

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

JUSTINIAN CAPITAL SPC,

Appellant,

-against-

No. 155

WESTLB AG,

Respondent.

-----

20 Eagle Street  
Albany, New York 12207  
September 14, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

JAMES J. SABELLA, ESQ.  
GRANT & EISENHOFER, P.A.  
Attorneys for Appellant  
485 Lexington Avenue, 29th Floor  
New York, NY 10017

CHRISTOPHER M. PAPARELLA, ESQ.  
HUGHES HUBBARD & REED, LLP  
Attorneys for Respondent  
One Battery Park Plaza  
New York, NY 10004

Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 155, Justinian  
2 Capital v. WestLB.

3 MR. SABELLA: If I could reserve three  
4 minutes, Your Honor?

5 CHIEF JUDGE DIFIORE: Three minutes, sir?

6 MR. SABELLA: Yes, thank you.

7 CHIEF JUDGE DIFIORE: You may.

8 MR. SABELLA: Jim Sabella for appellants.  
9 The decision below undermines the legislature's  
10 creation of the safe harbor for securities  
11 transactions in the champerty statute. The statute  
12 simply provides that the safe harbor applies, if the  
13 purchase price is 500,000 dollars - - -

14 JUDGE GARCIA: Counsel?

15 MR. SABELLA: - - - or more. Yes, Your  
16 Honor?

17 JUDGE GARCIA: Looking at this safe harbor,  
18 it's - - - it's somewhat on its face  
19 counterintuitive, right? So champerty's bad, but if  
20 you do it on a large enough scale, we'll give you  
21 safe harbor. It would kind of be an odd statute.  
22 Safe harbor would apply to like insider trading,  
23 right? It's bad, but if you trade enough shares,  
24 you're good.

25 So what would be the reason for the safe

1 harbor the way it's written?

2 MR. SABELLA: I - - - I think clearly the  
3 reason is to protect big financial transactions. New  
4 York - - - and - - - and this Court, you know - - -

5 JUDGE GARCIA: I - - - I think it's to say,  
6 given what champerty protects against, that you have  
7 to have a stake in the game, right? And if you look  
8 at the legislative history of this statute as I read  
9 - - - read it, there was a provision that they've  
10 tossed around that was debated to say face value, a  
11 million dollars, which would have been your argument.  
12 It's a large enough transaction. But they didn't put  
13 that in the statute. They put the purchase language  
14 in.

15 MR. SABELLA: Right, but they - - -

16 JUDGE GARCIA: So doesn't that go towards -  
17 - - you have to have a real stake in the game to do  
18 this?

19 MR. SABELLA: Well, yes, I'll get to that,  
20 but - - - but I wanted to talk about that change in  
21 the statute, because the statute had provided a  
22 million dollar face amount or 500,000 dollars paid,  
23 and used that word. And when the bill jacket talked  
24 about "paid" it was referring to that version of the  
25 statute.

1                   But then when the legislature adopted the  
2                   statute, they didn't adopt either of those things,  
3                   and they simply said purchase price and they didn't  
4                   say "paid" and I think there was - - - I - - - I  
5                   think that meant something. I think it would be - -  
6                   -

7                   JUDGE GARCIA: But that would be lowering  
8                   the face value essentially.

9                   MR. SABELLA: I - - - I didn't read that  
10                  way at all, Your Honor. And I think the stake in the  
11                  game here is, is a binding obligation to pay.

12                 JUDGE PIGOTT: Is that why they made the  
13                  change in your view?

14                 MR. SABELLA: Well, I don't - - - I don't  
15                  know. But I - - - I - - - I do think that that is  
16                  part of it. I think that a binding obligation is  
17                  good enough. I mean, consider - - - like - - - like  
18                  Your Honor was saying before, the rules you adopt  
19                  have to apply to everybody here. Suppose this is  
20                  Microsoft, and Microsoft promised to pay 500,000  
21                  dollars. That's got to be good.

22                 JUDGE GARCIA: But then let's go to the  
23                  binding - - - binding obligation to pay. I read the  
24                  purchase agreement, and it seems to me if you don't  
25                  pay the purchase price by a certain date, what you

1           essentially have is an option to take an extra five  
2           percent of the recovery.

3                   MR. SABELLA: Well, I think it's more than  
4           that. You do lose five percent, right - - -

5                   JUDGE GARCIA: And that's your option. You  
6           could pay 500,000 dollars or you could think I'm  
7           going to recover more than that if I - - -

8                   MR. SABELLA: I don't see it that way, Your  
9           Honor. They have an obligation to pay that money.  
10          And recall, there's evidence in the record - - -

11                   JUDGE ABDUS-SALAAM: What happens, counsel,  
12          if - - - if they default?

13                   MR. SABELLA: If they don't pay the money?

14                   JUDGE ABDUS-SALAAM: Is there any provision  
15          - - - if - - - yes, is there any provision in that  
16          purchase agreement that if they default, something  
17          happens? What happens?

18                   MR. SABELLA: Well, in addition to losing  
19          five percent, it's a debt. They could be sued for  
20          it. I mean, the - - - the uncontradicted testimony  
21          of both parties - - -

22                   JUDGE STEIN: But as I - - -

23                   MR. SABELLA: - - - to the transaction - -

24          -

25                   JUDGE STEIN: But as I read that agreement,

1           they can - - - they can only recover the actual notes  
2 themselves.

3           MR. SABELLA: I - - - I don't think that's  
4 correct, Your Honor. I think they could go against  
5 Justinian, and as Mr. Lowe testified, if they go  
6 against Justinian, and put Justinian into insolvency,  
7 they could go against whatever assets Justinian has  
8 and it has several other portfolios - - -

9           JUDGE STEIN: I thought they defined assets  
10 as these notes right in the agreement. Am I - - - am  
11 I misreading something?

12           MR. SABELLA: Those are the assets if  
13 there's a default, but this created a debt. This is  
14 an un - - - an - - - an unequivocal obligation to  
15 pay, and the testimony is very clear about that.

16           CHIEF JUDGE DIFIORE: Does there has to be  
17 some reason - - - some demonstration of a reasonable  
18 possibility that the entity can make good on its  
19 obligation to pay?

20           MR. SABELLA: Well, sure, and - - - and - -  
21 - and - - -

22           CHIEF JUDGE DIFIORE: What is that?

23           MR. SABELLA: It is the borrowing power. I  
24 mean, they went into the market, and - - - and there  
25 was a prior deal that's referred to in the papers

1           between Justinian and - - - and WestLB, and there  
2           they were able to borrow the money, and they paid the  
3           500,000 - - - I think it was actually 900,000 - - -  
4           but they paid it. And here they went into the market  
5           again. They offered to give up - - - up to fifty  
6           percent of the interest to get that, but the motion  
7           to dismiss was made, and - - - and - - - and they  
8           couldn't borrow the money.

9                         But that doesn't mean that - - - you know,  
10           when someone offers to give up fifty percent of their  
11           interest, you don't do that if you don't think you  
12           really have an obligation to pay - - -

13                         JUDGE STEIN: Isn't there at least - - -

14                         MR. SABELLA: - - - and that they could  
15           come after you.

16                         JUDGE STEIN: - - - a question of fact as  
17           to what - - - what they did or didn't do and - - -  
18           and - - - and whether this is - - - you know, I'll  
19           use the word sham or it's - - - it's a legitimate  
20           obligation?

21                         MR. SABELLA: Those are questions of fact,  
22           and I don't think summary judgment was the answer  
23           here. I mean, we - - - and we've argued that in the  
24           papers that there are a lot issues of - - - of fact  
25           relating to that. But they did go into the market,

1 and let's face it. Every house buyer in America,  
2 pretty much, needs a loan in order to buy the house.  
3 It doesn't make it a sham.

4 JUDGE FAHEY: Well - - -

5 MR. SABELLA: It doesn't make it illusory.

6 JUDGE FAHEY: - - - analytically though,  
7 you've got to take a step back. First, you got to -  
8 - - on - - - even under - - - under what Judge Stein  
9 made reference to is it is a champertous arrangement  
10 then, you would - - - you would - - - are you  
11 acknowledging that?

12 MR. SABELLA: Not at all, Your Honor.

13 JUDGE FAHEY: Okay.

14 MR. SABELLA: Not at all.

15 JUDGE FAHEY: Because - - - because if  
16 we're talking about a sham payment and whether it's a  
17 question of fact, and we say that safe harbor  
18 applies, but - - - or may or may not apply, depending  
19 on whether - - - or not this transaction sub - - - is  
20 - - - is an adequate substitute for payment. Maybe  
21 it is, maybe it isn't a question of fact, but  
22 nonetheless, it's still a champertous transaction.

23 MR. SABELLA: But I don't agree with that.

24 JUDGE FAHEY: Okay.

25 MR. SABELLA: And that's the second - - -



1 sort of the second point. If we win on either of  
2 those points, there has to be a reversal. We don't  
3 think it's champertous at all. They bought  
4 securities. They bought a legitimate debt, and it  
5 seems to me if - - - if this court's decisions in  
6 Bluebird and Love Funding mean anything, it's that if  
7 you buy debt and you try to enforce it, the fact that  
8 you may have to resort to litigation, is not - - -  
9 doesn't make something champertous.

10 JUDGE STEIN: Well, what about the fact  
11 that - - - that they - - - that they have a right to  
12 - - - that it's - - - it's kept in this vault for  
13 them, and that - - - that decisions - - - certain  
14 decisions can't be made, transfers can't be made  
15 without their consent, does that look like really - -  
16 -

17 MR. SABELLA: Well - - -

18 JUDGE STEIN: - - - relinquishing  
19 ownership?

20 MR. SABELLA: - - - again, that's not  
21 really what the situation is. There's an account,  
22 right? And the account is in the name of Justinian.  
23 There's no vault, there's no lockbox. That's  
24 something Mr. Paparella cleverly put in his papers,  
25 but there is no such thing. It's an account.

1 JUDGE RIVERA: So how - - -

2 MR. SABELLA: And - - -

3 JUDGE RIVERA: - - - how much money are  
4 they making off this?

5 MR. SABELLA: Excuse me?

6 JUDGE RIVERA: What - - - what - - - what -  
7 - -

8 MR. SABELLA: Right now it - - -

9 JUDGE RIVERA: - - - piece of this are they  
10 getting?

11 MR. SABELLA: Their - - - their share of  
12 the recovery would be - - - right now be fifteen  
13 percent. It would have been twenty percent, but now  
14 it's fifteen percent.

15 JUDGE RIVERA: Which - - - which - - - when  
16 these parties are entering this agreement, what is  
17 anticipated to be the value of the fifteen, twenty  
18 percent?

19 MR. SABELLA: Well, that's why they did it  
20 as a percentage, because it's awfully hard to  
21 evaluate what's going to be collected on a distressed  
22 debt.

23 JUDGE RIVERA: And yet - - - and yet you're  
24 committing to half a million dollars?

25 MR. SABELLA: Yes. Yes, Your Honor. I

1 mean, they expect - - - look, there's no evidence in  
2 the record that they expect to recover twenty million  
3 or thirty million or forty million on these notes.  
4 The notes are 180 million Euros, okay. So that's the  
5 amount in controversy here. But - - -

6 JUDGE FAHEY: I want to - - - I want to go  
7 back a second, before you get off on this - - -

8 MR. SABELLA: Yeah.

9 JUDGE FAHEY: - - - Bluebird Partners talks  
10 about valid business reasons for the purpose - - -  
11 for the purchase and - - - and there are - - -  
12 various other reasons were given for it. I - - - I  
13 don't think that supports your argument that this is  
14 not a champertous agreement.

15 Secondly, Love Funding, I think raises some  
16 more interesting questions in - - - in - - - you  
17 might want to address those, because there, the way I  
18 understand it, there was a - - - it was a pre-  
19 existing - - - the question was whether or not  
20 there's a pre-existing propriety interest, but from  
21 on our point of view, also the questions raised is  
22 whether or not a champerty claim requires that the  
23 claim itself be illegitimate or prosecuted in an  
24 effort to get costs, and what's - - - what's  
25 illegitimate, and what costs, of course, then come

1           into meaning, and we're looking at our jurisprudence  
2           back to 1906, and - - - and the case the Second - - -  
3           Wrightman (ph.), I think, is the name of the case;  
4           I'm not sure. And - - - but it's - - - it's an  
5           interesting legal question, but I think it directly  
6           affects what's considered a champertous transaction.

7                       MR. SABELLA: Right. Well, with respect to  
8           the pre-existing interest aspect, that didn't exist  
9           in Bluebird. It didn't exist in the federal case,  
10          the Second Circuit's case, Elliott Associates; it  
11          didn't exist in Judge Mukasey's case, Banque Gestion  
12          against Paraguay. The purchases of distressed debt  
13          all the time don't have pre-existing interest and the  
14          transactions are not held to be champertous.

15                      And with respect to the - - - the fact that  
16          they have a percentage sharing arrangement, again in  
17          Judge Mukasey's case, he specifically says the fact  
18          that you do this on a sharing basis, doesn't make it  
19          champertous. This court had the Fairchild Hiller  
20          case, where seventy-five percent, I think, was going  
21          to somebody else. They were - - - the court rejected  
22          both champerty and real party-in-interest.

23                      So I don't think the fact that they weren't  
24          able to price it exactly, so they said a million  
25          dollars plus a percentage, I don't think that in and

1 of itself has really anything to do with whether it's  
2 champertous or not.

3 JUDGE FAHEY: So does champerty require  
4 that the claim be illegitimate, or prosecuted in an  
5 effort to get costs?

6 MR. SABELLA: I believe so, and I think the  
7 amicus - - -

8 JUDGE FAHEY: I'm sorry?

9 MR. SABELLA: I said, I believe so.

10 JUDGE FAHEY: Do you?

11 MR. SABELLA: And I think the amicus brief  
12 that Burford Capital put in, sort of lays that out  
13 pretty well, that really what champerty's involved  
14 with - - - is it a shakedown just to try to get some  
15 costs? This is a legitimate 180 Euro - - - 180  
16 million dollar Euro distressed debt, and it seems to  
17 me that the champerty statute really doesn't apply.

18 CHIEF JUDGE DIFIORE: Thank you, sir.

19 MR. SABELLA: Thank you.

20 CHIEF JUDGE DIFIORE: Counsel?

21 MR. PAPARELLA: Chris Paparella from Hughes  
22 Hubbard for the respondents, Your Honors.

23 I - - - I want to take the - - - the - - -  
24 the issues - - - the - - - the questions that Your  
25 Honors raised in - - - in the order that you've

1 raised them.

2 It - - - if you look at the safe harbor  
3 amendment from 2004, and you look at your decision,  
4 Judge Pigott, in - - - in the Merrill Lynch v. Love  
5 Funding case, and - - - and the decision of Judge  
6 Bellacosa in - - - in the Bluebird case, all three of  
7 those things were on a continuum. And - - - and they  
8 express a similar philosophy about champerty in New  
9 York, and that is that the - - - that the - - - the  
10 crucial question under the champerty statute is  
11 whether the party taking the assignment, buying,  
12 because there has to be a purchase, has skin in the  
13 game, other than - - -

14 JUDGE STEIN: So - - - so what is required  
15 for skin in the game? A promissory note, would that  
16 be enough?

17 MR. PAPARELLA: No, I don't think it would  
18 be enough, Your Honor.

19 JUDGE STEIN: It has to be cash paid - - -  
20 actual cash paid?

21 MR. PAPARELLA: Your Honor, I - - - I  
22 believe that - - - that the legislative history shows  
23 that what the assembly intended was a payment, was an  
24 actual payment.

25 JUDGE STEIN: Well, I - - - it may be a

1 payment. What - - - what - - - you talk about skin  
2 in the game. If you have a legal obligation to pay  
3 money - - -

4 MR. PAPARELLA: Right.

5 JUDGE STEIN: - - - isn't that skin in the  
6 game?

7 MR. PAPARELLA: You - - - first of all,  
8 Your Honor, there's no legal obligation to pay money  
9 here.

10 JUDGE STEIN: Well, there's a contract  
11 here. Now you - - - you may question the - - -  
12 whether that is a - - - a sham or - - - or a  
13 legitimate contract, but let's assume for the moment  
14 that it is absolutely legitimate that - - - that all  
15 the things that they say, that they tried to raise  
16 the funds, that they were still working on that, and  
17 that they weren't able to do it by the time that the  
18 statute of limitations ran out, but they - - - but  
19 they absolutely intended and they have - - - there's  
20 ramifications if they don't pay this money. Let's  
21 just assume that.

22 MR. PAPARELLA: Okay.

23 JUDGE STEIN: Why - - - why isn't that  
24 good?

25 MR. PAPARELLA: Well - - - well, Your

1 Honor, what - - - what - - - if you read the - - -  
2 the legislative memorandum from the assembly, and - -  
3 - and there's some confusion here. There were two  
4 amendments making their way - - - there was one - - -  
5 there was one amendment in the Senate, which had some  
6 language, and there was an amendment in the Assembly,  
7 which used the word "purchase price".

8 And - - - and if you read the memorandum,  
9 what the Assembly said is that the purpose of the  
10 bill was to take a certain spe - - - series - - -  
11 certain types of transactions out of the champerty  
12 statute, and that was - - - those were transactions  
13 where investors had actually invested - - - had - - -  
14 had a - - - had skin in the game - - - had paid a  
15 substantial amount of money and invested in the note,  
16 and so having paid a - - -

17 JUDGE STEIN: But - - - but if I sign a  
18 promissory note, okay, and again, I - - - I realize  
19 that this is not the exact facts we have here, and I  
20 put my house against it as - - - as security, I think  
21 that has - - - I have skin in the game, even though  
22 no cash has changed hands.

23 MR. PAPARELLA: You - - - you may, Your  
24 Honor, but - - - but - - - and - - - and - - - and I  
25 would agree with you that if you do something like



1 that, you're probably closer to the safe harbor than  
2 what they did, but they didn't sign a promissory  
3 note. In this case, they didn't - - -

4 JUDGE STEIN: They signed a contract,  
5 though.

6 MR. PAPARELLA: No, no, but - - - but Your  
7 Honor - - -

8 JUDGE STEIN: Is it - - - how is a contract  
9 different from a promissory note?

10 MR. PAPARELLA: I'll tell you how it's  
11 different, Your Honor.

12 JUDGE STEIN: What - - -

13 MR. PAPARELLA: In the contract they  
14 signed, they admitted that the failure to pay the  
15 base purchase price isn't a default and it's not a  
16 breach. And so, if the - - -

17 JUDGE STEIN: Where does it say it's not -  
18 - - it's not a breach?

19 MR. PAPARELLA: It says it's not a default  
20 in the contract, and - - - and the negotiator for  
21 Justinian, the owner of Justinian, Mr. Lowe,  
22 testified in his deposition, that the failure to pay  
23 the base purchase price was not a breach of the  
24 contract. He testified to it three different times  
25 in his deposition. I asked him - - - I said, is it a

1 default? He said it's not a default. And it's  
2 clearly - - - if you read the agreement, it's not a  
3 default. And I said is the failure to pay it a  
4 breach? And he said, no, it's not a breach. And I -  
5 - -

6 JUDGE GARCIA: Counsel, it seems to me,  
7 going back to my original question, it's an option.

8 MR. SABELLA: It's just an option, Your  
9 Honor. It's just an option.

10 JUDGE GARCIA: So there's a payment date  
11 where you have to decide, are we going to pay or are  
12 we going to take a five percent piece of the recovery  
13 fee?

14 MR. PAPARELLA: Exactly, Your Honor.

15 JUDGE GARCIA: And - - -

16 MR. PAPARELLA: Exactly.

17 JUDGE GARCIA: - - - to go back to a  
18 question earlier, the recourse here, I read the  
19 contract, and I think that's the contract, was  
20 against the assets, and not - - -

21 MR. PAPARELLA: Yes.

22 JUDGE GARCIA: - - - against anything else.

23 MR. PAPARELLA: Against the note.

24 JUDGE GARCIA: Right.

25 MR. PAPARELLA: But - - - but - - -

1 JUDGE GARCIA: Those assets, sorry, yes.

2 MR. PAPARELLA: You - - - you have to read  
3 Mr. Lowe's deposition, because I asked him in his  
4 deposition about - - - I took him to Section 3 of  
5 Section 10 of the contract, which is the remedies for  
6 breach, and - - - and I said, does it apply? And he  
7 said, no, because there's no breach. And - - - and I  
8 said, well - - - well, if there's no default and no  
9 breach for the failure to pay the base purchase  
10 price, then how do they enforce it. And he launches  
11 into this thing about, well, they can go down to the  
12 Cayman Islands and commence a insolvency proceeding.

13 JUDGE GARCIA: Putting - - - putting that -  
14 - - that aside for a second, so there is some  
15 language in this contract that if you don't pay,  
16 interest accrues, right, on the purchase price.

17 MR. PAPARELLA: Yes.

18 JUDGE GARCIA: But it seems to me, and I'm  
19 not entirely clear on this, that if you opt for the  
20 five percent, the interest is subsumed in the five  
21 percent recovery.

22 MR. PAPARELLA: Yes, Your Honor.

23 JUDGE GARCIA: I wasn't sure.

24 JUDGE PIGOTT: Does it make any difference  
25 in - - - in our previous decisions, we've always



1 statute turns on whether or not you've already got  
2 some interest?

3 MR. PAPARELLA: I - - - I think it turns on  
4 whether - - - on - - - on - - - on - - - no, not  
5 entirely. It turns on whether you - - - at the end,  
6 after the assignment is consummated, whether you have  
7 an interest, whether you have an interest other than  
8 your ability to profit from the litigation. So  
9 either like in a distressed bond case, Your Honor,  
10 you've bought the whole bond, so you own it lock,  
11 stock, and barrel. You - - - you have an interest in  
12 it, right?

13 Here, that didn't happen. They didn't buy  
14 this lock, stock, and barrel, and - - - and let me  
15 just take you to the record to - - - to one key part  
16 of the record. If you look at - - - at page 217 of  
17 the record, that - - - that's part of the contract,  
18 and it's a letter that Justinian writes to Canadian  
19 Imperial Bank of Commerce about what they're supposed  
20 to do and not do with the notes and all the  
21 associated rights, and what they instruct, and they -  
22 - - they were required to send that letter to  
23 Canadian Imperial Bank of Commerce, and what they say  
24 to Canadian Imperial Bank of Commerce is, do not take  
25 those notes out of that account, unless the seller,

1 Deutsche Pfandbriefbank, gives you their prior  
2 written consent to do it. You are forbidden. We  
3 can't get them out. Nobody else can get them out.  
4 Deutsche Pfandbriefbank has a first lien, a perfected  
5 lien on those notes. They have to stay in that  
6 account, unless they say something different. That's  
7 a lockbox account. That account is set up for the  
8 benefit of the seller and they have the right to  
9 eighty-five percent of the proceeds. The only  
10 interest that Justinian has in this case is its right  
11 to a fifteen-percent contingent fee. They're not  
12 even paying the costs in this case.

13 JUDGE STEIN: But it - - - you - - - so you  
14 don't agree that if they paid - - - if they actually  
15 paid the million dollars, that that - - -

16 MR. PAPARELLA: If they paid the million  
17 dollars, Your Honor, they'd be in the safe harbor.

18 JUDGE STEIN: Can they then - - - okay.

19 MR. PAPARELLA: But they didn't. They  
20 didn't, and they never had any - - -

21 JUDGE STEIN: Well, that's another - - -  
22 that's another question that we haven't gotten to  
23 yet, but.

24 MR. PAPARELLA: Well, right. But - - - but  
25 there's no dispute here. By - - - by the way, in

1 terms of summary judgment, the - - - the key facts  
2 here are not in dispute. They never had the million  
3 dollars. Both - - -

4 JUDGE STEIN: But they intend - - - to me,  
5 intent is almost always a jury question.

6 MR. PAPARELLA: But - - - but Your Honor,  
7 when you have - - -

8 JUDGE STEIN: So and - - - and both of this  
9 turn - - - really, to me the arguments on both  
10 aspects of this case, turn on intent. What was their  
11 intent in entering into this transaction? And what  
12 was their intent in - - - in putting this purchase  
13 price - - -

14 MR. PAPARELLA: Right.

15 JUDGE STEIN: - - - in - - - in the - - -  
16 in the agreement.

17 MR. PAPARELLA: If - - - if you - - - Your  
18 Honor, if you look at appendix - - - and I'm going to  
19 say the numbers backwards, because it's an email  
20 string - - - so start with page 385 and work your way  
21 back to page 376. And it is a series of emails going  
22 back and forth between Mr. Lowe, who owns Justinian,  
23 this English-trained lawyer who lives in the Cayman  
24 Islands, and Mr. Glynn who's the negotiator for  
25 Deutsche Pfandbriefbank. And what they agree is that

1 the purchase is not really a debt. It's - - -

2 JUDGE STEIN: I don't read it that way. I  
3 - - - I - - - they clearly were trying to get - - -  
4 make sure that they got within the safe harbor.  
5 There's no question about that, but I don't read it  
6 the way that you read it - - -

7 MR. PAPARELLA: Well - - - well, Your  
8 Honor, what - - -

9 JUDGE STEIN: - - - which is saying they  
10 never intended to pay it.

11 MR. PAPARELLA: Mr. - - - Mr. Lowe says to  
12 Mr. Glynn that - - - that - - - it's an option. He -  
13 - - he - - - if he wanted to pay it, it - - - he had  
14 an economic incentive to pay it, because if he paid  
15 it, it kept his contingent fee at twenty percent  
16 rather than fifteen percent. If he didn't pay it,  
17 his contingent fee di - - - went down to fifteen  
18 percent. It's not that he didn't have some incentive  
19 to pay it. The question is, what - - - did he have  
20 to pay it and what happened if he didn't pay it, and  
21 - - - and - - -

22 JUDGE GARCIA: But, counsel - - - I'm  
23 sorry, because I - - - time is running out, but - - -

24 MR. PAPARELLA: I'm sorry, Your Honor.

25 JUDGE GARCIA: - - - on attorney's fees.



1 The way I read this again is, it's not a  
2 reimbursement, it's a percentage?

3 MR. PAPARELLA: It's a percentage.

4 JUDGE GARCIA: And what is the percent?

5 MR. PAPARELLA: In - - - in terms of the  
6 deal that - - -

7 JUDGE GARCIA: In terms of if you set - - -  
8 if they settle this case, and they get a recovery,  
9 attorneys' fees come off the top.

10 MR. PAPARELLA: The - - - the - - - the  
11 counsel fee - - - the - - - the lawyer fee - - - the  
12 - - - the fees for the lawyers they hire come off the  
13 top.

14 JUDGE GARCIA: And how is it calculated?  
15 Is it reimbursement or is it a straight percentage of  
16 the recovery?

17 MR. PAPARELLA: It's a percentage. It's  
18 twenty-five percent.

19 JUDGE GARCIA: Right.

20 MR. PAPARELLA: And - - - and the lawyers  
21 agreed to bear all of the costs of the case except  
22 for expert witnesses and - - - and - - - and they  
23 contemplated that the expert witnesses would only be  
24 paid out of a recovery.

25 JUDGE GARCIA: So twenty-five percent of

1 the recovery - - - the first twenty-five percent goes  
2 to - - -

3 MR. PAPARELLA: For the lawyers.

4 JUDGE GARCIA: - - - the lawyers.

5 MR. PAPARELLA: And - - - and then the - -  
6 -eighty-five percent of what's left goes to the  
7 seller, goes right into that account which if for the  
8 seller's account, and - - - and they come at the end  
9 of the waterfall. So who's interests are they  
10 pursuing here? Who - - - this is - - - what - - -  
11 the distinction is between somebody who takes an  
12 assignment to pursue their rights and somebody who  
13 takes an assignment to profit from the litigation  
14 process.

15 JUDGE RIVERA: Well, look - - - if I can  
16 just interrupt, because your time is up, but just  
17 this question - - -

18 MR. PAPARELLA: Sorry, Your Honor.

19 JUDGE RIVERA: - - - with the Chief Judge's  
20 permission. So it's clear that with that safe harbor  
21 that the legislature is interested in, if not  
22 promoting, at least insuring there are not obstacles  
23 to certain types of arrangements, correct?

24 MR. PAPARELLA: Yes.

25 JUDGE RIVERA: Okay, to things kinds of

1 arrangements, so - - -

2 MR. PAPARELLA: Yes, Your Honor.

3 JUDGE RIVERA: So, given the nature of the  
4 kinds of arrangements that - - - that the legislature  
5 is interested in, why - - - why does it require the -  
6 - - the exchange of cash or the payment when,  
7 especially in - - - in the financial center that we  
8 are in, individuals and companies come up with all  
9 kinds of complex financial structures and there's  
10 leveraging going on all the time, and a promise can  
11 indeed have incredible repercussions, which is not  
12 necessarily about immediately, right, exchanging a  
13 payment.

14 MR. PAPARELLA: Right.

15 JUDGE RIVERA: But what - - - why do you  
16 need this payment? Because the statute doesn't say  
17 payment.

18 MR. PAPARELLA: It - - - it says - - -

19 JUDGE RIVERA: I understand your reference  
20 to the bills, but the statute doesn't say payment.

21 MR. PAPARELLA: It's true, the statute says  
22 purchase price and - - - and - - - and - - -

23 JUDGE RIVERA: And one could certainly  
24 negotiate a purchase price that's lower than what the  
25 other person in this agreement thinks is the ultimate

1 value, right? That's part of this negotiation.

2 MR. PAPARELLA: Yes, yes. But - - - but -  
3 - - you know, the legislature settled on 500,000.  
4 And - - - and it's not just the bill jacket, the  
5 memorandum which says, repeatedly, we're talking  
6 about a payment. It's - - - it's also - - - there's  
7 an affidavit that they submitted on this motion from  
8 - - - from the - - - the sponsor of the bill,  
9 Assemblywoman Jean (ph.) and she uses the verb to  
10 pay, paid payment, four different times in her  
11 affidavit. That - - - that's their evidence that  
12 they submitted and they're bound by it.

13 But coming back, Judge Rivera, to your  
14 question, I - - - I believe that the reason - - -

15 JUDGE RIVERA: Why is it so obvious - - -  
16 is it not in the language of - - -

17 MR. PAPARELLA: The language of the - - -

18 JUDGE RIVERA: - - - the provision itself?

19 MR. PAPARELLA: Your Honor, the language of  
20 the statute is ambiguous. It is, because it says  
21 purchase price. All I can tell you is what the - - -  
22 what the evidence in both the legislative history and  
23 the affidavit they submitted says, and I can offer to  
24 you a rationale for it, so - - - so that you - - -

25 JUDGE RIVERA: It just strikes me given the

1 - - - the nature - - - and it'll be the last question  
2 or rhetorical in some sense - - -

3 MR. PAPARELLA: You can ask me as many  
4 questions as you want, Your Honor.

5 JUDGE RIVERA: The na - - - the nature - -  
6 - well, not - - - and the Chief Judge and everyone  
7 else may not think so. So the - - - the nature of  
8 the - - - the transactions that are - - - are being  
9 made possible or taken out from under the coverage of  
10 the champerty statute otherwise based on this  
11 provision are, in part, exactly the kind where you  
12 might not exchange funds, but you might instead have  
13 these other kind of complex financial instruments  
14 that support the interest in the transaction, and  
15 that's why I'm not - - - I'm having difficulty with  
16 your argument.

17 MR. PAPARELLA: Your Honor, the - - - the  
18 problem is what the legislature wanted to do was to  
19 avoid litigation like this. That - - - that's what  
20 they said. They said we - - - you know, you  
21 shouldn't pay a bunch of money, 500,000 bucks for a  
22 debt, and then be embroiled in litigation about  
23 whether or not - - - whether or not there's  
24 champerty.

25 So there's no way, other than to have a

1 bright line, where - - - where it's like a mortgage  
2 foreclosure and somebody says, you know, I paid.  
3 Where's the check? And - - - and - - - and if you  
4 require a payment, and there's all the evidence there  
5 that you need to find that the legislature intended a  
6 payment, you have a bright line. You will never have  
7 litigation about this issue on these facts ever  
8 again.

9 But - - - but can I come back to one last  
10 thing and let me give you one cite for the record - -  
11 -

12 CHIEF JUDGE DIFIORE: Very quickly, sir.

13 MR. PAPARELLA: - - - Your Honor, and - - -  
14 and that is to Mr. Lowe's testimony that it was  
15 neither a default nor a breach. And that is at page  
16 - - - hang on; I'm just sorry - - - it's at page 464  
17 - - - 460 - - - 461 of the record. And - - - and  
18 it's - - - throughout his deposition, I asked him  
19 three different times, and every time, Mr. Lowe said,  
20 it's not a default and it's not a breach. It's a  
21 debt that's due. But - - - but this agreement's  
22 governed by New York law, and calls for litigation in  
23 the New York courts. It - - - if I say I'm going to  
24 do something in an agreement, but you can't sue me if  
25 I don't do it for default or breach, you don't have a

1 remedy.

2 CHIEF JUDGE DIFIORE: Thank you, sir.

3 MR. PAPARELLA: Thank you, Your Honor.

4 CHIEF JUDGE DIFIORE: Mr. Sabella, to your  
5 adversary's point about that it's neither a default  
6 or a breach just - - -

7 MR. SABELLA: Yeah, that's what I wanted to  
8 follow up. And there's nothing in the agreement that  
9 says you can't sue us for it. That - - - the  
10 agreement set - - - set - - - doesn't have - - - no  
11 agreement has to specific what your remedies are. If  
12 you promise to do something in an agreement, and you  
13 don't do it, you get sued for it. And the - - - the  
14 agreement doesn't have to specify what the remedies  
15 are.

16 And at A458 and 459, Mr. Lowe testified  
17 about this, and he said, they have creditors' rights.  
18 We're in their debt. Now I don't think he wanted to  
19 spell out and I don't want to spell out a roadmap for  
20 DPAG for exactly how they should go after my guys to  
21 get the money, but the fact is, it's a debt, and they  
22 could go after Justinian, and they arguably could go  
23 after Justinian's principals. They owe the money.

24 JUDGE RIVERA: So what's - - - what's the  
25 point of saying it's not a default?

1 MR. SABELLA: Because they can't  
2 immediately take the notes back. If it's a default,  
3 they can immediately take the notes back. It - - -  
4 it craters the litigation and our clients are  
5 completely out of luck; can't pursue the case.

6 JUDGE ABDUS-SALAAM: Counsel, do you agree  
7 with your adversary that the language of the statute  
8 is ambiguous when it says, "purchase price"?

9 MR. SABELLA: I - - - I don't. I think if  
10 it had wanted to say paid, it would have said paid,  
11 like the previous version of the statute that they  
12 had under consideration and didn't adopt it. And I  
13 want to talk about that John's affidavit. That  
14 affidavit was submitted in the other case that I  
15 referred to between the parties, where, in fact, my  
16 client had paid the upfront money. So of course, her  
17 affidavit talked about the money being paid, in that  
18 case. The money was paid, but she was not drawing a  
19 distinction between whether it has to be paid or  
20 whether a promise to pay is sufficient.

21 JUDGE FAHEY: You know, you only - - - you  
22 only got a second. The Appellate Division at the end  
23 talked about DPAG subcontracting out its litigation  
24 for - - - for purely political reasons.

25 MR. SABELLA: Yeah.



1 JUDGE FAHEY: You should address - - -

2 MR. SABELLA: Yeah, I would like to address  
3 that - - -

4 JUDGE FAHEY: Yeah, address it.

5 MR. SABELLA: - - - because both of the  
6 courts below talked about the idea that if DPAG had  
7 sued on its own, that would have imperiled its  
8 existence. None of the documents and testimony said  
9 that, again, a clever reference by - - -

10 JUDGE FAHEY: Well, that doesn't mean  
11 there's not a political reason for subcontracting it  
12 out.

13 MR. SABELLA: Not - - - not at all. They -  
14 - - the board actually authorized - - - and this is  
15 at A351 - - - the board authorized the head of DPAG  
16 to sue in DPAG's own name. Obviously, banks don't  
17 like to sue each other. They don't like to do it in  
18 Germany; they don't like to do it in the United  
19 States, but they do it, and the board authorized him  
20 to do it. But he looked for alternatives and he  
21 found one that he liked better. But that doesn't  
22 mean that - - - that - - -

23 JUDGE RIVERA: Is it just a bank or it's  
24 also a government entity?

25 MR. SABELLA: Well - - -

1                   JUDGE RIVERA: And does that make it  
2 slightly different?

3                   MR. SABELLA: Maybe it increases the  
4 reluctance, but it doesn't - - - the board authorized  
5 him to do it. And it doesn't mean - - - people sue  
6 the government all the time. People that have  
7 businesses with the government, sue the government  
8 all the time. So it happens.

9                   To the extent that stirring up litigation  
10 matters, and again, the amicus brief makes a decent  
11 showing that maybe it doesn't, but to the extent it  
12 does, either this didn't stir up litigation or at a  
13 minimum, there's a factual issue that it didn't stir  
14 up litigation.

15                   The last point I'd like to respond to is  
16 this point that it's an option. If it's - - - I  
17 don't consider it an option, because if we lose this  
18 appeal, the case is over. We still owe a million  
19 dollars. And they can come after our client. I  
20 would expect that they would. They might put  
21 Justinian into bankruptcy; they might try to seize  
22 other assets that it has. They might try to go  
23 against the principals. If it's an option, you can't  
24 do any of that stuff. And Mr. Lowe testified here  
25 they could.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CHIEF JUDGE DIFIORE: Thank you, sir.

MR. SABELLA: Thank you.

(Court is adjourned)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Justinian Capital SPC v. WestLB AG, No. 155, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: September 21, 2016