

Nos. 12-3295 and 12-3298

**In the United States Court of Appeals
For the Tenth Circuit**

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
As Liquidating Agent of U.S. Central Federal Credit Union,
Plaintiff-Appellee,

v.

NOMURA HOME EQUITY LOAN, INC., et al.,
Defendants-Appellants,

AND

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
As Liquidating Agent of U.S. Central Federal Credit Union,
Plaintiff-Appellee,

v.

FINANCIAL ASSET SECURITIES CORP., et al.,
Defendants-Appellants,

*Appeals from July 25, 2012 Orders Entered by the U.S. District Court for the District of
Kansas, Nos. 11-2340 and 11-2649, by the Honorable Richard D. Rogers*

**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. 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 National Credit Union Administration Board ("NCUA") 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 Federal Credit Union Act ("FCUA") that clearly and unambiguously extends only the statutes of limitations for the NCUA's State law contract and tort claims (the "Extender Statute") to allow the NCUA also to bring Securities Act claims beyond the period prescribed by its statute of repose. SIFMA and its members are concerned about this unwarranted elimination of repose, the application of the Extender Statute to Federal and State statutory claims, and the District Court's decision to premise its ruling on its own view of what would best serve FCUA's purpose.

This case has far-reaching significance not only for SIFMA's members but also for the securities industry as a whole. The NCUA, the FDIC and the Federal Housing Finance Agency have commenced more than twenty actions against financial institutions concerning the sale of more than \$200 billion of

residential mortgage backed securities, and seek to apply the same or similar extender statutes to Securities Act claims based on the same incorrect construction used by the Court below.

PRELIMINARY STATEMENT

The Extender Statute 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 FCUA's Extender Statute 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 strictly 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 771(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 1989, Congress enacted the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), which added the Extender Statute to FCUA:

(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*.

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

The Extender Statute too is clear and unambiguous. It extends the “statute of limitations” for the NCUA’s State law “contract” and “tort” claims as a conservator or liquidating agent. Nothing in the text extends the statute of repose for any claims, nor the statute of limitations for any Federal claims or any statutory claims (Federal or State). As the Department of Justice (“DOJ”) recently explained, “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, only three years before FIRREA, when it extended the “commencement date” of the statute of limitations but not the repose period for certain environmental actions under State law, but not Federal law. Joint Appendix (“APP”)-474.

The District Court, in a ruling it characterized as “very close,” failed, however, to follow the plain language of the Extender Statute, and to recognize that it modifies only “the applicable statute of limitations” for the NCUA’s State law contract and tort claims. APP-349. The Court’s determination that Congress intended to refer to statutes of repose when it mentioned only “statute[s] of limitations” overlooked 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 statutory claims that are neither “contract” nor “tort” claims within the scope of the Extender Statute would have the perverse and clearly unintended result of *shortening* the time for the NCUA to assert certain Federal statutory claims. Nothing in the text of the Extender Statute (or its legislative history) supports such an untoward result, and Congress could not possibly have intended it. Accordingly, the District Court’s denial of Appellants’ motions to dismiss the NCUA’s Securities Act and State securities law claims should be reversed.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE EXTENDER STATUTE ESTABLISHES THAT IT IS LIMITED TO STATUTES OF LIMITATIONS, AND DOES NOT REACH STATUTES OF REPOSE

A. The Extender Statute 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 subjective views as to what Congress would have preferred to say, uncertainty and arbitrary decisions result.

Here, the District Court’s application of the Extender Statute to statutes of repose is inconsistent with the text of the Statute, which refers only to “statute[s] 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.” *Reiter v. Sonotone Corp.*, 442 U. S. 330, 337 (1979). “If the language is clear and unambiguous, the plain meaning of the statute controls.” *McGraw v. Barnhart*, 450 F.3d 493, 498 (10th Cir. 2006). 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 Statute clearly and unambiguously does *not* apply to statutes of repose because it does not even mention them. Congress also unmistakably demonstrated its intention that the Statute not apply to statutes of repose by directing that the “statute of limitation” may “begin[] to run” on “the date on which the cause of action *accrues*.” 12 U.S.C. § 1787(b)(14) (emphasis added). That language could not possibly refer to statutes of repose because, unlike statutes of limitation, statutes of repose “bar a claim after a period that is triggered by an arbitrary event unrelated to the accrual of the cause of action.” *Waller v. Pittsburgh Corning Corp.*, 946 F.2d 1514, 1515 n.1 (10th Cir. 1991).

The District Court acknowledged that (i) the Extender Statute references only “statute[s] of limitations” (not statutes of repose), (ii) “the term ‘accrual’ or ‘accrues’ characterizes a statute of limitations as opposed to a statute of repose” (APP-324), and (iii) Appellants’ arguments were not “implausible or without force.” APP-385. But the Court nevertheless concluded that the Statute was “ambiguous” on the grounds that “Congress may not necessarily be relied upon to use consistent terminology,” it was “not clear whether Congress meant ‘statute of limitations’ to include ‘statute of repose,’” and it was also “not clear that Congress meant to exclude the three-year deadline from the operation of the extender statute” because the “terms ‘statute of limitations’ and ‘statute of repose’ are often conflated.” APP-322, 325. The Court then ruled, based on its own policy judgment as to what would achieve “the general purposes of the Congress in establishing the powers of the NCUA,” and its view that “courts generally construe [ambiguous limitations] provisions in favor of the government,” that when it comes to the Extender Statute, the term “statute of limitations” includes statutes of repose. APP-324, 327.

The Court’s reasoning and conclusion are untenable. *First*, when Congress extended certain “statute[s] of limitations” in FIRREA, there was no “ambiguity” about the fact that it did not extend statutes of repose. As the DOJ recently explained in its *amicus* brief in support of the Government’s position that

the reference to “statutes of limitations” in CERCLA’s extender statute does not include statutes of repose, by 1986, three years *before* Congress enacted FIRREA, Congress’s use of the distinct concept of “statutes of limitations” did not create any ambiguity that it did not cover 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.

APP-454.³ Similarly, in *NCUA v. RBS Sec., Inc.*, No. CV 11-5887-GW (C.D. Cal. Dec. 19, 2011) (tentative order), 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.” APP-408. This Court too has long acknowledged the “well recognized distinctions between statutes of limitations and statutes of repose.” *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996).

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

³ The Fourth Circuit heard oral argument on the appeal on January 30, 2013.

Addendum to this brief lists dozens of examples from the Congressional record and committee reports where Congress did just that. See Addendum at A1-A107.

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. However, 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 cited CERCLA § 309, but nothing in that statute suggests that the term “statute of limitations” means statute of repose. See *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 363 (5th Cir. 2005). The District Court referred to the Ninth Circuit’s construction of § 309 in *McDonald v. Sun Oil Co.*, 548 F.3d 774, 778-91 (9th Cir. 2008), but that decision was “erroneous” as the DOJ has argued because it “created an ambiguity where none existed” and ignored the “clear,” “plain language” of CERCLA which “applies only to state statutes of limitations, and does not extend to statutes of repose.” APP-452.

Congress's decision *not* to mention statutes of repose in the Extender Statute 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. "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); *see also 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."). 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.

APP-457-58.

Statutes of repose are particularly important to ensure finality in the context of strict liability claims under the Securities Act. This Court has explained that the “legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt the normal business and facilitate false claims. It was understood that the three-year rule was to be absolute.” *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1435-36 (10th Cir. 1991) (summarizing Congressional Record and quoting *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987)), judgment vacated on other grounds by *Dennler v. Trippet*, 503 U.S. 978 (1992).

Indeed, Congress shortened the Securities Act’s statute of repose when it realized that the strict liability created by the Act was stifling the economy. A-120-21 (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 as compared to \$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 fact which they cannot secure themselves.”) The SEC has extolled the beneficial purposes of the Securities Act’s 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.” A-109 (SEC *amicus curiae* brief in *P. Stolz*).

The Securities Act’s statute of repose is also critical because it protects market participants from the problems of proof that can arise when untimely claims are brought. *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.”) The Securities Act’s statute of repose also prevents strategic delay by investors, 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, the statute of repose encourages prompt enforcement of securities laws and serves cultural values of diligence. It also has the salutary effect 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.

Second, the Court below should not have relied on the proposition that it should construe an ambiguous limitations provision in favor of the government. In the first place, the Extender Statute is *not* ambiguous. It specifically applies only to “statute[s] of limitations” and does not reference “statutes of repose.”

Moreover, the authorities the Court cited are inapposite because they concern claims *against* the government, unlike the NCUA's claims here; because the Extender Statute applies only to actions brought by the NCUA "as conservator or liquidating agent," and not as the government; and because when, as here, the NCUA acts as a liquidating agent for a private entity, it "steps into the shoes" of that entity. See *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994); *Perpetual Fin. Corp. v. United States*, 61 Fed. Cl. 126, 145 (2004) ("When acting in its receivership capacity, the FDIC is not an agency of the United States").

Third, the District Court's conclusion that "a construction of the extender statute which increases the opportunity of plaintiff to bring actions to recover money on behalf of the government would be consistent with the general purposes of the Congress," APP-327, overlooked that, as the Supreme Court has admonished, "there is no federal policy" that a federal custodian such as the FCUA "should always win," and courts routinely have "rejected 'more money' arguments remarkably similar to the one made here." *O'Melveny*, 512 U.S. at 88. When Congress crafts complex legislation such as FIRREA, it inevitably balances competing policy goals. 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. A-116 (135 Cong. Rec. 3499) (1989). The focus was on

strengthening the FDIC. The provisions relating to the NCUA were not added until several months after the bill was first proposed. A-118 (135 Cong. Rec. 12,142) (1989).

The compromises Congress reached in trying to achieve these 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): “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.” “[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 by the DOJ, APP-468).

Accordingly, 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 of Internal Revenue*, 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 (2003) (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.”). 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 Statute begin and end with its plain and unambiguous language.

The Supreme Court has instructed that 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’” 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). 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.

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 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).

As the District Court acknowledged, the only other Court that has construed the Extender Statute found it does *not* apply to statutes of repose. See APP-416, 406 (tentative orders in *NCUA v. RBS* (C.D. Cal. Dec. 19, 2011, Jan. 30, 2012)); APP-427-429 (tentative order in *NCUA v. Goldman* (Mar. 15, 2012)); APP-438 (Sept. 4, 2012 order confirming tentative decision). Judge Wu found the Extender Statute “plainly refers to statutes of limitation. It makes no mention whatsoever of statutes of repose.” APP-406.

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), which like the Extender Statute was added by FIRREA, “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). Congress tacitly ratified this holding when it amended FIRREA in 1994 (see 12 U.S.C. § 1821(d)(14)(C)) and elected not to revise its extender statutes. See *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1795-96 (2010).

Two courts have found that a similar extender statute in the Housing and Economic Recovery Act of 2008 (“HERA”) applies to statutes of repose, even though they are not mentioned. *FHFA v. UBS Ams., Inc.*, 858 F. Supp. 2d 306 (S.D.N.Y. 2012), *appeal docketed*, No. 12-3207 (2d Cir. Aug. 14, 2012); *FHFA v. Countrywide Fin. Corp.*, 2012 WL 5275327 (C.D. Cal. Oct. 18, 2012). However, HERA does not apply to statutes of repose for the reasons given by SIFMA in its *amicus* brief urging reversal in *UBS*. The *UBS* Court misplaced reliance on its own policy judgment as to what would achieve the “congressional purpose” to ‘preserve and conserve’ the assets of insolvent financial institutions,” 858 F. Supp. 2d at 316, and on the loose use of the term “statute of limitations” in judicial opinions that were not directed to the distinction between such statutes and statutes of repose.⁴ The *Countrywide* Court found that HERA’s extender statute was ambiguous and the Court was therefore bound by the Ninth Circuit’s decision in *McDonald* to construe HERA in favor of the FHFA. However, as explained on page 10 above,

⁴ That loose use proves nothing about Congress’s use of the term in carefully drafted legislation, and does not overcome the clear legal distinction between statutes of limitations and statutes of repose, and the overwhelming evidence that Congress and the courts understand that distinction. Indeed, several of the opinions cited by the Court below confirm that courts appreciate the important distinction between the concepts. *See, e.g., McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011) (“A statute of repose is strong medicine . . . ‘as opposed to a statute of limitations, which begins running upon the accrual of some claim and permits equitable exceptions...’”); *Anixter*, 939 F.2d at 1434 (“Section 13 sets forth a statute of limitations framed by a statute of repose”).

McDonald was itself wrongly decided, and as explained in Point IB below, even if the Extender Statute were ambiguous, it could not implicitly repeal Section 13's statute of repose and should not be construed in favor of the NCUA. Finally, *UBS* does not support the District Court's decision here because the *UBS* Court specifically distinguished FIRREA on the ground that HERA is "a different statute, enacted under different circumstances, and addressed to a different class of problems," and "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.* at 340.⁵

B. Even if the Extender Statute Were Ambiguous as the District Court Found, It Could Not Implicitly Repeal Section 13's Statute of Repose, and Should Be Limited to Statutes of Limitations

The District Court's ruling that the Extender Statute implicitly repealed the statute of repose in Section 13 of the Securities Act for claims by the NCUA is untenable for additional reasons.

⁵ The DOJ submitted an *amicus* brief in support of affirmance in *UBS*, but did not disavow any of the arguments it made in its *Waldburger amicus* brief (APP-440-475) quoted above, including that by 1986 Congress well understood the distinctions between statutes of limitations and statutes of repose. The DOJ nevertheless argued that "any ambiguities" in Congress's use of the term "statute of limitations" should be resolved in the FHFA's favor, but that is incorrect as shown in Point IB below. The DOJ also argued that HERA "mirror[ed]" the provisions of 28 U.S.C. § 2415 and applied to "any action" brought by the FHFA, but as shown in Point II below those assertions do not support the application of the Statute to the claims in question here.

First, repeal by implication is strongly disfavored. “[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). “If any interpretation permits both statutes to stand, the court must adopt that interpretation, ‘absent a clearly expressed congressional intention to the contrary.’” *Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Eng’rs*, 619 F.3d 1289, 1299 (11th Cir. 2010). Here, the District Court’s finding that it is “not clear whether Congress meant ‘statute of limitations’ to include ‘statute of repose’” (APP-322) shows there was no clearly expressed Congressional intention to the contrary. Accordingly, it was the “duty,” *Radzanower*, 426 U.S. at 155, of the Court below to permit both statutes to stand by applying Section 13’s statute of repose to the NCUA’s Securities Act claims and the Extender Statute to the NCUA’s State law contract and tort claims.

Second, the Court found that the Statute was “ambiguous” and that it was “not clear whether Congress meant ‘statute of limitations’ to include ‘statutes of repose.’” APP-322. Those findings compelled the conclusion that the Statute did *not* implicitly repeal Section 13’s statute of repose because a statute cannot be “repeal[ed] by implication” by an “ambiguous” statute. *Elephant Butte Irrigation Dist. v. U.S. Dep’t of Interior*, 269 F.3d 1158, 1164 (10th Cir. 2001) (“Even if we assume the wording of [the later statute] is confusing, that fact would cut against

finding repeal by implication, which must be clear and manifest.”) (quoting *Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936)).

Third, 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). (“It is inappropriate to reach the harsh result of imposing § 16(b)’s [strict] liability without fault on the basis of unclear language.”) Yet the decision of the Court below would do exactly that by eliminating the Securities Act’s three year statute of repose for the NCUA’s Section 11 and 12 claims that seek to 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”).

If the Extender Statute is found to be “ambiguous” it should be construed to apply only to statutes of limitations for several other important reasons. As shown in Point IA above, it has long been recognized that statutes of repose serve many important policy objectives, including finality in commercial transactions and preventing the assertion of stale claims. Moreover, there is no indication in the legislative history of FIRREA that Congress intended the Statute to apply to statutes of repose. In contrast, as the District Court acknowledged, this

Court has “discuss[ed] the legislative history of § 13 and not[ed] it was understood that the three-year repose period was absolute.” APP-328.

The Extender Statute reflects Congress’s intention to give the NCUA time to consider whether it has viable State “contract” and “tort” claims by extending “statute[s] 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.” APP-474. “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 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.

APP-467-68. Similarly, although a primary purpose of the Securities Act was to provide a remedy for purchasers of securities who were not given accurate information, 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 Congress's purpose of increasing the ability of the NCUA to recover money proves too much, because there is no indication that Congress intended to give the NCUA unfettered authority "at all costs." *Rodriguez*, 480 U.S. at 525-26. There is no basis to conclude that the plain language of the Extender Statute, which expands statutes of limitations for certain claims but not statutes of repose, did not sufficiently serve Congress's purpose.

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

The District Court incorrectly applied the Extender Statute to Federal claims and statutory claims, even though it is limited on its face to State law contract and tort claims. The Court gave two reasons: (1) the Statute expressly applies "in general" to "any action brought by" the NCUA, and (2) "analogous statutes have been applied to statutory claims." APP-318, 320. Neither rationale supports the Court's departure from the plain language of the Statute.

The Statute’s statement that it applies to “any *action* brought by” the NCUA does not mean that it applies to every *claim* asserted in such actions. The Statute refers to and modifies the statutes of limitations for only two types of “claim” — “tort claim[s]” and “contract claim[s]” — to the extent those claims arise “under State law.” 12 U.S.C. § 1787(b)(14). By extending the statute of limitations only for such “claims” in any “action” brought by the NCUA, Congress established that it was not treating the words “claims” and “actions” as synonyms, and did not provide any basis to read the Statute as extending the statute of limitations for any other claim. Congress did not and could not have intended to do so for the additional reason that it did not say *how* the statute of limitations for any other claim should be changed.

The District Court observed that the word “any” has an expansive meaning, 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 Muni. 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 Court below cited 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”).

The District Court’s conclusion that the Statute applies to the NCUA’s claims under Sections 11 and 12 of the Securities Act and California and Kansas Blue Sky laws also fails for several other reasons. *First*, those statutory claims are neither “tort claims” nor “contract claims.” *See Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1127 (2d Cir. 1989) (quoting and agreeing with SEC position that “Section 12(2) does not permit an analogy to tort or criminal law” and “is not derived from tort law principles”); *Benedetto v. PaineWebber Grp., Inc.*, 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 for three and two years, respectively...”).

The Court below stated that several Courts have applied provisions similar to the Extender Statute to statutory claims. Most, however, applied 28 U.S.C. § 2415’s statute of limitations to statutory claims that were analogous to

common law claims, unlike the NCUA's *sui generis* Securities Act and Blue Sky law claims. *See, e.g., United States v. Deluxe Cleaners & Laundry, Inc.*, 511 F.2d 926, 929 (4th Cir. 1975) (applying § 2415 to Service Contract Act claim that "was subject ... to the general period of limitation of six years prescribed" for contract claims); *United States v. Sunoco, Inc.*, 501 F. Supp. 2d 641, 648-50 (E.D. Pa. 2007) (applying § 2415 because Pennsylvania's Storage Tank and Spill Prevention Act "actually sound[s] in tort"). In contrast, Courts have declined to apply Section 2415 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). The District Court should have "assume[d]" that when Congress enacted the Extender Statute it was "aware of [this] relevant judicial precedent" and intended the Statute to be construed consistently, *Merck*, 130 S. Ct. at 1795-96, and therefore *not* to apply to *sui generis* statutory claims.⁶

⁶ The District Court also relied on cases decided after FIRREA of which Congress could not have been aware: *FHFA v. UBS* which was wrongly decided for the reasons described above, and *FDIC v. Zibolis*, 856 F. Supp. 57 (D.N.H. 1994),

Second, Congress could not have intended that the Statute apply to the NCUA's Federal law claims, such as under the Securities Act, because Congress plainly understood how to refer to "Federal law" and "Federal or State Law" in FIRREA, having done so more than twenty times in other provisions, *see* Pub. L. No. 101-73, yet it did not do so in the Statute. "[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).

Moreover, while the Extender Statute expressly leaves in place State statutes of limitations that are longer than the minimum periods it provides, there is no such provision for Federal claims with longer statutes of limitation. Accordingly, applying the Statute to Federal claims would have the perverse effect of *reducing* to three years the NCUA'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

which misplaced reliance on the "any action" language discussed above and acknowledged that the state statutory claim in question had been analogized to a quasi-contract claim.

at odds with the intentions of the drafters” is another reason not to apply the Extender Statute to Federal law claims. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 244 (1989).

Finally, there are good reasons for Congress’s decision that the Extender Statute 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 NCUA had a minimum three year statute of limitations for all such State law claims.

CONCLUSION

The District Court’s decision as to the Extender Statute should be reversed.

Dated: New York, New York
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/s/ Michael J. Dell

Dated: February 1, 2013

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Dated: February 1, 2013

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I hereby certify that on the 1st day of February 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.

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/s/ Michael J. Dell

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