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Section 16(b) and its Limitations Period: the Case for Equitable Tolling

By Michael J. Kaufman[*]and John M. Wunderlich[**]

I. Introduction.

This coming term, in Credit Suisse Securities (USA) LLC v. Simmonds, the Supreme Court will explore the contours of the limitation period for the private right of action under Section 16(b) of the Securities Exchange Act of 1934. Limitations periods mitigate the risk that evidence of meritorious claims will become stale and relieve potential defendants from unending uncertainty about whether they will be brought into court. The appropriate limitation period must be balanced, however, against allowing potential plaintiffs sufficient time to discover and file meritorious claims. This balance is manifest in the judicial and congressional effort to fashion limitation periods for private rights of action under the securities laws.

The Supreme Court has already made several attempts to strike the appropriate balance in its interpretation of the statute of limitations for securities fraud claims under Section 10(b) of the 1934 Act.[1] Now, the Court will endeavor to strike a balance for the private right of action under Section 16(b) in Simmonds. The Court will address whether the two-year limitation period for claims to recover short-swing profits under Section 16(b) is subject to tolling, and if so, whether the defendant's failure to file necessary disclosures under Section 16(a) tolls that time. This Article argues that tolling is consistent with the statutory text, Supreme Court precedent, and the overarching purpose of the prohibition on insider short-swing trading.

II. Section 16 and the Prohibition on Insider Short-Swing Trading.

After the stock market crash in 1929, Congress enacted the federal securities laws to promote the integrity of American markets and protect investors from fraud and other abusive practices. One of the practices at which Congress took aim "was the flagrant betrayal of … fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities," as well as "the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others."[2] To protect outside stockholders against insider trading by these persons, Congress enacted Section 16 that "takes the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great."[3] The class of transactions targeted: short-swing trading. Section 16(b) requires statutory insiders to disgorge profits from the purchase and sale (or sale and purchase) of any equity security of the issuer within a period of less than six months.[4] This section is enforceable by private right of action, but this action must be brought within two years of the insider realizing any profit.[5]

Section 16 is the only provision in the 1934 Act that deals directly with insider trading. It attacks insider trading on three fronts: First, Section 16(a) requires certain insiders to report to the Securities and Exchange Commission ("SEC") their equity security holdings and transactions in the issuer's securities.[6] Second, Section 16(c) prohibits these insiders from "transacting short sales in the issuer's equity securities."[7] Third, Section

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16(b) allows the issuer or any security holder to sue on behalf of the issuer and recover "short-swing" profits from the purchase and sale (or sale and purchase) by certain insiders within a six-month period.[8] These next Parts discuss Section 16(b)'s prohibition on short-swing trading and Section 16(a)'s duty of prompt disclosure.

A. Statutory Insiders and Short-Swing Profits.

To state a claim under Section 16(b), a plaintiff must allege that (1) within a period of less than six months, (2) the defendant, who is a statutory insider, (3) bought and sold, or sold and bought, (4) and made a profit.[9] Section 16(b) is enforced by only private enforcement.[10]

Section 16(b) casts a wide net. First, Section 16(b) targets all those who one would reasonably assume would have access to inside information, or "statutory insiders." Statutory insiders include officers, directors, and shareholders with more than a 10% interest in the issuing company.[11] (In turn, shareholders with more than a 10% interest can consist of a group that collectively owns more than 10% of the issuer's securities.[12]) These statutory insiders are presumed to have access to inside information.[13]

Second, Section 16(b) is designed to ensnare the largest possible group of trades. Under Section 16(b) whether the purchase comes before the sale is irrelevant; as long as the purchase is less than the sale price, any profit is recoverable. Additionally, the statute can actually require disgorgement even when an insider has a cumulative loss in the six-month period: "[T]he statute does not bundle together all transactions within a six-month period to determine whether the insider has a cumulative profit. Instead, it matches the lowest purchase price with the highest sale price to require disgorgement of the largest possible 'profit.'"[14]

And third, Section 16(b) also targets a whole class of transactions where the improper use of inside information by these corporate insiders is most likely to occur—all short-swing trading in a six-month period—even though the defendant may not have acted on inside information. But first, what is short-swing trading? Swing trading is commonly defined as speculative trading. It lies somewhere in between the day-trading pattern of buying and selling stock and a buy-and-hold method. A swing trader typically holds a trade for only one to four days. The focus on swing trading is not on the fundamental or intrinsic value of the stock, but on the stock's price trends and patterns. Swing traders trade stock in the direction of the stock. They grab stock in the uptrend (or upswing) after a downtrend (or pullback). An uptrend is a series of rallies that extend through previous high points, interrupted by declines that end above the low point of the last sell-off point. In other words, an uptrend is a series of higher highs and higher lows. A downtrend is a series of declines that extend through previous low points, interrupted by increases that end below the high point of the last rally. In other words, a downtrend is a series of lower lows and lower highs.

So why does Congress target short-swing trading as a potential source of abuse? By targeting trading in a six-month period, Congress implicitly recognized that abuse of inside information is most likely to occur in short-term, in-and-out trading because the period for which to commit capital is brief and the useful life of the insider information is likewise short. Thus, Section 16(b) is often referred to as the prohibition on "short swing" transactions for corporate insiders.

B. Section 16's Duty of Prompt Disclosure.

The prohibition on short-swing trading in Section 16(b) does not operate in isolation, however, and when considered along with Section 16(a), it is clear that the entire section embodies an ethos of prompt disclosure. Section 16(a) represents Congress's attempt to provide plaintiffs with almost immediate notice of a potential Section 16(b) violation. Section 16(a) requires statutory insiders to disclose to the SEC their initial holdings on Form 3 and changes to those holdings on Form 4.[15] Originally, statutory insiders had to file a Form 4 on or before the tenth day after the end of the month in which a change in their beneficial ownership occurred, but in

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2002, in the wake of corporate scandals like Enron and WorldCom, Congress enacted the Sarbanes-Oxley Act, which changed the time in which a statutory insider had to file a Form 4.[16] Under SOX, insiders must file a Form 4 before the end of the second business day after the day on which the subject transaction has been executed (or, if the two-day limit is not feasible, at another time set by the SEC).[17] This short, two-day period alerts plaintiffs to a change in ownership almost immediately and it encourages even more advanced notice because the filing deadline is measured from the date the order is placed or the transaction is executed, and not the closing or delivery date of the security.[18]

III. Competing Interpretations of the Limitations Period Under Section 16(b).

Aside from the broad liability under Section 16(b), Section 16(b) also provides that "no … suit shall be brought more than two years after the date such profit was realized" from the alleged short-swing transaction.[19] All the federal courts agree that this limitation period begins to run at the time of the transaction. But the courts disagree over whether that limitation period can be equitably tolled. The federal courts have announced three different ways to construe Section 16(b), including as: (1) a statute of repose, triggered by the transaction and not subject to tolling; (2) a statute of limitations subject to tolling until the plaintiff has actual notice of the violation; and (3) a statute of limitations that is tolled until the insider files the disclosures required by Section 16(a).

A. Statutes of Limitations, Statutes of Repose, and Equitable Tolling.

Before addressing the three approaches, we offer a brief word about statutes of limitations, statutes of repose, and equitable tolling. In general, statutes of limitations and repose are quite similar in their effect and purposes.[20] Both provide a time limit after which a lawsuit cannot be brought and both serve to, among other things, promote accurate fact-finding and provide defendants and others with the comfort of knowing they are free from suit.[21] They differ in triggering event (or accrual) and, typically, length. A statute of limitations is often triggered by discovery of the claim and it is usually short. A statute of limitations is an affirmative defense against a plaintiff who does not sue within a specified time after discovering the cause of action. A statute of limitations is often subject to tolling principles as well. In contrast, a statute of repose is often longer and is triggered by the complained of event. A statute of repose caps the time for liability. Statutes of repose are often not subject to tolling.

Equitable tolling, which suspends the running of a limitation period, is a remedy that is reserved for circumstances where the time has lapsed but the plaintiff, though diligent, is not at fault. For example, equitable tolling is customarily available if extraordinary circumstances prevent the plaintiff from filing despite the plaintiff's diligence, the plaintiff was tricked by the defendant into letting the deadline pass, or the plaintiff, even though diligent, could not obtain all the vital information bearing on the existence of the claim.

B. Section 16(b) as a Statute of Repose Without Equitable Tolling.

Not all federal courts believe equitable tolling is available under Section 16(b). One federal court—Carr Consolidated Biscuit Co. v. Moore[22]—has held that the limitations period under Section 16(b) is one of repose, triggered upon the date of the transaction, and it is not subject to equitable tolling. The court in Carr reasoned that the plain text of the limitations period did not provide for any tolling, and thus none would be inferred. No federal court of appeals has adopted this approach.

C. Section 16(b) as a Statute of Limitations with Equitable Tolling Until Notice.

In contrast, other federal courts have construed the limitation period as a statute of limitations that *is* subject to tolling but only until the plaintiff has notice of the violation. The leading case to adopt this approach is Litzler v. CC Investments, LDC[23] from the Second Circuit. (Although the Second Circuit addressed the question earlier in Tristar Corp. v. Freitas, the court avoided the question because, regardless of tolling, the plaintiff's claim was untimely.[24]) In Litzler, the court held that tolling was triggered when the defendant did not file a

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Form 4, and would end when the plaintiff gets "actual notice" that a person subject to Section 16(a) has realized a short-swing profit. There, the court said that the plaintiffs had actual notice of a potential Section 16(b) claim because a shareholder had written the company and demanded that the company institute a Section 16(b) action to recover short-swing profits more than two years earlier. It is important to note that under Litzler, if the defendant files the necessary Section 16(a) disclosures, then the court considers this adequate notice of the claim. Thus, the court's approach is more akin to a constructive notice: if the plaintiff has actual or constructive notice of the claim, then the time is no longer tolled.

D. Section 16(b) as a Statute of Limitations with Equitable Tolling Until Disclosure.

Third, some courts, mostly those in the Ninth Circuit, have held that the limitation period is equitably tolled if the defendant does not file the disclosures required by Section 16(a).[25] The leading case to adopt this position is Whittaker v. Whittaker Corp.[26] In that case the Ninth Circuit said the dispositive question was whether tolling was inconsistent with Congress's purpose when it enacted Section 16. After considering the legislative purpose as a whole, the court concluded that Congress intended to toll the limitations period until the defendant filed required disclosures under Section 16(a). The Ninth Circuit also took to task the Second Circuit's "notice" approach. The court said that this approach was inferior because courts then had to wrestle with whether the knowledge of corporate officers or directors should be attributed to the corporation.

In *Simmonds v. Credit Suisse Securities (USA) LLC*, the Ninth Circuit reaffirmed its commitment to treating the limitation period as subject to equitable tolling until disclosure. In a surprising turn of events, Judge Smith–who authored Simmonds–specially concurred, saying that he would have overruled Whittaker. According to Judge Smith, the limitation period should be treated as one of repose. 27. The judge continued that the straightforward text and the near-strict liability under Section 16 support treating the limitation period as a statute of repose without equitable tolling.[27] According to Judge Smith, the straightforward text and the near-strict liability under Section 16 support treating the limitations period as a statute of repose without equitable tolling.

We note here that whether disclosure must be *accurate* is a different question, one that the courts have not yet resolved. The court in Roth v. Reyes, addressed the issue. As the plaintiffs in that case argued, "it is one thing to make disclosures that put potential plaintiffs on notice of their possible claims; it is another thing to make disclosures that obfuscate such claims. Indeed, enforcing the statute of limitations in this case would arguably permit insiders to immunize themselves from punishment as to one form of corporate misconduct (i.e., reaping short-swing profits) by engaging in another (i.e., disguising those profits)."[28] At least one federal court agrees with this approach.[29] The Ninth Circuit disagrees, however, and has said that under this rule, a shareholder could bring an action any time against an insider who disclosed a purportedly exempt transaction, effectively eliminating the two-year limitations period.[30]

E. Illustrating the Difference.

The nuances between the three approaches are less than obvious. A simple hypothetical serves to illustrate the difference between the three positions. Consider the following:

> Statutory Insider completes a transaction prohibited under Section 16(b). One year later ("Year 1"), Shareholder A writes the company and demands that the company disgorge profits from Statutory Insider's trading. The company declines. Two years from the transaction ("Year 2"), Statutory Insider files the required disclosure under Section 16(a), and Shareholder A files suit. Three years after the transaction ("Year 3"), Shareholder B files suit against Statutory Insider. Four years after the transaction ("Year 4"), Shareholder C files suit. Which suit is timely?

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Under the strict statute-of-repose approach, only Shareholder A's suit is timely. Under this approach, the limitations period is triggered on the date of the transaction, and any suit filed after two years from that date, regardless of notice or disclosure, is untimely. Under the Second Circuit's notice approach, Shareholder A's and Shareholder B's suits are both timely, but not Shareholder C's suit. Under this approach, the time is tolled until the plaintiff has notice of a potential Section 16(b) violation.[31] Shareholder B's suit is still filed within two years of notice of the claim, i.e., Shareholder A's letter to the company. (This was the case in Litzler v. CC Investments, LDC.) Shareholder B's suit is not timely—Shareholder B had notice of the claim in Year one, but did not file until Year four, more than a year too late. Under the disclosure approach, all the suits are timely: The statute of limitations was tolled until the statutory insider filed the required disclosures under Section 16(a) in Year two. So, the shareholders had two years from the disclosure to file.

IV. The Case for Equitable Tolling.

This Part contends that equitable tolling is consistent with Section 16(b)'s statutory text, Supreme Court precedent, and the overarching purpose of Section 16 and limitation periods. This Part first argues that, as a general matter, the statutory text allows for equitable tolling. Second, this Part explains why the lack of disclosure under Section 16(a) is a basis for equitable tolling under Section 16(b). Last, this Part argues that the disclosure approach is superior to the notice approach.

A. Equitable Tolling Applies to Every Limitations Period.

The text of Section 16(b) suggests that the limitation period is a statute of repose, but it tells us nothing about whether the limitations period is subject to tolling and it does not provide a basis for upsetting courts' traditional authority to equitably toll limitations periods. The structure of Section 16 as a whole, however, reveals that disclosure under Section 16(a) is vital to enforcing Section 16(b). This symbiotic relationship supports tolling the limitations period.

To begin, the text states that "no … suit shall be brought more than two years after the date such profit was realized."[32] This language is comparable to the statute of repose under Section 10(b), which provides that no securities fraud suit "may be brought not later than … 5 years after such violation."[33] The Supreme Court in Merck & Co. v. Reynolds, recognized that the limitations period under Section 10(b) provides defendants with "total repose."[34] The Supreme Court in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, likewise referred to the limitations period in Section 16(b) as one of repose,[35] although, this was no more than a passing reference in a footnote. Characterizing Section 16(b) as a statute of repose suggests that the limitations period is not subject to tolling; statutes of repose are typically not subject to tolling.

But this is not always the case, particularly when a longer statute of repose is unaccompanied by a shorter statute of limitations triggered by discovery. As a general matter, the Supreme Court has recognized that limitations periods are customarily subject to equitable tolling.[36] In Holmberg v. Armbrecht, the Supreme Court observed that equitable tolling, "is read into every federal statute of limitation."[37] And more specifically, the Supreme Court has refused to read equitable tolling into a limitations period usually where a longer statute of repose operates alongside a shorter statute of limitations.[38] This was the case in Lampf,[39] where the Court held that equitable tolling was inconsistent with the three-year statute of repose. There, the Court said that equitable tolling was unnecessary because the statute included a shorter, one-year statute of limitations triggered by the discovery of facts constituting a statutory violation. Equitable tolling, according to the Court, would be redundant because the discovery-based statute of limitations had a built-in tolling provision. Section 16(b) is different. Although the Section 16(b) limitations period sets an outside limit for liability, Section 16(b) does not take tolling into consideration as does the limitations regime at issue in Lampf.

Instructive here is Holland v. Florida, where the Supreme Court recently addressed whether equitable tolling

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would be inferred in a statute limiting the time to file petitions for a writ of habeas corpus.[40] Its analysis is telling. Under 28 U.S.C.A. § 2244, prisoners have one year to file a petition; the statute affords a specific tolling provision for prisoners who file state postconviction proceedings, but otherwise says nothing about the availability of equitable tolling. In Holland, the Court held that the limitations period could be tolled for equitable reasons, and that absent a clear command, a federal limitations period would not displace courts' traditional equitable authority. The Court laid out five circumstances in which a court's equitable authority would be curtailed by a limitations regime, none of which applied, so the Court held that courts retained their power to equitably toll the limitations period under 28 U.S.C.A. § 2244.[41]

First, *Holland* recognized that if the limitation period is set out in an unusually emphatic form, then this would curtail courts' traditional equitable. For example, the Court pointed to United States v. Beggerly,[42] where the Court refused to find equitable tolling because the statute of limitations was 12 years and thus, unusually generous. In contrast, the limitations period under Section 16(b) is rather short at two years. The next two circumstances under Holland are similar: Holland said that if the statute uses highly detailed and technical language that cannot be read as containing implicit exceptions or if Congress reiterated the limitations period several times in different ways, then courts' traditional equitable authority would be curtailed. Here, there is nothing unusual about Section 16(b)'s limitation period; it appears only once and states rather matter-of-factly that the time limit is two years. Holland also recognized that if either the limitations period relates to an underlying subject matter with respect to which the practical consequences of allowing tolling would have been substantial (i.e., tax collecting), or the statute, if tolled, would toll substantive limitations on the amount of recovery, then the courts' equitable authority would be curtailed. But here, tolling Section 16(b)'s limitations period does not impact the substance of the claim—the six-month period for liability is set at an earlier time. Moreover, there does not appear to be any practical consequences other than forcing defendants to disgorge profits they would not have been entitled to had they filed appropriate disclosures under Section 16(a). None of the circumstances described by Holland apply to Section 16(b)'s limitations period. Thus, nothing suggests that Congress displaced courts' traditional equitable power to toll this limitations period either.

B. Lack of Disclosure under Section 16(a) is a Basis for Equitable Tolling.

Section 16(b) does not operate in isolation; rather, Section 16(b) must be read with Section 16(a).[43] The structure and purpose of Section 16 likewise supports the conclusion that Section 16(b) is subject to equitable tolling until disclosure. An outside shareholder's ability to enforce a private cause of action under Section 16(b) depends on adequate disclosure under Section 16(a).

Section 16(a) reports are typically the main—if not the only—source of information for a Section 16(b) suit. Ergo, even in the face of the plaintiff's diligence, absent the defendant's disclosure under Section 16(a), the plaintiff likely cannot discover the facts to support the claim.[44] For instance, Section 16(a) reports allow the examining shareholder to discover and isolate the dates of the trades at issue, compute the short-swing profits to be disgorged, identify the statutory insiders as individuals or groups, and pinpoint the shares in which the insiders have or share a direct or indirect pecuniary interest.[45] And Form 4 requires the insider to disclose the insider's name, address, and other information, and to list all non-derivative securities owned, acquired, or disposed of, including the transaction date, the execution date, the amount and price per share of the securities acquired or disposed of, and the amount of the securities beneficially owned after the reported transaction. If the security is a derivative security (including a call, put, warrant, option, or convertible security), then the insider must provide similar information and the conversion or exercise price. These disclosures are necessary because shareholders who bring suit under Section 16(b) are typically outsiders and minority holders; other than the Section 16(a) disclosure, these shareholders often don't have adequate sources of information.

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Opponents of equitable tolling contend that an absolute period of repose after two years represents a tradeoff for the rather draconian liability under Section 16. Because Section 16(b) might be violated unintentionally, the argument goes, the statute provides persons subject to liability under Section 16 repose after two years. Indeed, there is considerable disagreement about the efficacy and propriety of Section 16(b) in general.[46]

There are several problems with this argument, however. First, this interpretation has no direct support in the legislative history.[47] Second, this interpretation contradicts Congress's intent under Section 16. Congress was deliberately overbroad, ensnaring the largest group of trades that might violate Section 16 and the broadest class of persons who might abuse insider information. Congress thought that the need to prevent inside trading outweighed the unfairness of subjecting to liability those who unintentionally violate the act. Third, this interpretation allows those who do intentionally violate Section 16 escape liability, and what is worse, this interpretation rewards persons who do not comply with their legal obligations under Section 16(a) in the first place. The Supreme Court in Simmonds should avoid an interpretation that has the unintended consequence of encouraging people to misbehave.

Opponents respond that in the event defendants do intentionally violate Section 16 and escape liability under Section 16(b), they may still be liable under Rule 10b-5. But Rule 10b-5 is subject to a five-year statute of repose as well, and the trades are no easier to discover if the defendant simply waits five years to disclose under Section 16(a). In sum, if insiders can insulate their transactions from the scrutiny of outside shareholders simply by refusing to file Section 16(a) reports and waiting out the limitations periods, then Congress' creation of these shareholders' derivative suits would be nullified.[48]

Last, opponents contend that an added benefit to interpreting Section 16(b) as a strict statute of repose not subject to equitable tolling provides a simple bright-line rule. Bright-line rules in limitations periods are preferable because they ensure that the limitations period will effectively prevent lawyers from initially filing time-barred claims and enable courts to readily dismiss time-barred claims without awaiting factual development under summary judgment.

But equitable tolling based on disclosure under Section 16(a) likewise provides a bright-line rule simple in application *and* it promotes resolution based on the merits of the claim rather than dismissal on some procedural default. The question is simply whether the defendant filed disclosures under Section 16(a). The other advantage to this rule is that it gives defendants control over their liability: If they want to trigger the limitations period, then all they must do is what the law already demands of them by filing disclosures under Section 16(a).

C. Addressing the Difference Between the Second and Ninth Circuits.

As a final point, the Ninth and Second Circuits' disagreement over tolling is less significant than it seems. The two courts disagree over whether a plaintiff can be said to have discovered a Section 16(b) claim absent a Section 16(a) disclosure. The Second Circuit says yes, the plaintiff can actually discover the violation. The Ninth Circuit says no, that without the Section 16(a) disclosure, there can be no discovery. These are really two variants of the same theme, however: the statute runs when the plaintiff knew or should have known of the violation. According to the Ninth Circuit, the defendant's disclosure under Section 16(a) would put any reasonable person on notice of a violation.

Nevertheless, the Ninth Circuit appears to have the better argument that a bright-line approach based on disclosure under Section 16(a) is more appropriate. The drawback to a notice-based limitations rule is that notice will often end up being a fact question, meaning the limitations period will not readily act as a screening mechanism. Moreover, under the Second Circuit's standard, the question arises whether the knowledge of corporate

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officers or directors should be attributed to the corporation, thereby giving the company and its shareholders constructive notice and allowing the limitations period to run. The ability of a defendant to impute the knowledge of corporate officers and directors to the corporation would seriously impair the ability of minority shareholders to bring Section 16(b) suits.

V. Conclusion.

In Credit Suisse Securities (USA) LLC v. Simmonds, the Supreme Court must strike the appropriate balance in its interpretation of the limitation period under Section 16(b). The statute provides a two-year statute of repose, but the appropriate balance is struck by recognizing that the statute is equitably tolled in the event the defendant does not file required reports under Section 16(a). Congress has made clear that these reports are the basis for a private cause of action under Section 16(b); without them, the plaintiff usually cannot discover a claim.

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[FN1] *See, e.g.,* Merck & Co., Inc. v. Reynolds, 130 S. Ct. 1784, 176 L. Ed. 2d 582, Fed. Sec. L. Rep. (CCH) P 95733 (2010); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321, Fed. Sec. L. Rep. (CCH) P 96034 (1991); *see also* Kaufman and Wunderlich, Toward a Just Measure of Repose: The Statute of Limitations for Securities Fraud, 52 Wm. & Mary L. Rev. 1547 (2010).

[FN2] S. Rep. No. 1455, 73d Corp., 2d Sess. 55 (1934); *see also* Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 592 n.23, 93 S. Ct. 1736, 36 L. Ed. 2d 503, Fed. Sec. L. Rep. (CCH) P 93973 (1973).

[FN3] Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 422, 92 S. Ct. 596, 30 L. Ed. 2d 575, Fed. Sec. L. Rep. (CCH) P 93328 (1972).

[FN4] 15 U.S.C.A. § 78p(b).

[FN5] 15 U.S.C.A. § 78p(b).

[FN6] 15 U.S.C.A. § 78p(a).

[FN7] Steinberg and Landsdale, Jr., The Judicial and Regulatory Constriction of Section 16(b) of the Securities Exchange Act of 1934, 68 Notre Dame L. Rev. 33, 34-35 (1992); *see also* 15 U.S.C.A. § 78p(c).

[FN8] 15 U.S.C.A. § 78p(b).

[FN9] Arnold S. Jacobs, 1 Section 16 of the Securities Exchange Act § 3:1 (2011); *see also* Levy v. Sterling Holding Co., LLC, 544 F.3d 493, 496, Fed. Sec. L. Rep. (CCH) P 94863 (3d Cir. 2008), cert. denied, 129 S. Ct. 2827, 174 L. Ed. 2d 553 (2009).

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[FN10] Gollust v. Mendell, 501 U.S. 115, 122, 111 S. Ct. 2173, 115 L. Ed. 2d 109, Fed. Sec. L. Rep. (CCH) P 96001 (1991).

[FN11] 15 U.S.C.A. § 78p(b).

[FN12] *See, e.g.*, Roth v. Jennings, 489 F.3d 499, 510–16, Fed. Sec. L. Rep. (CCH) P 94352 (2d Cir. 2007).

[FN13] Foremost-McKesson, Inc. v. Provident Securities Co., 423 U.S. 232, 243, 96 S. Ct. 508, 46 L. Ed. 2d 464, Fed. Sec. L. Rep. (CCH) P 95396 (1976).

[FN14] Taylor, Teaching an Old Law New Tricks: Rethinking Section 16, 39 Ariz. L. Rev. 1315, 1317 (1997).

[FN15] 15 U.S.C.A. § 78p(a)(1).

[FN16] 15 U.S.C.A. § 78p(a)(2)(B) to (C) (1994) (amended 2002).

[FN17] 15 U.S.C.A. § 78p(a)(2)(C).

[FN18] Disclosing insider trading also levels the playing field: when insiders trade stock, they send a strong signal to the market about the strength of the company for two reasons: (1) those in command of the company have access to the most and best information about the company; and (2) these insiders have the power to bring about the success or failure of the company's projects. A problem, however, is that insiders' trading information is conveyed to the market without any statement of reasons, so the market may misunderstand the reason for the trade. Taylor, Teaching an Old Law New Tricks: Rethinking Section 16, 39 Ariz. L. Rev. 1315, 1350-51 (1997).

[FN19] 15 U.S.C.A. § 78p(b).

[FN20] These statutes are often seen operating in conjunction—as the statute of limitations does for claims under Section 10(b) of the 1934 Act—with the statute of limitations triggered upon discovery to encourage diligent investigation and the statute of repose to provide an outer benchmark that eventually cuts off liability regardless of discovery.

[FN21] See Ochoa and Wistrich, The Puzzling Purposes of Statutes of Limitation, 28 Pac. L.J. 453, 460-69 (1997), for an excellent summary of the purposes of limitations periods.

[FN22] Carr-Consolidated Biscuit Co. v. Moore, 125 F. Supp. 423 (M.D. Pa. 1954).

[FN23] Litzler v. CC Investments, L.D.C., 362 F.3d 203, Fed. Sec. L. Rep. (CCH) P 92725 (2d Cir. 2004).

[FN24] Tristar Corp. v. Freitas, 84 F.3d 550, 551, 554, Fed. Sec. L. Rep. (CCH) P 99230 (2d Cir. 1996) .

[FN25] Simmonds v. Credit Suisse Securities (USA) LLC, 638 F.3d 1072, 1094-97 (9th Cir. 2011), cert. denied, 2011 WL 1343555 (U.S. 2011) and cert. granted, 2011 WL 1481302 (U.S. 2011); Roth v. Reyes, 567 F.3d 1077, 1082, Fed. Sec. L. Rep. (CCH) P 95244 (9th Cir. 2009); Kay v. Scientex Corp.,

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719 F.2d 1009, 1014–15, Fed. Sec. L. Rep. (CCH) P 99546 (9th Cir. 1983); *see also* Rosen ex rel. Egghead.Com, Inc. v. Brookhaven Capital Management, Co. Ltd., 179 F. Supp. 2d 330, 337–39, Fed. Sec. L. Rep. (CCH) P 91670 (S.D. N.Y. 2002); Donoghue v. American Skiing Co., 155 F. Supp. 2d 70, 74–75, Fed. Sec. L. Rep. (CCH) P 91547 (S.D. N.Y. 2001); Morales v. Executive Telecard, Ltd., Fed. Sec. L. Rep. (CCH) P 90238, 1998 WL 314734, *3-*4 (S.D. N.Y. 1998).

[FN26] Whittaker v. Whittaker Corp., 639 F.2d 516, Fed. Sec. L. Rep. (CCH) P 97871, 31 Fed. R. Serv. 2d 263, 67 A.L.R. Fed. 819 (9th Cir. 1981).

[FN27] Simmonds v. Credit Suisse Securities (USA) LLC, 638 F.3d 1072, 1099–1101 (9th Cir. 2011), cert. denied, 2011 WL 1343555 (U.S. 2011) and cert. granted, 2011 WL 1481302 (U.S. 2011) (Smith, J., concurring).

[FN28] Roth v. Reyes, 2007 WL 518621, *1 n.1 (N.D. Cal. 2007).

[FN29] Tyco Intern., Ltd. v. Kozlowski, Fed. Sec. L. Rep. (CCH) P 93242, 2005 DNH 68, 2005 WL 927014, *3-*4 (D.N.H. 2005).

[FN30] Roth v. Reyes, 567 F.3d 1077, 1083, Fed. Sec. L. Rep. (CCH) P 95244 (9th Cir. 2009).

[FN31] We have simplified the rules to compute the two-years for the purpose of this hypothetical but the timing rules under the Second Circuit's approach are more complex than we let on: According to the Second Circuit, one computes the tolling period based on the two-year limitations period "less the statutory grace period." Tristar Corp. v. Freitas, 84 F.3d 550, 554, Fed. Sec. L. Rep. (CCH) P 99230 (2d Cir. 1996). The statutory grace period now is two days. 15 U.S.C.A. § 78p(a)(2)(B) to (C).

[FN32] 15 U.S.C.A. § 78p(b).

[FN33] 28 U.S.C.A. § 1658(b)(2).

[FN34] 130 S. Ct. 1784, 1797 (2010).

[FN35] Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 360 n.5, 111 S. Ct. 2773, 115 L. Ed. 2d 321, Fed. Sec. L. Rep. (CCH) P 96034 (1991).

[FN36] *See, e.g.,* Holland v. Florida, 130 S. Ct. 2549, 2560, 177 L. Ed. 2d 130 (2010); Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95, 111 S. Ct. 453, 112 L. Ed. 2d 435, 1 A.D.D. 455, 54 Fair Empl. Prac. Cas. (BNA) 577, 55 Empl. Prac. Dec. (CCH) P 40397, 18 Fed. R. Serv. 3d 1 (1990); Hallstrom v. Tillamook County, 493 U.S. 20, 27, 110 S. Ct. 304, 107 L. Ed. 2d 237, 30 Env't. Rep. Cas. (BNA) 1425, 20 Envtl. L. Rep. 20193 (1989); Holmberg v. Armbrecht, 327 U.S. 392, 396-97, 66 S. Ct. 582, 90 L. Ed. 743, 162 A.L.R. 719 (1946); Bailey v. Glover, 88 U.S. 342, 22 L. Ed. 636, 1874 WL 17315 (1874).

[FN37] Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S. Ct. 582, 90 L. Ed. 743, 162 A.L.R. 719 (1946).

[FN38] *See* U.S. v. Beggerly, 524 U.S. 38, 48–49, 118 S. Ct. 1862, 141 L. Ed. 2d 32, 40 Fed. R. Serv. 3d 756, 28 Envtl. L. Rep. 21290 (1998) (rejecting equitable tolling in a case involving the Quiet Title

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Act (“QTA”) because “[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute” and “the QTA, by providing that the statute of limitations will not begin to run until the plaintiff ‘knew or should have known of the claim of the United States,’ has already effectively allowed for equitable tolling” (citations omitted)).

[FN39] Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363, 111 S. Ct. 2773, 115 L. Ed. 2d 321, Fed. Sec. L. Rep. (CCH) P 96034 (1991).

[FN40] Holland v. Florida, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010).

[FN41] Holland v. Florida, 130 S. Ct. 2549, 2561, 177 L. Ed. 2d 130 (2010).

[FN42] U.S. v. Beggerly, 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32, 40 Fed. R. Serv. 3d 756, 28 Envtl. L. Rep. 21290 (1998).

[FN43] *See, e.g.,* American Standard, Inc. v. Crane Co., 510 F.2d 1043, 1058, Fed. Sec. L. Rep. (CCH) P 94924 (2d Cir. 1974).

[FN44] “[]Section 16 compels disclosure (through Form 4) that is so clear that an insider's short-swing profits will be discovered without any investigation other than the putting together of two and two.” Litzler v. CC Investments, L.D.C., 362 F.3d 203, 208, Fed. Sec. L. Rep. (CCH) P 92725 (2d Cir. 2004).

[FN45] *See* 17 C.F.R. § 240.16a-1(a)(2).

[FN46] *See, e.g.,* Dessent, Weapons to Fight Insider Trading in the 21st Century: A Call for the Repeal of Section 16(b), 33 Akron L. Rev. 481 (2000) (calling for Section 16(b)'s repeal); Taylor, Teaching an Old Law New Tricks: Rethinking Section 16, 39 Ariz. L. Rev. 1315 (1997) (calling for Section 16(b)'s repeal).

[FN47] Judge Smith himself recognized this in his concurrence. *See* Simmonds v. Credit Suisse Securities (USA) LLC, 638 F.3d 1072, 1100 (9th Cir. 2011), cert. denied, 2011 WL 1343555 (U.S. 2011) and cert. granted, 2011 WL 1481302 (U.S. 2011).

[FN48] Cook and Feldman, Insider Trading Under the Securities Exchange Act, 66 Harv. L. Rev. 385, 414 (1953).

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39 NO 3 SECRLJ ART 1

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