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High Court To Consider Time Limit For Derivative Claims

By **Evan Weinberger**

Law360, New York (June 27, 2011) -- The U.S. Supreme Court on Monday agreed to hear a group of investment banks' challenge to a Ninth Circuit ruling in a case involving initial public offerings with broader implications for shareholder derivative suits brought after the statute of limitations codified in federal securities laws.

The high court agreed to hear an appeal of a December decision reviving 24 lawsuits that were part of a consolidated securities action over initial public offerings of 54 companies in the late 1990s on the grounds that a lower court incorrectly dismissed them with prejudice based on the underwriters' assertion that the two-year statute of limitations had elapsed for the claims. The suits alleged that the underwriters engaged in prohibited short-swing transactions.

In their petition for certiorari, the underwriters argued that the 30-year-old rule on which the Ninth Circuit relied, established in a 1981 case called Whittaker v. Whittaker Corp., was out of step with established precedents in the Second Circuit and needed to be resolved by the Supreme Court.

The rule states that the two-year statute of limitations on derivative claims is tolled until a shareholder files the necessary forms notifying a company of wrongdoing, even if the company is already aware of the wrongdoing.

“Because the issuers on whose behalf this case was brought and their shareholders had actual notice of the underlying facts for at least six years before this lawsuit was filed, these complaints would have been time-barred if brought in the Second Circuit,” the underwriters said in their cert petition, filed in April. “Certiorari is warranted based on that conflict alone.”

Bank of America Corp., JPMorgan Chase & Co., Credit Suisse Securities (USA) LLC, Morgan Stanley, Goldman Sachs Group Inc., Deutsche Bank AG and Citigroup Inc., among others, were the petitioners.

At the same time, the Supreme Court rejected a cert petition filed by Vanessa Simmonds, the named plaintiff in the consolidated securities, who appealed the Ninth Circuit's affirmation of the district court's dismissal of the remaining 30 lawsuits on the grounds that she did not comply with presentation requirements under Section 16(b) of the Securities Exchange Act.

According to her petition, the Ninth Circuit ruled Simmonds' demand letters did not state with sufficient specificity that the investment banks and company insiders issuing their first batch of public stock turn over ill-gotten gains.

The letters, the appeals court said, clearly failed to satisfy the adequacy standards that compelled Simmonds to state the alleged wrongdoing the shareholder targeted and the legal action the shareholder intended to take prior to filing the suits.

Simmonds argues that such specificity was not required under Section 16(b) claims, noting that several scholars have argued that such demand letters are traditionally only one page long and written in general terms.

Jeffrey I. Tilden, a partner at Gordon Tilden Thomas & Cordell LLP representing Simmonds, said he was disappointed in the high court's split cert rulings, but vowed to fight on the statute of limitations question.

“The petition granted addresses an issue that has been long settled in the Ninth Circuit, nationally and in the mind of the [U.S. Securities and Exchange Commission], and we look forward to addressing it,” he said.

Counsel for the underwriters, Christopher Landau of Kirkland & Ellis LLP, could not be immediately reached for comment.

Chief Justice John Roberts recused himself from the decisions on the two cert petitions, according to the Supreme Court.

During a 10-day span in October 2007, Simmonds, then a 22-year-old college student, sued the banks and 54 companies that made IPOs in 1999 and 2000. Many of the defendant companies were part of the dot-com boom, and included TiVo Inc., Audible Inc. and Priceline.com Inc.

Simmonds — whose father, Robert Simmonds, works as a securities plaintiffs attorney — sought disgorgement of profits from the underwriters on behalf of the nominal defendant issuers under Section 16(b), which creates strict liability for company insiders who buy and sell stock in their own company within a six-month period without disclosure.

Simmonds is represented by Jeffrey I. Tilden, Jeffrey M. Thomas, Mark A. Wilner, Jessica E. Levin and David M. Simmonds of Gordon Tilden Thomas & Cordell LLP, and William C. Smart and Ian S. Birk of Keller Rohrback LLP.

The IPO underwriters are represented by Christopher Landau, Andrew B. Clubok, Brant W. Bishop and Susan E. Engel of Kirkland & Ellis LLP, Christopher B. Wells and Ryan P. McBride of Lane Powell PC, Sri Srinivasan, Anton Metlitsky and Andrew J. Frackman of O'Melveny & Myers LLP, Carter G. Phillips, Joel M. Mitnick and Judith Welcom of Sidley Austin LLP, David Ichel and Joseph M. McLaughlin of Simpson Thacher & Bartlett LLP, Gandolfo V. DiBlasi, Penny Shane and David M.J. Rein of Sullivan & Cromwell LLP, and Fraser L. Hunter and David S. Lesser of WilmerHale.

The case is Vanessa Simmonds v. Credit Suisse Securities et al., case number 10-1218 , in the U.S. Supreme Court.

--Additional reporting by Allison Grande, Derek Hawkins and Dietrich Knauth. Editing by John Williams.