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Second Circuit Reaffirms Its View That Extender Statutes Supersede Statutes of Repose

The Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") includes a so-called Extender Statute prescribing the limitations period for actions brought by the Federal Deposit Insurance Corporation ("FDIC") as conservator or receiver for a failed bank. The Housing and Economic Recovery Act of 2008 ("HERA") includes a materially identical provision governing the limitations period for actions brought by the Federal Housing Finance Agency ("FHFA") as conservator or receiver for government-sponsored entities within its regulatory purview, such as Fannie Mae and Freddie Mac. These Extender Statutes have been utilized by the FDIC and FHFA to pursue residential mortgage-backed securities ("RMBS") claims that otherwise would have been barred by various statutes of repose, and in 2013, in *FHFA v. UBS*, the Second Circuit held that the FHFA Extender Statute displaced the Securities Act's three-year statute of repose.[1] However, in 2014, the Supreme Court held in *CTS Corp. v. Waldburger* that a Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") provision preempting state statutes of limitations did not preempt state statutes of repose.[2] Since then, RMBS defendants have invoked *CTS* to argue that the FDIC, FHFA, and similar Extender Statutes do not displace statutes of repose. The Fifth and Tenth Circuits have rejected such arguments (relying, in part, on *UBS*).[3] In *FDIC, as Receiver for Colonial Bank v. First Horizon Asset Sec., Inc.*, 2016 WL 2909338 (2d Cir. May 19, 2016) ("*Colonial Bank*"), a divided panel of the Second Circuit concluded that *CTS* did not undermine the rationale of *UBS*, and accordingly held that the FDIC Extender Statute supersedes the Securities Act's three-year statute of repose. Although the *Colonial Bank* decision did not result in a Circuit split that could have been helpful in obtaining Supreme Court review, the thoughtful dissent suggests that this issue may well generate ongoing judicial disagreement and find its way to the Supreme Court.

Background

Both the FDIC and FHFA Extender Statutes provide that, with respect to tort claims (usually read to include securities claims as well) brought by the agency as conservator or receiver, the applicable "statute of limitations"

[1] *FHFA v. UBS Americas Inc.*, 712 F.3d 136, 141-44 (2d Cir. 2013).

[2] *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2185-88 (2014).

[3] *See FDIC v. RBS Sec. Inc.*, 798 F.3d 244 (5th Cir. 2015) (FDIC Extender Statute held to displace Texas Securities Act statute of repose); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014) (NCUA Extender Statute, which is materially identical to the FDIC and FHFA Extender Statutes, held to displace Securities Act statute of repose).

shall be at least three years from the date of the agency's appointment as conservator or receiver.[4] The Extender Statutes make no reference to potentially applicable statutes of repose.

In 2007, Colonial Bank, a federally-insured bank headquartered in Montgomery, Alabama, invested approximately $300 million in nine residential mortgage-backed securities ("RMBS"). Colonial suffered heavy losses on those RMBS, and on August 14, 2009, the Alabama State Banking Department closed Colonial and appointed the FDIC as receiver. On August 10, 2012, within three years of its appointment as receiver, the FDIC filed suit against the issuers and underwriters of the RMBS, alleging that the prospectus supplements misrepresented the creditworthiness of the loans backing the RMBS, and asserting claims under Sections 11 and 15 of the Securities Act. Defendants moved to dismiss the complaint as time-barred under the Securities Act's statute of repose — because the action was commenced more than three years after the RMBS had been offered to the public[5] — arguing that the FDIC Extender Statute did not displace the Securities Act's statute of repose.

While that motion was pending, the Second Circuit decided *UBS*. The *UBS* Court held that the timeliness of Securities Act claims brought by FHFA was governed by the HERA Extender Statute alone, without regard to the Securities Act's statute of repose. The *UBS* Court specifically rejected the argument that the FHFA Extender Statute's use of the term "statute of limitations" meant that it left in place otherwise applicable statutes of repose.[6] In this regard, although it acknowledged a difference between statutes of limitations and statutes of repose, the *UBS* Court noted that Congress and the federal courts often used the term "statute of limitations" to refer to both statutes of limitations and statutes of repose.[7] Moreover, the *UBS* Court reasoned, the text of the Extender Statute indicated that Congress intended to preclude the application of any limitations periods other than as set forth in the statute itself, because the statute provides that "'*the* applicable statute of limitations with regard to *any* action brought by [FHFA] as conservator or receiver *shall be'* as set forth in the extender statute."[8] In light of *UBS*, the *Colonial Bank* Defendants withdrew their Securities Act statute of repose argument.

The next year, the Supreme Court decided *CTS*. The issue in *CTS* was whether CERCLA § 9658, which provides for limited preemption of state statutes of limitations otherwise applicable to state-law toxic tort actions, also preempted state statutes of repose. The Supreme Court conceded that Congress sometimes used the term "statute of limitations" to refer to both statutes of limitations and statutes of repose, but held that features of § 9658 precluded reading it to extend to statutes of repose.[9]

[4] *See* 12 U.S.C. § 1821(d)(14)(A) (FIRREA); 12 U.S.C. § 4617(b)(12)(A) (HERA).

[5] *See* 15 U.S.C. § 77m.

[6] *See UBS,* 712 F.3d at 142-43.

[7] *Id.*

[8] *Id.* at 143 (quoting 12 U.S.C. § 4617) (emphasis and brackets added by Court).

[9] *CTS*, 134 S.Ct. at 2185-88.

Relying on *CTS*, the *Colonial Bank* Defendants moved for judgment on the pleadings, renewing their argument that the FDIC Extender Statute did not displace the Securities Act's statute of repose and that the action was therefore time-barred. The district court (Stanton, J.) agreed, and entered judgment for Defendants.[10]

The *Colonial Bank* Decision

A divided panel of the Second Circuit vacated the judgment. Judge Lynch, joined by Judge Carney, noted that Defendants made no attempt to distinguish the FDIC Extender Statute from the FHFA Extender Statute, and that the outcome was therefore controlled by *UBS* unless Defendants could show that its rationale had been explicitly or implicitly overruled by *CTS*.[11] The majority concluded that Defendants had not made such a showing. As a threshold matter, the majority observed that *CTS* did not hold that a federal statute extending "statutes of limitation" must always be read to leave in place existing statutes of repose.[12] The majority then catalogued the key ways that, in its view, CERCLA § 9658 differed from the Extender Statutes, leading the majority to conclude that *CTS* had "limited bearing" on the case at bar.[13]

Most significantly, the majority determined that the FDIC Extender Statute and § 9658 "are structured and worded in fundamentally different ways."[14] Specifically, § 9658 "[did] not purport to create an entirely new statute of limitations framework for state toxic tort actions; instead, it provided a limited '[e]xception to State statutes.'"[15] "By contrast, the Extender Statute establishes 'the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver.'"[16] The majority concluded that "this structure suggests that Congress intended the Extender Statute to supersede any and all other time limitations, including statutes of repose."[17]

Defendants argued that, like § 9658, the Extender Statute refers to statute of limitations in the singular, and that *CTS* had reasoned that this was an "'awkward way to mandate the pre-emption of two different time periods with two different purposes.'"[18] The majority did not find this persuasive, noting that CERCLA refers to existing statute of limitations periods whereas the Extender Statute refers to a statute of limitations period newly created by the Extender Statute itself.[19] Nor did the majority view the fact that the Extender Statute's limitations period is tied to

[10] *FDIC, as Receiver for Colonial Bank v. Chase Mortgage Finance Corp.*, No. 12-cv-6166 (S.D.N.Y. Sep. 2, 2014).

[11] *Colonial Bank*, at 9.

[12] *Id*. at 10.

[13] *Id*. at 4.

[14] *Id*.

[15] *Id*.

[16] *Id*. at 5.

[17] *Colonial Bank*, at 5.

[18] *Id*. (quoting *CTS*, 134 S.Ct. at 2186-87).

[19] *Id*. at 17.

accrual as supporting Defendants' position; rather, the majority took this to mean only that the Extender Statute is itself a statute of limitations, but irrelevant to whether it displaced otherwise applicable statutes of repose (a question already answered in the affirmative by *UBS*).[20]

The majority also contrasted the legislative histories of the two provisions. With respect to CERCLA § 9658, the Congressional report recommending a preemption amendment had distinguished between statutes of limitations and statutes of repose, but the statute as enacted did not. The majority observed that there was no legislative history to the FDIC Extender Statute making such a distinction, thereby undermining Defendants' argument that the Extender Statute's failure to refer to statutes of repose was of significance.[21]

Given these differences in the statutes' structure, wording, and histories, the majority was of the view that "much of *CTS*'s reasoning is simply inapplicable to the Extender Statute."[22] Accordingly, the majority "perceive[d] nothing in *CTS* that undercuts the *UBS* opinion's analysis of the Extender Statute."[23] Following from that conclusion, the outcome in *Colonial Bank* was dictated by *stare decisis*.

Judge Parker dissented. He was of the view that the majority's reasoning failed to adequately account for the differences between statutes of limitation and statutes of repose as discussed in *CTS*, the holding of which he characterized as having "direct relevance to this case."[24] He disagreed with the majority's premise that *CTS*'s importance turned on whether § 9658 and the Extender Statute were "textually congruent." Rather, in Judge Parker's view, "[the importance of *CTS*] derives from its instruction on how to read extender statutes." In this regard, he observed that whereas *UBS* had interpreted "*the* statute of limitations" in the Extender Statute as evidence that Congress intended one limitations period to apply, *CTS* had "treated virtually identical language describing the covered period in the singular as evidence that Congress did not intend to alter 'two different time periods with two different purposes.'"[25] Judge Parker concluded that when the FDIC Extender Statute was enacted in 1989 "Congress understood the distinction between statutes of limitations and statutes of repose,"[26] and stressed that the Extender Statute does not reference statutes of repose yet "contains numerous references to the accrual of claims," which, the *CTS* Court emphasized, is relevant to statutes of limitations but not statutes of repose.[27] Given the foregoing, Judge Parker concluded that the Extender Statute did not reflect the clear and unmistakable

[20] *Id*. at 18.

[21] *See id*. at 11.

[22] *Id*. at 5.

[23] *Colonial Bank*, at 6.

[24] *Id*. at 8 (Parker, J. dissenting).

[25] *Id*. at 10 (quoting *CTS*, 134 S.Ct. at 2186-87).

[26] *Id*. at 9.

[27] *Id*. at 11.

Congressional intent necessary to constitute an implied repeal of "a widely relied on and widely applied statute of repose."[28]

Looking Ahead

The FDIC, FHFA, and the National Credit Union Administration Board ("NCUA") have filed billions of dollars' worth of claims against RMBS issuers and underwriters that would have been barred by statutes of repose, but for the Extender Statutes as construed by various decisions. The *CTS* decision gave RMBS defendants encouragement that courts would revisit the issue and adopt a narrow reading of the term "statute of limitations" as used in the Extender Statutes, and their arguments have been successful in some district courts. With *Colonial Bank*, the Second Circuit has joined the Fifth and Tenth Circuits in holding that *CTS* is of limited, and ultimately not determinative, application to the Extender Statutes.[29] The Supreme Court denied certiorari in both of those cases,[30] and had the outcome in *Colonial Bank* been different, the issue would have been more strongly positioned for Supreme Court review. However, given the split panel in the Second Circuit, the fact that the Circuit courts are interpreting a very recent Supreme Court decision, and that the Ninth Circuit is currently considering the same issue in *NCUA v. Wachovia Mortg. Tr. et al*., No. 13-56620 (9th Cir. filed Sept. 17, 2013), the prospect of Supreme Court review remains real.

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[28] *Id*. at 11.

[29] *See FDIC v. RBS Sec. Inc.*, 798 F.3d 244; *NCUA v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199.

[30] *RBS Sec. Inc. v. FDIC,* 136 S. Ct. 1492, 1493 (2016); *Nomura Home Equity Loan, Inc. v. Nat'l Credit Union Admin. Bd.*, 135 S. Ct. 949, 190 L. Ed. 2d 830 (2015).

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