14-3648-cv

In the United States Court of Appeals
For the Second Circuit

FEDERAL DEPOSIT INSURANCE CORPORATION, CORP, as Receiver for Colonial Bank,

Plaintiff-Appellant,

—against—

FIRST HORIZON ASSET SECURITIES, INC., FIRST HORIZON HOME LOAN CORPORATION, CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK SECURITIES INC., FTN FINANCIAL SECURITIES CORP., HSBC SECURITIES (USA) INC., RBS SECURITIES INC., UBS SECURITIES LLC, AND WELLS FARGO ASSET SECURITIES CORPORATION,

Defendants-Appellees,

CHASE MORTGAGE FINANCE CORP., JP MORGAN CHASE & CO., JP MORGAN SECURITIES LLC, CITICORP MORTGAGE SECURITIES, INC., CITIMORTGAGE, INC., CITIGROUP GLOBAL MARKETS INC., ALLY SECURITIES LLC, AND MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Defendants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AMERICAN BANKERS ASSOCIATION AND THE CLEARING HOUSE ASSOCIATION LLC IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that *amici curiae* do not issue stock or have a parent corporation that issues stock.

The Clearing House Association LLC is a limited liability company and as such has no shareholders. Rather, each member holds a limited liability company interest in The Clearing House that is equal to each other member's interest, none of which is more than a 10% interest in The Clearing House. The Securities Industry and Financial Markets Association and the American Bankers Association are non-profit trade groups and have no shares or securities that are publicly traded.

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June 9, 2016

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INTEREST OF *AMICI CURIAE*

The Securities Industry and Financial Markets Association is an association of hundreds of securities firms, banks and asset managers, including many of the largest financial institutions in the United States. The American Bankers Association is the principal national trade association of the financial services industry in the United States. The Clearing House is the oldest banking association and payments company in the United States. *Amici* submitted a brief on the underlying appeal, in which they set forth their Statement of Interest. *Amici* incorporate that Statement here.[1]

Amici respectfully submit this brief to elaborate on the reasons why the petition for panel rehearing and rehearing *en banc* should be granted, and why the FDIC Extender Statute (the "Statute"), 12 U.S.C. § 1821(d)(14), should not be expanded beyond the limited scope expressly provided by Congress. The divided panel's decision is flatly inconsistent with the text of the Statute and Supreme Court precedent and overlooks the critical significance of the venerable statute of repose in the Securities Act of 1933 (the "Securities Act").

Rehearing is warranted because the panel majority's decision is enormously important and has nationwide implications. Dozens of cases

[1] This brief was not authored in whole or in part by counsel for any party. No counsel or party other than *amici curiae*, their members or their counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, in accordance with Fed. R. App. P. 29(a).

concerning hundreds of billions of dollars of securities and damages have been kept "alive only because of so-called 'extender statutes,'" Alison Frankel, *SCOTUS Repose Opinion Is Good News for Securities Defendants, Reuters*: On the Case (June 9, 2014), http://blogs.reuters.com/alison-frankel/2014/06/09/scotus-repose-opinion-is-good-news-for-securities-defendants, and their incorrect application to displace statutes of repose. More than a dozen opinions, including many in this Circuit, have considered whether the extender statutes affect statutes of repose.

It is imperative that this Court correct the divided panel's decision to conform to the Supreme Court's decision in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014), which enunciated clear and categorical principles on the important questions (i) whether the Congressional extension of the "statute of limitations" for certain state law claims also extends statutes of repose for any claims, and (ii) whether the clear and unambiguous text of a Congressional statute should yield to a court's view of the purpose of the statute. Those principles, which the District Court correctly applied in this action, have a significant impact on *amici*'s members and the securities markets because they minimize uncertainty, which is the primary purpose of the Securities Act's statute of repose. The divided panel's decision would undermine those principles.

It is vital to the securities industry and financial markets that laws are construed and applied as enacted by Congress and that statutes of repose are strictly enforced. If statutes are interpreted based on the assumption that Congress does not understand or forgets critical distinctions between terms — such as the distinction between a statute of limitations and a statute of repose that *CTS* found Congress understood only three years before it enacted the Statute — and based on subjective judicial views of how best to accomplish perceived legislative purposes, there is no limit to the manner in which statutes may be misconstrued. That would undermine the bedrock principle of predictability upon which *amici*'s members and all market participants rely.

ARGUMENT

THE PANEL MAJORITY, IN FAILING TO FOLLOW THE PLAIN LANGUAGE OF THE FDIC EXTENDER STATUTE AND THE SUPREME COURT'S DECISION IN *CTS,* OVERLOOKED THE CRITICAL IMPORTANCE OF THE SECURITIES ACT'S STATUTE OF REPOSE

CTS resolved a division among the lower courts as to whether Congressionally enacted extender provisions that expressly apply to the "statute of limitations" also displace statutes of repose. The Supreme Court held CERCLA's extender provision does *not* displace statutes of repose. The Court based its ruling primarily on the "natural reading of [CERCLA's] text" which — like the FDIC Extender Statute — refers only to the "statute of limitations" and contains other

textual features inconsistent with applying it to statutes of repose. 134 S. Ct. at 2188.

The divided panel's application of the Statute's provision for "the applicable statute of limitations" for state law "contract" and "tort" claims to preempt the Securities Act's statute of repose is untenable because it is inconsistent with both *CTS* and the text of the Statute. There is no dispute that the Statute, like the extender provision *CTS* considered, refers many times to the "statute of limitations" but never to any statute of repose or federal or statutory claim, let alone the Securities Act or its statute of repose. But the panel majority gives short shrift to Congress's omission of any mention of statutes of repose or federal or statutory claims, and fails to acknowledge the importance of the Security Act's statute of repose.

CTS explained the critical importance of statutes of repose. They "effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.' . . . Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability." 134 S. Ct. at 2183 (citations omitted). "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). A statute of repose "serves the need for finality in

certain financial and professional dealings." *Caviness v. Derand Res. Corp.,* 983 F.2d 1295, 1300 n.7 (4th Cir. 1993).

Congress determined that it is particularly important to ensure finality in the context of the Securities Act's near strict liability claims. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419-20 (2012) (reversing limitation on Section 16(b) statute of repose). As Judge Parker explained, "the Securities Act's statute of repose is especially important for issuers and underwriters of securities to be free from near-strict statutory liability three years after the offering or sale of securities" and "reflects a legislative determination that, once three years have passed from the public offering or sale of a security, a company's management may treat a securities transaction as closed." (Dissent at 8, 9) Accordingly, as this Court has recognized, the Securities Act "defines the right involved in terms of the time allowed to bring suit." *P. Stolz Family P'ship L.P. v. Daum,* 355 F.3d 95, 102 (2d Cir. 2004). The Securities Act's statute of repose provides an important "substantive right," *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.,* 721 F.3d 95, 109 (2d Cir. 2013), and an "absolute limitation" on Securities Act claims. *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 704 (2d Cir. 1994).

The Securities Act's statute of repose is also essential to the functioning of the Act's statutory affirmative defenses, which could otherwise be

undermined by the passage of time. The statute of repose protects market participants from "the problems of proof . . . that arise if long-delayed litigation is permissible." *Norris v. Wirtz,* 818 F.2d 1329, 1333 (7th Cir. 1987). Congress was concerned that "lingering liabilities would disrupt normal business and facilitate false claims." *P. Stolz Family P'ship L.P.*, 355 F.3d at 105 (quoting *Norris*, 818 F.2d at 1332).

By eliminating "protracted liability," *CTS*, 134 S. Ct. at 2183, the Securities Act's statute of repose adds predictability that serves the important purpose of enabling financial institutions to deploy for productive use capital that otherwise might be tied up indefinitely in reserves to cover potential liability. It protects new shareholders, bondholders and management from liability for conduct that occurred at a time when they were not associated with the business. And it prevents strategic delay by plaintiffs, 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).

The Supreme Court concluded in *CTS* that Congress was well aware of the "critical distinction" between statutes of repose and statutes of limitations when it enacted the CERCLA extender statute in 1986, but chose not to refer to statutes of repose. 134 S. Ct. at 2187. Congress plainly had not forgotten that difference three years later when it enacted the FDIC Extender Statute. The

Supreme Court's statutory construction in *CTS* therefore applies with equal or greater force here. Congress, in making the same choice in the Statute to refer only to the "statute of limitations," did *not* displace the Securities Act's statute of repose.

The panel majority grounds its decision on flawed logic and strained reasoning that overlooks the Supreme Court's fundamental holdings in *CTS*. For example, the majority bottomed its decision on its conclusion that it was bound to follow the pre-*CTS* decision in *Federal Housing Finance Agency v. UBS Americas Inc.,* 712 F.3d 136 (2d Cir. 2013), because its rationale purportedly was not overruled implicitly or expressly by the Supreme Court in *CTS*. (Op. at 9-10) That is simply incorrect.

The *UBS* panel based its decision on its assumption that Congress "used the term 'statute of limitations' to refer to statutes of repose" and on its own view of "the objectives of the statute overall." 712 F.3d at 143 (citations and quotations omitted). But the Supreme Court expressly rejected those rationales in *CTS*. The Supreme Court found that Congress understood the distinction between statutes of limitations and statutes of repose. Moreover, the Court explained that the Fourth Circuit erred by "invoking the proposition that remedial statutes should be interpreted in a liberal manner . . . [and] treat[ing] this as a substitute for a conclusion grounded in the statute's text and structure." 134 S. Ct. at 2185.

The panel majority also reasoned that the Statute's reference to "the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver" means it applies to any "limitations period." (Op. at 14-15) That is a *non sequitur*. Congress did not say that. There is nothing in the language of the Statute quoted by the divided panel or otherwise that includes statutes of repose, or that makes the Statute applicable to the Securities Act, which is not a state-law "contract" or "tort" claim to which the Statute is limited.[2]

CONCLUSION

The Court should grant Appellees' petition for rehearing.

June 9, 2016

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[2] The panel majority gave great weight to its view that *CTS* did not say "'statutes of limitations' must *always* be read to leave in place existing statutes of repose" and "did not direct courts *never* to use" the canon of interpreting remedial statutes in a liberal manner. (Op. at 10, 11 (emphasis added)) But the panel did not identify any tenable basis in the Statute for an exception to the Supreme Court's holdings here, and there is none.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

1. This brief complies with the page limitations set forth in Fed. R. App. P. 29(d) and 35(b)(2) because it is 7.5 pages in length, exclusive of the corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of digital submission and this certificate of compliance, which are exempted by Fed. R. App. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2010 in a proportionally spaced typeface, namely Times New Roman 14 point font.

/s/ *Michael J. Dell*
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Dated: June 9, 2016

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing, as submitted in digital form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with McAfee's VirusScan Enterprise 8.8 and, according to the program, is free of viruses.

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Dated: June 9, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June 2016:

I presented *Amici 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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Dated: June 9, 2015