UNITED STATES SUPREME COURT CHANGES IN DETERMINING WHETHER JUDICIAL DECISIONS SHOULD APPLY RETROACTIVELY

ROBERT W. GINN†

INTRODUCTION

In a recent issue of the Creighton Law Review,[1] I recommended that the United States Supreme Court adopt a federal uniform statute of limitations for actions brought under Section 10(b)[2] of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5 ("10(b) action") promulgated under the Securities Exchange Act of 1934.[3] In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,[4] the United States Supreme Court held that a federal statute of limitations derived from the 1934 Act should apply to all 10(b) actions. In *Gilbertson*, the majority applied its holding retroactively to the facts before the Court without addressing whether retroactive application was proper under *Chevron Oil Co. v. Huson*.[5] In this article, I discuss how two recent cases, *Gilbertson* and *James B. Beam Distilling Co. v. Georgia*[6] have signaled a change in the law regarding whether judicial decisions should apply retroactively.[7]

---

† Robert W. Ginn, B.A., Northwestern University; J.D. Creighton University School of Law. The author is a member of the Nebraska Bar and is associated with Kutak Rock & Campbell. Special thanks are due Andrew Naylor for assisting in the preparation of this article.

1. Ginn, *The Statute of Limitations Applicable to Section 10(b) Actions: Data Access and its Progeny*, 24 CREIGHTON L. REV. 781 (1991).

2. 15 U.S.C. § 78j (1982). Section 10(b) provides in pertinent part:

> 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—
>
> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

3. Securities Exchange Act of 1934, 15 U.S.C. §§ 78aa-78ll (1988).

4. 111 S. Ct. 2773 (1991).

5. 404 U.S. 97 (1971). *See infra* notes 51-58 and accompanying text.

6. 111 S. Ct. 2939 (1991).

7. *See infra* notes 51-84 and accompanying text.

GILBERTSON

From 1979 through 1981, several investors sought to take advantage of potential federal income tax benefits by investing in several Connecticut limited partnerships.[8] A New Jersey law firm assisted in organizing the limited partnerships, which were created to purchase and then lease computer hardware and software.[9] The limited partnerships failed in 1983, partly due to the obsolescence of their products.[10] Following an investigation of the limited partnerships by the Internal Revenue Service, the investors were denied the tax benefits they claimed because the assets were overvalued and profits were lacking.[11] In 1986 and 1987, the investors filed 10(b) actions alleging that the partnership offering memoranda, which had in part been prepared by the law firm, contained misrepresentations regarding the partnership's profitability, tax benefits, the marketability of the products, and the accuracy of equipment appraisals that had induced the investors into investing in the limited partnerships.[12]

The United States District Court for the District of Oregon ruled that the investors' complaints were time barred by Oregon's two-year limitations period for fraud claims.[13] The district court granted summary judgment for the defendants.[14] The district court found that the declining financial strength of the limited partnerships had given the investors "inquiry notice" of potential fraud as early as 1982.[15]

The United States Court of Appeals for the Ninth Circuit reversed the district court on the ground that the issues pertaining to the time when the investors were aware of potential fraud could not be disposed of by summary judgment.[16] In so ruling, the Ninth Circuit rejected the investors' assertion that a uniform federal limitations period should govern 10(b) actions.[17] The United States Supreme Court granted certiorari "in view of the divergence of opinion among the Circuits regarding the proper limitations period for Rule 10b-5 claims."[18]

On appeal to the Supreme Court, the investors argued that the Ninth Circuit had correctly identified the time-honored practice of borrowing the applicable statute of limitations from the most analo-

8. *Gilbertson*, 111 S. Ct. at 1776.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 2776-77.
13. *Id.* at 2777. *See* ORE. REV. STAT. § 12.110(1) (1989).
14. *Gilbertson*, 111 S. Ct. at 2777.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 2777.

gous state cause of action.[19] The investors further argued that the Ninth Circuit was correct in ruling that Oregon's two-year common-law fraud statute was the source from which a 10(b) action limitations period should derive.[20] The law firm claimed that the federal one-year/three-year period found in section 13 of the Securities Act of 1933 applied as well as to certain actions in the Securities Exchange Act of 1934 and was the appropriate limitations period.[21] On behalf of the Securities Exchange Commission, the Solicitor General argued in favor of applying the five-year statute of repose specified in section 20A of the 1934 Act.[22]

The Court rejected the state law analogy because Congress had provided "an express limitations period in the 1933 and 1934 Acts."[23] The Court further rejected the five year statute of repose contained in Section 20A of the 1934 Act because Congress had limited the statute to insider trading cases.[24] Writing for the Court, Justice Blackmun stated that the express causes of action found in the 1933 and 1934 Acts provided the proper guidance for 10(b) limitation rulings and held that a one-year limitations statute and a three-year statute of repose should apply to this case.[25]

In instances in which Congress is silent, the Court acknowledged the traditional federal court practice of borrowing the state statutes of limitations that are most analogous to a present cause of action.[26] However, the Court noted exceptions justifying deviation from the general rule.[27] For example, the Court noted that a state limitations period sometimes frustrates congressional intent partly because state legislatures do not have federal interests in mind when enacting legislation.[28]

In order to ascertain whether the state borrowing doctrine or federal borrowing doctrine should apply, the Court articulated a

19. *Id.*
20. *Id.*
21. *Id.* (citing the Securities Act of 1933, ch. 38, § 13, 48 Stat. 84 (codified as amended at 15 U.S.C. § 77m (1988)); 15 U.S.C. §§ 78i(c), 78r(c), 78cc(b) (1988) (provisions of the Securities Act of 1934)). While these sections are not linguistically identical, all the sections relate to a period of one year after discovery and three years after the violation. The one-year period is a statute of limitations. The three-year period is a statute of repose. The two periods will be referred to as the period through out this Comment.
22. *Id.* at 2777-78 (citing 15 U.S.C. 78t-1(b)(A) (1988), as added by the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 5, 102 Stat. 4681).
23. *Id.* at 2781-82.
24. *Id.* at 2781.
25. *Id.* at 2781-82.
26. *Id.* at 2778.
27. *Id.*
28. *Id.*

three-part test.[29] First, a federal court must determine whether a uniform federal limitations period, rather than a state statute of limitation, provides the most analogous cause of action for the particular issue.[30] Priority should be given to consistency within a jurisdiction when related causes of action are at issue.[31] Second, if a court finds in favor of a uniform limitations period, it must decide if a state or a federal period is most appropriate by taking into account the "geographic character of the claim" and the salutary purpose of avoiding forum shopping.[32] Third, assuming a federal limitations period is most appropriate, a court must show that the federal source provides a "closer fit" with the cause of action than any available state source.[33]

In *Gilbertson*, the Court found that because 10(b) actions are implied by the courts rather than being express creatures of legislation, courts should adhere to the express limitations periods found within section 10(b).[34] The Court stated, "[w]e can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections."[35]

Apparently ignoring its own three-step process for resolving the state-federal limitations dilemna, the majority in *Gilbertson* simply noted that when a statute of origin such as the 1934 Act contains similar or analogous express causes of action, the inquiry should usually be ended.[36] The Court declared that, "[o]nly where no analogous counterpart is available should a court then proceed to apply state-borrowing principles."[37] Thus, the Court reasoned that because the 1934 Act contained several express causes of action with limitations periods of one year after discovery or in no event more than three years, and because the 1934 Act amended the limitations period of the 1933 Act, section 10(b) actions should be governed by the one-year/three-year limitations period.[38]

In a separate concurring opinion, Justice Scalia took issue with the majority's three-step inquiry and the presumption that, in cases

29. *See id.*
30. *See id.* at 2779.
31. *See id.* at 2779.
32. *Id.* (quoting Agency Holding Corp. v. Malley-Duff Assoc. Inc., 483 U.S. 143, 154 (1987)).
33. *Id.*
34. *Id.* at 2779-80. Section 10(b) claims are not expressly provided for in the language of the statute but are judicially implied. *See* Kardon v. National Gypsum Co., 69 F. Supp. 512, 513-14 (E.D. Pa. 1946).
35. *Gilbertson*, 111 S. Ct. at 2780.
36. *Id.*
37. *Id.*
38. *See id.*

in which a federal cause of action has been created by the judiciary, the courts should look to the statute of origin for a statute of limitations provision.[39] Justice Scalia opined that in the absence of causes of action implied from federal statutes, state statutes of limitations should be respected.[40] However, in a case in which a cause of action is implied and Congress did not have the opportunity to provide for a limitations period, as in the instant case, Justice Scalia agreed that the Court must assume that congressional intent would be better served by applying a uniform limitations period throughout the statute.[41]

Justices Stevens and Souter dissented, stating that Congress, as creator of the statute, should have the responsibility for providing the appropriate statute of limitations.[42] The legislature, according to Justice Stevens, also has the opportunity to establish whether the statutes of limitations it creates should apply retroactively.[43] When such matters are left to the judicial process, the dissent declared that questions which are "difficult and arguably inconsistent with the neutral, non-policy making role of the judge" are raised.[44]

Dissenting from the majority's "cursory treatment of the retroactivity question"[45] yet agreeing that a uniform statute of limitations should apply, Justice O'Connor, with whom Justice Kennedy joined, argued that the majority unfairly "shuts the courthouse door" on the investors because the investors could neither have anticipated nor have foreseen the *Gilbertson* holding.[46] Justice O'Connor declared, "[I]n holding that respondent's suit is time-barred under a limitations period that did not exist before today, the Court departs drastically from our established practice and inflicts injustice on the respondents."[47]

In a separate dissenting opinion, Justice Kennedy argued that although the majority prudently adopted the one-year-from-discovery period, the majority failed to recognize the practical difficulties that injured parties may have in establishing a violation of Section 10(b) within the three-year period of repose.[48] Elaborating on this problem, Justice Kennedy declared:

The most extensive and corrupt schemes may not be discov-

39. *Id.* at 2783 (Scala, J., concurring).
40. *Id.*
41. *Id.*
42. *Id.* at 2783-84 (Stevens and Souter, J.J., dissenting).
43. *Id.* at 2784.
44. *Id.*
45. *Id.* at 2786 (O'Connor, J., dissenting).
46. *Id.*
47. *Id.*
48. *Id.* at 2789-90 (Kennedy, J., dissenting).

> ered within the time allowed for bringing an express cause of action under the 1934 Act. Ponzi schemes, for example, can maintain the illusion of a profit-making enterprise for years, and sophisticated investors may not be able to discover the fraud until long after its perpetration.[49]

Justice Kennedy argued that the ruling in *Gilbertson* ignores the policy of the 1934 Act of protecting investors from issuer misconduct.[50]

GILBERTSON ANALYSIS

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,[51] the majority failed to follow *Chevron Oil Co. v. Huson*,[52] under which courts are required to consider three factors in determining whether a judicial decision changing existing law should apply retroactively.[53] First, a court must determine whether the "decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed."[54] Second, a court must consider the merits of each case by looking at the prior history of the rule at issue, "its purpose and effect, and whether retrospective operation will further or retard its operation."[55] Third, a court must consider whether the retroactive application of the decision will or could "produce substantial inequitable results."[56]

In applying the *Chevron* factors, at least one court has emphasized that a judicial decision should not apply retroactively when the new decision overrules precedent upon which the litigants may have relied, or decides an issue of first impression the resolution of which was not foreseeable.[57] Indeed, treatment of the third factor often de-

---

49. *Id.* at 2789.

50. *Id.* at 2790 (declaring that "a 3-year absolute time bar is inconsistent with the practical realities of § 10(b) litigation and the congressional policies underlying that remedy.").

51. 111 S. Ct. 2773 (1991).

52. 404 U.S. 97 (1971).

53. *Id.* at 106. *See* Williams v. City of Atlanta, 794 F.2d 624, 626 (11th Cir. 1986); Anton v. Lehpamer, 787 F.2d 1141, 1142 (7th Cir. 1986); Jackson v. City of Bloomfield, 731 F.2d 652 (10th Cir. 1984); Brackshaw v. Miles, Inc., 723 F. Supp. 60, 61-63 (N.D. Ill. 1989).

54. *Chevron*, 404 U.S. at 106 (citing Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 496 (1971)).

55. *Id.* at 106-07 (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965)).

56. *Id.* at 107 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).

57. Chris N. v. Burnsville, Minn., 634 F. Supp. 1402, 1414 (D. Minn. 1986) (stating that "[g]iven that the second *Chevron* prong is inconclusive, and that the third will almost invariably favor plaintiffs, the first, 'threshold' factor has become predominant.")).

pends on the outcome of the first, and, with few exceptions,[58] an inequity is found where there is clear past precedent on which parties may have reasonably relied.[59]

The *Gilbertson* decision is also at odds with the long-standing doctrines of both federal courts borrowing state periods of limitations to 10(b) actions and prospective-only application of new law. The treatment of *Gilbertson* and similar cases by the United States Court of Appeals for the Ninth Circuit provides a striking illustration.

Prior to the Supreme Court's decision in *Gilbertson*, in the absence of a federal limitations period, the Ninth Circuit consistently applied state statutes of limitations for common-law fraud to 10(b) actions.[60] In *Nesbit v. McNeil*,[61] the Ninth Circuit soundly rejected the rationale of *In re Data Access Systems Securities Litigation*,[62] in

58. *See* Brackshaw v. Miles, Inc., 723 F. Supp. 60, 63 (N.D. Ill. 1989) (holding that the plaintiff had failed to establish that retroactive application of controlling law would be inequitable excepting the extent to which it had overturned some existing precedent).

59. *See* Grimes v. Owens-Corning Fiberglass Corp., 843 F.2d 815, 820 (4th Cir. 1988) (declaring that inequity would result if plaintiff was barred because he or she relied on clear Fourth Circuit precedent); Zemonick v. Consolidation Coal Co., 762 F.2d 381, 388 (4th Cir. 1985) (stating that "given the reasonable reliance of the plaintiffs upon what appeared to be established and solid precedent and the full development by the parties of their proofs on the merits, equity and fairness require that the court not abruptly turn a deaf ear to them."); Adelaar v. Lauxmont Farms, Inc., 695 F. Supp. 821, 826 (M.D. Pa. 1988) (declaring that "[w]hen established precedent does not warrant reliance upon the plaintiffs' choice of a limitations period, it is not inequitable or harsh to apply the new rule retroactively."); Chris N. v. Burnsville, Minn., 634 F. Supp. 1402, 1412 (D. Minn. 1986) (holding that plaintiff reasonably relied on prior precedent and "the belated erection of a procedural bar is an unwarranted frustration of plaintiff's reasonable expectation of adjudication on the merits."); Snowden v. City of Carbondale, 613 F. Supp. 1207, 1209 (S.D. Ill. 1985) (stating in reference to equities of retrospective application, "it cannot be said in the instant case that plaintiff was justified in relying on a five-year limitations period.").

60. *See, e.g.*, Nesbit v. McNeil, 896 F.2d 380, 384 (9th Cir. 1990) (applying Oregon two-year statute of limitations for fraud); David v. Birr, Wilson & Co., Inc., 839 F.2d 1369, 1371 (9th Cir. 1988) (applying California three-year statute of limitations for fraud); Robuck v. Dean Witter & Co., Inc., 649 F.2d 641, 644 (9th Cir. 1980) (applying California three-year statute of limitations for fraud); Williams v. Sinclair, 529 F.2d 1383, 1387 (9th Cir. 1976) (applying Washington three-year statute of limitations for fraud); Douglas v. Glenn E. Hinton Investments, Inc., 440 F.2d 912, 914-15 (9th Cir. 1971) (applying Washington three-year statute of limitations for fraud); Hecht v. Harris, Upham & Co., 430 F.2d 1202, 1210 (9th Cir. 1970) (applying California three-year statute of limitations for fraud); Royal Air Properties, Inc. v. Smith, 312 F.2d 210, 214 (9th Cir. 1962) (applying California three-year statute of limitations for fraud); Fratt v. Robinson, 203 F.2d 627, 634-35 (9th Cir. 1953) (applying Washington three-year statute of limitations for fraud). *See also* In re Consol. Capital Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 95,238 (N.D. Cal. 1990); Levy v. Eletr, 724 F. Supp. 1269, 1271 (N.D. Cal. 1989) (following Ninth Circuit's ruling that 10(b) actions are governed by the California three-year statute of limitations for criminal fraud claims).

61. 896 F.2d 380 (9th Cir. 1990).

62. 843 F.2d 1537 (3d Cir.), *cert. denied sub nom.* Vitello v. I. Kahlowsky & Co., 488 U.S. 849 (1988).

which the United States Court of Appeals for the Third Circuit had advocated the one-year/three-year period later adopted in *Gilbertson*.[63] Nor was a district court[64] in the Ninth Circuit swayed by subsequent adoption of *Data Access* in *Ceres Partners v. GEL Associates*[65] and *Short v. Belleville Shoe Mfg. Co.*[66] by the United States Courts of Appeals for the Second and Seventh Circuits.

The Ninth Circuit has also held that even if it were to adopt the uniform period advocated by *Data Access*, it would not do so retroactively.[67] Its decisions focused on an equity principle similar to that required by *Chevron*. In *Nesbit*, the Ninth Circuit declared that "[W]e have been most reluctant to apply [a federal statute of limitations period] retroactively in a manner that would cut off the rights of a plaintiff whose action was timely under our decisions which existed at the time the action was filed."[68]

In reversing the Ninth Circuit's ruling in *Gilbertson* and applying the uniform federal statute of limitations period retroactively, the Supreme Court effectively discarded the *Chevron* three-step inquiry for ascertaining the retroactive effect of a new rule.[69] The first prong of the *Chevron* test—whether the new rule overrules past precedent under which the litigants may have relied[70]—received not even cursory comment by the majority in *Gilbertson*. Dissenting, Justice O'Connor noted that the majority simply ignored longstanding Ninth Circuit precedent mandating the borrowing of state statutes of limitations.[71] In her dissenting opinion, Justice O'Connor declared:

> Quite simply, the Court shuts the courthouse door on respondents because they were unable to predict the future . . . until today, however, the Court had never applied a new limitations period retroactively to the very case in which it announced the new rule so as to bar an action that was timely under binding Circuit precedent. Our practice has been instead to evaluate the case at hand by the old limitations period; reserving the new rule application in future

63. *Nesbit*, 896 F.2d at 384.

64. *See* Nakamoto v. Harley, 758 F. Supp. 1357, 1362-63 (D. Haw. 1991) (arguing that the Second, Third, and Seventh Circuits' position is "without merit").

65. 918 F.2d 349 (2d Cir. 1990).

66. 908 F.2d 1385 (7th Cir. 1990).

67. *Nesbit*, 896 F.2d at 384. *See also Nakamoto*, 758 F. Supp. at 1363 (stating "in *Nesbit*, the court of appeals went on to hold that even if it were to . . . follow the Second, Third, and Seventh Circuits, its decision to do so would not apply retroactively").

68. *Nesbit*, 896 F.2d at 384.

69. *Gilbertson*, 111 S. Ct. at 2787 (O'Connor, J., dissenting) (declaring "the present case is indistinguishable from *Chevron Oil* and retroactive application should therefore be denied").

70. *See supra* note 54 and accompanying text.

71. *Gilbertson*, 111 S. Ct. at 2786 (O'Connor, J., dissenting).

cases.[72]

Applying the one-year/three-year period retroactively is a significant departure from the Supreme Court's historical treatment of a new limitations period.

JAMES B. BEAM DISTILLING CO.

In *James B. Beam Distilling Co. v. Georgia*,[73] the abandonment of *Chevron Oil Co. v. Huson*[74] became complete. In *Beam*, the Court abandoned the *Chevron* inquiry in favor of stronger adherence to the principle of *stare decisis*; in a case in which a new rule is applied retroactively, like cases will be given like effect.[75]

Prior to its amendment in 1985, the petitioners in *Beam* had been subject to a Georgia law that imposed an excise tax on imported liquor.[76] Following the Court's ruling and subsequent retroactive application of *Bacchus Imports, Ltd. v. Dias*,[77] the petitioners in *Beam* brought suit to recover the taxes they had paid from 1982 through 1984.[78] The Supreme Court of Georgia held that the pre-1985 statute was inconsistent with the Commerce Clause;[79] however, the Georgia Supreme Court applied its ruling on a prospective basis only, effectively barring petitioners' claim to recover taxes paid before *Bacchus* was decided.[80] The issue before the Court was whether the state appellate court was required to apply its decision retroactively in light of *Bacchus*.[81]

In the majority opinion authored by Justice Souter, the Court

---

72. *Id.* at 2786.

73. 111 S. Ct. 2439 (1991).

74. 404 U.S. 97 (1971).

75. *Beam*, 111 S. Ct. at 2447. The majority stated that:

> [Litigants are not] to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. To this extent, our decision here does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case.

Id.

76. *Id.* at 2442. *See* GA. CODE ANN. § 3-4-60 (1982).

77. 468 U.S. 263 (1984). In *Bacchus*, the United States Supreme Court addressed the issue of whether Hawaii's tax exemption for Okolehao and pineapple wine violated the Commerce Clause. The Court held that the tax exemption violated the Commerce Clause, because the tax exemption discriminated in favor of local Hawaiian products. The Court remanded to the Supreme Court of Hawaii the issue of whether the holding should be applied retroactively.

78. *Beam*, 111 S. Ct. at 2442.

79. *Id.*

80. *Id.*

81. *Id.* at 2441.

held that a new rule of law will be given retroactive effect, despite any arguments based on the *Chevron* factors, when the rule has been applied retroactively by a higher court.[82] The principles of *stare decisis* and equity dictate that once retroactive application is chosen for a new rule, it is also chosen for those seeking its prospective application.[83] "[T]he *Chevron Oil* test," Justice Souter added, "cannot determine the choice of law by relying on the equities of the particular case."[84]

Most recently, the Court's judgment in *Northwest Savings Bank v. Welch*[85] exemplified the combined effect of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*[86] and *Beam*, reinforcing the Court's new law regarding retroactivity. In *Welch*, the Court vacated and remanded a 10(b) action in light of *Beam* and *Gilbertson*.[87] The issue in the lower court was the application of the *Chevron* analysis.[88] The United States Court of Appeals for the Second Circuit declared that its earlier decision in *Ceres Partners v. GEL Associates*[89] had overruled clear precedent.[90] Yet, the Court vacated the Second Circuit's judgment and remanded for consideration under *Beam* and *Gilbertson*, indicating that *Chevron* no longer has relevance to 10(b) actions and that the uniform rule shall be applied retroactively.[91]

CONCLUSION

Speculation over whether *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*[92] frustrates the federal court practice of borrowing state limitations periods in 10(b) actions filed prior to the new rule was settled by the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia*.[93] In *Beam*, the majority held that *stare decisis* and equity dictate that once retroactive application is chosen for a new rule, "it is chosen for all others who might seek its prospective application."[94] Although the Court skirted the issue of retroactivity in *Gilbertson*, the new one year/three year limitations

82. *Id.* at 2446.
83. *Id.* at 2446-47.
84. *Id.* at 2447.
85. 111 S. Ct. 2882 (1991).
86. 111 S. Ct. 2773 (1991).
87. Welch, 111 S. Ct. at 2882-83.
88. Welch v. Cadre Capital, 923 F.2d 989 (2nd Cir.), *cert. granted sub nom.* Northwest Savings Bank v. Welch, 111 S. Ct. 2882 (1991).
89. 918 F.2d 349 (2d Cir. 1990).
90. *Cadre Capital*, 923 F.2d at 994.
91. *Welch*, 111 S. Ct. 2882-83.
92. 111 S. Ct. 2773 (1991).
93. 111 S. Ct. 2439 (1991).
94. *Id.* at 2447-48.

period was applied to the case.[95] The *Beam* decision mandates that, as a new rule applied retroactively, the one year/three year period applies to all future 10(b) actions.[96]

95. *Gilbertson*, 111 S. Ct. at 2782 (holding "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 therefore must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation.").

96. *See supra* note 75 and accompanying text.