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MERCK & CO. V. REYNOLDS: SARBANES-OXLEY'S PERPLEXING STATUTE OF LIMITATIONS

*Jordan Ludwig**

I. INTRODUCTION

In 2002, Congress expanded the statute of limitations in most private securities fraud cases as part of the Sarbanes-Oxley Act ("Sarbanes-Oxley" or "the Act").[1] This expanded statute of limitations is codified in 28 U.S.C. § 1658(b):

> Notwithstanding subsection (a),[2] a private right of action that involves a claim of fraud, deceit, manipulation or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities exchange Act of 1934 . . . may be brought not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.[3]

Since Sarbanes-Oxley's enactment in 2002, the circuit courts of appeal have been "increasingly divided" over when the statute of limitations begins to run under § 1658(b)(1)—otherwise known as an

* J.D. 2011, Loyola Law School Los Angeles; B.A. History 2008, University of Maryland, College Park. I would like to thank all of the editors and staffers of Volume 44 of *Loyola of Los Angeles Law Review* for their hard work in making this Supreme Court issue possible. Elena DeCoste Grieco, Jeffrey Payne, Oliver Gold, and Andrew Lichtenstein deserve special recognition for their selfless devotion to the issue. Lastly, thanks to Professor Michael Guttentag for his sponsorship and helpful feedback during the writing process.

1. 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12.16[1] (4th ed. 2002). Sarbanes-Oxley expanded the statute of limitations from the original statute of limitations for securities fraud actions: a one-year "discovery" period and a three-year "repose" period. 15 U.S.C. §§ 77m, 78i(e) (2006).

2. Subsection (a) provides a uniform four-year statute of limitations period for all civil actions arising under a congressional act. Section 1658(a) is not retroactive, and if a congressional statute states a statute of limitations § 1658(a) does not control.

3. 28 U.S.C. § 1658(b) (2006).

"'inquiry notice' standard."[4] Specifically, the circuit courts have been divided over denoting the specific point in time when a plaintiff is put on sufficient "inquiry notice" such that the expanded statute of limitations of Sarbanes-Oxley begins to run. This is the issue addressed in *Merck & Co. v. Reynolds*.[5] The U.S. Supreme Court, in an increasingly rare proplaintiff opinion,[6] held that inquiry notice does not begin to run until the plaintiff has discovered, or a reasonably diligent plaintiff would have discovered, the facts of the violation, *including the fact of scienter*.[7]

This Comment examines and analyzes the Court's holding in *Merck*. Part II of this Comment provides an overview of the facts and procedural history of the case. Part III discusses how the Court reached its opinion, and Part IV analyzes the holding. Finally, Part V contains concluding remarks about *Merck*'s effects on securities litigation.

II. STATEMENT OF THE CASE

A. Facts

Merck arose out of the Vioxx debacle. In the mid-1990s Merck developed the anti-inflammatory drug Vioxx.[8] Several months after the Food and Drug Administration (FDA) approved Vioxx, Merck announced the results of its Vioxx GI Outcomes Research (VIGOR) study.[9] This study showed that Vioxx users suffered fewer gastrointestinal side effects than users of naproxen (a competing anti-inflammatory drug); however, the study also showed that Vioxx users, as compared to naproxen users, had a greater chance of having a heart attack.[10] Merck responded to these findings by announcing

4. Petition for a Writ of Certiorari at 3, Merck & Co. v. Reynolds, 130 S. Ct. 1784 (2010) (No. 08-905).

5. 130 S. Ct. 1784 (2010).

6. *E.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (holding that customers and suppliers could not be held liable as aiders and abettors in a securities fraud case because plaintiffs could not demonstrate reliance); *Tellabs Inc. v. Makor Issues & Rights*, 551 U.S. 308 (2007) (raising pleading standards for securities fraud cases).

7. *See Merck*, 130 S. Ct. at 1789–90. It should be noted that Vioxx is the brand name for the drug rofecoxib.

8. *Id.* at 1790.

9. *Id.*

10. *Id.*

that the disparity was due to naproxen's ability to block platelet aggregation—a quality that Vioxx did not share.[11] In other words, Vioxx did not cause heart attacks, but rather, Naproxen conferred an additional benefit upon its users. This became known as the "naproxen hypothesis."[12]

Debate about the naproxen hypothesis continued into 2001. In May 2001, a group of plaintiffs sued Merck on a products liability claim that Vioxx users were four times more likely to suffer heart attacks than naproxen users.[13] Further, in August 2001, the *Journal of the American Medical Association* wrote that the cardiovascular data "raised a 'cautionary flag' and strongly urged that 'a trial specifically assessing cardiovascular risk' be done."[14] Around the same time, a leading news outlet quoted a Merck scientist who expressed support for the naproxen hypothesis.[15] Shortly thereafter, the FDA sent Merck a warning letter, which Merck released to the public, stating that Merck's Vioxx marketing was "'false, lacking in fair balance, or otherwise misleading'"; however, the FDA acknowledged that the naproxen hypothesis was a "'possible explanation'" for the disparity.[16] In response, Merck reexamined its data and claimed that there was "no evidence that Vioxx increased the risk of heart attacks" and once again advanced the naproxen hypothesis.[17]

With this basic groundwork laid, the Court sets forth three important events that occurred between October 2003 and November 2004. In October 2003, the *Wall Street Journal* published the results of a Merck-funded Vioxx study that concluded that Vioxx users were 37 percent more likely to have heart attacks than those given a substitute drug.[18] Merck nevertheless defended Vioxx.[19] Then, in September 2004, Merck withdrew Vioxx from the market because of a new study confirming that Vioxx increased the likelihood of heart attacks.[20] While Merck claimed these results were "'totally

11. *Id.* at 1791.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 1791–92.
18. *Id.* at 1792.
19. *Id.*
20. *Id.*

unexpected,'" in November 2004, the *Wall Street Journal* published another article stating that Merck "'fought forcefully for years to keep safety concerns from destroying the drug's commercial prospects.'"[21] The plaintiffs in *Merck* brought suit shortly before Merck withdrew Vioxx from the market.[22] The plaintiffs alleged that Merck defrauded its investors "by promoting the naproxen hypothesis, knowing the hypothesis was false."[23]

B. Procedural History

In the District Court of New Jersey, Merck moved to dismiss the complaint on the grounds that the plaintiffs knew or should have known the "'facts constituting the violation'" at least two years earlier; therefore, the statute of limitations had expired.[24] The district court granted Merck's motion, holding that the VIGOR study, the FDA warning letter, and Merck's response to the letter should have alerted the plaintiffs to the possibility that Merck had knowingly misrepresented the dangers of Vioxx.[25] As such, the plaintiffs had been put on inquiry notice.

The Third Circuit Court of Appeals reversed the district court's opinion.[26] While the Third Circuit held that these events constituted "'storm warnings,'" the events did not "suggest much by the way of scienter [an essential element of a securities fraud case], and consequently did not put the plaintiffs on 'inquiry notice.'"[27] Merck appealed to the Supreme Court to resolve the circuit split over when the statute of limitations begins to run under § 1658(b)(1).[28]

III. REASONING OF THE COURT

Recall that under § 1658(b)(1) the statute of limitations in a securities fraud case begins to run "2 years after the discovery of the facts constituting the violation."[29] The first part of the Supreme

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1792–93.
26. *Id.* at 1793.
27. *Id.*
28. *Id.*
29. 28 U.S.C. § 1658(b)(1) (2006).

Court's opinion held that the word "'discovery' in [§ 1658(b)(1)] refers not only to a plaintiff's *actual* discovery of certain facts, but also to the facts that a reasonably diligent plaintiff would have discovered."[30] How did the Supreme Court reach this ruling when it is not clear from the face of the statute?

The Court applied principles of general fraud in reaching its decision. There is a history of precedent supporting the principle that the statute of limitations in a fraud case should not begin to run until the plaintiff has become aware of the injury. For example, in *Holmberg v. Armbrecht*,[31] the Supreme Court held that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is *discovered*."[32] In the context of statutes of limitation, this is known as the "'discovery rule.'"[33] The Court went on to note that in more recent years, state and federal courts have employed the discovery rule for claims other than fraud, including instances where the legislature has simply used the word "discovery" in the statute.[34] For example, after the Court established an implied private right of action for § 10(b),[35] every court of appeals to interpret the term "discovery" has held that discovery "occur[ed] not only once a plaintiff *actually* discover[ed] the facts, but also when a . . . reasonably diligent plaintiff would have discovered them."[36] Accordingly, the Court concluded that "discovery," as used in § 1658(b)(1), includes discovery of those facts that a reasonably diligent plaintiff would have discovered.[37]

The second issue the Court resolved was what encompassed "the facts constituting the violation."[38] This is the heart of the decision

30. *Merck*, 130 S. Ct. at 1793.

31. 327 U.S. 392 (1946).

32. *Id.* at 1794 (citing Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946)).

33. *Id.* at 1793.

34. *Id.* at 1794.

35. The Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), used the statute of limitations for securities price-manipulation cases found in 15 U.S.C. § 78i(e). *Id.* at 364 n. 9. Under this provision, the Court held that "private § 10(b) actions 'must be commenced within one year *after the discovery of the facts constituting the violation* and within three years after such violation.'" *Merck*, 130 S. Ct. at 1795 (quoting *Lampf*, 501 U.S. at 364).

36. *Merck*, 130 S. Ct. at 1795.

37. *Id.* at 1796.

38. *Id.*

because if scienter were not included in the "facts constituting the violation" the plaintiffs could not prevail. Merck argued that a plaintiff did not need to possess information indicating that the defendant had acted with scienter in order to establish inquiry notice.[39] On the other hand, the respondents argued that the statute of limitations began "with discovery of the elements of a violation, *including scienter*."[40] The Supreme Court agreed with the respondents that knowledge of scienter *was* a necessary element to start the statute of limitations.[41]

The Court reached this result by emphasizing the importance of scienter in establishing a securities fraud (particularly, a § 10(b) violation).[42] Under § 10(b), plaintiffs "cannot recover without proving that a defendant made a material misstatement *with an intent to deceive*—not merely innocently or negligently."[43] Additionally, the Court noted not only that is scienter an essential element of the claim but also that Congress has enacted heightened pleading standards for this requirement.[44] Accordingly, the Court was concerned that it would be far too easy for potential defendants to conceal their intent to deceive for the two-year statute of limitations period.[45]

The Court's opinion expressly rejects Merck's arguments. First, Merck argued that facts or misleading statements are sufficient to show scienter in and of themselves.[46] The Court disagreed and provided, by way of example, that "[a]n incorrect prediction about a firm's future earnings, by itself, does not automatically tell us whether the speaker deliberately lied or just made an innocent (and therefore nonactionable) error."[47] In this respect, Merck argued that requiring knowledge of scienter to commence the statute of limitations would revive stale claims;[48] however, the Court

39. Brief for the Petitioners at 19–20, *Merck*, 130 S. Ct. 1784 (No. 08-905).
40. Brief for Respondents at 21, *Merck*, 130 S. Ct. 1784 (No. 08-905) (emphasis added).
41. *Merck*, 130 S. Ct. at 1796.
42. *Id.* at 1796–98.
43. *Id.* at 1796.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 1797.
48. *Id.*

responded by noting that § 1658(b)(2) gives defendants total repose after five years from the date of the violation.[49]

Second, Merck argued that the limitations period began to run once plaintiffs had a "quantum of information sufficiently suggestive of wrongdoing that [plaintiffs] should conduct a further inquiry."[50] Once again, the Court rejected this point because the plaintiffs had not necessarily discovered facts showing scienter or other facts of the violation. Since scienter is a fact constituting the violation, if the Court allowed the statute of limitations to run merely because a plaintiff discovered facts that would have reasonably led him to investigate further, the statute of limitations would run *before* discovery of the "facts constituting the violation," that is, scienter.[51] This is contrary to the federal statute, which contains no language suggesting that the statute of limitations can begin prior to discovery.[52]

Lastly, Merck argued that determining when a "hypothetical reasonably diligent plaintiff would have 'discover[ed]' the necessary facts is too complicated for judges to undertake."[53] The Court flatly rejected this contention and stated that at least five circuit courts already engage in this type of inquiry in securities fraud cases.[54] In sum, the Court held that under § 1658(b)(1) the statute of limitations only begins to run once the plaintiff discovers, or a reasonably diligent plaintiff would have discovered, the facts constituting the violation, including scienter, regardless of whether the plaintiff undertook a reasonably diligent investigation.[55]

Finally, the Court addressed whether the plaintiffs in this case had discovered, or should have discovered, the facts constituting the violation, including scienter. Merck argued that the FDA's warning letter and the pleadings filed in the previous products liability actions

49. *Id.*

50. *Id.* This language is similar to the approach taken by the some of the circuit courts. *E.g.* *Franze v. Equitable Assurance*, 296 F.3d 1250, 1254 (11th Cir. 2002); *Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir. 1997); *Fujisawa Pharma. Co. v. Kapoor*, 115 F.3d 1332, 1335–36 (7th Cir. 1997).

51. *Merck*, 130 S. Ct. at 1797.

52. *Id.*

53. *Id.* at 1798.

54. *Id.*

55. *Id.*

should have given the plaintiffs the facts constituting the violation.[56] The Court rejected this and held that neither of these facts, "whether viewed separately or together, reveal 'facts' indicating scienter."[57] Therefore, the plaintiffs did not "discover" facts relating to scienter, and their claim was not barred under the statute of limitations as set forth in § 1658(b)(1).[58]

IV. ANALYSIS

In recent years, the Supreme Court has been decidedly prodefendant in securities law cases.[59] From a plaintiff's perspective, *Merck* is a welcome exception to this trend. Of the three approaches taken by the circuit courts of appeal,[60] the Supreme Court elected to adopt the most proplaintiff one—and in a unanimous decision nonetheless. This part analyzes the strengths of the *Merck* decision as well as one shortcoming of the opinion. Overall, however, this author believes that the *Merck* decision is a well-reasoned opinion that will go a long way in helping preserve the legal rights of securities fraud plaintiffs.

First and foremost, plaintiffs in securities fraud cases face one less procedural hurdle in vindicating their rights. The element of scienter has become an increasingly important part of securities

56. *Id.* at 1798–99.

57. *Id.* at 1799.

58. *Id.*

59. *See* James Dugan, *Staying in Compliance with New Securities Law Requirements*, *in* RECENT DEVELOPMENTS IN SECURITIES LAWS: LEADING LAWYERS ON UNDERSTANDING RECENT DECISIONS, NAVIGATING NEW SEC INITIATIVES, AND ESTABLISHING COMPLIANCE POLICIES 3 (2010) (noting that between 2005 and 2008 there was a trifecta of prodefendant decisions); Andrew C. W. Lund, *Opting Out of Good Faith*, 37 FLA. ST. U. L. REV. 393, 433 n.201 (2010) ("[T]he post-PSLRA proliferation of 'bright-line rules' regarding scienter allegations [have been] generally prodefendant . . . .").

60. The circuit courts have adopted at least three main approaches to defining the statute of limitations in § 1658(b). Petition for a Writ of Certiorari, *supra* note 4, at 20. The first approach, dubbed "Pure 'Storm Warnings'" by the petitioner in *Merck*, has been applied by the Fourth, Fifth, Eighth, and Eleventh Circuits. *Id.* Under this approach, the statute of limitations begins to run "from the moment that there exist[s] 'storm warnings' of possible fraud." *Id.* The second approach, taken by the First, Sixth, Seventh, Tenth, and sometimes Second Circuits, has been dubbed the "'Storm Warnings' Plus Investigation" approach. *Id.* at 21. Under this approach, the statute of limitations begins to run on the date that the plaintiff is actually or constructively aware of the violation and could have discovered the alleged fraud through investigation. *Id.* Lastly, the third approach, applied by the Third and Ninth Circuits, is nearly identical to the second approach but does not require investigation. *Id.* at 23. Under the third approach, the statute of limitations begins to run when plaintiffs have knowledge of the facts constituting the violation, including scienter. *Id.* at 23–24.

cases. The U.S. Code requires that a plaintiff's complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[61] This heightened pleading standard, further defined in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[62] has received vocal criticism from scholars.[63] In fact, at least one scholar has suggested that the pleading standard for securities fraud cases post-*Tellabs* is unconstitutional.[64] While this assertion may be overstated, the point is this: scienter is an extremely important element in a securities fraud case, and if plaintiffs have any hope of making it past a motion to dismiss, they must plead it with particularity.

So how does *Merck* help plaintiffs overcome this difficult hurdle? By requiring knowledge of scienter to commence the two-year statute of limitations, plaintiffs do not have to worry about filing suit with possibly incomplete knowledge because of mere "storm warnings" that suggest fraud. Corporate defendants are sophisticated entities that often have the top legal counsel available. As such, plaintiffs cannot count on easily finding facts that can lead to the "strong inference of scienter."[65]

Had the Court chosen an alternative approach to beginning the statute of limitations, then after committing securities fraud, a potential defendant could leak information that would constitute storm warnings. This would require a plaintiff to file suit before the two-year statute of limitations expires with incomplete information (assuming he did not have facts constituting the required strong inference of scienter). Though a plaintiff may ultimately find the requisite information to surpass the heightened pleading standard in a

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61. 15 U.S.C. § 78u-4(b)(2) (2006); *see also* Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633, 638–39 (2010) ("Under the PSLRA, to survive a motion to dismiss, in a securities fraud complaint, a plaintiff must have pled misleading statements with 'particularity' and pled 'a strong inference' of scienter.").

62. 551 U.S. 308, 313, 317, 321, 324 (2007).

63. *See e.g.*, John M. Wunderlich, Tellabs v. Makor Issues & Rights, Ltd.*: The Weighing Game*, 39 LOY. U. CHI. L.J. 613, 690 (2008) (stating that the *Tellabs* decision has had "many negative ramifications").

64. Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

65. In *Tellabs*, the Court held that during the pleading stage, courts must consider "competing inferences" that may be drawn from factual allegations. *Tellabs*, 551 U.S. at 324. Further, the court held that "[a] complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.*

motion to dismiss, he may also exhaust limited funding in the litigation's pleadings stage. The process of filing several amended complaints is extraordinarily burdensome, and, if the plaintiff cannot discover facts allowing the "strong inference" of scienter, the complaint may ultimately be dismissed with prejudice.

Under *Merck*, potential plaintiffs are no longer pressured to file suit while lacking necessary knowledge (unless the five-year repose period[66] will expire). The effects of this change should be increased judicial economy, decreased litigation costs for both parties, increased likelihood of adjudicating securities fraud cases on the merits, and decreased filing of lawsuits that are unlikely to succeed. All of these goals are desirable, and in this author's opinion, they are important steps in helping restore the balance of fairness for plaintiffs.

Overall, *Merck* was an "excellent" and well-reasoned opinion that effectively responded to all of the defendants' persuasive arguments.[67] However, the opinion expressly reserves an important question: "[W]e say nothing about other facts necessary to support a private § 10(b) action."[68] The elements of a § 10(b) action are (1) a material misrepresentation or omission; (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.[69]

In *Merck*, the United States filed an amicus brief, arguing that the "facts constituting the violation" in § 1658(b)(1) were limited to the first three of these elements.[70] Accordingly, the government agreed with Merck that reliance, economic loss, and loss causation, were *not* facts constituting the violation.[71] The Court, however, expressed no opinion on whether these elements constitute facts of the violation.

What will the impact of this ambiguity be? One leading law firm argues that "there are probably few circumstances in which a

66. 28 U.S.C. § 1658(b)(2). This section serves as an "unqualified bar on actions instituted '5 years after [the] violation' . . . ." Merck & Co. v. Reynolds, 130 S. Ct. 1784, 1797 (2010).

67. In his concurrence, Justice Stevens compliments Justice Breyer's majority opinion as "convincing and correct." *Merck*, 130 S. Ct. at 1799 (Stevens, J., concurring).

68. *Id.* at 1796 (majority opinion).

69. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).

70. Brief of the United States as Amicus Curiae Supporting Respondents at 12, *Merck*, 130 S. Ct. 1784 (No. 08-905).

71. *Id.* at 12 n.1.

plaintiff could discover a material misstatement made with fraudulent intent, but would not otherwise be on constructive notice of facts that would satisfy these other elements."[72] There is certainly merit to this argument. It is difficult to conceive of a situation where this might occur; however, it is not impossible.

For instance, a plaintiff could learn of clandestine information relating to Hypothetical Corporation X's material misrepresentation and fraudulent intent, yet, the public at large is not privy to this information. Next, suppose that since the information is private, Corporation X's stock does not suffer. Therefore, the plaintiff would have no economic loss and could not bring a viable securities fraud claim. If after two years, however, the information became public and the price of Corporation X's stock plummeted, the plaintiff has now suffered the economic loss necessary to bring a lawsuit. But because the two-year statute of limitations has expired, it is questionable whether the plaintiff can sue Corporation X. While the plaintiff was aware of the "elements constituting the violation" under the government's definition, he or she was not technically aware of the damages element because it did not yet exist.

This situation may be a rare one, but the law is replete with bizarre factual scenarios. The Court had the opportunity to hold whether the remaining elements of a securities fraud violation constitute the "facts of the violation."[73] Instead, it chose to reserve the question. This form of reservation, however, may result in another circuit split, which might ultimately require the Court to examine this issue in detail.

One may argue that in a hypothetical such as the one above, the plaintiff has a duty to inform the public of the fraud, and therefore is guilty of sitting on his rights. Accordingly, the plaintiff should not be allowed to bring his suit anyway. This author disagrees. Plaintiffs who bring securities fraud actions may have no desire to harm the corporation in which they have invested unless and until they have been harmed themselves. A common stock shareholder should have

72. Merck & Co. v. Reynolds*: U.S. Supreme Court Clarifies Statute of Limitations in Securities Fraud Cases*, DAVIS POLK (Apr. 28, 2010), http://www.davispolk.com (search "U.S. Supreme Court clarifies" and follow article hyperlink).

73. Even though the Court had the opportunity to rule on this matter, it is ordinarily not supposed to rule beyond the questions to which it granted certiorari. Therefore, it is difficult to actually criticize the Court for not ruling on this matter.

no duty to other shareholders, or to the general public, to inform them of the knowledge to which he has been privy.

V. CONCLUSION

In sum, *Merck* is an excellent decision and a welcome departure from the Court's spate of prodefendant decisions in securities fraud cases. Another leading defense firm stated on its website that "the number of § 10(b) complaints dismissed under the two-year statute of limitations will likely fall."[74] This is a desirable goal in this author's opinion. Cases should be heard on the merits rather than dismissed under procedural nuances. The holding in *Merck* not only helps give plaintiffs a fairer chance to vindicate their rights, it will help keep corporations in check.

Nevertheless, the *Merck* Court reserved the questions of whether reliance, economic loss, and loss causation constitute facts of a securities violation. The government and a leading law firm argue that they do not and that a situation is unlikely to arise where a plaintiff will be aware of an intentional material misrepresentation and not the final three elements. While this argument does not lack merit, as this Comment demonstrates, there are factual scenarios where this might occur. Accordingly, it is conceivable that this issue may make its way to the Supreme Court again in the future.

74. Andrew B. Weissmann et al., *What Does* Merck & Co. v. Reynolds *Mean for the Future of the Statute of Limitations Defense in Securities Fraud Litigation?*, WILMER HALE (May 4, 2010), http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9489.