

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED
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JUN 30 2005

**MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT**

LAWRENCE E. JAFFE PENSION PLAN, ON
BEHALF OF ITSELF AND ALL OTHERS SIMILARLY
SITUATED,

Plaintiff,

- against -

HOUSEHOLD INTERNATIONAL, INC., ET. AL.,

Defendants.

Lead Case No. 02-C-5893
(Consolidated)

CLASS ACTION

Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

**MEMORANDUM OF LAW IN SUPPORT OF HOUSEHOLD
DEFENDANTS' MOTION PURSUANT TO THE SEVENTH
CIRCUIT'S RECENT DECISION IN *FOSS v. BEAR, STEARNS CO.*
TO DISMISS THE COMPLAINT IN PART**

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This memorandum is submitted on behalf of all Defendants except Arthur Andersen, L.L.P., namely Household International, Inc., Household Finance Corp. and former officers and directors William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar (referred to collectively herein as "Household Defendants" or "Defendants"), in support of their motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss as time-barred under the applicable statute of limitations part of Plaintiffs' Amended Complaint to the extent claims are sought to be asserted therein by persons who purchased Household securities before July 30, 1999.

PRELIMINARY STATEMENT

On December 3, 2004, this Court certified this case as a class action only as to the Section 10(b) claims asserted in the Complaint, which purports to state a claim against the Defendants on behalf of a class of investors who purchased Household securities from October 23, 1997 to October 11, 2002 (the "Class"). The Court also specified in a ruling on a previous motion to dismiss that the Complaint relates back to August 19, 2002, the date on which the earliest of the now-consolidated suits was filed. 3/19/04 Mem. Op. & Order, at 27. The class period, along with the alleged false and misleading statements enumerated in the Complaint, thus predates the filing of this action by nearly five years. Much of the Section 10(b) claim asserted in the Complaint therefore is based on claims that arose more than three years before the action was filed. Such claims are time-barred under the three-year statute of repose the Supreme Court adopted for Section 10(b) claims in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991) (adopting the limitations provision from 15 U.S.C. § 78i(e) for use in § 10(b) cases).

The United States Court of Appeals for the Seventh Circuit has squarely held in its recent decision in *Foss v. Bear, Stearns Co.*, 394 F.3d 540 (7th Cir. 2005), that while the

Sarbanes-Oxley Act extended the statute of repose for securities fraud claims from three to five years,¹ the Act does not apply retroactively to revive securities fraud claims that were already time-barred when Sarbanes-Oxley went into effect on July 30, 2002. In *Foss* the Seventh Circuit adopted as “persuasive” the reasoning of the Second Circuit in a December 2004 decision that held that Sarbanes-Oxley’s statute of limitations did not revive claims which were already time-barred on July 30, 2002. See *Foss*, 394 F.3d at 542 (citing *In re Enterprise Mortgage Acceptance Co.*, 391 F.3d 401 (2d Cir. 2004)).

The Complaint’s five year class period, which seeks relief related to purchases of Household securities from October of 1997 to October of 2002 premised on allegedly false and misleading statements made during the same period, necessarily includes purchases for which relief can no longer be sought because they occurred prior to July 30, 1999. Those of the Class’s Section 10(b) claims that arose more than three years before enactment of Sarbanes-Oxley on July 30, 2002 — *i.e.*, all claims that arose before July 30, 1999 — are time-barred, as they were time-barred on July 30, 2002 when Sarbanes-Oxley became effective and revival of such claims is now precluded as a matter of law in this Circuit. Such claims should therefore be dismissed with prejudice.²

¹ Public Company Accounting Reform and Investor Protection Act of 2002 (“Sarbanes-Oxley”), Pub. L. No. 107-204, § 804, 116 Stat. 745, 801 (2002), codified in part at 28 U.S.C. § 1658(b).

² The Household Defendants tried to resolve this dispute through the meet and confer process with the Plaintiffs in an exchange of correspondence in June, 2005. Plaintiffs refused, however, to dismiss claims that arose before July 30, 1999.

ARGUMENT

THE CLASS'S SECURITIES FRAUD CLAIMS THAT AROSE PRIOR TO JULY 30, 1999 SHOULD BE DISMISSED AS TIME-BARRED

In view of the Seventh Circuit's recent decision in *Foss*, so many of the Class's Section 10(b) claims as arose prior to July 30, 1999 should be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).³ In the alternative, if the Court is disinclined to consider a second motion to dismiss, the Court can and should treat this motion as a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c),⁴ and grant the Defendants judgment dismissing the time-barred claims.

I. The Statute of Repose Was Three Years Prior to Sarbanes- Oxley

In *Lampf*, the Supreme Court held that Section 10(b) claims must be brought within three years of the alleged violation, or be forever barred. *Lampf*, 501 U.S. at 364 (stating that "litigation instituted pursuant to § 10(b) and Rule 10b-5 must be commenced within one year after the discovery of the facts constituting the violation and within three years after

³ Because Defendants' motion is based on new controlling authority not available to Defendants when their first motion to dismiss was filed, this Court should consider this motion as a second motion to dismiss under the law of this district. See *Muhammad v. Village of Bolingbrook*, No. 02 C 3770, 2004 WL 1557958, *1 (N.D. Ill. July 8, 2004) ("a court might properly entertain a second motion to dismiss if convinced that it is not interposed for delay and that the disposition of the case on the merits can be expedited for doing so"); *Donnelli v. Peters Securities Co.*, No. 02 C 0691, 2002 WL 2003217, at *3 (N.D. Ill. Aug. 29, 2002) (same); *Strandell v. Jackson County, Illinois*, 648 F.Supp. 126, 129 (S.D. Ill. 1986) (same). An appendix of all unreported cases referenced herein has been submitted herewith.

⁴ There is no doubt that the Defendants' argument, which was preserved in its Answer and Affirmative Defenses filed July 2, 2004 (see Second Defense, at 261), could be considered on a motion for judgment on the pleadings. See Fed. R. Civ. P. 12(h); 12(c); *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1115 (7th Cir. 1970) ("[a] motion to dismiss made after the filing of an answer serves the same function as a motion for judgment on the pleadings and may be regarded as one"); *Merk v. Jewel Food Stores Division, Jewell Companies, Inc.*, 702 F.Supp. 1391, 1396 (N.D. Ill. 1988) ("we may view Jewel's [second] motion [to dismiss] as a motion for judgment on the pleadings and accordingly assess its merits").

such violation”). As a statute of repose, the three year limit is absolute and not subject to tolling. *Id.* at 363. The Complaint details a litany of allegedly false and misleading statements made from October of 1997 through July of 1999. Complaint ¶¶ 192-233. The Complaint bases the beginning of the class period (October 23, 1997) on the earliest of these allegedly false and misleading statements, seeking redress for purchases of Household securities beginning on October 23, 1997. Under *Lampf*'s three-year statute of repose, however, all claims that arose prior to July 30, 1999 but were not brought by July 30, 2002 are time-barred. Moreover, the Seventh Circuit has recently held that such claims cannot be revived through retroactive application of Sarbanes-Oxley's enlarged statute of limitations.

II. The Seventh Circuit Has Recently Held that Sarbanes-Oxley Does Not Revive Claims that Were Time-Barred on July 30, 2002

A. The New Statute of Limitations Under Sarbanes-Oxley

The statute of limitations for securities fraud under Section 804(1) of Sarbanes-Oxley, passed on July 30, 2002, amends 28 U.S.C. § 1658(b) to provide:

(a) . . . [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 (15 U.S.C. 78c(a)(47)), 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.

(b) EFFECTIVE DATE. — The limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act.

(c) NO CREATION OF ACTIONS. — Nothing in this section shall create a new, private right of action.

This action was deemed to have been filed on August 19, 2002,⁵ after the passage of Sarbanes-Oxley. Sarbanes-Oxley's new statute of limitations therefore applies to securities fraud claims asserted in the Complaint *to the extent* that such claims were not already extinguished by the *Lampf* statute of repose prior to the filing of this action. The key issue on this motion is whether Sarbanes-Oxley's new statute of limitations retroactively revives claims that were already time-barred on July 30, 2002 — the date Sarbanes Oxley was passed and on which the new, longer statute of limitations went into effect. In *Foss* the Seventh Circuit recently made clear that as a matter of law Sarbanes-Oxley does not have this effect.

B. Under Controlling Law Recently Articulated by the Seventh Circuit, Sarbanes-Oxley Does Not Revive Claims (Such as Those in This Case Arising Prior to July 30, 1999) Which Were Time-Barred on the Date Sarbanes-Oxley Became Effective, *i.e.*, July 30, 2002

Foss involved a securities fraud action filed more than three years after the alleged violation. Without Sarbanes-Oxley applying retroactively to revive the already time-barred claim, the suit was “doomed.” 394 F.3d at 542. Judge Easterbrook's opinion, joined by Judges Posner and Bauer, concluded that no such revival is available. The Seventh Circuit found the Second Circuit's reasoning in *Enterprise Mortgage Acceptance Co.* “persuasive,” stating that there is “nothing to add to the Second Circuit's explanation.” *Id.*, citing *Enterprise Mortgage Acceptance Co.*, 391 F.3d 401, 403 (2d Cir. 2004) (“we affirm the respective judgments of the district courts, in each case finding that Section 804 of Sarbanes-Oxley . . . does not revive plaintiffs' expired securities fraud claims”).

The Seventh and Second Circuits are not alone in holding that Sarbanes-Oxley does not revive claims that were time-barred on July 30, 2002. The Eighth Circuit recently

⁵ 3/19/04 Mem. Op. & Order, at 27

held that “the Sarbanes-Oxley Act does not apply retroactively to revive claims on which the prior statute of limitations had run.” *In re ADC Telecommunications, Inc. Securities Litig.*, No. 04-2537, 409 F.3d 974, 2005 WL 1322576, at *3 (8th Cir. June 06, 2005). The Fourth Circuit similarly held that “Sarbanes-Oxley does not revive the plaintiffs’ otherwise untimely securities fraud claim.” *Glaser v. Enzo Biochem, Inc.*, No. 03-2188, 2005 WL 647745, at *4 (4th Cir. Mar. 21, 2005) (unpublished opinion). Several district courts have also concluded that Sarbanes-Oxley does not revive moribund claims. *See, e.g., Lieberman v. Cambridge Partners, L.L.C.*, No.Civ.A. 03-2317, 2004 WL 1396750, at *3 n.12 (E.D. Pa. June 21, 2004); *In re Heritage Bond Litig.*, 289 F.Supp. 2d 1132 (C.D. Cal. 2003); *but see Roberts v. Dean Witter Reynolds, Inc.*, No. 8:02-CV-2115-T-26, 2003 WL 1936116 (M.D. Fla. Mar. 31, 2003), *vacated and remanded sub nom. Tello v. Dean Witter Reynolds, Inc.*, No. 03-12545, ___ F.3d ___, 2005 WL 1279130, at *16 (11th Cir. June 1, 2005).⁶

Any claims based on purchases made more than three years before Sarbanes-Oxley was enacted were already time-barred when Sarbanes-Oxley went into effect on July 30, 2002. Taking the view most favorable to the Class, the latest date which triggers the statute of repose applicable to securities fraud is the date on which a plaintiff purchased the security at issue.⁷ *See Otto v. Variable Annuity Life Ins. Co.*, 816 F.Supp. 458, 461 n.3 (N.D.Ill.

⁶ The Eleventh Circuit vacated and remanded the district court decision in *Tello* because factual questions needed to be resolved before statute of limitations issues could be addressed.

⁷ Although there is a split in this district regarding what triggering act constitutes a violation for statute of limitations purposes, *see, e.g., Waldock v. M.J. Select Global, Ltd.*, No. 03 C 5293, 2004 WL 2278549, at *4 (N.D. Ill. Oct. 7, 2004) (“the statute of repose is triggered for a Section 10(b) and Rule 10b-5 violation when the defendant makes the misrepresentation or omission in connection with the sale or purchase of a security to a particular plaintiff”), predicated the violation on the sale rather than the alleged misrepresentation is more favorable to the Class because a sale is necessarily subsequent to the misrepresentation upon which it is based. *See Northwestern Human Services, Inc. v. Panaccio*, No. Civ.A.03-157, 2004 WL 2166293 (E.D. Pa. Sept. 24, 2004) (holding that the “violation” occurs at the time of the alleged misrepresentation, and noting that as “a matter of simple logic, any misrepresentation or omission must have occurred on or before the date of the sale”).

1992) (finding for statute of limitations purposes that "a violation of § 10(b) and Rule 10b-5 is comprised not only of a misrepresentation or omission of material fact, but also includes the purchase or sale" of the security involved). Thus, all claims based on the purchase of a Household security prior to July 30, 1999 arose at least three years prior to July 30, 2002 and were time-barred as of that date. These claims are not revived by Sarbanes-Oxley and should therefore be dismissed with prejudice.⁸

CONCLUSION

For the foregoing reasons, all of the Class's Section 10(b) claims that arose prior to July 30, 1999 are time-barred and should be dismissed with prejudice. In the alternative, the Court should grant Defendants judgment on the pleadings dismissing such time-barred claims. An order should be entered dismissing the claims of all Class members who purchased Household securities before July 30, 1999 insofar as they assert a claim based on such a purchase.

⁸

Likewise, Class claims based upon Section 20(a) of the 1934 Act should be dismissed as time-barred to the same extent as the Section 10 claims, as such claims are secondary actions requiring a predicate violation of some other section of the 1934 Act. 15 U.S.C. § 78t(a); *Harrison v. Dean Witter Reynolds, Inc.*, 79 F.3d 609, 617 (7th Cir.), *cert. denied*, 519 U.S. 825 (1996).

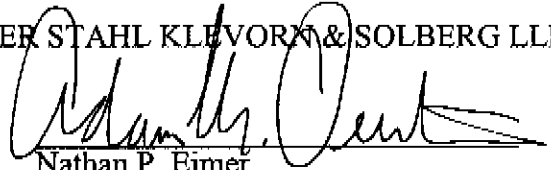
Dated: June 30, 2005

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