

NO. A09-1086

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State of Minnesota  
**In Court of Appeals**

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Mountain Peaks Financial Services, Inc.,

*Respondent,*

v.

Catherine A. Roth-Steffen,

*Appellant.*

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**APPELLANT'S REPLY BRIEF AND  
SUPPLEMENTAL APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## LEGAL ARGUMENT

### **I. THE STATUTE OF LIMITATIONS EXEMPTION UNDER THE FEDERAL HIGHER EDUCATION ACT APPLIES ONLY TO THE LISTED ENTITIES, NOT RESPONDENT.**

The fundamental question before this Court is whether the limited exemption contained in 20 U.S.C. § 1091(a) (“Section 1091(a)”) – which exempts certain entities from statute of limitations defenses – applies to Respondent as the assignee of the student loan. As a threshold matter, Respondent has not even provided a shred of evidence that the original lender, MOHELA, was protected under the Federal Higher Education Act (“HEA”). Regardless, there is no basis to apply Section 1091(a) to Respondent because the enumerated entities protected under Section 1091(a) does not include assignees. The most persuasive case and the case directly on point is *Casa Investment Co., Inc. v. Nestor*, 2008 WL 3896012 (Aug. 12, 2008, Fla. Cir. Ct.).

Respondent’s attempts to deny the persuasiveness of the *Casa* case falls flat. Respondent challenges the persuasiveness of this case because this case was overturned by a Florida appellate court. Respondent, however, fails to make clear that this case was reversed on procedural grounds; the Appellate Court did not overrule or otherwise disturb the lower court’s analysis of Section 1091(a). Specifically, *Casa* was reversed on the grounds that debtor’s oral motion for summary judgment before the trial court deprived the non-moving party of proper notice. *See Casa Investment Co., Inc. v. Nestor*, 8 So. 3d 1219 (Fla. 3d Dist. Ct. App. 2009). The lower court’s substantive analysis of Section 1091(a) therefore remains unblemished. And again, the *Casa* court held that assignees, like Respondent, are not protected under the HEA. *Casa Investment Co., Inc. v. Nestor*,

2008 WL 3896012 at 2-3 (“A close reading of the statute reveals that language is very specific regarding which entities may pursue those debts. Conspicuously, assignees, are not one of these entities”).

On the other hand, Respondent’s assertion that “other courts” have held that Section 1091(a) applies to assignees is supported by one, single unpublished Letter Opinion issued by the fourth judicial circuit of Arkansas. RA8. Unlike *Casa*, the Letter Opinion fails to provide any analysis of the HEA or other courts’ interpretation of the HEA. Therefore, this court should afford more credence to *Casa* when creating precedent on such an important issue of law.

Respondent appears to argue that all student loans are exempt from statute of limitations. Respondent’s interpretation of the HEA and the cases which Respondent cites makes Congress’s delineation in the HEA of exempt entities superfluous. Respondent’s reliance on *United States v. Phillips*, 20 F.3d 1005, 1007 (9th Cir. 1994) and *United States v. Glockson*, 998 F.2d 898, 897 (11th Cir. 1993) is misplaced. The far-reaching language of these federal court opinions is undoubtedly imprecise. For one, Section 1091(a) can in no way be construed to apply to all student loans. Such an interpretation directly contradicts a plain reading of the statute, which specifically limits who may take advantage of the limitations exemption. *See* 20 U.S.C. § 1091a(a)(2)(B)-(D)(2008). Further, in these cited opinions, none of the courts considered the application of the HEA to non-listed entities or the application of Section 1091(a) to assignees.

Respondent’s cited case law fails to articulate the proper scope of application of the statute of limitations exemption and contradicts the plain reading of Section 1091(a).

If the exemption was intended to apply to all student loan debt, Congress would not have taken the time to enumerate a list of protected entities. At the very most, these opinions can be chalked up to a hasty interpretation of Section 1091(a) and a failure to contemplate a situation in which a claimant other than an entity protected under Section 1091(a) was seeking recovery on an otherwise time-barred claim.

While some courts have disregarded the limiting language of Section 1091(a), other courts have been more precise when addressing the scope of Section 1091(a). *See Millard v. United Student Aid Funds, Inc.*, 66 F.3d 252, 253 (9th Cir. 1995) (claim held exempt from the statute of limitations defense because the guaranty agency had an agreement with the Secretary of Education as required under Section 1091(a)); *see also, United States v. Smith*, 811 F. Supp. 646, 648 (S.D. Ala. 1992) (Section 1091(a) “provides that litigation may be commenced by the *Federal Government* to collect defaulted loans regardless [of any statute of limitations]”) (emphasis added). In *In re Loving*, the Indiana bankruptcy court recognized that in order to be protected under the HEA, a lender must qualify as one of the five enumerated entities. *See In re Loving*, 269 B.R. 655 (Bankr. S.D. Ind. 2001). In a footnote, the *Loving* court noted that the debtor did not object to the lender’s statement that it was a listed entity under Section 1091(a) and therefore waived her right to do so; had she raised this issue, the court would have required the lender to prove that it was an entity listed under Section 1091(a) by providing an agreement with the Secretary of Education. *Id.* at 656.

**A. THE U.S. DEPARTMENT OF EDUCATION APPLIES A STRICT CONSTRUCTION INTERPRETATION TO SECTION 1091(A).**

The Department of Education strictly construes Section 1091(a). In an unrelated case, Appellant's counsel asked the Department of Education whether another guarantor entity, unrelated to Respondent, had an agreement with the Secretary of Education, and therefore was protected by the HEA. AA173. The U.S. Department of Education, of course, is the Department responsible for implementing and enforcing the HEA. The Department's response was instructive as to how the Department of Education interprets the HEA. In response to an e-mail dated September 2, 2009, the Department of Education stated the following:

**Question:** "I would like to know whether an entity named "The Educational Resources Institute" is protected under 20 U.S.C. §1091a ("Section 1091(a))."

**Answer:** "The Educational Resources Institute is a non-profit organization that is a non-FFELP guarantor of private student loans. *As such, it does not come within the protections from statute of limitation claims that is provided by HEA §484A.*"

AA174 (emphasis added). The Department of Education's assertion that an entity (such as The Educational Resources Institute) does not enjoy the protections of Section 1091 is instructive to this case. The Department obviously applies a narrow interpretation as to who is entitled to protection under Section 1091(a); the Department's inquiry as to whether an entity receives protection under Section 1091(a) ends with the text of 1091a.

If the Department of Education, which is responsible for implementing and enforcing the HEA, applies a narrow interpretation as to who is entitled to the statute of

limitations exemption under the HEA, this Court should similarly apply a narrow and strict interpretation of Section 1091(a).

**B. RESPONDENT'S RELIANCE ON THE FINANCIAL INSTITUTIONS REFORM, RECOVERY AND ENFORCEMENT ACT BY ANALOGY IS NOT PERSUASIVE.**

Respondent cites *Cadle Co. II, Inc. v. Stamm*, 633 So.2d 45 (Fla. App. 1 Dist., 1994), a Florida district court decision, which interprets the Financial Institutions Reform, Recovery and Enforcement Act codified as 12 U.S.C. § 1821(d)(14) ("FIRREA") to argue that other federal exemptions to statutes of limitations apply to assignees. Respondent, however, does not explain that the express language of FIRREA is fundamentally different from Section 1091(a) of the HEA. FIRREA protects the Federal Deposit Insurance Company ("FDIC") and the Resolution Trust Corporation ("RTC") from state statute of limitations defenses. FIRREA states:

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver 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.

12 U.S.C. §1821(d).

Respondent's reliance on the FIRREA case law is unconvincing when textual and substantive differences between the FIRREA and the HEA are considered. The textual distinctions between the FIRREA and Section 1091(a) causes the FIRREA to be inapposite. Section 1091(a), with surgical precision, limits who may enjoy the statute of

limitations exemption to five categories.<sup>1</sup> *See* 20 U.S.C. § 1091a(a)(2)(B)-(D)(2008). There is no indication that this list was intended to be merely illustrative. Therefore, to ignore the specific list of protected entities and apply Section 1091(a) more broadly would render the list superfluous. *Beisler v. C.I.R.*, 814 F.2d 1304, 1307 (9th Cir. 1987). By comparison, the legislature did not precisely craft a list of protected entities under the FIRREA.

From a substantive standpoint, the HEA goes much farther than the FIRREA in that it provides a statute of limitations exemption, not just a 6-year statute of limitations floor. The FIRREA merely extends the time period that an action may be brought in cases where the applicable state limitations period is less than 6 years. Section 1091(a), on the other hand, extends the period a lender may bring a claim indefinitely. Such a broad exemption, therefore, should require a narrow construction of such exemption. As this Court is aware, statute of limitations defenses ensures that evidence does not become stale and prevents “fraud, oppression and interminable litigation.” *See Bachertz v. Hayes-Lucas Lumber, Co.*, 275 N.W. 694, 697 (Minn. 1937) (the statute of limitations is designed to prevent one party who has a claim against another from waiting an unreasonable amount of time to bring that claim and allowing the other to believe that no such claim existed); *see also Bustad v. Bustad*, 116 N.W. 2d 552, 556 (Minn. 1962) (the salutary purpose of the statute of limitations is to discourage lawsuits based on stale claims). Under FIRREA, the interest in ensuring that parties do not sit on their claims is

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<sup>1</sup> The five categories of protected persons are Guaranty agencies, qualifying educational institutions, the Secretary of Education, the United States Attorney General, and the heads of other federal agencies.

left intact—the claim will be time-barred by the later of 6 years or the state limitations period—whereas under the HEA, a claim will be preserved indefinitely.

In examining the limitations issue with regard to the HEA, two interests should be considered: (1) the federal government’s interest in recovering student loan debt; and (2) the interest in ensuring that lenders are not sitting on claims, perpetrating fraud and oppressing the public. Arguably, these interests are, at least in part, aligned. Respondent’s statement that the “original lenders would be forced to hold expired student loans” is a misstatement. *See* Respondent’s Brief at 9 (emphasis added). Debts held by an “original lender” protected under Section 1091(a) will be marketable to the private market and on equal footing with privately issued debt. Private assignees of these original lenders will enjoy a statute of limitations period that is identical to that of similarly situated privately issued debt. Pursuant to Section 1091(a), the original lender is not estopped from bringing its claim against the debtor, and therefore not forced to just hold onto defaulted student loans. This limited scope of Section 1091(a) serves to ensure the government will not be forced to just hold onto student loan debt and further protects the courts from a floodgate of claims brought years, even decades later when the evidence is stale, memories are fuzzy and or debtors are insolvent or deceased and therefore judgment proof.

**C. OTHER CASES HAVE REFUSED TO EXTEND A STATUTE OF LIMITATIONS EXEMPTION TO ASSIGNEES.**

But even if the FIRREA analogy has any persuasive affect, there are other cases where Courts have not extended statute of limitations exemptions to assignees. *Wamco*,

*III, Ltd. v. First Piedmont Mortgage Corp.*, 856 F. Supp. 1076 (E. D. Va. 1994) (criticized other courts for extending FIRREA exemption to assignees; the statute “by its plain terms” confers a personal benefit to RTC, not to assignees). Additionally, an equally analogous litigated issue is whether the federal or state statute of limitations exemption applies to assignees of the Small Business Administration (“SBA”). The Virginia Supreme Court declined to extend the federal statute of limitations exemption to SBA assignees, reasoning in part that the exemption is a private right of the government. *See Long, Long & Kellerman, P.C. v. Wheeler*, 570 S.E.2d 822, 826 (Va. 2002)(“the rationale underlying the rule that the federal government is immune to the operation of statutes of limitations would not be served by permitting a private assignee to enjoy perpetual immunity from a statute of limitations for a purely private benefit”).

## **II. THERE IS NO EVIDENCE THAT APPELLANT ACKNOWLEDGED THESE LOANS AND EXTENDED THE STATUTE OF LIMITATIONS.**

Respondent raises for the first time the argument that the statute of limitations was renewed in 2002 by virtue of the alleged forbearance agreements set forth in Exhibits AA93-AA94.<sup>2</sup> These alleged forbearance agreements do not constitute an acknowledgment of any existing debt by which the statute of limitations may be renewed under Minnesota law.

In order to possibly review the statute of limitations, a writing acknowledging or promising to pay a pre-existing debt must describe or furnish the means of identifying the debt or debts to which it refers and such writing cannot be supplemented by parol

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<sup>2</sup> Respondents did not raise this issue with the trial court and therefore cannot raise it for the first time on appeal.

evidence. *Russell & Co. v. Davis*, 53 N.W. 766, 767 (Minn. 1892); *Olson v. Myrland*, 264 N.W. 129, 131 (Minn. 1935). The acknowledgment must be sufficiently clear and definite in its terms to show that the debt at issue is the subject matter of the acknowledgement; where there is more than one debt due from the defendant to the plaintiff, it must be apparent as to which it applies. *Baxter v. Brandenburg*, 163 N.W. 516, 517 (Minn. 1917); see *Whitney v. Reese*, 11 Minn. 138 (Minn. 1865); *Denny v. Marrett*, 13 N.W. 148, 149 (Minn. 1882) (“there should be a direct recognition of the indebtedness sued on, from which a willingness to pay the same may be reasonably implied”).

In *Whitney*, the Minnesota Supreme Court held that a writing signed by the defendant promising to pay the balance on a pre-existing debt, referred to in the writing as “our debt,” was insufficient to take either or both of the defendant’s notes out of the statute of limitations because it did not appear as to which of the two debts that the defendant had in favor of the plaintiff the writing referred to. *Whitney v. Reese*, 11 Minn. 138 at 8 (“the language is too vague and indefinite to determine” which debt the written promise was referring to).

As matter of law, Exhibits AA93-AA94 do not constitute an acknowledgment of an existing debt. Nowhere on these documents is the debt expressly identified. Exhibits AA93-AA94 do not reference account numbers and (AA63, ¶ 4), or reference the amount of the debt at issue, or the date of issuance of the debt in any discernable way. AA93-AA94. Further, as a matter of law, parol evidence may not be used to link these forbearance agreements (i.e., Exhibits

AA93-AA94) to the debt at issue in this case. *See Russell & Co. v. Davis*, 53 N.W. 766, 767 (Minn. 1892). Therefore, not only have Respondents failed to link Exhibits AA93-AA94 to the debt alleged to be due, but parol evidence may not be used to determine whether and/or which debt at issue corresponds to each of the two separate writings set forth in Exhibits AA93 and AA94.

Finally, Appellant graduated law school in May 1998 with over \$100,000 in student debt based on over a dozen separate loan transactions. In the absence of any express identification of the debt, or the amount thereof, there is no basis upon which this Court can determine that Exhibits AA93-AA94 relates to the debt at issue in this case. For these reasons, such documents do not satisfy the requirements of Minnesota law which would permit a renewal of the statute of limitations contained in Minn. Stat. § 516.110.<sup>3</sup>

**III. THE DISCREPANCIES IN RESPONDENT'S COURT FILINGS ALONG WITH THE ABSENCE OF PROOF OFFERED BY RESPONDENT CREATE MATERIAL FACT QUESTIONS AND THEREFORE SUMMARY JUDGMENT WAS INAPPROPRIATE.**

Respondent asks this Court to ignore the inconsistencies in the evidence presented by it "as an innocent clerical error." Respondent's Brief at 11; AA2. What Respondent ignores is that "clerical errors" permeate the entire record. Again, these "clerical errors"

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<sup>3</sup> Without providing any authority, Respondent appears to claim that Missouri's 10-year statute of limitations should apply. Any choice of law provision provided in the contract is not dispositive with regard to the statute of limitations. Minnesota appellate courts have routinely held that the statute of limitations is a procedural issue and therefore Minnesota's statute of limitations governs. *See Christian v. Burch*, 763 N.W.2d 50, 58 (Minn Ct. App. 2009)("Because statutes of limitations are procedural, there was and is, no need to engage in a substantive choice-of-law analysis"). Matters of procedure and remedies are governed by the law of the forum state. *Id.*

consist of conflicting sworn testimony and lack of evidence about when the loans were disbursed (*cf* AA20-21 and AA78, ¶¶ 6 and 9) and what amounts were disbursed (*see* AA63).<sup>4</sup> Further, there are issues regarding the credibility of Mustari's testimony, Respondent's affiant, by virtue of the inconsistent affidavits which could serve as a basis for impeachment at trial. *See Bixler v. J.C. Penney Co., Inc.*, 376 N.W.2d 209, 216 (Minn. 1985).

Respondent's "clerical errors" are symptomatic of a bigger problem, which is Respondent's failure to proffer an evidentiary foundation to satisfy its burden at summary judgment. Significant and important questions need to be answered to establish no issue of material fact with respect to the debt at issue. There are still significant questions whether these alleged loans were disbursed to the Appellant. The only evidence submitted by Respondent to prove that the debt was actually disbursed are two checks in the amount of \$6,650. Exhibit AA163-AA164 (shows checks payable to Washington University/Appellant in the amount of \$13,300 (\$6,650 each)); Exhibit AA162 (loan amount is equal to \$14,000 reduced by the \$700 Lease Guarantee Fee (\$13,300)). This does not add up to \$20,358.00, which is the total amount Respondent claims was disbursed. Respondent's Brief at 3. Respondent needs to show the actual disbursement of loan funds to prove an obligation of Appellant to repay such loans. As Appellant indicated, she filled out numerous applications for student loans to obtain the best rates. The existence of the Applications and Promissory Notes therefore prove nothing. In

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<sup>4</sup> These type of clerical errors are bound to occur when Respondent waits eight (8) plus years before filing its lawsuit. The purpose behind statutes of limitations is to avoid the type of evidentiary problems that permeate the record here.

short, Respondent has not offered evidence beyond a genuine issue of fact to prove that Appellant owes the amount claimed.

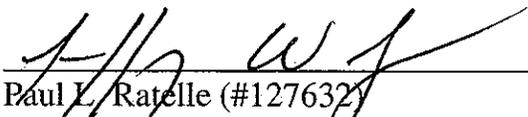
**CONCLUSION**

Because Respondent's claims violate Minnesota's statute of limitations, and because summary judgment was entered despite issues of material fact, Appellant respectfully requests that this Court dismiss Respondent's case and award Appellant the costs of this appeal, and such other relief as the Court deems just and equitable.

Dated: September 4, 2009

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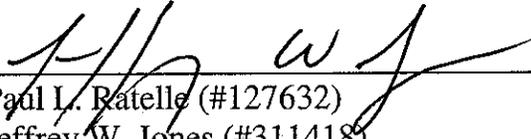
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3 for a brief produced with a proportional font. The brief contains 3,461 words. This brief was prepared using Microsoft Office Word 2003.

DATED: September 4, 2009

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