No. 13-3183

In the United States Court of Appeals For the Tenth Circuit

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
as Liquidating Agent for U.S. Central Federal Credit Union
and for Western Corporate Federal Credit Union,

Plaintiff-Appellant,

v.

BARCLAYS CAPITAL INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Kansas,
The Honorable John W. Lungstrum, No. 2:12-cv-2631

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

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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 and related laws to deter and remedy wrongdoing. One key component is the consistent application of statutory limits on the time to bring claims, including repose periods, 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, and not based on subjective assertions of legislative purpose that do not take account of the often competing

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

objectives that Congress weighs in drafting particular provisions. That is essential to ensure predictability, which is a bedrock of business planning and the effective and efficient functioning of the securities markets. It allows SIFMA's members to understand how to comply with the law and how the law will be enforced.

SIFMA submits this brief to elaborate on the reasons why the ruling below that the claims of National Credit Union Administration Board ("NCUA") are time-barred should be affirmed. SIFMA believes the Extender Statute, Section 1787(b)(14) of the Federal Credit Union Act ("FCUA"), should be construed in accordance with its express direction that its time limitations cannot be extended by "any provision of any contract," and to preserve its repose period. 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 statutory limits on the time to bring claims, including repose periods, are strictly enforced. The preservation of uniformity, certainty, predictability and repose have far-reaching significance for all of SIFMA's members and the securities industry as a whole. SIFMA often appears as *amicus curiae* in appeals that implicate these concerns.

PRELIMINARY STATEMENT

In 1989, Congress enacted the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which added the Extender Statute to FCUA as follows:

> (14) Statute of limitations for actions brought by conservator or liquidating agent
>
> (A) In general — *Notwithstanding any provision of any contract*, the applicable statute of limitations with regard to any action brought by the Board as conservator or liquidating agent 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 Board as conservator or liquidating agent; or
> >
> > (ii) the date on which the cause of action accrues.

Add. 1, 12 U.S.C. § 1787(b)(14) (emphasis added).

The Extender Statute is clear and unambiguous. It applies to "any action brought by the Board as conservator or liquidating agent" and "[n]otwithstanding any provision of any contract." Thus, it and its repose period are absolute and not subject to "any" contractual tolling provisions. They thereby serve the important policies of uniformity, certainty, predictability and repose.

On September 25, 2012, NCUA, as conservator and liquidating agent of two credit unions, commenced this action against Appellees (together, "Barclays") under the Securities Act of 1933 (the "Securities Act") and California and Kansas securities statutes. NCUA's claims concern the credit unions' purchases of residential mortgage-backed securities between October 15, 2006 and June 12, 2007.

Barclays moved to dismiss NCUA's claims and, in a second motion to dismiss, argued that the claims were time-barred because, *inter alia*, NCUA did not bring them within three years after its appointment as conservator on March 20, 2009, and NCUA's tolling agreements with Barclays did not extend NCUA's time to sue under the Extender Statute. NCUA, joined by *amicus curiae* Federal Deposit Insurance Corporation ("FDIC"), made four arguments against the aspects of Barclays' motion to dismiss that are pertinent to this appeal: (1) that NCUA's time to bring its claims is governed by the Extender Statute, (2) that the Extender Statute's three year period for NCUA to file its Securities Act claims was extended by NCUA's tolling agreements with Barclays, (3) that the three years should not start to run until NCUA placed the credit unions into liquidation on October 1, 2010, and (4) that under California and Kansas law, NCUA's state law claims are governed by a two year statute of limitations that was extended by NCUA's tolling agreements with Barclays. The District Court agreed with NCUA's first argument but rejected the other three. The Court found that the plain language of the Extender Statute establishes that its time limitations cannot be extended by a tolling agreement; the Extender Statute's repose period cannot be extended or waived by agreement or equitable estoppel; and NCUA's time to bring its claims started to run when it was appointed as conservator of the credit unions.

Subsequently, on August 27, 2013, this Court held that the "Extender Statute" establishes "the" time limitations for NCUA to bring its claims in "any" action. *NCUA v. Nomura Home Equity Loan, Inc.*, __ F.3d __, 2013 WL 4516977, at *8 (10th Cir. Aug. 27, 2013). This Court explained that the Extender Statute "invokes repose language" and "includes the concept of repose" to the extent "that the limitations period begins to run" on "the date of the appointment of [NCUA] as conservator or liquidating agent." *Id.* at *11.

Now on this appeal NCUA and FDIC reiterate their arguments that were rejected by the District Court. NCUA concedes that the Extender Statute's "notwithstanding" clause "would clearly displace" an agreement by the parties to *shorten* the Statute's limitations periods (NCUA Br. 33-34), but argues that it nevertheless permits contracts that give NCUA *more* time to sue. Nothing in the text of the Statute, or the law relating to repose periods, supports NCUA's argument. Instead, NCUA and FDIC in effect ask this Court to rewrite the Statute's requirement that its time limitations apply to "any" action and must be enforced "[n]otwithstanding any provision of any contract," to bar only contracts that *reduce* NCUA's time to sue, to permit any contracts that affect NCUA's time to assert state law claims, and to restart the time limitations for NCUA to assert claims if it places a credit union of which it is the conservator into liquidation. NCUA contends this would serve a Congressional goal to enhance NCUA's ability to recover assets. SIFMA and its members believe NCUA's and FDIC's arguments are misconceived.

The District Court correctly determined that Congress "clearly articulated by the text of the Extender Statute . . . [that its] limitations period [applies] '[n]otwithstanding any provision of any contract,'" and that "if a statutory limitations period was intended to extinguish the right to sue, that period may not be extended or waived by agreement." (Add. 21, 22, 38) SIFMA supports the District Court's application of the Statute as it was written by Congress to set "the" applicable limitations period in "any" action "[n]otwithstanding any provision of any contract," and to give effect to its "repose language." That decision is faithful to the plain language of the Extender Statute, which should end the inquiry. NCUA and FDIC ignore the fundamental rule this Court reiterated in August, that "the plain meaning of the statute controls" where, as here, it is "unambiguous." *NCUA,* 2013 WL 4516997, at *7.[3]

Although the absence of any ambiguity makes it unnecessary to look further, nothing in the legislative history suggests a different result. To the contrary, the District Court's ruling is consistent with what the Second and Fifth Circuits have explained was the "purpose" of the Extender Statute "to give the agency in question . . . 'three years from the date upon which it is appointed receiver to decide whether to bring any causes of action. . . .'" *FHFA v. UBS Americas Inc.*, 712 F.3d 136, 142 n.2 (2d Cir. 2013), quoting *FDIC v. Barton*, 96 F.3d 128, 133 (5th Cir. 1996). It is also consistent with the longstanding recognition of the importance of the strict application of repose periods, particularly in the securities law context. While this Court and the District Court

[3] SIFMA respectfully disagrees with the District Court's and this Court's decisions that the Extender Statute applies to the repose period set forth in the Securities Act or to Federal or *sui generis* state statutory claims. *See* Brief of *Amicus Curiae* SIFMA in Support of Appellants and in Support of Reversal, *NCUA v. Nomura Home Equity Loan, Inc.*, Nos. 12-3295 and 12-3298, Doc. No. 01018994798 (10th Cir. Feb. 1, 2013). But SIFMA agrees that if the Extender Statute is interpreted to displace the statutes of repose that would otherwise govern NCUA's federal and *sui generis* state statutory claims, that should be done in a manner that is consistent with the Statute's plain language and promotes predictability and finality for those affected by the failure of a credit union.

have held that Congress intended the Extender Statute to give NCUA three years to investigate and bring an action on behalf of a failed credit union, Congress balanced that grant with express limits on NCUA's time to sue, and made those limits "[n]otwithstanding any provision of any contract." Congress thereby served other long established policy goals to provide certainty and finality for market participants, which encourages investment that creates jobs, and to promote prompt enforcement of securities law and other claims, which avoids stale claims and the loss of evidence.

If statutes were interpreted based on the assumption that Congress did not mean what it said in those statutes, there would be no limit to the manner in which they might be construed. The uniformity, certainty, predictability and repose that are essential to the markets and the economy would be undermined. Accordingly, the District Court's dismissal of NCUA's claims should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE EXTENDER STATUTE DICTATES THAT ITS TIME LIMITATIONS MUST BE ENFORCED "NOTWITHSTANDING ANY PROVISION OF ANY CONTRACT"

A. The Extender Statute Should Be Construed in Accordance With its Unambiguous Direction that it Applies "Notwithstanding Any Provision of Any Contract"

SIFMA's members and other market participants rely on the application of the securities and other laws as they are drafted. When courts do so, all market participants benefit from predictability and certainty. However, if statutes are rewritten based on subjective views as to what Congress would have preferred to say, as NCUA and FDIC in effect ask this Court now to do, uncertainty and arbitrary decisions result.

For this reason, it is settled beyond question that the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case" and "[i]f it does, 'our inquiry must cease' … and 'the plain meaning of the statute controls.'" *NCUA*, 2013 WL 4516997, at *7, *quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *McGraw v. Barnhart*, 450 F.3d 493, 498 (10th Cir. 2006). *See also FHFA*, 712 F.3d at 141 (construing a similar extender statute: "Absent ambiguity, our analysis also ends with the statutory language… 'We must presume that the statute says what it means.'"). If the statutory language in question is unambiguous, 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).

Here, as the District Court found, the plain language of the Extender Statute unambiguously directs that it must be enforced "[n]otwithstanding any provision of any contract." (Add. 22, 38) Indeed, FDIC asserts that "[t]hese words literally mean what they say: Notwithstanding any provision of any contract, the statute of limitations displaces such provisions." (FDIC Br. 2) There is no exception for tolling agreements.

NCUA nevertheless argues that the "Notwithstanding" clause refers only to a provision of a contract that is (i) "inconsistent" with "the three-year minimum federal statute of limitations established by the Extender Statute" (NCUA Br. 14), (ii) sets "a shorter limitations period," or (iii) contains "a choice-of-law clause that specifies the law of a jurisdiction with a statute of limitations for torts of less than three years." (NCUA Br. 33-34)[4] FDIC argues that the phrase refers only to a contract that "changes" the statute of limitations. (FDIC Br. 5)

The simple flaw in these arguments is that the Extender Statute is not limited to contractual provisions that are "inconsistent" with or "change" the limitations period. *See, e.g., Dean v. U.S.,* 556 U.S. 568, 572 (2009) ("we

[4] The authority NCUA cites (NCUA Br. 27-30) concerns statutes, not contractual notwithstanding clauses. Even as to statutes, some courts do not confine the application of "notwithstanding" clauses to conflicts with an older statute. *See, e.g., Castro v. Sec'y of Homeland Sec.*, 472 F.3d 1334, 1337 (11th Cir. 2006) ("notwithstanding" clause superseded prior laws "on the same subject" "whether or not" there was a conflict); *Crowley Caribbean Transp., Inc. v. United States*, 865 F.2d 1281, 1283 (D.C. Cir. 1989) ("notwithstanding" clause in statute authorizing international disaster relief superseded prior statute requiring government preference for U.S.-flag vessels even where compliance with the prior act would "not cause significant delay in providing disaster relief"). Here, as discussed below, Congress made clear that it did not intend to confine the reach of the "Notwithstanding" clause to inconsistent contracts by revising it from "Notwithstanding any contractual provisions to the contrary" to "Notwithstanding any provision of any contract." Moreover, the tolling NCUA seeks is inconsistent with the Extender Statute.

ordinarily resist reading words or elements into a statute that do not appear on its face."); *62 Cases of Jam v. U.S.,* 340 U.S. 593, 596 (1951) (courts construing statutes must look to "what Congress has written . . . neither to add nor to subtract, neither to delete nor to distort."). The Statute unambiguously rules out "any provision of any contract," as FDIC acknowledges. (FDIC Br. 2)[5]

Furthermore, this Court has explained that the Extender Statute sets "'*the* applicable statute of limitations' for '*any* action brought by' NCUA on behalf of a failed credit union .… Application of the Extender Statute is mandatory." *NCUA*, 2013 WL 4516997, at *8 (emphasis in original). "By using these words, Congress precluded the possibility that some other limitations period might apply to claims brought by [NCUA] as conservator [or receiver].'" *Id., quoting FHFA*, 712 F.3d at 142. Moreover, NCUA itself argued in its March 1, 2013 brief on that appeal ("NCUA March 2013 Brief"), that "'[w]hen Congress "select[s] the word 'any,'" courts "ascribe to that word its plain meaning.' *United Transp. Union v.*

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[5] FDIC observes that the "notwithstanding" language in another provision of FIRREA refers only to certain contracts — those that "call[] for termination, default, acceleration or exercise of rights upon" the failure of a bank and the appointment of FDIC as receiver. (FDIC Br. 21 n.46) But that further undermines NCUA's and FDIC's argument, because it shows that when Congress wanted to make an exclusion in FIRREA that was narrower than the Extender Statute's exclusion of "any provision of any contract," Congress knew how to do so. "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *In re Antrobus*, 519 F.3d 1123, 1129 (10th Cir. 2008). *See also United States v. Ron Pair Enters.,* 489 U.S. 235, 242 n.5 (1989).

Dole, 797 F.2d 823, 829 (10th Cir. 1986); *see United States v. Gonzales,* 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976))." (Doc. No. 01019011169 at 49-50)[6]

B. The Extender Statute's Repose Period Should be Strictly Enforced, Notwithstanding Any Provision of Any Contract, to Preserve Uniformity, Certainty, Predictability and Finality

NCUA asserts that "[t]he text [of the Extender Statute] offers no support" for the District Court's ruling that "Congress intended § 1787(b)(14) as a kind of statute of repose or jurisdictional bar that would keep NCUA from extending the time limit through tolling agreements." (NCUA Br. 32) But the text of the Statute fully supports the District Court's holding. As this Court recently held, the Statute in fact "invokes repose language" and "includes the concept of repose" to the extent "that the limitations period begins to run" on "the date of appointment of [NCUA] as conservator or liquidating agent." *NCUA,* 2013 WL 4516997, at *11. This, in addition to the "Notwithstanding" clause, is further "reason," to borrow NCUA's language, "to believe Congress intended § 1787(b)(14) to create [an] inflexible barrier to suit" (NCUA Br. 39) that would preserve uniformity, certainty, predictability and repose.

[6] FDIC argues that the District Court's "reading renders the statute ambiguous." (FDIC Br. 22) However, FDIC does not point to anything in the lower court's opinion that does so, nor to any Court that has reached a different decision.

Statutes of repose, such as § 1787(b)(14)(B)(i), "create[] a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996). Because a statute of repose "defines the right involved in terms of the time allowed to bring suit," it is "subject [only] to legislatively created exceptions" and runs "without interruption once the triggering event has occurred, even if equitable considerations would warrant tolling." *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 102-03 (2d Cir. 2004). Thus, the Supreme Court has emphasized that the Securities Act's three year limitation on lawsuits "is a period of repose inconsistent with tolling," *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), and the same principle governs the "repose language" in the Extender Statute. A statute of repose cannot be tolled by agreement even if the statute does not expressly so provide. *Midstate Horticultural Co. v. Penn. R.R.*, 320 U.S. 356, 358-60 (1943). That is true of the repose language in the Extender Statute *a fortiori* because Congress explicitly determined that it is "[n]otwithstanding any provision of any contract."[7]

[7] NCUA and FDIC argue that *Midstate* held only that statutes of repose serving an important public policy cannot be tolled by agreement. (NCUA Br. 37-39; FDIC Br. 13-14) But "[t]he teaching of the *Midstate* case . . . is that the running of the statute destroys the right to affirmative recovery as well as the remedy, so that the period of limitations cannot be waived by the parties." *United States v. W. Pac. R.R.,* 352 U.S. 59, 72 (1956). Moreover, the repose period at issue here serves important public policies, as explained herein.

The importance of the "concept of repose," as in the Extender Statute, has long been recognized, even for "just claims." "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." *Bradway v. Am. Nat'l Red Cross*, 992 F.2d 298, 301 n.3 (11th Cir. 1993); *Caviness v. Derand Res. 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"); *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989) (statutes of repose serve the "economic best interests of the public as a whole . . . 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."); *Sun Valley Water Beds, Inc. v. Herm Hughes & Son*, 782 P.2d 188, 189 (Utah 1989) ("Statutes of repose promote the public goal of certainty and finality in the administration of commercial transactions"); *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

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The case-law NCUA and FDIC cite is unpersuasive. *See ESI Montgomery Cnty., Inc. v. Montenay Int'l Corp.*, 899 F. Supp. 1061, 1066 (S.D.N.Y. 1995) (relying exclusively on a single district court case that, without analysis, applied a tolling agreement to a § 10(b) cause of action); *J.E. Liss & Co. v. Levin*, 201 F.3d 848, 850, 851 (7th Cir. 2000) (basing *dicta* that statutes of repose "normally are waivable" by agreement on a single intermediate appellate state court decision).

public's right to a remedy and the need to place an outer limit on the tort liability of [defendants.]").

Congress has determined that repose is particularly important in the context of securities law claims because, as this Court has explained, Congress "fear[ed] that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule [of the Securities Act] was to be absolute." *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1435-36 (10th Cir. 1991)*, vacated on other grounds sub nom., Dennler v. Trippet,* 503 U.S. 1978 (1992) (summarizing Congressional Record and quoting *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987), *overruled on other grounds by Short v. Belleville Shoe Mfg.*, 908 F.2d 1385 (7th Cir. 1990)); *accord P. Stolz*, 355 F.3d at 105; *Lampf,* 501 U.S. at 363 (citing the ABA task force's "inescapable conclusion that Congress did not intend equitable tolling to apply" to the Security Act's statute of repose and holding "the purpose of [that] 3-year limitation is clearly to serve as a cutoff"). The need to avoid lingering liabilities that led Congress to enact absolute repose language in the Securities Act was just as important when Congress enacted the Extender Statute, particularly if the Statute is viewed as displacing Securities Act and state law statutes of repose that would otherwise provide a deadline for NCUA's claims, as this Court has determined.

The SEC too has extolled the beneficial purpose of repose in the context of Securities Act claims, in words that apply equally to the Extender Statute's three-year provision here: "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." *Amicus curiae* brief in *P. Stolz*, No. 02-7680, 2003 WL 23469697, at *8 (2d Cir. Sept. 8, 2003).

Finality is particularly important for NCUA's Securities Act claims because of their strict liability standards. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381–82 (1983) (Section 11 applies a "stringent standard of liability"). Indeed, 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.").

Thus, Congress shortened the Securities Act's statute of repose when it realized that the strict liability created by the Act was stifling the economy. 78

Cong. Rec. 8709-10 (1934) ("it is well known that because of this law the issuance of securities has practically ceased"). Without finality as to potential liability, corporate directors would not issue new securities and help lift the economy out of the Depression. Companies issued only about $1 billion in securities in 1933, which was down dramatically from the $10 billion in 1929. *Id.* (directors "hesitate to step out and start to finance new expansion and new development, taking a chance, where they have to rely upon their assistants for facts which they cannot secure themselves."). Congress served these same policies in the Extender Statute's three year repose language.

Repose is also critical because it protects market participants from the problems of proof that can arise when untimely claims are brought. In addition, it provides market participants with clear guidance as to the length of time that documents must be retained to defend against claims, thereby reducing 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."). Furthermore, repose prevents 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, repose encourages prompt enforcement of securities laws and serves cultural values of diligence.

Repose 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. It provides certainty for third-parties who transact with market participants that may assert claims or have claims asserted against them.

In short, NCUA's argument that it "serves no useful public purpose" to enforce the Extender Statute's "Notwithstanding" clause to preclude the application of a tolling agreement (NCUA Br. 46), is simply wrong. With all of the numerous public benefits provided by repose, and the fact that it has long been favored by Congress, it was perfectly reasonable, and to be expected, that if Congress in the Extender Statute set a new time for NCUA to bring Securities Act claims that otherwise would have been limited by its statute of repose, Congress would also circumscribe that time and create a new repose period that is equally absolute.

Nor is there any basis to NCUA and FDIC's list of supposed dire consequences of this Court's application of the Extender Statute as it was written by Congress. In the first place, the Statute does not put NCUA at a "disadvantage compared to private parties." (NCUA Br. 46) Private parties do not benefit from the Extender Statute's *sui generis* superseding of the repose periods of federal and state securities laws, as determined by this Court, which ensures that NCUA has three years to investigate claims, negotiate settlements and otherwise avoid burdening the courts with litigation. NCUA itself argued in its March 2013 Brief (at 57) that "[a]ny harm that might be caused by § 1787(b)(14) shortening the periods for some [NCUA] claims is offset by the benefit from the lengthened period for other claims and the minimum period of three years for all claims."

Second, the statute does not "place future defendants at a disadvantage by compelling NCUA to initiate litigation against them earlier" or "burden the courts by forcing into litigation future disputes involving the FDIC, NCUA, and FHFA that might have settled with more time." (NCUA Br. 46) The three years allowed by Congress, which is in addition to the prior time that the institution in conservatorship or liquidation had to address the claim, is more than enough for NCUA and FDIC to negotiate settlements and avoid burdening the courts with unnecessary litigation. Moreover, Congress's enactment of that limit serves its purpose of ensuring that NCUA expeditiously concludes matters relating to institutions of which it is the conservator or liquidator. And of course if NCUA does sue, that does not prevent a subsequent settlement.

Third, enforcing the limitations that Congress placed on NCUA's *sui generis* time to sue, like the enforcement of any other limitations period, does not give the defendants "an unearned windfall." (NCUA Br. 46) That is particularly true here, since it is undisputed that absent the Extender Statute, many of NCUA's claims would have been time-barred.

If NCUA and FDIC disagree with Congress's determinations on these issues, they should ask Congress to amend the statute, and not this Court to rewrite it. *Sierra Club v. EPA*, 311 F.3d 853, 862 (7th Cir. 2002) ("[U]nder our system of government, it is not our business or the EPA's business to rewrite a clear statute so that it will better reflect 'common sense and the public weal.' Only Congress can do that. If the EPA wishes to" change the statute, "it must petition Congress.")

C. Even if this Court Were to Look Beyond The Unambiguous Direction in the "Notwithstanding" Clause (And It Should Not), That Clause Should be Enforced

NCUA argues that in applying the Extender Statute, this Court should look beyond its plain language to its "history, purpose and structure." NCUA maintains that doing so would show that Congress purportedly "intended to give the agencies a minimum (not maximum) time to pursue … recoveries" and had the "specific objective of maximizing governmental recoveries." (NCUA Br. 17-18) That argument proves too much. If that alone were Congress's intent and objective (and it plainly was not), Congress would not have included the "Notwithstanding" clause in the Extender Statute, let alone any of the deadlines in its subsequent provisions. To give NCUA "a minimum (not maximum)" time to pursue claims, Congress would not have included any limitations period at all.

NCUA relies on the statement of FIRREA's sponsor that the bill was intended to maximize potential recoveries by the Government. (NCUA Br. 42-43) However, since the "Notwithstanding" clause is not ambiguous, there is no reason nor basis to look to that statement, and it cannot undo what Congress has enacted. *See Ex parte Collett,* 337 U.S. 55, 61 (1949) ("[T]here is no need to refer to the legislative history where the statutory language is clear.")

Even if the Extender Statute had been ambiguous, the Supreme Court has admonished that, "there is no federal policy" that a federal custodian such as the NCUA "should always win." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994). Courts routinely have "rejected 'more money' arguments remarkably similar to the one made here." *Id.* *See*, *e.g.*, *Marsh v. Rosenbloom*, 499 F.3d 165, 180-81 (2d Cir. 2007) (rejecting New York State's argument that CERCLA's six year limitations period preempts Delaware's three-year corporate wind-up period "because it would net the government more money"); *FDIC v. Ernst & Young LLP*, 374 F.3d 579, 583 (7th Cir. 2004) (rejecting FDIC's attempt to escape contractual restrictions between a failed bank and its auditor even though "if [FDIC] win[s] the insurance fund will be better off"); *Adagio Inv. Holding Ltd. v. FDIC*, 338 F. Supp. 2d 71, 80 (D.D.C. 2004) ("FDIC-R does not enjoy *carte blanche*" to sweep funds out of insured accounts "for 'there is no federal policy that the [deposit insurance] fund should always win.'") (quoting *O'Melveny*);

FDIC v. Gladstone, 44 F. Supp. 2d 81, 88 (D. Mass. 1999) (rejecting public policy argument against subjecting federal receivers to affirmative defenses because "[t]his policy amounts to nothing more than a policy of letting the FDIC win regardless of the facts.").

Moreover, Senator Riegle's comments appear to have been addressed to the narrow issue of whether FIRREA would revive claims that were already time-barred at the time the statute was enacted in 1989. Thus, he advocated construing the new provisions to "maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law claims that would otherwise have been lost due to the *expiration* of *hitherto* applicable limitations periods." 135 Cong. Rec. S10182-01, *S10206 (1989) (emphasis added). And the two cases he cited, *International Union of Electrical, Radio & Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243 (1976), and *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 311-16 (1945), both concern the retroactive application of limitations statutes. However, the retroactivity of FIRREA is not at issue on this appeal, and this Court has rejected the argument that FIRREA revives claims that were time-barred when FDIC was appointed as receiver. *See FDIC v. Regier Carr & Monroe*, 996 F.2d 222, 225-26 (10th Cir. 1993). Furthermore, the Supreme Court and this Court have warned against heavy reliance on the comments of one member of Congress in construing a statute. *See Garcia v. United States*, 469 U.S. 70, 76 (1984); *Seneca-Cayuga Tribe v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1033 n.19 (10th Cir. 2003).

As the District Court explained, there is no evidence of "a Congressional intent to give plaintiff unfettered latitude in asserting claims, as the Extender Statute clearly and unambiguously imposes a deadline for such claims, which must be enforced in accordance with its terms. The Extender Statute also plainly and unambiguously imposes that deadline 'notwithstanding any provision of any contract; including a tolling agreement, and that language too must be enforced." (Add. 41)

The legislative history actually shows that Congress broadened the "Notwithstanding" clause to make it as comprehensive as possible. The clause was initially drafted to state, "Notwithstanding any contractual provisions to the contrary. . . ." S. Rep. No. 101-19, at 93 (1989). The clause was then expanded, as enacted, to cover not only "any contractual provisions to the contrary," but "any provision of any contract."

When Congress crafts complex legislation such as FIRREA, it inevitably balances competing policy goals. The compromises Congress reaches in trying to achieve its goals are reflected in the language it enacts, which must be enforced as enacted. As the Supreme Court explained in *Board of Governors of* *the Federal Reserve System v. Dimension Financial 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.

Similarly, the Supreme Court has emphasized that:

> no 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).

Moreover, untethering statutory construction from the plain language of the statute, and relying instead on subjective 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.").

Accordingly, the Supreme Court has repeatedly reminded courts not to "rewrite a statute because they might deem its effects susceptible of improvement" to carry out perceived legislative purposes. *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398 (1984); *accord 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."). Instead of looking to Congressional purpose to interpret clear statutory language, "we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).[8]

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 Court's explanation is instructive as to why the "Notwithstanding"

[8] 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*, 540 U.S. at 539. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Id.* at 542.

clause here should not be "interpreted" to exempt "any [tolling] provision of any contract":

> 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).

D. The Extender Statute and its Repose Period Cannot be Extended by Equitable Estoppel

The District Court explained that "the 'notwithstanding' provision demonstrates Congress's intent to set an outer limit that may not be extended by agreement, and allowing plaintiff to enforce its tolling agreement through equitable estoppel would undermine that intent and render the 'notwithstanding' limitation meaningless." (Add. 23) It is also settled that repose periods cannot be extended by equitable estoppel. *Anixter*, 939 F.2d at 1437. Moreover, this Court has explained that the language Congress used in the Extender Statute "preclude[s] the possibility that some other limitations period might apply to claims brought by [NCUA] as conservator or receiver." *NCUA*, 2013 WL 4516997, at *8. That should end NCUA's equitable estoppel argument.

NCUA nevertheless asserts that there is something inequitable about Barclays' position that the tolling agreement signed by the parties does not extend NCUA's time to sue. NCUA's position is undermined by its own assertion that had it agreed with Barclays to *shorten* the limitations periods in the Extender Statute, that agreement would not be enforceable against NCUA. (NCUA Br. 14-15)

Sophisticated, well-counseled parties such as NCUA are fully capable of understanding the terms of the Extender Statute, and the courts must give effect to those terms. *See Midstate*, 320 U.S. at 359. As the Second Circuit recently explained, in ruling that *American Pipe* tolling does not extend the statute of repose in Section 13 of the Securities Act, despite the plaintiffs' argument that such a ruling could burden the courts and disrupt class action litigation: "Given the sophisticated, well counseled litigants involved . . . it is not apparent that such adverse consequences will inevitably follow. . . . But even if the decision causes some such problem, it is a problem that only Congress can address; judges may not deploy equity to avert the negative effects of statutes of repose." *Police & Fire Ret. Sys. v. IndyMac MBS, Inc.*, 721 F.3d 95, 109-10 (2d Cir. 2013).

II. NCUA'S THREE YEAR TIME PERIOD TO SUE WAS NOT EXTENDED BY ITS PLACEMENT OF THE CREDIT UNIONS INTO LIQUIDATION

NCUA argues that its time to sue was extended when it placed the credit unions into liquidation on October 1, 2010. (NCUA Br. 51-52) The plain language of the Extender Statute does not support that argument. Section 1787(b)(14)(B)(i) states that in circumstances relevant here, the limitations period "begins to run on" the "date of the appointment of [NCUA] as conservator or liquidating agent." NCUA was appointed as conservator on March 20, 2009. Nothing in the Statute suggests that the limitations period would begin to run again when NCUA later placed the credit unions into liquidation. To the contrary, that would destroy the Statute's uniformity, certainty, predictability and repose by allowing NCUA, as conservator, to revive long-extinguished claims after an unlimited time period by placing a credit union into liquidation.

Nor is that needed to serve Congress's purpose of giving NCUA three years to investigate and sue. NCUA can do so as soon as it is appointed as conservator. Here, for example, as NCUA informed this Court in its March 2013 Brief (at 9), "[a]fter placing the Credit Unions into conservatorship, NCUA investigated the RMBS that had contributed to the Credit Unions' failure."

III. THE PLAIN LANGUAGE OF THE EXTENDER STATUTE BARS NCUA'S STATE LAW CLAIMS

NCUA argues that "even if the federal three-year minimum limitations period cannot be tolled by agreement," "the applicable state securities laws permit the use of tolling agreements" and should govern NCUA's California and Kansas law claims. (NCUA Br. 20) But this Court has already held that the Extender Statute applies to "any action." *NCUA*, 2013 WL 4516997, at *8. The Statute's directive that it is "[n]otwithstanding any provision of any contract" therefore applies to all of NCUA's claims, including those that arise under state law and to which a tolling agreement purports to apply.

Nor are the state statutes of limitations reset when the conservator is appointed. (NCUA Br. 56-57) The Statute refers to "the period applicable under State law," 12 U.S.C. § 1787(b)(14)(A)(ii)(II), and does not say that that period cannot start to run before the conservator is appointed or that it is governed by 12 U.S.C. § 1787(b)(14)(B).

CONCLUSION

The District Court's decision to dismiss NCUA's claims should be affirmed.

Dated: New York, New York
October 3, 2013

Respectfully submitted,

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 6,998 words, exclusive of the corporate disclosure statement, table of contents, table of citations, addendum, certificate of service, certificate of digital submission and this certificate of compliance as exempted by Fed. R. App. 32(a)(7)(B)(iii).

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/s/Michael J. Dell

Dated: October 3, 2013

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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 + AntiSpyware Enterprise 8.8 and, according to the program, is free of viruses. In addition, I certify that all required privacy redactions have been made.

/s/ Michael J. Dell

Dated: October 3, 2013

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October 2013:

1. 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.

2. I caused to be delivered seven copies of *Amicus Curiae's* Brief to the Clerk of the Court via Federal Express.

/s/ Michael J. Dell

Dated: October 3, 2013