

## U.S. Supreme Court Holds that the Statute of Limitations for Section 16(b) Short-Swing Liability Claims Is Not Tolled

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On March 26, 2012, in *Credit Suisse Securities (USA) LLC v. Simmonds*, the U.S. Supreme Court held 8-0 that not filing a Section 16(a) disclosure statement does not toll (i.e., suspend) the two-year statute of limitations for suits under the short-swing liability rules of Section 16(b) of the Securities Exchange Act of 1934; the limitations period can begin running even if the disclosure statement is filed at a later date or never filed at all. The Court's decision provides insiders of U.S. public companies with better protection and more certainty against time-barred claims.

The Supreme Court reversed the [Ninth Circuit](#), which had held, citing to its [precedent](#), that the limitations period is tolled until an insider files the Section 16(a) disclosure statement "regardless of whether the plaintiff knew or should have known of the conduct at issue". In dicta, the Supreme Court also rejected the [Second Circuit's rule](#) that the limitations 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".

The Supreme Court did indicate some willingness to permit equitable tolling of the Section 16(b) limitations period, but under circumstances more limited than the "disclosure" rule of the Ninth Circuit or the "actual notice" rule of the Second Circuit.

### Background

Under Section 16, directors, certain officers and 10% beneficial owners of equity securities of U.S. public companies are subject to a reporting regime under Section 16(a) and the short-swing liability rules under Section 16(b). Section 16(b) is a strict liability statute and applies whenever there is a sale and purchase, or purchase and sale, of a company's equity securities by an insider within a six-month period.

In 2007, Vanessa Simmonds sued numerous financial institutions, including Credit Suisse, that had underwritten various initial public offerings in the late 1990s and 2000. Ms. Simmonds, who is the daughter of one of the lawyers bringing suit and who obtained the shares in question at his direction, alleged that the underwriters and issuers' insiders schemed to profit from "hot" IPOs. Alleging that the underwriters failed to comply with the Section 16(a) reporting requirements and that there was short-swing liability, Ms. Simmonds argued that this failure tolled the two-year statute of limitations for purposes of Section 16(b).

The District Court for the Western District of Washington rejected Ms. Simmonds' argument, noting that "there is no dispute that all of the facts giving rise to [Ms. Simmonds'] complaints . . . were known to the shareholders . . . for at least five years before these cases were filed", and dismissed the claims as untimely. The Ninth Circuit then reversed the District Court in relevant part.

The U.S. federal government filed an [amicus brief](#) in which it rejected Ms. Simmonds' argument that the statute of limitations is tolled until the filing of a Section 16(a) statement, as well as the underwriters' argument that the limitations period is absolute and is not susceptible to tolling at all. Rather, it took a third view that the period is "equitably tolled until a reasonably diligent security holder knows or should know the facts underlying [the] claim".

### Supreme Court's Analysis

In delivering the opinion of the Court, Justice Scalia recited the statutory language of Section 16, which provides that short-swing liability suits must be brought within "two years after the date such [short-swing] profit was realized" and observed that the text of Section 16(b) simply does not support the Ninth Circuit's

view. The Court went on to say, “[e]ven accepting that equitable tolling for fraudulent concealment is triggered by the failure to file a §16(a) statement, the [Ninth Circuit’s] rule is completely divorced from long-settled equitable-tolling principles”.

The Court noted that a litigant seeking equitable tolling bears the burden of establishing two elements:

- that he or she has been pursuing his or her rights diligently; and
- that some extraordinary circumstances stood in his or her way.

The Court also pointed out that it is “well established” that, when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those facts are, or should have been, discovered by the plaintiff. The Court indicated that it would, in fact, be “inequitable” to allow tolling to continue beyond this point, noting “[t]he inequity of the [Ninth Circuit’s] rule is especially apparent in a case such as this, where the theory of §16(b) liability of underwriters is so novel that [they] can plausibly claim that they were not aware they were required to file a §16(a) statement”.

The Court did not rule out the possibility of tolling altogether, saying that “assuming some form of tolling does apply, it is preferable to apply that form which Congress was certainly aware of, as opposed to the rule that the Ninth Circuit has fashioned”. By this, the Court made clear that “Congress intended to apply *ordinary* background tort principles” (emphasis in original). The Court then acknowledged a 4-4 split (arising from the recusal of Chief Justice Roberts) concerning the underwriters’ claim that the Section 16(b) limitations period constitutes a statute of repose that is not subject to tolling at all and remanded for the lower courts to consider how the “usual rules of equitable tolling” apply to the facts on hand.

## Implications

While the Court left open the possibility of tolling the Section 16(b) statute of limitations under limited circumstances, our assessment is that its definitive rejection of both the “disclosure” rule of the Ninth Circuit and the “actual notice” rule of the Second Circuit will discourage an otherwise active and financially motivated plaintiffs’ bar from bringing stale short-swing liability suits, unless the facts would satisfy the requirements necessary for an equitable tolling claim to survive the pleading stage.

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