

12-3207-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

FEDERAL HOUSING FINANCE AGENCY, AS CONSERVATOR FOR
THE FEDERAL NATIONAL MORTGAGE ASSOCIATION AND
THE FEDERAL HOME LOAN MORTGAGE CORPORATION,
Plaintiff-Appellee,

—against—

UBS AMERICAS, INC., UBS REAL ESTATE SECURITIES INC., UBS SECURITIES, LLC,
MORTGAGE ASSET SECURITIZATION TRANSACTIONS, INC., DAVID MARTIN, PER
DYRVIK, HUGH CORCORAN AND PETER SLAGOWITZ,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION IN SUPPORT OF APPELLANTS AND IN
SUPPORT OF REVERSAL**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Securities Industry and Financial Markets Association has no parent company and has not issued any stock.¹

¹ All parties have consented to the filing of this brief. *Amicus curiae* hereby certifies that no counsel for a party authored this brief in whole or in part; no party or counsel for a party contributed money that was intended to fund preparation or submission of this brief; and no person other than *amicus curiae*, its members, and its counsel, contributed money that was intended to fund preparation or submission of this brief.

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association

(“SIFMA”) is an association of hundreds of securities firms, banks and asset managers. 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 has offices in New York and Washington, D.C., and is the United States regional member of the Global Financial Markets Association (GFMA).²

SIFMA and its members have a strong interest in this appeal for two principal reasons. First, they recognize the importance of the fair and timely enforcement of the federal securities laws to deter and remedy wrongdoing. One key component is the consistent application of the statutes of repose that are a critical part of those laws. Such statutes provide 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. Second, SIFMA and its members recognize the importance of the application of federal law as it is written by Congress, not based on subjective assertions of legislative purpose that do not take account of the often competing objectives that Congress weighs in drafting particular provisions. That is essential

² More information about SIFMA is available at www.sifma.org.

to ensure predictability. And predictability is a bedrock of business planning and the effective and efficient functioning of the securities markets because it allows SIFMA's members 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.

In this action, the Federal Housing Finance Agency ("FHFA") concedes that it did not bring its claims under the Securities Act of 1933 (the "Securities Act") within the period allowed by its statute of repose. However, the District Court construed a provision of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008) ("HERA") that clearly and unambiguously extends only the statutes of limitations for State law contract and tort claims brought by the FHFA as conservator or receiver (the "Extender Provision"), to allow the FHFA also to bring claims under the Securities Act beyond the period prescribed by its statute of repose. SIFMA and its members are concerned about this unwarranted elimination of repose with respect to such claims, about the unwarranted application of the Extender Provision to federal claims, including *sui generis* Securities Act claims that are not contract or tort claims, and that the District Court premised its decision on its own view of what would best serve the purpose of HERA.

This case has far-reaching significance not only for SIFMA's members but also for the securities industry as a whole. This action is one of seventeen commenced by the FHFA against various financial institutions involved in the sale of residential mortgage backed securities ("RMBS"). The FHFA has filed fifteen of those actions in the Southern District of New York, and all seek to apply the Extender Provision to Securities Act claims and to supersede its statute of repose. Appellants' Special Appendix ("SPA") at 2, n.1. More than \$200 billion in RMBS are at issue in these FHFA actions. In addition, the Federal Deposit Insurance Corporation and National Credit Union Administration, in their capacity as conservators or receivers, have begun filing actions in which they seek to apply similar extender provisions in other statutes to Securities Act claims, based on the same incorrect construction used by the Court below.

PRELIMINARY STATEMENT

The Extender Provision should be construed in accordance with its plain language as not applying to statutes of repose, federal claims, or *sui generis* statutory claims (whether federal or State). SIFMA submits this brief to elaborate on the reasons why the ruling below should be reversed, and why HERA's Extender Provision should not be expanded beyond the limited scope expressly provided by Congress. It is important to the securities industry and financial

markets that securities and related laws are construed and applied as they are enacted by Congress and that statutes of repose are enforced.

Congress long ago included in Section 13 of the Securities Act both a statute of limitations and a clear and unambiguous statute of repose for claims under Sections 11 and 12(a)(2):

No action shall be maintained to enforce any liability created under section 77k or 77l(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(a)(1) of this title, unless brought within one year after the violation on which it is based. *In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale.*

15 U.S.C. § 77(m) (emphasis added).

In 2008, Congress enacted HERA's Extender Provision:

(12) *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 Agency 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 *on which 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
on which 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 limitations begins to run on any claim
described in such subparagraph shall be the later of—

(i) the date of the appointment of the Agency as
conservator or receiver; or

(ii) the date *on which the cause of action accrues*.

12 U.S.C. § 4617(b)(12) (emphasis added). This provision too is clear and unambiguous. It extends the statutes of limitations for State law contract and tort claims brought by the FHFA as a conservator or receiver. Nothing in the text extends the statute of repose for any claims, nor the statute of limitations for any federal claims or federal or State statutory claims. Congress’s repeated use of the phrase “federal or state” in other provisions of HERA shows that when Congress wanted the statute to cover both federal and State law, Congress did so expressly. And as the Department of Justice (“DOJ”) recently explained in support of a statutory construction virtually identical to that urged by Appellants here, “there is nothing novel about overriding a State’s statute of limitations while continuing to give effect to its statute of repose,” Congress did just that in 1986 when it extended the “commencement date” of the limitations period but not the repose period for

certain environmental actions under State law, but not federal law, more than twenty years before Congress enacted HERA. *See* DOJ *amicus curiae* brief in *Waldburger v. CTS Corp.*, No. 12-1290 (4th Cir. Aug. 16, 2012) (“DOJ *Amicus* Brief”).

The District Court erred in failing to follow the plain language of the Extender Provision and to recognize that it modifies only “the applicable statute of limitations” for State law contract and tort claims brought by the FHFA as conservator or receiver. The Court’s determination that Congress intended to refer to statutes of repose when it mentioned only “statute[s] of limitations” overlooks that Congress has repeatedly shown that it understands the important conceptual difference between the two. If statutes are interpreted based on the assumption that Congress does not understand critical distinctions between terms, there is no limit to the manner in which statutes may be construed.

Moreover, including federal claims and *sui generis* statutory claims that are neither contract nor tort claims within the scope of the Extender Provision would have the perverse and clearly unintended result of *shortening* the time for the FHFA to assert certain federal statutory claims. Nothing in the Extender Provision’s text (or legislative history) supports such an untoward result, and Congress could not possibly have intended it. Congress deliberately extended the minimum length of statutes of limitations for the FHFA’s State law contract and

tort claims to make it uniform, and in doing so Congress preserved both the existing repose for defendants and the federal statutes of limitations that already apply nationwide. If Congress wanted to do more it knew how to do so and would have done so. Accordingly, the District Court's denial of Appellants' motion to dismiss the FHFA's Securities Act claims should be reversed.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE EXTENDER PROVISION ESTABLISHES THAT IT IS LIMITED TO STATUTES OF LIMITATIONS, NOT STATUTES OF REPOSE

A. The Extender Provision Does Not Apply to Statutes of Repose

SIFMA's members and other market participants rely on the application of the securities and other laws as they are plainly drafted. When courts do so, all market participants benefit from predictability and certainty. However, when courts rewrite statutes based on intuitions as to what Congress would have preferred to have said, uncertainty and arbitrary decisions result.

Here, the District Court's application of the Extender Provision to statutes of repose is inconsistent with the text of the statute, which refers only to statutes of limitations. Accordingly, the Court's ruling violates the first rule of statutory construction, that "our starting point must be the language employed by Congress." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U. S. 330, 337 (1979)). If a "statute is unambiguous" the

court's sole function is to enforce it according to its terms. *United States v. Peterson*, 394 F.3d 98, 107 (2d Cir. 2005). There is neither a need nor a basis to resort to "legislative history and other tools of interpretation." *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999).

The Extender Provision clearly and unambiguously does not apply to statutes of repose because it does not even mention them. Congress also demonstrated its intention that the Provision not apply to statutes of repose in an additional way. Congress directed that "the applicable statute of limitations" is the longer of the "the 3-year period beginning on the date on which the *claim accrues*" or "the applicable period under State law." 12 U.S.C. § 4617(b)(12) (emphasis added). That could not refer to statutes of repose because such statutes bar claims absolutely, regardless of when the claims accrue. *See Burlington Northern & Santa Fe Ry. v. Poole Chemical Co.*, 419 F.3d 355, 363 (5th Cir. 2005) ("A statute of repose . . . abolishes the cause of action after the passage of time even though the cause of action may not have yet accrued").

The District Court acknowledged that (i) the Extender Provision references only "statutes of limitations" (not statutes of repose), (ii) the task of construing the Provision "must 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose,'" (iii) "[i]f a statute's language is unambiguous, 'the sole

function of the courts is to enforce it according to its terms,” and (iv) statutes of limitations and statutes of repose are “at least in theory, conceptually distinct.” SPA-9-10 (quoting *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004); *Katzman v. Essex Waterfront Owners LLC*, 660 F.3d 565, 568 (2d Cir. 2011)). But the Court nevertheless concluded that it was unclear whether Congress intended its reference to “statute[s] of limitations” in the Extender Provision also to apply to statutes of repose because “Congress, the courts and learned commentators regularly use the term ‘limitations’ to encompass both types of timeliness provision.” SPA-11. The Court then ruled, based on its own policy judgment as to what would achieve the “congressional purpose” of maximizing the ability of the FHFA to put government sponsored entities (“GSEs”) in a sound and solvent condition, that the term “statute of limitations” in the Extender Provision should also apply to statutes of repose. *Id.* at 15.

However, as the DOJ recently explained in its *amicus* brief in support of the Government’s position that, as Appellants argue here, an extender provision that is limited to statutes of limitations should not be extended to statutes of repose, there is no ambiguity in Congress’s use of the distinct concepts of statutes of limitations and statutes of repose:

Plaintiffs are mistaken to suggest that there was ambiguity in the use of the terms “statute of repose” and “statute of limitations” when Congress amended

CERCLA in 1986. The distinction between these terms was well established by then.

* * *

The definition of “statute of limitations” was well established by 1986, when Congress enacted 42 U.S.C. § 9658. Significantly, the report issued pursuant to section 301(e) of the original CERCLA statute . . . expressly recognized the difference between statutes of limitations and statutes of repose. Far from suggesting that the two terms were synonymous or interchangeable, that Report noted that statutes of repose can “have the same effect as some statutes of limitation,” insofar as each can eliminate a plaintiff’s right to proceed before the plaintiff discovers his injury.

DOJ *Amicus* Brief at 9, 16 (emphasis added). The Government’s position is completely inconsistent with FHFA’s argument here concerning the Extender Provision. Similarly, in *Nat’l Credit Union Admin. Bd. v. RBS Securities, Inc.*, No. CV 11-5887-GW (C.D. Cal.) (Order issued Jan. 30, 2012), the Court observed that it “cannot be disputed” that “there was an important distinction between statutes of limitation and statutes of repose in the nation’s securities legislation by 1989.” Joint Appendix (“JA”)-706.

Congress has repeatedly demonstrated that it appreciates the distinction between “statutes of limitations” and “statutes of repose,” confirming that its use of one term does not include the other, and that it is fully capable of identifying a statute of repose when it intends to do so. The Addendum to this

brief lists dozens of examples from the Congressional record and committee reports. *See* Addendum at A1-90.

The two Acts of Congress cited by the District Court are not to the contrary. The Court observed that Section 13 of the Securities Act is entitled “Limitations of Actions” and includes a statute of repose. But that is not relevant to the construction of the term “*statute of limitations*,” as Section 13 does not refer to its statute of repose as a “statute of limitations” but rather as a “limitation of actions.” *See* 15 U.S.C. § 77(m). While “the term ‘limitations period’ is commonly understood . . . to encompass traditional statutes of limitations as well as rules and statutes of repose,” there is “an important difference between the terms ‘limitations period’ and ‘statute of limitations.’” *Abrams v. Ciba Specialty Chem. Corp.*, 659 F. Supp. 2d 1225, 1233-34 (S.D. Ala. 2009). The Court below also stated that a statute of repose in the Securities Exchange Act of 1934 was modified by a provision entitled “Statute of limitations.” SPA-12. But the title of the modified provision was “Time limitations on the commencement of civil actions arising under Acts of Congress,” not “statute of limitations.” 28 U.S.C. § 1658.³

³ The District Court noted that the Merriam-Webster Collegiate Dictionary’s definition of “statute of limitations” generally includes any limitation of time to enforce legal rights. SPA-77. However, that reference to a single lay dictionary does not overcome the fact that Congress (and the courts) understand that statutes of repose are not statutes of limitations. Far more relevant is Black’s Law Dictionary, which defines a “statute of repose” as distinct from a “statute of limitations.” Black’s Law Dictionary, 1450-51 (8th ed. 1999) (“Statute of

Congress's decision not to mention statutes of repose in the Extender Provision is particularly important because of the critical role of statutes of repose in general and the Securities Act's statute of repose for strict liability claims in particular. Statutes of repose serve the "economic best interests of the public as a whole" by providing "substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989); *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 Resources Corp.*, 983 F.2d 1295, 1300 n.7 (4th Cir. 1993) (a statute of repose "serves the need for finality in certain financial and professional dealings"); *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188, 189 (Utah 1989) ("Statutes of repose promote the public goal of certainty and finality in the administration of commercial transactions");

limitations. 1. A law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)..." "Statute of repose. A statute barring any suit that is brought after a specified time since the defendant acted. . . even if this period ends before the plaintiff has suffered a resulting injury. *Cf.* State of Limitations.")

Aldrich v. ADD Inc., 770 N.E.2d 447, 454 (Mass. 2002) (“In establishing the [statute of repose], the Legislature struck what it considered to be a reasonable balance between the public’s right to a remedy and the need to place an outer limit on the tort liability of [defendants.]”) The DOJ recently underscored these salutary purposes:

The absolute nature of statutes of repose, and their definitive starting point, work together to afford providers of essential services with an assurance that no lawsuit can be filed after the passage of a fixed amount of time, regardless of the timing of the injury to the plaintiff or its discovery. . . . Statutes of repose address the concern that defendants could thus be exposed to liability indefinitely for actions in the distant past, regardless of the length of the statute of limitations.

DOJ *Amicus* Brief at 12-13.

Similarly, this Court has explained that “Congress included the statutes of repose [in Section 13 of the Securities Act] because of fear that lingering liabilities would disrupt normal business and facilitate false claims.”

P. Stolz Family P’ship L.P. v. Daum, 355 F.3d 92, 105 (2d Cir. 2004) (quoting *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987); *see also Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990) (citing the ABA task force’s conclusion that it is “inescapable” that Congress intended that equitable tolling not apply to the statute of repose because of policy concerns in favor of finality). The SEC also extolled the beneficial purposes of the Securities Act’s statute of repose

in its *amicus curiae* brief in *P. Stolz*, No. 02-7680, 2003 WL 23469697, at *8 (2d Cir. Sept. 8, 2003): “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.” It also protects new shareholders, bondholders and management who were not associated with a business at the time of challenged conduct from liability for that conduct.

In addition, statutes of repose protect market participants from the problems of proof that can arise when untimely claims are brought, and provide market participants with clear guidance as to how long documents must be retained in order to defend against securities claims, and thereby reduce the need for unnecessary protective measures and associated costs. *See Norris*, 818 F.2d at 1333 (“The statute of repose is designed to deal with the problems of proof — and the invitation to file claims easier to advance than to refute — that arise if long-delayed litigation is permissible.”) Moreover, statutes of repose prevent strategic delay by investors, who could otherwise seek “recoveries based on the wisdom given by hindsight” and the “volatile” prices of securities. *Short*, 908 F.2d at 1392. Instead, statutes of repose encourage prompt enforcement of securities laws and serve cultural values of diligence.

The two authorities cited by the District Court do not stand for the proposition that a court's view of the best way to achieve Congressional policy concerns should trump Congress's own conclusions as expressed in specific statutory language. The Court cited the statement that "context matters" in *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1681 (2012), SPA-10, but the statute that was being construed in that case was clearly ambiguous. Nothing in that opinion suggests that the Supreme Court was abandoning its longstanding rule that unambiguous phrases should be applied based on their plain meaning. To the contrary, *Caraco* explained that statutory construction must begin with the language of the statute. 132 S. Ct. at 1680. *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009), the other case cited by the District Court, also holds that "[s]tatutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well." *Id.* at 296 (quoting *United States v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003)). *Pettus'* statement that "when construing the plain text of a statutory enactment, we do not construe each phrase literally or in isolation. Rather we attempt to ascertain how a reasonable reader would understand the statutory text, considered as a whole," does not support the District Court's reasoning. *Pettus*, at 297.

Untethering statutory construction from the plain language of the statute, and replacing it with subjective judicial speculation about how best to accomplish Congressional policy concerns would infringe on the role of our elected legislators. *See 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.”). It would also create great uncertainty as to how laws will be interpreted and enforced. For these reasons, SIFMA strongly urges that the construction of the Extender Provision begin and end with its unambiguous plain language.

The District Court overlooked that when Congress crafts complex legislation such as HERA it inevitably balances competing policy goals. For example, HERA was intended, among other things, to provide grants to the States and local governments to purchase and rehabilitate foreclosed properties, establish oversight and regulatory authority over the GSEs, “expand access to the middle class to the low interest, low fee loans provided by the” FHA,” “build more affordable housing,” curtail predatory loan practices, allow the Treasury Secretary to buy stock in GSEs, create “a more robust and competent regulator of the GSEs,” restore confidence in and liquidity of the GSEs and the housing market, modernize

the FHA, and reduce foreclosures. 154 Cong. Rec. H.6841-50 (daily ed. July 23, 2008) (Statement of Rep. Sessions); *accord* 154 Cong. Rec. S.7448-50 (daily ed. July 25, 2008) (Statement of Rep. Reed). The compromises Congress reached in trying to achieve these goals are reflected in the language that 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): “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.”

The Supreme Court has cautioned against looking to Congressional purpose to interpret clear statutory language for the additional reason that “we assume ‘that the legislative purpose is expressed by the ordinary meaning of the words used’” and “[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Am. Tobacco*, 456 U.S. at 68) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Interpreting legislation based on policy considerations rather than the plain statutory language is also problematic because legislative

history itself is often uncertain. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 539 (2003) (legislative history of § 330 of the Bankruptcy Code “creates more confusion than clarity about the congressional intent.”) The Supreme Court has repeatedly reminded courts not to “improve” statutory language in the hopes of better carrying out perceived legislative purposes. *See, e.g., id.* at 538 (declining to “read an absent word into the statute” and explaining that “[i]t results from ‘deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill.’”); *Badaracco v. Comm’r*, 464 U.S. 386, 398 (1984) (“Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.”) “[N]o legislation pursues its purposes at all costs. 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) (also quoted in the DOJ *Amicus* Brief at 23). “If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent.” *Lamie*, 540 U.S. at 542.

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 Extender Provision 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 § 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 District Court's decision is also inconsistent with the ruling of the District of Arizona that "the applicable statute of limitations with regard to any action brought by the [Resolution Trust] Corporation as conservator" under 12 U.S.C. § 1821(d)(14), a statute similar to the Extender Provision, "deal[s] only with procedural statutes of limitations and not substantive statutes of repose." *Resolution Trust Corp. v. Olson*, 768 F. Supp. 283, 285 (D. Ariz. 1991).

The Central District of California has construed a similarly worded extender provision as not applying to statutes of repose. *See Nat'l Credit Union*, (Orders issued Dec. 19, 2011 and Jan. 30, 2012) JA-711, JA 1358-59. Judge Wu, addressing the “date on which the statute of limitation begins to run,” found that 12 U.S.C. § 1787(b)(14)(B), a banking law providing for extensions of the “*Statute of limitations* for actions brought by [a] conservator or liquidating agent,” “*plainly* refers to statutes of limitation. It makes no mention whatsoever of statutes of repose.” JA-704 (emphasis added) (tentative decision later finalized).⁴

The Court below acknowledged that the statutory language at issue in *Resolution Trust* and *National Credit Union* is “nearly identical” to HERA’s Extender Provision and that the statutes addressed in those cases are also grounded on “a Congressional intent to ‘preserve and conserve’ the assets of insolvent financial institutions.” SPA 78-79. The District Court nevertheless declined to follow those cases because “there are reasons to think that Congress was willing to go further to ensure the solvency of the two GSEs than to ensure the survival of the thousands of banks and credit unions around the country.” *Id.* However, that assertion is undermined by Congress’s decision to use “nearly identical” language

⁴ The Court in *Nat'l Credit Union Admin. Bd. v. RBS Securities, Inc.* reached a different conclusion, but found “there are substantial grounds for a difference of opinion” and granted defendants’ motion to certify the issues for appeal. No. 11-2340-RDR (D. Kan. Sept. 19, 2012).

in all three statutes, which strongly suggests that the opposite is true. The Court below did not cite any evidence that Congress intended that HERA's Extender Provision have greater scope, or that Congress believes the FHFA plays a more important role than the FDIC.⁵

The Court below also cited four district court opinions (one of which it authored) that refer to Section 13 of the Securities Act as a "statute of limitations," even though it includes a statute of repose. SPA-12. But the loose use of that term in those opinions, none of which was directed to the distinction between a statute of limitations and a statute of repose, proves nothing about Congress's use of the term in carefully drafted legislation, and does not overcome the clear legal distinction between the concepts, and the overwhelming evidence that Congress (and the courts) understand that distinction. The District Court itself authored an opinion that acknowledged the distinction in 1997. *See Stuart by Craven v. Am. Home Prods. Corp.*, No. 95 Civ. 4940 (DLC), 1997 WL 695578, at *3 (S.D.N.Y. Nov. 6, 1997) ("while the statute of limitations measures a deadline for filing from the date a cause of action accrued, the statute of repose measures the deadline from the date the product was first sold.") Similarly, Judge Sweet,

⁵ The Court's statement that HERA created an exception for a "single, privileged plaintiff" and citation of a newspaper article for the proposition that the failure of the GSEs would have been catastrophic for the American economy in a way that the failure of a single bank or credit union would not be, SPA-79, is not evidence that Congress intended this extender provision to go further.

who authored one of the other opinions cited by the District Court, has recognized the distinction. *See Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 277 B.R. 20, 30-32 (S.D.N.Y. 2002) (“As a general rule, statute of limitations periods are suspended against putative class members . . . the . . . rule has been extended to statutes of repose. . . . Tolling the limitations period while class certification is pending does not compromise the purposes of statutes of limitation and repose.”)

**B. Even if the Extender Provision Were Ambiguous,
It Should Be Limited to Statutes of Limitations**

Even if the Extender Provision were ambiguous with respect to its application to statutes of repose, it should be construed as limited to statutes of limitations. As shown in Point IA above, the legislative history of HERA demonstrates that Congress was balancing many goals and objectives. While the District Court’s decision is premised on the linchpin assumption that one of Congress’ primary goals was broadly to extend the FHFA’s time to bring lawsuits as a conservator, the only support cited by the Court below is a single district court decision that was reversed on other grounds. SPA 14-15, (citing *In re Fed. Nat’l Morg. Ass’n Sec., Deriv., & ERISA Litig.*, 725 F. Supp. 2d 169, 177-78 (D.D.C. 2010), *rev’d on other grounds*, *Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012). That decision does not even mention statutes of repose and merely observes that “[b]y extending the limitations period, Congress seems to have contemplated that

FHFA might need more time to decide whether and how to pursue any claims it inherited as Fannie Mae's newly-appointed conservator.” 725 F. Supp. 2d at 177-78 (emphasis added). The District Court's reliance on that observation to support its own ruling is circular — it looks to the language of the Extender Provision to divine a Congressional intent broadly to extend the time for the FHFA to act and then uses that implied intention to modify that plain language.

As shown in Point IA above, it has long been recognized that statutes of repose serve many important policy objectives, including providing financial institutions with the benefits of finality and preventing the assertion of stale claims. These concerns are especially important for Section 11 and 12 claims under the Securities Act because they can impose strict liability for inadvertent and non-fraudulent conduct. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381–82 (1983) (Section 11 applies a “stringent standard of liability”). The Supreme Court has explained that it is not appropriate to resolve an ambiguity in a statute in a way that imposes a “harsh result” on a strict liability defendant. “If Congress wishes to impose such liability, we must assume it will do so expressly or by unmistakable inference.” *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 252 (1976) (“even if the legislative record were more ambiguous, we would hesitate to adopt [plaintiff's] construction. It is inappropriate to reach the harsh result of imposing § 16(b)'s [strict] liability without fault on the basis of unclear language.”)

The Extender Provision reflects Congress's intention to give the FHFA time to consider whether it has viable State contract and tort claims by extending statutes of limitations for such claims and making the minimum period uniform without disturbing the certainty and finality provided by statutes of repose. As the DOJ has explained, "there is nothing novel about overriding a state's statute of limitations while continuing to give effect to its statute of repose." DOJ *Amicus* Brief at 29. "Congress did exactly that for tort claims against the United States under the Federal Tort Claims Act: federal law in that setting preempts state statutes of *limitations*, but state statutes of *repose* have continuing force with respect to claims against the United States." *Id.* Congress also did just that when it modified statutes of limitations but not statutes of repose in CERCLA, despite countervailing policy concerns:

In a further attempt to escape the statute's plain language, plaintiffs simplistically assert that Congress intended section 9658 "to provide victims of latent environmental damage a remedy against the source of the contamination," suggesting that the displacement effected by section 9658 must therefore be read to encompass statutes of repose. . . . Although Congress was undoubtedly interested in assisting tort plaintiffs to some degree, it balanced that interest against several competing values of at least equal importance.

DOJ *Amicus* Brief at 23. Similarly, although a primary purpose of the Securities Exchange Act was to stamp out securities fraud, *see, e.g., Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 690 (3d Cir. 1991), that does not mean that in

creating causes of action to promote this goal, Congress did not intend that there be limitations that serve important business concerns.

For the same reasons, the District Court's reference to the Congressional purpose of maximizing the ability of the FHFA to "put the [GSEs] in a sound and solvent condition" proves too much, because there is no indication that Congress intended to give the FHFA unfettered authority "at all costs." *Rodriguez*, 480 U.S. at 525. There is no basis to conclude that the plain language of the Extender Provision, which expands statutes of limitations for certain claims but not statutes of repose, did not sufficiently serve Congress's purpose.

In short, limiting the Extender Provision to statutes of limitations, and finding it inapplicable to statutes of repose, is entirely consistent with the intentions of Congress. Accordingly, the District Court should have done so.

II. THE EXTENDER PROVISION IS LIMITED TO STATE LAW CONTRACT AND TORT CLAIMS

The District Court acknowledged that "it may be the case, as defendants contend, that Congress could have been clearer about HERA's applicability to claims under federal law," SPA-17, but the Court nevertheless concluded that the Extender Provision applies to such claims. That was incorrect.

A. The Extender Provision Does Not Apply to Federal Claims

While the Extender Provision states that it applies to “any action brought by the Agency as conservator,” it does not state that it applies to every *claim* (i.e., both state and federal claims). To the contrary, the Extender Provision states that the statute of limitations “in the case of any tort claim, [is] the longer of – (I) the 3-year period beginning on the date on which the claim accrues; or (II) the period applicable under State law,” and there is a similar provision for contract claims. 12 U.S.C. § 4617(b)(12)(A). Neither provision refers to claims based on federal law (nor to State statutory claims). Yet Congress obviously understood how to refer to federal law in HERA because it did so in other provisions. *See* 12 U.S.C. § 4617 (containing five references to “Federal or State law”). “Where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally.” *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. U.S.*, 464 U.S. 16, 23 (1983)).

Moreover, while the Extender Provision expressly leaves in place State statutes of limitations that are longer than the minimum periods provided in the Provision, there is no such provision for federal claims with longer statutes of limitation. Accordingly, applying the Provision to federal claims would have the perverse effect of *reducing* to three years the FHFA’s time to bring actions under

federal statutes of limitations that are longer than three years. *See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 143 (1987) (four year statute of limitations for RICO claims); 15 U.S.C. § 15(b) (four year statute of limitations for Clayton and Sherman Act claims); 28 U.S.C. § 1658(a) (four year statute of limitations for federal claims without a specific statute of limitations). That “result demonstrably at odds with the intentions of the drafters” is another reason not to apply the Provision to federal law claims. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1988); *see also Am. Tobacco Co.*, 456 U.S. at 71 (“Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.”)

Finally, there are good reasons for Congress’s decision that the Extender Provision should apply only to State law contract and tort claims. There is considerable variation in the statutes of limitations applicable to such State law claims. Thus, Congress may have intended merely to ensure that the FHFA had a minimum three year statute of limitations for all such State law claims.

B. The Extender Provision Applies Only to State Law Contract and Tort Claims, And Not to *Sui Generis* Statutory Claims

The Extender Provision expressly applies to State law “contract” and “tort” claims. 12 U.S.C. § 4617(b)(12)(A). It does not apply to *sui generis* statutory claims, such as the FHFA’s claims under Sections 11 and 12 of the Securities Act and State Blue Sky laws, because they are not “torts.” *See Burnett*

v. Sw. Bell Tel., L.P., 151 P.3d 837, 843 (Kan. 2007) (claim under ERISA § 510 is not a tort); *Malley-Duff & Assoc., Inc. 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”); *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”).

One Court has applied a statute of repose for FDIC tort claims to Securities Act claims, but it did not provide any explanation for doing so. *See FDIC v. Morgan Stanley & Co.*, 2012 U.S. Dist. LEXIS 15759 (S.D. Tex. Feb. 8, 2012). Other courts have referred to certain other federal statutory claims as statutory torts. However, none of those cases stands for the proposition that Congress intended to include *sui generis* statutory claims such as Securities Act claims under Sections 11 and 12 within the scope of the Extender Provision, which is limited on its face to actual tort and contract claims.

CONCLUSION

The District Court's decision as to the Extender Provision should be reversed.

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Respectfully submitted,

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/s/ Michael J. Dell

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