Securities Litigation ADVISORY ■

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Fifth Circuit Confirms FDIC Extender Statute Preempts State Statutes of Repose

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In a significant decision, the Fifth Circuit Court of Appeals recently allowed the Federal Deposit Insurance Corporation (FDIC) to maintain a securities fraud suit against several major financial institutions even though the FDIC filed its claims after the expiration of a state law statute of repose. *FDIC v. RBS Securities Inc.,* No. 14-51055 (5th Cir. Aug. 10, 2015). Consistent with other appellate courts that have considered the issue, the Fifth Circuit held that the FDIC's "extender statute" preempts all state limitations periods, whether they be characterized as statutes of limitation or statutes of repose.

Acting as receiver for a closed bank, the FDIC claimed in *RBS Securities* that the defendant financial institutions made false statements or omitted material facts in connection with the sale of residential mortgage backed securities in the years leading up to the 2008 financial crisis. As the FDIC often does when bringing claims in its capacity as a receiver, it relied on the so-called extender statute, 12 U.S.C. § 1821(d)(14), to maintain its claims for securities fraud. The FDIC extender statute allows the FDIC a three year grace period to bring any claim that belongs to a closed bank and is viable on the date the FDIC takes over as receiver. In other words, the FDIC has three years to bring a claim that exists on the date of receivership, even if a state statute of limitations would normally operate to extinguish this claim during this three year period. Congress granted the FDIC this grace period to allow it ample time to investigate and evaluate claims belonging to closed banks.

Relying heavily on *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), the defendants in *RBS Securities* sought to dismiss the FDIC's claims on the grounds that the extender statute preempted state statutes of limitations but not state statutes of repose.[1] In *CTS Corp*., the Supreme Court held that a provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) preempted only state statutes of limitations, not state statutes of repose. The defendants in *RBS Securities* attempted to draw parallels between

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[1] Quoting the U.S. Supreme Court, the Fifth Circuit in *RBS Securities* described a statute of limitations as something that creates a time limit in civil cases based on when the claim accrued. On the other hand, the Fifth Circuit explained that a statute of repose places an "outer limit" on the right to bring a civil action and that the time limit begins to run from the last culpable act or omission of the defendant. *RBS Securities*, slip op. at 12.

the relevant provision of CERCLA and the FDIC extender statute. They further argued that, because the FDIC's suit was filed outside the statute of repose contained in the Texas Securities Act, its claims against them were time barred.

The Fifth Circuit rejected the defendants' position in *RBS Securities* and concluded that the FDIC extender statute preempted state statutes of limitations and statutes of repose. The Fifth Circuit began by describing any similarities between CERCLA and the extender statute as "superficial." In particular, the Fifth Circuit noted that the extender statute "prescribes a new, mandatory statute of limitations for actions brought by the FDIC as receiver." *RBS Sec*., slip op. at 17. According to the Fifth Circuit, "[s]uch mandatory language 'precludes[s] the possibility that some other limitations period might apply' to shorten the three-year minimum period the statute sets out." *Id*. (quoting *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1226 (10th Cir. 2014)). The *RBS Securities* court also observed that, given the purpose of the FDIC extender statute, as well as the demands placed upon the FDIC to investigate and pursue claims during a financial crisis, Congress could not have intended to preempt statutes of limitations while leaving statutes of repose untouched.

The Fifth Circuit's ruling in *RBS Securities* confirms that the FDIC enjoys broad authority to pursue claims belonging to closed financial institutions. It also underscores that, for financial institutions and other actors with potential liability to the FDIC when acting as receiver, the only date that matters is the one established by the extender statute.

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