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U.S. Supreme Court Rejects a Broad Tolling Approach to the Statue of Limitations for Section 16(b) Claims

BY THE SECURITIES LITIGATION AND ENFORCEMENT PRACTICE

In *Credit Suisse Sec. (USA) LLC, v. Simmonds*,[1] the U.S. Supreme Court addressed the application of the statute of limitations for claims brought under Section 16(b) of the Securities Exchange Act of 1934.[2] In a case that reached back to events occurring in the 1990s, the plaintiff alleged that underwriters of 54 "dot-com" initial public offerings (IPOs) manipulated stock prices using short-swing transactions in violation of Section 16(b). Yet, the plaintiff did not file her complaints against the underwriters until 2007, which raised serious questions regarding the timeliness of the plaintiff's Section 16(b) claims.

Section 16(b) provides stockholders of a company a private right of action against the company's officers, directors, and certain beneficial owners of the company (*i.e.*, "insiders") who realize profits from the purchase and sale, or sale and purchase, of the company's securities within any six-month period. Nevertheless, Section 16(b) states that "no such suit shall be brought more than two years after the date such profit was realized." In *Simmonds*, the Court examined whether the two-year limitation period is subject to tolling, and, if so, whether tolling continues until the insider publicly discloses the trades.

The Circuit Courts' Approaches

Prior to the Court's decision in *Simmonds*, there were three competing interpretations of Section 16(b)'s limitations period: (1) a "strict" approach under which the statute is treated as a statute of repose – a firm bar that is not subject to tolling; (2) a "notice" or "discovery" approach under which the time period is tolled until there was sufficient information to put plaintiff on notice of a potential Section 16(b) claim; and, (3) a "disclosure" approach under which the time period is tolled until the insider discloses the transactions at issue in mandatory Section 16(a) reports, regardless of whether the plaintiff knew or should have known of the conduct at issue.

The Court's Holding

In a unanimous opinion written by Justice Antonin Scalia, the Court expressly rejected the "disclosure" approach that had been adopted by the Ninth Circuit. Relying on the plain language of Section 16, the Court held that the running of the limitations period does not depend upon the timing of the insider's disclosure of the trades in Section 16 reports. However, the Court did not reach the issue of whether the two-year period in Section 16(b) is a statute of repose immune from equitable tolling. Instead, the

Court remanded the case back to the Ninth Circuit to "consider how the usual rules of equitable tolling apply to the facts of this case." Notable elements from the Court's opinion include:

- The Statute Is Not Tolled Until Section 16(a) Disclosures Are Made: Pointing to the explicit text of Section 16(b) as "the most glaring indication" of congressional intent, the Court held that the two-year clock starts from the "date such profit was realized," not when Section 16(a) disclosures are made by the company insider.

- Section 16(b) as a Statute of Repose Not Reached: Divided 4-4 on the issue, the Court was unable to reach a majority on the underwriters' contention that Section 16(b)'s limitations period is a statute of repose. The Court stated that "[w]e do not reach that contention, because we conclude that, even assuming that the 2-year period can be extended, the Ninth Circuit erred in determining that it is tolled until the filing of a §16(a) statement." This affirmed, "without precedential effect," the Ninth Circuit's holding that 16(b) did not establish a statute of repose.

- Statutes of Repose Not Subject to Tolling: In what may be the most far-reaching element of the opinion, the Court recognized that, if Section 16(b) was held to be a statute of repose, the time period would *not* be subject to tolling. This element of the Court's decision might be used in other contexts, for example, in relation to arguments about whether the statute of repose applicable to claims under Section 10(b) and Rule 10b-5 can be subject to tolling.

Conclusion

The Court's interpretation of the Section 16(b) limitation period narrows the window for bringing claims against insiders. By rejecting the Ninth Circuit's disclosure approach, Section 16(b) claims are no longer subject to a potentially indefinite tolling period. Although the Court did not hold that Section 16(b) is a statute of repose, the Court also did not foreclose the lower courts from reaching that conclusion. Indeed, the Court recognized that if Section 16(b) is subject to a statute of repose, no tolling would be permitted.

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Contributors to this alert were partners William F. Sullivan and Howard M. Privette and associates Scott Carlton and Michelle Hull.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Chicago

Mark D. Pollack
1.312.499.6050
markpollack@paulhastings.com

Los Angeles

Joshua G. Hamilton
1.213.683. 186
joshuahamilton@paulhastings.com

Thomas P. O'Brien
1.213. 683. 6146
thomasobrien@paulhastings.com

Howard M. Privette
1.213. 683. 6229
howardprivette@paulhastings.com

William F. Sullivan
1.213.683.6252
williamsullivan@paulhastings.com

Thomas A. Zaccaro
1.213. 683. 6285
thomaszaccaro@paulhastings.com

New York

Kenneth M. Breen
1.212.318.6344
kennethbreen@paulhastings.com

Alan J. Brudner
1.212.318.6262
alanbrudner@paulhastings.com

Maria E. Douvas
1.212.318.6072
mariadouvas@paulhastings.com

Douglas Koff
1.212.318.6772
douglaskoff@paulhastings.com

Kevin Logue
1.212.318.6039
kevinlogue@paulhastings.com

Barry G. Sher
1.212.318.6085
barrysher@paulhastings.com

Carla R. Walworth
1.212.318.6466
carlawalworth@paulhastings.com

Palo Alto

Peter M. Stone
1.650.320.1843
peterstone@paulhastings.com

San Diego

Christopher H. McGrath
1.858.458.3027
chrismcgrath@paulhastings.com

San Francisco

Grace Carter
1.415.856.7015
gracecarter@paulhastings.com

Edward Han
1.415.856.7013
edwardhan@paulhastings.com

Washington, D.C.

Kirby D. Behre
1.202.551.1719
kirbybehre@paulhastings.com

Morgan J. Miller
1.202.551.1861
morganmiller@paulhastings.com

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[1] No. 10-1261, 2012 WL 986812 (U.S. Mar. 26, 2012).

[2] 15 U.S.C. § 78p(b).