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Corporate Law - Developing Uniformity in Limitations Periods for Implied Private Actions under the Securities Exchange Act of 1934

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CORPORATE LAW—DEVELOPING UNIFORMITY IN LIMITATIONS PERIODS FOR IMPLIED PRIVATE ACTIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

Westinghouse Electric Corp. by Levit v. Franklin (1993)

I. INTRODUCTION

In 1964, corporate shareholders received increased protection when the United States Supreme Court recognized an implied private cause of action for violations of section 14(a)\(^1\) of the Securities Exchange Act of 1934\(^2\) (1994 Act) and accompanying Rule 14a-9.\(^3\) As a result, shareholders...

\(^{1}\) 15 U.S.C. § 78n(a) (1988). Section 14(a) provides:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, 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, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78c of this title.

\(^{2}\) Many shareholders in large corporations are unable to attend shareholder meetings, thus the use of proxies has become more significant. Michael J. Hetzer, Comment, Proxy Regulation: Ensuring Accurate Disclosure Through a Negligence Standard, 50 FORDHAM L. REV. 1423, 1425 (1982). Section 14(a) helps guarantee the use of proxies as an effective organizational tool. Id. at 1425-26.


The various sections of the 1933 Act dealt at some length with the required contents of registration statements and prospectuses and expressly provided for private civil causes of action. ... The 1934 Act was divided into two titles. Title I was denominated "Regulation of Securities Exchanges," and Title II was denominated "Amendments to Securities Act of 1933."

 Id.

\(^{4}\) 17 C.F.R. § 240.14a-9(a) (1992). Rule 14a-9 provides in pertinent part:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

 Id.
ers could bring private actions to recover for damages caused by omissions or misleading statements in the proxy process. However, the protection offered to shareholders varied among and within federal circuits because different federal courts applied different limitations periods to these implied private actions. Thus, litigants seeking favorable limitations periods often engaged in forum shopping when filing Rule 14a-9 actions. Uncertainty and forum shopping also existed in applying limitations periods to other implied private actions under the 1934 Act, including private civil actions brought under section 10(b) and accompanying Rule 10b-5.


5. For a discussion of the different statutes of limitations that courts applied to certain implied private actions brought under the 1934 Act, see infra notes 30-39 and accompanying text.

In the case of implied private actions brought under § 14(a) of the 1934 Act and accompanying Rule 14a-9, there was no congressionally defined limitations period because the judiciary implied this private cause of action. Thus, federal courts looked to state law under the "absorption doctrine" to determine the applicable limitations period. For a discussion of the "absorption doctrine" and the resultant application of differing limitations periods, see infra notes 28-43 and accompanying text.

6. For a discussion of the uncertainty and potential forum shopping created by this lack of uniformity, see infra notes 39-40 and accompanying text.


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.

8. 17 C.F.R. § 240.10b-5 (1992). Rule 10b-5 promulgated under section 10(b) of the 1934 Act 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.
The United States Court of Appeals for the Third Circuit, however, applied a new approach to this problem. In 1988, the Third Circuit applied a one-year/three-year federal limitations period to private civil actions brought under section 10(b) and Rule 10b-5.9 Two other circuits subsequently adopted this approach,10 followed later by the Supreme Court.11 Recently, the Third Circuit held that the one-year/three-year federal limitations period also applies to private civil actions brought under section 14(a) and accompanying Rule 14a-9.12

This Casebrief traces the development of the Third Circuit approach to applying federal limitations periods to implied private actions brought under the 1934 Act. First, this Casebrief examines judicial recognition of implied private rights of action under the 1934 Act and the disparate application of state limitations periods to these actions.13 Next, this Casebrief discusses the evolution of a uniform federal limitations period for Rule 10b-5 actions and the subsequent congressional reaction.14 Finally, this Casebrief examines the Third Circuit's application of the one-year/three-year federal limitations period to Rule 14a-9 actions,15 concluding that the Third Circuit is the forerunner in an approach that is soon to be uniform throughout the federal courts.16

II. LIMITATIONS PERIODS IN RULE 14A-9 ACTIONS

A. Implied Private Rights of Action

The introductory paragraph of the session laws to the 1934 Act states that the Act is "[t]o provide for the regulation of securities exchanges and

Id.


13. For a discussion of implied private rights of action under the 1934 Act and the disparate application of limitations periods, see infra notes 17-43 and accompanying text.

14. For a discussion of the application of a federal limitations period to rule 10b-5 actions and the congressional reaction to that development, see infra notes 44-70 and accompanying text.

15. For a discussion of the Third Circuit's approach to limitations periods under Rule 14a-9, see infra notes 72-117 and accompanying text.

16. See infra notes 132-38 and accompanying text.
of over-the-counter markets ... to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.\textsuperscript{17} To further these purposes, Congress included in the 1934 Act various express causes of action with express limitations periods.\textsuperscript{18} Later, many federal courts

\begin{quote}

18. See, e.g., 15 U.S.C. §§ 78i(e), 78r(a), (c) (1988) (sections 9(e) and 18 of 1934 Act contain one-year/three-year limitations period). Section 16(b) contains a two year limitations period, while § 20A was added in 1988 as part of the Insider Trading and Securities Fraud Enforcement Act of 1988, which contains a five year limitations period. See 15 U.S.C. § 78p(b) (1988); 15 U.S.C. § 78t-1(a), (b)(4) (1994).

Section 9(e) provides in pertinent part:

Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. ... No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.


Section 18 provides in pertinent part:

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance .... A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction.

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

15 U.S.C. § 78r(a), (c).

Section 18 is the only provision that can apply in the proxy process in which Congress expressly provided for a private action. Marc I. Steinberg & William A. Reece, \textit{The Supreme Court, Implied Rights of Action, and Proxy Regulation}, 54 Ohio St. L.J. 67, 98 (1993). Only purchasers and sellers of securities may bring suit however, and "there has been no reported case successfully invoking § 18(a)." \textit{Id.} (citing Edward F. Greene, \textit{Determining the Responsibilities of Underwriters Distributing Securities Within an Integrated Disclosure System}, 56 Notre Dame Law. 755, 758 (1981)).

Section 16(b), which contains a two year limitations period, provides in pertinent part:

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer ... shall inure to and be recoverable by the issuer ... Suit to
implied private rights of action for certain sections of the 1934 Act in which Congress had not expressly authorized private actions.\textsuperscript{19}

In a 1946 decision, \textit{Kardon v. National Gypsum Co.},\textsuperscript{20} a district judge in the Third Circuit first suggested that federal courts should recognize an implied private right of action for violations of section 10(b) and Rule 10b-5.\textsuperscript{21} The Supreme Court, however, did not recognize an implied private right of action under the 1934 Act until its 1964 decision, \textit{J.I. Case Co. v. Borak}.\textsuperscript{22} The plaintiffs in this derivative action alleged that the defendants violated section 14(a) of the 1934 Act by including misrepresentations

recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer . . . but no such suit shall be brought more than two years after the date such profit was realized.


Section 20A provides in pertinent part:

(a) Any person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court [of] competent jurisdiction to any person who . . . has purchased . . . or sold . . . securities of the same class.

. . . .

(b)(4) No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation.


19. \textit{See}, \textit{e.g.}, Kardon \textit{v. National Gypsum Co.}, 69 F. Supp. 512 (E.D. Pa. 1946) (implying private right of action under § 10(b) of the 1934 Act and Rule 10b-5); \textit{see also}, 3 \textit{Louis Loss, Securities Regulation} 1763-64 (2d ed. 1961); 6 \textit{Louis Loss, Securities Regulation} 3869-73 (2d ed. Supp. 1969) (indicating that by 1969, 10 of 11 Courts of Appeals had recognized private cause of action under Rule 10b-5, although Supreme Court had not yet directly ruled on issue); Tamar Frankel, \textit{Implied Rights of Action}, 67 Va. L. Rev. 553 (1981) (examining history of Supreme Court recognition of implied rights of action). For a discussion of other sections of the 1934 Act in which private rights of action have been implied, see infra note 26 and accompanying text.


21. \textit{Id.} In this case, the plaintiffs sued the National Gypsum Company and others for fraudulently inducing them to sell certain stock for an amount less than the stock’s actual value. \textit{Id.} at 513. The defendants moved to dismiss, in part, for failure to state a cause of action. \textit{Id.} The court noted that the complaint alleged a violation of § 10(b) of the 1934 Act, a section not expressly providing for a private cause of action. \textit{Id.} Judge Kirkpatrick, however, stated that the 1934 Act disclosed “a broad purpose to regulate securities transactions of all kinds.” \textit{Id.} at 514. “[I]n view of the general purpose of the Act, the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies.” \textit{Id.} Thus, the district court denied the motion to dismiss and allowed this private cause of action to continue. \textit{Id.} at 514-15.

in a proxy statement.²³ Noting that “federal courts have the power to grant all necessary remedial relief,” the Supreme Court held that a shareholder could bring either a direct or derivative action for violations of section 14(a) and Rule 14a-9.²⁴ In subsequent cases, the Supreme Court defined the parameters of materiality and causation required to bring a private action under Rule 14a-9.²⁵ Later, the Supreme Court also recognized an implied private right of action under Rule 10b-5.²⁶

23. **Id.** at 427. The plaintiff alleged that he and other shareholders of J.I. Case Company were deprived of preemptive rights due to a merger between J.I. Case Company and American Tractor Corporation “effected through the circulation of a false and misleading proxy statement by those proposing the merger.” Id.

24. **Id.** at 432-34.

25. The Court first addressed the issue of causation. **Mills v. Electric Auto-Lite Co.,** 396 U.S. 375 (1970). In **Mills,** the Court held that when a finding of materiality exists, the shareholder satisfies causation by showing the proxy solicitation itself was an “essential link” in accomplishing the transaction. **Mills,** 396 U.S. at 385.

Later, the Court clarified the issue of materiality. **TSC Indus. v. Northway, Inc.,** 426 U.S. 438 (1976). The Court stated that “[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” **Id.** at 449. The omission or misrepresentation does not have to be the most important factor in the shareholder’s decision, instead it only must be substantially likely that disclosure of the fact would have been viewed by a shareholder “as having significantly altered the ‘total mix’ of information made available.” Id.

Finally, the Court clarified two other issues: (1) “[W]hether a statement couched in conclusory or qualitative terms purporting to explain directors’ reasons for recommending certain corporate action can be materially misleading within the meaning of Rule 14a-9” and (2) whether minority shareholders, whose votes are not required to authorize the action at issue in the proxy solicitation, can establish damages caused by the misleading solicitation. Virginia Banksshares, Inc. v. Sandberg, 501 U.S. 1085, 1087 (1991). The Court held that knowingly false statements explaining directors’ reasons for recommending certain action may be actionable, but the plaintiff must show that there was “something false or misleading in what the statements expressly or impliedly declare about its subject.” **Id.** at 1096. The Court also rejected any theory of causation that offered protection to shareholders whose votes were not required for the action at issue in the proxy solicitation. **Id.** at 1102-05.

26. **Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.,** 404 U.S. 6 (1971). In this case, the liquidator of a casualty company alleged that the company was injured by the fraudulent sale of certain securities the company owned. **Id.** at 7. The liquidator alleged violations of § 17(a) of the Securities Act of 1933 (1933 Act) and § 10(b) of the 1934 Act. **Id.** The Supreme Court held that the complaint properly alleged a violation of § 10(b). **Id.** at 13-14. In a footnote, the Court stated, “[i]t is now established that a private right of action is implied under § 10(b).” **Id.** at 13 n.9.

Note that in addition to § 14(a) and § 10(b), federal courts have recognized implied private rights of action for other sections of the 1954 Act. See **Piper v. Chris-Craft Indus., Inc.,** 430 U.S. 1, 55 (1977) (Stevens, J., dissenting) (“No one seriously questions the premise that Congress implicitly created a private right of action when it enacted § 14(e) in 1968.”); Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 181 (2d Cir.) (noting that violations of § 6(b) may give rise to private right of action, but here plaintiff failed to state claim), *cert. denied,* 385 U.S. 817 (1966); **Howing Co. v. Nationwide Corp.,** 826 F.2d 1470 (6th Cir. 1987) (implying private right of action under § 18(e)), *cert. denied,* 486 U.S. 1059 (1988).
Although the judiciary created these implied private rights of action and defined certain parameters, neither the judiciary nor Congress specified exact limitations periods for these actions. Courts, therefore, used the "absorption doctrine" to determine the applicable statute of limitations for implied private rights of action under the 1934 Act. Under the absorption doctrine, "a court 'borrows' or 'absorbs' the local time limitation most analogous to the case at hand."

### B. Effects of the Absorption Doctrine

In the case of implied private rights of action under the 1934 Act, use of the absorption doctrine led to great disparity of limitations periods between federal circuits and even within federal circuits. One reason for this disparity was that courts differed as to what state law was most anal-

Since 1975 however, the Supreme Court has limited judicial recognition of private rights of action. See Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (refusing to imply private right of action under § 17(a) of 1934 Act); Cort v. Ash, 422 U.S. 66 (1975) (denying implied right of action under § 610 of Federal Election Campaign Act and creating four-part test for determining implied rights of action). See generally Frankel, supra note 19.

27. See Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1387 (7th Cir. 1990) (noting that Congress did not create limitations period for Rule 10b-5 action because right of action under Rule 10b-5 was created by courts), cert. denied, 501 U.S. 1250 (1991); Committee on Federal Regulation of Securities, Report of the Task Force on Statute of Limitations for Implied Actions, 41 Bus. Law. 645, 645-46 (1986) [hereinafter ABA Committee Report] ("Because Congress did not expressly create the private cause of action under Rule 10b-5, it did not specify a limitations period for that action.").

Enforcement actions brought by the Securities and Exchange Commission (SEC) are generally not restricted by a limitations period. See SEC v. Rind, 991 F.2d 1486 (9th Cir.) (holding no statute of limitations applies to SEC enforcement actions), cert. denied, 114 S. Ct. 489 (1993).

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


30. See ABA Committee Report, supra note 27, at 646, 653, 662 (appendix B) (discussing inconsistency in limitations periods for Rule 10b-5 cases and noting that Rule 14a-9 situation parallels Rule 10b-5 situation).
gous to the implied federal cause of action at issue.\textsuperscript{31} For section 10(b) and section 14(a) claims, federal courts borrowed limitations periods from state fraud laws, state blue sky laws or certain other state laws.\textsuperscript{32} Furthermore, because limitations periods for the same type of law vary from state to state, differences occurred even when courts borrowed from the same type of state law.\textsuperscript{33}

Thus, in 1986, as a result of this disparate application of limitations periods, "the limitations periods for Rule 10b-5 actions range[d] from one year in Maryland to ten years in Tennessee."\textsuperscript{34} Even within a single circuit disparities existed. For example, in the Third Circuit, a court confronted with a Rule 14a-9 or Rule 10b-5 action in 1986 might have applied the

\begin{footnotesize}
31. Id. at 659-61 (appendix A) (listing borrowing practice of each circuit as of 1986 for Rule 10b-5 actions).
32. For examples of courts that borrowed limitations periods from state fraud laws, see Reeves v. Teuscher, 881 F.2d 1495, 1500-01 (9th Cir. 1989) (noting that Ninth Circuit applies forum state's statute of limitations for fraud claims to Rule 10b-5 claims); Maggio v. Gerard Freezer & Ice Co., 824 F.2d 125, 127-28 (1st Cir. 1987) (applying Massachusetts' three-year common law fraud limitations period in Rule 10b-5 action); Hackbart v. Holmes, 675 F.2d 1114, 1120-21 (10th Cir. 1982) (applying Colorado's three-year statute of limitations for fraud to Rule 10b-5 claim).


Other courts used a case-by-case approach. ABA Committee Report, supra note 27, at 651 (noting that Fifth and Eleventh Circuits determine limitations period on case-by-case basis); see, e.g., Sioux, Ltd. Sec. Litig. v. Coopers & Lybrand, 914 F.2d 61, 64 (5th Cir. 1990) (applying Texas' four-year fraud limitations period to Rule 10b-5 action). The Third Circuit also used a case-by-case approach. See Sharp v. Coopers & Lybrand, 649 F.2d 175 (3d Cir. 1981) (looking first to state blue sky law, but then determining state fraud law to be more analogous), cert. denied, 455 U.S. 938 (1982).

Finally, some courts borrowed from state catchall limitations periods. See Allison Dabbs Garrett, The Ramshackle Edifice: Limitations Periods for Private Actions Under Rule 10b-5, 28 Duq. L. Rev. 1, 24-25 n.151 (1989) (indicating approach has generally been rejected because not all states have catchall laws).

For further examples of cases where courts borrowed a limitations period from the same type of state law, but the effective result was imposition of differing time periods, see infra notes 35-36.

34. ABA Committee Report, supra note 27, at 646.
\end{footnotesize}
Delaware three-year statute of limitations for fraud, or the New Jersey or Pennsylvania six-year statute of limitations for fraud. 

Application of the "absorption doctrine" also resulted in differences in the use of "tolling doctrines," which affected burden of proof issues and cutoff period determinations. Finally, if an implied private right of action under the 1934 Act involved plaintiffs from more than one state, some plaintiffs' claims might be time-barred while others were not. This widespread disparity in application of limitations periods resulted in uncertainty and forum shopping among possible jurisdictions.

C. Changing the Limitations Period

Commentators criticized the absorption doctrine's use in the context of Rule 14a-9 and Rule 10b-5 actions, however its application accorded with Supreme Court rulings. As the Third Circuit indicated in Roberts v.


38. Ceres Partners v. GEL Assocs., 918 F.2d 349, 355 (2d Cir. 1990) ("Indeed, in a single such suit brought in a state whose law requires borrowing of the laws of an out-of-state plaintiff, the claims of some plaintiffs may be time-barred while those of other plaintiffs are not."). As the court noted in Ceres, one New York case involved the application of 26 separate statutes of limitations. Kronfeld v. Advest, Inc., 675 F. Supp. 1449 (S.D.N.Y. 1987).

39. ABA Committee Report, supra note 27, at 647. "This uncertainty and lack of uniformity promote forum shopping by plaintiffs and result in wholly unjustified disparities in the rights of parties litigating identical claims in different states... Vast amounts of judicial time and attorney's fees are wasted." Id.

40. For examples of commentary critical of using the absorption doctrine in Rule 14a-9 and Rule 10b-5 actions, see 3 H. Bloomental, SECURITIES AND FEDERAL CORPORATE LAW, § 8.31[3][b] (1993) (indicating that absorption doctrine in this context has resulted in "tremendous waste of judicial and other resources."); Dennis J. Block & Nancy E. Barton, Securities Litigation, 7 SEC. REG. L.J., 374, 374 (1980) (describing result of absorption doctrine as "unsatisfactory state of affairs").

The Supreme Court, however, ruled that application of the doctrine was appropriate. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n.29 (1976) ("Since no statute of limitations is provided for civil actions brought under § 10(b), the law of limitations of the forum State is followed as in other cases of judicially implied remedies."); Holmberg v. Ambrecht, 327 U.S. 392, 395 (1946) (noting in dictum that where Congress is silent, federal courts adopt analogous local law limitation periods).
“Magnetic Metals Co.”, 41 “the Supreme Court has announced the rule that we must look not for an analogous federal limitations period, but for an analogous forum state limitations period.”42 That rule controlled until the 1980s, when the Supreme Court reexamined and eventually altered its approach towards the absorption doctrine.43

In 1987, the Supreme Court outlined a new procedure to determine applicable time limitations for federal actions that do not include an express limitations period. In Agency Holding Corp. v. Malley-Duff & Associates, Inc.,44 the Court considered the application of a limitations period to a private action brought under the Racketeer Influenced and Corrupt Organizations Act (RICO),45 a federal statute without an express limitation.

41. 611 F.2d 450 (3d Cir. 1979). This 1979 case involved allegations of § 10(b) and 14(a) violations as well as common law fraud arising out of a merger in which the plaintiff sold his stock. Id. at 451-53. The district court decided that the New Jersey Uniform Securities Act, § 49:3-71(a), was the most analogous state statute, and thus held that the claim was time-barred by that statute’s two year limitations period. Roberts, 611 F.2d at 453-54. Reversing, the Third Circuit held that the district court should not have applied the limitations period of the New Jersey Uniform Securities Act because the Act protects only buyers of securities, not sellers. Id. at 452-56. Because this case involved a seller, the court determined that the six-year limitations period for common law fraud in New Jersey was more appropriate. Id.


43. The first alteration occurred in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). In DelCostello, the Supreme Court rejected the use of a state statute of limitations in two consolidated cases. Id. at 158-71. The Court outlined a narrow exception to the use of state statutes of limitations, holding that a federal statute of limitations should be used when: (1) federal law provided a closer analogy than state law; and (2) “when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.” Id. at 171-72.

Later, in Wilson v. Garcia, 471 U.S. 261, 263 (1985), the Court confronted the “absorption doctrine” in the context of a civil rights action brought under § 1983 of the Civil Rights Act, 42 U.S.C. § 1983 (1988). The Court laid out a three-step procedure. Wilson, 471 U.S. at 268. First, a court must characterize the claim to determine whether state or federal law governs. Id. Second, if federal law governs, a court must determine whether all claims arising out of the federal statute “should be characterized the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.” Id. Finally, a court must determine which state statute is most appropriate. Id.

In this case, the Court determined that federal law governed the characterization and that uniformity was necessary for § 1983 claims. Id. at 268-76. Finally, the Court determined that tort law was most appropriate, and thus the tort limitations period applied to this claim. Id. at 276-80.

44. 483 U.S. 143 (1987). In Agency, the Supreme Court essentially retained the test set forth in Wilson and added the exception set forth in DelCostello. Id. at 145-49; see also Palm, supra note 37, at 1228-29 n.53 (describing Wilson test and DelCostello exception, and stating that “the Supreme Court combined the Wilson test and DelCostello exception.”).

Referring to the Third Circuit's application of a Pennsylvania six-year residual statute of limitations, the Court held that a uniform limitations period taken from federal law should be applied to RICO actions.\(^{47}\)

In *Agency*, the Court set forth the following analysis to determine the applicable limitations period. First, courts should inquire whether all claims brought under the federal statute should be characterized the same way or whether each claim should be characterized based on the facts and legal theories of each case.\(^{48}\) Second, courts should inquire whether a federal or state statute of limitations is more appropriate.\(^{49}\) Generally courts should borrow from state law, but in some circumstances a court may more appropriately borrow a limitations period from a federal statute.\(^{50}\) Those instances include situations in which a federal statute is more analogous than available state statutes or when federal policies and litigation practicalities make the federal statute more appropriate.\(^{51}\)

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46. *Agency*, 483 U.S. at 145-46. In this case, Malley-Duff & Associates, Inc. (Malley-Duff), a former insurance agent for Crown Life Insurance Company (Crown Life), sued Crown Life under a variety of theories after Crown Life terminated Malley-Duff’s agency. *Id.* at 145. Under one theory, Malley-Duff asserted a cause of action under RICO. *Id.* Malley-Duff alleged that Crown Life together with Agency Holding Corporation “formed an enterprise whose purpose was to acquire by false and fraudulent means and pretenses various Crown Life Agencies that had lucrative territories.” *Id.* In particular, Malley-Duff alleged that Crown Life attempted to achieve its purpose by setting unrealistic production quotas for Malley-Duff and other agencies, and then terminating those agencies for failure to satisfy their quotas. *Id.* Because RICO does not contain a statute of limitations for civil actions, the issue in this case involved determining the appropriate statute of limitations for a RICO claim. *Id.* at 146.

47. *Id.* at 149-57. The Court borrowed the four-year statute of limitations from the Clayton Act, 15 U.S.C. § 15(b) (1988). The Clayton Act was considered more analogous to RICO than any state law because RICO was patterned after the Clayton Act, and “[b]oth RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney’s fees.” *Agency*, 483 U.S. at 150-51.

48. *Agency*, 483 U.S. at 147. With regard to RICO actions, the Court noted that a uniform limitations period is preferable because RICO claims can encompass a variety of activities, which could be analogized to different types of state laws with different limitations periods. *Id.* at 149-50. The Court also noted that “characterization of a federal claim for purposes of selecting the appropriate statute of limitations is generally a question of federal law.” *Id.* (citing *Wilson v. Garcia*, 471 U.S. 261, 269-70 (1985)).

49. *Id.*

50. *Id.*

51. *Id.* at 147-48. The Court referred to certain cases where federal limitations periods were adopted. *Id.* at 148 (citing Occidental Life Insurance Co. of California v. EEOC, 452 U.S. 355 (1977); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Holmberg v. Ambrecht*, 327 U.S. 392 (1946)).

With regard to RICO actions, the Court indicated that a federal statute, the Clayton Act, was more analogous than state statutes. *Id.* at 149-55. The Court also noted that the practicalities of RICO litigation made a uniform federal statute more appropriate. *Id.*
Less than a year later, the Third Circuit had the opportunity to apply the Agency analysis to a private action brought under Rule 10b-5. In In re Data Access Systems Securities Litigation, the Third Circuit Court of Appeals, en banc, held that the limitations periods in the 1934 Act furnished a better analogy than state statutes. In addition, the Court held that the federal policies and litigation practicalities in Rule 10b-5 actions made the federal rule more appropriate. According to the Court, a need for uniformity required application of the one-year/three-year limitations period contained in most express actions under the 1934 Act. Thus, the Third Circuit adopted a federal limitations period for Rule 10b-5 actions—a limitations period of one year after discovery of the alleged violation, and no more than three years after the violation. Soon after the Data Access decision, the Seventh and Second Circuits adopted that same one-year/three-year limitations period. Nevertheless, other circuits continued to

52. 843 F.2d 1537 (3d Cir.) (en banc), cert. denied, 488 U.S. 849 (1988).
53. Id. at 1545 (citing DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 172 (1989)). In Data Access, certain purchasers of Data Access Systems, Inc. common stock filed suit following public disclosures of fraudulent business and stock trading activities involving Data Access. Id. at 1538. Later, the Securities and Exchange Commission also filed a complaint against Data Access and others. Id. This case involved the shareholders’ third amended complaint, which alleged that certain attorneys and accountants violated § 10(b) of the 1934 Act and Rule 10b-5, and committed common law fraud and negligence. Id. at 1538-39.

The district court determined that New Jersey’s six-year limitations period for common law fraud should apply. Id. at 1538. The defendants, contending that the two-year limitations period for New Jersey’s blue sky law should apply, successfully moved for certification. Id.

The Third Circuit, en banc, first noted that courts in the circuit generally select the state statute of limitations most compatible with the federal policies advanced by Rule 10b-5. Id. at 1541. Normally, the state blue sky law was utilized, unless that law did not afford a civil damage action for the particular allegations of that case. Id. The Third Circuit, however, noted that such a case-by-case approach must be modified to be consistent with recent Supreme Court holdings. Id. at 1543 (citing Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987), Wilson v. Garcia, 471 U.S. 261 (1985) and DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)). Thus, the court applied the Agency analysis, concluding that it should use a limitations period from the 1934 Act. Id. at 1545.

54. Id. at 1545-50. The court looked at the express causes of action in the 1933 and 1934 Acts and determined that the available choices were either the one-year/three-year limitations period for sections 9(e), 18(c) and 29(b), or the two-year limitations period for section 16(b). Id. at 1545-46. Discussing the necessity of a uniform limitations period, the Third Circuit determined that it would be best to apply the one-year/three-year limitations period found in all but one of the express causes of action of the 1934 Act. Id. at 1543-50.

55. Id. The court noted that the three-year period serves as a statute of repose, which absolutely bars litigation after three years of the occurrence of the violation. Id. at 1546. For a general discussion of the functioning of statutes of repose, see Palm, supra note 57, at 1218-22, 1231-32.

56. Ceres Partners v. GEL Associs., 918 F.2d 349, 364 (2d Cir. 1990) (applying one-year/three-year federal limitations period to claims brought under § 10 and § 14 of the 1934 Act); Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1392 (7th
borrow from local law, thus maintaining the prior uncertainty in Rule 10b-5 actions.57

In 1991, the Supreme Court attempted to resolve the disparate application of limitation periods for Rule 10b-5 actions. In *Lampf, Pleua, Lipkind, Purpis & Petigrow v. Gilbertson*,58 the Court held that the one-year/three-year limitations period applies to implied private causes of action brought under Rule 10b-5.59 The Court confirmed the analysis set forth in *Agency*, but stated that when an action is "implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period."60 Therefore, the Court looked first to both the Securities Act of 1933 (1933 Act) and the 1934 Act.61 The Court concluded that the most analogous provisions to section 10(b) were certain express causes of actions in those Acts containing the one-year/three-year limitations pe-

Cir. 1990) (applying one-year/three-year federal limitations period to claim brought under § 10 of the 1934 Act), cert. denied, 501 U.S. 1250 (1991). These two circuits also emphasized the need for a uniform limitations period in Rule 10b-5 actions. *Ceres*, 918 F.2d at 360-61 ("[W]e conclude that judicial selection of a uniform nationwide limitations period is what Congress would have intended for private rights of action judicially implied under those laws."); *Short*, 908 F.2d at 1589 ("E]veryone wants a simpler way - and to everyone that means a uniform federal statute of limitations."). In addition to considering the one-year/three-year limitations period for §§ 9(e), 18(a) and 29(b), and the two-year limitations period for § 16(b), the courts in *Ceres* and *Short* also considered and rejected the five-year limitations period for § 20A of the 1934 Act—added by the Insider Trading and Securities Fraud Enforcement Act of 1988. *Ceres*, 918 F.2d at 362-63; *Short*, 908 F.2d at 1390-92.

The Seventh Circuit also noted that equitable tolling does not extend the three-year period of repose. *Short*, 908 F.2d at 1391. Congress included a statute of repose, which acts as an absolute bar to litigation after three years, to prevent investors from basing litigation decisions on the subsequent price of the stock. *Id.* at 1392. The Seventh Circuit in *Short* stated:

"Prices of securities are volatile. If suit may be postponed indefinitely on equitable grounds, then investors may gamble with other people's money. An investor in Short's position may sell her shares for a price certain. If the firm does poorly, she keeps the money; if it does well, she sues and asks for the increase in value."

*Id.*


59. *Id.* at 361-62. For a discussion of the Court's holding, see *infra* notes 60-68.

60. *Lampf*, 501 U.S. at 355-59. The Court further noted that "[o]nly where no analogous counterpart is available should a court then proceed to apply state-borrowing principles." *Id.* at 359.

61. *Id.* at 359-61. The Court indicated that in the 1934 Act, all of the express causes of action, except for § 16(b), contain a one-year/three-year limitations period. *Id.* at 359-60. The Court also explained that when Congress adopted the 1934 Act, it amended § 13 of the 1933 Act so that all express causes of action in the 1933 Act would also use the one-year/three-year limitations period. *Id.* at 360 n.7.
period.\textsuperscript{62} The Court confined the \textit{Lampf} litigants to such a limitations period, which resulted in their claims being time-barred.\textsuperscript{63}

The \textit{Lampf} decision had widespread repercussions because certain lower federal courts, determining that this limitations rule should be applied retroactively, dismissed many pending securities claims.\textsuperscript{64} Concurrently, motions to dismiss were filed for claims involving certain highly publicized financial scandals of the 1980s.\textsuperscript{65} Concerned with the possible dismissal of large securities fraud cases, Congress quickly reversed the retroactive effect of the decision by enacting section 27A of the 1934 Act.\textsuperscript{66} Section 27A required federal courts to use pre-\textit{Lampf} determinations of

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\begin{itemize}
\item \textsuperscript{62} \textit{Id.} The Court rejected the SEC's contention that the most analogous provision was the five year limitations period of section 20A of the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78t-1(b)(4). \textit{Lampf}, 501 U.S. at 361-62. The Court also held that equitable tolling is inconsistent with the one-year/three-year limitations period. \textit{Id.} at 363.

\item \textsuperscript{63} \textit{Lampf}, 501 U.S. at 364. The \textit{Lampf} litigants' complaints were filed more than three years after the alleged misrepresentations, thus they were barred by the three-year statute of repose. \textit{Id.}

\item \textsuperscript{64} See, e.g., Caproni v. Prudential Sec., Inc., 15 F.3d 614, 616 (6th Cir. 1994) (discussing district court's dismissal of plaintiff's § 10(b) claim after \textit{Lampf} decision); Plaut v. Spendthrift Farm, Inc., 789 F. Supp. 231, 232 (E.D. Ky. 1992) (discussing court's prior dismissal of this case as time-barred after \textit{Lampf} decision), aff'd, 1 F.3d 1487 (6th Cir. 1993).

\item On the same day of the \textit{Lampf} decision, the Supreme Court also decided \textit{James B. Beam Distilling Co. v. Georgia}, 501 U.S. 529 (1991). In a fragmented decision, a majority of the Court held that when a court decides a new rule of law, and the court applies the new rule to the litigants in that case, the new rule must be applied retroactively to all such claims based on facts arising before that decision (unless barred by procedural requirements or \textit{res judicata}). \textit{Id.} at 544, 547, 548. Because the Court in \textit{Lampf} applied the new rule to the litigants in that case, lower courts interpreted the combination of \textit{Lampf} and \textit{Beam} as requiring the application of the new \textit{Lampf} rule to all pending cases. See \textit{Palm}, supra note 37, at 1250-59 (discussing \textit{Beam} decision and result of \textit{Lampf-Beam} combination).

\item \textsuperscript{65} See David S. Hilzenrath, \textit{Senate Backs More Time for Investor Suits; Bill Would Reverse High Court Ruling}, Wash. Post, Nov. 22, 1991, at D1 (noting that hundreds of millions of dollars of claims had been thrown out, and that Michael Milken and Charles Keating, Jr. had filed motions for dismissal); Barbara Roper, \textit{Stop the Clock on Swindlers}, N.Y. TIMES, Nov. 19, 1991, at A25 ("Michael Milken . . . and other defendants filed legal motions in Federal District court last month to have eight bondholder suits dismissed because of \textit{Lampf's} new statute of limitations.").

\item \textsuperscript{66} 15 U.S.C. § 78aa-1 (Supp. IV 1992); see also \textit{Palm}, supra note 37, at 1262-63 (examining Congress' reaction to \textit{Lampf} and reasons for enacting § 27A). Section 27A provides:

\begin{itemize}
\item \textsuperscript{(a)} Effect on pending causes of action

The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

\item \textsuperscript{(b)} Effect on dismissed causes of action

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991-

\begin{itemize}
\item \textsuperscript{(1)} which was dismissed as time barred subsequent to June 19, 1991, and
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limitations periods for section 10(b) actions filed on or before June 19, 1991 (the day before the date of the Lampf decision).\(^67\) Section 27A also required reinstatement of many claims previously dismissed due to the Lampf holding.\(^68\) As a result, federal courts still apply differing limitations periods to Rule 10b-5 cases filed on or before June 19, 1991.\(^69\) However, for Rule 10b-5 actions filed after June 19, 1991, federal courts now uniformly apply the one-year/three-year limitations period.\(^70\)

D. Third Circuit Approach to Rule 14a-9

Although finally providing uniformity in limitations periods for Rule 10b-5 actions, the Supreme Court has not yet directly addressed the applicable limitations period for implied private actions brought under section 14(a) and Rule 14a-9.\(^71\) The Third Circuit, however, recently took a step towards developing a uniform limitations period for section 14(a) actions. In *Westinghouse Electric Corp. v. Levit v. Franklin*,\(^72\) the Third Circuit held that the federal one-year/three-year limitations period that applies to section 10(b) actions, also applies to implied private actions brought under section 14(a) and Rule 14a-9.\(^73\)

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\(^68\) Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-246, 105 Stat. 2236 (1991), was codified as § 27A of the 1934 Act. Originally, two bills were introduced, each with a set limitations period for § 10(b) actions, but the result was a product of compromise. See Palm, *supra* note 27, at 1262 n.207.

\(^69\) 15 U.S.C. § 78aa-1(a). Note also that § 27A requires courts to apply pre-Beam retroactivity rules. See id. § 78aa-1(a),(b).

\(^69\) See id. § 78aa-1(b).


\(^70\) See Harper v. Virginia Dep’t of Taxation, 113 S. Ct. 2510 (1993) (solidifying rule that Supreme Court proposed in fractured Beam decision). In *Harper*, a 7-2 decision, the Court held:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

*Id.* at 2517. Thus, the effect of this rule is that the Lampf holding applies retroactively except where § 27A dictates otherwise.


\(^72\) 993 F.2d 349 (3d Cir. 1993).

\(^73\) *Id.* at 353.
In *Westinghouse*, two shareholders brought a derivative suit and class action against directors and senior officers of Westinghouse Electric Corporation.\(^74\) The suit alleged, in part, violations of section 14(a) and Rule 14a-9.\(^75\) The shareholders claimed that directors omitted material information and included false and misleading information in proxy statements concerning Westinghouse actions in the Philippines.\(^76\) The shareholders requested that the district court void a directors' election, rescind an amendment to the corporation's articles of incorporation, and grant compensatory damages.\(^77\)

The district court, noting that the same limitations period generally governs suits brought under section 10(b) and section 14(a), held that under the *Lampf* analysis the one-year/three-year rule should be applied to Rule 14a-9 claims.\(^78\) However, the court refused to apply the one-year/three-year limitations period in this case, due to the "inequity imposed by retroactive application" and because the Supreme Court had not specifically determined whether this new section 10(b) limitations period also governed section 14(a) claims.\(^79\) The district court instead applied the New Jersey six-year statute of limitations governing fraud claims, and thus held the suit was not time-barred.\(^80\)

The Third Circuit, however, reversed the district court, holding that the one-year/three-year limitations period applied to section 14(a) claims,

\(^74\) *Id.* at 351.

\(^75\) *Id.*

\(^76\) *Id.* In particular, the shareholders claimed that officers of Westinghouse exposed the company to the possibility of "substantial losses" because certain officers made illegal payments to gain a power plant contract in the Philippines, and then the officers "failed to fulfill their obligations under that contract by substituting cheaper, inferior materials, components and equipment than were specified by the contract terms." *Id.* The shareholders' counsel apparently requested that Westinghouse's board of directors take legal action against those officers. *Id.* The shareholders claimed that proxy statements were misleading for failing to disclose such a request by the shareholders' counsel and also for failing to disclose that Westinghouse spent money lobbying for the Pennsylvania "Directors Liability Act," which shielded Westinghouse directors from liability for any illegal activities that may have occurred in the Philippines. *Id.*

\(^77\) *Id.* at 352.

\(^78\) *Westinghouse Elec. Corp. by Levit v. Franklin*, 789 F. Supp. 1313, 1317-18 (D.N.J. 1992) (applying *Lampf* analysis to determine that one-year/three-year rule should apply to § 14(a) and Rule 14a-9 claims), rev'd, 993 F.2d 349 (3d Cir. 1993). Aside from noting the traditional similarity in treatment of § 10(b) and § 14(a) claims, the district court also noted that § 14(a) is similar to § 18 because both sections protect investors from misrepresentation. *Id.* Accordingly, the court held that the one-year/three-year limitations period found in § 18(c) also applies to claims brought under § 14(a) and Rule 14a-9. *Id.* at 1318.

\(^79\) *Id.* at 1317-19. The court indicated that if it applied the one-year/three-year limitations period the case would be time-barred because the plaintiffs did not file their claim within one year of discovering the misrepresentation. *Id.* at 1318-19.

\(^80\) *Id.* at 1319.
thus barring the shareholders’ suit.\textsuperscript{81} The issue on interlocutory appeal was whether the one-year/three-year rule adopted for section 10(b) claims in Data Access applies to section 14(a) claims filed after the Data Access decision.\textsuperscript{82}

Under the rationale of Data Access and Lampf, the court first looked for analogous provisions in the statute of origin, the 1934 Act.\textsuperscript{83} The court determined that the 1934 Act contains similar provisions using the one-year/three-year limitations period.\textsuperscript{84} In particular, the court noted similarities to section 18 and section 9, which serve to protect investors and ensure complete information for investment decisions.\textsuperscript{85} Accordingly, the court concluded that the one-year/three-year limitations period, contained in those sections and applicable to section 10(b) claims, should also apply to section 14(a) claims.\textsuperscript{86} The Third Circuit further determined that the one-year/three-year limitations period for section 14(a) claims should be given retroactive effect in this case.\textsuperscript{87}

III. Analysis

The Third Circuit has taken the lead in developing uniformity in limitations periods for implied private rights of action under the 1934 Act.\textsuperscript{88} Data Access marked the first time any circuit held that the federal one-year/three-year limitations period governs section 10(b) actions.\textsuperscript{89} Subse-

\begin{itemize}
  \item \textsuperscript{81} Westinghouse Elec. Corp. by Levit v. Franklin, 993 F.2d 349, 353-57 (3d Cir. 1993). The defendants filed this interlocutory appeal under 28 U.S.C. § 1291(b). \textit{Id.} at 350.
  \item \textsuperscript{82} \textit{Id.} at 350.
  \item \textsuperscript{83} \textit{Id.} at 353. Applying the rationale of Data Access and Lampf, the court indicated that it discerned congressional intent to use a limitations period from the 1934 Act. \textit{Id.}
  \item \textsuperscript{84} \textit{Id.} at 352-54.
  \item \textsuperscript{85} \textit{Id.} at 355. The court also found that both § 10(b) and § 14(a) were intended "to protect investors" and the Third Circuit generally applied the same limitations period to both. \textit{Id.}
  \item \textsuperscript{86} \textit{Id.} at 355-57.
  \item \textsuperscript{87} \textit{Id.} at 354-57. The court stated that because the certified question related to Data Access, it did not consider the application of a Lampf-Beam analysis to the issue of retroactivity. \textit{Id.} at 354 n.2. The court also did not consider the applicability of § 27A because its express terms only address § 10(b) claims. \textit{Id.} Instead, the court relied on Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), which provided an analysis based upon equitable factors. \textit{Westinghouse}, 993 F.2d at 354. Under the \textit{Chevron} analysis, the Third Circuit determined that its decision should apply retroactively. \textit{Id.} at 354-56. The court also stated that "[a]t a minimum Data Access should have put plaintiffs on notice as to the likelihood of a uniform limitations period for other implied causes of actions under the Securities Exchange Act, particularly given the tradition in this judicial circuit of applying the same limitations period to Section 10(b) claims and Section 14(a) claims." \textit{Id.} at 356.
  \item \textsuperscript{88} For a discussion of this development, see supra notes 52-87 and accompanying text.
  \item \textsuperscript{89} \textit{In re Data Access Sys. Sec. Litig.}, 843 F.2d 1537 (3d Cir.) (en banc), \textit{cert. denied}, 488 U.S. 849 (1988). For a discussion of the Third Circuit's opinion and reasoning in Data Access, see supra notes 52-55 and accompanying text.
\end{itemize}
sequently, that limitations period became the uniform limitations period in all federal courts for section 10(b) actions brought after June 19, 1991.90 Recently in Westinghouse, the Third Circuit decided to apply that same federal limitations period to a section 14(a) action.91

The question considered in this Casebrief is whether the federal one-year/three-year limitations period is the most suitable limitations period for section 14(a) actions, or whether a different limitations period would be more appropriate. This Casebrief contends that application of the federal one-year/three-year limitations period to section 14(a) actions is appropriate. Furthermore, other federal courts confronted with section 14(a) claims should reach the same result as that reached by the Third Circuit.

In Lampf, the Supreme Court clarified the procedure to determine limitations periods for implied private causes of action.92 As discussed, federal courts now look first for analogous provisions in the statute of origin.93 Courts only look elsewhere if no analogous provisions can be found there.94 Thus, the Third Circuit in Westinghouse looked first to the 1934 Act and examined section 14(a)'s similarity to sections 9, 18 and 10(b). The latter provisions, like section 14(a), "protect investors and . . . ensure their ability to make educated decisions regarding their investments . . . based on accurate and complete information."95 However, the Third Circuit in Westinghouse did not discuss the two provisions of the 1934 Act that contain different limitations periods.96

Section 16(b) of the 1934 Act contains a two-year limitations period, and section 20A, added by the Insider Trading Act of 1988, contains a five-year limitations period.97 Clearly both of these provisions also protect investors. Section 16(b) allows recovery for profits made by corporate "in-

90. For a discussion of the Supreme Court's adoption of the one-year/three-year limitations period for Rule 10b-5 actions as well as congressional limitation on that holding, see supra notes 58-70 and accompanying text.
91. Westinghouse, 993 F.2d at 353. For a discussion of the Third Circuit's opinion and reasoning in Westinghouse, see supra notes 72-87 and accompanying text. The Third Circuit was actually the second circuit court to apply the one-year/three-year rule to a § 14 claim, because the Second Circuit had decided previously that the one-year/three-year limitations period applies to claims brought under § 14(d) and § 14(e) of the 1934 Act. Ceres Partners v. GEL Assocs., 918 F.2d 349 (2d Cir. 1990).
92. For a discussion of the Lampf procedure, see supra notes 59-63 and accompanying text.
94. Id.
95. Westinghouse, 993 F.2d at 353.
96. See id. The two provisions containing different limitations periods are § 16(b) and § 20A. For a discussion of these provisions, see supra note 18 and infra notes 98-110 and accompanying text.
97. For a discussion of limitations periods for these two provisions, see supra note 18.
siders" on the purchase and sale of securities within a six-month period.\textsuperscript{98} Section 20A allows recovery for profits made by persons engaged in insider trading.\textsuperscript{99}

Despite the fact that these two provisions also protect investors, the Third Circuit used the limitations period from other provisions, presumably because sections 16(b) and 20A are not appropriately analogous to section 14(a).\textsuperscript{100} Section 16(b) is not analogous to section 14(a) because it does not involve disclosure of information.\textsuperscript{101} In fact, even complete disclosure fails to provide a defense against recovery.\textsuperscript{102} Furthermore, sections 16(b) and 14(a) contain differing standards of culpability. With regard to section 14(a), most federal courts, including the Third Circuit, hold that a showing of negligence will sustain liability.\textsuperscript{103} In certain instances, however, the possibility of a heightened standard of scienter may be required.\textsuperscript{104} Section 16(b), on the other hand, uses a strict liability standard.\textsuperscript{105}

Section 20A is arguably more analogous to section 14(a), but it is also not the most appropriate provision. Section 20A applies whenever a person violates a provision of the 1934 Act by trading "in a security while in possession of material, nonpublic information . . . ".\textsuperscript{106} Thus in certain cases, section 20A, like section 14(a), can involve failure to disclose material information.\textsuperscript{107} As the Supreme Court noted in Lampf, however, sec-

\textsuperscript{100} Westinghouse, 993 F.2d at 352-54. The court did not discuss provisions in the 1934 Act that are not analogous to § 14(a). Instead the court discussed only those provisions it considered analogous to § 14(a). \textit{Id.}
\textsuperscript{101} Ceres Partners v. GEL Assocs., Inc., 918 F.2d 349, 362 (2d Cir. 1990) (finding § 16(b) differs from §§ 10(b) and 14(d) because § 16(b) is not a disclosure section).
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{See}, e.g., Shidler v. All Am. Life & Fin. Corp., 775 F.2d 917 (8th Cir. 1985) (rejecting strict liability and applying negligence standard to § 14(a) claim); Gould v. American-Hawaiian S.S. Co., 535 F.2d 761 (3d Cir. 1976) (requiring negligence standard for liability).
\textsuperscript{104} \textit{See} Adams v. Standard Knitting Mills, Inc., 623 F.2d 422 (6th Cir.), \textit{cert. denied}, 449 U.S. 1067 (1980) (holding that showing of scienter required for outside accountant liability under Rule 14a-9); \textit{see also} Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1090 n.5 (1991) (Justice Souter indicating that Supreme Court reserves question whether scienter required under § 14(a)).
\textsuperscript{107} \textit{See}, e.g., \textit{Storage Technology}, 804 F. Supp. at 1374 (alleging violations of § 10(b) and § 20A arising from false statements, lack of disclosure and insider trading).
tion 20A aims at the specific problem of insider trading.108 Additionally, the text of section 20A indicates that the provision lacks intent to enhance any other protective provisions of the 1934 Act.109 Furthermore, the standard of culpability under Section 20A varies depending on the independent violation of the 1934 Act alleged in each case.110

The primary reason why limitations periods from either section 16(b) or section 20A are not appropriate, however, is simply because other provisions are more analogous to section 14(a). In Westinghouse, the Third Circuit noted similarities to sections 9 and 18, which expressly contain the one-year/three-year limitations period, and section 10(b), which now impliedly contains that same limitations period.111 Significantly, the court seemed concerned that those provisions, like section 14(a), contain a disclosure element.112 Section 18 implicates disclosure because it protects securities purchasers who relied on false or misleading statements in a document filed under the 1934 Act.113 Section 18 is also the only express private action under the 1934 Act that can apply in the proxy process.114 Section 9 involves disclosure because it creates liability for inducing a purchase or sale of a security via a false or misleading statement.115 Section 10(b) also relates to disclosure because it protects against the use of a "manipulative or deceptive device or contrivance" in the purchase or sale of securities.116 Moreover, Third Circuit courts have recognized similari-

109. Id. The Court pointed to provision (d) which provides:
   (d) Authority not to restrict other express or implied rights of action:
   Nothing in this section shall be construed to limit or condition the
   right of any person to bring an action to enforce a requirement of this
   chapter or the availability of any cause of action implied from a provision
   of this chapter.
110. The use of § 20A requires an independent violation of the 1934 Act. See supra note 106.
112. Id. (noting that §§ 9, 10(b) and 18 protect investors by guaranteeing accurate and complete information).
114. Steinberg & Reece, supra note 18, at 98.
   If a dealer or broker, or other person selling . . . or purchasing . . .
the security, to make . . . for the purpose of inducing the purchase or sale
of such security, any statement which was at the time . . . false or misleading
as to any material fact, and which he knew or had reasonable ground
   to believe was so false or misleading.
   Id.
116. 15 U.S.C. § 78j(b) (1988). For the statutory language of § 10(b) and its disclosure aspects, see supra note 7 and accompanying text.
ties between sections 10(b) and 14(a) and have usually applied the same
limitations period to both.117

Some differences exist, however, between section 14(a) and sections
9, 10(b) and 18. Notably, sections 9, 10(b) and 18 generally apply in the
context of trading in securities,118 whereas section 14(a) does not involve
trading in securities, but instead involves the solicitation of proxies.119
The standards of culpability also vary. As noted, most federal courts,
including the Third Circuit, apply a negligence standard to section 14(a)
claims, although some courts require a showing of scienter.120 Sections 9,
10(b) and 18 all require a showing of scienter.121 Thus, in the Third Cir-
cuit and in most federal courts, the standard of culpability for section
14(a) differs from that for sections 9, 10(b) and 18.

Despite these differences, the Third Circuit concluded that sections 9,
10(b) and 18 are most analogous to section 14(a).122 Certainly the fact
that these provisions protect investors by requiring disclosure shows a
strong similarity to section 14(a).123 Furthermore, section 18 is clearly
analogous to section 14(a) because it also applies in the proxy setting.124

Thus, while it is clear that sections 9, 10(b) and 18 of the 1934 Act are
fairly analogous to section 14(a), provisions in the 1933 Act might also be
examined to determine the appropriate limitations period. The Supreme
Court has previously noted the interrelation of the 1933 and 1934 Acts.125
Moreover, in Lampf, the Supreme Court examined both the 1933 and
1934 Acts to determine an appropriate limitations period for section 10(b)
actions.126 Although, the Third Circuit in Westinghouse only discussed sim-
ilarities between section 14(a) and certain provisions in the 1934 Act - the
statute of origin - section 11 of the 1933 Act should also be examined.127

117. Westinghouse Elec. Corp. by Levit v. Franklin, 993 F.2d 349, 353 (3d Cir.
1993).
118. For a discussion of these provisions, see supra note 18 and accompanying
text.
119. For a discussion of the provisions protection, see supra note 18 and
accompanying text.
120. For a discussion of the proxy solicitation aspect of § 14(a), see supra note
19 and accompanying text.
121. For a discussion of the standard of culpability for § 14(a), see supra notes
109-04 and accompanying text.
122. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976) (holding
§ 10(b) involves element of scienter); Adams v. Standard Knitting Mills, Inc., 623
F.2d 422, 429 n.6 (6th Cir.) (indicating in dictum that § 18 requires scienter), cert.
denied, 449 U.S. 1067 (1980); Connolly v. Havens, 763 F. Supp. 6, 11-12 (S.D.N.Y.
1991) (dismissing § 9 claim for failure to plead scienter).
123. Westinghouse Elec. Corp. by Levit v. Franklin, 993 F.2d 349, 353 (3d Cir.
1993).
124. Steinberg & Reece, supra note 18, at 98.
125. See SEC v. National Sec., Inc., 393 U.S. 453, 466 (1968) (noting interde-
pendence of securities laws).
126. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350,
Section 11 of the 1933 Act uses the one-year/three-year limitations period.\textsuperscript{128} Furthermore, section 11 resembles section 14(a) of the 1934 Act because section 11 requires disclosure to protect purchasers of securities from omissions or false statements in registration statements.\textsuperscript{129} In addition, section 11 utilizes a negligence standard of culpability, just as section 14(a) does in most circuits.\textsuperscript{130} The only significant difference between section 11 and section 14(a) is that section 11 protects purchasers of securities while section 14(a) protects voting shareholders.\textsuperscript{131} Thus, analysis of section 11 of the 1933 Act supports the Third Circuit's conclusion that the one-year/three-year limitations period applies to section 14(a) claims. Overall, an examination of both the 1933 and 1934 Acts supports the conclusion that those provisions containing the one-year/three-year limitations period are most analogous to section 14(a).

IV. Conclusion

Sections 10(b) and 14(a) serve to protect investors.\textsuperscript{132} That protection increased when the judiciary recognized implied private causes of action under both sections.\textsuperscript{133} However, because courts applied different limitations periods to these implied private actions, this increased level of protection lacked consistent application throughout the federal courts.\textsuperscript{134}

\textsuperscript{128} 15 U.S.C. § 77m (1988). Section 13 of the 1933 Act provides application of the one-year/three-year limitations period to § 11. Section 13 provides in pertinent part:

No action shall be maintained to enforce any liability under section 77k . . . unless brought within one year after the discovery of the untrue statement or omission . . . . In no event shall any such action be brought to enforce a liability created under section 77k . . . more than three years after the security was bona fide offered to the public . . . .”

\textit{Id.}

The 1933 Act originally contained a two-year/ten-year limitations period. However, when Congress passed the 1934 Act, it cut the period to one-year/three-year and also included the one-year/three-year limitations period in all express civil action provisions of the 1934 Act, except for § 16(b). Ceres Partners v. GEL Assoc., 918 F.2d 349, 362 (2d Cir. 1990). The \textit{Ceres} court concluded that this action “suggests that Congress, if it had provided an express right of action under §§ 10(b) and 14, would have adopted a one-year/three-year period.” \textit{Id.} at 363.

\textsuperscript{129} 15 U.S.C. § 77k. Section 11 provides for civil suit when any part of a registration statement at its effective date “contained an untrue statement of material fact or omitted to state a material fact . . . .” \textit{Id.}

\textsuperscript{130} Ernst & Ernst v. Hochfelder, 425 U.S. 185, 207-09 (1976) (discussing provisions of 1933 Act that use negligence standard, including § 11).

\textsuperscript{131} See Hetzer, \textit{supra} note 1, at 1498 (comparing § 11 of 1933 Act with § 14(a) of 1934 Act).

\textsuperscript{132} Westinghouse Elec. Corp. by Levit v. Franklin, 993 F.2d 349, 353 (3d Cir. 1993) (noting that § 14(a) and § 10(b) are intended to “protect investors”).

\textsuperscript{133} For a discussion of judicial recognition of implied private causes of action under § 10(b) and § 14(a), see \textit{supra} notes 19-26 and accompanying text.

\textsuperscript{134} For a discussion of this disparity, see \textit{supra} notes 30-39 and accompanying text.
Recognizing a need for uniformity, the Third Circuit first applied a federal limitations period to implied private actions brought under section 10(b). Subsequently, that limitations period and the protection offered to investors under section 10(b) have become uniform throughout the federal courts. The Third Circuit has now applied that same limitations period to implied private actions brought under section 14(a). This approach to section 14(a) actions accords with Supreme Court reasoning and should contribute to uniform treatment of section 14(a) claims throughout the federal courts. As a result, section 14(a) will eventually offer greater protection to investors because those investors bringing an action under section 14(a) will be certain of the applicable limitations period, and all potential litigants will be subject to the same limitations period.

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136. For a discussion of the Supreme Court's adoption of the one-year/three-year limitations period for Rule 10b-5 actions as well as congressional limitation on that holding, see supra notes 58-70 and accompanying text.


138. For a discussion of the Third Circuit's analysis, see supra notes 72-87, 91-124 and accompanying text.