Supreme Court's *Credit Suisse Securities* Decision Shields Corporate Insiders from Endless Liability for Short-Swing Profits Under § 16(b) of the Securities Exchange Act of 1934

Corporate officers and directors received some assurance from the Supreme Court on Monday that they will not be required to defend against decades-old claims to disgorge short-swing profits. In *Credit Suisse Securities LLC v. Simmonds*, the Supreme Court unanimously overturned a lower court decision that would have allowed shareholders to sue insiders for "short-swing" profits under § 16(b) of the Securities Exchange Act of 1934 for an indefinite period of time so long as Forms 4 describing the transactions were not filed, and regardless of whether the plaintiff knew of the challenged conduct. The Supreme Court's decision prevents significant erosion of § 16(b)'s statute of limitations and provides officers and directors with some protection against stale claims.

Section 16(b) imposes "strict liability" on any officer, director, or beneficial owner of a public company who realizes profits from the purchase and sale of the corporation's securities within a six-month time period. This "short-swing profits" rule allows shareholders to sue for disgorgement of any profits realized in such a sale, whether the transactions were conducted with any improper purpose or not. The rule is intended to act as a broad prophylactic against the "unfair use of information" by corporate insiders. A well-organized plaintiffs' bar actively monitors public reports of insiders' securities transactions in order to pursue such disgorgement claims.

In 2007, Vanessa Simmonds filed 55 actions against the underwriters of initial public offerings in the late 1990s and 2000. She alleged that corporate insiders and the underwriters conspired to drive up the price of the securities in the aftermarket, and as a result made short-term profits when they sold their personal shares. Ms. Simmonds claimed that the defendants should be forced to disgorge their profits to the issuers under § 16(b).

That statute, however, contains a *two-year* statute of limitations that is triggered the day profits are realized. Simmonds' claims were filed almost *ten years* after the fact. As a result, the trial court dismissed her claims. On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that the statute of limitations was tolled because the defendants did not file Forms 4 reporting the sales. Although tolling is an "equitable" doctrine that can delay a limitations period where a reasonably diligent plaintiff could not have discovered the underlying cause of action, the Ninth Circuit incongruously held that it should apply regardless of whether "the plaintiff knew or should have known of the conduct at issue."

In a short, direct, and unanimous opinion, the Supreme Court reversed. The Court stressed that the Ninth Circuit's decision was inconsistent with the express directive in the statute that the two-year clock begins on "the date [the short-swing] profit was realized"—not on the date a Form 4 is filed. The court of appeals also ignored the essential requirements of the equitable tolling doctrine that the plaintiff prove "(1) *that he has been pursuing his rights diligently*, and (2) that some extraordinary circumstances stood in his way." According to the Supreme Court, the Ninth Circuit disregarded both elements. Finally, the Court noted the court of appeals' anomalous conclusion that extended the two-year limit even though the plaintiff was so fully aware of her claim that she had filed her complaint.

The Supreme Court's decision leaves open whether §16(b)'s limitations period is a statute of repose that imposes an absolute two-year deadline in every case and is never subject to equitable tolling—even if the shareholder is unaware of the claim. The eight members of the Court who heard the case were equally

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divided on that question and did not decide it; Chief Justice Roberts recused himself. If that issue reaches the Court in the future, it could grant insiders even greater security against belated short-swing profit suits. In the meantime, opportunistic plaintiffs who seek to recover short-swing profits from age-old securities transactions will find their claims barred unless they can meet the rigorous requirements of the traditional equitable tolling doctrine.

If you have any questions or would like to learn more about the issues raised in the Court's decision, please contact your usual Ropes & Gray advisor.

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