TRIBUNAL DE APELACIONES
REGIÓN JUDICIAL DE SAN JUAN

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION; and MBIA INSURANCE CORPORATION, Plaintiffs, v. UBS FINANCIAL SERVICES INC.; UBS SECURITIES LLC; CITIGROUP GLOBAL MARKETS INC.; GOLDMAN SACHS & CO. LLC; J.P. MORGAN SECURITIES LLC; MORGAN STANLEY & CO. LLC; MERRILL LYNCH, PIERCE, FENNER & SMITH INC.; RBC CAPITAL MARKETS, LLC; and SANTANDER SECURITIES LLC. Defendants.	Case No. TA: KLCE2021 Tribunal De Primera Instancia, Sala de San Juan, Civil No. SJ2019CV07932

BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Securities Industry and Financial Markets Association ("SIFMA") advocates for the interests of its members in the securities industry, including hundreds of securities firms, banks, and asset managers. Its mission is to support strong and stable financial markets and to promote economic growth, while educating others about—and, in turn, increasing confidence in—the financial markets. As part of that work, SIFMA often asks to be heard as amicus curiae in cases of widespread concern to the financial industry.

This is one such case. Many of SIFMA's members underwrite bonds, including the municipal bonds at issue in this case. Bond underwriters depend on predictable and sensible legal doctrines in order to facilitate bond issuances, which in turn help municipalities raise funds for essential services. The decision below injects uncertainty into the status of those transactions in Puerto Rico, undermining well-settled background rules against which all financial entities operate. The decision below thus threatens harm, not only to SIFMA's underwriter members, but also to the financial industry in Puerto Rico more broadly. For these reasons, SIFMA respectfully submits that this brief provides an important perspective on the consequences of the trial court's decision, if left to stand.

INTRODUCTION

Bond insurers are in the business of guaranteeing payments of principal and interest on municipal bonds if the bond issuer defaults. The bond issuer pays insurers sizeable premiums for this service. Insurers have every incentive and opportunity to conduct detailed analyses of the issuer's condition before issuing such a policy. All participants in these transactions—including the insurers themselves—expect insurers to bear the risk, however remote, that the issuer will default and be unable to make the promised principal and interest payments. This case asks whether bond insurers can in effect nullify that allocation of risk by turning bond *underwriters* into de facto guarantors of municipal debt.

Plaintiffs here are sophisticated insurers that, starting over twenty years ago, agreed to insure municipal bonds issued by Puerto Rico and three of its instrumentalities, as part of an effort to raise money for important infrastructure projects. Years after those issuances, and for reasons that the bond insurers were in a better position than other market participants to foresee, Puerto Rico defaulted on these debts. Fourteen years after the last bond issuance, plaintiffs filed this lawsuit in an attempt to avoid the consequences of the default they insured against, seeking a backstop from the defendant underwriters who helped Puerto Rico raise much-needed capital.

The insurers claim that, in deciding to issue policies for billions of dollars in debt, they relied on a single sentence from the offering documents for these bonds (the "Official Statement"), which consisted primarily of representations from the bonds' issuers. The sentence in question is the only part of the Official Statement that makes a representation on behalf of the underwriters: it informs investors that the underwriters "reviewed the information" in the issuers' Official Statement "as part of their respective responsibilities *to investors*" (emphasis added). Even though this sentence was not directed to the insurers (and there is nothing in these transactions resembling a contract between the insurers and the underwriters), the insurers assert that the underwriters did not conduct that review. Not content to recover against just the bond issuers, Plaintiffs have now sued the underwriters, invoking two equitable doctrines: unilateral declaration of will and *actos propios*. On June 1, 2021, the trial court denied the underwriters' motion to dismiss, concluding that it was premature to dismiss the action.

As the underwriters' petition for interlocutory review persuasively explains, this decision was wrong on the law. SIFMA lends its voice because the flaws with the decision go even deeper: If left to stand, the decision threatens to undermine the foundational rules that underwriters rely on in deciding to facilitate the issuance of municipal bonds in the first instance. Underwriters—like many others in the financial industry—presume that sophisticated parties like insurers perform their own due diligence and bear the consequences of an issuer default; that courts will enforce standard disclaimers by their terms; and that statutes of repose prevent stale claims from upending a company's business a decade or more after the transactions at issue. But by allowing this suit to go forward, the trial court turned those commercial realities on their head, creating uncertainty and instability that will discourage investment in Puerto Rican bonds, and municipal debt generally, moving forward. This Court should grant review and reverse.

ARGUMENT

I. The Decision Below Ignores The Realities Of The Industry: Plaintiffs Are Sophisticated Parties, And Market Themselves As Such

In considering the equitable claims in this lawsuit, this Court should not lose sight of who is invoking the tribunal's equitable powers. This is not a suit brought by an individual investor or someone unsophisticated in bond issuances. Instead, the plaintiffs are sophisticated commercial insurers who were paid generously to take on the precise risk of default of which they now complain. More than just that, their theory of the case—that they relied on just one statement made by the underwriters, while doing little to no investigation of their own—contradicts what the insurers touted to their own investors and those who purchased their services. To allow insurers to offload their risk onto the bond underwriters is to fundamentally contradict the expectations of this transaction's parties—and participants in the bond market more generally.

A. Overview of the municipal bond market

Municipal bonds help state and local governments (the issuers) fund essential infrastructure. Investors buy the bonds and thus lend money to the issuers; the issuers, in turn, promise to pay investors back their principal—the amount they originally lent—plus interest, sometimes years after the bonds were issued. In this way, municipal bonds allow issuers to raise money for important public works projects without waiting years for sufficient tax revenue. *See generally* Anthony Saunders & Roger D. Stover, *Commercial Bank Underwriting of Credit-Enhanced Bonds: Are there Benefits to the Issuer*? (July 23, 2001), available at SSRN: https://ssrn.com/abstract=280809.

Municipal bond offerings involve many participants other than the issuers and investors—including financial advisors, attorneys, and rating agencies. One such participant is the underwriter. The underwriter's primary responsibilities are to negotiate the bond's price, purchase the bonds and offer them for resale, and market the bonds to investors after reviewing the issuer's "official statement" regarding the bonds. Because these responsibilities primarily involve the investors, it is the investors—not the issuers, not anyone else—to whom the underwriters typically make representations regarding the bonds.

One other participant in many (but not all) municipal bond offerings is the insurer, which guarantees investors their principal and interest payments in the event of a default. Historically, municipal bonds were considered very low-risk to insurers—such low risk that insuring them were deemed "zero-loss" opportunities. *Bond Insurers Led into Temptation*, Forbes/Investopedia, Feb. 28, 2008, https://tinyurl.com/324urkks. Nevertheless, insurers' financial guaranties can help reduce interest rates (and thus borrowing costs) for municipalities, as investors may be more willing to accept a lower return rate in exchange for guaranteed payment by the insurers. See Jeffrey Delmon, *Private Sector Investment In Infrastructure: Project Finance, PPP Projects And PPP Frameworks* § 2.8.2.5 (4th ed. 2021) (noting that by providing its superior credit rating and security—deemed a "wrap"—a bond insurer "improv[es] the rating for the bond and reduc[es] the yield required, justifying the cost of the insurance wrap"). As a result, for decades, the plaintiffs and other insurers enjoyed huge profits from low-risk activities. See, *e.g.,* Press Release, *National Public Finance Guarantee Corp. Study Finds the Commonwealth of Puerto Rico Continues Toward Fiscal Stabilization Despite Recession and Obstacles Ahead*, Business Wire (Mar. 2, 2011), https://tinyurl.com/hcjz69t7 (plaintiff touting its "financial strength" as the "world's largest U.S. public finance-only financial guarantee insurance company," including "its $5.6 billion in claims-paying resources, $2.4 billion in statutory capital and strong embedded profitability from its $483 billion insured portfolio and $5.4 billion investment portfolio as of December 31, 2010").

Insurers are not just important in providing guaranteed returns in the event of a default. Investors count on the fact that major insurers would not voluntarily put themselves on the hook for billions of dollars without assuring themselves through due diligence that the underlying bond issuances were sound—a fact that the insurers tout as well. As the trade group Association of Financial Guaranty Insurers (of which both plaintiffs are members) declares, bond insurers "maintain disciplined credit selection and underwriting standards" and "have the resources to evaluate the unique risk of each issuer and to conduct due diligence." Association of Financial Guaranty Insurers, *Financial Guaranty Insurance*, https://tinyurl.com/6wxvvtzn. And if their due diligence reveals a problem or concern, "[t]hey may also be able to negotiate stronger terms and conditions" with the issuer. *Id.*

B. The insurers in this case are sophisticated financial entities who advertise their independent review of bond issuances.

Both plaintiffs are financial guaranty insurance companies headquartered in New York. Complaint ¶¶ 41–42. The plaintiffs regularly insured public finance obligations, including those for U.S. political subdivisions and "utility districts, airports, health care institutions" and other major public projects. Complaint ¶¶ 41-42. As one plaintiff, MBIA, put it simply, it makes "unconditional commitments to guarantee timely payment" to bondholders. MBIA Annual Report (Form 10-K) at 101 (Mar. 8, 2006), https://tinyurl.com/55fptvka.

Of course, such an "unconditional commitment" can come with a price tag: there is always a risk, however slight, that factors like an economic downturn could lead to large-scale default. MBIA was not blind to this risk. As MBIA admitted to investors, "[c]hanges in general economic conditions can adversely impact" its business. *Id.* at 31. Those changes included "[r]ecessions, increases in corporate, municipal or consumer default rates, changes in interest rates, changes in law or regulation and other general economic and geopolitical conditions." *Id.* In short, MBIA was well aware that the very factors that ended up causing it to be on the hook in Puerto Rico—including a decade-long recession and increased borrowing—could cause it to have to pay out on claims on its policies.

But MBIA had a way of analyzing (and deciding whether to assume) that risk: It repeatedly told investors and the public that it engaged in extensive due diligence before issuing a financial guaranty policy. MBIA declared that it evaluates "[t]he creditworthiness of each insured issue" and, for municipal bonds, maintained its own underwriter standards that consider "economic and social trends, debt and financial management, adequacy of anticipated cash flow, satisfactory legal structure and other security provisions, viable tax and economic bases, adequacy of loss coverage and project feasibility." *Id.* at 101; see also Def.'s Mot. to Dismiss, at 8 (quoting virtually identical statement in MBIA's 2001 10-K). Far from advertising that it relies on others for its due diligence, MBIA told investors that it had a practice of doing extensive, independent, research into the municipal bonds it was asked to insure. As it was a sophisticated insurer asked to guarantee billions of dollars in debt, its investors—and issuers, underwriters, bondholders and potential bondholders—would expect no less.

C. In order to ensure that sophisticated parties like insurers do their due diligence, courts treat them differently from ordinary consumers.

Even though the plaintiffs are sophisticated financial players; even though they were aware of and accepted the risk that economic forces could push the insured bonds into default; and even though they repeatedly represented that they conducted independent due diligence; plaintiffs would have the Court believe that they made a weighty financial decision by relying on just one brief sentence in the bonds' Official Statement, which told potential investors that the underwriters "reviewed the information" in the Official Statement "as part of their respective responsibilities to investors." See, e.g., Complaint ¶¶ 16, 29. But no reasonable party in the insurers' shoes would have relied on this statement—itself directed to investors—as a representation to insurers vouching for the issuer's financial condition. In denying the defendants' motion to dismiss, the trial court's decision seemingly exempts insurers from the typical rules that apply to parties like them—and creates enormous uncertainty about the rules of the road going forward.

In considering whether a plaintiff justifiably relied on a representation in a securities offering—or was misled in a financial transaction more broadly—courts have long recognized that they must consider the sophistication or lack thereof of the party claiming to be misled. When the parties claiming fraud are "large corporations engaged in complex transactions in which they were advised by counsel"—sophisticated entities that negotiated "with their eyes wide open"—courts are more wary of indulging their claims. *Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 952 N.E.2d 995, 1001-02 (N.Y. 2011).

This rule extends not just to what the entities knew, but what they should have known. Specifically, "[w]here sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access," many courts "are particularly disinclined to entertain claims of justifiable reliance." *Crigger v. Fahnestock & Co.,* 443 F.3d 230, 235 (2d Cir. 2006).

The rule applies with particular force to bond insurers. Rather than relying on the due diligence of others in the transaction, like underwriters, a "sophisticated financial insurance company[] is supposed to decide for itself the relevant universe of risk it deems to be material to diligence before issuing insurance." *Assured Guar. Mun. Corp. v. DLJ Mortg. Cap., Inc.*, 997 N.Y.S.2d 97 (Sup. Ct. 2014). While investigations can be time-consuming and costly—and thus simply piggybacking on the investigative work of others "might be a business model that bond insurers would prefer," *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, No. 1:00-CV-3181-JOF, 2004 U.S.

Dist. LEXIS 18513 (N.D. Ga. Aug. 23, 2004)—it is simply not the case that insurers have "no obligation at all to investigate any bond transaction offered up by an underwriter" for insuring, *id.* Instead, because the law demands more of sophisticated parties—and because entities with fewer resources and lesser access, like investors, rely on insurers—bond insurers must conduct their own due diligence. *Id.*

This rule makes good sense. First, it ensures that a sophisticated insurer's claimed damages were actually brought about by a misstatement, rather than external forces. See, *e.g.*, *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025 (9th Cir. 1992) (noting that justifiable reliance asks whether it was the misstatement that caused plaintiff harm). A sophisticated party like a bond insurer "requires less information to call a misrepresentation into question than would an unsophisticated investor." *Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1028 (4th Cir. 1997) (internal quotation marks and alteration omitted). "Likewise, when material information is omitted," a sophisticated party "is more likely to know enough so that the omission still leaves him cognizant of the risk." *Id.* at 1028–29 (internal quotation marks and alteration omitted). Where a sophisticated entity's damages are due not to its reliance on a misrepresentation but to its decision to take its chances on a financial venture, the rule rightfully precludes recovery.

Second, and relatedly, the rule has sound policy roots: It ensures that sophisticated bond insurers do not engage in a game of "heads I win, tails you lose." Although a sophisticated insurer is of course better positioned than most to discover the facts of a matter and to know when to investigate further, it might not always be incentivized to engage in such due diligence. After all, such due diligence—if done right—may be costly. So insurers will be inclined to stick their heads in the sand (or, worse, ignore or hide the red flags raised by a limited investigation) when it comes to high-risk transactions—so long as they can recover from another entity after the fact if their gamble does not pay off. If the gamble succeeds, they reap the enormous rewards associated with it; if not, they recover their losses from someone else.

That is the precise moral hazard that this case risks encouraging. Far from being naïve investors, the insurers had all the ability in the world to investigate the issuers' financial condition before insuring multiple hundreds of millions of dollars in bonds. In fact, if their SEC filings are to be believed, the insurers *did* investigate in the mine run of cases. Yet whether MBIA made a "business decision" to forgo its normal due diligence in this case, *cf. MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*, 58 N.Y.S.3d 874 (Sup. Ct.), *aff'd as modified*, 84 N.Y.S.3d 157 (2018), or simply conducted due diligence and reasonably concluded that the likelihood of default was remote, the insurers now seek to shift the burden of their failed bet onto another party. And by not recognizing the insurers as the sophisticated parties they are, the trial court's decision blesses that gamble.

Without holding sophisticated actors like bond insurers to their end of the bargain—as they are in jurisdictions across the United States—the court risks thwarting, not furthering, the goal of economic recovery in Puerto Rico. It disincentivizes reasonable investigation by insurers and, in so doing, disincentivizes underwriters from assisting Puerto Rico and its municipalities in raising capital. Financial stability depends on clear and predictable rules; the trial court's outlier decision provides only uncertainty and confusion.

II. The Decision Undermines Standard Disclaimers That Reflect The Parties' Agreed-Upon Risk Allocation

There is another reason the insurers' claims fail: The underwriters told the insurers that the underwriters could not guarantee the accuracy of the very information that purportedly caused the insurers' damages. The Official Statement stated that the underwriters had simply reviewed it, and stressed that the underwriters "do not guarantee the accuracy or completeness" of the information in the offering documents. Complaint ¶ 115. The insurers must have understood the meaning of this disclaimer, as they too disclaimed any responsibility for the Official Statement's "accuracy or completeness." *See* Def.'s Mot. to Dismiss, at 8. And far from "demanding . . . assurances as to [the Official Statement's] accuracy in the form of representations and warranties," *Centro Empresarial Cempresa*, 952 N.E.2d at 1002, the insurers instead were content to know that the information may not be accurate at all.

Courts give disclaimers in financial transactions like these significant weight in deciding whether a claim has merit. Some consider the disclaimers part of the analysis as to whether there was a misrepresentation at all, see *Flippin Materials Co. v. United States*, 312 F.2d 408, 413 n.7 (Ct. Cl. 1963) (disclaimers may be "taken into account in . . . deciding whether there was in fact a misrepresentation"). Others consider the disclaimers in deciding whether a plaintiff reasonably relied on a misrepresentation. *See DynCorp v. GTE Corp.*, 215 F. Supp. 2d 308, 319 (S.D.N.Y. 2002) (stating that "particularized disclaimers" can "make it impossible" for a plaintiff "to prove . . . that it reasonably relied on . . . representations that it alleges were made to induce it to enter into [agreements]"); *see also Fin. Guar. Ins. Co. v. Putnam Advisory Co.,* No. 12-cv-7372, 2020 WL 5518146, at *40–41, *94 (S.D.N.Y.

Sept. 14, 2020) (sophisticated party could not reasonably rely on purported misrepresentation in document where, among other things, document included a disclaimer that the defendant did not guarantee "the accuracy of the information contained herein"); *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 598–99 (N.Y. 1959) (where the contract specified that the seller had not "made . . . any representations as to the . . . expenses [or] operation . . . [of the building] and the Purchaser hereby expressly acknowledges that no such representations have been made," the language "destroys the allegations in plaintiffs['] complaint that the agreement was executed in reliance upon . . . contrary oral representations").

Whichever way the disclaimers are analyzed, these decisions reflect an obvious truth: Disclaimers set the parties' expectations. Like other standardized contractual terms, disclaimers reduce uncertainty as to who bears responsibility for incorrect information. *See generally* Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds,* 53 Emory L.J. 929 (2004) (discussing benefits of other standardized terms in bond contracts). Such clarity may help avoid unnecessary costs, including (sometimes) the costs of doomed lawsuits.

These disclaimers are particularly important in the municipal bond market. Much like the legal rules regarding sophisticated parties, disclaimers of this sort ensure that bond insurers conduct their own investigations to the extent they want to vet the offering documents' accuracy—after all, they are well positioned to research, investigate, and even demand changes from an issuer depending on the results of the investigation. Enforcing these provisions by their terms not only ensures that the insurers entering into costly (and perhaps risky) financial transactions do so with their eyes wide open: it also benefits investors and the public at large, who see an insurer's involvement as a sign that it has done additional due diligence. *See, e.g.*, *Standard & Poor's Bond Insurance Book 2004* (Standard and Poor's, 2004) at 43 ("[I]t is presumed that [bond] insurers only take on liabilities judged to have minimal loss potential, except under extreme economic conditions."). At bottom, thus, such a system benefits everyone—investors, underwriters, insurers, and the public at large that depends on stable municipal investment.

Conversely, if parties are told that their disclaimers do not mean what they say, it injects considerable uncertainty into financial transactions. More than that, failing to respect the parties' express allocation of risk here could have disastrous consequences for municipalities. Forced to bear unexpected costs and unable to predict their legal exposure ex ante, underwriters may require higher spreads on bond sales. Cf. *McNair v. Johnson & Johnson*, 818 S.E.2d 852, 866 (W.Va. 2018) (expansion of liability results in "significant litigation costs" that are added to product prices "to the disadvantage of consumers"). Even worse, underwriters who rely on standard disclaimers elsewhere to know their liability will be wary of entering into transactions going forward. The end result is harm to the very entities that municipal bonds are supposed to help—state and local governments, investors, and taxpayers—as governments will receive less in bond proceeds or may be unable to raise funds for necessary capital projects without resorting to tax increases. This case thus represents an important opportunity for the courts to explain that, as elsewhere in the United States, financial entities in Puerto Rico can rely on the plain text of their disclaimers.

III. The Decision Upsets Important Policies Served By Statutes Of Repose

In addition to relying on the sophistication of insurers and the commonsense meaning of standard disclaimers, underwriters depend on a third factor to ensure predictability: statutes of repose. Although the trial court here found the statutes of repose under both federal and Puerto Rico securities laws to be inapplicable, it had no basis for doing so. Puerto Rico Uniform Securities Act (PRUSA)'s two-year statute of repose applies not just to lawsuits brought under the PRUSA, but also those between participants in the securities industry claiming securities-related misrepresentation. *See PaineWebber Inc. of Puerto Rico v. First Boston (P.R.) Inc.,* 136 D.P.R. 541, 544 (P.R. 1994). Similarly, the U.S. Congress drafted a five-year statute of repose that applies to any "private right of action" that "involves a claim of fraud, deceit, manipulation, or contrivance … of a regulatory requirement concerning the securities laws." 28 U.S.C. § 1658(b).

As the underwriters have explained, those statutes bar the insurers' claims here, which are at their core causes of action relating to securities transactions. The insurers and underwriters are all major players in the securities industry; indeed, as the insurers contend, the "bonds at issue here could not have been issued on marketable terms without [their] insurance and guarantees." Complaint ¶ 15. And the insurers take issue with just one statement made by the underwriters: that they reviewed information in the issuers' Official Statement as part of their "responsibilities to investors under[] the federal securities laws." Complaint ¶ 16. Fundamentally, thus, plaintiffs' claims concern a misrepresentation in the offering documents for securities transactions. See, e.g., Complaint ¶¶ 16, 17, 19, 90-92; see also Motion to Dismiss 32. While the insurers insist that their claims sound in equity, not securities law, plaintiffs cannot evade the policy dictates of both the Puerto Rican legislature and Congress so easily.

These statutes of repose are in place for important reasons. "The purpose of a statute of repose is to create an absolute bar on a defendant's temporal liability." *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017) (internal quotation marks omitted). Much like a discharge in bankruptcy, statutes of repose "reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014) (internal quotation marks omitted). They thus allow for a "fresh start or freedom from liability." *Id.* For that reason, statutes of repose generally admit of no judge-made exceptions such as equitable tolling. 4 C. Wright & A. Miller, Federal Practice and Procedure § 1056 (4th ed. 2021) ("[A] repose period is fixed and its expiration will not be delayed by estoppel or tolling").

Statutes of repose reflect a business reality too: "[B]usiness planning is impeded by contingent liabilities that linger indefinitely." *McCann v. Hy-vee, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011). Moreover, in large-scale securities transactions, "repose protects settled economic expectations of not just the defendant, but a multitude of economic actors." Michael J. Kaufman & John M. Wunderlich, *Toward a Just Measure of Repose: Statutes of Limitations for Securities Fraud*, 52 Wm. & Mary L. Rev. 1547, 1605 (2011). Indeed, when a corporation is held liable for an event that occurred twenty years prior, "'during those twenty years, thousands of people may have invested in the corporation, hundreds of people may have accepted jobs with it, dozens of lenders may have extended credit to it, and scores of firms may have entered business partnerships with it.'" *Id.* at 1606 (quoting Tyler T. Ochoa &

Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453, 458, 460 (1997)). "'As a result of the corporation's liability, those investments may be forfeited, those jobs may be lost, those loans may not be repaid, and those business partnerships may collapse.'" *Id.* Put simply, "'as time passes, the investors, employees, lenders, and business partners acquire reliance interests that may be disrupted by, and that must be weighed against,'" any "'claims to compensation.'" *Id.*

These policy rationales don't just reflect common sense intuitions: they also have empirical support. Studies show that statutes of repose encourage investment and growth. A 2013 study in the products-liability context found that imposing statutes of repose was associated with "statistically significant increases in economic activity"; specifically, a close to 2% increase in the number of small businesses. Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 Vand. L. Rev. 257, 261-62, 303 (2013). When businesses—including financial institutions—can measure and predict their liability ex ante, they are more likely to expand and invest.

And, of course, the reverse is also true: without being able to count on statutes of repose and their enforcement, businesses cannot fully expend their resources, wary always of expanding liability around the corner. Some planned investments will fail entirely; others may founder as attorneys and executives worry about what liability may arise fifteen years out. See generally Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 Colum. L. Rev. 1847, 1875 (2000) (noting that, in the class-action context, the "frightening possibility of an inordinate and unpredictable number of separate suits" affects a number of financial decisions, including the size of a settlement). Underwriters seeking to avoid indeterminate legal exposure might even choose to stop doing business in Puerto Rico, which would devastate municipalities' ability to raise capital. These policy considerations make even clearer how wrong the insurers are on the law. See, e.g., *Tapucu v. Gonzales*, 399 F.3d 736, 743 (6th Cir. 2005) (considering "far-reaching consequences" in rejecting interpretation of statute).

In sum, statutes of repose exist for a reason: to protect settled expectations—including among innocent parties—and to encourage growth and investment in reliance on those expectations. Both of those considerations underscore the error here in allowing stale claims to proceed.

CONCLUSION

The insurers argue that Puerto Rico's very financial recovery is at issue in this case. They urge the Court to "reestablish the normal functioning of the municipal bond market with transparency and integrity," as no less than "the welfare of the people of Puerto Rico" is at stake. Complaint ¶ 5.

The insurers are right as to the stakes. But those considerations point to rejecting their claims, not providing these New York-based insurers with a windfall recovery and allowing them to undermine any reasonable allocation of risk. The "normal functioning of the bond market" requires treating insurers as the sophisticated parties they are; holding them to their unconditional guarantees; and enforcing the background rules against which all financial entities operate. Allowing insurers to treat underwriters as their guarantors of these bonds—and nullifying these New York-based insurers' contractual obligations along the way—will ultimately disserve the cause this lawsuit purports to serve: "facilitat[ing] Puerto Rico's return to the capital markets and financial stability." Complaint ¶ 5.

Date: July 2, 2021

Respectfully submitted,

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