No. 14-51055

In the United States Court of Appeals For the Fifth Circuit

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Guaranty Bank,

Plaintiff-Appellant

v.

MERRILL LYNCH PIERCE FENNER & SMITH, INCORPORATED; RBS SECURITIES INCORPORATED,

Defendants-Appellees.

Cons. with No. 14-51066

FEDERAL DEPOSIT INSURANCE CORPORATION
As Receiver for Guaranty Bank,

Plaintiff-Appellant,

v.

DEUTSCHE BANK SECURITIES, INCORPORATED;
GOLDMAN SACHS & COMPANY,

Defendants-Appellees.

Appeal from the U.S. District Court for the Western District of Texas, Austin

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BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that *Amicus Curiae* does not issue stock or have a parent corporation that issues stock.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is an association of hundreds of securities firms, banks and asset managers, including many of the largest financial institutions in the United States. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA's members operate and have offices in all fifty states. SIFMA has offices in New York and Washington, D.C., and is the United States regional member of the Global Financial Markets Association.[1]

In this action, the Federal Deposit Insurance Corporation ("FDIC") concedes that it did not bring its claims under the Texas Securities Act (the "TSA") within the period allowed by its five-year statute of repose. Defendants therefore moved for judgment on those claims on the pleadings because they are barred by that statute of repose. The FDIC responded that Defendants' motion should be denied based on a provision of 12 U.S.C. § 1821(d)(14) (the "FDIC Extender Statute") that was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). The FDIC Extender Statute extends the "statute of limitations" for certain claims bought by the FDIC. However, the

[1] This brief was not authored in whole or in part by counsel for any party, and no counsel or party other than *amicus curiae*, its members or its counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, in accordance with Fed. R. App. P. 29(a).

Statute clearly and unambiguously extends *only* the "statute of limitations" for the FDIC's state-law "contract" and "tort" claims, and not the statute of repose for its TSA claims. Accordingly, the District Court properly rejected the FDIC's Extender Statute argument and granted Defendants' motion. The court explained that the plain language of the FDIC Extender Statute and the United States Supreme Court's decision in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014), "compel[ ] the conclusion" that the TSA's statute of repose governs the FDIC's TSA claims and requires the dismissal of those claims. ROA.14-51055.1761.

SIFMA and its members have a strong interest in this appeal for three principal reasons.

First, the Supreme Court in *CTS* enunciated clear and categorical principles on the important questions of whether the Congressional extension of "statutes of limitations" for certain state law claims also extends statutes of repose for those claims, and whether the clear and unambiguous text of a Congressional statute should yield to a lower court's view of the purpose of the statute. Those statutory principles, which the court below followed correctly in this action, have a significant impact on SIFMA's members and the securities markets because they minimize uncertainty, which is the primary purpose of statutes of repose. The FDIC's arguments on this appeal, however, would undermine those principles.

Second, SIFMA and its members rely on the fair, consistent and timely enforcement of federal and state securities laws to deter and remedy wrongdoing. One key component of that enforcement is the consistent application of the statutes of repose that are a critical part of those laws and serve purposes wholly distinct from statutes of limitation. By establishing a definitive outside time limit for claims that cannot be tolled, statutes of repose provide the markets with a measure of certainty and finality, set a time after which market participants are free from the fear of lingering liabilities and stale claims, and ensure that claims can be adjudicated based on evidence that is fresh. This is important for financial planning and operations. The unwarranted narrowing of such statutes would undermine the finality upon which the orderly operation of the markets depends.

Third, SIFMA and its members recognize the importance of the application of federal and state securities and other laws as they are written by Congress and state legislatures, not based on subjective assertions of legislative purpose that do not account for the often competing objectives that lawmakers weigh in drafting particular provisions. That is essential to ensure predictability. Predictability is crucial for business planning and the effective and efficient functioning of the securities markets because it allows participants to understand

how to comply with the law and how the law will be enforced. SIFMA often appears as *amicus curiae* in appeals that implicate these concerns.

This case has far-reaching significance for SIFMA's members and for the securities industry as a whole. The FDIC, the National Credit Union Administration Board ("NCUA") and the Federal Housing Finance Agency ("FHFA") have commenced numerous actions against financial institutions concerning the sale of residential mortgage-backed securities that seek to apply the same or similar extender statutes to permit them to assert federal and state law securities claims based on the same incorrect construction that they urge on this appeal.

SUMMARY OF ARGUMENT

This case concerns the question of whether extender statutes that expressly apply only to "statutes of limitations" for state law "contract" and "tort" claims should also be applied to statutes of repose for state statutory securities law claims. SIFMA supports Defendants' argument, and the District Court's holding, that the FDIC Extender Statute should be construed in accordance with its plain language and the Supreme Court's prior rulings and thus should not apply to statutes of repose. SIFMA submits this brief to elaborate on the reasons why the ruling below should be affirmed, and why the FDIC Extender Statute should not be expanded beyond the limited scope expressly provided by Congress.

In 1989, Congress enacted FIRREA, which added the FDIC Extender Statute that provides as follows:

> (14) *Statute of limitations* for actions brought by conservator or receiver
>
> (A) In general
>
> Notwithstanding any provision of any contract, *the applicable statute of limitations* with regard to any action brought by the [FDIC] as conservator or receiver shall be—
>
> (i) in the case of any contract claim, the longer of—
>
> (I) the 6-year period beginning *on the date the claim accrues*; or
>
> (II) *the period applicable under State law*; and
>
> (ii) in the case of *any tort claim* . . ., the longer of—
>
> (I) the 3-year period beginning *on the date the claim accrues*; or
>
> (II) *the period applicable under State law*.
>
> (B) Determination of the date on which a claim accrues
>
> For purposes of subparagraph (A), the date on which the *statute of limitation* begins to run on any claim described in such subparagraph shall be the later of—
>
> (i) the date of the appointment of the [FDIC] as conservator or receiver; or
>
> (ii) the date *on which the cause of action accrues*.

12 U.S.C. § 1821(d)(14) (emphasis added).

The FDIC Extender Statute is clear and unambiguous. It extends only the "statute of limitations" for state law "contract" and "tort" claims brought by the

FDIC as a conservator or receiver. Statutes of repose are not mentioned. Nothing in the Extender Statute extends the statute of repose for any claims.

There is nothing novel about overriding a State's procedural statute of limitations while continuing to give effect to its substantive statute of repose. The Supreme Court explained in *CTS* that Congress did just that in 1986 when it amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") to extend the "commencement date" of the statute of limitations but not the repose period for certain environmental actions under State law. 134 S. Ct. at 2191. Congress enacted the FDIC Extender Statute only three years later. As the District Court found, "a faithful application of [*CTS*]'s logic to the FDIC Extender Statute compels the conclusion the TSA's statute of repose is not preempted, and operates to bar the FDIC's untimely claims." ROA.14.51055.1750.

In *CTS*, the Supreme Court addressed the CERCLA extender provision, Section 9658, which, in language that is in all material respects similar to the FDIC Extender Statute, extends statutes of limitations for state-law tort claims by persons exposed to a toxic contaminant. The Supreme Court, like this Court in *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005), found that Section 9658 extends *only* statutes of limitations and *not* statutes of repose. The District Court in this case correctly held that the same

textual language, Congressional intent, and pertinent public policies require the same outcome here.

If statutes are instead interpreted based on the assumption that Congress does not understand critical distinctions between terms (such as between statutes of limitations and statutes of repose), and based on subjective judicial views of how best to accomplish legislative purposes, there is no limit to the manner in which statutes may be misconstrued. That would undermine the bedrock principle of predictability upon which SIFMA's members and all market participants rely. It is vital to the securities industry and financial markets that applicable laws are construed and applied as enacted by Congress and state legislatures and that statutes of repose are strictly enforced. This Court should affirm the decision below.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE FDIC EXTENDER STATUTE AND THE SUPREME COURT'S DECISION IN *CTS* REQUIRE THE AFFIRMANCE OF THE DECISION BELOW

A. The Supreme Court's Decision in *CTS* and the Plain Language of the FDIC Extender Statute Establish that the Statute Applies Only to "Statutes of Limitation" and Does Not Displace Statutes of Repose

In *CTS*, the Supreme Court resolved a division among the lower courts as to whether Congressionally-enacted extender provisions that expressly apply to statutes of limitations also displace statutes of repose. The court held that

CERCLA's extender provision does *not* displace statutes of repose. The court based its ruling primarily on the "natural reading of [CERCLA's] text" which — like the FDIC Extender Statute — refers only to statutes of limitations and contains other textual features that are incompatible with its application to statutes of repose. 134 S. Ct. at 2188. This Court had previously reached the same conclusion that the "plain language" of CERCLA's extender provision preempts state statutes of limitations, but not statutes of repose. *Burlington*, 419 F.3d at 362. These rulings, applied to the plain language of the FDIC Extender Statute, which is in all material respects similar to the CERCLA extender statute, require the affirmance of the decision below dismissing the FDIC's TSA claims.

The Supreme Court has long emphasized that "the starting point for interpreting a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The District Court correctly applied that instruction to the FDIC Extender Statute, and followed the Supreme Court's logic and analysis in *CTS* concerning the textually similar CERCLA extender statute, in finding that the FDIC's claims are time-barred.

There is no dispute that the TSA contains a statute of repose. Article 581-33(H)(2)(b) clearly states that claims can "in no event" be brought

"more than five years after the sale" of the securities at issue. *Williams v. Khalaf*, 802 S.W.2d 651, 654 n.3 (Tex. 1990). This Court has ruled that a statute of repose, such as the one at issue here, "abolishes the cause of action." *Servicios-Expoarma, C.A. v. Indus. Mar. Carriers, Inc.*, 135 F.3d 984, 989 (5th Cir. 1998). "'Unlike a statute of limitations' a statute of repose creates a substantive right to be free from liability after a legislatively determined period." *Burlington*, 419 F.3d at 363 (citation and internal quotation marks omitted).

There is also no dispute that the FDIC Extender Statute, like the extender provision at issue in *CTS*, refers many times to "statute[s] of limitations" but not to statutes of repose. *CTS* explained the "critical distinction" between those two concepts, and concluded that Congress was well aware of the difference by the time the CERCLA extender statute was enacted in 1986, yet chose not to refer to statutes of repose in that provision. 134 S. Ct. at 2186. As the court below found, that awareness "can fairly be imported to Congress three years later when it enacted" the FDIC Extender Statute. ROA.14-51055.1760. In *In re Countrywide Fin. Corp. Mort.-Backed Secs. Litig.*, 966 F. Supp. 2d 1031, 1039 (C.D. Cal. 2013), the court observed that a "search of the Congressional record from 1985 until the enactment of FIRREA reveals at least forty-four separate uses of the phrase 'statute of repose' across twenty-seven different statements by members of Congress." The court concluded that these statements "both prior to and

contemporaneous with the enactment of FIRREA suggest that Congress understood the meaning of the term 'statute of repose' but nevertheless failed to use it in the [FDIC] extender statute." *Id.* at 1037. Similarly, in *FDIC v. Chase Mtge. Fin. Corp.*, No. 12 Civ. 6166(LLS), 2014 WL 4354671, at *4 (S.D.N.Y. Aug. 29, 2014), the court explained that "when faced with a statute which presented both a statute of limitations and a statute of repose, Congress chose language which focused on and changed the statute of limitations, and left the statute of repose untouched. That gives no support to the FDIC's argument that it intended to replace both." Thus, the Supreme Court's strict statutory construction in *CTS*, applies with equal or greater force here. Congress, in making a similar choice to refer only to statutes of limitations in the FDIC Extender Statute, did *not* intend to displace statutes of repose.[2]

CTS teaches that the FDIC Extender Statute does not apply to statutes of repose for several additional reasons. *First*, *CTS* held that CERCLA's use of the

[2] The cases on which the FDIC relies do not detract from this analysis. In *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014), cert. denied, __ S. Ct. __, No. 14-379, 2015 WL 132974 (Jan. 12, 2015), which involved an extender statute that is virtually identical to the FDIC Extender Statute, the Tenth Circuit reached an incorrect result because it failed properly to take into account the Supreme Court's decision in *CTS* and the substantial similarities between the NCUA and CERCLA extender statutes, and mistakenly relied on generalized pronouncements about FIRREA's remedial purpose to override the extender statute's plain text. Similarly, in *FDIC v. Rhodes*, 336 P.3d 961 (Nev. 2014), the Nevada Supreme Court, in a 4-3 decision, improperly relied on superficial differences between the CERCLA and FDIC extender statutes and failed even to address *CTS's* holding that the absence of any reference to "statute[s] of repose" is "instructive" in determining that an extender statute applies only to statutes of limitations. 134 S. Ct. at 2185. Finally, the Second Circuit's decision in *Fed. Housing Fin. Agency v. UBS Americas, Inc.*, 712 F.3d 136 (2d Cir. 2013), was issued *before CTS* and thus does not reflect its clear teaching.

concept of "accrual" indicates that it was intended to apply only to statutes of limitations because that concept is not relevant to repose. 134 S. Ct. at 2187. That logic applies completely to the FDIC Extender Statute which also employs the concept of accrual. Under that Statute, the "statute of limitation . . . begins to run" on the date the FDIC becomes receiver or "the date on which the cause of action *accrues*." 12 U.S.C. § 1821(d)(14)(B) (emphasis added). *See Chase Mtge. Fin. Corp.*, 2014 WL 4354671, at *4 ("The concept of accrual, which is central to the [FDIC extender statute], is wholly absent from the 1933 Act's statute of repose.").

Second, CERCLA, like the FDIC Extender Statute, "describe[s] the covered [time] period in the singular," not the plural as would be expected if it applied both to the statute of limitations and the statute of repose. *CTS*, 134 S. Ct. at 2186. CERCLA's Section 9658 refers to "the applicable limitations period," "such period" and "the statute of limitations established under State law," 42 U.S.C. § 9658(a)(1) & (2), and the FDIC Extender Statute makes "the applicable statute of limitations" the longer of the period mandated by the statute or "the period applicable under State law." Thus, the Supreme Court's finding that CERCLA's reference to a single covered time period "would be an awkward way to mandate the pre-emption of two different time periods with two different purposes," *CTS*, 134 S. Ct. at 2187, is equally applicable to the FDIC Extender Statute.

Third, CERCLA, like the FDIC Extender Statute, refers to existing actions. The Statute defines "the applicable statute of limitations" for certain claims "with regard to any *action* brought by" the FDIC. 12 U.S.C. § 1821(d)(14)(A) (emphasis added). The Supreme Court explained in *CTS* that CERCLA's reference to a "civil action" "presupposes that a [covered] civil action exists" and is inconsistent with a statute of repose, which "can prohibit a cause of action from coming into existence." 134 S. Ct. at 2187. Accordingly, consistent with *CTS*, the District Court was correct in its finding that the similar language of the FDIC Extender Statute was designed "to encompass only statutes of limitations," which generally begin to run after a cause of action accrues. ROA.14.51055.1754.

The FDIC argues that the plain language of the FDIC Extender Statute, its similarities to CERCLA, and the Supreme Court's logic in *CTS*, should give way to the FDIC's parochial pronouncements about the remedial purpose of the Statute. Br. 38-42. That position is untenable because it ignores the fundamental nature of the legislative process. When Congress crafts complex legislation, it inevitably balances competing policy goals. For example, CERCLA was concerned with the laudable goals of environmental remediation, addressing public health threats, and providing for liability of persons responsible for hazardous waste. FIRREA was intended, among other things, "to reform,

recapitalize, and consolidate the Federal deposit insurance system," as well as to "enhance the regulatory and enforcement powers of Federal regulatory agencies" for financial institutions. 135 Cong. Rec. S10182-01, 101st Congress, First Session, 1989 WL 193738, (Aug. 4, 1989). However, the Supreme Court in *CTS* rejected the argument that such laudable goals – or judicial views as to how they are best achieved – can override the plain language of a statute. Instead, the court reaffirmed the fundamental principle that "Congressional intent is discerned primarily from the statutory text." 134 S. Ct. at 2185.

As the Supreme Court explained in *CTS*, "almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem," but "no legislation pursues its purposes at all costs." *Id.* (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)). Indeed, it has been a dominant theme of the Supreme Court in recent terms that legislation must be enforced in accordance with its plain language and not according to a judicial assessment of how best to effectuate a perceived legislative purpose. *See, e.g., Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (applying "plain text" of the federal bank fraud statute, which does not require proof of intent to defraud a financial institution, even though that extends its coverage "to a vast range of fraudulent schemes, thus intruding on the historic criminal jurisdiction of the States"); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196,

1199-1200 (2013) ("under the plain language of Rule 23(b)(3)," plaintiffs in securities fraud class actions are not required to prove materiality at the class-certification stage even though "certain 'policy considerations' militate in favor of requiring precertification proof of materiality").[3] This Court has also emphasized the importance of this approach to statutory construction. *See Burlington*, 419 F.3d at 362 ("In cases involving statutory construction, a court begins with the plain language of the statute. A court assumes that the legislative purpose of a statute is expressed by the ordinary meaning of the words used.").

The District Court likewise rejected the FDIC's argument that "clear statutory text should be massaged to mean something else in order to advance the generalized goal of the statute." ROA.14-51055.1760. The compromises Congress reached in trying to achieve its goals are reflected in the language it enacted. As the Supreme Court explained in *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986),

[3] *See also Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 1999-2000, 2006 (2012) (the "ordinary meaning" of 28 U.S.C. § 1920, which awards costs for "compensation of interpreters," excludes the cost of document translation even though "it would be anomalous to require the losing party to cover translation costs for spoken words but not for written words"); *Hall v. United States*, 132 S. Ct. 1882, 1886, 1893 (2012) (under a "plain and natural reading" of Bankruptcy Code § 503(b), the phrase "any tax . . . incurred by the estate" does not cover tax liability resulting from individual debtors' sale of a farm even though "there may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable"); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1887, 1890, 1895 (2011) (the word "report" in the False Claims Act's public disclosure bar "carries its ordinary meaning" and thus includes responses to FOIA requests even though this permits potential defendants to "insulate themselves from liability by making a FOIA request for incriminating documents").

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

"Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

Thus, when the Ninth Circuit recently limited the statute of repose in Section 16(b) of the Securities Exchange Act of 1934 based on its view of the policy behind the statute, instead of applying its plain language, the Supreme Court reversed. The Supreme Court's explanation is instructive as to why the FDIC Extender Statute should not be applied to statutes of repose here:

> 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. The text of Section 16 simply does not support [such a] rule. . . . [Respondent] disregards the most glaring indication that Congress did not intend that the limitations period be categorically tolled until the statement is filed: The limitations provision does not say so.

Credit Suisse Sec. (USA) LLC v. Simmonds, 132 S. Ct. 1414, 1419-20 (2012).

The Supreme Court has repeatedly reminded courts not to "improve" or "rewrite a statute because they might deem its effects susceptible of improvement" to carry out perceived legislative purposes. *Badaracco v. Comm'r*, 464 U.S. 386, 398 (1984). Untethering statutory construction from the plain language of the statute, and relying instead on subjective judicial speculation about how best to accomplish Congressional policy concerns would infringe on the role of our elected legislators. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (declining to "read an absent word into the statute" out of "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill."); *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them. . . . [T]he text . . . may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted.").

Failing to follow express statutory language would create great uncertainty as to how laws will be interpreted and enforced. SIFMA strongly urges that the construction of the FDIC Extender Statute should begin and end with its plain and unambiguous language.

B. The Plain Language of the FDIC Extender Statute Is Limited to State Common Law Contract and Tort Claims and Does Not Apply to Statutory Claims Such as Those Under the Texas Securities Act

The FDIC Extender Statute does not apply to the FDIC's TSA claims for another independent reason. The plain language of the Statute refers only to state-law "contract" and "tort" claims, 12 U.S.C. § 1821(d)(14)(A), and not to state statutory claims. Contrary to the FDIC's arguments, the FDIC Extender Statute's statement that it applies to "any *action* brought by" the FDIC does not have a broad displacing effect because it does not mean that it applies to every *claim* asserted in such actions. 12 U.S.C. § 1821(d)(14)(A) (emphasis added).[4]

Congress's distinction in the text of the FDIC Extender Statute between "actions," and "claims" within those actions, demonstrates that it did not treat those words as synonyms. The Statute refers to and modifies the statutes of limitations for only two types of *claims* — "tort claim[s]" and "contract claim[s]" — and only to the extent those *claims* arise "under State law." *Id.* It is also

[4] The FDIC argues that the word "any" has an expansive meaning (Br. 18-19), but that word modifies the word "action," not "claim" and "must 'be limited' in [its] application 'to those objects to which the legislature intended [it] to apply.'" *Small v. United States*, 544 U.S. 385, 388 (2005). Moreover, "any" "can and does mean different things depending upon the setting." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004). It can "never change in the least [] the clear meaning of the phrase selected by Congress…." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012). Accordingly, courts commonly interpret its meaning in the context in which the word is used. *See, e.g.*, *Nixon,* 541 U.S. at 132 ("any entity" refers only to private and not public entities). The cases the FDIC cites on this point are not to the contrary. They interpreted the relevant statutory language in accordance with its plain meaning and properly limited the application of the word "any" to the object identified in the statute. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008) ("any" "other law enforcement officers" means "law enforcement officers of whatever kind").

apparent that Congress did not and could not have intended that the Statute apply to any other claims because the Statute does not say *how* the statute of limitations for any other claim should be changed. The text therefore provides no basis to read the Statute as applying to any other claim.[5]

Thus, since the FDIC's claims under the TSA are statutory claims, and indeed *sui generis* statutory claims, not "tort" or "contract" claims, the FDIC Extender Statute does not apply to them. *See Burnett v. S.W. Bell Tel., L.P.*, 151 P.3d 837, 843 (Kan. 2007) (claim under ERISA § 510 is not a tort); *Benedetto v. PaineWebber Grp., Inc.*, No. 96-3401, 1998 U.S. App. LEXIS 21426, at *11 (10th Cir. Sept. 1, 1998) (unpublished) (distinguishing securities and tort claims: "The statute of limitations on Kansas securities law and common law tort actions runs

[5] Congress further demonstrated its intent to apply the FDIC Extender Statute narrowly by extending it only to state law "contract" and "tort" claims, in contrast to 28 U.S.C. § 2415(a), which also applies to claims "founded upon" a tort or a contract. The absence in the FDIC Extender Statute of "founded upon" language — which has been held, in the application of Section 2415, to invite analogies between statutory claims and tort or contract claims — reflects Congress's decision to limit the scope of the Extender Statute to the state common law contract and tort claims to which it refers. *See Johnson v. United States*, 225 U.S. 405, 415 (1912) ("A change of [statutory] language is some evidence of a change of purpose."). Although a statutory claim may be "founded upon" a contract or tort, that does not mean a particular statutory claim is a "tort" or "contract" claim. In fact, numerous courts have ruled to the contrary. *See*, *e.g.*, *In re Zilog, Inc.*, 450 F.3d 996, 998 (9th Cir. 2006); *Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1127 (2d Cir. 1989). Indeed, even Courts applying the broader language of Section 2415 have declined to apply it to *sui generis* statutory claims that are not grounded on common law claims. *See*, *e.g.*, *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 158-59 (7th Cir. 1987) (claim under Surface Mining Control and Reclamation Act for reclamation fees); *United States v. Palm Beach Gardens*, 635 F.2d 337, 339-40 (5th Cir. 1981) (claim under Hill-Burton Act for recovery of federal funds used in construction of non-profit hospital); *United States v. Lutheran Med. Ctr.*, 680 F.2d 1211, 1214 (8th Cir. 1982) (claim under Community Mental Health Center Act to recover federal grant).

for three and two years, respectively…"); *Malley-Duff & Assoc., v. Crown Life Ins. Co*., 792 F.2d 341, 353 (3d Cir. 1986) ("civil RICO is truly *sui generis* and that particular claim cannot be readily analogized to causes of action known at common law") *aff'd*, 483 U.S. 143 (1987); *Chevron Chem. Co. v. Voluntary Purchasing Grp. Inc.*, 659 F.2d 695, 702 (5th Cir. 1981) (because the Lanham Act "created a *sui generis* federal statutory cause of action," common law trade dress infringement precedent was not controlling); *Garcia v. Overland Bond & Inv. Co.*, 668 N.E.2d 199, 206-07 (Ill. App. Ct. 1996) (allowing Consumer Fraud Act statutory claim to proceed, notwithstanding "the general rule in Illinois . . . that corporate employees are not vicariously liable for *tortious* acts of [a] corporation in which they do not participate").

The distinction between statutory claims created by state legislatures and state common law contract and tort claims is important to SIFMA and its members. When state legislatures enact statutes that create new private securities law claims, the legislation reflects a balancing of public policies and competing factors. One of the key legislative determinations is the point at which such claims are deemed to be abolished by the passage of time, regardless of when the plaintiff's injury occurred or was discovered. That determination should not be overruled by statutes of limitations applicable to common law contract and tort claims.

II. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED TO PRESERVE STATE LEGISLATURE-ENACTED STATUTES OF REPOSE

Statutes of repose in general, and the TSA's statute of repose in particular, are critical to ensure certainty and finality in the securities industry. *CTS* explained the important rationale behind statutes of repose: "[s]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time'.…Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability." 134 S. Ct. at 2183. *See also Bradway v. Am. Nat'l Red Cross*, 992 F.2d 298, 301 n.3 (11th Cir. 1993) ("In passing a statute of repose, a legislature decides that there must be a time when the resolution of even just claims must defer to the demands of expediency."); *Caviness v. Derand Res. Corp*., 983 F.2d 1295, 1300 n.7 (4th Cir. 1993) (statute of repose "serves the need for finality in certain financial and professional dealings").

Statutes of repose also enable financial institutions to free up for productive use capital that might otherwise be tied up indefinitely in reserves to cover potential liability. In the context of federal securities claims, for example, the Securities and Exchange Commission has extolled the beneficial purposes of the applicable statute of repose: "The three-year provision assures businesses that are subject to liability under [Sections 11 and 12] that after a certain date they may

conduct their businesses without the risk of further strict liability for non-culpable conduct." Brief of the SEC, as Amicus Curiae at *8, *P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92 (2d Cir. 2004) (No. 02-7680), 2003 WL 23469697.

Statutes of repose relating to securities claims are critical for the additional reason that they protect market participants from "the problems of proof . . . that arise if long-delayed litigation is permissible." *Norris v. Wirtz*, 818 F.2d 1329, 1333 (7th Cir. 1987). They further prevent strategic delay by plaintiffs, who could otherwise seek "recoveries based on the wisdom given by hindsight" and the "volatile" prices of securities. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990). Instead, statutes of repose encourage prompt enforcement of the securities laws and serve cultural values of diligence. They also have the benefit of protecting new shareholders, bondholders and management who were not associated with a business at the time of challenged conduct from liability for that conduct.

By including a statutory repose period, it is clear that the Texas legislature intended the TSA to provide businesses with these same types of assurances and benefits. *See, e.g.*, *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 286-87 (Tex. 2010) ("In recognizing the absolute nature of a statute of repose, we have explained that 'while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of

repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.'"); *Burlington*, 419 F.3d at 363-64.

Allowing the FDIC's TSA claims here to proceed would undercut these important objectives. Long-dead TSA claims could be resurrected despite the contrary mandate of its statute of repose. Moreover, potential liability for such resurrected claims in connection with future bank failures may extend virtually indefinitely because claims may not even accrue under the FDIC Extender Statute until the FDIC is appointed as the receiver or conservator of the failed bank, an event that is untethered to any aspect of the alleged wrongdoing and could occur at any time.

The Supreme Court's decision and analysis in *CTS* have put to rest any question whether similar extender statutes apply to statutes of repose. The court below and other courts have recognized this. *See, e.g.*, *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig*., No. 12-CV-3279 (C.D. Cal. Dec. 8, 2014) ECF No. 196 ("the [FDIC] Extender Statute does not displace the [federal Securities] Act's statute of repose"); *FDIC v. Chase Mtge. Fin. Corp.*, No. 12 Civ. 6166 (LLS), 2014 WL 4354671, at *4 (S.D.N.Y. Sept. 2, 2014) (the FDIC Extender Statute does not displace Section 13's statute of repose); *see also NCUA v. Goldman Sachs & Co.,* No. 2:11-cv-6521-GW-JEM (C.D. Cal. July 11, 2013) ECF No. 159 (Wu, J.) (pre-*CTS* decision that 12 U.S.C. § 1787(b)(14) does not

displace statutes of repose), *interlocutory appeal pending*, No. 13-56851 (9th Cir.). These courts have recognized the critical importance of statutes of repose and refused to modify the substantive repose rights created by legislatures.

III. THERE IS NO PRESUMPTION IN FAVOR OF THE FDIC

The brief submitted by the NCUA and the FHFA as *amici curiae* argues for a "presumption" in favor of the construction of the FDIC Extender Statute that is proposed by government parties. *See* NCUA/FHFA Brief at 24-26. No such presumption should apply here for several reasons. *First*, the FDIC, as receiver for Guaranty Bank, is acting as a private plaintiff and is not entitled in that role to any presumption that may be available to the government. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994) (the FDIC steps into the "shoes" of a private plaintiff when it acts as a receiver). *Second*, such a presumption could apply only if the FDIC Extender Statute were ambiguous, but it is *not* ambiguous. Its plain language specifically applies only to "statute[s] of limitations" and does not refer to "statutes of repose" or statutory state law claims such as the FDIC's claims under the TSA. *Third*, a presumption should not be applied here to upset the balance of policy considerations discussed above.

CONCLUSION

For the foregoing reasons, the District Court's decision should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,106 words, exclusive of the corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of digital submission and this certificate of compliance, which are exempted by Fed. R. App. 32(a)(7)(B)(iii).

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Dated: February 25, 2015

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing, as submitted in digital form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with McAfee's VirusScan Enterprise 8.8 and, according to the program, is free of viruses. In addition, I certify that no privacy redactions were required under 5th Cir. Rule 25.2.13.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February 2015:

I presented *Amicus Curiae's* Brief to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record.

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