SECURITIES FRAUD AND THE STATUTE OF LIMITATIONS: THE STRANGE CASE OF THE “MODIFIED UNIFORM” SECURITIES ACT

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“LB 848, with certain modifications to meet local Nebraska conditions, is the Modified Uniform Securities Act.”

—Introducer’s Statement of Purpose of LB 848, Nebraska Legislature, April 13, 1965.

INTRODUCTION

Oddly enough, the statute of limitations for fraud under the federal securities laws oftentimes varies, depending upon the state in which the action is brought or what state statute of limitations otherwise applies. This unexpected result derives from the fact that Congress provided relatively short statutes of limitation (one to two years) in the sections of the federal securities laws dealing specifically with civil liability.1 Plaintiffs soon learned, however, that they could allege violations of the criminal provisions of the federal securities laws, such as Securities and Exchange Commission rule 10b-52 adopted under section 10(b) of the Securities Exchange Act of 19343 (“rule 10b-5”), and the courts would “imply” a civil remedy.4 The doctrine of “implied civil liability” for criminal violations of federal securities laws has thereafter become heavily entrenched in federal securities law.

Professor Louis Loss of Harvard University, however, who drafted the Uniform Securities Act, did not like the doctrine of implied civil liability for criminal violations, and heavily criticized the courts for arriving at this result. In perhaps his own way of get-

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4. See notes 52-60 and accompanying text infra.
ting back at the federal judiciary, Loss put a provision substantially identical to rule 10b-5 into the Uniform Securities Act, but he inserted another provision denying any private right of action based on that section.5

There were others who felt that the doctrine of "implied civil liability" for criminal violations of the securities laws was a good thing, and who recommended the adoption of the Uniform Securities Act with rule 10b-5, but without a denial of private rights of action thereunder. Nebraska adopted this latter approach in section 2(1) of the Securities Act of Nebraska.6 As might be expected, this departure produces some differences between the civil remedies available in states with the "modified" uniform securities act and those states with the "uniform" uniform securities act. This departure, however, also produces a significant difference in the statute of limitations applicable to a significant portion of the federal securities law violations taking place within those jurisdictions.

SUMMARY OF CONCLUSIONS

For the reasons set forth in detail below, the author is of the opinion that the statute of limitations for federal securities fraud under rule 10b-5 for actions brought in Nebraska is the same as the statute of limitations for actions based upon common law fraud —or four years from the date the fraud was discovered or should have been discovered.7

The Eighth Circuit Court of Appeals, however, when faced with a statute of limitations question under rule 10b-5, reached a contrary result—one under Arkansas law8 and once under Iowa law.9 The Eighth Circuit held in both of these cases that the proper statute of limitations to be applied was the shorter two-year statute found in the state securities law (also found in Nebraska's securities law) and not the longer statute of limitations applicable to common law fraud.

In order to maintain perspective throughout this article, it is useful to understand the following logical development of the reasons why a different result should apply in Nebraska than in Arkansas or Iowa:

5. **Uniform Securities Act** § 410(h).
PREMISE: The governing rule is that the federal courts will apply to causes of action under rule 10b-5 the statute of limitations applicable to the state civil cause of action having the "closest resemblance" to rule 10b-5.\(^9\)

a. In the Arkansas case, there was a criminal statute substantially identical to rule 10b-5, but civil liability based on that statute was expressly denied. Therefore, the Eighth Circuit concluded that it must look to the section of the Arkansas securities law relating to misrepresentation (whether fraudulent or not) for the applicable statute of limitations.\(^11\)

b. In the Iowa case, there was a criminal statute substantially identical to rule 10b-5, and civil liability based on that statute was expressly permitted, but the state securities law expressly provided a two-year statute of limitations for civil actions arising out of violations of that section. Therefore, the Eighth Circuit properly concluded that the two-year statute governed.\(^12\)

c. In Nebraska, there is a statute substantially identical to rule 10b-5—section 2(1) of the Securities Act of Nebraska.\(^13\) Civil liability based on that statute is not denied, and the statute of limitations in the state securities law by its express terms does not apply to actions based on that section.\(^14\)

CONCLUSION: Based upon the assumptions that (1) Nebraska's criminal statute which is equivalent to rule 10b-5 does create an implied right of civil action, and (2) the statute of limitations applicable to such civil actions is section 25-207 of the Nebraska statutes, which is coincidentally—but only coincidentally—the same statute of limitations applicable to common law fraud, then a court applying the reasoning of the Eighth Circuit should conclude that the proper statute of limitations for rule 10b-5 actions brought in Nebraska is four years from the date of discovery of the fraud.

Again, for the purpose of maintaining perspective throughout this article, it is useful to understand the following points at the outset.

1. There has been a split among the circuits of the courts of appeals as to how one determines which statute of limitations applies in a rule 10b-5 action. The premise

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10. See notes 27-45 and accompanying text infra.
11. 422 F.2d at 1237.
12. 533 F.2d at 374. Iowa has subsequently replaced the blue sky law applicable in In re Alodex Corp. Sec. Litigation, 533 F.2d 372 (8th Cir. 1976), and adopted the Uniform Securities Act. [1976] 1A BLUE SKY L. REP. (CCH) ¶ 14,001.
13. NEB. REV. STAT. § 8-1102(1) (Reissue 1974).
stated above, however, that the state statute having the
"closest resemblance" to rule 10b-5 should be applied, is the
one point upon which all of the circuits agree. Although
the various circuits have followed different routes in ar-
riving at their conclusions in the past, given Nebraska's rel-
atively unique statutory scheme, all circuits ought to arrive
at the same point of conclusion. Accordingly, the reasoning
expressed here is also applicable in the other states having
statutes similar to that in Nebraska.

2. In the conclusion stated above, an assumption has
been made that Nebraska's equivalent of rule 10b-5 creates
an implied civil right of action. This assumption is prob-
ably correct because:

   a. Section 2(1) of the Securities Act of Nebraska and
rule 10b-5 are identical, except that the former applies
to acts within the State of Nebraska, and the latter ap-
plies to acts involving interstate commerce.

   b. The doctrine that an implied civil right of action
was created under rule 10b-5 was well established at the
time the Securities Act of Nebraska was enacted, and Ne-
braska was among the states which specifically rejected
the approach of the Uniform Securities Act of denying
a civil right of action based upon a violation of section
2(1).

   c. In the absence of any Nebraska law to the con-
trary, there is no reason to expect that a federal court
would find that a Nebraska court would ignore, in inter-
preting Nebraska law, a long standing and well estab-
lished line of precedent (running back thirty years and
up to the Supreme Court level) which holds that the
identical section in the federal securities laws creates a
private right of action. This is especially true because
the Securities Act of Nebraska contains a directive that
it be construed to achieve uniformity with the related
federal legislation.15

3. In the conclusion stated above, an assumption has
been made that the statute of limitations applicable to vi-
olations of Nebraska's equivalent of rule 10b-5 would be sec-
tion 25-207, the statute which appears to be applicable to
fraud of all types—whether common law or statutory. The
shorter statute of limitations found in section 18 of the Se-
curities Act of Nebraska is specifically limited to section
18 violations, so it seems unlikely that it would be applied.
Although there is at least one other statute of limitations
which a court might consider,16 it appears that even if such
other statute were applied, the period of limitations would
be the same as if section 25-207 were applied.17

1974).
17. See notes 106-07 and accompanying text infra.
4. In *Ernst & Ernst v. Hochfelder*,\(^1^8\) the United States Supreme Court, resolving what had been a long standing split among the circuits of the courts of appeals, held that some showing of *scienter* is necessary in order to establish a rule 10b-5 violation.\(^{19}\) This is contrary to the position previously taken by the Eighth Circuit, and undermines the logic and the reasoning of the Arkansas and Iowa cases discussed above. While it is possible that *Hochfelder* may cause the Eighth Circuit to re-evaluate its position and adopt the approach of some other circuit, the effect would not be to change the analysis for Nebraska law purposes, as more fully discussed below.\(^{20}\) It is for this reason that point “1” above, that any circuit looking at Nebraska law would come to the same conclusion, becomes especially important.

This brief introduction should facilitate the understanding of the more extensive analysis which follows.

**FRAUD VS. MISTAKE—TWO THEORIES OF LIABILITY**

Before getting into the case law and legislative history for an examination of how it bears on the statute of limitations question, it may be desirable to develop the philosophical basis for having two different statutes of limitation for various types of securities law violations, which is the law at the federal level, and which this article suggests is the law in Nebraska.

Section 18 of the Securities Act of Nebraska imposes civil liability on a seller, in general, whenever a security is sold and there has been “any untrue statement of a material fact or any omission to state a material fact,”\(^21\) and the seller is unable to “sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of the untruth or omission.”\(^22\)

Thus, where a security is sold and a material fact concerning the security is not disclosed, the seller is liable regardless of whether (1) he knew of the omitted fact and intentionally failed to disclose it to the purchaser, (2) he knew of the omitted fact, but through negligence it was not disclosed to the purchaser, or (3) he actually did not know of the omitted fact, but “in the exercise of reasonable care” he could have discovered it so that he could disclose it to the purchaser.

In other words, section 18 may be said to impose liability for

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19. *Id.* at 1381.
20. See notes 78-82 and accompanying text infra.
22. *Id.*
"mistake." If a person sells a security, and makes a misrepresentation concerning the security at the time of sale (or omits to make a material disclosure), even though such misrepresentation is the result of an innocent mistake on the part of the seller, he will be liable to the purchaser under this section. In addition, this statute imposes an affirmative duty on the seller to conduct an investigation for the buyer's protection, and creates a liability for breach of this duty, even if the breach arises through a mistake. This statute obviously adopts a strict standard of liability and imposes a high standard of care, and a short statute of limitations (two years from the date of contract of sale) would appear to be reasonable.

Subsection (b) of section 2(1) of the Securities Act of Nebraska, which is substantially identical to subsection (b) of rule 10b-5, imposes liability for intentional misrepresentations or omissions in much the same way that section 18 imposes liability for misrepresentations or omissions as a result of mistake. Even more significant, however, are subsections (a) and (c) of section 2(1). Subsections (a) and (c) are substantially equivalent to subsections (a) and (c) of rule 10b-5 and make it unlawful to "employ any device, scheme, or artifice to defraud," or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit."

In addition to section 2(1) of the Securities Act of Nebraska, two other sections of the Nebraska statutes potentially relate to intentional securities law violations. These are section 28-1217, which makes it unlawful "with intent to deceive, cheat or defraud" to make any false representation with respect to facts which affect the value of any securities, and section 28-1216, which makes it unlawful to make any false statement "with intent that it shall be relied upon" regarding the financial condition of any person or corporation.

Assuming that implied rights of action based upon violations of criminal statutes are permitted in Nebraska, as they are at common law, then logic would dictate that causes of action based upon sections 28-1216 and 28-1217 be governed by the same statute of limitations as causes of action based upon section 2(1) of the Securities Act of Nebraska. In the author's opinion, almost any action which could be based upon rule 10b-5 or section 2(1) could also

be based upon section 28-1217, so it makes little sense to apply different statutes of limitation.

It is reasonable to expect that the statute of limitations for injury occasioned by intentional fraud should be longer than the statute of limitations for mistake. Section 25-207 of the Nebraska statutes imposes a statute of limitations of four years for frauds (presumably including both statutory and common law frauds), and the statute of limitations runs from the date of discovery rather than from the date of the contract of sale.\(^2\)

With this background, it is helpful to look at some of the key cases which have considered the statute of limitations question at the federal level.

**FEDERAL CASES ON SELECTING A STATUTE OF LIMITATIONS—THE RESEMBLANCE TEST**

It has been said that when no statute of limitations is provided for a federal cause of action, "the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation."\(^2\) Although there was some debate during the late 1940's and early 1950's as to whether the federal courts should not look within the federal statutory framework for an applicable statute of limitations, the law has now become well settled,\(^2\) and the only question remaining is which state statute of limitations should be applied.

At first reading, one may get the impression that the various circuits of the courts of appeals are in disagreement on the method which should be employed in ascertaining which state statute of limitations applies to rule 10b-5 actions. This is not entirely true. There is agreement, even among otherwise conflicting cases, that the statute of limitations should be chosen which is applicable to state actions bearing the closest resemblance to rule 10b-5. A recent comprehensive article on the statute of limitations under rule 10b-5 notes that:

> Most recently, the Federal courts, in cases involving section 10(b) have chosen among competing state statutes of limitations by applying a "resemblance" test, in which

\(^2\)\(\text{NEB. REV. STAT. } \S\ 25-207 \text{ (Reissue 1975).}\)
\(^2\)\(\text{Holmberg v. Armbrecht, } 327 \text{ U.S. 392, 395 } (1946)) \text{ (considering a suit under the Federal Farm Loan Act). For a discussion of the cases on this point arising under rule 10b-5, see III L. Loss, } \text{SEcurities Regulation } 1771-72 \text{ (2d ed. 1961).}\)
\(^2\)\(\text{See notes 29-45 and accompanying text infra.}\)
they choose the period of limitations applicable to state actions most closely resembling the substantive elements of a section 10(b) action.29

Two cases which are in conflict in their final result, the Eighth Circuit case of Vanderboom v. Sexton30 and the Sixth Circuit case of Charney v. Thomas,31 are in agreement on the first step of their reasoning: If the state statute in question has a statutory provision creating a cause of action substantially equivalent to that created by rule 10b-5, it is the statute of limitations applicable to that section which should be applied to the federal cause of action. It is only if the state lacks such a rule 10b-5 equivalent that the courts need look further. In both Vanderboom and Charney, the courts found that the state law lacked a rule 10b-5 equivalent cause of action, and they proceeded to look at other possible statutes of limitation—wherein the disagreement was reached.

In Charney v. Thomas, the Sixth Circuit stated:

Although in some cases the local Blue Sky Law might be the more appropriate point of reference, in the present case the Michigan law contains no provision similar to section 10(b) of the federal law. Thus, the normal six-year period . . . should apply despite the fact that actions under section 10(b) are not exactly the same as common law fraud actions.32

In Vanderboom, the Eighth Circuit read Charney to mean that "the local statute which bears the closest resemblance to the federal statute" should be utilized, and coined the language which has been picked up by the later cases and dubbed "the resemblance test."33 The Eighth Circuit made it clear that its decision was based upon a finding that there was no rule 10b-5 equivalent cause of action under Arkansas law. The Arkansas statute considered in Vanderboom expressly denied a private right of action for securities fraud, and the Commissioner's notes left no doubt about the meaning or interpretation of that section.34 As discussed below, however, the Nebraska statute rejected this approach.35

Since Vanderboom, the Seventh and Fifth Circuits have had occasion to consider the question, and to analyze the holding of Van-

31. 372 F.2d 97 (6th Cir. 1967).
32. Id. at 100.
33. 422 F.2d at 1237-38.
34. Id. at 1238.
35. See notes 68-75 and accompanying text infra.
derboom in relation to Charney. In both circuits, the courts were considering statutes where the local law, unlike the earlier decisions, did contain a provision creating a private right of action equivalent to rule 10b-5. Both circuits read Vanderboom and Charney as dictating the result that the appropriate statute of limitations under the applicable state law was the statute of limitations applicable to the state rule 10b-5 equivalent.

In Parrent v. Midwest Rug Mills, Inc., the Seventh Circuit applied the resemblance test, stating:

Except for the interstate elements in 10b-5, Section 12 of the Illinois Securities Law [citation omitted] covers the same violations as 10b-5.

It is clear that under the resemblance test the three year limitation in Section 13, subd. D of the Illinois Securities Law [which applies to actions based upon the anti-fraud provisions of Section 12 of the Illinois Securities Law] [citation omitted] applies to the 10b-5 actions stated in Counts I and II. In Hudak v. Economic Research Analysts, the Fifth Circuit considered the question of what statute of limitations should be applied to a rule 10b-5 action brought in Florida. The Hudak court stated:

The anti-fraud provisions of the Florida securities statutes and Rule 10b-5 . . . address the problems of false and misleading communications involving the sale of securities with strikingly similar language. Indeed, as an examination of the text set out in the margin indicates, commentators have justifiably referred to § 517.301(1) of the Florida Statutes as “the mirror image of Rule 10b-5.” This congruence between the state and federal schemes is not limited to a surface resemblance, but extends as well to judicial elaborations on the elements necessary to make out a case—requirements differing significantly from those applicable to the Florida common law of fraud.

36. 455 F.2d 123 (7th Cir. 1972).
37. Id. at 127 (footnote omitted).
38. 499 F.2d 996 (5th Cir. 1974).
39. In the first of the Fifth Circuit decisions on this point, Sargent v. Genesco, Inc., 492 F.2d 750 (5th Cir. 1974), the court stated:

The federal securities laws contain no limitation period that is expressly applicable to claims under section 10(b) and rule 10b-5, nor does federal law prescribe any general statute of limitations for civil actions. Consequently, the limitation period which the forum state applies to the state remedy which bears the closest substantive resemblance to rule 10b-5 and which best effectuates its purpose is to be applied.

Id. at 758. The Fifth Circuit did not discuss the choice to any significantly greater extent in Sargent, because it concluded that since the case had been
Given the similarity of § 517.301(1) and Rule 10b-5, in both language and interpretation, and the congruence between the specific remedy sought here—return of the purchase money—and the remedy of rescission for which Florida securities law provides a two-year statute, we hold that the district court erred in applying the three-year [common law] fraud period.\textsuperscript{40}

Facts substantially identical to those considered by the Seventh Circuit in \textit{Parrent} and the Fifth Circuit in \textit{Hudak} arose in the Eighth Circuit in the case of \textit{In re Alodex Corp. Securities Litigation}.\textsuperscript{41} \textit{Alodex} arose under Iowa law as it existed in that state prior to adoption of the Uniform Securities Act. The old Iowa law contained a criminal statute substantively similar to rule 10b-5; another section \textit{expressly permitted} civil actions to be maintained for violations of the criminal provisions.\textsuperscript{42} The \textit{Alodex} court concluded that the statute of limitations found in the old Iowa Blue Sky Law applied, since it applied to civil actions based upon violations of the criminal statute.\textsuperscript{43}

It would seem obvious from the law which had developed prior to \textit{Alodex} both in the Eighth Circuit and in other circuits, that when a statute exists in the state which is substantially similar to rule 10b-5, the statute of limitations applicable to civil actions thereunder should be applied to rule 10b-5 claims. \textit{Alodex}, therefore, is consistent with the prior cases.

From quotations above, it should be apparent that under the "resemblance test," a court considering an action under rule 10b-5 governed by the Nebraska statute of limitations should apply the state statute of limitations applicable to section 2(1) of the Securities Act of Nebraska, which is substantially identical with rule 10b-5.\textsuperscript{44} The Florida, Illinois, and Iowa statutes considered by the Fifth, Seventh, and Eighth Circuits, respectively, had a different statutory scheme than the Nebraska statute, and the state blue sky law contained a statute of limitations applicable to \textit{all actions} brought under the Act, \textit{including} actions brought under the fraud 

\textsuperscript{40} 499 F.2d at 999-1000.
\textsuperscript{41} 533 F.2d 372 (8th Cir. 1976).
\textsuperscript{42} Iowa Code §§ 502.23, 502.26 (1973). Iowa adopted the Uniform Securities Act subsequent to the filing of the action in \textit{Alodex}. \textit{See} note 12 \textit{supra}.
\textsuperscript{43} 533 F.2d at 373.
\textsuperscript{44} For a discussion of the identity of § 2(1) of the Securities Act of Nebraska and rule 10b-5, \textit{see} notes 64-74 and accompanying text \textit{infra}. 

transferred to Florida from New York under a change of venue statute, the Florida court would have to apply the same statute of limitations as the New York court would have applied, and the law in New York was clearly established.
sections. In Nebraska, the statute of limitations applicable to statutory frauds is contained in the portion of the Nebraska statutes dealing with statutes of limitation generally.46

IMPLIED LIABILITY FOR VIOLATION OF PROTECTIVE STATUTES, SPECIFICALLY SECTION 2(1) OF THE SECURITIES ACT OF NEBRASKA

Section 2(1)46 of the Securities Act of Nebraska is substantially identical with rule 10b-547 of the Securities and Exchange Commission. The Nebraska statute defines what acts constitute prohibited activities, and, like rule 10b-5, does not state that a private civil cause of action may be based upon a violation of the statute. It might be argued, therefore, that the application of section 2(1) is strictly criminal in nature, and that no private right of action may be based on this section.

One point should be made at the outset. Rule 10b-5 was clearly adopted by the Securities and Exchange Commission to interpret what was a criminal statute.48 Although section 2(1) of the Securities Act of Nebraska is substantially identical to rule 10b-5 in language, it is not clear from the legislative history that there was ever any intent that it be construed as exclusively criminal in nature.

The legislative history is set forth in greater detail below, but it is worth mentioning that at the time the Securities Act of Ne-

45. See notes 106-07 and accompanying text infra.
46. Neb. Rev. Stat. § 8-1102 (Reissue 1974) provides:
   (1) It shall be unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
      (a) To employ any device, scheme, or artifice to defraud;
      (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
      (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.
47. Rule 10b-5, 17 C.F.R. § 240.10b-5 (1976), 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.
braska was adopted, civil causes of action for fraud of the type defined in rule 10b-5 were well established.49 Furthermore, section 17 of the Securities Act of Nebraska50 deals specifically with criminal violations, just as section 1851 deals specifically with civil remedies. There is no reason to believe that section 2(1) of the Securities Act of Nebraska was not inserted by the legislators with the intent that it be applicable to both civil and criminal violations.

On the assumption that section 2(1) might be construed as strictly criminal in nature, however, it is useful to consider the doctrine of “implied civil remedies” for criminal wrongdoing. The basis for the implied liability doctrine in federal law has been discussed by Professor Bromberg in his treatise on securities law.52 The rationale behind the private right of action under rule 10b-5 applies with equal force, of course, to private rights of action under section 2(1) of the Securities Act of Nebraska. Professor Bromberg stated:

It is a venerable common-law doctrine that a person injured by violation of a statute enacted for the benefit of persons in his position is entitled to recover his damages. The Restatement's [Torts] formulation, as it entered 10b-5 cases, read:

SEC. 286. Violations Creating Civil Liability. The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:

(a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and

(b) the interest invaded is one which the enactment is intended to protect; and

(c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interest results from that hazard; and,

(d) the violation is a legal cause of the invasion, and

the other has not so conducted himself as to disable himself from maintaining an action.53

It is well recognized that violations of protective statutes create

49. See notes 56-59 and accompanying text infra.
52. 1 A. Bromberg, Securities Law: Fraud §§ 2.4-2.5(7), at 27-47 (1971).
53. Id. at 29-30. Professor Bromberg notes that the Restatement of Torts section quoted in the text has been rewritten since the early 10b-5 cases to make it optional with the courts to adopt the legislative standard as a reasonable man standard. Id. at 30 n.57.
an "implied" right of action, even though no "express" right of action is set forth in the statute. The doctrine of "implied liability" as it applies in a blue sky context is by no means unique to Nebraska, and it has been extensively treated in an Ohio law review. The Ohio article defines "implied liabilities" as including, among other things, those created by the anti-fraud provisions of state securities laws, such as section 2(1) of the Securities Act of Nebraska. The article notes:

The doctrine of implied liability could be described as the doctrine whereby statutory duties, which carry only express criminal or administrative sanctions, give rise to implied civil remedies to private parties who are injured by a breach of the stated duty. . . .

. . . Implied liabilities and common law liabilities are not the same. Implied liabilities arise through a breach of express statutory directives, or perhaps through a breach of rules and regulations promulgated thereunder. Common law liabilities exist irrespective of the statutory language, unless, of course, the statute specifically provides that the statutory liabilities are intended to replace and entirely supersede common law liabilities.

The first decision on implied liabilities under rule 10b-5, Kardon v. National Gypsum Co., noted that "the disregard of a [criminal] statute is a wrongful act and a tort." The court very strongly made the point that affirmative legislative action is necessary in order to deny a private right of action based upon breach of a criminal statute. The court said:

Of course, the legislature may withhold from parties injured the right to recover damages arising by reason of violation of a statute but the right is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear very clearly and plainly.

Subsequently, the United States Supreme Court has made it clear that, "[i]t is now established that a private right of action is implied under § 10(b)."

55. Id. at 1193.
57. 69 F. Supp. at 513.
58. Id. at 514.
The option "to withhold from parties injured" the right to sue for violation of the anti-fraud provisions of the Uniform Securities Act by expressly denying the right "very clearly and plainly" as suggested by Kardon is the option exercised by Professor Loss ten years later in drafting the Uniform Securities Act as codified by the states of Michigan and Arkansas and as considered by the Sixth and Eighth Circuits. Nebraska's decision to modify the Loss version of the Uniform Securities Act, by omitting this express denial, keeps Nebraska statutory law consistent with the common law doctrine that a person injured by violation of a statute enacted for the benefit of persons in his position is entitled to recover his damages. If the Nebraska language fails to create an implied right of action, then the rationale of Kardon and the literally hundreds of other cases having imposed civil liabilities under rule 10b-5 would be in error. Thus, although the author has not found any Nebraska case holding that section 2(1) creates an implied right of action, to hold that it did not do so would be contrary to the rationale and logic of every decision involving a private right of action under rule 10b-5.60

LEGISLATIVE HISTORY OF THE UNIFORM SECURITIES ACT AND THE SECURITIES ACT OF NEBRASKA

The Uniform Securities Act arose out of a project commissioned at Harvard University by the National Conference of Commissioners on Uniform State Laws. It was prepared under the auspices of Professor Louis Loss, and the Harvard Law School Study of State Securities Regulation.61

At the time the Uniform Securities Act was being developed, Kardon v. National Gypsum Co.,62 had accumulated a ten-year following on the point that the language of rule 10b-5 created a private right of action, unless it was specifically denied. Professor Loss disagreed with the concept of having liability created by a provision like rule 10b-5, which he considered vague, stating that:

60. Several cases under the laws of other states relative to implied rights of action under state law, as opposed to federal law, have been collected in Newton, A Look at the Montana Securities Act and Its Relation to the Federal Securities Act, 26 MONT. L. REV. 31, 52 n.114 (1964), although the vast bulk of precedent lies at the federal level.


62. See notes 56-58 and accompanying text supra.
[T]here can be little justification for a series of provisions which make it impossible for a legitimate seller to order his business in such a way that the creation of a contingent liability will be a relatively rare event.63

Rule 10b-5 essentially prohibits fraud, and given the United States Supreme Court’s current interpretation of the rule, which requires plaintiffs to demonstrate some degree of scienter on the part of defendants,64 rule 10b-5 can hardly be said to make it “impossible” for a “legitimate seller” to stay within the law. Nevertheless, Professor Loss was able to influence the drafting of the Uniform Securities Act to the extent that although rule 10b-5 was codified as section 101,65 any private right of action thereunder was specifically eliminated by the following language in section 410(h):

The rights and remedies provided by this act are in addition to any other rights or remedies that may exist at law or in equity, but this act does not create any cause of action not specified in this section or section 202(e) [relating to suits against broker-dealers].66

As if the Uniform Securities Act itself was not clear enough, the following comment (referred to by the court in Vanderboom) was included in the official discussion of section 410(h):

The mere presence of certain specific liability provisions in a statute is no assurance that other liabilities will not be implied by the courts under the doctrine which creates a common-law tort action for violation of certain criminal statutes. Restatement of Torts §§ 286-88. Notwithstanding the presence of several specific liability provisions in each of the several SEC statutes, the federal courts have implied a civil cause of action by a defrauded seller against the buyer under SEC Rule X-10B-5 [now 10b-5] . . . . The “but” clause in Section 410(h) is designed to assure that no comparable development is based on violation of § 101 of this Act.67

The Securities Act of Nebraska was adopted nine years after the Uniform Securities Act had been proposed. By this time, some states had begun rejecting the “no new causes of action” language of section 410(h). The Ohio article cited above, which went to press prior to the time the new Nebraska law was enacted, noted that:

Among the states which have adopted major portions of the Uniform Securities Act, seven states have omitted the “no new liabilities” clause of section 410(h) of the final

64. Ernst & Ernst v. Hochfelder, 96 S. Ct. 1375, 1381 (1976).
65. UNIFORM SECURITIES ACT § 101.
66. UNIFORM SECURITIES ACT § 410(h).
67. Commissioners’ Note, UNIFORM SECURITIES ACT § 410(h).
draft. It would seem that only two reasonable inferences
can be drawn from the omission of the clause: either the
legislatures of these states did not wish to take a position
on this matter, or the legislatures meant to allow applica-
tion of the doctrine of implied liabilities.88

Whether the legislatures of Nebraska and the seven states pre-
ceding it in omitting the "no new causes of action" provision from
the act intended to create a private right of action, or merely in-
tended to take no position, is not important. The Securities Act of
Nebraska was not adopted in a vacuum, and it is evident that the
framers of the act would have had available to them the comments
of the National Conference of Commissioners, and that they would
have been cognizant of the ramifications of departing from language
the intent of which had been so carefully spelled out.

The legislative history of the Securities Act of Nebraska has
been examined, and it is relatively brief. It does, however, make
the following things clear:

1. The legislature never intended to adopt the Uni-
form Securities Act in the identical form in which it was
adopted in all other states, but knowingly adopted it with
some modifications.

2. The legislature intended that the Act would be con-
strued with reference to the related federal legislation.

3. The legislature intended that section 2(1) would,
among other things, define the parameters of what consti-
tutes "fraud . . . in connection with the sale . . . of a secu-
riety" in the State of Nebraska. There is no reference to
this being a criminal section, and fraud is essentially a civil
concept.

When the Securities Act of Nebraska was originally introduced
into the Legislature as L.B. 848 in 1965, the Introducer's Statement
of Purpose was as follows:

LB 848, with certain modifications to meet local Ne-
braska conditions, is the Modified Uniform Securities Act.
. . . Uniformity in securities laws is desirable and neces-
sary. It also provides an abundance of judicial and admin-
istrative precedents from other states. The border states
of Kansas [which adopted the same modified version of the
anti-fraud sections adopted in Nebraska] and Colorado
have adopted the Uniform Act and it is also being consid-
ered at this time in Wyoming. LB 848 is closely coordi-
nated with the Federal Securities Laws which should assist
in the administration of this Act . . . . LB 848 is essen-

88. 17 W. RES. L. REV., supra note 54, at 1196.
tially a law requiring full disclosure with respect to sale of securities as do the federal laws. (Emphasis added).69

The legislative history contains the following explanation of the purpose of section 2:

Section 2 sets out the definitions of what constitutes fraud and other prohibited practices in connection with the sale, purchase or offer of a security. One of the main things is line 24. This prohibits this kind of practice in the sale of securities in the state of Nebraska. Again this is just a section to set up the requirements of what an advisor, broker, or anyone selling securities must do and what constitutes fraud and what would be prohibited.70

It must be remembered that when referring to “the definitions of what constitutes fraud . . . in connection with the sale . . . of a security” in discussing section 2, the word “fraud” ordinarily implies nothing more than a civil wrong.71 The word may, of course, take a modifier such as “criminal fraud” or “willful and intentional fraud” which may then cause the phrase to carry the implication of criminal misconduct.

The discussion of section 18 of the Securities Act of Nebraska does not provide any insight as to why the legislature elected not to include a denial of civil liability based upon fraud under section 2, as the Uniform Act had done. The discussion of section 18 is limited, in fact, to a discussion of remedies available to the Department of Banking, such as the power to enjoin or issue stop orders.

The discussion of section 17 does make it clear that this section was intended to be the key criminal section of the statute:

Section 17 is the criminal penalty section for violation of the act. A maximum fine being $5,000 and the maximum imprisonment being 3 years and there is a 5 year statute of limitation so that it and this is in keeping with federal statutes concerning federal securities.72

As may be seen, there is nothing in the legislative history of the Securities Act of Nebraska which suggests that section 2 was to be limited to criminal violations. In fact, one could come to quite the opposite conclusion based upon the reference to section 2’s definition of what constitutes “fraud” in connection with the sale of securities, since the section of the Nebraska statutes dealing with

statutes of limitation expressly recognizes the existence of a civil cause of action based upon "fraud." It is also interesting to note that prior to the adoption of the Modified Uniform Securities Act, Nebraska had been said to be the only state to have recognized the doctrine of implied liabilities in its securities law.

Given the strong tendency of the courts to find an implied right of action, the legislative history of the Uniform Securities Act, and the legislative history of the Securities Act of Nebraska, it is the author's opinion that a court ought to find that section 2(1) of the Securities Act of Nebraska creates a private right of action. If this is the case, the next step would be to determine whether section 2(1) bears the "closest resemblance" to rule 10b-5. The answer to the question is complicated somewhat by the fact that the Eighth Circuit's historical view of the elements necessary to constitute a cause of action under rule 10b-5 is not in accord with a recent United States Supreme Court opinion, as discussed below.

NEBRASKA SECTION 2(1) AND RULE 10b-5 COMPARED
—THE "RESEMBLANCE TEST"

Traditionally, the question of selecting an appropriate statute of limitations has been heavily entwined with the question of "scienter" or "presence of fraudulent intent" under the federal securities laws. Some of the circuits of the courts of appeals, including the Seventh, Eighth, and Ninth Circuits, were sharply divided with other circuits, including the Second and Tenth Circuits, over the question of whether some showing of intent is necessary to establish a rule 10b-5 violation, or whether "mere negligence" is sufficient.

The Eighth Circuit has been of the view that negligence is sufficient to establish a rule 10b-5 violation, and its interpretation of

74. 17 W. Res. L. Rev., supra note 54, at 1196. The statute cited (Neb. Rev. Stat. § 81-331 (Reissue 1958)) was part of the old securities law which was replaced by the Securities Act of Nebraska.
75. See notes 77-82 and accompanying text infra.
76. For circuit court decisions holding in substance that negligence alone is sufficient for civil liability under § 10(b) and rule 10b-5, see, e.g., White v. Abrams, 495 F.2d 724, 734 (9th Cir. 1974); Myzel v. Fields, 386 F.2d 718, 734-35 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968); Kohler v. Kohler Co., 319 F.2d 634, 637 (7th Cir. 1963). For circuit court decisions holding that some type of scienter is necessary in such actions, see, e.g., Clegg v. Conk, 507 F.2d 1351, 1361-62 (10th Cir. 1974); Lanza v. Drexel & Co., 479 F.2d 1277, 1306 (2d Cir. 1973).
which statute of limitations properly applies has been heavily based upon this assumption. In 1976, however, the United States Supreme Court considered the question in *Ernst & Ernst v. Hochfelder*.\(^7\) and concluded that scienter is required to establish a rule 10b-5 violation.\(^7\)

The Eighth Circuit, like other circuits, has heavily based its decision as to what statute of limitations applies upon the scienter question, that is to say, whether "lack of intent" to defraud is a defense. The Eighth Circuit emphasized the importance of the scienter question in the *Alodex* decision, where it said:

*Vanderboom v. Sexton*, supra, viewed two factors to be significant in determining which particular state statute of limitations should be applied in a Rule 10b-5 case: (1) does the state statute share a common purpose with Rule 10b-5, and (2) does the state statute permit the assertion of substantially the same defenses that are available in a Rule 10b-5 case?

As to the second prong of the *Vanderboom* case, it is necessary to examine what defenses are allowed in the state cause of action relied upon by the various parties as establishing the appropriate statute of limitations. If there is a manifest minimization of assertable defenses available in a particular state cause of action which is analogous to Rule 10b-5, the statute of limitations for that cause of action should be applied since it would more closely approximate the federal policy and proof requirements of Rule 10b-5. [Citation omitted.] This inquiry and conclusion are compelled because this court has held that scienter need not be proved in a Rule 10b-5 case to establish liability.\(^8\)

Because of the emphasis upon scienter in the Eighth Circuit and elsewhere, it is important to consider the effect of the Supreme Court's holding in *Hochfelder* that proof of scienter is an essential ingredient in a rule 10b-5 case.

As noted by the Eighth Circuit in *Alodex*, the relevance of the scienter consideration is that the courts attempt to pick the state statute of limitations bearing the "closest resemblance" to rule 10b-5, and they then apply the state statute of limitations applicable to that state statute. It is clear from the express language of section 18 of the Securities Act of Nebraska that scienter is not required in order to establish a violation. As discussed above, a viola-

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78. 96 S. Ct. 1375 (1976).
79. Id. at 1381.
80. 533 F.2d at 373.
tion of section 18 may be established on the basis of negligence or mistake alone.\textsuperscript{81}

Since scienter is \textit{not} required under section 18, but \textit{is} required under rule 10b-5, as interpreted by the Supreme Court in \textit{Hochfelder}, section 18 obviously bears \textit{less} resemblance to rule 10b-5 after \textit{Hochfelder} than it did under the Eighth Circuit's previous interpretation. Therefore, the Eighth Circuit, as well as other circuits, should be even less likely to select the statute applicable to section 18 of the Securities Act of Nebraska for a rule 10b-5 case than they would have been before \textit{Hochfelder}.

The question of whether section 2(1) of the Securities Act of Nebraska requires a showing of scienter is one upon which there are no prior reported cases. Since section 2(1) and rule 10b-5 are substantially identical, and since section 22\textsuperscript{82} of the Securities Act of Nebraska carries an express directive that it be interpreted so as to achieve uniformity with the related federal legislation, it would seem most logical to say that if rule 10b-5 requires scienter, section 2(1) also requires scienter. Based upon the lack of prior law and the directive of parallel construction with the federal law, the courts should be equally likely to select the statute of limitations applicable to section 2(1) after \textit{Hochfelder} as they were before \textit{Hochfelder}.

The question arises, what if the courts should determine on the basis of intervening cases or cases drawn from other areas of Nebraska law that section 2(1) does \textit{not} require scienter, even though this section is substantially identical? It should be obvious that if the courts were to reject section 2(1) as being the most similar to rule 10b-5 on this basis, they could only turn to a statute or common law doctrine which clearly did require the showing of scienter. This would have to be either section 28-1217 of the Nebraska statutes as discussed above, or the statute of limitations applicable to common law fraud. Thus, the effect of bypassing section 2(1) as the section bearing the closest resemblance would only be to result in the selection of the statute applicable to common law fraud, and, if anything, \textit{Hochfelder} makes it more likely, rather than less likely, that the statute of limitations applicable to common law fraud would be applied to a rule 10b-5 violation governed by Nebraska law. While \textit{Hochfelder} is a significant decision in the field, it does not change the conclusions of this article—it merely reinforces them.

\textsuperscript{81} See notes 21-22 and accompanying text supra.

\textsuperscript{82} NEB. REV. STAT. § 8-1122 (Reissue 1974).
AVAILABLE STATUTES OF LIMITATION IN NEBRASKA

The Nebraska statutory scheme is different from those considered by the Fifth, Seventh, and Eighth Circuits in Hudak,83 Parrent,84 and Alodex,85 respectively. Since the Hudak, Parrent, and Alodex cases applied the statutes of limitation applicable to the local equivalent of rule 10b-5, it is useful to compare those statutory schemes with that existing in Nebraska.

FLORIDA AND IOWA STATUTORY SCHEMES

In Florida and Iowa, the state securities law contained a section creating liabilities substantially equivalent to those found in rule 10b-5.86 The law of both states, however, contained (in virtually identical language) a statute of limitations applicable to any violation of any section of the state securities act:

Every sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser . . . provided, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale . . . .87

The Fifth Circuit in Hudak and the Eighth Circuit in Alodex properly concluded that this statute of limitations applied to a violation of the anti-fraud provisions of the Florida and Iowa Securities Acts.

ILLINOIS STATUTORY SCHEME

In Illinois, the rule 10b-5 equivalent was contained in section 12 of the Illinois Securities Act.88 Section 13 of the Act created a civil liability for the violation of any of the provisions of the Act, and limited suits for any violation of the Act to three years.89 The Seventh Circuit in the Parrent case properly concluded that the statute of limitations contained in the Illinois Securities Act applied to violations of the anti-fraud provisions of the Act.

NEBRASKA AND FEDERAL STATUTORY SCHEMES

Nebraska has taken an approach, unlike Florida, Illinois, or

83. See notes 38-40 and accompanying text supra.
84. See notes 36-37 and accompanying text supra.
85. See notes 41-43 and accompanying text supra.
87. Fla. Stat. Ann. § 517.21 (1972); Iowa Code § 502.23 (1973) (this provision applied to "every sale and contract for sale").
Iowa, which is substantially identical to that taken in the Securities Act of 1933. An examination of section 18 of the Securities Act of Nebraska and sections 12 and 13 of the Securities Act reveals that section 18(1) creates a cause of action virtually identical with that created by section 12 of the Securities Act of 1933. Furthermore, a comparison of Nebraska section 18(3) and Securities Act section 13 shows that the statute of limitations in both cases has been specifically limited to causes of action arising under section 18(1) in the area of Nebraska law and sections 11 and 12 in the case of federal law, respectively.

Section 2(1) of the Securities Act of Nebraska, section 17(a) of the Securities Act of 1933, and rule 10b-5 are substantially identical, section 17(a) being very slightly narrower. The argument was made at the federal level that the statute of limitations contained in section 13 should be applied to violations of section 17(a). These arguments were rejected, and the cases are discussed below. For the same reasons, it would appear that any argument that the Nebraska section 18(3) statute of limitations should govern a Nebraska section 2(1) violation should also be rejected.


92. Securities Act of Nebraska § 2(1), NEB. REV. STAT. § 8-1102(1) (Reissue 1974), provides:

(1) It shall be unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
   (a) To employ any device, scheme, or artifice to defraud;
   (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
   (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Securities Act § 17(a), 15 U.S.C. § 77l(a) (1970), provides:

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
   (1) to employ any device, scheme or artifice to defraud, or
   (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
   (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

See note 47 supra for the language of rule 10b-5.

93. See notes 91–98 and accompanying text infra.
In addition, the entire Nebraska regulatory scheme must be viewed in context. There are at least two other sections of the Nebraska statutes dealing with fraud in the sale of securities which are located outside the Securities Act of Nebraska, and there is an entire Article of the Nebraska statutes dealing with statutes of limitation of all types. As will be seen, these statutes are designed to be comprehensive in scope, and to provide statutes of limitation for violations of all Nebraska statutes.

At the outset, it must be determined whether the statute of limitations contained in Nebraska section 18(3) should be applied to a violation of Nebraska section 2(1). The question is directly analogous to the question of whether the statute of limitations contained in section 13 of the Securities Act of 1933 should be applied to a violation of section 17(a), and therefore these cases are relevant.

The 1948 case of Rosenberg v. Globe Aircraft Corp. held that one could not obtain broader rights and remedies on an implied right of action theory by suing under the criminal anti-fraud provisions of the federal securities laws than by suing under the more specific violation sections. Had this view prevailed, the statute of limitations found in a section 13 claim would have been applied to all anti-fraud claims, whether arising under the Securities Act of 1933 or the Securities Exchange Act of 1934, since the two acts were held to be construed in pari materia.

Osborne v. Mallory disagreed with this line of reasoning, dismissing section 12 claims as being barred by the statute of limitations, and permitting section 17(a) anti-fraud claims under a six-year statute of limitations found in state law. Although twenty-six years old—an antique by securities law standards—Osborne considered the identical issue under federal law which a court would now be faced with in Nebraska.

The District Court for the Southern District of New York, in Fishman v. Raytheon Manufacturing Co., followed Rosenberg when presented with the same question, but was reversed by the

97. Id. at 124-25.
99. Id. at 873.
100. Id. at 879.
Second Circuit Court of Appeals.102 The Second Circuit, adopting the reasoning of Osborne, stated:

We note in passing that a suit under § 17 of the 1933 Act—a suit which must rest on fraudulent conduct—seems also to be free of the restrictions imposed on a Section 11 suit [such as the shorter statute of limitations]. If so, then a complaint may couple a Section 11 cause of action, subject to those restrictions, with a Section 17 cause of action, free of them—provided the Section 17 cause of action adds adequate allegations of fraud to the allegations made in the Section 11 cause of action.103

Literal hundreds of federal court cases have followed the doctrine laid down in Osborne and on appeal in Fishman, and have rejected the idea that the statute of limitations provided in section 13 should be applied to causes of action arising out of violations of section 17(a) and the other anti-fraud provisions.

By analogy, it would appear that the statute of limitations contained in section 18(3) of the Securities Act of Nebraska should not be applied to a Nebraska section 2(1) violation. Section 18(3) expressly recognizes that a cause of action may arise under any section of the Nebraska Act by providing that every cause of action arising under sections 1 through 24 (which is the entire Nebraska Act) shall survive the death of any person who might have been a plaintiff or defendant. Immediately following this statement which applies to every section of the Securities Act of Nebraska, section 18(3) provides that no person may sue under section 18 unless suit is brought within two years.104 Certainly it may be argued that as a matter of statutory construction, the Securities Act of Nebraska leaves open the question of which statute of limitations applies to actions brought under sections 1 through 17 and sections 19 through 24. If the statute of limitations found in the Securities Act of Nebraska does not apply to private rights of action brought under section 2(1), then Nebraska statutes of limitation outside the Securities Act must be examined.

NEBRASKA STATUTES OF LIMITATION

There are at least three Nebraska statutes dealing with fraud

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102. 188 F.2d 783 (2d Cir. 1951).
103. Id. at 787 n.2. See generally III L. Loss, SECURITIES REGULATION 1780-84 (2d ed. 1961).
104. NEB. REV. STAT. § 8-1118(3) (Reissue 1974) provides in pertinent part:
Every cause of action under sections 8-1101 to 8-1124 shall survive the death of any person who might have been a plaintiff or defendant. No person may sue under this section more than two years after the contract of sale.
in the sale of securities or fraud in connection with the sale of commodities which are located outside the Securities Act of Nebraska. They are criminal statutes, and they are in addition to the criminal sanctions contained in the Securities Act of Nebraska itself. Assuming that these criminal statutes give rise to a private right of action, then it is appropriate to assume that all types of civil securities and commodities fraud in Nebraska should have the same statute of limitations.

The Nebraska courts have never determined which statute of limitations applies to actions for securities fraud, but two of the statutes contained outside the Securities Act of Nebraska in the Article devoted to all statutes of limitation, suggest themselves. The first is section 25-207, which provides as follows:

The following actions can only be brought within four years: . . . (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until discovery of the fraud, except as provided in sections 30-2206 and 76-288 to 76-298.

The second is section 25-206, which provides as follows:

An action . . . upon a liability created by statute, other than a forfeiture or penalty, can only be brought within four years.

All of the cases discussed in this article which have looked outside the state blue sky law for a statute of limitations have chosen a statute similar to section 25-207 relating to general acts of fraud, and none has chosen a statute similar to section 25-206 applicable to liabilities created by statute. The reasons for this have not been addressed in any of these cases, although it would seem that statutes similar to section 25-206 would be more likely to be construed to apply to an express statutory civil liability rather than to an implied liability based upon a violation of a criminal statute.

One point should be made clear, however; the result would be the same no matter which statute was chosen because of the peculiar application of the federal tolling doctrine. Even in states where the statute of limitations is a specified number of years from the date of the contract of sale, the federal courts apply a limitation period for rule 10b-5 actions running for the same number of years.

from the date of discovery of the fraud (or the date upon which it reasonably should have been discovered).\textsuperscript{108} This is because it violates federal public policy for a statute of limitations for fraud to be running where the person against whom it is running is unaware of the facts and circumstances giving rise to the fraud.\textsuperscript{109}

It is interesting to speculate whether a longer statute of limitations might be available to plaintiffs suing under rule 10b-5(c) (engaging in a course of business which operates as a fraud) than under rule 10b-5(a) (committing a fraudulent act). Where an offering document which is clearly fraudulent is furnished at the time of investment and the plaintiff testifies that he never read it, the statute of limitations might be deemed to run from the date upon which the offering document was furnished, on the theory that he would have discovered the fraud if he had read the offering document, and consequently the statute of limitations began to run at that time. On the other hand, where a continuing course of conduct is involved, as in the case of a continuing offering spanning several months or even years, the statute of limitations might not be deemed to commence to run until such time as the continuing course of conduct has terminated.

CONCLUSION

No court as yet has determined which statute of limitations applies to federal causes of actions under rule 10b-5 brought in Nebraska. The Eighth Circuit has held, in cases involving Arkansas and Iowa law, that the statute of limitations applicable to the state cause of action bearing the "closest resemblance" to rule 10b-5 should be applied. In these Eighth Circuit cases construing Arkansas and Iowa law, the applicable statute of limitations was the statute of limitations found in the state blue sky laws.


\textsuperscript{109} An analogous situation is found in the interpretation of Neb. Rev. Stat. § 25-208 (Reissue 1975) which governs, \textit{inter alia}, malpractice actions. The Nebraska Supreme Court has repeatedly held that a cause of action does not accrue and the statute of limitations does not start to run until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the facts giving rise to the malpractice. See Toman v. Creighton Memorial St. Joseph's Hosp., Inc., 191 Neb. 751, 758, 217 N.W.2d 484, 489 (1974); Acker v. Sorensen, 183 Neb. 866, 871, 165 N.W.2d 74, 77 (1969); Spath v. Morrow, 174 Neb. 38, 43, 115 N.W.2d 581, 583 (1962).
There are interesting differences in the blue sky laws of Arkansas, Iowa, and Nebraska, however, which should lead a court to the conclusion that the statute found in section 18(3) of the Securities Act of Nebraska should not govern rule 10b-5 actions brought in Nebraska. The Arkansas Blue Sky Laws contained a statute similar to rule 10b-5, but unlike rule 10b-5, private rights of action based upon such statute were expressly denied. Iowa had a statute similar to rule 10b-5, but the short statute of limitations in the Iowa Blue Sky Laws expressly governed actions brought under such statute. Nebraska, on the other hand, has a statute substantially identical to rule 10b-5, but private actions grounded upon such statute are not expressly governed by the statute of limitations found in the Securities Act of Nebraska. In fact, the statute of limitations found in section 18(3) of the Securities Act of Nebraska specifically limits its application to Nebraska section 18 violations, which are violations based upon mistake or breach of duty.

Since the statute of limitations in the Securities Act of Nebraska does not expressly apply to actions brought under Nebraska's rule 10b-5 equivalent, the longer Nebraska statute of limitations applicable to general fraud actions should be applied to rule 10b-5 actions in Nebraska. The liability provisions of the Securities Act of Nebraska and liability provisions of the federal securities laws are almost identical. With respect to the federal statutory scheme, it has been consistently held that the short statute of limitations applicable to causes of actions based upon mistake should not be applied to causes of actions based upon fraud. It would appear consistent, therefore, with the legislative intent of Nebraska law and the federal regulatory framework, that causes of action arising under Nebraska's rule 10b-5 equivalent be governed by a longer statute of limitations than that applicable to causes of action based upon mistake or breach of duty. Applying the resemblance test, the applicable statute of limitations in rule 10b-5 actions brought in Nebraska should also be the longer statute of limitations.