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US Supreme Court Provides Guidance on Section 16(b)'s Statute of Limitations

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In *Credit Suisse Securities (USA) LLC v. Simmonds*, No. 10-1261, 566 U.S. ___ (2012), the United States Supreme Court recently addressed the timeliness of claims under Section 16(b) of the Securities Exchange Act of 1934 — the provision of the securities laws that permits recovery of certain "short-swing trading" profits. 15 U.S.C. § 78p(b). Section 16(b) provides that "no . . . suit shall be brought more than two years after the date such [short-swing] profit was realized." In *Simmonds*, the Supreme Court was asked to decide whether Section 16(b)'s statute of limitations should be read literally (as a two-year statute of repose), or whether the limitations period is subject to principles of tolling. The Ninth Circuit Court of Appeals had held below that the Section 16(b) limitations period is tolled until a Section 16(a) statement is filed disclosing the short-swing trades.

In a short, eight-page decision, the Supreme Court squarely rejected the Ninth Circuit's holding that under the so-called "*Whittaker* Rule" the statute of limitations is tolled until the filing of a Section 16(a) report. The *Simmonds* court made clear that, to the extent the Section 16(b) limitations period is subject to tolling at all, any tolling of the limitations period must cease when the plaintiff discovers, or should have discovered, facts that support a claim. However, the court was evenly split on the question of whether Section 16(b)'s limitations period can be tolled in the first place, or whether it is a period of repose. Thus, the issue of whether the Section 16(b) statute of limitations can be equitably tolled remains unsettled as a matter of Supreme Court jurisprudence.

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The *Simmonds* case arose when Vanessa Simmonds filed suit under Section 16(b) in the Western District of Washington against 54 underwriters, alleging that they employed a variety of mechanisms to artificially inflate the aftermarket price of the stock following various initial public offerings and that this conduct allowed them to profit from the aftermarket sales. 24 of the underwriters successfully moved to dismiss the claims on statute of limitations grounds, and Simmonds appealed to the Ninth Circuit, arguing that the underwriters' failure to comply with Section 16(a)'s reporting requirements tolled the two-year limitations period for her alleged Section 16(b) claim. The Ninth Circuit agreed and held that Section 16(b)'s statute of limitations is tolled until the insider discloses his transactions in a Section 16(a) filing "regardless of whether the plaintiff knew or should have known of the conduct at issue." *Simmonds v. Credit Suisse Securities (USA) LLC*, 638 F.3d 1072, 1095 (9th Cir. 2010). In reaching this decision, the Ninth Circuit relied heavily on its previous holding in *Whittaker v. Whittaker Corp*, 639 F.2d 516 (9th Cir. 1981).

On appeal to the Supreme Court, the parties, as well as the United States as *amicus curiae*, presented three competing interpretations of Section 16(b)'s limitations period: (1) the Ninth Circuit's "disclosure approach," under which the running of the statute of limitations is tolled until a Section 16(a) report is filed; (2) a strict approach under which Section 16(b) is treated as a statute of repose not subject to any tolling; and (3) a "notice" or "discovery" approach under which the limitations period is tolled either until the insider files a Section 16(a) statement or until the plaintiff becomes aware of the facts and circumstances that would support a valid Section 16(b) claim.

In an 8-0 decision,[1] the Supreme Court reversed the Ninth Circuit and determined that it erred in holding that the limitations period is tolled until the filing of a Section 16(a) statement. *Credit Suisse Securities (USA) LLC v. Simmonds*, No. 10-1261, slip op. at 4, 566 U.S. ___ (2012). Justice Scalia, writing for the court, noted that if Congress had wanted the limitations period to be tolled until a Section 16(a) statement was filed, it could have easily done so by providing in the statutory text that the period runs from the time such a statement was filed. *Id.* at 4-5. The court also dismissed the contention that the doctrine of equitable tolling for the fraudulent concealment of facts supports the "disclosure approach" because it is a well-settled principle of law that equitable tolling ceases when the fraudulently-concealed "facts are, or should have been, discovered by the

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plaintiff." *Id.* at 5. Allowing tolling to continue beyond this point would be "inequitable and inconsistent with the general purpose of statutes of limitations." *Id.* at 6. The court placed particular emphasis on the inequity of the Ninth Circuit's approach in a case like *Simmonds*, in which the underwriters can plausibly claim that they were not required to file a Section 16(a) statement. There, the Ninth Circuit's rule would essentially force them to either file a Section 16(a) statement or to "face the prospect of Section 16(b) litigation in perpetuity." *Id.* at 6.

The Supreme Court thus discarded the Ninth Circuit's "disclosure approach." However, although the court's rejection of the Ninth Circuit approach was unanimous, it was split 4-4 on the Ninth Circuit's rejection of the argument that Section 16(b) establishes a period of repose not subject to tolling. *Id.* at 8. Therefore, this portion of the Ninth Circuit's opinion was affirmed without precedential effect. The court then remanded the case to the Ninth Circuit to consider how the traditional rules of equitable tolling apply to the facts of the case. *Id.* This command suggests that the court favors an approach under which the limitations period is tolled until such time as the facts supporting a Section 16(b) claim are, or should have been, discovered by the plaintiff. But the 4-4 split on the tolling issue means that the Supreme Court has not made a pronouncement on whether Section 16(b)'s limitations period should be subject to tolling at all.

Authored by William H. Gussman, Jr.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or the author.

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[1] Chief Justice Roberts took no part in the consideration or decision of the case.

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