OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LAMPF PLEVA LIPKIND PRUPIS & PETIGROW,

Petitioner V. JOHN GILBERTSON, ET AL.

CASE NO: 90-333

PLACE: Washington, D.C.

DATE: February 19, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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LAMPF PLEVA LIPKIND PRUPIS :

& PETIGROW, :

Petitioner :

v. : No. 90-333

JOHN GILBERTSON, ET AL. :

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Washington, D.C.

Tuesday, February 19, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:12 a.m.

APPEARANCES:

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of the Petitioner.

F. GORDON ALLEN, III, ESQ., Portland, Oregon; on behalf of the Respondents.

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PROCEEDINGS

(11:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 90-333, Lampf Pleva, et al. v. Gilbertson.

Spectators are reminded the Court remains in session. There's to be no talking.

Mr. Olson, you may proceed whenever you are ready.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONER

MR. OLSON: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents two closely related questions. First, should Federal securities fraud claims under Section 10(b) of the Securities Exchange Act of 1934 be governed by a single Federal statute of limitations or by the law of the forum State on a case-by-case basis.

Second, should the Federal rule be the 1-year/3-year standard established by Congress for the comparable Federal securities fraud remedies at the same time that it created Section 10(b), or by a limitations period enacted -- extracted from some other Federal law passed decades later.

The respondents are Oregon residents who brought actions under Section 10(b) and Rule 10b-5 to recover the

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losses they had sustained on limited partnership tax shelter investments. Petitioner is a New Jersey law firm that was involved in preparing some of the offering materials.

Oregon's 2-year fraud statute of limitations was applied by both courts below in adjudicating petitioner's summary judgment motion. The district court granted the motion. The Ninth Circuit reversed, holding that issues of fact remained as to when the alleged fraud was discovered. There is no dispute, however, that if the Section 10(b) claims against petitioner -- that the 10(b) claims against petitioner would have to be dismissed if the 1-year/3-year limitations period were to be applied.

I will focus today on three principal contentions. First, the wasteful and debilitating consequences of borrowing State limitations periods on Federal policies, the Federal civil justice system, and Federal litigants make it essential that a uniform Federal standard be adopted.

Second, the 1-year/3-year limitation period, repeatedly adopted by Congress when it enacted the 1933 and the 1934 securities acts, including Section 10(b), is the only choice for Section 10(b) that is compelled both as a matter of legislative intent and as the standard most compatible with the Federal remedy and the Federal

policies underlying that remedy. This solution has been endorsed with near unanimity by the courts, commentators, and the Bar.

Third, neither the 5-year limitations period adopted by Congress in 1988 for insider trading, nor the 4-year limitations period adopted in 1979 for land sales are rational, workable, or jurisprudentially acceptable alternatives.

Turning first to the operation and effect of the system that prevails in many of the circuits today, that system, with the exception of the three circuits, the Second, Seventh, and Third Circuit, is to apply the law of the forum State. The district court applies the fraud statute of limitations, the Blue Sky statute of limitations, the contract statute of limitations, the personal injury statute of limitations, or some catch-all statute of limitations, depending upon the particular facts of the particular case and the particular forum in which the case is brought.

Thus there are 50, 100, 150, and more potential statutes of limitations to apply at the outset in a 10b-5 case. State statutes of limitations for fraud or Blue Sky may vary from as short as 1 to as many as 10 years, and these complications are exacerbated because then the district courts apply different and numerous rules of

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tolling with respect to when the statute of limitations has begun to run.

Furthermore, as respondents point out and concede in their brief, State statutes of limitations with respect to fraud or Blue Sky are constantly changing. This complicates the district court jobs further.

QUESTION: Mr. Olson, these are problems that always exist whenever you borrow State statutes of limitations, but we've been doing it for a couple of hundred years. I think what you're saying is that it's always better to make up or pick a Federal statute of limitations. Is that always true?

MR. OLSON: Well, it may -- it may be from that standpoint generally preferable to pick a Federal uniform statute of limitations for a federally created right. But this, the securities laws under Section 10(b), are at the far end of the spectrum, because there must be an interstate nexus to begin with. That was not the, that's not the case in many of the statute of limitations this Court has adjudicated in the last few years. There must be an interstate nexus. There are frequently many plaintiffs and many defendants from many different States. There is a Federal source to turn to in this case.

QUESTION: Have you read the law of conflict of laws recently? I mean, from the standpoint of a lawyer

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figuring out what substantive law is going to govern his case, I don't know that securities law is any more difficult than any other field for determining what substantive law the particular court is going to apply.

MR. OLSON: Well, the commentators in the courts that have struggled with this, one judge from the Seventh Circuit said this is as enervating as it can possibly be in the Federal securities field. The ABA special committee on Federal securities law studied this and said that this is a disaster, there is chaos, there is forum shopping, there is litigation, year after year of litigation after litigation. Those same choice of law rules that the Court just -- that you just referred to, Justice Scalia, exacerbated even further --

In New York, for example, the district court in New York will either apply the rule of New York if it's a New York resident bringing the action, or the law of New Jersey if it's a New Jersey resident bringing the action. The Second Circuit in the Ceres Partners case described one Federal securities case in which 26 different statute of limitations were applied, and another case in which 34 different statute of limitations were applied.

Even the plaintiffs concede that there is forum shopping in this area. The plaintiffs indicated, for example, there undoubtedly is forum shopping, and they

simply said that there is no imposition on the Federal court system. Well, this Court has said that it is an imposition on the Federal court system to be -- for there to be forum shopping. There is inconsistency, injustice, unfairness. There are different results for different litigants similarly situated. There is uncertainly in the marketplace for the marketing of Federal securities -- this is an important segment of our national and international economy -- and it undermines Federal policies, the very Federal policies that were at work in 1933 and 1934 when Congress enacted the '33 and '34 act, the importance of establishing uniform enforcement in Federal securities laws.

As this Court specifically has held in the Wilson case, few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of statutes of limitations.

QUESTION: Mr. Olson, do any of the States in causes of action like this apply a doctrine of latches?

MR. OLSON: They do not apply the doctrine of latches --

QUESTION: In lieu of a statute of limitations. Sometimes latches is applied along with it, but I mean in lieu of statute of limitations.

MR. OLSON: They do not -- the doctrine of

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latches generally would be applied in cases involving equity rather than cases for the vindication of private rights of action for damages in the 10(b) context. Doctrines sounding like latches are applied in that the district courts and the States sometimes apply equitable tolling doctrines, which amount to the same things, to justify whether or not a statute of limitations would apply in a given case or not.

In fact, it's true that in this case everyone, everyone -- the SEC, the petitioner, the respondents -- agree that the present system is unacceptable and should be changed. The respondents offer a modification of the present system, but even they agree that the present system should be -- changed.

QUESTION: Has anyone sought to get legislation from Congress? Congress does have the power to pass statutes of limitation. Why didn't that occur to anybody? I mean, if there is as much upset about it, if everybody is in agreement as you say, it ought to be a simple thing to get a statute.

MR. OLSON: Well, it's -- as you know, Justice Scalia, it's not that simple necessarily to get a statute.

QUESTION: Well, maybe there isn't that much agreement.

MR. OLSON: Many of the commentators have agreed

that congressional legislation in this area would be beneficial. The ABA study, a special study that I referred to, specifically suggested congressional legislation. There has not yet --

QUESTION: Well, Mr. Olson, in the Judicial Improvements Act passed a year ago, Congress did adopt a general 4-year statute of limitation, but apparently limited it to acts enacted after the enactment of the 4-year statute of limitations provision.

MR. OLSON: Yes.

QUESTION: In other words, they didn't seek to apply it --

MR. OLSON: Yes, that's correct, Justice --

QUESTION: -- to previous enactments or causes of actions. Now, why was that? I mean, why, why so limit it?

MR. OLSON: I think that the Congress bit off in the judicial, or Justice Improvement Act, which was passed in 1990, about as much as it felt that it could chew at that particular point. It decided that a 4-year statute of limitations would apply in specific --

QUESTION: For all future acts of Congress, unless they provide otherwise expressly.

MR. OLSON: For all private remedies created by future acts of Congress, that's correct.

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QUESTION: Well, maybe that should be a guidepost in this case.

MR. OLSON: Well, the answer to that, I think, Justice O'Connor, is found in this Court's repeated statement, and most recently, or perhaps not most recently, but recently in footnote 1 in the Patterson v. McLean case. Congress makes law by affirmative actions of both Houses of Congress, signed by the President, not by inaction. Every time, every time the Congress -- let me resort, return to the 1- and 3-year statute of limitations, because Congress did consider the subject of statutes of limitations for private remedies under the securities acts of 1933 and 1934. The 73d Congress spent a great deal of time considering, as this Court has indicated, we must resort --

QUESTION: Well, it considered some -- a limitation period for those causes of action that Congress expressly created. I don't think you can say it considered what the cause -- statute of limitations should be for a cause of action implied by the courts.

MR. OLSON: The court -- the Congress at that time -- that is correct, Justice O'Connor, because the cause of private right of action under Section 10(b) is implied from Section 10(b). Section 10(b) did not explicitly create an express cause of action or a statute

of limitations. Therefore Congress did not expressly focus it -- on it and enact a statute of limitations.

But I submit that Congress focuses -- focused on the subject about as closely and as carefully as Congress could under the circumstances. The Congress in 1933 and 1934 -- and there were two acts -- focused expressly on a uniform national legislation, a regimen, regime of governing securities transactions in the United States.

Ultimately, this Court has said, the test is what Congress, what balance would Congress have preferred. That's the standard articulated in the Wilson case and repeated in the DelCostello case and in the Agency Holding case. What standard would Congress have preferred.

What happened in 1933 and 1934 when the 1933 and 1934 securities acts were created, is that Congress expressly created five or six separate, specific private rights of action. And the one thing that Congress focused on in conjunction with each of those causes of action, and the desire by Congress that Federal securities law be treated uniformly in the courts of the Nation, is that every express cause of action created by Congress in 1933 and 1934 was given an express statute of limitation.

Secondly, every express statute of limitations created by Congress in 1933 and 1934 was a nontollable outside limit, 1-year/3-year statute of limitations, a

maximum outside limitation of 3 years for the vindication of the right.

QUESTION: But are all those statutes identical with one another?

MR. OLSON: No, they're not, Justice Stevens. Each of the statutes created in Section -- in the securities act of '33 and '34 is somewhat different. One of them deals with misrepresentations in registration statements. One of them deals with misrepresentations in prospectuses. One of them deals with stock listed on an exchange. But the panoply of those statutes taken together, some of which have slightly different standards, they are all -- they all have two or three things in common. They are all Federal securities regulations that create private rights of actions. They all have an express statute of limitations, and a nontollable 3-year maximum statute of limitations. And generically, Congress decided, however much each of the specific limitations period would be different from one another, each of them would be subject to the same 1-year/3-year statute of limitations period. So although there are differences in the remedies, there is no difference in the limitations period that Congress intended to apply.

And each time this Court has considered what should -- in the first place I should step away for a

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moment and say this Court has repeatedly said that whether the right -- whether an implied right of action should exist under a Federal statute is ultimately a matter of legislative intent. And this Court has determined, each time it has examined the contours of an implied right of action, has looked to the Congress that created the remedy from which the courts discern a right of action.

And each time this Court has considered Section 10(b), Section 17 of the '33 act, Section 14 of the '34 act, or other aspects of Federal securities regulations, the Court has uniformly turned to the 73d Congress to determine not only whether such a right exists, but whether -- what the scope and limitations and contours of that right would be. The Court did it in the Blue Chip case, the Court did it in Ernst & Ernst -- in the Ernst & Ernst case, Piper v. Chris-Craft, and on and on. The Court has repeatedly looked to that one source of information as to what Congress might have preferred. And in this case what Congress --

QUESTION: We weren't moved, evidently, by the fact that whenever Congress wanted a cause of action it adopted a statute of limitations for it. That didn't seem to influence us.

MR. OLSON: It -- this --

QUESTION: I mean, you say every other, every

instance in that statute where Congress created a private right of action, it enacted a statute of limitations for that cause of action, right?

MR. OLSON: That's correct.

QUESTION: But we found that Congress really had in mind another cause of action without a statute of limitations.

MR. OLSON: You -- this Court --

QUESTION: I mean, you can say we looked to it, but have we really used it? Has that been our guiding, our guiding star, what the 73d Congress wanted?

MR. OLSON: This -- invariably when the Court has construed the scope and contours, whether sienter is required under Section 10(b), whether preponderance of the evidence or a clear and convincing standard, whether Section 10(b) is limited to purchasers and sellers, the Court has invariably turned to what Congress did in 1933 and 1934, the 73d Congress.

And this Court has not considered the statute of limitations before. This is the first time that that has directly come before this Court and has been directly presented. But we submit that the only source to discern, the only reliable source to discern what would Congress has intended, is that very same source.

It is also true that if the Court adopts a

separate or a distinct methodology, which I think, and I respectfully submit, is really the same as looking at legislative intent anyway, but if the Court looks at it differently and applies the analogy standard that is articulated in the Agency Holding v. Malley-Duff case, one draws -- comes to the same conclusion.

In Blue Chip this Court examined, in order to determine the scope and contours of Section 10(b) with respect to the purchaser and seller requirement, it -- this Court looked to the express causes of action in the '33 and '34 act, called them comparable causes of action, said that they were the appropriate vehicle and analogy to compare them with.

This Court has repeatedly said that standards of fraud under the common law are light years away from the right created under Section 10(b), and that those comparable causes of action do provide an appropriate analogy because they are Federal, they are intended to be uniform, they are intended to provide private redress for securities fraud, they all arise at the same time.

And the other aspect of this from the standpoint of the analogy standard is that if this Court were to adopt a longer period of limitations for Section 10(b), 5 years, for example, as the Commission suggests, that would tend to write out, nullify, or repeal the legislation that

the 30 -- the 73d Congress specifically focussed on and enacted with respect to these other statutes, because, as this Court has noted, the actions under Section 9 of '34 act, Sections 11 and 12 of the '33 act, and so forth, can be brought under Section 10(b).

So an artful pleader, if given a choice between a 5-year statute of limitations as the Commission urges, and the 1- and 3-year statute of limitations that Congress expressly adopted, would naturally plead it under Section 10(b) to take advantage of the 5-year statute of limitations, thus resulting in a judicial nullification of the express intent of Congress.

Now I can't emphasize enough --

QUESTION: (Inaudible) true that the -- is it the Insider Trading Act of '88 that the Commission relies on?

MR. OLSON: Yes, Justice White.

QUESTION: Well, isn't it true that that -- that's the only time that there, that Congress has provided a statute of limitations with respect to a cause of action that can be -- involve 10(b)?

MR. OLSON: It -- in this sense only --

QUESTION: Isn't that right?

MR. OLSON: Only in a very limited sense, Justice White.

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QUESTION: Well, that -- well, anyway, it's right.

MR. OLSON: It's right only in a very limited sense, in the sense that a --

QUESTION: Well, tell me when it isn't right.

(Laughter.)

MR. OLSON: I will. Most of the causes of action that might be brought under 10(b) cannot be pleaded under the -- we'll call it the Insider --

QUESTION: Well, that's true, that's true. But I still ask -- you can bring a cause of action under that '88 act that involves a violation of 10(b).

MR. OLSON: That's correct.

QUESTION: And there is then an express statute of limitations for it.

MR. OLSON: Congress expressly decided -- you're correct in stating that Congress expressly decided for a narrow band, a very peculiar type of Section 10(b) violations. And it's not just 10(b). That 1988 statute --

QUESTION: I agree with that. I agree with that, but it does involve 10(b).

MR. OLSON: It does involve 10(b). It involves --

QUESTION: Why shouldn't -- why isn't that the

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closest statute that we should look to?

MR. OLSON: Well, there are several reasons why that is not the closest. In the first place, if the ultimate test is legislative intent, the appropriate place to look first of all is to the language of that specific 1988 statute. What Congress said in that 1988 statute, and respondents concede on page 42 of their brief that Congress could not have been clearer with respect to this, it did not intend that 1988 statute to apply otherwise to Section 10(b) or any other of the securities --

QUESTION: So -- so you suggest we have -- there are two -- you suggest two statutes of limitations that would be -- that would apply this -- different 10(b) actions? One that involves the '88 act, and for all others there would be this other statute of limitations?

MR. OLSON: There is already the one --

QUESTION: Is that right?

MR. OLSON: Not -- no, Justice White, because there are already the 1- and 3-year statute of limitations that apply to many of the facts that might be pleaded under Section 10(b).

QUESTION: Right.

MR. OLSON: The 1988 statute carved out a very narrow niche of people trading on inside information who may sue contemporaneous traders for a very limited remedy,

that is, they may only recover the profit of the contemporaneous trader in the same type of securities.

But Congress specifically said nothing in this section shall be construed to limit or condition a right of any person to enforce a requirement of this title or the availability of any cause of action implied from a provision of this title. Thus Congress could not have been clearer that it did not intend the 1988 legislation to apply to Section 10(b) actions beyond this -- the narrow hybrid remedy that was created to solve a specific problem created by -- what the Congress perceived was created was a judicial decision.

QUESTION: Mr. Olson, were -- are there any other overlaps in the 1988 statute? Does that limitation period cover any other actions that are governed by another Federal statute of limitations?

MR. OLSON: That limitations period covers any -- let me put it this way, Justice Scalia, that that statute creates a right, a remedy for a violation of either Section 10(b) or other -- violation of other provisions of the '34 act.

QUESTION: Which already have their own statute of limitations?

MR. OLSON: Which already have their own statute of limitations.

QUESTION: So it wouldn't be at all unusual for that 1988 statute to duplicate the 1- and 3-year statute that you're arguing for, it already duplicates other ones?

MR. OLSON: That's exact -- that's precisely correct. And what Congress was saying -- the history of the 1988 statute is that Congress did not really focus on the statute of limitations at all. There is very little legislative history. The statute was originally, in the 1988 legislation, was taken from the Insider Trader Sanctions Act of 1984, which had a 5-year limitation period which restricted the right of the SEC to seek certain civil penalties. That in turn was taken from the 5-year Federal criminal statute of limitations. What Congress did in each of these events was repeat that 5-year statute of limitation.

It didn't focus on the balancing process, which is what Congress clearly did, and I probably should return to this point. The one thing that Congress did in 1933 and 1934 is to conduct the kind of balancing that this Court says is necessary to evaluate when and what are the limitations of an appropriate statute of limitations period.

Several members of the Congress indicated that they had not in their lifetime been exposed to more debate, public commentary, public controversy, with

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respect to what the statute of limitations would be.

When the 1933 act was passed and express remedies were created, the Congress enacted a 2-year/10-year statute of limitations. There was, there was a great amount of public outcry and lobbying, both from the business community and people on the other side of the issue.

Congress then had considerable hearings and debates, and specifically conducted that balancing. They understood that they might be cutting off the rights of some plaintiffs when they enacted a statute of limitations that was the length that they enacted in 1934. But they did so quite intentionally and they considered the impact of the potential, which is described well by this Court in Chief Justice Rehnquist's opinion for the Court in the Blue Chip case, the effect of Section 10b-5 actions might have on officers, directors, accountants, underwriters, issuers, and so forth, and the international marketplace. The Court conducted that balancing process and decided that that 3-year statute of limitations was the right solution for securities act limitations.

The one thing that I would like to mention before I reserve the balance of my time for rebuttal is that the respondents have urged that the international -- the Interstate Land Sales Act, which was amended in 1979

to have a 4-year statute of limitations, ought to be the guide. I would simply like to reiterate what we have said in our brief, that the Interstate Land transactions act, Congress was not balancing the importance of secondary markets and the effect upon the economy of litigation with respect to securities. This is a statute which Congress enacted without consideration of what the appropriate statute of limitations ought to be in securities cases, and it is a nontollable -- it is a tollable, arguably, statute of limitations.

The respondents favor that statute of limitations because they contend that there should be a tollable statute of limitations. I say that that is the strongest evidence that it's not the right statute of limitations, because the one thing about which there was virtually, if any -- there was no dissent in 1934, none in the Senate anyway, that the absolute 3-year statute should be a bar and that there should not be in this field a tollable statute of limitations.

With the Court's permission, I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Olson.

Mr. Allen, we'll hear now from you.

ORAL ARGUMENT OF F. GORDON ALLEN, III

ON BEHALF OF THE RESPONDENTS

MR. ALLEN: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether Section 10(b) and Rule 10b-5, private rights of action, will continue to have proper fraud statutes of limitations, statutes of limitations which are discovery based, or whether this Court will impose upon this antifraud remedy a 3-year statute of repose. And that is what we're talking about here, a 3-year statute of repose which will, in the words of this Court in Bailey v. Glover in 1875, cited frequently since then, which statute of repose will, in the words of this Court, become the means by which fraud can be successfully accomplished. The --

QUESTION: As it is where it's used elsewhere in the Federal securities acts.

MR. ALLEN: The other Federal securities acts are not antifraud remedies. At the time the 73d Congress enacted the 3-year statute of repose for those other sections, the little legislative history that we have on the subject tells us that a political tradeoff was made whereby a short statute of repose was put on the acts, but the proponents of that short statute of repose argued that the burden of proof on the plaintiffs would be so low they are basically strict liability causes of action with the defense of good faith available, that the burden on the

plaintiffs would be so low that a short statute of limitations was justified.

QUESTION: Even if you showed fraud it would do you no good. You'd still be subject to the 3 years, wouldn't you?

MR. ALLEN: Under the express remedies?

QUESTION: Yes.

MR. ALLEN: Yes. But those are different remedies. It's sort of like -- those are remedies, they are strict liability remedies. The fact that someone who is liable under those remedies may also have committed fraud, in -- in many cases may be a coincidence, but fraud is not a necessary element of the burden of proof.

QUESTION: Is there always intentional fraud in a 10b-5 violation?

MR. ALLEN: No, Your Honor, most courts hold that recklessness is also sufficient, but they do not hold that negligence is sufficient or that there are strict liability causes of action. And the instruction which is given for recklessness, as I can testify as plaintiff's lawyer, is exceedingly onerous. It comes so close to fraud that it is all but fraud.

Furthermore, we should not be looking at the intent of the 73d Congress in any specific way. This Court has held on many occasions, Bankers Life, Blue Chip

Stamps, Herman & MacLean, Basic Inc., Aaron v. SEC, this Court has always looked at Section 10(b) as a catch-all antifraud remedy, Congress' invitation to the SEC and maybe the courts in the future to fashion flexible antifraud remedies that would match the evolution of securities fraud. Those antifraud remedies have been developed in the sixties and the seventies and the eighties, in this Court in the seventies and the eighties. They are broad remedies, and to now shoehorn them back into the intent of Congress with the result of imposing a statute of repose, a 3-year statute of repose, would be a mistake.

It is too easy for promoters to figure out how to conceal their frauds for 3 years. This Court has, is certainly aware of Ponzi schemes whereby promoters are able to feed back proceeds from later investors to earlier investors. There are all kinds of accounting schemes whereby corporate executives and accountants can monkey with the books and go under -- undiscovered for years.

The bond investors who have filed an amicus brief here present a particularly compelling situation. They tell us that securities fraud -- they tell us that the average municipal bond which is unregistered and has no remedy except 10b-5, the average municipal bond will not default for 4 and a half years, then investors will

have no idea that they have been defrauded until there has been a default. And the result of a 3-year statute of repose is going to mean that the only Federal, the only Federal remedy for securities fraud available to bondholders will not apply in more than half of the cases where there is fraud.

Now, the respondents would like to make three points. First, under your tests in DelCostello and Malley-Duff, it is still the norm, it is still the rule for this Court to borrow State statutes of limitations, and there is nothing about the borrowing of State statutes of limitations which has frustrated or interfered with Federal policy, and State -- and the State statutes from which these statutes of limitations are taken, common law fraud and Blue Sky statutes of -- Blue Sky statutes, are at least as analogous to 10(b) and Section 10b-5 as are the Federal alternatives that are being proposed. No interference, just as analogous.

The second point we are -- we want to make is that this Court should reaffirm its holdings in Bailey v. Glover and Holmberg v. Armbrecht that a statute of limitations for fraud is -- it is particularly important that a statute of limitations for fraud be discovery based, that it be tollable, that is that it not start to run until the plaintiff either discovers or should have

discovered that he or she has a cause of action.

QUESTION: Should have discovered in the exercise of reasonable care?

MR. ALLEN: Yes, Your Honor.

The third point we want to make is that recent congressional action and inaction in the face of the evolution of Section 10(b) and Rule 10b-5, particularly where Congress has turned its attention to the securities laws on a number of occasions to examine them for problems, that recent inaction and ratification by Congress is of much more significance than the intent of the 73d Congress, an intent which this Court has repeatedly said is only of the most general nature, and an intent which invited the future to fashion remedies that would deal with the evolving nature of securities fraud. That is what you've said.

Now the respondents make a big point of the lack of uniformity. This lack of uniformity as a problem has been only recently perceived by three circuit courts. Prior to that, it is hard to find examples of problems arising because of the use of statutes -- borrowed State statutes, and there is a reason for that. The reason is because the Federal courts have imposed the rule of Holmberg v. Armbrecht whenever they have borrowed State statutes of limitations. That is they have borrowed the

duration from State law, but they have insisted that whatever that duration they borrowed was, that it not start until discovery. So the result is that whatever the duration has been, it has been of minor significance because plaintiffs have been allowed -- because it has not start to run until plaintiffs discover their cause of action. So the result has been that plaintiffs bring their causes of action very quickly --

QUESTION: Well then one -- another result is that the statute of limitations which you say is actually applied has really no connection with any other statute of limitations at all, if it doesn't even represent the State statute.

MR. ALLEN: I'm not following you.

QUESTION: It's -- well, from what you say, the duration is taken from the State, but the Federal courts are insisting that it be discovery based. Then that really severs the connection with State statute, so that the Federal courts are really just making it up. Is that right?

MR. ALLEN: No, I don't think it's right. I think they are borrowing the State statute --

QUESTION: But only part of it, you say.

MR. ALLEN: They are -- well, they have never acknowledged that they were borrowing part of it. They

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have borrowed the State statute of limitations subject to the Federal doctrine from this Court that it not start until the plaintiff discovered the cause of action.

QUESTION: Well, but Holmbrecht against Arm -- what's the name of the respondent? Holm --

MR. ALLEN: Holmberg v. Armbrecht.

QUESTION: Holmberg against Armbrecht was never laid down as a formula to apply to all statutes of limitations, was it, by this Court?

MR. ALLEN: I think it was, yes. I think that Justice Frankfurter made a fairly complete and -- rule without exception that this Court in borrowing State statutes of limitations would do the same thing that it also does when acting upon Federal statutes of limitations, most Federal statutes of limitations, and that is that they not start to run until the plaintiff discovers the cause of action.

QUESTION: Are you going to -- suppose we disagree with you on whether the State law should apply. What's your argument with respect to what the statute of limitations should be in that event?

MR. ALLEN: All right. First of all, it should not be a 3-year statute of repose. I think you have heard me say that.

Second of all, we believe that the situation

presented by the relationship, by the -- between the Interstate Land Sales Act and the securities acts is very similar to the situation that you encountered in the Malley-Duff case in examining the relationship between the Clayton Act and Rico. What you had in the relationship between the Clayton Act and Rico was that you had a subsequent statute, Rico, which you found had been very much patterned after the language and the concept of the Clayton Act. And so you said that this is the best indication of what Federal policy should be in a statute of limitations for Rico.

Now look at the Interstate Land Sales Act. In the late sixties, in 1968 or '69, Congress passed a remedy for people who are cheated by the sales through the mails and over the telephone of land in sunny climates and the like, investment properties. And what Congress did was to enact a remedy which sort of sat between a 12-2 remedy in the securities laws and a 10b-5 remedy in the securities law, but Congress did say that it was intending to pattern this after the securities laws.

What it did 10 years later, though, is what is compelling about this analogy, because 10 years later it decided to make the Interstate Land Sales Act more like the securities act. It decided to divide out a 12-2 remedy, a strict liability-type remedy -- 12-2 of the 1933

act is what I am referring to. They decided to divide out a 12-2 remedy, and they decided to divide out a 10b-5 remedy. And they made that 10b-5 remedy identical, or practically identical, to Rule 10b-5 in the securities acts, and once again they said our intention here is to pattern this after the securities acts.

Then what did they do with respect to the statute of limitations? They took a 3-year statute of repose and put it on the 12-2 remedy, the 73d Congress, and then they took a 3-year from discovery, a discovery-based statute of limitations, and put it on the 10b-5 remedy for 10b-5.

Look at what else Congress has done. Congress, when they enacted the residual statute of limitations in the Judicial Reform Act, Section 313, enacted a 4-year statute of limitations based upon accrual. Under the holdings of the Federal courts that notion of accrual will probably also turn out to be discovery based.

So Congress has, in the Interstate Land Sales Act, which, we would submit to you, is recent. It's 1979. It sits right in the middle of this Court's most important holdings in the securities area, it represents Congress' intent on what it should do in a fraud case. And in the residual Judicial Reform Act, enacted last year, this Court has -- the Congress enacted a statute of limitations

which is discovery based.

QUESTION: Mr. Allen --

QUESTION: Mr. Allen -- I'm sorry.

QUESTION: Mr. Allen, do you -- do you take the position that if we were to apply a Federal statute of limitations and were to apply the 1-year/3-year statute of limitations, that there could never be any equitable tolling of that 3-year period? Is that the position you want to take here?

MR. ALLEN: I think you -- that that is the position that this Court better figure on, because that statute has been interpreted numerous times -- not numerous times, but a number of times, as it applies to the express remedies, and the courts always hold that it is a statute of repose. And petitioner --

QUESTION: Have we held that?

MR. ALLEN: No, you haven't.

QUESTION: Not yet.

QUESTION: Mr. Allen, how does this work, I mean, when we pick a Federal statute? You have described one that you say well, it's pretty close to 10b-5. Suppose --

MR. ALLEN: Very close.

QUESTION: Suppose 2 years from now Congress passes yet another statute that is even closer? I suppose

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we jump over to that one then, right? I mean, this is an ongoing looking, scanning the United States Code for the closest friend, right?

MR. ALLEN: I read your dissent in Malley-Duff. I agree with you. I don't know how you would get to borrowing State statutes of limitations in this case in the first place, for the reasons that you stated, and also for the reasons stated in the test. There's -- this borrowing of State statutes has worked for 40 years. It doesn't interfere with State policies. It appeals to certain people who think uniformity is very important, but uniformity at what price? And the price of this uniformity is going to be this 3-year statute of repose, which is going to oust the Federal courts of -- jurisdiction over interstate securities fraud when claims are brought by the most innocent and the most deserving of this Federal -- of the Federal courts' attention.

QUESTION: Of course that problem of jumping from statute to statute is, I suppose, an argument for Mr. Olson's position of sticking with the limitations from the statute that this cause of action is derived from. I mean, there is never going to be another 73d Congress.

MR. ALLEN: I agree with that. But I don't --

(Laughter.)

MR. ALLEN: I don't agree with Mr. Olson's

position. It would be a reversal of this Court's -- this Court has always said that the legitimacy of Section 10(b) and Rule 10b-5 rests more on congressional ratification than original congressional intent. That has been the position of this Court, the best statement of which is found in the Blue Chip Stamp case.

QUESTION: Well, really what Blue Chip said was the oak had grown so big it was too late to saw it down. That's basically what I -- the way I read it.

MR. ALLEN: Exactly. And you would be sawing it down. To put a 3-year statute of repose on this action is to saw it down.

Tolling in a -- tolling in a fraud case is not only the policy of this Court which you have held on a number of occasions, it is also the policy of Congress. In 1934 Congress was not dealing with fraud statutes of limitations. Congress, when dealing with fraud statutes of limitations, has imposed tolling.

You -- I think I have nothing else to say. I'm going to yield back my time.

Thank you very much.

QUESTION: Very well, Mr. Allen.

Mr. Olson, do you have rebuttal? You have 3 minutes.

REBUTTAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONER

MR. OLSON: I'll be very brief.

QUESTION: You'll have to be.

(Laughter.)

MR. OLSON: One of the points that respondents make is that there must be a discovery-based statute of limitations in the securities fraud area. That is a concept which Congress debated and rejected. The debate was extensive and Congress rejected it. Congress knew that it was cutting off rights, and it intended to cut off rights, because it balanced the enforcement objectives and the remedial objectives of the '33 and '34 act with the effect of those remedies on the marketplace, and it cut off those rights and it intended it not to be a discovery based limitation.

QUESTION: But your opponent says that those were not fraud actions.

MR. OLSON: Well, the problem with what my opponent says with respect to those are not being fraud actions, is that Congress repeatedly characterized those actions as fraud actions. The legislative history of the 1933 and '34 act contain the word "fraud" literally thousands of times in reference to the express remedies created by those statutes. They are -- some of them have less of a standard of proof for the plaintiff, some of

them have a greater standard of proof. Section 9 of the '34 act does require sienter. The one thing in common with respect to the statutes that Congress created, the remedies that Congress created that the Congress called fraud statutes -- some of which had sienter, some of which did not -- is that they all had an express statute of limitations, they all had the same statute of limitations, and it cut off the rights at 3 years.

The Holmberg case v. Armbrecht dicta is just that. It's dicta by Justice Frankfurter in an equity case. As this Court said in American Pipe and Construction v. Utah in 1974, the concept of Federal tolling must be construed to be consistent and consonant with the legislative scheme and the legislative purpose. In this case the legislative scheme and the legislative purpose are clear.

If there is, as this Court said in Touche Ross v. Redington, if there is any injustice as a result of someone's right being cut off, that -- if this result, as the Court said, then sanctions injustice, that argument, when made here, is made in the wrong forum.

This Court is not at liberty to legislate. The 73d Congress conducted the legislative activities necessary to apply a statute of limitations to the '33 and '34 acts and the Section 10(b) remedy. As this Court said

in DelCostello, the family resemblance between Section 10(b) and the other '33 and '34 act express remedies is undeniable. There's an, a substantial overlap of remedies and the balancing of interests is the same. Congress has conducted that balance of interest, of remedies, and selected a 3-year statute of limitations.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson.

The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)

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BY Roojeuer Hunter

(REPORTER)