1976); *Newman v. Prior*, 518 F.2d 97, 100 (4th Cir. 1975). See also *Roberts v. Magnetic Metals Co.*, 611 F.2d at 463 (Seitz, C.J., dissenting). Several commentators support the adoption of the blue sky alternative if use of the federal statute is precluded. See, e.g., 6 L. LOSS, *supra* note 129, at 3902; Martin, *supra* note 11, at 459 & n.105; Schulman, *supra* note 8, at 643 & n.46.

181. See note 129 *supra*. See also *Lord v. E.F. Hutton & Co.*, No. 79-3573 (E.D. Pa. July 3, 1980); *Hoover v. E.F. Hutton & Co.*, [1980] FED. SEC. L. REP. (CCH) ¶ 97,654 (E.D. Pa. June 24, 1980).

182. The *Hochfelder* Court interpreted rule 10b-5 restrictively when it limited causes of action to those involving scienter. See 425 U.S. at 214. For a brief discussion of the Court's holding, see notes 116-18 and accompanying text *supra*.

against excessively expansive readings.”<sup>183</sup> Consequently, a shorter, less indulgent limitations period would appear to be more compatible with a narrow approach to liability.<sup>184</sup>

## V. CONCLUSION

A limitations period is inherently a policy choice. It goes without saying that the problem would be solved if Congress explicitly established a statute of limitations applicable to section 10(b).<sup>185</sup> Similarly, the answer would be clear if the lower federal courts were free to look to the most similar federal statute rather than to state law. This approach is especially appealing where, as in the case of acting under section 10(b) and rule 10b-5, the federal cause of action is judicially implied rather than express, so that it cannot be said that Congress intentionally abdicated setting the limitations period.<sup>186</sup> However, as Chief Judge Seitz noted in *Magnetic Metals*, the lower courts are not writing on a clean slate and can abandon the absorption doctrine only when the Supreme Court so mandates.<sup>187</sup>

183. *Collins v. Signetics Corp.*, 605 F.2d 110, 113 (3d Cir. 1979). Indeed, this warning predated the most recent Supreme Court decisions in which the Court confirmed its reluctance to imply new causes of action in the securities area. See *Transamerica Mort. Inv. Adv. v. Lewis*, 444 U.S. 11 (1979); *Touche, Ross & Co. v. Redington*, 442 U.S. 560 (1979). See generally Friedman, *Implied Remedies Under Rule 10b-5: Are They Only for Defrauded Sellers?* Nat'l L.J., December 10, 1979, at 26; Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings*, 65 GEO. L.J. 891 (1977).

184. Arguably, however, considering the federal securities laws as remedial in nature, a longer statute might best effectuate the legislative purpose. See *United Cal. Bank v. Salik*, 481 F.2d at 1015. See also *Nickels v. Koehler Management Corp.*, 541 F.2d 611, 618 (6th Cir. 1976), cert. denied, 429 U.S. 1074 (1977); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 409 (2d Cir. 1975); *Campito v. McManus*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,874, at 95,573 (N.D.N.Y.). The Supreme Court has, on several occasions, characterized § 10(b) and rule 10b-5 as remedial in nature. See, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972); *Superintendent of Ins. v. Bankers Life and Cas. Co.*, 404 U.S. 6, 12 (1971); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

Moreover, it may be argued that the more extreme the misconduct required to obtain recovery, the longer the limitations period should be and the “lower” the technical barriers to relief. See Martin, *supra* note 11, at 457; Raskin & Enyart, *supra* note 19, at 315 (when only negligent conduct is required, a shorter limitations period is appropriate). In light of the more recent restrictive tendencies of the Supreme Court and the nature of the securities markets, however, neither argument is persuasive. For a brief discussion of the nature of the securities markets with respect to the appropriate period of limitations for securities fraud, see text accompanying note 190 *infra*.

185. See *United Cal. Bank v. Salik*, 481 F.2d at 1015. The *Salik* court observed “that there is no answer that is entirely satisfactory and we doubt any will be forthcoming unless Congress enacts a federal limitations statute specifically applicable to such actions.” *Id.* One commentator suggests that the antitrust laws provide an analog upon which Congress may model a uniform period of limitations. 5A A. JACOBS, *supra* note 6, at § 235.02 & n.109. The proposed ALI Federal Securities Code suggests a two-tiered limitations period of one year after discovery, or five years after sale, as a solution to this problem. ALI FED. SEC. CODE § 1727 (Final Draft 1980).

186. See notes 10-11 and accompanying text *supra*.

187. See 611 F.2d at 456 (Seitz, C.J., dissenting); note 178 and accompanying text *supra*.



Although no choice is problem-free, on balance, the continued adoption of the Pennsylvania blue sky statute of limitations is preferable to application of the general fraud statute. The policy considerations articulated by Chief Judge Seitz are persuasive:

After the plaintiff has notice, there is a strong federal interest in requiring him to file suit quickly. 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. Finally, by quickly bringing matters to a head, the blue sky rule will tend to promote greater stability in the market, a major goal of federal securities regulation. All of these policies are undercut by a rule that permits the plaintiff who has knowledge to wait six years, all the while watching the fate of the corporate enterprise and the concomitant rise and fall in the price of stock.<sup>188</sup>

Application of the shorter limitations period is not unfair to plaintiffs since the equitable tolling doctrine, under which the statute is tolled during the period in which a plaintiff is found to have been disabled from taking action, ensures that a plaintiff will have adequate time in which to bring suit.<sup>189</sup> Furthermore, it is generally easier to discover fraud in securities transactions than in other kinds of transactions since the disclosure requirements of the securities laws promote discovery of wrongdoing, and since the existence of trading markets provide periodic indicia of the value of the investment.<sup>190</sup> So, too, it must be remembered that the primary consideration underlying statutes of limitations is fairness to the defendant, who, at some point, should "be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations," and who should not "be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared.'"<sup>191</sup>

These considerations militate in favor of a short statute. The Supreme Court has noted that "litigation under Rule 10b-5 presents a

188. 611 F.2d at 463 (Seitz, C.J., dissenting) (citation omitted).

189. For a discussion of the federal tolling doctrine, see note 44 and accompanying text *supra*.

190. Martin, *supra* note 11, at 456.

191. Note, *Statutes of Limitation*, 63 HARV. L. REV 1177, 1185 (1950), quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944). This is particularly true in rule 10b-5 litigation since, under *Hochfelder*, liability is cast in terms of "scienter" — a mental state embracing intent to deceive, manipulate or defraud. See notes 116-18 and accompanying text *supra*. Given the emphasis upon state of mind issues, indirect, inferential proof is likely to predominate in a 10b-5 trial. Where such evidence is central, it is appropriate to require suits to be filed as early as possible.

danger of vexatiousness different in degree and kind from that which accompanies litigation in general.”<sup>192</sup> Under such circumstances, it is particularly important to foreclose the assertion of stale claims at an early date. Adoption of the blue sky statutes of limitations is also more conducive to discouraging the untoward, and unfair, effects of forum shopping.

Finally, there is considerable appeal in using as a reference point for the federal statute adopted to redress securities frauds a state statute which was intended to compensate people for wrongs in the same area.<sup>193</sup> If the federal courts continue to follow the absorption doctrine, it is important for them to recognize that the blue sky statutes reflect the legislatures’ best judgment in the regulatory area most comparable to that of the federal right being enforced. On the other hand, a close matching of the various elements of the federal cause of action to various state claims, which may or may not result in the selection of the blue sky statute, could result in a crazy quilt application of statutes of limitations and expose a federal claimant to the vagaries of state law.

Thus, while it is indeed difficult to develop a logical approach to the limitations issue within the illogical framework of the absorption doctrine, we submit that the courts best promote the relevant federal policies and effect a fair and workable guideline by adopting the statute of limitations contained in the comparable area of state securities antifraud legislation.\*

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192. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975).

193. See *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 414 (D.C. Cir. 1977). In *Forrestal*, the court noted the “similarities in purpose and substance” between the blue sky and federal securities antifraud remedies. *Id.* See also *Dupuy v. Dupuy*, 551 F.2d 1005, 1024 n.31 (5th Cir.), *cert. denied*, 434 U.S. 911 (1977); *Vanderboom v. Sexton*, 422 F.2d 1233, 1239-40 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970).

\* *Editor’s Note*: As this article went to press, the Third Circuit issued its opinion in *Biggans v. Bache Halsey Stuart Shields, Inc.*, No. 80-1281 (3d Cir., filed Dec. 31, 1980). In *Biggans*, the plaintiff claimed that the defendant broker’s handling of the plaintiff’s discretionary trading account constituted “churning,” or generating excessive commissions through unnecessary transactions, in violation of § 10(b) and rule 10b-5. *Id.* slip op. at 2. The district court held that the applicable statute of limitations was that contained in the Pennsylvania Blue Sky statute, distinguishing *Magnetic Metals* on the ground that the Pennsylvania statute, unlike the New Jersey provision at issue in that case, provides a cause of action for both buyers and sellers. *Id.* slip op. at 3-4. Consequently, the district court found the action to be time barred and entered summary judgment for the defendant. *Id.* slip op. at 4. For a discussion of the district court’s opinion in *Biggans*, see notes 33 & 109 *supra*.

On appeal, the Third Circuit vacated and remanded, holding that the Pennsylvania general fraud statute of limitations, rather than the Blue Sky provision, was the appropriate limitations period applicable to the plaintiff’s claim. *Biggans v. Bache Halsey Stuart Shields, Inc.*, No. 80-1281, slip op. at 10 (3d Cir., filed Dec. 31, 1980). Judge Sloviter, joined by Judge Gibbons—who also constituted the panel majority in *Magnetic Metals*—found *Magnetic Metals*

controlling because, while the Pennsylvania Blue Sky Statute does provide a remedy for both aggrieved buyers and sellers, they read it to provide for a private cause of action for damages *against* only wrongdoing buyers or sellers, so that the plaintiff's claim against his broker for "churning" would be governed by Pennsylvania's general fraud statute. *Id.* slip op. at 7-9.

In his dissent, Judge Weis disagreed both with the majority's analysis, preferring that of Chief Judge Seitz's dissent in *Magnetic Metals*, and with their construction of the Pennsylvania Blue Sky statute, arguing that their literalist interpretation was unjustified. *Id.* slip op. at 11-14 (Weis, J., dissenting). For a discussion of Chief Judge Seitz's dissent in *Magnetic Metals*, see notes 97-98 and accompanying text *supra*.

The authors submit, however, that very little is settled by the *Biggans* decision. Resting as it does on the narrow ground of the court's interpretation of a new and untested state statute, the precedential value of *Biggans* may well be limited to its unique facts since *Magnetic Metals* remains distinguishable in more straightforward buyer/seller 10b-5 cases.

While the Third Circuit has declined to rehear the *Biggans* case en banc, *Biggans v. Bache Halsey Stuart Shields, Inc.*, No. 80-1281 (3d Cir., Jan. 22, 1981) (denial of rehearing), Chief Judge Seitz and Judges Hunter, Weis, and Garth dissented from that decision and would have reconsidered the case. *Id.* In addition to the uncertainty caused by the narrow ground upon which the court's decision rests, as well as the obvious division of opinion on the court, the authors submit further that the lasting impact of *Biggans* will be to perpetuate the confusion over 10b-5 actions in Pennsylvania until the state Blue Sky statute is authoritatively interpreted by the Pennsylvania Supreme Court and, in doing so, subject the scheme of federal securities regulation to the vicissitudes of state law.

