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"Inquiry Notice" on Trial: The Supreme Court to Clarify Standards for Statute of Limitations in Securities Class Actions

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Next term, the Supreme Court will issue a decision that could resolve an issue that has plagued the district and appellate courts for years, and that undoubtedly will have a profound impact on whether certain late-filed securities class actions will be permitted to proceed past the pleading stage. The Court's anticipated decision in *Merck & Co. v. Reynolds*[1] should determine, once and for all, the proper standard for measuring when "inquiry notice" is triggered for purposes of determining whether the statute of limitations has run in a case under Section 10(b) of the Securities Exchange Act of 1934. The case also provides the Court with an opportunity to clarify the distinction between the standard for "inquiry notice" under Section 10(b), versus the standard under Sections 11 and 12(a)(2) of the Securities Act. We discuss the *Merck* case in greater detail below. First, however, we consider the legal framework in which the *Merck* case arises, and the varying interpretations of "inquiry notice" among the Courts of Appeal preceding *Merck*.

The Legal Framework

Three separate issues have plagued the application of the statute of limitations in securities fraud cases, creating uncertainty at the district court level, and leading to a general loosening of the standards governing the statute of limitations under Section 10(b): *first,* a split between the Courts of Appeals regarding what evidence is necessary to trigger the running of the statute of limitations; *second*, a split between the circuits regarding whether the limitations period begins only after a period for "reasonable" investigation; and *third,* confused application of inquiry notice standards in "mixed" cases brought under both Section 10(b) and Section 11.

In Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, the Supreme Court resolved a split between the circuits by establishing a uniform statute of limitations period across the circuits for claims brought under Section 10(b).

Section 10(b) of the Securities Exchange Act of 1934[2] and related Rule 10b-5[3] outlaw fraud in connection with the sale of securities and imposes civil liability on violators. To state a claim under Section 10(b), a plaintiff must show that the defendant made a misstatement or omission of material fact *with scienter* in connection with the purchase or the sale of a security.[4] By contrast, Section 11 of the Securities Act of 1933[5] imposes civil liability on parties who make misstatements or omissions of material fact in a securities registration statement without regard to whether a party was aware of its misrepresentation of the facts.[6]

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*[7] the Supreme Court resolved a split between the circuits by establishing a uniform statute of limitations period across the circuits for claims brought under Section 10(b). The court held the appropriate period was that provided by §9(e) of the Exchange Act[8] which establishes a limitations period of "one year after the discovery of the facts constituting the violation."[9] In 2002, with its enactment of the Sarbanes-Oxley Act, Congress extended the limitations period for 10(b) suits to "2 years after the discovery of the facts constituting the violation" for claims brought after July 30, 2002.[10] The limitations period for claims brought under the Securities Act of 1933, including §11 claims, is one year.[11]

For claims under both Sections 10(b) and 11, the limitations period starts when a potential plaintiff has either actual or inquiry notice of the facts underlying his claim.[12] Under the actual notice standard, the statute of limitations begins to run when a potential plaintiff learns he has a claim against the defendant for a violation of the securities laws.[13] Inquiry notice, on the other hand, is said to be an objective analysis that imputes to potential plaintiffs the knowledge a reasonable investor of ordinary intelligence would have discovered.[14] Under the inquiry notice standard, plaintiffs are deemed to have knowledge of all publicly available information, including published media reports, court filings, press releases and filings with the Securities and Exchange Commission.[15] The purpose of the inquiry notice standard is to prevent potential plaintiffs from ignoring signs that a violation has occurred, and to encourage such parties to investigate their potential claims in order to discover the underlying facts.[16]

While the circuits are in agreement that the limitations period may be triggered by either actual or inquiry notice,[17] the circuits differ on the questions of whether evidence of scienter is necessary for inquiry notice in §10(b) cases, and when the statute of limitations clock actually starts ticking.

Determining When the Statute of Limitations Actually Begins to Run

The Courts of Appeals subscribe to at least three different standards measuring when the statute of limitations begins to run in cases involving inquiry notice. The question dividing the circuits is whether the statute of limitations period begins to run at the time plaintiffs are placed on inquiry notice, or whether plaintiffs have a period of time after being put on notice to conduct a reasonably diligent investigation into their claims before the limitations clock even begins to run. The majority of the circuits employ a plaintiff-friendly inquiry-notice-plus-reasonable-diligence test.[18] Under that test, once a potential plaintiff is placed on inquiry notice the plaintiff has a duty to exercise reasonable diligence in investigating the potential claim. The statute of limitations period only begins to run once the plaintiff "in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud."[19] Other circuits adopt a more defendant-friendly pure-inquiry-notice test.[20] Under that test, the statute of limitations for claims under the securities laws begins to run at the time the plaintiff has inquiry notice of a violation.[21] The Second and Third Circuits adopt a hybrid of the two tests. If a plaintiff actually investigates a claim after being put on inquiry notice, the limitations period does not begin to run until an investor exercising reasonable diligence would have uncovered the violation.[22] However, if the investor makes no inquiry after being placed on notice, the statute of limitations will begin to run on the date the plaintiff first had inquiry notice.[23]

The approaches adopted by the majority of the circuits, including the Second and Third Circuits, not only extend the time period for plaintiffs to timely file suit but also add another layer of confusion to a test already fraught with uncertainty. A court in a circuit adopting the hybrid or notice-plus-investigation test arguably must determine not only when the plaintiff was put on inquiry notice, but also when a hypothetical investor exercising "reasonable diligence" in investigating a claim would have uncovered the facts underlying the claim.

Whether Inquiry Notice Requires Evidence of Scienter

While scienter is an element of a §10(b) violation, until recently the Courts of Appeals did not require that evidence of scienter be discovered in order to place a plaintiff on inquiry notice of a claim under that section. In the past year, however, at least two circuits, the Third and Ninth, have held that an investor is not placed on inquiry notice until there is publicly available evidence that indicates the defendant acted with the requisite scienter when making the alleged misrepresentations.[24] Under the Third and Ninth Circuits' holdings, the limitations period would not begin to run even when an investor actually obtains knowledge that a defendant had made a misrepresentation if there is no evidence that the defendant had knowingly made the misrepresentation. The Second,[25] Tenth[26] and Eleventh[27] Circuits have not adopted the Third and Ninth Circuits' approach, and have rejected arguments that evidence of scienter is required before inquiry notice is triggered. As a result of the split among the circuits, a 10(b) claim would be time-barred if the plaintiff filed suit in Atlanta or New York, but would be timely if filed in Newark or Los Angeles—hardly a rational system of jurisprudence in the federal courts for the adjudication of securities class actions.

Different Limitations Periods for Claims Brought Under Sections 10(b) and 11

Defendants in cases claiming violations of both Sections 10(b) and 11 have, at times, fallen victim to an unintended consequence of the circuits' split on whether scienter is necessary for inquiry notice. Courts attempting to evaluate the timeliness of securities fraud claims have, on occasion, neglected to subject each separate claim to its appropriate limitations period and inquiry notice standard, and instead have evaluated different claims under one standard.

In one recent case—*Alaska Electrical Pension Fund*[28]—the Third Circuit discussed the different inquiry notice standards governing §10(b) claims and those under Section 11. In an opinion which followed and applied *Merck*, the Third Circuit in *Alaska Electrical Pension Fund* clarified how the different elements of a cause of action under Section 10(b), on the one hand, and Section 11 on the other hand, should affect the inquiry notice standards for claims brought under each section:

> **Under § 10(b), a corporation does not engage in culpable activity unless it acted with scienter. Thus, as defamation is not assault, so is § 10(b) not § 11. Section 11 does not require a plaintiff to plead or to prove scienter; § 10(b) does. This is a distinction with a difference, both in terms of what a plaintiff must show for recovery *and* in terms of what information must be available for inquiry.[29]**

The Third Circuit thus made it clear that evidence insufficient to trigger inquiry notice of a §10(b) claim nevertheless could be sufficient to trigger inquiry notice of a §11 claim.[30]

Unfortunately, courts have at times paid less attention to the distinctions between the inquiry notice standards governing Sections 10(b) and 11 claims. Both district and circuit courts have made the error of subjecting claims brought under the two sections to the same test of inquiry notice, including the test of whether plaintiff was on inquiry notice of *fraudulent* activity by the defendants. In one example from within the Ninth Circuit, the district court in *In re Exodus Communications*[31] made this mistake. The plaintiffs in that case alleged violations of Sections 10(b) and 11. In its opinion denying the defendant's motion to dismiss the case on statute of limitations grounds, the court combined its analysis of the timeliness of both claims and ruled that the plaintiffs did not have inquiry notice of either claim until "a reasonably diligent investor should have discovered the facts underlying the alleged fraudulent activity."[32] The court rejected the defendants' argument that the Exodus' announcement of a "disastrous" second quarter should have put the plaintiffs on inquiry notice of their claims stating such disclosures "do not necessarily suggest that earlier statements were *fraudulent*"[33]—and by "fraudulent" the court meant an element of knowing misrepresentation. In so holding, the *Exodus* court grafted onto Section 11 an element of intentionality that is nowhere found in the text of the statute.

The Third Circuit thus made it clear that evidence insufficient to trigger inquiry notice of a §10(b) claim nevertheless could be sufficient to trigger inquiry notice of a §11 claim.

The district court in *In re Alcatel Securities Litigation* made a similar mistake. The plaintiffs in that case were also claiming violations of both Sections 10(b) and 11. In denying the defendants' motion to dismiss those claims on statute of limitations grounds, the court failed to distinguish between the different inquiry notice standards for each claim. The court rejected the defendants' argument that a newspaper article and pending litigation should have put the plaintiffs on notice of their claims, finding that such evidence did not suggest the probability of fraud, ignoring the fact that claims under Section 11, unlike claims alleging fraud, do not require evidence the defendant had acted with scienter. [34]

The *Merck* Decision

It was in this legal landscape that *Merck & Co., Inc. v Reynolds* reached the Third Circuit Court of Appeals. The claims in *Merck* arose out of Merck's development and sale of the prescription pain drug Vioxx and alleged misrepresentations by Merck regarding the safety of the drug.[35] In 1999, before Merck received approval from the Food and Drug Administration (FDA) to market Vioxx, the company commenced a study of the drug comparing it to naxoprene, the active ingredient in several brand-name pain relievers. The results of the study showed that users of Vioxx suffered from heart attacks more frequently than users of naxoprene. Merck announced the results of the study on March 27, 2000 but qualified the results with the company's own hypothesis for the higher incidence of cardiovascular events in Vioxx users. Merck, theorized that naxoprene had beneficial effects that reduced the frequency of cardiovascular events. The company also admitted that these effects had not been observed in any previous studies involving naxoprene.

The release of the study results triggered a public debate as to the safety of the drug. Articles in *The New York Times*, *USA Today* and the *Journal of the American Medical Association* along with reports from market analysts reported that Vioxx may increase the risk of heart attacks in patients. Through this period, Merck continued to publicly advocate the "naxoprene hypothesis" as the explanation for the study's results.[36]

In September 2001, the FDA issued a Warning Letter to Merck ordering the company to cease the making of such claims and deemed Merck's representations of Vioxx's safety profile to be misleading.[37] The Warning Letter stated the reason for the test results was unknown, Merck's naxoprene hypothesis was unproven and the results could be due to harmful effects of Vioxx. In the week after the FDA's letter was published, the price of Merck's stock declined by over 6%; however, the stock recovered its value by the end of September. The FDA's issuance of the Warning Letter was reported widely by both media sources and securities analysts, but most analysts continued to project that revenues from Vioxx would continue to increase in the future.

Months earlier, in May 2001, a product liability lawsuit was filed against Merck alleging that the company knew Vioxx increased users' risk of suffering heart attacks but did not communicate the risks to users. Additional lawsuits were filed in September 2001 after the FDA's Warning Letter alleging Merck had engaged in fraud and made misrepresentations concerning Vioxx. Throughout this period, Merck representatives continued to insist publicly that Vioxx did not pose cardiovascular risks and that the study results were due to beneficial effects of naxoprene.

In October 2003, a Harvard study concluded that Vioxx increased the risk of heart-attack in patients by 40% compared to a competing painkiller medication.[38] Finally, on September 30, 2004, Merck announced that it was removing Vioxx from the market entirely due to another study which confirmed Vioxx increased the risk of cardiovascular events in patients. The price of Merck's stock dropped 27% the same day in response to the news.

The District Court Dismisses Plaintiffs Claims as Untimely

On November 30, 2003, investors filed a class action securities suit against Merck and a number of its directors and officers employees and directors in the United States District Court for the Eastern District of Louisiana.[39] The complaint alleged Merck had misrepresented the risks associated with Vioxx and its commercial viability through the company's statements and omissions thereby inflating the price of Merck's stock and causing the plaintiffs to suffer losses when the stock price dropped after the truth concerning the risks of Vioxx were revealed. The complaint alleged Merck's conduct violated Sections 11, 12(a)(2) and 15 of the Securities Act of 1933, as well as Sections 10(b), 20(a) and 20A of the Securities Exchange Act of 1934. The case, along with all other Vioxx-related suits, were transferred to the U.S. District Court for the District of New Jersey.

Merck filed a motion with the District Court to dismiss the case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending that the claims were barred by the statute of limitations. In April 2007, the District Court granted the motion and dismissed the complaint.[40] The court ruled the plaintiffs were on inquiry notice of their securities fraud claims no later than October 9, 2001—over two years before the plaintiffs filed their complaint—when *The New York Times* published an article in which the president of Merck's research lab admitted there was no proof that naproxen had beneficial cardiovascular effects and that Vioxx may increase the risk of heart attacks in patients.[41] The court determined that the article, combined with the FDA's Warning Letter, the products liability suit, and other widespread media reports discussing Vioxx's potential risks, were sufficient "storm warnings" that a reasonable investor would have been able to discover the alleged misrepresentations and omissions.[42] The court also rejected the plaintiff's argument that Merck's repeated assurances regarding Vioxx's safety profile offset the "storm warnings" holding that a reasonable investor could not rely on Merck's assurances in light of the publicly available information questioning the safety of Vioxx, including the FDA Warning Letter, that expressly accused Merck of misrepresenting the risks associated with the drug.[43]

[For more on "storm warnings" and their impact on Inquiry Notice, see "Storm Warnings Revisited" by Mary Eaton (Willkie Farr & Gallagher LLP) in the February 2009 issue of *Securities Litigation Report*, (vol. 6, no.2) © West LegalWorks.]

The Third Circuit's Reversal

Plaintiffs appealed the district court's ruling to the United States Court of Appeals for the Third Circuit, contending that the district court had incorrectly applied the inquiry notice standard to the case. In September 2008, the Third Circuit reversed, holding that the FDA Warning Letter and media reports did *not* put the plaintiffs on inquiry notice.[44] The Third Circuit specifically held that inquiry notice was only triggered by "storm warnings of culpable activity," and that such storm warnings must give a reasonable investor some reason to believe that Merck did not itself believe its representations regarding the safety of Vioxx—that is, that it acted with scienter.[45] The Third Circuit then concluded that the FDA's Warning Letter to Merck, along with press coverage of the Vioxx study, did *not* provide the plaintiffs with sufficient evidence that Merck *knowingly* misrepresented Vioxx's safety profile—and therefore did not put plaintiffs on inquiry notice. The court relied in part on the lack of any significant drop in the price of Merck's stock in reaction to the FDA Warning Letter and the related media coverage.[46] The court rationalized that since under the Efficient Markets Hypothesis, all material information is incorporated into the price of a stock, if publicly available information constituted a storm warning so as to put a reasonable investor on inquiry notice of fraud related to a company, the storm warning would be reflected by a corresponding dip in the price of the company's stock.[47] The Third Circuit further observed that the Warning Letter gave no indication that the FDA suspected Merck did not believe its naxoprene hypothesis. The Third Circuit also concluded that to the extent the Warning Letter and media reports might have constituted storm warnings, Merck's repeated assurances regarding the safety of Vioxx and its continued advocacy of the naxoprene hypothesis effectively counteracted those storm warnings. Since the court found no evidence in the FDA Warning Letter, or in related press and market analyst reports, that would inform a reasonable investor that Merck made its misrepresentations with scienter, it reversed the district court's dismissal.

The Supreme Court Cert. Petition

On January 15, 2009, Merck filed a petition for a writ of certiorari with the Supreme Court asking the court to hear its appeal of the Third Circuit's ruling.[48] In its petition, Merck claimed the Third Circuit had erred in holding the statute of limitations for federal securities fraud claims does not begin to run until there is publicly available evidence the defendant had acted *fraudulently*—that is, with scienter.[49] Merck asked the Court to resolve two issues dividing the circuits regarding when constructive discovery has occurred in securities fraud cases triggering the statute of limitations: *first,* whether the limitations period begins only after a reasonable period for investigation; and *second,* whether a plaintiff must have evidence that the defendant acted with scienter in order to be put on inquiry notice.[50] Merck urged the Court to grant certiorari in order to establish a national inquiry notice standard thereby discouraging forum shopping, eliminating the uncertainty among the district courts as to when the statute of limitations for a claim has expired, and reducing the cost of litigating securities fraud claims generally. According to Merck, its appeal presented a superior case to the companion cert. petition filed in *Betz v. Trainer Wortham*[51] from the Ninth Circuit, since the plaintiff in *Betz* admittedly had *actual* knowledge of the alleged misrepresentation. Thus, the *Betz* petition would not present the Supreme Court with an opportunity to resolve the disagreement among the circuit courts of appeals on whether evidence of scienter is necessary to trigger inquiry notice.[52]

Merck urged the court to grant certiorari in order to establish a national inquiry notice standard thereby discouraging forum shopping, reducing uncertainty among the district courts as to when the statute of limitations for a claim has expired and reducing the cost of litigating securities fraud claims.

The *Betz* Case—Another Variation on the Theme

As previously noted, the conflict among the Circuits pits the Third and Ninth Circuits against the other Courts of Appeals. Besides the *Merck* case, the conflict is best captured in the Ninth

Circuit's decision in *Betz,* a 2-to-1 decision with a blistering dissent from Chief Judge Alex Kozinski. In *Betz,* plaintiff Trainer Wortham, an investment advisory firm, filed its petition for a writ of certiorari in May 2008.[53] The Supreme Court has not acted on that petition, pending review of the *Merck* case.

The claims in *Betz* arose out of the mismanagement by Trainer Wortham & Co. of the investment of Heidi Betz, a customer of the firm.[54] Betz claimed in making her investment she relied on a statement by a Trainer Wortham employee that he could invest her money in a way that would provide her a monthly return of $15,000 without subjecting her $2.2 million investment to any risk of loss. This promise directly conflicted with the contract between Trainer Wortham and Betz which explicitly stated the account was subject "to a possible loss of principal." Betz opened her account with Trainer Wortham in June 1999. In February 2000, her monthly account statements revealed the principal remaining in the account had dipped below the original $2.2 million investment. By March 2001, the balance of her account had declined to less than half its original value. When Betz called an employee of the firm in March 2001 to inquire the reason for the decline, the employee assured her "that the shortfall was temporary, that the markets would recover, and that in a year or less her account balances would be back to $2.2 million." In May 2002, with the value of her remaining principal continuing to dwindle, Betz met with Trainer Wortham's president to discuss her account. In June 2002, the president informed Betz that Trainer Wortham would not reimburse her for the lost value of her principal.

Betz threatened to sue Trainer Wortham in July 2002 but did not actually do so until she filed a complaint with the United States District Court for the Northern District of California in July 2003 alleging violations of §10(b). Trainer Wortham filed a motion for summary judgment on the grounds that Betz's claims were barred by the statute of limitations. The district court held that Betz had inquiry notice at least two years prior to July 2003 and thus granted the motion. Betz subsequently appealed the ruling to the United States Court of Appeals for the Ninth Circuit, arguing that the district court had misapplied the inquiry notice standard.

The Ninth Circuit Panel Opinion

The Ninth Circuit reversed the district court's ruling. In his opinion for the court, Judge Ronald Gould held that Betz's declining account balance was an indication only that Trainer Wortham had broken its promise not to touch her principal and did not indicate the promise had been made *fraudulently* with the requisite scienter.[55] The court ruled there was, at the least, a genuine issue as to whether a reasonable investor would have discovered the facts constituting inquiry notice two years prior to the date Betz filed suit.[56] The Ninth Circuit panel further held that a rational jury might conclude that the assurances Trainer Wortham gave to Betz in March 2001 regarding the status of her principal were sufficient to dispel any duty Betz had at the time to investigate her claim.[57] Based on those findings, the Ninth Circuit concluded that the district court erred in granting the defendant's motion for summary judgment.

Chief Judge Kozinski's Dissent to Denial of Rehearing En Banc

In February 2008, the Ninth Circuit denied Trainer Wortham's Petition for Rehearing En Banc.[58] In his dissent to that denial, Chief Judge Kozinski criticized the majority's opinion on multiple fronts. Chief Judge Kozinski disagreed with the majority and asserted that summary judgment was appropriate in this case because there was no dispute aside from whether the facts were sufficient to put a reasonable investor on inquiry notice.[59] His dissent argued that by ruling that only a jury can decide how a reasonable investor would have acted, the majority decision will have the effect of forcing defendants to trial even in cases where the parties are in agreement as to the historical facts underlying the case. In so doing, Chief Judge Kozinski wrote, the majority was "[p]addling stubbornly against the current" of the other circuits.[60]

Chief Judge Kozinski also disagreed with the majority's interpretation of the inquiry notice standard and argued Betz had inquiry notice at the time she first learned the value of her principal had begun to decline—three-and-a-half years prior to when she filed suit. He noted the irony that the court refused to find Betz had inquiry notice prior to July 2001, despite the fact that in response to her dwindling account balances, Betz actually made inquiries regarding the loss of her principal in March 2001:

> **Notice that *actually* causes an investor to make inquiries is nevertheless insufficient to put a reasonable investor on notice to make inquiries. No other court in the known universe has adopted such an oxymoronic rule.[61]**

Chief Judge Kozinski criticized the majority for holding an investor does not have inquiry notice until she has proof the defendant acted with scienter:

> **[W]ithout more proof of scienter, the panel opines, a reasonable investor in Betz's position would have believed that the bank really did mean to put the money into 30-day T-bills, but somehow got confused and bought volatile stock instead. According to the panel, it wouldn't have crossed a reasonable investor's mind that the bank lied when it promised a risk-free investment until June 2002, when Betz had lost about four-fifths of her principal and the bank refused to make good her losses. The argument does serious violence to 'reasonable investor' and 'inquiry notice'.[62]**

The results of the majority's standard, he warned, would be to encourage potential securities fraud plaintiffs to drag out their investigations and adopt a "wait-and-see" approach to determine if the value of their stock drops prior to filing suit. He remarked, "[a]fter this opinion, we might as well rename the PSLRA [Private Securities Litigation Reform Act of 1995] in the Ninth Circuit as the SPLFEA (Securities Plaintiffs Lawyers' Full Employment Act)[63] and asserted that the majority's holding conflicted with the inquiry notice standard adopted by the other circuits:

> **A plaintiff has storm warnings—and is therefore on inquiry notice—long before the storm itself is upon him… We are the only circuit to hold that plaintiff has no storm warnings until the hurricane makes landfall.[64]**

Finally, Chief Judge Kozinski criticized the majority's treatment of the assurances Trainer Wortham allegedly made to Betz. In his dissent, he conceded that assurances by a defendant may prevent the statute of limitations from being triggered where those assurances prevent a potential plaintiff from discovering facts related to her claim, but argued that in cases like *Betz*—where the defendant's assurances do not conceal or misrepresent any of the facts related to the claim but instead amount only to "joll[ying] a disappointed investor along sunny forecasts of future bull markets"—such assurances should not stop the statute of limitations period from running.[65] Chief Judge Kozinski opined that under the majority's standard "the statute stops running the moment defendant makes a cheerful noise, … effectively writ[ing] the statute of limitations off the books."[66] Concluding his dissent and critique of the majority's ruling, Chief Judge Kozinski asserted that "businesses unfortunate enough to be sued in this circuit for securities fraud might as well forget about 28 U.S.C.A. § 1658(b)(1); it is nothing but a filigree on the statutory page."[67]

The Cert. Petition in *Betz*

In its petition for a writ of certiorari, Trainer Wortham argued that the Ninth Circuit had erred in determining a plaintiff was not put on inquiry notice of potential §10(b) claims until she received evidence the defendant had acted with the requisite scienter and by ruling that assurances made by a defendant to a plaintiff could suspend the plaintiff's duty to investigate her claims.[68]

The Supreme Court invited the Solicitor General to file an amicus brief expressing the government's views on the questions.[69] In her brief, the Solicitor General recommended the court not grant Trainer Wortham's petition, arguing the Ninth Circuit applied the correct standards. The Solicitor General agreed, however, with Merck that the case would not present the Court with a chance to resolve the splits between the circuits regarding the inquiry notice standard.[70] The government claimed the lower courts should have ruled Betz had *actual* notice of the §10(b) violations and that the outcome of the case would have been the same under any of the competing inquiry notice standards espoused by the circuit courts.[71] The Solicitor General's brief also noted that in cases like *Betz,* where "an innocent mistake is unlikely," evidence that a representation was false is sufficient evidence of scienter to put investors on inquiry notice. Thus, regardless of whether evidence of scienter is necessary to trigger inquiry notice, the brief argued, the outcome in *Betz* would have been the same.[72]

Potential Implications of *Merck*

In *Merck*, the Supreme Court has a chance to set a unified standard for the inquiry notice doctrine governing the statute of limitations for claims brought under §10(b). The Court will be asked to adopt one of the different inquiry notice standards which have split the courts of appeals since *Lampf*. The adoption of a pure inquiry notice standard, or something similar to it, would reinvigorate the statute of limitations defense, and eliminate stale claims. Should the Court instead choose an approach requiring a reasonable period for investigation before the statute of limitations commences to run, surely the result will be a further erosion of the inquiry notice doctrine. Either way, the adoption of a uniform national standard will at least afford defendants with a degree of certainty over the statute of limitations.

Merck presents the Supreme Court with a compelling opportunity to resolve the uncertainty surrounding the inquiry notice standard. We expect the case to receive significant attention from *amicus curiae* as the case proceeds in the next term.

NOTES

1. *Merck & Co. v. Reynolds*, No. 08-905 (U.S. filed Jan. 15, 2009).
2. Securities Exchange Act of 1934, 15 U.S.C.A. § 78j(b).
3. Rule 10b-5, 17 C.F.R. § 240.10b-5.
4. *Semerenko v. Cendant Corp.*, 223 F.3d 165, 174 (3rd Cir. 2000).
5. Securities Act of 1933, 15 U.S.C.A. § 77k.
6. Securities Act of 1933, 15 U.S.C.A. § 77k.
7. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321, Fed. Sec. L. Rep. (CCH) P 96034 (1991).
8. *Lampf*, 501 U.S. at 364.
9. 15 U.S.C.A. § 78i(e).
10. 28 U.S.C.A. § 1658(b).
11. 15 U.S.C.A. § 77m.
12. *In re Alcatel Securities Litigation*, 382 F. Supp. 2d 513,5223, Fed. Sec. L. Rep. (CCH) P 93132 (S.D. N.Y. 2005).
13. *Betz v. Trainer Wortham & Co., Inc.*, 486 F.3d 590, 593, Fed. Sec. L. Rep. (CCH) P 94318 (9th Cir. 2007), for additional opinion, see, 236 Fed. Appx. 253 (9th Cir. 2007) and reh'g granted, opinion withdrawn, 503 F.3d 973 (9th Cir. 2007) and on reh'g, 504 F.3d 1017, Fed. Sec. L. Rep. (CCH) P 94432 (9th Cir. 2007), opinion superseded on denial of reh'g, 519 F.3d 863, Fed. Sec. L. Rep. (CCH) P 94588 (9th Cir. 2008), petition for cert. filed, 76 U.S.L.W. 3646, 77 U.S.L.W. 3021 (U.S. May 27, 2008).
14. *Alaska Elec. Pension Fund v. Pharmacia Corp.*, 554 F.3d 342, 347, Fed. Sec. L. Rep. (CCH) P 95052 (3d Cir. 2009), petition for cert. filed, 77 U.S.L.W. 3611 (U.S. Apr. 22, 2009).
15. *In re Alcatel Securities Litigation*, 382 F. Supp. 2d at 523.
16. *Alaska Electrical Pension Fund*, 554 F.3d at 347.
17. *Betz v. Trainer Wortham & Co., Inc.*, 504 F.3d 1017, 1022-1023, Fed. Sec. L. Rep. (CCH) P 94432 (9th Cir. 2007), opinion superseded on denial of reh'g, 519 F.3d 863, Fed. Sec. L. Rep. (CCH) P 94588 (9th Cir. 2008), petition for cert. filed, 76 U.S.L.W. 3646, 77 U.S.L.W. 3021 (U.S. May 27, 2008).
18. *Betz* 504 F.3d at 1024.
19. *Sterlin v. Biomune Systems*, 154 F.3d 1191, 1201, Fed. Sec. L. Rep. (CCH) P 90279 (10th Cir. 1998).
20. Brief for the Organization for International Investment and the Chamber of Commerce of the United States of America as *Amici Curiae* in Support of Petitioners at 8, *Trainer Wortham v. Betz* (No. 07-1489).
21. *Caviness v. Derand Resources Corp.*, 983 F.2d 1295, 1303, Blue Sky L. Rep. (CCH) P 73803, Fed. Sec. L. Rep. (CCH) P 97354, R.I.C.O. Bus. Disp. Guide (CCH) P 8205 (4th Cir. 1993).
22. *LC Capital Partners, LP v. Frontier Ins. Group, Inc.*, 318 F.3d 148, 154, Fed. Sec. L. Rep. (CCH) P 92258 (2d Cir. 2003); *In re Merck & Co., Inc. Securities*, Derivative & ""Erisa" Litigation, 483 F. Supp. 2d 407, 418 (D.N.J. 2007), judgment rev'd, 543 F.3d

150, Fed. Sec. L. Rep. (CCH) P 94834 (3d Cir. 2008), cert. granted, 129 S. Ct. 2432 (2009).
23. *LC Capital Partners*, 318 F.3d at 154; *Merck*, 483 F. Supp. 2d at 418.
24. *Betz*, 504 F.3d 1017 (9th Cir. 2007); *Alaska Electrical Pension Fund*, 554 F.3d 342 (3rd Cir. 2009).
25. *Dodds v. Cigna Securities, Inc.*, 12 F.3d 346, 352, Fed. Sec. L. Rep. (CCH) P 98025 (2d Cir. 1993).
26. *Sterlin*, 154 F.3d at 1202, n. 19.
27. *Theoharous v. Fong*, 256 F.3d 1219, 1228, Fed. Sec. L. Rep. (CCH) P 91472 (11th Cir. 2001).
28. *Alaska Electrical Pension Fund*, 554 F.3d 342.
29. *Alaska Electrical Pension Fund*, 554 F.3d at 348, FN4.
30. *Alaska Electrical Pension Fund*, 554 F.3d at 348, FN4.
31. *In re Exodus Communications, Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) P 93357, 2005 WL 1869289 (N.D. Cal. 2005), on reconsideration, 2005 WL 2206693 (N.D. Cal. 2005).
32. *In re Exodus Communications*, 2005 WL 1869289 at *21-22.
33. *In re Exodus Communications*, 2005 WL 1869289 at *28.
34. *In re Alcatel Securities Litigation*, 382 F. Supp. 2d at 526.
35. Brief for Petitioner at 6, *Merck & Co., Inc. v. Reynolds*, 129 S. Ct. 2432 (2009).
36. *In re Merck & Co., Inc. Securities, Derivative & ""ERISA" Litigation*, 543 F.3d 150, 156, Fed. Sec. L. Rep. (CCH) P 94834 (3d Cir. 2008), cert. granted, 129 S. Ct. 2432 (2009).
37. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, 543 F.3d at 156-57.
38. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, 543 F.3d at 159.
39. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, 543 F.3d at 153.
40. In re Merck & Co., Inc. Securities, Derivative & ""Erisa" Litigation, 483 F. Supp. 2d 407 (D.N.J. 2007), judgment rev'd, 543 F.3d 150, Fed. Sec. L. Rep. (CCH) P 94834 (3d Cir. 2008), cert. granted, 129 S. Ct. 2432 (2009).
41. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, 483 F.Supp.2d at 419.
42. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, 483 F.Supp.2d at 419.
43. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, 483 F.Supp.2d at 421.
44. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, 543 F.3d at 172.
45. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, 543 F.3d at 166.
46. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, 543 F.3d at 168.
47. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, 543 F.3d at 168.
48. Brief for Petitioners, *Merck & Co., Inc. v. Reynolds*, 129 S. Ct. 2432 (2009).
49. Brief for Petitioners at i, *Merck & Co., Inc. v. Reynolds*, 129 S. Ct. 2432 (2009).
50. Brief for Petitioners, *Merck & Co., Inc. v. Reynolds*, 129 S. Ct. 2432 (2009).
51. *Betz v. Trainer Wortham & Co., Inc.*, 519 F.3d 863, Fed. Sec. L. Rep. (CCH) P 94588 (9th Cir. 2008), petition for cert. filed, 76 U.S.L.W. 3646, 77 U.S.L.W. 3021 (U.S. May 27, 2008).
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53. *Trainer Wortham v. Betz*, No. 07-1489 (U.S. filed May 27, 2008), available at 2008 WL 2305802.
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55. *Betz*, 504 F.3d at 1026.
56. *Betz*, 504 F.3d at 1027.
57. *Bet*, 504 F.3dz at 1027.
58. *Betz v. Trainer Wortham & Co., Inc.*, 519 F.3d 863, Fed. Sec. L. Rep. (CCH) P 94588 (9th Cir. 2008), petition for cert. filed, 76 U.S.L.W. 3646, 77 U.S.L.W. 3021 (U.S. May 27, 2008).
59. *Betz*, 519 F.3d at 866.
60. *Betz*, 519 F.3d at 866.
61. *Betz*, 519 F.3d at 867.
62. *Betz*, 519 F.3d at 867.
63. *Betz*, 519 F.3d at 868.
64. *Betz*, 519 F.3d at 869.
65. *Betz*, 519 F.3d at 870-71.
66. *Betz*, 519 F.3d at 878.
67. *Betz*, 519 F.3d at 878.
68. Brief for Petitioners at i., *Trainer Wortham v. Betz* (No. 07-1489), available at 2008 WL 2305802.
69. Brief for the United States as Amicus Curiae at 1, *Trainer Wortham v. Betz* (No. 07-1489), available at 2008 WL 2305802.
70. Brief for the United States as Amicus Curiae at 5, *Trainer Wortham v. Betz* (No. 07-1489), available at 2008 WL 2305802.
71. Brief for the United States as Amicus Curiae at 16, *Trainer Wortham v. Betz* (No. 07-1489), available at 2008 WL 2305802.
72. Brief for the United States as Amicus Curiae at 6, *Trainer Wortham v. Betz* (No. 07-1489), available at 2008 WL 2305802.