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I. INTRODUCTION

A. Background

The Federal Student Aid office of the U.S. Department of Education administers billions of dollars in postsecondary student aid—as of 2004, the outstanding student loan portfolio totaled $357 billion.[2] Over sixty percent of all college graduates in the nation have taken advantage of some kind of federal loan.[3] These student loans can be generally divided into two types: (1) some are made directly by the federal government under the Direct Loan program,[4] but (2) most are made by private lenders under the auspices of the Federal Family Education Loan program ("FFEL"). Although the Department of Education oversees FFEL loans, "guaranty agencies"—state or nonprofit institutions that contract with the federal government to supervise the FFEL—do the day-to-day administration of the FFEL.[5] The actual payment and loan processing is

1. J.D. 2005, Brigham Young University Law School. My thanks to the Journal editors for their careful and thorough editing and for their suggestions. Also, thanks to Joseph Cotterman and Mary Torrez for their help with the Ms. Baker sources (and to Joe for letting me work on the case). Most of all, my thanks to my wife, Julie, and son, Derek, for their enduring support, love, and confidence.

2. U.S. DEPARTMENT OF EDUCATION, FEDERAL STUDENT AID, ANNUAL PERFORMANCE REPORT, FISCAL YEAR 2004, at 1, http://www.ed.gov/about/offices/list/fsa/04annualreport.pdf.

3. *See* NATIONAL CENTER FOR EDUCATION STATISTICS, THE CONDITION OF EDUCATION 2004 99 (2004), http://nces.ed. gov/pubs2004/2004077.pdf (2004) (indicating that 65.4% of graduates received federal loans). Federal loans include Perkins loans, Stafford subsidized loans, Stafford unsubsidized loans, PLUS Loans, and Supplemental Loans to Students. *See* U.S. DEPARTMENT OF EDUCATION, THE STUDENT GUIDE 2, http://studentaid.ed.gov/students/attachments/siteresources/Stud_guide.pdf (last visited Oct. 25, 2005).

4. In the Federal Direct Loan program, loans are paid directly to the student (or to the school on the student's behalf) by the federal government. *See* 20 U.S.C. §§ 1087a–1087j (1994). For fiscal year 2004, "the Department awarded $13.2 billion in net loans to 1.9 million Direct Loan Program recipients." U.S. DEPARTMENT OF EDUCATION, FEDERAL STUDENT AID, ANNUAL PERFORMANCE REPORT, FISCAL YEAR 2004 7, http://www.ed.gov/about/offices/list/fsa/04annualreport.pdf. That number does not include $6.3 billion in consolidation loans. *Id.*

5. 20 U.S.C. § 1085(j) (1994); DEANNE LOONIN, STUDENT LOAN LAW 3 (National Consumer Law Center 2002). Extensive requirements for the agreement with the government are found in 20 U.S.C. § 1078(b) (1994). Nearly every state has a guaranty agency. *See* Education

usually done either directly through the borrowers' schools or through commercial lenders—generally banks or other financial institutions.[6] The federal government guarantees these privately funded loans, such that in the case of student default, the lender can, assuming it has taken the required "due diligence" steps in attempting to collect the loan,[7] be repaid by the relevant guaranty agency.[8] The guaranty agency then takes assignment of the delinquent loan and seeks to collect from the borrower. "After approximately four years," defaulted loans not collected by the guaranty agency are assigned to the Department of Education.[9]

The rising frequency of default on student loans in the 1980s[10]—among other factors[11]—led Congress in 1991 to amend section 1091a of the federal loan program[12] such that, for certain specified lenders and governmental entities listed in the statute, "[n]otwithstanding any other provision of statute, regulation, or administrative limitation, *no limitation shall terminate* the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken" to collect on delinquent student loans.[13] Essentially, this

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Resource Organizations Directory, *State Guaranty Agency*, http://wdcrobcolp01.ed.gov /programs/erod/org_list.cfm?category_cd=SGA (last visited Oct. 25, 2005).

6. An organization that may qualify as an "eligible lender" includes "a National or State chartered bank, a mutual savings bank, a savings and loan association, a stock savings bank, or a credit union" that meets certain requirements. 20 U.S.C. § 1085(d) (1994).

7. *See* 34 C.F.R. §§ 682.411, 682.507. *See also* 20 U.S.C. §§ 1080(d), 1085(f) (1994).

8. 20 U.S.C. § 1080(a) (1994). *See also* U.S. DEPARTMENT OF EDUCATION, FEDERAL STUDENT AID, ANNUAL PERFORMANCE REPORT, FISCAL YEAR 2004 app. A, Notes to Principal Financial Statements 10 (2004), http://www. ed.gov/about/offices/list/fsa/04annualreport.pdf (2005).

9. U.S. DEPARTMENT OF EDUCATION, FEDERAL STUDENT AID, ANNUAL PERFORMANCE REPORT, FISCAL YEAR 2004 app. A, Notes to Principal Financial Statements 10 (2004), http://www.ed.gov/about/offices/list/fsa/04annualreport.pdf (last visited Nov. 7, 2005) http://www .ed.gov /about/offices/list/fsa/04annualreport.pdf (2005).

10. The default rate peaked in 1990 at an astounding 22.4%. *National Student Loan Cohort Default Rates*, http://www.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html (last visited Oct. 25, 2005).

11. For a description of an unfavorable court decision which resulted in a circuit split and helped prompt the amendment, see *infra* Part III.A.2.

12. *See* 20 U.S.C. § 1091a (1994).

13. *Id.* § 1091a(a)(2) (emphasis added). The full text of the statute reads:

> (2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by—
>
> (A) an institution that receives funds under this subchapter and part C of subchapter I of chapter 34 of Title 42 that is seeking to collect a refund due from a student on a grant made, or work assistance awarded, under this subchapter and part C of subchapter I of chapter 34 of Title 42;
>
> (B) a guaranty agency that has an agreement with the Secretary under section 1078(c) of this title that is seeking the repayment of the amount due from a borrower on a loan made under part B of this subchapter after such guaranty agency reimburses the previous holder of the loan for its loss on account of the default of the borrower;

amendment provided that once a student contracts for a student loan, the student cannot use a statute of limitations as a defense against collection on that loan by the entities listed in the statute—ever.

B. The Issue — Scope of Section 1091a

However, the reach of the amended section 1091a is unclear. Most importantly, it is unsettled whether—or in what circumstances—the statute also exempts entities that are *not* specifically listed in section 1091a from statutes of limitations when they take assignment of student loans. This is a critical question, because if all non-listed entities can also rely on section 1091a's exemption, the potential liability of delinquent borrowers is greatly expanded. Defaulted student loans, amounting to billions of dollars,[14] could be revived at any time, even many years down the road, by anyone who could gain assignment of those loans. Private lenders and collection agencies could thus act as "private attorneys general" of sorts in ensuring repayment of valid student loan debts. However, it would also mean that the government would have less control over collection practices for long-defaulted student loans. On the other hand, if non-listed entities cannot use section 1091a, then only the entities listed in the statute—mostly federal agencies—will devote resources to collecting on long-defaulted loans.[15] There are obviously important policies at play, and billions of dollars at stake.

C. Overview—How the Courts Have Interpreted Section 1091a

Although nearly fourteen years have passed since Congress amended section 1091a, no reported decision *directly* answers whether that

> (C) an institution that has an agreement with the Secretary pursuant to section 1087c or 1087cc(a) of this title that is seeking the repayment of the amount due from a borrower on a loan made under part C or D of this subchapter after the default of the borrower on such loan; or
>
> (D) the Secretary, the Attorney General, or the administrative head of another Federal agency, as the case may be, for payment of a refund due from a student on a grant made under this subchapter and part C of subchapter I of chapter 34 of Title 42, or for the repayment of the amount due from a borrower on a loan made under this subchapter and part C of subchapter I of chapter 34 of Title 42 that has been assigned to the Secretary under this subchapter and part C of subchapter I of chapter 34 of Title 42.

Id.

14. According to government figures available in 1999, "13.3 million loans worth $26.7 billion are in default." Edward Walsh, *Lawsuits Over Student Loans Rise; U.S. Hires More Collection Lawyers to Pursue Defaulters*, WASH. POST, Apr. 19, 1999, at A4. That number has presumably grown in the intervening years.

15. The government does, however, rely on collection agencies and, if that fails, lawsuits brought by the Justice Department. *See id.*

statute's exemption applies to non-listed entities.[16] For a multi-billion dollar question of federal statutory interpretation, this may be somewhat unusual. However, this dearth of reported precedent is probably due to three factors. First, when lenders or collection agencies contact or file suit against a debtor seeking to recover a long-past-due student loan debt, a debtor may simply pay the debt rather than contest it. Second, a debtor may simply ignore a filed complaint, in which case a default judgment will be entered against her and she will have no opportunity to contest application of the statute.[17] Third, although the aggregate amount of defaulted student loans is very large, the amount of each individual defaulted loan is typically small;[18] thus, litigation is frequently in small claims courts, which generally do not report decisions nor create binding precedent. These three factors not only explain the lack of reported decisions, but also highlight the importance of a thorough analysis of the scope of section 1091a, such as this article attempts—it seeks to provide an answer to a difficult question where no answer is forthcoming from the bench.

Despite the lack of a published case *directly* on point, various cases have addressed the scope of section 1091a issue in passing. Numerous recent court opinions have described the scope of section 1091a broadly: for example, they have stated that in enacting section 1091a, "Congress eliminated *all* statutes of limitations [for student loans]"[19] or have referred to section 1091a as "eliminat[ing] *all* limitations defenses for collection of student debts."[20] This language would appear to exempt *any* holder of a student loan from statutes of limitations—regardless of whether that entity is mentioned in section 1091a. However, these courts probably did not intend to address the scope of section 1091a, and such language seems contrary to the rule that "[i]n construing a statute [the courts] are obliged to give effect, if possible, to every word Congress used."[21] Construing section 1091a to apply to *any* holder of student loans

16. In the unpublished opinion Accounts Portfolio L.P. v. Cortigene, No. 14-95-00037-CV, 1996 WL 65385 (Tex. App. Feb. 15, 1996), the court raised the question of section 1091a's applicability to non-listed entities but the court decided the case on other grounds.

17. "[A]ccording to Assistant U.S. Attorney Eneid Francis, . . . most cases end in a default judgment against the debtor." David A Fahrenthold, *Unpaid School Loans Attacked: Uncle Sam Sues Deadbeat Debtors*, TIMES-PICAYUNE, July 12, 1999, at A1.

18. Walsh, *supra* note 14 ("The average loan in default is about $ 2,000."); Fahrenthold, *supra* note 17 ("[M]ost debts are near the national average of $2,500, though they range from about $1,000 to more than $70,000.").

19. Lee v. Paige, 376 F.3d 1179, 1180 (8th Cir. 2004) (emphasis added), vacated on other grounds, Spellings v. Lee, —- S. Ct. —-, 2005 WL 470904 (2005). *See also* cases cited *infra* notes 94–97.

20. United States v. Lawrence, 276 F.3d 193, 196 (5th Cir. 2001) (emphasis added).

21. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

would render the listing of entities in that statute superfluous.[22] Thus, the discussion in these cases does not decide the issue of section 1091a's scope.

D. Outline of Article

This article seeks to answer the question of whether entities not listed in section 1091a are exempt from statutes of limitations. It concludes, based on the text and history of section 1091a and through analogy to other lines of precedent, that non-listed entities can *only* take advantage of section 1091a's exemption with respect to a loan if they were assigned that loan by one of the entities listed in the statute. Otherwise, they should be subject to statutes of limitations in their collection efforts. Part II describes the relevant parties in the question of the scope of section 1091a—lenders and "extended purchasers"—and presents, as a case study, a recent case where an extended purchaser attempted to use section 1091a to avoid a statute of limitations. Part III analyzes the text and history of section 1091a and looks at how courts have interpreted that statute. Part IV explains and rejects an argument in favor of universal application of section 1091a. It argues instead, based on analogies to two separate lines of cases, that the only non-listed entities who should be exempt under section 1091a are those who take assignment from an entity listed in that section. Part V offers a brief conclusion.

II. NON-LISTED ENTITIES: LENDERS AND EXTENDED PURCHASERS

There are two kinds of non-listed entities who could seek to take advantage of section 1091a: non-listed lenders and what this Article refers to as "extended purchasers." As to the first group, although educational institutions acting as lenders are listed in section 1091a, financial institutions and other private lenders are not. Thus, the majority of lenders fall under the umbrella of "non-listed entities" who may seek to avoid statutes of limitations by relying on section 1091a. The second type of non-listed entity is the "extended purchaser." This Part briefly defines the term "extended purchaser" and then, to highlight the question of section 1091a's scope, presents an actual scenario where an extended purchaser attempted to use section 1091a to collect on a student loan.

22. *See* Beisler v. C.I.R., 814 F.2d 1304, 1307 (9th Cir. 1987) ("We should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress.").

A. "Extended Purchaser" Defined

Often, the original lenders of student loans will assign those loans to private buyers[23] on the "secondary market."[24] The secondary buyers then become the substituted "owners" of the loans and receive any interest and repayment. Sometimes, the assigned loan is not in default, but the original lender assigns the loan in an effort to raise capital.[25] If the need for capital is particularly urgent—for example, due to a rocky financial condition—the lender may sell the loan for less than its face value as an incentive for a quick sale. Others of these secondary market sales are of already-defaulted loans, where the lender or the government "sells" the defaulted loan—generally at a discount—to avoid the nuisance of trying to collect on the loan.[26] Secondary purchasers may in turn sell the most difficult-to-collect of the defaulted loans at an even greater discount to other purchasers willing to take even more risks.[27] This article refers to all subsequent resales—secondary or more removed—as made on the "extended market." It refers to all buyers on the extended market as "extended purchasers."

B. A Case Study: Dunstone and Ms. Baker

In the summer of 1987, Ms. Baker[28]—tired of the minimum wage jobs that she had been working—decided that she would like instead to become a beautician and hairdresser. She located a suitable college in her

23. "Often the original lender will sell the loan to another lender specializing in student loans . . . ." LOONIN, *supra* note 5, at 3.

24. "A secondary market is one where goods, services, or securities previously issued, bought, or sold are made available for further buying or selling." Jason T. Strickland, *The Proposed Regulatory Changes to Fannie Mae and Freddie Mac: An Analysis*, 8 N.C. BANKING INST. 267, 268 n.12 (2004). *See also* BLACK'S LAW DICTIONARY 984 (7th ed. 1999).

25. LOONIN, *supra* note 5, at 35 ("Often a FFEL originating lender will sell the loan *before* default to Sallie Mae or some other secondary market lender.").

26. Lenders particularly may be willing to sell loans on the extended market because of the possibility that the government will refuse to reimburse the lender at student default. *See* Annotation, *Rights and Obligations of Federal Government, Under 20 U.S.C.S. § 1080, when Student Borrower Defaults on Federally Insured Loan*, 73 A.L.R. FED. 303, 307 (1985) ("Lenders' claims have been denied for, inter alia, insufficient documentation, for lending sums beyond those authorized by the government, and, generally, for failure to pursue collection actions with due diligence.") (footnotes omitted); *see also, e.g.,* Am. Bank of San Antonio v. United States, 633 F.2d 543 (Ct. Cl. 1980); Am. Sav. v. Bell, 562 F. Supp. 4 (D.D.C. 1981); Citizens Sav. v. Califano, 480 F. Supp. 843 (D.D.C. 1979); Knoxville Bus. Coll. v. Boyer, 451 F. Supp. 58 (E.D. Tenn. 1978). Buying such loans can be a very risky investment for the secondary market purchaser, since the defaulting student may be no longer in the state, insolvent, or bankrupt.

27. Although there is theoretically no limit to the number of links in the chain of sale of these loans, it is presumably rare to have more than two or three such links.

28. This scenario is based on actual facts from a pro bono case in which the author participated. Ms. Baker's name has been changed for purposes of anonymity.

hometown of Phoenix, Arizona, and prepared to begin classes that fall. To help finance her vocational education, Ms. Baker turned to the Federal Student Loan Program and was approved for a government-guaranteed student loan from MeraBank, a local savings and loan. She signed the necessary paperwork but was diagnosed with multiple sclerosis before she could begin her studies.[29] This debilitating disease left her in such poor health that she withdrew from her college before the term began and cancelled the student loan, having neither attended classes nor received funds in connection with the loan. Although she eventually substantially recovered from her illness, Ms. Baker abandoned her aspirations of attending beauty school.

Soon after Ms. Baker withdrew from school, MeraBank, her would-be lender, began to suffer troubles of its own. These troubles culminated in the institution falling victim to the savings and loan crisis of the 1980s.[30] In January 1990, MeraBank went into receivership under the control of the Resolution Trust Corporation.[31] Eventually, MeraBank was dissolved and its papers and effects were presumably warehoused or disposed of.

Unfortunately, nearly twenty years later, Ms. Baker's beauty school dream returned to haunt her. In 2004, she received a copy of a complaint[32] seeking repayment of her abandoned student loan. The claimant was Dunstone Financial, LLC ("Dunstone"), an Arizona-based debt collection agency whose website claims: "We specialize in recovering past due balances and charged-off debt. . . . Results are guaranteed!"[33] Dunstone's suit was based on the promissory note Ms.

29. Multiple sclerosis (MS) is "[a] chronic disease of the central nervous system (CNS) . . . [that] results in temporary, repetitive, or sustained disruptions in nerve impulse conduction, causing symptoms such as muscular weakness, numbness, [and] visual disturbances . . . . MS is a relatively common disorder: more than 250,000 Americans are affected." TABER'S CYCLOPEDIC MEDICAL DICTIONARY, s*clerosis*, (F.H. Davis ed. 19th ed. 2002).

30. For a description of the savings and loan industry and the associated crisis, the "Enron" of its day, see Edward L. Ruben, *Communing with Disaster: What We Can Learn From the Jusen and the Savings and Loan Crises*, 29 LAW & POL'Y INT'L BUS. 79, 79–87 (1997). *See also* Modzelewski v. Resolution Trust Corp., 14 F.3d 1374, 1375 (9th Cir. 1994) (giving a factual account of MeraBank's demise).

31. The RTC was created by Congress as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") to staunch the massive bankruptcies of financial institutions in the savings and loan crisis. *See* Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 & 15 U.S.C.); Marjorie I. Stein, *Developments in Banking Law: 1993: VI. Resolution Trust Corporation*, 13 ANN. REV. BANKING L. 57, 57 (1994) ("[The RTC] . . . takes over insolvent S&Ls, sells their assets, and extinguishes the interests of stockholders by distributing the proceeds of the sales to them.").

32. The complaint was filed in the North Valley Justice Court—one of Arizona's small claims courts. *See* SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, JUSTICE COURTS – GENERAL INFORMATION, http://www.superiorcourt.maricopa.gov/justiceCourts/Info/genInfo.asp (last visited Oct. 25, 2005).

33. *Dunstone Financial, L.L.C.*, http://www.dunstone.com (last visited Oct. 25, 2005).

Baker had signed in 1987, which apparently had survived MeraBank's dissolution in 1990 and been acquired by an extended purchaser.[34] The complaint necessarily also claimed that Arizona's statute of limitations, which requires that suits on written contracts be brought "within six years after the cause of action accrues,"[35] was inapplicable. Dunstone argued that, instead, 20 U.S.C. § 1091a "provides that there can be no time-bar defense in an action brought to collect on a student loan."

Although Ms. Baker could argue that she never actually received the loans, that course would entail difficult questions of proof, requiring financial records and witness testimony regarding a transaction over twelve years earlier. Her case would be much simpler—and could end with a motion for summary judgment[36]—if Dunstone was wrong and Arizona's statute of limitations barred collection of the purported loan. If, on the other hand, Dunstone's interpretation of section 1091a was correct, a trial or settlement seemed inevitable.

III. THE HISTORY AND INTERPRETATION OF SECTION 1091A

The example of Ms. Baker frames the question: can a non-listed entity, such as Dunstone, use 20 U.S.C. § 1091a to avoid statutes of limitations? Before answering that question, this Part provides necessary background on section 1091a, particularly the 1991 amendment of that

34. Dunstone claimed to have received assignment of Ms. Baker's student loan for the purpose of collection from a mysterious entity called Talisman Partners, LLP ("Talisman"). Dunstone claimed that Talisman was the eventual purchaser—through at least one intermediary—of some of MeraBank's accounts receivable, including Ms. Baker's account. Talisman thus appears to be what is known among bankruptcy attorneys as a "vulture investor." *See* HILARY ROSENBERG, THE VULTURE INVESTORS: THE WINNERS AND LOSERS OF THE GREAT AMERICAN BANKRUPTCY FEEDING FRENZY (1992); Suniati Yap, *Investing In Chapter 11 Companies: Vultures Or White Knights?*, 2 SW. J. L. & TRADE AM. 153 (1995). A vulture investor is "[a]n investor who attempts to profit by buying debt of bankrupt or credit-impaired companies." Dictionary.com, *Vulture Investor*, http://dictionary.reference.com/ search?q=vulture investor (last visited Oct. 25, 2005) (quoting DAVID L. SCOTT, WALL STREET WORDS: AN A TO Z GUIDE TO INVESTMENT TERMS FOR TODAY'S INVESTOR (2003)).

35. "An action for debt where indebtedness is evidenced by or founded upon a contract in writing executed within the state shall be commenced and prosecuted within six years after the cause of action accrues, and not afterward." ARIZ. REV. STAT. § 12-548 (2000). In applying this statute to the case of promissory notes, the Arizona courts have held that "the cause of action accrues and the statute of limitations begins to run when the debt becomes due." Cheatham v. Sahuaro Collection Serv., Inc., 577 P.2d 738, 740 (Ariz. Ct. App. 1978). Dunstone's documents listed the purported due date of Ms. Baker's loan as December 28, 1991. Thus, were the Arizona statute of limitations to apply, Dunstone's claims would have been barred as of December 28, 1997—over six years before Dunstone filed its complaint.

36. In Arizona, summary judgment should be granted "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1).

section. Then it describes how courts have interpreted section 1091a and examines how those interpretations might apply to non-listed entities.

A. The Background and Text of 20 U.S.C. § 1091a

As mentioned above,[37] Congress amended the federal student loan statute as part of the Higher Education Technical Amendments of 1991.[38] This section describes the pre- and post-amendment versions of the statute and the circuit split that gave rise to the amendment.

1. The 1986 version of section 1091a and the tax refund offset provisions

Before 1991, the federal loan statute provided that the government could file suit against borrowers of student loans, "[n]otwithstanding any provision of State law that would set an earlier deadline for filing suit[,] . . . until 6 years following the date on which the loan is assigned, transferred, or referred to the Secretary [of Education]."[39] Similar

37. *See* text accompanying notes 12–13.

38. *See* Pub. L. No. 102-26, 105 Stat. 124 (1991).

39. Pub. L. No. 99-498, § 484A, 100 Stat. 1268 (1986) (codified at 20 U.S.C. § 1091a(a) (1986)). The full text of the provision reads:

(a) IN GENERAL.—Notwithstanding any provision of State law that would set an earlier deadline for filing suit –

> (1) an institution which receives funds under this title may file suit for collection of a refund due from a student on a grant made or work assistance awarded under this title during a period of time extending at least until a date 6 years (exclusive of periods during which the State statute of limitations period otherwise applicable to the suit would be tolled under State law) after the date the refund first became due;
>
> (2) a guaranty agency which has an agreement with the Secretary under section 428(c) may file suit for collection of the amount due from a borrower on a loan made under part B of this title during a period of time extending at least until a date 6 years (exclusive of periods during which the State statute of limitations period otherwise applicable to the suit would be tolled under State law) after the date such guaranty agency reimburses the previous holder of the loan for its loss on account of the default of the borrower;
>
> (3) an institution which has an agreement with the Secretary pursuant to section 463(a) may file suit for collection of the amount due from a borrower on a loan made under part E of this title during a period of time extending at least until a date 6 years (exclusive of periods during which the State statute of limitations period otherwise applicable to the suit would be tolled under State law) after the date of the default of the borrower with respect to that amount; and
>
> (4) subject to the provisions of section 2416 of title 28 of the United States Code, the Attorney General may file suit –
>
> (A) for payment of a refund due from a student on a grant made under this title until 6 years following the date on which the refund first became due;
>
> (B) for collection of the amount due the Secretary from a borrower pursuant to section 428(c)(2)(D) and (c)(8) of this title until 6 years following the date on which the loan is assigned to the Secretary under part B of this title; and
>
> (C) for collection of the amount due from a borrower on a loan made under part E until 6 years following the date on which the loan is assigned, transferred, or referred to the

provisions defined the period in which educational institutions and guaranty agencies could sue for collection of student loans.[40] A lawsuit, however, was not the only option. A different code provision allowed the government to offset income tax refunds of delinquent borrowers to recoup their student loans.[41] According to a Treasury Department regulation, the statute of limitations for using the tax refund offset method was ten years: "[A] past-due legally enforceable debt which may be referred by a Federal agency to the Service for offset is a debt . . . [w]hich, except in the case of a judgment debt, has been delinquent for at least three months but has not been delinquent for more than ten years at the time the offset is made."[42]

2. Circuit split: Jones *and* Grider

The federal circuit courts of appeals soon split over the meaning of the Treasury regulation. First, the Eleventh Circuit addressed the regulation.[43] In *Jones v. Cavazos*,[44] a delinquent student borrower, Jones, challenged the government's ability to collect on her loan through tax refund offset. She had defaulted on her college loan in 1974 and, twelve years later, the Secretary of Education took assignment of that loan for collection.[45] The crux of Jones' argument was that the Treasury regulation "creates a ten year federal statute of limitations which begins to run when the debt first goes into default."[46] Since she had defaulted over twelve years earlier, Jones argued, the government was barred from offsetting her taxes. The district court, however, granted summary judgment for the government, and the Eleventh Circuit affirmed on appeal. Relying on various other district court cases,[47] the Eleventh

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Secretary under part E of this title.

Id.

40. *Id.* Technically, the provision did not set affirmative limitations on those entities, but merely restricted application of any state statutes of limitations for "at least" six years. *Id.* A House report on the bill indicates that it "[p]rovides that *at least* the six-year Federal statute of limitation for filing suit by a guaranty agency or the Secretary for collection of a loan would apply if the period under state law is less than six years." H.R. REP. NO. 99-383 (1985) (emphasis added).

41. 31 U.S.C. § 3720A (Supp. 1989); 26 U.S.C. § 6402 (1989).

42. 26 C.F.R. § 301.6402-6(T)(b) (1988).

43. However, in an earlier case, in dicta, the Eighth Circuit indicated how it would likely construe the regulation: "[T]he setoff procedure will not be used to satisfy an obligation which has been delinquent for more than ten years at the time the offset is made. This does, we think prudently, place limits upon use of the offset procedure for obligations *older than* ten years." Thomas v. Bennett, 856 F.2d 1165, 1169 n.4 (8th Cir. 1988) (emphasis added and citation omitted).

44. 889 F.2d 1043 (11th Cir. 1989).

45. *Id.* at 1044.

46. *Id.* at 1047.

47. Roberts v. Bennett, 709 F. Supp. 222 (N.D. Ga. 1989); Hurst v. U. S. Dep't of Educ., 695

Circuit determined that the ten-year limitation did not begin to run until the Department of Education *took assignment* of the delinquent student loan.[48] Thus, the word "delinquent" in the Treasury regulation meant delinquent *as to the government*. In the words of one of the district courts quoted by the *Jones* court, "the debt cannot become delinquent until it is in the hands of the agency requesting the offset."[49]

The next year, the Fifth Circuit addressed the same issue in the case of *Grider v. Cavazos*.[50] There, two students, Grider and Gladecki, had defaulted on their student loans: Grider in 1975 and Gladecki in 1971.[51] The Department of Education took assignment of their loans in 1979.[52] In 1986, on behalf of the Department of Education, the IRS offset the tax refunds of both students. Grider and Gladecki challenged the offset in a suit filed against the Secretary of Education, but the district court granted summary judgment for the Secretary, coincidentally issuing its final judgment the same day that the Eleventh Circuit issued its opinion in *Jones*.[53] On appeal, the Fifth Circuit reversed the trial court.[54] Although it recognized that its holding created a circuit split,[55] the appellate court could not assent to the Eleventh Circuit's construction of the word "delinquent":

> Absent ambiguity, we must not tinker. And try as we might, we fail to see how the Regulation could be viewed as ambiguous. *Delinquent* is a word the meaning of which is universally understood by lawyer and layman alike when used in reference to a debt. . . . In the face of such unambiguous language, how can a court justify usurping the legislative function that was delegated to the Secretary of the Treasury by supplying words such as "in the hands of the Secretary" to modify "delinquent"?[56]

Based on this "plain meaning" interpretation of the regulation, the Fifth Circuit held that the government can only offset tax refunds within ten

F. Supp. 1137 (D. Kan. 1988).

48. *Jones*, 889 F.2d at 1048–49.

49. *Id.* at 1048 (quoting *Roberts*, 709 F. Supp. at 225).

50. 911 F.2d 1158 (5th Cir. 1990). For more information on, and a criticism of, both the *Jones* and *Grider* cases, see Michael Sawyer Smith, Note, *Third Party Assignment, Statutes of Limitation, and the Tax Refund Offset Program: Breathe a Little Easier Student Deadbeats, the Fifth Circuit Is on Your Side*, 46 VAND. L. REV. 443 (1993).

51. 911 F.2d at 1159–60.

52. *Id.*

53. *Id.* at 1160.

54. *Id.* at 1165.

55. *Id.* at 1162.

56. *Id.* at 1163.

years of the date of original default.

3. *The amended section 1091a*

Congress was not long in reacting to the September 1990 *Grider* decision. On March 6, 1991, Representative William D. Ford[57] of Michigan introduced the "Higher Education Technical Amendments" ("HETA") bill,[58] which eventually became the amended section 1091a.[59] In the House debates, Representative Ford stated that the bill, in part, "overcomes a recent circuit court decision that puts in jeopardy the ability of the Department of Education to collect defaulted student loans through offsets of income tax refunds and other means."[60] The "decision" was apparently the Fifth Circuit's decision in *Grider v. Cavazos*.[61]

However, the amendment to section 1091a did much more than merely reverse the Fifth Circuit's holding on the meaning of the Treasury regulation.[62] In fact, the revision extended far beyond amending the tax refund offset provisions—it eliminated *all* the statutes of limitations that were previously part of section 1091a. The new text of 1091a(a), as codified in the United States Code, reads:

> (a) IN GENERAL.—(1) It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced.
> (2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by—
> (A) an institution that receives funds under this subchapter and part C

57. For whom the William D. Ford Federal Direct Loan Program is named. *See* 20 U.S.C. § 1087a (1994).

58. *See* 137 CONG. REC. H1454–05 (Mar 6, 1991).

59. The President signed the bill on April 9th of that year. *See* 137 CONG. REC. H3422–04 (Apr. 9, 1991).

60. 137 CONG. REC. H1808–02 (Mar. 19, 1991).

61. *See* Guillermety v. Sec'y of Educ., 241 F. Supp. 2d 727, 754 & n.24 (E.D. Mich. 2002); Kitchen v. U.S. Dep't of Educ., No. 97 CIV. 9391(DLC), 1998 WL 167325, at *2 (S.D.N.Y. Apr. 9, 1998) ("In 1991, Congress passed the Higher Education Act Technical Amendments ('HETA'), which among other things and in response to *Grider*, abolished the previously applicable statute of limitations.").

62. *See* United States v. Wall, 794 F. Supp. 350, 353 (D. Or. 1992) ("[A]lthough the legislative history indicates a desire to deal with the specific issue raised in the *Grider* case, . . . Congress did not confine its action to such cases.").

> of subchapter I of chapter 34 of Title 42 that is seeking to collect a refund due from a student on a grant made, or work assistance awarded, under this subchapter and part C of subchapter I of chapter 34 of Title 42;
> (B) a guaranty agency that has an agreement with the Secretary under section 1078(c) of this title that is seeking the repayment of the amount due from a borrower on a loan made under part B of this subchapter after such guaranty agency reimburses the previous holder of the loan for its loss on account of the default of the borrower;
> (C) an institution that has an agreement with the Secretary pursuant to section 1087c or 1087cc(a) of this title that is seeking the repayment of the amount due from a borrower on a loan made under part C or D of this subchapter after the default of the borrower on such loan; or
> (D) the Secretary, the Attorney General, or the administrative head of another Federal agency, as the case may be, for payment of a refund due from a student on a grant made under this subchapter and part C of subchapter I of chapter 34 of Title 42, or for the repayment of the amount due from a borrower on a loan made under this subchapter and part C of subchapter I of chapter 34 of Title 42 that has been assigned to the Secretary under this subchapter and part C of subchapter I of chapter 34 of Title 42.[63]

Thus, the same entities that were restricted by time limits in the old section 1091a now had explicit authority to sue to collect student loans, regardless of any limitations periods.

Further, the "effective date" provision of HETA indicated that

> [t]he amendments made by this section shall be effective as if enacted by the Consolidated Omnibus Budget Reconciliation Act of 1985 (Public Law 99-272), and shall apply to any actions pending on or after the date of enactment of the Higher Education Technical Amendments of 1991 that are brought before November 15, 1992.[64]

Essentially, as long as a proceeding was "pending" on or after April 9, 1991,[65] it was exempt from statutes of limitations. Although the effective date provision also required the government to bring suit (if at all) prior

63. 20 U.S.C. § 1091a (1998).

64. *Id.* (as codified from § 3(c) of Pub. L. No. 102-26, as amended Pub. L. No. 102-325, Title XV, § 1551, 106 Stat. 838 (1992)).

65. The date on which the Higher Technical Amendments of 1991 was enacted. *See* 137 CONG. REC. H3422–04 (Apr. 9, 1991).

to November 15, 1992, Congress soon revoked this "sunset provision."[66]

4. Courts determine the scope of section 1091a's retroactivity

With its newfound freedom from time restrictions, the Department of Education began to pursue defaulted loans with renewed vigor. Court cases examining the scope of amended section 1091a began springing up, while delinquent borrowers sought to contest this new onslaught. The most significant holding of the resulting court decisions was that amended section 1091a applies retroactively to avoid all statutes of limitations, regardless of when the loan went into default.

Although apparently no one questions the retroactive effect of section 1091a, the scope of that retroactivity was not immediately apparent. In fact, the first federal district court to address the application of section 1091a apparently viewed it as somewhat limited. In *United States v. Friedenberg*,[67] decided in September of 1991, the district court applied the newly-amended statute, noting that the effective date provision "states that [section 1091a] is to be considered effective as if it were part of the Consolidated Omnibus Budget Reconciliation Act of 1985."[68] The *Friedenberg* court found the statute applicable in that case, partly because "[i]n 1985, the claim was not time barred."[69] Apparently, the court read the effective date provision as making section 1091a retroactively applicable only to those student loans that had not been barred by the prior six-year limitation[70] as of the date of the 1985 Act.[71] Thus, under *Friedenberg*, a loan that went into default in 1979 and was barred by a statute of limitations in 1984 would not have become collectible under the section 1091a amendment.

Subsequent cases, however, disagreed with the *Friedenberg* dictum. In *United States v. Davis*,[72] the court noted that "[t]he *Friedenberg* court, without discussion, apparently concluded that the determining factor regarding retroactivity of [section 1091a] is whether a student loan debt was time barred in 1985."[73] The *Davis* court noted, however, that the

66. Pub. L. No. 102-325, § 1551 106 Stat. 448 (July 23, 1992) ("Subsection (c) of section 3 of the Higher Education Technical Amendments of 1991 (Public Law 102-26) is amended by striking 'that are brought before November 15, 1992.'").

67. No. CV-90-0707, 1991 WL 352884 (E.D.N.Y. Sept. 20, 1991).

68. *Id.* at *2.

69. *Id.* Because the case of a claim that *was* barred in 1985 was not before the court, this statement is, of course, dicta.

70. *See supra* note 39 and accompanying text.

71. That date was April 7, 1986. Pub. L. No. 99-272, § 16041(e) (1986).

72. 142 B.R. 293 (S.D. Ind. 1992).

73. *Id.* at 296.

Consolidated Omnibus Budget Reconciliation Act of 1985, which section 1091a is linked to, "provides as follows: 'The amendment made by section 16033 [which sets the statute of limitations for the collection of defaulted student loans] shall apply to all grants, including grants awarded before the enactment of this Act.'"[74] Thus, because the 1985 Act itself had an effective date provision that applied retroactively without limit, the *Davis* court concluded that section 1091a "applies to all grants, regardless of when those loans were issued or whether claims for repayment of those grants were still viable on April 7, 1986."[75] Thus, under *Davis*, a loan that went into default and was barred by a statute of limitations before 1985 would still be open to collection under the amended section 1091a.

Other federal district courts soon agreed with the *Davis* analysis.[76] Moreover, when the federal circuit courts began to address the issue, they unanimously agreed that the statute applied retroactively without limit,[77] and further held that such application did not violate the ex post facto clause[78] or the due process clause.[79] It is thus settled—barring

74. *Id.* (quoting Pub. L. No. 99-272, § 16041(e)) (alteration in original).

75. *Id.* As the *Davis* court noted, "the Consolidated Omnibus Budget Reconciliation Act of 1985 . . . (the United States astutely points out) took effect on April 7, 1986, not in 1985." *Id.*

76. United States v. Mastrovito, 830 F. Supp. 1281, 1283 (D. Ariz. 1993) (noting that "defendant attempts to circumvent the application of the Amendments with the argument that they are only retroactive to April 7, 1986" but finding that argument meritless); United States v. Phillips, No. CV S-92-952-DFL-GGH, 1993 WL 660213, at *4–*8 (E.D. Cal. June 14, 1993) (summarizing cases); United States v. Hodges, No. 4:92CV1395, 1993 WL 328044 (E.D. Mo. Apr. 21, 1993); United States v. Cawley, 821 F. Supp. 1219, 1222 (E.D. Mich. 1993); United States v. Keil, No. C92-2822-FMS, 1993 WL 69490 (N.D. Cal. Mar. 8, 1993); United States v. Collins, No. CIV. A. 92-1143, 1993 WL 52103 (E.D. Pa. Feb. 24, 1993); United States v. Ward, Civ.A. No. 92-1786, 1992 WL 373557 (E.D. La. Dec. 7, 1992); United States v. Blair, No. 8:CV91-00587, 1992 WL 506087, at *2 (D. Neb. Jul. 10, 1992) (finding that "the intent and effect of [section 1091a] was to eliminate the statute of limitations for recovery of defaulted student loan obligations" and that there is "no constitutional right to the benefit of the particular limitation period that happened to be in effect when a cause of action accrued"); United States v. Davis, 801 F. Supp. 581, 584 (M.D. Ala. 1992) ("[T]he court concludes . . . that the 1991 Amendments eliminating statutes of limitations for collection of defaulted student loans apply retroactively to revive claims time-barred under previous statutes of limitations."); United States v. Wall, 794 F. Supp. 350, 353 (D. Or. 1992) ("[G]iven the legislative history and the plain language of HETA, I find that Congress intended to retroactively abolish all limitations on the collection of student loans, so that all possible funds could be collected from student loan defaulters."); United States v. Daley, No. CS-91-0280-JBH, 1992 WL 106799, at *2 (E.D. Wash. May 13, 1992) ("Applicable case law and legislative history convince this court that abolition of the limitations period must be retroactively applied.").

77. *E.g.*, United States v. Glockson, 998 F.2d 896, 898 (11th Cir. 1993) ("[W]e hold that the Higher Education Technical Amendments of 1991 do revive actions to collect unpaid student loans that were barred by the statute of limitations before the enactment of that legislation."). *See also* United States v. Distefano, 279 F.3d 1241, 1244 (10th Cir. 2002); United States v. Lawrence, 276 F.3d 193, 195–96 (5th Cir. 2001); Bianco v. U.S. Dep't of Educ., No. 96-6050, 1996 WL 466653 (2d Cir. Aug. 16, 1996); United States v. Johnson, No. 93-16644, 1994 WL 266553 (9th Cir. Jun. 16, 1994); United States v. MacDonald, No. 93-1924, 1994 WL 194248 (6th Cir. May 16, 1994).

78. United States v. Brown, 7 F. App'x. 353 (6th Cir. 2001); United States v. Singer, No. 96-5356, 1997 WL 812459 (D.C. Cir. Nov. 10, 1997); United States v. Young, No. 93-16062, 1993 WL

Supreme Court interference—that section 1091a applies retroactively to revive all claims on defaulted student loans, even claims that were previously barred by statutes of limitations.

B. Applying the Text, the Legislative History, and Judicial Interpretations of Section 1091a to Non-Listed Entities

This section now turns to the ultimate question—whether section 1091a applies to entities not listed in that statute. This section first examines the text of the statute, then to its legislative history to determine Congress's intent with respect to non-listed entities. Next, it examines the court decisions that have cited and interpreted section 1091a. It concludes that although the court decisions are ambiguous, the statutory text indicates that the statute should not apply to non-listed entities.

1. Text and legislative history of section 1091a

As a textual matter, section 1091a is quite clear: there is to be no limitation on any action taken to collect on defaulted students loans by

> (B) a guaranty agency that has an agreement with the Secretary under section [20 U.S.C. §] 1078(c) . . . ;
> (C) an institution that has an agreement with the Secretary pursuant to section [20 U.S.C. §] 1087c or § 1087cc(a) . . . ; or
> (D) the Secretary [of Education], the Attorney General, or the administrative head of another Federal agency . . . .[80]

The section specifically limits those who may take advantage of the exemption from limitations to five categories: guaranty agencies,[81] qualifying educational institutions, the Secretary of Education, the United States Attorney General, and the heads of other federal agencies.[82] Under a strict textualist reading, this would end the inquiry:

526368 (9th Cir. Dec. 20, 1993); United States v. Steele, No. 92-56047, 1993 WL 170956 (9th Cir. May 20, 1993).

79. United States v. Dauven, No. 97-35362, 1998 WL 276624 (9th Cir. May 22, 1998); *Singer*, No. 96-5356, 1997 WL 812459; United States v. Hodges, 999 F.2d 341, 342 (8th Cir. 1993).

80. 20 U.S.C. § 1091a(a)(2)(B)–(D) (1998). Section 1091a(a)(2)(A) deals with institutions who are "seeking to collect a refund due from a student on a grant made, or work assistance awarded," and thus is not applicable in the loan context. 20 U.S.C. § 1091a(a)(2)(A).

81. A guaranty agency is a state or nonprofit institution that contracts with the federal government to supervise the FFEL. *See* LOONIN, *supra* note 5, at 3.

82. Further, it defines the kinds of loans each entity can use section 1091a in pursuing: guaranty agencies can only use it in pursuing Federal Family Education Loans ("FFEL"), 20 U.S.C.

since non-listed lenders and extended purchasers do not fall into any of the five categories, they cannot use section 1091a to defend against statutes of limitations. A broader or less-strict reading of the text, on the other hand, would take account of the initial statutory language stating the "purpose" of the amendment—"It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced."[83] This "purpose" language is not at all restrictive; in fact, allowing non-listed entities to avoid statutes of limitations would help promote the purpose of "ensur[ing] that obligations to repay loans . . . are enforced."[84] So, there may be some narrow room for arguing that the amendment was meant to apply more broadly than the narrow list indicates.

However, this broader "purpose" argument probably does not ultimately support application of the exemption beyond the listed entities. The purpose section of a statute can certainly be used to help give proper context to the statute, but it cannot be used to *avoid* the actual text that implements that purpose.[85] Although Congress states the statute's purpose in section 1091a(a)(1), it is in 1091a(a)(2) that Congress attempts to implement that purpose. Furthermore, Congress' implementation, on its face, unquestionably limits the exemption to the listed categories—there is no indication that the list of entities in section 1091a was intended to be merely illustrative. It is a settled rule of statutory construction that "[i]n construing a statute[, the courts] are obliged to give effect, if possible, to every word Congress used."[86] Thus,

§ 1091a(a)(2)(B) ("[When] seeking the repayment of the amount due from a borrower on a loan made under part B of this subchapter [the FFEL program] . . . ;"), and educational institutions can only use it in pursuing Direct Loans or Perkins Loans, *Id.* §1091a(a)(2)(C) ("[When] seeking the repayment of the amount due from a borrower on a loan made under part C or D of this subchapter [Direct and Perkins Loans] . . . ;"). The Secretary of Education, Attorney General, and heads of administrative agencies are unlimited in their use of section 1091a. *See id.* § 1091a(a)(2)(D).

83. 20 U.S.C. § 1091a(a)(1).

84. *Id.*

85. As the Supreme Court has said:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice, —and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law. Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'"

Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (*quoting* Aaron v. SEC, 446 U.S. 680, 695 (1980) (*quoting* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 n.33 (1976))).

86. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). *See also* Gade v. Nat'l Solid Wastes

one should not look merely to the "purpose" language of section 1091a and ignore the specific list of entities. Construing section 1091a to apply more broadly than this list would render the listing of entities superfluous.[87]

Thus, looking solely to the text of section 1091a, it is fairly clear that non-listed entities are foreclosed from using the statute. Some additional support for this position can be found in the record of the debates and legislative history surrounding the HETA[88]—nearly all the commentary in the debates focused solely on allowing *the federal government* additional latitude in collecting on defaulted student loans. As mentioned above,[89] the sponsor of the bill stated that the bill was intended to reverse the *Grider* decision, which had "put[] in jeopardy the ability of *the Department of Education* to collect defaulted student loans through offsets of income tax refunds and other means."[90] Other representatives referred to the bill as furthering the federal government's ability to offset federal income tax refunds.[91] Similarly, in the related Senate debates, one Senator maintained that "the legislation assures that *the Department of Education* will not be limited in its ability to collect defaulted guaranteed student loans through the tax refund offset program."[92] Although these comments do not require that the statute was limited to helping the federal government, they at least indicate that the intent of the only members of Congress who commented on the statute was to provide an exemption for the federal government, not for non-listed entities.[93] When

Mgmt. Ass'n, 505 U.S. 88, 100 (1992) ("[I]t is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted).

87. *See* Beisler v. C.I.R., 814 F.2d 1304, 1307 (9th Cir. 1987) ("We should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress.").

88. This history is related here in full recognition of the arguments, most visibly championed by Justice Scalia, against giving undue weight to such considerations. *See, e.g.*, United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 521 (1992) (Scalia, J., concurring in the judgment) (referring to legislative history as "that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction"); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment); Edwards v. Aguillard, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting).

89. *See supra* notes 57–61 and accompanying text.

90. 137 CONG. REC. H1808–02 (Mar. 19, 1991) (statement of Rep. Ford) (emphasis added).

91. "[T]his bill removes the 10-year statute of limitations on IRS offset collections from student loan defaulters." *Id.* (statement of Rep. Coleman); "[T]hese amendments change the statute of limitations for collecting defaulted student loans through IRS offsets of tax refunds . . . . Some questions have arisen regarding the running of the statute of limitations. The amendment would life the statute of limitations for all time [and] would apply it retroactively." *Id.* (statement of Rep. Goodling).

92. 137 CONG. REC. S4089–01 (Mar. 21, 1991) (statement of Sen. Kassebaum) (emphasis added).

93. *See* Guillermety v. Sec'y of Educ., 241 F. Supp. 2d 727, 754 (E.D. Mich. 2002) ("[W]hile the 1991 amendment to the HEA, 20 U.S.C. § 1091a, was broad and general in its textual language,

the comments in the legislative history are taken in combination with the plain text of the statute, section 1091a does not apply to non-listed entities.

2. The conflicting court decisions

Despite the restrictive language and apparent legislative purpose of the amended section 1091a, some court cases interpreting that section have spoken of the exemption broadly. Taking the language of those courts at face value, it would appear that they see no need to restrict the application of section 1091a to the listed entities. For example, the Eleventh Circuit stated that "it appears to us that Congress intended the HETA amendments to apply retroactively to *all* student loan collection actions" and that "Congress intended to revive *all* time-barred actions to recover defaulted student loans."[94] Similarly, from the Fifth Circuit: "Today we . . . conclude that § 1091a eliminates *all* limitations defenses for collection of student debts."[95] An unpublished Second Circuit opinion stated that section 1091a "retroactively eliminated the statutes of limitations on *all* actions (including tax offsets) to recover on defaulted student loans."[96] And many other federal court decisions contain similarly broad language.[97]

it was narrowly focused on a particular problem-the ability of the federal government to collect delinquent student loans through the offset of federal tax refunds.").

94. United States v. Glockson, 998 F.2d 896, 897 (11th Cir. 1993) (emphasis added).

95. United States v. Lawrence, 276 F.3d 193, 196 (5th Cir. 2001) (emphasis added).

96. Bianco v. U.S. Dep't of Educ., No. 96-6050, 1996 WL 466653 (2d Cir. Aug. 16, 1996) (emphasis added).

97. United States v. Phillips, 20 F.3d 1005, 1007 (9th Cir. 1994) ("Congress provided that actions to collect on defaulted student loans were no longer subject to any statute of limitations."); Lee v. Paige, 276 F. Supp. 2d 980, 983 (W.D. Mo. 2003) ("In 1991, Congress eliminated all statutes of limitations on the collection of student loans . . . . The effect of [section 1091a] was to abrogate all statutes of limitations that would have barred the collection of past due student loans."), aff'd, 376 F.3d 1179 (8th Cir. 2004), vacated on other grounds by Spellings v. Lee, —- S. Ct. —-, 2005 WL 470904 (2005); United States v. King, No. Civ. 2001-31, 2002 WL 31628438, at *2 (D.V.I. Sept. 19, 2002) ("Section 1091a eliminates any statute of limitations bar on the collection of student loan obligations."); United States v. Wall, 794 F. Supp. 350, 352 (D. Or. 1992) ("[T]he HETA of 1991 removed any statute of limitations for student loans. . . . [G]iven the legislative history and the plain language of HETA, I find that Congress intended to retroactively abolish all limitations on the collection of student loans, so that all possible funds could be collected from student loan defaulters."); United States v. Walker, 795 F. Supp. 1073, 1073 (N.D. Okla. 1992) ("[T]he Higher Education Technical Amendments of 1991[] abrogated all limitation periods affecting collection of defaulted student loans."); United States v. Smith, 811 F. Supp. 646, 647–48 (S.D. Ala. 1992) ("There is no longer a statute of limitation on student loans, and none has existed since April, 1991. Section 3 of the Higher Education Technical Amendments Act, P.L. 102-26, enacted April 9, 1991, eliminated any statute of limitations that applied to suits brought to collect Education-financed student loans."); *In re* Cota, 298 B.R. 408, 417 (Bankr. D. Ariz. 2003) ("There is no statute of limitations for a student loan debt. *See* 20 U.S.C. § 1091a(a)(1). *See also* 15A AM. JUR. 2D *Colleges and Universities* § 21 (2003) ("The Higher Education Technical Amendments eliminated all statutes

However, this broad language was almost certainly imprecise; most likely, the courts never even considered the prospect of non-listed entities attempting to use the exemption of section 1091a. Moreover, other courts—more thorough in their analysis and precise in their phrasing—have recognized the restrictive language of section 1091a. For example, a Ninth Circuit case specifically rejected a debtor's claim that a statute of limitations barred collection of the debt because the creditor was a guaranty agency that "has an agreement with the Secretary of Education," as required in section 1091a(a)(2)(B).[98] Other courts, addressing the issue in passing, have used significant qualifications on their language. For example, a federal district court in the District of Columbia stated that section 1091a "eliminated the bar of any statute of limitations on *government collection* of student loans financed by the Department of Education."[99] Similarly, a federal district court in Alabama stated that the section "provides that litigation may be commenced, a judgment enforced, or a garnishment or offset action taken *by the Federal government* to collect defaulted loans regardless of any Federal or state statutes of limitation."[100] And from a Pennsylvania bankruptcy court: "[Section 1091a] has eliminated the running of any statute of limitations *against federal assignees* of student loan debts."[101]

Perhaps the most exacting analysis came in the Indiana bankruptcy

of limitation on actions to recover on defaulted student loans and therefore revives actions against defendants on which original statute of limitation would have run.").

98. Millard v. United Student Aid Funds, Inc., 66 F.3d 252, 253 (9th Cir. 1995). Because the statute only requires that the agency "has" an agreement, the court further held that it was immaterial whether the guaranty agency *had* an agreement at the time the loan was serviced—all that the court apparently required is that the agency have an agreement at the time of trial. *Id.*

99. Foster v. Alexander, 811 F. Supp. 5, 9 (D.D.C. 1993) (emphasis added). However, it should be noted that when the *Foster* court cited the statute, they omitted the list of entities that can use the statute, quoting only that "no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken." *Id.*
In addition, it can be argued that the quotation in the text overstates the case, because guaranty agencies and educational institutions—which are often not part of the government—are allowed to use the statute. However, given the agreements with the federal government that allow those institutions to participate in the federal loan program, it is not much of a stretch to say that they are acting based on delegation from the government.

100. United States v. Smith, 811 F. Supp. 646, 648 (S.D. Ala. 1992) (emphasis added). This statement was arguably limited to the federal government only because that is who was pursuing the claim—an especially compelling conclusion given the court's broad characterization of the statute in another part of its opinion. *See supra* note 97. However, the court later states that "[t]his resuscitative legislation is not an unusual action, and the courts have clearly recognized that Congress has the power to revive a time-barred claim *held by the government*." 811 F. Supp. at 648. Because this statement is made in support the constitutionality of section 1091a, an argument can be made that the court considered the amendment to only apply to the government.

101. *In re* Hankerson, 133 B.R. 711, 713 n.2 (Bankr. E.D. Pa. 1991) (emphasis added), *rev'd on other grounds sub nom*. Hankerson v. U.S. Dep't of Educ., 138 B.R. 473 (E.D. Pa. 1992) *and* Matter of Pettis, 146 B.R. 653 (E.D. Pa. 1992).

case of *In re Loving*.[102] In that case, Ms. Loving had obtained student loans from the government, which ended up being assigned to the Education Credit Management Corporation ("ECMC").[103] After Ms. Loving declared and had been discharged from bankruptcy, ECMC contacted her seeking repayment of the loans.[104] In a preemptive suit filed against ECMC, Ms. Loving claimed that ECMC was time-barred from attempting to collect on her old student loans, now over ten years old.[105] In rejecting this claim, the bankruptcy court stated that

> [b]y virtue of 20 U.S.C. § 1091a, Congress has eliminated any time constraint on *the United States' (or a guaranty agency['s])* collection of student loan obligations. . . . As a guarantor of the Loans, ECMC is not subject to any statute of limitations or equitable doctrine in pursuing Loving for the balance due under the Loans."[106]

As the emphasized text highlights, the court recognized that the scope of section 1091a was limited to the entities listed therein. Furthermore, in a footnote, the court recognized that "ECMC did not introduce evidence that it has 'an agreement with the Secretary under section 1087c or 1087cc(a);' however, Loving did not object to ECMC's statement that it qualifies as a student loan guarantor and, thus, any argument to the contrary has been waived."[107] The *Loving* court thus recognized that, to qualify under 1091a, ECMC had to fall within one of the five categories listed in that statute. The court apparently would have required evidence to that effect had Ms. Long not waived the issue.

As this brief overview shows, the language from the court cases is somewhat conflicting. Although many cases speak of section 1091a in broad terms, there are also cases that seem to recognize the limited scope of that provision. Stepping back from the particular cases, however, it should be noted that there is an arguably significant trend in the reported decisions. Although 1091a has been used to exempt guaranty agencies[108]

102. 269 B.R. 655 (Bankr. S.D. Ind. 2001).

103. *Id.* at 656.

104. *Id.* at 657. Student loans are not dischargeable in bankruptcy unless certain conditions are met. *See* 11 U.S.C. § 523(a)(8) (2000).

105. 269 B.R. at 656, 662.

106. *Id.* at 663 (emphasis added and footnote deleted).

107. *Id.*

108. Millard v. United Student Aid Funds, 66 F.3d 252 (9th Cir. 1995); Lovitt v. Tex. Guaranteed Student Loan Corp., No. 3-05-CV-0175-BD, 2005 U.S. Dist. LEXIS 12677 (N.D. Tex. June 27, 2005); *In re* Kaufman, No. 3:02-0650, 2002 U.S. Dist. LEXIS 23903 (M.D. Tenn. Nov. 14, 2002); Thompson v. N.M. Student Loan Guarantee Corp., 329 B.R. 145 (Bankr. E.D. Va. 2005); *In re* Loving, 269 B.R. 655 (Bankr. S.D. Ind. 2001); Higher Educ. Assistance Found., Inc. v. Glenn-Healy, 836 P.2d 25 (Kan. Ct. App. 1992); N.Y. State Higher Educ. Servs. Corp. v. Barry, 267

(as in 1091a(a)(2)(B)), institutions of higher education[109] (as in 1091a(a)(2)(A) and (C)), and the Secretary of Education or the Attorney General[110] (as in 1091a(a)(2)(D)) from statutes of limitations, there is not

A.D.2d 567 (N.Y. App. Div. 1999); N.Y. State Higher Educ. Servs. Corp. v. Upshur, 252 A.D.2d 333 (N.Y. App. Div. 1999); State Higher Educ. Servs. Corp. v. Starr, 179 A.D.2d 992 (N.Y. App. Div. 1992); N.Y. State Higher Educ. Servs. Corp. v. Laudenslager, 161 Misc. 2d 329 (N.Y. Sup. Ct. 1994); N.Y. State Higher Educ. Servs. Corp. v. Pratcher, 156 Misc. 2d 349 (N.Y. Sup. Ct. 1993).

109. Univ. of New England v. Leeman, CV000082767S, 2002 Conn. Super. LEXIS 1350 (Conn. Super. Ct. Apr. 29, 2002); State v. Shaw, 189 A.D.2d 1057 (N.Y. App. Div. 1993).

110. Lockhart v. United States, 376 F.3d 1027 (9th Cir. 2004), aff'd, —- S. Ct. —-, 2005 WL 3299398 (2005) (describing section 1091a as "a limited exception to the Debt Collection Act time bar in the student loan context"); United States v. Distefano, 279 F.3d 1241 (10th Cir. 2002); United States v. Lawrence, 276 F.3d 193 (5th Cir. 2001); United States v. Phillips, 20 F.3d 1005 (9th Cir. 1994); United States v. Glockson, 998 F.2d 896 (11th Cir. 1993); United States v. Hodges, 999 F.2d 341 (8th Cir. 1993); Hamilton v. United States, Case No. 2:03-CV-669, 2005 U.S. Dist. LEXIS 24051 (S.D. Ohio Oct. 19, 2005); Johnson v. U.S. Dep't of Educ., Civil Action No. 05-0237, 2005 U.S. Dist. LEXIS 20289 (W.D. Pa. Sept. 16, 2005); Roth v. United States, Civil File No. 02-820 (PAM/RLE), 2003 U.S. Dist. LEXIS 12931 (D. Minn. July 22, 2003); Guillermety v. Sec'y of Educ., 241 F. Supp. 2d 727 (E.D. Mich. 2002); United States v. Charles, 240 F. Supp. 2d 488 (M.D.N.C. 2002); United States v. Holmes, 3:01-CV-0935 NPM/GLS, 2002 U.S. Dist. LEXIS 6455 (N.D.N.Y. Apr. 10, 2002); United States v. Klein, No. 00 C 6301, 2001 U.S. Dist. LEXIS 21408 (N.D. Ill. Dec. 26, 2001); United States v. Lewis, Case No. 01-2006-JWL, 2001 U.S. Dist. LEXIS 9909 (D. Kan. Jun. 29, 2001); United States v. Makler, Civil Action No. 00-239, 2000 U.S. Dist. LEXIS 11306 (E.D. Pa. Aug. 11, 2000); United States v. Washington, Case No. 99-CV-72165-DT, 2000 U.S. Dist. LEXIS 4422 (E.D. Mich. Mar. 20, 2000); United States v. Durbin, 64 F. Supp. 2d 635 (S.D. Tex. 1999); United States v. Dwelley, 59 F. Supp. 2d 115, 118 (D. Me. 1999); United States v. McLaughlin, 7 F. Supp. 2d 90 (D. Mass. 1998); United States v. Smith, 862 F. Supp. 257 (D. Haw. 1994); Foster v. Alexander, 811 F. Supp. 5 (D.D.C. 1993) (filed against the U.S. Secretary of Education); United States v. Cawley, 821 F. Supp. 1219, 1222 (E.D. Mich. 1993); United States v. Robbins, 819 F. Supp. 672 (E.D. Mich. 1993); United States v. Shoemaker, Case No. 93-2113-KHV, 1993 U.S. Dist. LEXIS 19500 (D. Kan. Dec. 17, 1993); United States v. Southworth, Civil Action 93-0406-P-S, 1993 U.S. Dist. LEXIS 16922 (S.D. Ala. Nov. 15, 1993); United States v. Vanhoutteghem, Case No. 93-71789, 1993 U.S. Dist. LEXIS 18773 (E.D. Mich. Nov. 12, 1993); United States v. Harris, No. C-92-4155 M (CW), 1993 U.S. Dist. LEXIS 11519 (N.D. Cal. May 5, 1993); United States v. Keil, No. C92-2822-FMS, 1993 U.S. Dist. LEXIS 2971 (N.D. Cal. Mar. 8, 1993); United States v. Collins, Civil Action No. 92-1143, 1993 U.S. Dist. LEXIS 2315 (E.D. Pa. Feb. 24, 1993); United States v. Sellers, Civil Action 92-0637-T-M, 1993 U.S. Dist. LEXIS 1494 (S.D. Ala. Jan. 28, 1993); United States v. Davis, 801 F. Supp. 581 (M.D. Ala. 1992); United States v. Wall, 794 F. Supp. 350 (D. Or. 1992); *In re* Hankerson, 133 B.R. 711 (Bankr. E.D. Pa. 1991), *rev'd on other grounds sub nom*. Hankerson v. U.S. Dep't of Educ., 138 B.R. 473 (E.D. Pa. 1992) *and* Matter of Pettis, 146 B.R. 653 (E.D. Pa. 1992); United States v. Ward, Civil Action No. 92-1786 Section "N", 1992 U.S. Dist. LEXIS 18798 (E.D. La. Dec. 4, 1992); United States v. Daley, No. CS-91-0280-JBH, 1992 U.S. Dist. LEXIS 7001 (E.D. Wash. May 13, 1992); United States v. Robinson, Civil Action No. 90-2915-LFO, 1992 U.S. Dist. LEXIS 4818 (D.D.C. Apr. 13, 1992); United States v. Friedenberg, No. CV-90-0707, 1991 U.S. Dist. LEXIS 15440 (E.D.N.Y. Sept. 19, 1991); United States v. Brown, 7 F. App'x 353 (6th Cir. 2001); United States v. Motley, No. 00-1206, 2000 U.S. App. LEXIS 33375 (6th Cir. Dec. 12, 2000); United States v. Dauven, 1998 U.S. App. LEXIS 10608 (9th Cir. May 22, 1998); United States v. Singer, No. 96-5356, 1997 U.S. App. LEXIS 37559 (D.C. Cir. Nov. 10, 1997); United States v. Johnson, No. 93-16644, 1994 U.S. App. LEXIS 15548 (9th Cir. June 16, 1994); United States v. MacDonald, No. 93-1924, 1994 U.S. App. LEXIS 11280 (6th Cir. May 16, 1994); United States v. Mastrovito, No. 93-16768, 1995 U.S. App. LEXIS 323 (9th Cir. Jan. 6, 1995); United States v. Young, No. 93-16062, 1993 U.S. App. LEXIS 34107 (9th Cir. Dec. 20, 1993); United States v. Steele, No. 92-56047, 1993 U.S. App. LEXIS 12831 (9th Cir. May 20, 1993); United States v. Hammad, No. 92-1771, 1992 U.S. App. LEXIS 22920 (4th Cir. Sept. 16, 1992); United States v. Kral, No. 89-16551, 1991 U.S. App. LEXIS 11988 (9th Cir. June 4, 1991);

a single reported case where a non-listed entity has used section 1091a to avoid a statute of limitations. In *Accounts Portfolio L.P. v. Cortigene*,[111] the only reported case where a non-listed entity moved to qualify under section 1091a, the court denied the motion on other grounds and thus did not address the question of whether the statute applies to non-listed entities.[112] Of course, the fact that no appellate court has ever applied section 1091a to an extended purchaser must not be overemphasized—the proper case may simply not have arisen in a reporting court.[113]

IV. ARGUMENTS FOR APPLYING SECTION 1091A TO NON-LISTED ENTITIES

Thus, the text of the statute itself appears to restrict the statute to the listed entities. However, no reported precedent gives a solid answer to the question of a non-listed entity's claim for application of section 1091a, and the language from the courts is generally broad. Thus, non-listed entities—like Dunstone[114]—can and do argue that they should fall within section 1091a's umbrella. This Part therefore turns to extra-textual arguments for application of section 1091a to non-listed entities.

A. An (Unpersuasive) Argument for Universal Exemption

In the case of Ms. Baker, Dunstone propounded an argument by which section 1091a would apply to any holder of a defaulted student loan. It supported this argument for universal exemption by an analogy to interest rates. This section examines that argument and concludes that it is ultimately unavailing and should be rejected.

1. The argument's broad scope

Dunstone apparently recognized that it did not fall under the literal language of section 1091a. Nonetheless, it contended that it still could take advantage of that provision in advancing its claim. In its Disclosure Statement, Dunstone claimed that "the lack of limitations and laches defense outlined in 20 U.S.C. 1091a—and inherent in [Ms. Baker's]

United States v. King, Civ. No. 2001-31, 2002 U.S. Dist. LEXIS 18017 (D.V.I. Sept. 19, 2002).

111. No. 14-95-00037-CV, 1996 WL 65385 (Tex. App. Feb. 15, 1996).

112. *Id.* at *1–*2. However, even the Cortigene court recognized that Section 1091a has a limited scope: "[Section] 1091a exempts certain institutions and agencies from state statutes of limitations when seeking a judgment against a borrower of a defaulted student loan." *Id.* at *1 n.1.

113. *See supra* Part I.C.

114. *See supra* Part II.B.

student loans as they were issued, serviced and guaranteed by agencies with agreements with the federal government as outlined in the statute—followed those loans into the secondary market."[115]

This claim, if accepted, would be extremely far-reaching. In fact, it would apply to *any* holder of a student loan. Dunstone considered section 1091a applicable when a loan is "issued, serviced [or] guaranteed by agencies with agreements with the federal government."[116] However, *all* federally guaranteed student loans are either "issued," "serviced," or "guaranteed" by the federal government or its agencies—otherwise, they are not part of the federal student loan program. Thus, Dunstone's claim is that because of section 1091a, student loans are inherently exempt from statutes of limitations and that this exemption follows the loans and extends universally to all holders of the loans.

2. The analogy to interest rates

The sole substantive basis for Dunstone's claim is an analogy to interest rates; Dunstone admitted that it "has not been able to locate a published decision squarely holding that 20 U.S.C. § 1091a benefits [Dunstone]."[117] Dunstone asserted that

> case law related to the transfer of original interest rates exported by a nationally chartered bank, and their effect on usury law when a debt is sold in the secondary market, indicates that the original traits of the student loan at issue – including the lack of limitations and laches defenses – followed the loan into the secondary market and thereby [Dunstone] takes the benefit of 20 U.S.C. § 1091a.[118]

Dunstone cited three cases in support of its argument. The first, *Nichols v. Fearson*,[119] is an 1833 United States Supreme Court case that arose when the endorser of a promissory note sold the note at a discount,

115. Plaintiff's Disclosure Statement at 6 (on file with author).

116. *Id.* Dunstone used an "and" instead of an "or." However, Ms. Baker's loans were "issued" and "serviced" by Merabank, a private bank. She only fit under the third prong—her loan was guaranteed by an "agency" that had an agreement with the federal government: USA Funds, Arizona's guaranty agency. *See* Education Resource Organizations Directory, *State Guaranty Agency*, http://wdcrobcolp01.ed.gov/programs/erod/org_list. cfm?category_cd=SGA (last visited Oct. 25, 2005). Thus, for Ms. Baker, Dunstone's claim was that because a guaranty agency guaranteed the loan, the loan was automatically completely immune from statutes of limitations under section 1091a.

117. Plaintiff's Disclosure Statement, *supra* note 115, at 4.

118. *Id.*

119. 32 U.S. 103 (1833).

without being discharged from its endorsement.[120] When the purchaser later sued to recover from the endorser, the endorser argued that repayment would allow the note's purchaser to recover an "interest rate" greater than that allowable by local usury laws.[121] The Supreme Court rejected this argument, holding that there was no usury, in part because it is a cardinal rule "that a contract, which, in its inception, is unfaffected [sic] by usury, can never be invalidated by any subsequent usurious transaction."[122]

Dunstone then cited two federal circuit court cases, *FDIC v. Lattimore Land Corporation*[123] and *Krispin v. May Department Stores Company*.[124] In *Lattimore*, a Fifth Circuit case, a real estate corporation had taken out a high-priced loan from the Hamilton Mortgage Corporation, located in Georgia.[125] When the mortgage corporation later began to struggle financially, it assigned a partial interest in the note to the also-struggling Hamilton National Bank of Tennessee, which charged the real estate corporation interest ranging from 10½% to 11½%.[126] When the real estate corporation defaulted on the loan and was sued for repayment, it argued that the Hamilton National Bank had violated the National Bank Act, which mandated that the bank charge no more than Tennessee's 10% maximum rate.[127] The Fifth Circuit rejected the real estate corporation's defense, concluding that

> [u]nder these circumstances, the Tennessee interest limit of 10% does not apply because a transfer of a pre-existing debt to a national bank does not cause the National Bank Act to mandate the application of the usury law of the state where the national bank is located. . . . Applying normal choice of law rules to the present case, we think the Georgia usury laws should guide this Court and the note, initially non-usurious, remains so."[128]

Dunstone's interpretation of this case was that "the *Lattimore* court effectively held that the usury law originally applicable to the debt when it was originated followed the debt when it was assigned to another

120. *Id.*
121. *Id.* at 103–04.
122. *Id.* at 109.
123. 656 F.2d 139 (5th Cir. 1981).
124. 218 F.3d 919 (8th Cir. 2000).
125. *Lattimore*, 656 F.2d at 140.
126. *Id.* at 140, 146. The bank and mortgage corporation eventually were declared insolvent and the FDIC acquired a complete interest in the note. *Id.* at 140.
127. *Id.* at 146.
128. *Id.* at 147–49 (footnote omitted).

state."[129]

In *Krispin*, the other case cited by Dunstone, May Department Stores had issued credit cards to customers, to be governed by Missouri usury law; that law prohibited delinquency fees of more than $10.[130] However, the store retained the right to unilaterally alter the agreement. In 1996, May exercised that right and notified the customers that "effective immediately, credit is being extended by the May National Bank of Arizona"—a wholly-owned but independent subsidiary of the department store.[131] The department store purchased the banks' receivables on a daily basis,[132] which, according to Dunstone, meant that "the accounts were effectively sold on the secondary market as soon as they were funded."[133] Because of the daily assignments, the actual collection of any late fees was done by the store.[134] The *Krispin* lawsuit arose after late payment fees were raised to $15 and the credit card holders filed a class action lawsuit, challenging the late fees as usurious under Missouri law.[135] The court determined, however, that Missouri law did not apply. Even though the original contract was to be governed by Missouri law, the court determined that there was nothing restricting assignment of the credit agreements to the Arizona bank.[136] Further, because "it is now the bank, and not the store, that issues credit . . . and sets such terms as interest and late fees[,] . . . it makes sense to look to the originating entity (the bank), and not the ongoing assignee (the store), in determining [what law] applies."[137] Dunstone's summary of *Krispin* was that "[t]he 8th Circuit, like the 5th Circuit, sees the original interest rate as following a debt when it is sold or assigned."[138]

Dunstone then analogized these cases to section 1091a. It argued that, like interest rates and usury laws, Section 1091a's exemption from limitations should also "follow" loans and exempt subsequent purchasers from statutes of limitations. Dunstone argued that "the original traits of the student loan at issue—including the lack of limitations and laches defenses—followed the loan into the secondary market."[139]

129. Plaintiff's Disclosure Statement, *supra* note 115, at 5.
130. Krispin v. May Dept. Stores Co., 218 F.3d 919, 921 (8th Cir. 2000).
131. *Id.*
132. *Id.* at 923.
133. Plaintiff's Disclosure Statement, *supra* note 115, at 5.
134. *Krispin*, 218 F.3d at 921.
135. *Id.* at 922.
136. *Id.* at 923–24.
137. *Id.* at 924. Ultimately, the Eighth Circuit allowed the plaintiffs to amend their complaint to allege a violation of Arizona's usury laws and remanded for a determination of that claim. *See id*. at 924 n.3.
138. Plaintiff's Disclosure Statement, *supra* note 115, at 6.
139. *Id.* at 4.

3. Problems with the analogy

Dunstone's complex interest rate analogy, although likely to overwhelm unsophisticated debtors, is unconvincing for two reasons. First, Dunstone misunderstood the bases of the decisions in *Lattimore* and *Krispin*. Second, even if the cases stood for the principles that Dunstone claimed they did, Dunstone's analogy is inapplicable in the context of section 1091a because whereas whether a loan is usurious or not is a characteristic of the *loan* itself, section 1091a provides an exemption based on a characteristic of the *holder* of the loan.

a. Misunderstanding the cases. The first problem with the interest rate analogy is that it misunderstands the principles that controlled *Lattimore* and *Krispin*. Dunstone argued that the courts found the interest rates to be non-usurious because the usury laws and interest rates "followed" the loans as they passed from one party to another. The more credible explanation, as described below, is that the court in *Lattimore* was merely following standard choice of law principles and that the decision in *Krispin* was based on complete preemption by the National Banking Act.

(1) The Restatement rule and Lattimore. The decision in *Lattimore* was based, not on Dunstone's "usury law following a debt" rule, but on standard conflict of laws principles. The prevailing conflict of laws rule can be found in section 203 of the Restatement (Second) on Conflict of Laws,[140] which uses this formulation:

> The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under [the most significant relationship test].[141]

Thus, if a contract has a substantial relationship with a state in which the contractual interest rate is considered non-usurious, the contract will be

140. All references herein to the Restatement refer to the Restatement (Second).

141. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971). Under this section, the state need not have the most significant relationship for its more lenient usury laws to control; it merely needs a substantial relationship. In fact, the "greatly in excess" qualification indicates that the section typically applies when the state does not have the most significant relationship to the contract.

upheld—as long as it is not "greatly in excess" of the rate permitted by the state with the most significant relationship to the contract.

Although the Restatement rule does not specifically address the situation of assignment to another state as took place in *Lattimore*, it clearly applies to sustain interest rates in that context. The Restatement rule validates an interest rate under a particular state's law based on the relationship that the contract has with that state, which is in turn based on contacts with that state. An assignment to a party in another state could alter the contract's relationship with the first state by altering the contacts with that state, but such alteration would be limited; it could not change where the borrower is located, where the contract was signed and negotiated, where the original lender was located, or where the loan was made—all of which are relevant contacts for purposes of the rule.[142] The only relevant contact that transfer to another state could significantly affect is the location where the money is to be paid, and it will not even necessarily do that. Moreover, the Restatement comment indicates that the location where the money is to be paid is a contact that is "likely to be suspect" because it can "readily be manipulated."[143] Thus, that contact is almost never determinative. Therefore, because assignment alone will—practically speaking—never sufficiently alter the relationship of a state to a contract to make application of that state's usury law improper, assignment alone can never make a non-usurious loan into a usurious one. This Restatement rule is not based on any notion of usury laws "following" debts, but is instead based on principles of comity, protection of justified expectations, and promotion of state policies.[144]

The Restatement rule supports the court's decision in *Lattimore*. The original parties to the contract were both domiciled in Georgia, the contract was signed in Georgia, and the contract was to be performed in Georgia. In fact, "[t]he sole Tennessee connection of this transaction is the fact that Hamilton Mortgage and Hamilton National Bank were apparently Tennessee corporations."[145] The comments to section 203 of

142. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) (listing as relevant contacts "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.").

143. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 cmt. c (1971).

144. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (listing the relevant factors for choice of law as "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied").

145. Federal Deposit Ins. Corp. v. Lattimore Land Corp., 656 F.2d 139, 148 n.16. (5th Cir. 1981).

the Restatement indicate that:

> The state where the borrower is domiciled . . . will almost surely be a state of substantial relationship. And so too will be the state of performance, which is the state where the loan is to be repaid, provided that the state bears a normal and natural relationship to the contract. The same will be true of the state where the loan was made, if, at least, some other contact related to the contract is located there.[146]

Thus, Georgia would have a sufficiently "substantial relationship"—the Restatement's term—for its more generous usury law to apply.[147] And, even if Tennessee was presumed to be the state with the "most significant relationship," because the interest rate at issue in *Lattimore* was not "greatly in excess" of that allowed in Tennessee—the difference being less than two percent[148]—the contract would still not be considered usurious.

The *Lattimore* opinion itself shows that the decision was based on conflict of law principles and not Dunstone's amorphous "following" principle. In a lengthy footnote,[149] the court listed multiple reasons for the application of Georgia law, reasons that closely paralleled the Restatement factors:

> The contract was executed and to be performed in Georgia, with payment to be made to Hamilton Mortgage in Savannah. The land which was the subject of the security deed was in Georgia. The obligors were also Georgians. The sole Tennessee connection of this transaction is the fact that Hamilton Mortgage and Hamilton National Bank were apparently Tennessee corporations.[150]

Further, the court relied on a Georgia choice of law statute requiring that "[e]very contract shall bear interest according to the law of the place of

146. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 cmt. c (1971).

147. In fact, the contacts with Georgia were such that it likely was the state with the most significant relationship to the contract, making the last phrase of section 203 inapplicable. The court apparently thought so. *See Lattimore*, 656 F.2d at 148 n.16 ("In fact, Georgia is the only state with any interest in the case because all the parties (aside from the FDIC) are Georgia residents [some of whom] ironically strain to argue for the application of Tennessee law.").

148. *Id.* at 146. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 cmt. b (1971) ("Upholding a contract against the charge of usury by the application of the local law of one state, which has a substantial relationship to the transaction and the parties, can hardly affect adversely the interests of another state when the stipulated interest is *only a few percentage points higher* than would be permitted by the local law of the other state.") (emphasis added).

149. *See Lattimore*, 656 F.2d at 148 n.16.

150. *Id.*

the contract, unless upon its face it shall be apparent that the intention of the parties referred the execution of the contract to another forum."[151] As the court concluded, "by any reasonable interpretation of Georgia conflicts law, the Georgia courts would consider the present note to have been intended to be a Georgia note, to be measured under Georgia usury laws."[152] Assignment to an out-of-state party would not change the place of contract, and thus would not change the applicable usury law. Thus, Dunstone incorrectly interpreted *Lattimore*.

(2) Preemption in Krispin. Similarly, the decision in *Krispin* was not based on Dunstone's "following" principle, but on preemption by the National Banking Act. The relevant issue in that case was whether the credit card holders could state a claim against the Missouri store—as assignee of the Arizona bank—under Missouri's usury law. The court held that, because the National Bank Act "completely preempt[s] state law claims of usury brought against a national bank," the question was "whether appellants' suit against the store actually amounted, at least in part, to a state law usury claim against the bank."[153] If so, then the claim would be completely preempted by the National Bank Act, under which Arizona's, not Missouri's, usury law would apply.[154]

The court ultimately concluded that the credit card holders could not avoid application of the National Bank Act by suing the assignee of the bank rather than the bank itself. Although the store and the bank were affiliated, the court noted that the two entities were "required to maintain arms'-length transactions" and that the two entities had "entered into an agreement completely transferring authority over all customer credit accounts."[155] The daily assignment of the accounts to the store did not affect the ability of the bank to rely on the National Bank Act in setting

151. *Id.* (quoting Ga. Code. Ann. § 57–106 (1977).

152. *Id.*

153. Krispin v. May Dept. Stores Co., 218 F.3d 919, 922-23 (8th Cir. 2000).

154. The Act allows "any national banking association to charge interest at the rate allowed by the laws of the state in which the bank is located." *Id.* at 922. Under the Restatement conflict of laws rule, found in section 203, Arizona would not necessarily have had a "substantial relationship" with the contract, because its only connection was the location of the lender. The Restatement comments list the "domicil and principal place of business of the lender" as significant, although not determinative, contacts. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 cmt. c. *Cf.* Huchingson v. Republic Fin. Co., 370 S.W.2d 185 (Ark. 1963) (finding that a state did not have a substantial connection to a contract even though that state was the place of payment and the location of the lender's principal place of business). However, under the Full Faith & Credit Clause, Congress has the power to override normal conflict of laws principles and to provide for standard choice of law rules. U.S. CONST. art. IV, § 1. It did so in enacting the National Bank Act; therefore, the Act's usury provision controls, even though standard conflict of laws rules might come to a different conclusion.

155. *Krispin*, 218 F.3d at 923.

its late fees. This is not because, as Dunstone argued, the original interest rate or the Arizona usury law "follow[s] a debt when it is sold or assigned";[156] rather, it is because the National Bank Act *preempts* state usury laws. If the credit card holders in *Krispin* were allowed to impede the store's collection efforts by suing under state usury laws, that would interfere with the ongoing credit card agreements still in force with the bank. In essence, it would prevent the bank from charging the fees which Congress explicitly allowed it to charge under the National Bank Act. It was these considerations, not Dunstone's "following" principle, that drove the decision in *Krispin*.

b. "Inherent" characteristics. Even if *Lattimore* and *Krispin* did stand for the proposition that interest rates and usury laws "follow" loans, that proposition cannot be carried over into the context of section 1091a. Dunstone's analogy conflates a situation where a loan has a certain characteristic with one where the holder of a loan has a relevant characteristic.

In a sense, Dunstone is correct that an interest rate "follows" a loan. The interest rate states a relationship between the amount that the borrower borrows and the amount that he or she must eventually repay. Regardless of any subsequent resale or assignment of a loan, the interest rate remains the same as to the borrower. The interest rate can thus be said to "follow" a loan—the interest paid by the borrower is not affected by subsequent transactions. Given the Restatement rule described above, it is also in a sense true that a loan's non-usurious character "follows" the loan when it is assigned—assignment does not change the loan's relationship to a state so as to make that state's usury law inapplicable.[157]

However, that principle cannot properly be applied to section 1091a. Whereas a loan's interest rate or non-usurious character is an attribute of *the loan*, the section 1091a exemption from limitations is not. In other words, the section 1091a exemption is not granted because of some characteristic of the loan; rather, it is granted to the entities listed in the statute because of *who they are*: the federal government and entities administering the federal lending program. The legislative history supports this interpretation; Congress was trying to allow the listed entities additional leeway in collecting long-defaulted loans.[158] Thus, the

156. Plaintiff's Disclosure Statement, *supra* note 115, at 6.

157. When the interest incident to a loan falls within the legal limit when made, the applicable law can be seen as "making" the loan non-usurious. This attribute of not being usurious controls even when the loan is sold or assigned, even if discounted such that the extended purchaser's return would be usurious if it was the interest rate of the initial loan. Thus, the loan's non-usurious character can be seen as "following" the loan.

158. *See supra* Part III.B.1.

analogy to interest rates must fail, and with it falls the argument that all loan holders are exempt from statutes of limitations under section 1091a.

B. An Argument for Application of Section 1091a to Some Extended Purchasers

Although section 1091a should not apply universally to all non-listed entities, one limited class of non-listed entities should fall under the statute's umbrella: extended purchasers who take assignment of defaulted student loans from one of the entities listed in section 1091a. First, this section discusses (1) the law of assignment, particularly in regard to defaulted student loans, and (2) the rights generally available to assignees. It then argues, based on analogies to two separate lines of precedent, that section 1091a's statutory exemption from statutes of limitations should—as a matter of federal common law—follow a student loan when it is assigned.[159]

1. Assignment and "personal" rights

An "assignment" is "a transfer of property or some other right from one person (the 'assignor') to another (the 'assignee'), which confers a complete and present right in the subject matter to the assignee."[160] The "general rule" in case of assignment is that

> the assignment of a claim or a chose in action without any indication of an intention by the parties to restrict its operation vests the assignee with all the rights and remedies possessed by or available to the assignor, except those that are personal to the assignor and for his or her benefit only. In other words, if a contrary intention is not shown, an assignment ordinarily passes whatever is necessary to make it completely effectual.[161]

Therefore, if the original possessor of a claim had certain rights, any

159. Of course, because Ms. Baker's loan, *see supra* Part II.B, had not come to Dunstone by way of assignment from one of the entities listed in section 1091a, Dunstone could not have taken advantage of this argument.

160. 6 AM. JUR. 2D *Assignments* § 1 (2003) (footnote omitted). "An assignment is [a] voluntary act, unlike a court order directing an involuntary transfer of property, interests or rights. . . . An assignment is a formal transfer of property or property rights from one to another . . . ." 6 AM. JUR. 2D *Assignments* § 2 (2003) (footnote omitted).

161. 6 AM. JUR. 2D *Assignments* § 172 (2003) (footnotes omitted). *See also* 6A C.J.S. *Assignments* § 92 (2003) ("Unless a contrary intention is manifest or inferable, an assignment ordinarily carries with it all rights, remedies, and benefits which are incidental to the thing assigned, except those which are personal to the assignor and for his or her benefit only.").

assignee of that claim generally receives those same rights—thus serving the policy of passing along whatever is needed to make the assignment "completely effectual."

However, there is an important qualification—an assignee does not acquire rights "that are personal to the assignor and for his or her benefit only."[162] According to one court's widely cited definition, "rights 'personal' to the assignor are those which, although relating to the property assigned, constitute accrued causes of action that may be asserted independently of ownership of the property."[163] Some rights that have been held to be personal are: the right to recover for overpayment on a subsequently assigned contract,[164] the right to sue in federal court,[165] personal covenants,[166] the right to rescission of a securities transaction,[167] the right to sue for trespass,[168] and the right to sue for fraud.[169] These kinds of rights do not pass with assignment and are thus unavailable to assignees.

2. *Applying the "general rule" to student loans*

It is a close question whether the section 1091a exemption continues with assignment of a student loan. If the assignor was an entity listed in section 1091a, then it was exempt from statutes of limitations in collecting on the loan. Under the general rule of assignment, then, an assignee of the student loan presumptively could also avail itself of the section 1091a exemption—the right to collect free from limitations would pass along with assignment of the loan.[170] However, the presumption does not apply if that exemption is "personal to the

162. 6 AM. JUR. 2D *Assignments* § 172.

163. Jackson v. Thweatt, 883 S.W.2d 171, 176 (Tex. 1994).

164. Riverside Health Sys., Inc. v. Unruh, No. 90,370, 2003 WL 22479600, at *4 (Kan. Ct. App. Oct. 31, 2003).

165. Nat'l Enters., Inc. v. Smith, 114 F.3d 561 (6th Cir. 1997); LLP Mortgage Ltd. v. Vasicek, 227 F. Supp. 2d 1108, 1111 (D.N.D. 2002).

166. 718 Assocs., Ltd. v. Sunwest N.O.P., Inc., 1 S.W.3d 355 (Tex. App. 1999).

167. Soderberg v. Gens, 652 F. Supp. 560, 566 (N.D. Ill. 1987).

168. Breidecker v. Gen. Chem. Co., 47 F.2d 52 (7th Cir. 1931).

169. Heian v. Fischer, 63 P.2d 518 (Wash. 1937); Huston v. Ohio & Colo. Smelting & Ref. Co., 165 P. 251 (Colo. 1917).

170. This would also fit with the general rule's underlying policy, since exemption from limitations is necessary for the assignment to be "completely effectual" if assignment occurs after an enforceable statute of limitations has passed. Passing along the exemption would also allow the government more flexibility in its approach to student loan collection—the market of potential purchasers of long-defaulted loans would be much larger. It would also allow more and a greater variety of private resources, rather than just limited government resources, to be devoted to collection of defaulted loans.

assignor."[171] The critical question, then, is whether the section 1091a exemption is, for purposes of assignment, personal to the entities listed in section 1091a. If so, then that exemption is simply unavailable to assignees; if not, then assignees should be exempt to the same extent as assignors.

Based on the definition of personal rights given above, one can make a strong argument that the section 1091a exemption is *not* a personal right.[172] That is, the exemption from statutes of limitations is not a "cause[] of action that may be asserted independently of ownership of the property."[173] Although no court has addressed this precise question in relation to section 1091a, two lines of cases have confronted an analogous question in the context of other federal statutes. As explained below, although there is some conflict in the holdings, the better reasoned cases have concluded—as a matter of federal common law—that extended federal limitations periods are not personal to assignors and thus are available to assignees. By analogy we can conclude that section 1091a's exemption is also not personal to the entities listed in the statute and should pass to assignees of student loans when assignment is from an entity listed in the statute.

a. Small Business Administration cases. First, a series of cases addressing assignment from the United States Small Business Administration ("SBA")[174] can be analogized to section 1091a because of the similarity between the federal student loan program and the federal small business loan program. As with the FFEL student loan program, small business loans are made by private lenders but guaranteed by the SBA. Should the borrower default, the SBA will repay the lender and take assignment of the loan—just like a guaranty agency will do in the case of defaulted student loans. Also, as with student loans, the time in which the SBA can collect on small business loan is governed by federal law;[175] the SBA is not subject to state statutes of limitations.[176] As explained below, although courts have disagreed as to whether assignees of SBA loans can take advantage of the federal limitations period, the better reasoning is that they can. By analogy, then, assignees of the entities listed in section 1091a should be able to take advantage of that

171. 6 AM. JUR. 2D *Assignments* § 172.

172. *See* text accompanying footnote 163.

173. Jackson v. Thweatt, 883 S.W.2d 171, 176 (Tex. 1994).

174. *See* 15 U.S.C. §§ 631–657g (2002).

175. Recall that even before section 1091a was amended to eliminate statutes of limitations it provided a federal limitations period that preempted any state limitations period. *See supra* notes 39–40.

176. *See, e.g.*, United States v. Johnson, 946 F. Supp. 915, 918–21 (D. Utah 1996).

statute's exemption from limitations.

(1) Applying the federal SBA limitations period to assignees. In the case of *UMLIC VP LLC v. Matthias*,[177] a corporation borrowed money under the federal small business loan program so that it could set up a bakery and store in the Virgin Islands.[178] The corporation signed a mortgage in connection with the loan, and when it defaulted, the SBA repaid the private lender, then took assignment of the mortgage and resold it on the extended market.[179] After a series of assignments, the mortgage ended up in the hands of UMLIC, which filed suit against the borrower corporation. The corporation argued that the Virgin Islands statute of limitations barred collection of the loan; UMLIC, however, argued that as an assignee of the SBA it should be able to take advantage of the federal statute of limitations that would have been available to the SBA.[180]

The Third Circuit agreed with UMLIC that "an assignee stands in the shoes of the assignor—here the United States—and thus . . . the federal limitations periods apply to it as they would if the United States itself brought a foreclosure action."[181] The court gave three supporting reasons for its conclusion. First, "an assignee stood in the shoes of the assignor at common law."[182] Second, the court quoted the Restatement rule that where "A lends money to B and assigns his right to C[,] C's right is barred by the Statute of Limitations when A's right would have been."[183] The *Matthias* court could "see no reason that the inverse should not hold as well."[184] Third, the court looked to public policy, determining that "affording assignees of the United States the same rights as the United States is desirable because it improves the marketability of instruments held by the United States, thereby giving the United States greater flexibility in monetizing its claims."[185]

177. 364 F.3d 125 (3d Cir. 2004).

178. *Id.* at 128.

179. *Id.*

180. *Id.* at 131.

181. *Matthias*, 364 F.3d at 131.

182. *Id.* at 133. The court did not address the "personal to the assignor" limitation. It is unclear whether that is because it found that exception to be inapplicable or because it was never raised or litigated.

183. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 336 cmt. b, ex. 3).

184. *Id.*

185. *Id.* The court eventually concluded that because no federal limitations statute applied to this situation, "we are left with the result that there is no federally provided statute of limitations for [this situation]." *Id.* at 134. In United States v. Thornburg, 82 F.3d 886 (9th Cir. 1996), another SBA case, the court reached a similar holding—"an assignee of the federal government may invoke the [federal] six-year statute of limitations in enforcing its right to collect on the debt." *Id.* at 890. However, because the assignment in that case was solely for the purposes of collection, not a

(2) A contrary case. However, decisions in this area have not been unanimous. In *Long, Long & Kellerman, P.C., v. Wheeler*,[186] the Virginia Supreme Court decided a case where a couple had defaulted on their SBA-guaranteed loan. The couple had signed a deed of trust that was eventually assigned to Long, Long & Kellerman, P.C., as trustee.[187] When the trustee sued on the loan—twenty-one years after the date of the deed of trust—the couple defended on the basis of Virginia's twenty-year statute of limitations.[188] The trustee claimed that, as assignee of the SBA, it was not subject to the state statute of limitations. Although the court agreed that the SBA itself would not have been bound by the state limitations period, it rejected the claim that the trustee "stands in the shoes of the federal assignor and is not barred from foreclosing by virtue of any Virginia statute of limitations."[189] Rather, the court held that "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."[190] In effect, it found that the SBA exemption from state statutes of limitations is a private right of the government.

However, three of the seven justices in *Wheeler* dissented.[191] They concluded that "[t]he right to enforce [a] contract or instrument is one of the "'rights, remedies and benefits which are incidental to the thing assigned' . . . and not merely a right 'personal to the assignor and for [its] benefit only.'"[192] The dissent disagreed with the majority's "perpetual immunity" public policy analysis, since "this involves a public policy matter that is solely within the province of Congress, and it has seen fit to enact [the federal limitations statute] without any restriction upon those who may benefit from the absence of a limitation period."[193] The dissent thus considered the federal exemption to *not* be personal.

(3) Analysis. The rationale of the *Matthias* court and the *Wheeler* dissent can easily be carried over into the context of section 1091a.

complete assignment, *id.* at 891, it is much weaker as an analogy for the principle argued for here.

186. 570 S.E.2d 822 (Va. 2002).

187. *Id.* at 823.

188. *Id.*

189. *Id.* at 824–25.

190. *Id.* at 826.

191. *Id. See* VA. CONST. art. 6 § 2 ("The Supreme Court shall consist of seven justices.").

192. *Wheeler*, 570 S.E.2d at 826 (quoting Union Recovery Ltd. P'ship v. Horton, 477 S.E.2d 521, 524 (Va. 1996) (quoting Wamco, III, Ltd. v. First Piedmont Mortgage Corp., 856 F. Supp. 1076, 1086 (E.D. Va. 1994))).

193. *Id.* at 827.

Those judges considered the federal statute of limitations for SBA loans to not be "personal" to the government; by analogy, section 1091a's federal *exemption* from limitations periods should also not be considered personal. Moreover, this interpretation of section 1091a would further the important policy mentioned by the *Matthias* court: the government would have greater "flexibility in monetizing its claims" because of the improved "marketability" of student loans that are not subject to statutes of limitations.[194]

Of course, the holding of the majority in the *Wheeler* case would pull the other direction; by analogy to that holding, the exemption in section 1091a would be personal to the listed entities. Allowing the exemption to pass with an assigned student loan would "permit[] a private assignee to enjoy perpetual immunity from a statute of limitations for a purely private benefit,"[195] a result the *Wheeler* majority found distasteful.

As between these two analyses, the first—found in the *Wheeler* dissent and the *Matthias* holding—is more persuasive. Both cases recognized that the matter cannot be resolved by looking to the terms of the SBA statute. Thus, each court turned to policy reasons and precedent to support its view. The policy reasons advanced by the federal *Matthias* court, more expert in its interpretation of federal law, persuasively contradict the bare majority in *Wheeler*. Unless assignment carries with it the federal statute of limitations, then the federal government will be unable to "monetize" its claims other than through direct collection. In addition, the common law rule of assignment should apply to SBA loans, as both the *Wheeler* dissent and the *Matthias* court recognized, since the federal statutes do not restrict that rule.

The *Wheeler* majority apparently relied on a conclusion that since Congress had not specified a federal statute of limitations *time period*, the state statute of limitations stepped in to fill that void. However, this fails to give appropriate weight to Congress' preemption in the area of the SBA or to the common law rule of assignment. It is true that Congress did not specify a limitations period, in years, in which SBA suits need to be brought. However, (as even the *Wheeler* majority recognized), the limitations period under the SBA is a question of federal law, which should preempt state statutes of limitations. Since the deed of trust itself expressly stated that it "is to be construed and enforced in accordance with applicable Federal law,"[196] the federal rule of limitations—in that case, that state limitations do not apply—should have passed along with assignment of the loan. As for the *Wheeler* majority's

194. *Matthias*, 364 F.3d at 133.

195. *Wheeler*, 570 S.E.2d at 826.

196. *Id.* at 538 (Carrico, C.J., dissenting).

policy analysis, it is understandable that the court found it repugnant for a "private assignee to enjoy perpetual immunity from a statute of limitations for purely private benefit."[197] However, the court overlooked that this arrangement also benefits the federal government by giving it greater "flexibility in monetizing its claims."[198] The federal policy should outweigh the court's distaste for private exemption from limitations.

Thus, the *Wheeler* decision was mistaken in its analysis; the better holding is that the SBA's limitations exemption should pass with assignment of SBA loans. The SBA therefore provides a fitting analogy for extension of section 1091a's exemption to non-listed entities.

b. FIRREA cases. A second line of cases provides perhaps an even stronger argument by analogy for applying the section 1091a exemption to assignees of the listed entities. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")[199] was enacted in response to the "declining financial condition of the nation's banks and savings and loan institutions."[200] Among other things, the FIRREA created the Federal Deposit Insurance Corporation ("FDIC") and the Resolution Trust Corporation ("RTC"), which can act as receivers or conservators for failing financial institutions.[201] Part of the FIRREA provides that

> [n]otwithstanding 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.[202]

Although "the Corporation" refers literally to the FDIC, the RTC is granted identical powers by statute.[203] This provision is analogous to section 1091a: under the FIRREA, when a listed entity (the RTC or FDIC) takes over a financial institution as a conservator or receiver, "[n]otwithstanding" other limitations, it has at least six years to bring a

197. *Id.* at 826.
198. *Matthias*, 364 F.3d at 133.
199. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 & 15 U.S.C.).
200. RTC v. Love, 36 F.3d 972, 975 (10th Cir. 1994). *See also* Henderson v. Bank of New England, 986 F.2d 319, 320 (9th Cir. 1993).
201. *See supra* note 31.
202. 12 U.S.C. § 1821(d)(14)(A) (1994).
203. *See id.* § 1441a(b)(4)(A) (1994).

cause of action. Similarly, under 1091a, when a listed entity (guaranty agency, etc.) holds a loan that is in default, "[n]otwithstanding" any other limitation, it has an indefinite period to bring a cause of action. As explained below, numerous cases have applied the FIRREA's limitations period to assignees of the FDIC or RTC. These cases can properly be analogized to section 1091a, indicating that its exemption from limitations should also apply to assignees of the listed entities.

(1) Applying the FIRREA to assignees. Numerous courts have interpreted the FIRREA limitations period to extend to assignees of the FDIC or RTC; this sub-section summarizes only a few. One of the most complete expositions of the issue can be found in *FDIC v. Bledsoe*,[204] a Fifth Circuit case. When faced with the question of whether an assignee of the FDIC can use the extended limitations period available to the FDIC, the *Bledsoe* court properly noted that the language of the FIRREA is silent regarding the issue.[205] However, "[i]t is an axiomatic principle of statutory construction that in effectuating Congress' intent courts are to fill the inevitable statutory gaps by reference to the principles of the common law."[206] Relying on the common-law doctrine that "[a]n assignee stands in the shoes of his assignor," the court concluded that an assignee of the FDIC was also covered by the federal statute of limitations that would have applied to the FDIC.[207] Furthermore, as a policy matter,

> to hold that assignees are relegated to the state statute of limitations would serve only to shrink the private market for the assets of failed banks. It would require the FDIC to hold onto and prosecute all notes for which the state statute of limitations has expired because such obligations would be worthless to anyone else.[208]

Similarly, the Texas Supreme Court in *Jackson v. Thweatt*[209] addressed the rights of FDIC assignees. The *Jackson* court noted that the express statutory language refers only to the FDIC, but relied on the same common law "stands in the shoes" maxim as had the *Bledsoe* court to apply the longer limitations period to the FDIC's assignee.[210] The

204. 989 F.2d 805 (5th Cir. 1993).
205. *Id.* at 810.
206. *Id.*
207. *Id.*
208. *Id.* at 811.
209. 883 S.W.2d 171 (Tex. 1994).
210. *Id.* at 174.

court expressed a policy similar to that relied on by the *Bledsoe* court: "[i]f the FDIC's statute of limitations did not enure to the benefit of its transferees, the market value of notes and other assets in the hands of the FDIC would be diminished,"[211] because it would "shrink the private market for the assets of failed banks."[212] Ultimately, "while the statute alone might not vest any rights in transferees, the statute combined with the common law of assignment does."[213] Moreover, the *Jackson* court specifically addressed and rejected the argument that the FIRREA statute of limitations was "personal" to the FDIC.[214] It stated that "rights 'personal' to the assignor are those which, although relating to the property assigned, constitute accrued causes of action that may be asserted independently of ownership of the property."[215] Because the extended FIRREA statute of limitations "confers no benefit independent of the asset to which it relates," the court found it to not be personal.[216]

Other courts have followed this same reasoning,[217] including the First,[218] Ninth,[219] and Tenth Circuits.[220] In addition, several commentators have advocated applying the FIRREA statute of limitations to assignees.[221] In each case, the FIRREA limitations period has been determined to not be a right "personal to the assignor."

(2) The Fourth Circuit split. However, the cases have not been unanimous—in fact, due to a divergent view in the Fourth Circuit, the

211. *Id.*

212. *Jackson*, 883 S.W.2d at 174 (quoting Fall v. Keasler, No. C 90 20643 SW (ARB), 1991 WL 340182, at *4 (N.D. Cal. Dec. 18, 1991)).

213. *Id.*at 175.

214. *Id.* at 176.

215. *Id.*

216. *Id.*

217. Bruin Holdings, Inc. v. Moderski, 960 F. Supp. 62 (M.D. Pa. 1996); Fall, No. C 90 20643 SW (ARB), 1991 WL 340182; Mountain States Fin. Res. Corp. v. Agrawal, 777 F. Supp. 1550 (W.D. Okla. 1991); Union Recovery Ltd. P'ship v. Horton, 477 S.E.2d 521 (Va. 1996); Tivoli Ventures, Inc. v. Bumann, 870 P.2d 1244 (Colo. 1994); Cadle Co. II v. Lewis, 864 P.2d 718 (Kan. 1993); Cent. States Res. Corp. v. First Nat'l Bank, 501 N.W.2d 271 (Neb. 1993); Nat'l Loan Investors Ltd. P'ship v. Heritage Square Assocs., 733 A.2d 876 (Conn. App. Ct. 1999).

218. Beckley Capital Ltd. P'ship v. DiGeronimo, 184 F.3d 52 (1st Cir. 1999) (accepting the "policy rationale for allowing the assignee the benefit of the FIRREA statute of limitations," but refusing to extend that benefit where the policy was inapplicable).

219. United States v. Thornburg, 82 F.3d 886 (9th Cir. 1996). The Ninth Circuit, however, addressed a slightly different situation. *See supra* note 186.

220. UMLIC-Nine Corp. v. Lipan Springs Dev. Corp., 168 F.3d 1173, 1177 n.3 (10th Cir. 1999).

221. *See* Brian J. Woram, *FIRREA's Statutes of Limitations: Their Availability to Purchasers from the FDIC*, 110 BANKING L.J. 292 (1993); James J. Boteler, Comment, *Protecting the American Taxpayers: Assigning the FDIC's Six Year Statute of Limitations to Third Party Purchasers*, 24 TEX. TECH L. REV. 1169 (1993).

circuits are split.[222] The Fourth Circuit's position began to emerge when a federal district court in Virginia decided *Wamco, III, Ltd. v. First Piedmont Mortgage Corp.*[223] There, the district court—although recognizing the contrary trend—determined that the FIRREA's extended limitations period *is* a right that is personal to the RTC (or FDIC). The basis for the decision was that, in the court's view, "the remedial benefit conferred by the [FIRREA] is explicitly tied to the status of the entity on which it is conferred."[224] That is to say, because the statute "by its plain terms . . . applies in actions brought by the RTC in its capacity as either conservator or receiver," and not otherwise, "the statute confers a benefit that is personal to RTC."[225] The court criticized the contrary cases because "[f]or the most part, those decisions ignore the actual language of the statute and decide the issue on the basis of the common law of assignments and policy considerations."[226] Ultimately, the court decided that although

> there are valid policy reasons which can be advanced for interpreting the statute in another fashion[,] . . . Congress has spoken plainly to confer a benefit on a particular entity functioning in a particular status, [and] it is not for the courts to assess the various policy considerations which would support having enacted the statute to provide otherwise.[227]

The court thus applied the Virginia state statute of limitations, rather than the longer FIRREA limitations period, to the debt at issue.[228]

A little over two years later, the same court again addressed the issue of FIRREA's statute of limitations as applied to assignees. In *National Enterprises, Inc. v. R.G. Moore*,[229] the RTC, as receiver for a bank, had assigned a note to National Enterprises, "a California corporation."[230] National Enterprises filed suit within the FIRREA's six-year statute of

222. *Compare Beckley Capital Ltd. P'ship*, 184 F.3d at 52, *UMLIC-Nine Corp.*, 168 F.3d at 1173, *Thornburg*, 82 F.3d at 886, *and* FDIC v. Bledsoe, 989 F.2d 805 (5th Cir. 1993) *with* Fed. Fin. Co. v. Hall, 108 F.3d 46 (4th Cir. 1997).

223. 856 F. Supp. 1076 (E.D. Va. 1994).

224. *Id.* at 1086.

225. *Id*.

226. *Id.* The court also found the argument based on the Restatement, *see supra* text accompanying notes 184–85, to be inapplicable in the case of negotiable paper due to the Restatement's exclusion of negotiable instruments from the scope of that section. *Id.* at 1087.

227. *Id.* at 1087–88.

228. *Id.* at 1088.

229. 948 F. Supp. 567 (E.D. Va. 1996).

230. *Id.* at 568–69. The assignment was through an intermediary.

limitations but after the Virginia five-year statute would have passed.[231] It argued that as an assignee, "it acquired the same rights as the original assignor and therefore succeeded to the six-year statute of limitations."[232] In granting National Enterprises' motion for summary judgment, the *Moore* court curtly concluded that "under Virginia law, an assignee of an instrument acquires any right of the assignor to enforce that instrument, and therefore, the plaintiff is entitled to the six-year statute of limitations."[233] Although the court cited *Wamco*,[234] it did not explain how that apparently contradictory case was distinguishable.

An opportunity for the Fourth Circuit to resolve this intra-circuit split arose the next year. In *Federal Financial Co. v. Hall*,[235] an RTC assignee claimed that by virtue of the FIRREA's longer limitations period, the Virginia statute of limitations did not bar collection of a loan.[236] The Fourth Circuit noted that the "overwhelming majority" of courts apply the longer FIRREA limitations period to assignees; the court also noted the contrary *Wamco* decision (although it did not mention *Moore*).[237] It concluded that all the cases approached the question as a question of federal common law; *Wamco* merely differed in its conclusion that the FIRREA statute of limitations is "personal to the assignor."[238] However, the *Hall* court found the initial premise—that federal common law applied—to be flawed. Citing Supreme Court precedent to the effect that "[c]ourts should create federal common law rules only 'where there is a significant conflict between some federal policy or interest and the use of state law,'"[239] the Fourth Circuit found there to be no such "significant conflict."[240] Although the court recognized that "allowing a state-by-state determination . . . would disadvantage the federal government by reducing the value and marketability of the RTC's asset pool," it concluded that "no federal policy presents a sufficient justification for a federal common law rule of decision applying [the FIRREA limitations period] to assignees of the RTC."[241] Instead, the court turned to Virginia state common law, under which it nevertheless concluded that the federal

231. *Id.* at 569.
232. *Id.*
233. *Id.* at 570.
234. *Id.*
235. 108 F.3d 46 (4th Cir. 1997).
236. *Id.* at 47.
237. *Id.* at 48.
238. *Id.*
239. *Id.* at 49 (quoting O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994)).
240. *Hall*, 108 F.3d at 49.
241. *Id.*

six-year limitations period would apply.[242]

(3) Resolution. The vast majority of courts, as a matter of federal common law, extend the FIRREA's extended limitations period to assignees. The Fourth Circuit discussion in *Hall* stands in stark contrast to the other cases, although even that court was willing to extend the FIRREA period as a matter of state common law.[243] Although the *Hall* court's approach will almost invariably lead to the same conclusion, as a matter of state common law rather than federal common law, the Fourth Circuit's approach should still be rejected. That court mistakenly relied on the rule that "when the terms of a statute are clear, . . . courts are 'not free to replace . . . [that clear language] with an unenacted legislative intent.'"[244] Although that is a correct principle, it assumes that the FIRREA speaks clearly to application of that statute *to assignees*. It does not.

Moreover, courts should construe the FIRREA to effectuate Congress' intent. The Fourth Circuit's *Hall* approach, in effect, considers Congress to have intended for fifty different rules to potentially apply, depending on the state in which suit is brought. In addition to the incentive that this would create to forum shop, under the *Hall* court's approach, an assignee may be able to rely on the FIRREA limitations period, but only if the relevant *state* common law happens to interpret the *federal* statute to mandate such a result. Surely Congress did not intend such an illogical approach and such potentially inconsistent application of the federal statute. Even the *Hall* court recognized the "strong policy reasons for a uniform federal rule."[245] That policy, combined with the fact that Congress did not specifically address the rights of assignees, indicates that the unanimous approach of courts outside the Fourth Circuit should control—the FIRREA limitations period is not a "personal" right.

By analogy, the section 1091a exemption from limitations should also pass with assignment of the student loan as a matter of federal common law. It is not a right "personal" to the assignor.

242. *Id.* (citing Union Recovery Ltd. P'ship v. Horton, 477 S.E.2d 521 (Va. 1996)).

243. In fact, as the *Hall* concurrence pointed out, this made the majority's entire discussion of how to interpret the federal statute unnecessary. *Id.* at 51 (Murnaghan, J., concurring).

244. *Id.* at 50 (quoting United States v. Morison, 844 F.2d 1057, 1064 (4th Cir. 1988) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring))).

245. *Id.*

V. CONCLUSION

The government has a vested interest in the interpretation of section 1091a. So do the myriad investors and collection agencies, like Dunstone, that would love to have unrestricted access to the billions of dollars in defaulted loans. This article has attempted to determine the proper scope of section 1091a by seeking a middle ground—an application of the statute (to a question not addressed in the statute's text) that both protects the interests of the government and does not attribute an absurd intent to Congress. It has concluded, after looking to the decisions addressing analogous situations, that entities not listed in section 1091a should only be able to take advantage of that statute's exemption if they have taken *assignment* from one of the entities listed in that section. This interpretation promotes the policy of allowing the federal government to effectively "monetize" its valid contractual claims; restricting the exemption to those who take assignment from the listed entities also provides the government with some measure of control over how collections are pursued. Under a contrary approach—where non-listed entities were not exempt from limitations periods—considerations of state statutes of limitations, available forums, and the time necessary to locate the debtor would slowly restrict the number of entities willing to "buy" such loans until the government would have to either seek to collect the loan itself or give up on collecting it.

Although under the balance suggested in this article defaulted borrowers of student loans can still never rest easy, and are forever potentially liable, they can at least know that only the government, educational institutions, guaranty agencies, or their assignees are immune to statutes of limitations.