

Statute of Limitations--10(b) Action (Klein v. Auchincloss, Parker & Redpath)

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substance of his claims.¹⁶ On these grounds, the court vacated the injunction granted below.¹⁷

STATUTE OF LIMITATIONS — 10(b) ACTION

Another significant decision reached by the Court of Appeals was *Klein v. Auchincloss, Parker & Redpath*.¹⁸ In this action based on alleged violations of sections 9, 9(e), and 10(b)¹⁹ of the Securities Exchange Act of 1934, the district court granted summary judgment against the plaintiff on the ground that his action was barred by the applicable statute of limitations.²⁰ The circuit court of appeals reversed.

The plaintiff maintained that he had employed Auchincloss, Parker & Redpath to sell twenty shares of Superior Oil of California stock at the prevailing market price on the New York Stock Exchange. Two days later, on November 27, 1959, the defendant confirmed sale of the shares at \$1280 per share. The plaintiff later complained that the price was merely the artificial result of price manipulation by the defendants in violation of sections 9 and 10(b) of the 1934 Act.²¹

Suit was commenced on November 24, 1969, almost 10 years after the alleged fraudulent activities. On this ground and relying on the built-in statute of limitations of section 9(e),²² the district court dismissed the action.

In reversing the district court's determination and remanding the action of the district court for determination of the merits of the plaintiff's case, the court stated that the applicable statute of limitations is contained in two sections of the N.Y. Civil Practice Law and Rules.²³

The court was in agreement with the district court that the plaintiff's section 9 claim was properly dismissed. However, since section 10(b) contains no built-in statute of limitations, it was error to apply the three-year period of section 9. Rather, the federal court must turn

¹⁶ *Id.*

¹⁷ In so vacating, they suggested that the district court assign all of plaintiff's cases to a single judge who could decide the order of the proceedings so as to expedite their disposition. *Id.*

¹⁸ 436 F.2d 339 (2d Cir. 1971).

¹⁹ 15 U.S.C. §§ 78i, 78i(e), 78j(b) (1970).

²⁰ 15 U.S.C. § 78i(e) (1970) provides:

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.

²¹ The plaintiff further alleged that the defendant claimed that the sale was to a disinterested third party at the prevailing market price when in fact, according to the plaintiff, the shares were transferred to agents of the defendant, and that the prevailing market price was more than \$1280 per share. 436 F.2d at 340.

²² *Supra* note 20.

²³ N.Y. CIV. PRAC. §§ 203(f) & 213(g) (McKinney 1972).

to any applicable state statute of limitations and apply that statute. Since the alleged fraud occurred in New York, the court properly turned to the six-year period set forth in CPLR § 213(6).²⁴ Since CPLR § 213(6) contains a discovery rule,²⁵ it was necessary to apply CPLR § 203(f) as well.²⁶ Thus, if plaintiff had neither actual nor constructive notice of the fraud prior to the two years preceding the action, his claim under § 10(b) remained timely²⁷ even though some ten years had elapsed since the alleged fraud had been committed.

In finding against the plaintiff the district court had taken judicial notice of the fact that stock market quotations are published daily in various newspapers²⁸ and held that had the plaintiff been diligent, he could have discovered the fraud by examining these quotations on the relevant days.²⁹ The court of appeals disagreed and held that the defendants named were specialists in Superior Oil Stock and hence, could manipulate both prices on individual transactions and prices on multiple transactions over a period of several days. In short the plaintiff himself would have had to be a specialist in Superior Oil Stock in order to uncover the fraud. The issue of whether or not the plaintiff failed to exercise reasonable diligence in discovering the fraud is a question of fact, and, therefore, summary judgment was an inappropriate remedy.³⁰

FAILURE TO DISCLOSE MARKET-MAKING IS A 10(b) VIOLATION

In a recent action,³¹ the Court of Appeals for the Second Circuit held that a failure to disclose market-making activity in an over-the-

²⁴ The New York CPLR provision for actual fraud is contained in § 213(g): the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud or could with reasonable diligence have discovered it.

N.Y. CIV. PRAC. § 213(6) (McKinney 1972). For application of a state statute of limitations in a federal action, see *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951).

²⁵ The discovery rule allows a plaintiff additional time within which to bring his action if the wrong is not apparent at the time it is committed. N.Y. CIV. PRAC. § 203(f) (McKinney 1972).

²⁶ CPLR section 203(f) applies to any and all statute of limitations which contain a discovery rule except for periods of limitation set forth in article 2 of the Uniform Commercial Code. CPLR § 203(f) provides:

[W]here the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

N.Y. CIV. PRAC. § 203(f) (McKinney 1963).

²⁷ 436 F.2d at 341.

²⁸ See W. RICHARDSON, *THE LAW OF EVIDENCE* § 9 (9th ed. J. Prince 1964).

²⁹ 436 F.2d at 341.

³⁰ *Id.* at 341-42.

³¹ *Chasins v. Smith, Barney & Co., Inc.*, 438 F.2d 1167 (2d Cir. 1970).