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SUPREME COURT REJECTS PERPETUAL TOLLING OF SECTION 16(B) CLAIMS AGAINST CORPORATE INSIDERS

In a decision issued earlier this week, *Credit Suisse Securities (USA) LLC v. Simmonds*,¹ the Supreme Court held that the two-year time limit for bringing an action under Section 16(b) of the Securities and Exchange Act of 1934 is not tolled by the corporate insider's failure to file a Section 16(a) disclosure statement. Rather, the usual rules of equitable tolling apply. The Supreme Court's ruling overturns a thirty year-old Ninth Circuit decision, *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981).

Background

Section 16(a) requires a director, officer, or beneficial owner of more than ten percent of a public company's equity securities to disclose all transactions involving those securities.² Section 16(b) permits a corporation or a shareholder (on behalf of a corporation) to bring an action against corporate insiders who realize a profit from the purchase and sale of the corporation's equity securities within a six-month period. Section 16(b) is a strict liability statute and provides that "no such suit shall be brought more than two years after the date such profit was realized."³

In 2007, Simmonds filed 55 lawsuits under Section 16(b) to recoup profits realized by certain financial institutions (the "underwriters") in connection with various initial public offerings ("IPOs") in the late 1990s and 2000. Simmonds alleged that the underwriters inflated prices of certain securities in connection with these IPOs, allowing them to profit from the aftermarket sales. Simmonds also claimed that the underwriters had failed to comply with Section 16(a).⁴

The lawsuits were consolidated and the underwriters moved to dismiss on the ground that Section 16(b)'s two-year time period had expired long before Simmonds filed the suits. The district court granted the underwriters' motion to dismiss the complaints holding that "all of the facts giving rise to Ms. Simmonds' complaints against the [u]nderwriter [d]efendants were known to the shareholders of the [i]ssuer [d]efendants for at least five

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¹ No. 10-1261, 2012 WL 986812 (Mar. 26 2012).

² 15 U.S.C. §78p(a).

³ 15 U.S.C. §78p(b).

⁴ Simmonds claimed that the underwriters and the insiders were subject to Section 16(a) because, as a group, they owned in excess of ten percent of the outstanding stock during the relevant time period. *Id.* at *2.

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years before these cases were filed.”⁵ The Ninth Circuit reversed. Citing *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981), the Ninth Circuit held that the lawsuits were timely because the statute of limitations is tolled until an insider discloses his transactions in a Section 16(a) filing (the “*Whittaker rule*”).⁶

The Underwriters petitioned the Supreme Court for *certiorari* on the ground that the two-year time limit for bringing an action under Section 16(b) is a period of repose that cannot be extended or tolled. The Supreme Court granted *certiorari* in June 2011.

The Supreme Court’s Decision

The Supreme Court unanimously reversed the Ninth Circuit’s decision and rejected the argument that Section 16(b)’s two-year limit is tolled until a Section 16(a) disclosure has been made.⁷

The Court focused on the text of Section 16(b), which provides that the two-year limitation period starts from “the date such profit was realized.”⁸ The Supreme Court noted that “Congress could have very easily provided that no such suit shall be brought more than two years after the *filing of a statement under subsection (a)(2)(C)*. But it did not.”⁹

The Supreme Court also considered the reasoning behind the *Whittaker rule*. In *Whittaker*, the Ninth Circuit suggested that principles of equitable tolling for fraudulent concealment operate to toll the limitation period until the Section 16(a) statement is filed. The Supreme Court held that “the *Whittaker rule* is completely divorced from long-settled equitable tolling principles.”¹⁰ “Allowing tolling to continue beyond the point at which a §16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be inequitable and inconsistent with the general purpose of statutes of limitations: ‘to protect defendants against stale or unduly delayed claims.’”¹¹ The Supreme Court also criticized the *Whittaker rule* for creating liability “in perpetuity” for defendants who are not aware they had to file a Section 16(a) statement. Focusing on the text of Section 16(b), the Supreme Court noted that “[h]ad Congress intended this result, it most certainly would have said so.”¹²

In a footnote, the Supreme Court also rejected the “Second Circuit’s rule that the two-year period is tolled until the plaintiff ‘gets actual notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing.’”¹³ The Court noted that this rule also “departs from usual equitable tolling principles.”¹⁴

The Court remanded the case to the lower courts to “consider how the usual rules of equitable tolling apply to the facts of this case.”¹⁵

With respect to the question of whether Section 16(b) creates a period of repose that is not subject to tolling, the court divided 4 to 4, and thus affirmed, without precedential effect, the Ninth Circuit’s rejection of that argument.

5 *In re Section 16(b) Litig.*, 602 F. Supp. 2d 1202, 1217 (W.D. Wash. 2009).

6 *Simmonds v. Credit Suisse Sec. (USA) LLC*, 638 F.3d 1072, 1095 (9th Cir. 2011) (“[T]he Section 16(b) 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 know of the conduct at issue.”).

7 Justice Scalia delivered the opinion for the court. Chief Justice Roberts did not participate.

8 15 U.S.C. §78p(b).

9 *Simmonds*, 2012 WL 986812 at *3 (emphasis in original).

10 *Id.* at *4.

11 *Id.* (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008)).

12 *Id.*

13 *Id.* at *5, n. 7 (citing *Litzler v. CC Investments, L.D.C.*, 362 F. 3d 203, 208 (2004)).

14 *Id.*

15 *Id.* at *6.

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Conclusion

Although the Supreme Court left open the question of whether the two-year time limit in Section 16(b) can ever be tolled, the Supreme Court's rejection of the *Whittaker* rule and the Second Circuit's rule curtails the time period in which plaintiffs can file suit against corporate insiders under Section 16(b) and eliminates perpetual liability for those who do not file Section 16(a) disclosure statements.

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