

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

-----  
COMMONWEALTH OF PENNSYLVANIA PUBLIC  
SCHOOL EMPLOYEES' RETIREMENT SYSTEM,

Plaintiffs,

COMMERZBANK AG,

Plaintiff-Appellant,

-against-

No. 104

MORGAN STANLEY & CO., INCORPORATED,

Defendants-Respondents.  
-----

20 Eagle Street  
Albany, New York 12207  
June 1, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
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

Appearances:

JOSEPH D. DALEY, ESQ.  
ROBBINS GELLER RUDMAN & DOWD LLP  
Attorneys for Appellant  
655 West Broadway, Suite 1900  
San Diego, CA 92101

JAMES P. ROUHANDEH, ESQ.  
DAVIS POLK & WARDWELL LLP  
Attorneys for Respondent  
450 Lexington Avenue  
New York, NY 10017

Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's start with  
2 number 104, Commonworth - - - Commonwealth v. Morgan  
3 Stanley.

4 Counsel, would you want any rebuttal time?

5 MR. DALEY: I do, Chief Judge Lippman. I'd  
6 like two minutes, please, out of my twelve.

7 CHIEF JUDGE LIPPMAN: Two minutes, sure, go  
8 ahead. Get started. You're on.

9 MR. DALEY: May it please the court, I'm  
10 Joseph Daley for the plaintiff-appellant Commerzbank  
11 AG.

12 Your Honors, this court has been asked by  
13 the Second Circuit Court of Appeals to answer two  
14 certified questions; whether based on the  
15 declarations and documentary evidence below in the  
16 federal court, number one, could a reasonable trier  
17 of fact find that D-A-F, or DAF, validly assign - - -

18 CHIEF JUDGE LIPPMAN: Let's talk - - -  
19 let's talk about what the law is on a tort claim  
20 growing out of this kind of situation.

21 MR. DALEY: All right.

22 CHIEF JUDGE LIPPMAN: What - - - what is  
23 required to also transfer the - - - the tort claim?

24 MR. DALEY: Well, we need - - - we need to  
25 look at the - - - not only the language of the

1 transfer or the assignment, we also have to look at  
2 the intentions of the parties, which we - - -

3 CHIEF JUDGE LIPPMAN: Do we look at the  
4 intentions or we just look at the - - - the language?

5 MR. DALEY: No, we have - - - we have to  
6 look at the - - - we have to look at the intents - -  
7 - the intents of the par - - - of the parties - - -

8 JUDGE READ: That's somewhat - - -

9 MR. DALEY: - - - and the surrounding  
10 circumstances.

11 JUDGE READ: That's somewhat contrary to  
12 the way we usually treat contract actions here, isn't  
13 it, to look at extrinsic evidence?

14 MR. DALEY: Well, in this case, if you were  
15 to treat this as strictly a matter of contract, we  
16 really don't have the contract in front of us, do we?  
17 We have an agreement reached on October 4th, 2007 for  
18 DAF to transfer the entirety of the downgraded notes  
19 to Dresdner. What exactly happened at the moment of  
20 that agreement, we are not sure. Morgan Stanley  
21 would like this court to believe that the four  
22 corners of the - - -

23 CHIEF JUDGE LIPPMAN: Is there any - - - is  
24 there any case law that tells us what happens in this  
25 kind of situation as to whether the tort claim is

1 also assigned?

2 MR. DALEY: Sure, Your Honor.

3 CHIEF JUDGE LIPPMAN: What is it? What's  
4 the case?

5 MR. DALEY: Go - - - going all the way back  
6 - - - let's go back to 1885. This court in the  
7 Griffey case said that when the transfer is in - - -  
8 when the transfer is unqualified, it's the entire  
9 interest in the estate, chattel or thing, and that is  
10 exactly - - -

11 JUDGE PIGOTT: What's - - - what's your - -  
12 -

13 MR. DALEY: - - - what happened here.

14 JUDGE PIGOTT: What's your favorite case?  
15 What's - - - what case do you think, you know, we  
16 ought to be looking at most closely?

17 MR. DALEY: There are so many, but let's -  
18 - -

19 JUDGE PIGOTT: Well, C - - - how about CPC?

20 MR. DALEY: Let's - - - let - - -

21 JUDGE PIGOTT: CPC International.

22 MR. DALEY: CPC International is - - - is  
23 wonderful. Banque Arabe - - -

24 JUDGE PIGOTT: Banque Arabe.

25 MR. DALEY: - - - is a very good case for

1 us, but unfortunately Banque Arabe is - - - is not a  
2 case of this particular court, which is probably why  
3 the - - - the Second Circ - - - Circuit Court of  
4 Appeals certified the question.

5 JUDGE RIVERA: Well - - - well, does the  
6 case turn on whether or not the - - - the assignment  
7 really involves matters that are dehors, the original  
8 contract, because that seems to be what Fox and ACLI  
9 and the Second Circuit are suggesting. Certainly in  
10 the Second Circuit, it's saying you've got the  
11 supplemental - - -

12 MR. DALEY: Sure.

13 JUDGE RIVERA: - - - information that's  
14 been provided on the motion for reconsideration.

15 MR. DALEY: But - - - but cases like - - -  
16 like Fox and this court's recent - - - fairly recent  
17 decision in CalPERS - - -

18 JUDGE RIVERA: Cal - - -

19 MR. DALEY: - - - they turned on the  
20 specific language of the assignment. The language  
21 was there for the court to look at. For example, in  
22 the CalPERS case, this court said that the - - -  
23 whatever rights and obligations that - - - that the  
24 assignee would have had against the original borrower  
25 of the note, certainly would have transferred with

1 the assignment, but not something that happened  
2 outside of that, and that is the alleged mal - - -  
3 malpractice by the Shearman Ster - - - Sterling firm,  
4 so - - -

5 JUDGE STEIN: But - - - but aren't you in  
6 effect saying that because there is no explicit  
7 language here and - - - actually, I should ask you, I  
8 guess, what is there to show us what it - - -  
9 communication between the parties at all, that there  
10 was of any intent, but - - - but without that, aren't  
11 - - - aren't we just saying something that we've  
12 never said before which is that we just assume that  
13 it goes with the assignment?

14 MR. DALEY: Well, no, we - - - we are not  
15 asking this court to assume. We are not asking this  
16 court to hold that a claim and tort comes along  
17 automatically whenever there's a contract transfer -  
18 - - a contractual transfer of something like the secu  
19 - - - of the securities. But the fact is in this  
20 case, we don't know what happened in early October.  
21 And the case law does say - - -

22 JUDGE STEIN: But - - - but - - - then why  
23 wouldn't we find that in the absence of anything say  
24 - - - showing us - - - demonstrating that the parties  
25 explicitly shared an intent - - - not what was in

1           their heads, but what they communicated to each  
2           other, if not in writing, in some other way.

3                   MR. DALEY: But I don't think that you're  
4           so limited, Your Honor. We are allowed to look at  
5           the surrounding acts and circumstances. What - - -  
6           what are the circumstances facing DAF and Dresdner at  
7           the time? DAF could not hold on to the 120 million  
8           dollars in notes. Dresdner did not have to purchase  
9           those notes. All right? Having made the decision to  
10          purchase the notes, yes, it had to take them at par.  
11          It had to pay the full 120 - - -

12                   CHIEF JUDGE LIPPMAN: Is that the - - - is  
13          that the law, though, that - - - that - - - now  
14          you're saying, we - - - we see the language and that  
15          we always look to the circumstances around it? Or is  
16          it - - - or is it that the language is - - - is clear  
17          on its face, it's not ambiguous, and so what - - -

18                   MR. DALEY: The case law - - -

19                   CHIEF JUDGE LIPPMAN: Where - - - again, is  
20          that consistent with our jurisprudence?

21                   MR. DALEY: For a valid assignment in the  
22          State of New York, you are allowed to look at both  
23          the words or the acts of the parties in completing  
24          that assignment. When we don't have the specific  
25          words, per se, as we don't here, with a writing, we

1 are allowed to look at the - - - the - - -

2 JUDGE ABDUS-SALAAM: Counsel, what about  
3 the letter - - -

4 MR. DALEY: - - - the parties' acts.

5 JUDGE ABDUS-SALAAM: - - - that was - - - I  
6 think, confirms the purchase of the notes. What - -  
7 - what are we to make of that?

8 MR. DALEY: It's simply a post-agreement -  
9 - - four-day post-agreement confirmation of what had  
10 been agreed to four days earlier. And I - - - I want  
11 to go back just very briefly to Judge Lippman's  
12 question. Not only do we have the situation facing  
13 DAF and Dresdner here, we also have the declaration -  
14 - - sworn declarations of two persons involved in  
15 entities that certainly would know what - - - what  
16 had happened in 2007 at - - - at - - -

17 JUDGE FAHEY: But the problem is that's - -  
18 - that's four years after the fact, isn't it?

19 MR. DALEY: Pardon me, Your Honor?

20 JUDGE FAHEY: It's four years after the  
21 fact?

22 MR. DALEY: It is four years after the  
23 fact, but that's because the district court judge did  
24 not accept our reliance declaration and we felt the -  
25 - -



1 JUDGE FAHEY: Well, I thought on the data  
2 on Shlissel's declaration - - - I don't know if I'm  
3 saying it correctly - - - was - - -

4 MR. DALEY: 2012?

5 JUDGE FAHEY: Right.

6 MR. DALEY: Right.

7 JUDGE FAHEY: And the date of the  
8 assignment was October 8th, 2007, right?

9 MR. DALEY: But Mr. Shlissel makes clear in  
10 paragraph 5 of his declaration that at the time, he  
11 was the CEO of AGIMAT, and that is the overriding  
12 Massachusetts trust under which DAF was a money-  
13 market fund.

14 JUDGE READ: Under your logic, though, why  
15 would we always if a contract - - - why we wouldn't  
16 we always look at the extri - - - extrinsic evidence?

17 MR. DALEY: You wouldn't have to, Your  
18 Honor. If - - - if the language of the contract is  
19 clear, there's no need to go beyond it. In - - - in  
20 the Leon case - - - if I'm pronouncing it correctly,  
21 Leon or Leon v. Martinez - - - there was a question  
22 whether - - - about the assignment of future  
23 percentages of a personal injury recovery, and this  
24 court in Leon said, although the assignment itself  
25 was inartfully drafted, and although the complaint

1 and the accompanying affidavit attesting to what had  
2 been agreed to was inartfully drafted, that sufficed  
3 to show a valid assignment.

4 And we sort of have the same thing here. I  
5 mean, looking back, perhaps the declarations of Mr.  
6 Williams and Mr. Shlissel could have been even more  
7 explicit about what exactly happened on that  
8 afternoon of October 4th, but it does remain that  
9 both gentlemen in paragraph 5 of both of their  
10 declarations explain how all parties believed at the  
11 time that along with the notes - - - the transfer of  
12 the notes - - - came all rights, obligations, et  
13 cetera, associated with those notes - - -

14 JUDGE READ: Including tort claims?

15 MR. DALEY: It didn't spell out - - - it -  
16 - - the declarations don't spell out the term, "tort  
17 claim".

18 JUDGE READ: Let me ask you about the  
19 second question. Do you want to talk about that for  
20 a while?

21 MR. DALEY: The fraud question, Your Honor?  
22 Yes, I'd be happy to.

23 JUDGE READ: Yeah.

24 MR. DALEY: Under - - - under this state's  
25 law, we have at least three avenues of getting to

1 Morgan Stanley as a fraudster, even accepting Morgan  
2 Stanley's position that they can't be credited as the  
3 - - - the actual maker of the false ratings. And  
4 that - - - and the first one, of course, is whether  
5 or not Morgan Stanley authorized and caused this  
6 statement to have been made.

7 And of course, they did. They are the ones  
8 that arranged and placed the rated notes. They are  
9 the ones that primed the pump that went out to  
10 prospective purchasers ahead of time and said - - -  
11 and I'm paraphrasing here - - - we've got a great - -  
12 -

13 CHIEF JUDGE LIPPMAN: They caused - - - you  
14 - - - there's - - - there's evidence in the record  
15 that they caused those statements to be made?

16 MR. DALEY: Yes, of course. They are the  
17 ones that - - -

18 CHIEF JUDGE LIPPMAN: Well, where does it -  
19 - - where does it show that?

20 MR. DALEY: I'm going to have to, before my  
21 rebuttal time, dip into the - - - the appendix, but  
22 the - - - I can - - - I can tell you for sure that  
23 the district court made specific findings based on  
24 the evidence - - - which, by the way, they did not  
25 get overturned on appeal - - - that they had actually

1           gone in and - - - these are her words - - -  
2           manipulated the ratings process. They gave false  
3           data to the rating agencies. They insinuated  
4           themselves into the process. They called up or e-  
5           mailed when they didn't see the precise great ratings  
6           that they - - - that they wanted, that they had  
7           promised prospective clients - - - prospective  
8           purchasers were going to be there.

9                         JUDGE STEIN: And - - - and the court said  
10           all that in the context of the aiding and abetting  
11           cause of action, correct?

12                        MR. DALEY: That's correct.

13                        JUDGE STEIN: Okay. So - - - so doesn't  
14           most of our case law, if not all of it, that deals  
15           with - - - that talks in any way about this  
16           authorizing and causing statements to be made, isn't  
17           it usually when the - - - the prime speaker/maker of  
18           the statements makes them through somebody else to a  
19           third party? Rather than here, it's sort of the  
20           reverse.

21                        MR. DALEY: That is certainly one of the  
22           ways you can get to it, but let - - - let's think  
23           about it. Unless - - - and let's think about here, I  
24           mean - - - unless Morgan Stanley actually goes back  
25           to the rating agencies and gets them to change the

1 ratings from BBB or C all the way back up to AAA,  
2 those ratings aren't going to be - - - those ratings  
3 aren't going to come out. The notes will be unable  
4 to have been sold. As we said in our briefing, this  
5 is - - -

6 JUDGE STEIN: But isn't it more like aiding  
7 and abetting?

8 MR. DALEY: Aiding and abetting is only  
9 that they know that there's a fraud being committed.  
10 Here they are actually participants in - - -

11 JUDGE STEIN: Well, they have to do more  
12 than just know. Aiding and abetting presumes some  
13 action on their part, doesn't it?

14 JUDGE RIVERA: Well, who's - - - who's got  
15 the interest in going to AAA?

16 MR. DALEY: Who has the interest?

17 JUDGE RIVERA: I mean, does Moody's have a  
18 particular interest in moving from B to AAA, or is it  
19 really Morgan and Stanley who's got the player  
20 interest in this?

21 MR. DALEY: As the record also sho - - -  
22 stated, Moody's and S&P knew that if they did not  
23 give - - - if they did not acquiesce and give these  
24 ratings, Morgan Stanley would have taken its business  
25 elsewhere.

1 JUDGE RIVERA: So they know their interest  
2 is not in the AAA; their interest is in not losing  
3 this client.

4 MR. DALEY: Exactly. And they're also, as  
5 I - - - or as the record stated - - - they're being  
6 paid three times their normal rate to give these  
7 false ratings. I see the red light is on; I'd like  
8 to reserve two minutes.

9 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll  
10 have your rebuttal time.

11 MR. DALEY: Thank you.

12 CHIEF JUDGE LIPPMAN: Counselor?

13 MR. ROUHANDEH: James Rouhandeh of Davis  
14 Polk & Wardwell for - - -

15 CHIEF JUDGE LIPPMAN: Deal with the - - -  
16 the language issue first as to intent in relation - -  
17 - what does the language here show or not show?

18 MR. ROUHANDEH: Well, there's an absence of  
19 any assignment of tort claim. And under New York  
20 law, for at least a hundred years, it's been  
21 absolutely - - -

22 CHIEF JUDGE LIPPMAN: What's your case?  
23 What's your best case?

24 MR. ROUHANDEH: Fox v. Hirschfeld, but - -  
25 -

1                   JUDGE PIGOTT: Don't you think we ought to  
2 have something better than an Appellate Division  
3 decision that was decided seven years before women  
4 learned of - - - got - - - got the chance to vote, as  
5 to whether or not a husband is signing a - - - a  
6 contract to his wife, somehow set up, you know, the  
7 law for the next hundred years involving securities?

8                   MR. ROUHANDEH: Yes, and that's why in the  
9 Court of Appeals case - - - and the CalPERS case,  
10 essentially came out the same way. My point going -  
11 - - it goes back a hundred years. It's long been the  
12 law in New York.

13                   JUDGE PIGOTT: What about CPC?

14                   MR. ROUHANDEH: CPC is really, I think, a  
15 different issue. Really has to do with the fraud  
16 issue.

17                   JUDGE PIGOTT: Well, the big deal was that  
18 Judge Hancock said that, you know, you're at a 3211  
19 and you take everything that they say to be true.  
20 And if everything they say is true, Morgan Stanley  
21 was committing fraud here. And your argument is,  
22 well, either we committed fraud with these people or  
23 fraud with these people, but because you can't tell  
24 us which one, we walk. And that just doesn't seem to  
25 make sense.

1 MR. ROUHANDEH: That's not our position.  
2 Our position - - - Judge Scheindlin sustained and  
3 denied our summary judgment motion with respect to  
4 aiding and abetting liability. Essentially, what she  
5 did is followed New York law, which has a divide  
6 between direct liability - - - primary fraud  
7 liability - - - and aiding and abetting liability.  
8 That claim is going forward. That claim was allowed  
9 to go forward - - - the aiding and abetting claim.

10 What the court essentially said was, under  
11 New York law - - - my reading of New York law, which  
12 I believe Judge Scheindlin was correct - - - you must  
13 be the maker of the statement; it must be attributed  
14 to you for there to be direct fraud liability.  
15 Whether that's done indirectly through another  
16 person, you still have to make a statement - - -

17 JUDGE PIGOTT: We don't know that yet. I  
18 mean, isn't - - - isn't - - - isn't though, kind of  
19 the point of a 3211 that you haven't even answered in  
20 this case. So - - - so nobody knows what Morgan  
21 Stanley is going to do or say in terms of answer, and  
22 then - - -

23 MR. ROUHANDEH: No, no, we - - - they - - -  
24 I - - - Your Honor, actually it is beyond that stage,  
25 because at the summary - - -



1 JUDGE PIGOTT: It is, but not for us.

2 MR. ROUHANDEH: - - - it was at the summary  
3 - - - yes, it was at the summary judgment stage, so  
4 we had answered. We had moved to dismiss. And we  
5 had then - - - and one - - - some issues lost, some  
6 issues - - - the case then went forward. Years of  
7 discovery - - - absolutely years of discovery. Judge  
8 Scheindlin had this case - - - she had all the  
9 evidence arrayed in front of her, and she said, when  
10 I look at the evidence, they don't state a claim,  
11 there isn't evidence of Morgan Stanley making a  
12 statement, so they're - - - they can't be liable as -  
13 - - as a - - - under direct fraud, but there is  
14 evidence of aiding and abetting liability.

15 JUDGE PIGOTT: Can - - - could you explain  
16 that, making a statement? As I read this, I thought,  
17 what happened here was that Morgan Stanley talked to  
18 Moody's and S&P, and - - - I mean, maybe they didn't  
19 get on the phone and say, you know, raise these  
20 rates, but - - - but among them, they made it clear  
21 that - - - that they needed these - - - these AAAs in  
22 order to sell this stuff.

23 MR. ROUHANDEH: Well, that - - - yeah.  
24 That's classic aiding and abetting - - - allegations  
25 of aiding and abetting liability.

1 JUDGE PIGOTT: Well, unless you inspired  
2 it. Unless - - - unless you - - - you were the - - -  
3 the principal that - - - that began it.

4 MR. ROUHANDEH: No, even - - - even so, I  
5 think, in - - - for example, in the CPC, that  
6 McKesson case, there the - - - the defendant made a  
7 statement, and the court articulated the standard for  
8 fraud as the making of a statement and a statement  
9 that's attributed to the defendant. Here there was  
10 no statement attributed.

11 JUDGE PIGOTT: But - - -

12 MR. ROUHANDEH: Again, Judge Scheindlin - -  
13 -

14 JUDGE PIGOTT: The - - - the difference I -  
15 - - as I understand what - - - what you're saying is,  
16 if S and - - - let's take - - - let's just take  
17 Moody's. If Moody's, you know, improperly rated  
18 these, all right, you - - - you're going to be liable  
19 only if you assisted them in - - - in - - - aided and  
20 abetted them in - - - in raising the - - - the  
21 rating?

22 And what they want to say is, you're the  
23 one that did it. You - - - you're the one that went  
24 to Moody's and you said, you know, we can't sell  
25 these things unless you've got a AAA rating, and by

1 the way, you know, there's money in it for you if you  
2 do that.

3 MR. ROUHANDEH: So the "did it" has to be  
4 the making of a statement for there to be direct  
5 liability under the law - - -

6 JUDGE PIGOTT: Can it be conduct?

7 MR. ROUHANDEH: - - - in - - - in New York,  
8 even under McKesson in that case, which - - - or CPC;  
9 there, there was - - - the Court of Appeals outlined  
10 the principals and the elements of a fraud claim.

11 JUDGE PIGOTT: But conduct, though? You  
12 say - - - you said there's no statement, but can - -  
13 - can there be conduct?

14 MR. ROUHANDEH: No, there must be a  
15 statement. Deception is - - - it's - - - it's - - -  
16 in fact, the New York - - - the common law fraud, and  
17 especially in New York, is - - - form the basis for  
18 this - - -

19 JUDGE RIVERA: But - - - but I'm - - -

20 MR. ROUHANDEH: - - - federal securities  
21 law where deception is basically the same.

22 JUDGE RIVERA: - - - I'm Morgan Stanley. I  
23 can't - - - I can't make the statement because the  
24 statement has to come from "independent assessor"  
25 who's going to give it either the B or less or the

1           AAA. And I turn to that particular alleged  
2           independent entity and I say, this is what I want to  
3           see. But I can't make the statement, because it has  
4           to come from you.

5                       MR. ROUHANDEH: Right.

6                       JUDGE RIVERA: Why - - - why would that not  
7           fall - - -

8                       MR. ROUHANDEH: Be - - -

9                       JUDGE RIVERA: - - - within a measure of  
10          fraud?

11                      MR. ROUHANDEH: Because under New York law,  
12          there has been - - - and now there is under federal  
13          law - - - a very clear distinction between a primary  
14          liability and aiding and abetting liability. It's a  
15          comprehensive scheme. This isn't a situation where a  
16          party - - - an aider and abettor can escape  
17          liability.

18                      JUDGE RIVERA: Well - - - well, I see  
19          Moody's as being the aider and abettor. But you're -  
20          - - Morgan Stanley, according to these allegation, is  
21          the one who wants the AAA, the one who benefits from  
22          the AAA. They're the engine that drives the AAA.

23                      MR. ROUHANDEH: But un - - - under the law  
24          - - - under New York, you have to be the maker of the  
25          statement.

1                   JUDGE RIVERA: They - - - but they  
2 facilitate that, right, through the use of this,  
3 again, alleged independent entity.

4                   MR. ROUHANDEH: Right. But - - - but to  
5 change the law - - - because I think it would be a  
6 change of the law - - - to say that in that  
7 circumstances Morgan Stanley would be liable, would  
8 open the floodgates to litigation where lawyers - - -

9                   JUDGE PIGOTT: No, no, no.

10                  MR. ROUHANDEH: - - - and accountants - - -

11                  JUDGE PIGOTT: No, no, no. I - - - I'm  
12 still missing this. Moody's is - - - you know, all  
13 they do is paint signs. You know, you say, I want a  
14 sign; they paint a sign. They don't care, you know,  
15 whose sign it is, what it's for or anything else.  
16 Rate these things. And - - - and that's all they do.

17                  And you want to say, well, because that's  
18 what they're doing - - - they're doing this  
19 ministerial act - - - we can't be held responsible,  
20 because they're the ones who painted the sign. The  
21 fact that we asked for the sign, the fact that we  
22 told them, you know, what color to paint the sign,  
23 all that - - - all we're doing is aiding and abetting  
24 them in making the sign. And I don't think that's  
25 the law in the State of New York.

1 MR. ROUHANDEH: I - - - I beg to differ,  
2 Your Honor.

3 JUDGE PIGOTT: You - - -

4 MR. ROUHANDEH: I think it was, you know,  
5 as recently as the - - - as the CPC case. And I  
6 don't think - - - they've not stated - - - Judge  
7 Scheindlin looked through the law; we've looked  
8 through the law. There isn't a New York - - -  
9 certainly, not a New York Court of Appeals case - - -  
10 where somebody - - -

11 JUDGE PIGOTT: Let's assume for a minute -  
12 - -

13 MR. ROUHANDEH: - - - has ever been liable  
14 for not - - - if they didn't make a statement. Ever.

15 JUDGE PIGOTT: Assume - - - assume the  
16 facts of the - - - that at least Judge - - - Judge  
17 Rivera and I are - - - are talking about, where - - -  
18 where you guys say, this is what we want. You're  
19 sitting around in your - - - in your office and  
20 saying, we need these ratings. And Morgan Stanley  
21 says, by God, we're going to get them somehow. And  
22 you go and you - - - and you get them. And you're  
23 saying, we never made a statement; never made a  
24 statement. You can't get us. I don't think that's  
25 the law.

1 MR. ROUHANDEH: Well, you - - - you can't  
2 say you can't get us, because under that theory,  
3 which isn't the case here, but under that set of  
4 facts, it would be aiding and abetting liability  
5 under New York - - -

6 JUDGE PIGOTT: But no, you see, Moody's is  
7 going to say, we didn't do a damn thing. All we did  
8 is what we were supposed to do. And you got to prove  
9 that we didn't rate these right or that - - -

10 MR. ROUHANDEH: That - - -

11 JUDGE PIGOTT: - - - or that the model we  
12 used was wrong, and - - - and if you can't prove  
13 that, we win, and - - - and MS walks.

14 MR. ROUHANDEH: Your Honor, that's not this  
15 case. That's - - - the allegation was that Moody's  
16 and S&P committed fraud, that they knew that their  
17 ratings were false. This isn't a case - - - that's  
18 not how the facts played out. This was years and  
19 years of discovery, and Judge Scheindlin determined,  
20 well, you're alleging that S&P and Moody's  
21 independently didn't believe the opinions that they  
22 were giving, that they knew them to be fraudulent and  
23 - - -

24 JUDGE STEIN: What about omission  
25 liability?

1 MR. ROUHANDEH: Omission liability?

2 JUDGE STEIN: Yeah, why - - - why doesn't -  
3 - - why wouldn't that apply here?

4 MR. ROUHANDEH: It - - - there would be  
5 omission liability if there were fiduciary duty. I  
6 think the law's been clear - - -

7 JUDGE STEIN: Well, no, about a special  
8 knowledge - - - the - - - the - - - - exception?

9 MR. ROUHANDEH: Again, that - - - the  
10 special facts doctrine, which I don't believe this  
11 court has ever adopted, but even if the court were to  
12 adopt it, I don't think it applies here for a couple  
13 of reasons. One is, it never went to Judge  
14 Scheindlin. She never had the opportunity to address  
15 it. It didn't come up on appeal, and they're raising  
16 it here new for the first time, which is probably the  
17 most inappropriate place to raise it.

18 But in any event, one of the elements is,  
19 you have to know that the party - - - that another  
20 party is relying on you and your specialized  
21 knowledge. And there were no facts that have been  
22 alleged to meet that particular element. So it's  
23 really pulling out of thin air this - - - this  
24 special - - - this new claim or new theory of  
25 liability that hadn't been presented to the - - -



1                   JUDGE STEIN: Do you - - - you mean to say  
2 that - - - that Morgan Stanley didn't know that the  
3 people that were investing in these - - - in these  
4 securities were relying on the rating?

5                   MR. ROUHANDEH: Yes. And in fact, the - -  
6 - Judge Scheindlin determined that fact.

7                   JUDGE RIVERA: What's the point of the  
8 rating?

9                   MR. ROUHANDEH: Judge Scheindlin - - -

10                  JUDGE RIVERA: What's the point of having  
11 ratings if you're not relying on them?

12                  MR. ROUHANDEH: Judge Scheindlin determined  
13 this fact in - - -

14                  JUDGE RIVERA: Why am I going to put money  
15 into something that's really B instead of a AAA? Why  
16 - - - why am I doing that?

17                  MR. ROUHANDEH: Because not - - - because  
18 not every - - - this was the ground for the court  
19 denying class certification. The judge said, it's  
20 not true that all parties rely on ratings. Some rely  
21 on them; some rely on them a little; some don't rely  
22 on them at all. There were facts presented of - - -

23                  JUDGE FAHEY: You can't even - - - you  
24 couldn't even go to market with these unless they are  
25 related (sic) A or above, could you?

1                   MR. ROUHANDEH: You could go to market. It  
2 would be - - - it depended on who could invest - - -

3                   JUDGE FAHEY: They would just be  
4 unsaleable.

5                   MR. ROUHANDEH: Some parties - - - well,  
6 no, some parties could invest and other parties  
7 couldn't invest, depending on AAA, but this, again,  
8 was an issue that's - - - this is a very fact-  
9 specific issue, that by the way, the Court need not  
10 address if there's no standing, but - - -

11                  JUDGE FAHEY: No, let's go back a second to  
12 the - - -

13                  MR. ROUHANDEH: Sure.

14                  JUDGE FAHEY: I - - - I just want to go  
15 back to standing a second on Commerz. And - - - and  
16 Judge Pigott's point, I thought, was particularly  
17 relevant. We're talking about applying a 19th  
18 century standard, in essence, requiring an expressed  
19 provision for a transfer of this particular claim  
20 that's set out in a deed case from 1913.

21                  And you want to say that that's consistent  
22 in a law in the 21st century, where - - - I think you  
23 have a problem even showing that this encompasses the  
24 entire contract - - - the assignment itself  
25 encompasses the entire contract.

1           They have some weaknesses on their side,  
2 obviously, too, but that fundamental policy question,  
3 which is what this court should be concerned with,  
4 about protecting commercial transactions and making  
5 sure they're both honest and accurate, seems to me at  
6 the heart of this. And I want you to address that.

7           MR. ROUHANDEH: The - - - the - - - whether  
8 it's a contract - - - well, first let me say, it's  
9 the plaintiff's burden.

10          JUDGE FAHEY: Well, what I'm saying is it's  
11 - - - it's a writing - - -

12          MR. ROUHANDEH: Right.

13          JUDGE FAHEY: - - - and it's a purchase  
14 order, and - - - and it appears - - - and there's an  
15 argument that it's - - - it's a purchase order that's  
16 been supplemented with oral communications and  
17 agreements and - - - and so the quality of that proof  
18 is a whole other question. I already pointed out to  
19 them, I thought it was four years later that they  
20 brought up the quality of this proof, so - - -  
21 nonetheless, it is what it is.

22          MR. ROUHANDEH: Well, the - - - the - - -  
23 the - - -

24          JUDGE FAHEY: But that doesn't get away  
25 from the underlying issue in Fox, which is, how could

1 this standard possibly be sufficient to deal with the  
2 commercial transactions that cover 21st century New  
3 York State?

4 MR. ROUHANDEH: It is, and in fact, Fox is,  
5 you know - - - they - - - one of the oldest cases,  
6 but it comes all the way up through CalPERS. And it  
7 gives exactly what the law should be which is the  
8 contracting parties had the right, the opportunity to  
9 obtain the tort claim - - -

10 JUDGE PIGOTT: But do you distinguish - - -

11 MR. ROUHANDEH: - - - if they wanted.

12 JUDGE PIGOTT: You're talking about torts.  
13 Do you - - - let's assume for a minute that somebody  
14 buys a car for their daughter, all right. And they -  
15 - - and they assign the car. They've given them the  
16 car. The air bag goes off and it's defective, and -  
17 - - and the daughter's badly hurt.

18 Is there a defense by the air bag people to  
19 say, she has absolutely no standing. You know, when  
20 - - - when dad gave her the car, he did not transfer  
21 to her any tort rights, because there's nothing  
22 there. All you got is the registration, the  
23 certificate of title turnover, and that does not  
24 include the right to tort, so she can't sue for her  
25 damages under tort law.

1 MR. ROUHANDEH: No. That - - - that - - -  
2 there would be a product liability and that - - -

3 CHIEF JUDGE LIPPMAN: It's still a tort.

4 MR. ROUHANDEH: That - - - that would run  
5 to - - the pro - - - she would have a product  
6 liability claim that would - - - and she would have  
7 an action directly against the manufacturer of an  
8 unsafe product.

9 JUDGE PIGOTT: Why wouldn't he have it?  
10 Why wouldn't the father have it?

11 MR. ROUHANDEH: Because - - -

12 JUDGE PIGOTT: He's the one that owned the  
13 car.

14 MR. ROUHANDEH: The - - - the father might  
15 have a difference in purchase price. But the law - -  
16 - what they - - - a position that is being advocated  
17 is, every time I sell a security now, the law for a  
18 hundred years, whether it's under Fox or otherwise -  
19 - - now, every security sold in New York, which is a  
20 lot of securities through the exchanges, every time a  
21 security is sold in New York, a tort claim travels  
22 with it. That has never been the law ever.

23 JUDGE PIGOTT: What that means is that if  
24 you're - - - if you're going to get subprime  
25 mortgages and bank - - - and - - - and bundle them up

1 and sell them to somebody, you may be responsible if  
2 you weren't careful.

3 JUDGE FAHEY: Yeah, and prior to - - -

4 MR. ROUHANDEH: No, it's - - -

5 JUDGE FAHEY: - - - MacPherson v. Buick, we  
6 didn't have products liability claims too, so - - -

7 MR. ROUHANDEH: It's going to be - - -

8 JUDGE FAHEY: - - - that's why I'm asking  
9 you, because that's - - -

10 MR. ROUHANDEH: Yes.

11 JUDGE FAHEY: - - - really at the heart of  
12 this.

13 MR. ROUHANDEH: Yes.

14 JUDGE FAHEY: This is a bigger question  
15 than this particular case. It - - - it has more  
16 profound implications, and it could have the kind of  
17 implications that that case had.

18 MR. ROUHANDEH: Right. If you sell an IBM  
19 stock, you send - - - sell GE stock and - - - or a  
20 debt, then from now on, the - - - the rule that's  
21 being advocated by - - - by the appellant here is  
22 that even though no party ever wrote down tort claims  
23 are going to go with it, they do automatically travel  
24 with the - - -

25 JUDGE RIVERA: Well - - -

1                   JUDGE ABDUS-SALAAM: Is there something we  
2 could look at besides the language itself? What  
3 about the - - - as you mentioned - - - the price of  
4 the stock? If it's sold without any discount for  
5 value, even though the seller knows that now that  
6 stock is virtually worthless, and the buyer also  
7 knows that, can we look at that?

8                   MR. ROUHANDEH: Well, I - - - here in this  
9 case, no, there's no inference that should be made  
10 from the purchase at - - - at a hundred cents on the  
11 dollar, because as the declarations make clear in the  
12 record, that was done as a matter of federal law that  
13 was required to purchase.

14                  JUDGE STEIN: That's only if they choose to  
15 pur - - - chose to purchase this.

16                  MR. ROUHANDEH: If they did choose to  
17 purchase, and what this does is it basically leaves  
18 the contracting parties the opportunity to negotiate,  
19 like any other provision in the contract. This is no  
20 different than any other provision in the contract.  
21 You've got to negotiate for it. You have to come to  
22 a meeting - - -

23                  JUDGE RIVERA: Okay, so let - - - let - - -  
24 let me - - -

25                  MR. ROUHANDEH: - - - of minds and write it

1 down.

2 JUDGE RIVERA: - - - because you raised  
3 CalPERS. So let's talk about CalPERS for one moment,  
4 because at least it's - - - it's a - - - in this  
5 century. So CalPERS, as I take it, that citation to  
6 Fox is what I asked your - - - your adversary. It  
7 says "The assignment did not include a cause of  
8 action arising outside the loan documents  
9 themselves". And it cites to Fox. It's again to  
10 this point that if the assignment is referencing  
11 either materials or the type of claim that is dehors,  
12 the actual underlying source of the assignment, that  
13 that is not covered in the assignment.

14 MR. ROUHANDEH: Right, here, there's just a  
15 - - - there's just a purchase and a sale, whether  
16 it's reflected in that contract. If it's reflected  
17 in that letter agreement, which we believe is a  
18 contract, it's, in essence, a trade confirmation.  
19 The contract is formed when the payment is made, and  
20 it's a completed contract. No language whatsoever.  
21 If - - - and there's no language anywhere else.

22 JUDGE RIVERA: But isn't - - - isn't this  
23 about what it means when - - - when they purchase the  
24 notes and the trans - - - and the notes are  
25 transferred to Dresdner or whoever and - - - and then



1           they now own these - - - the company that owns the  
2           notes -- isn't it about what this means, that you  
3           paid for these notes, whether or not - - - that's  
4           dehors - - - the assignment? Isn't that what we're  
5           talking about at the end of the day?

6                     MR. ROUHANDEH: Yeah, the quest - - - the  
7           question is - - - right, and it has broad  
8           implications. Every security, if I buy a car, if I  
9           buy a product, does the tort claim that the seller  
10          had travel with it?

11                    CHIEF JUDGE LIPPMAN: Okay, counsel.

12                    MR. ROUHANDEH: Not automatically.

13                    CHIEF JUDGE LIPPMAN: Thanks, counsel.

14           Let's hear rebuttal from the other side.

15                    What about your - - - your adversary's last  
16           argument? That in every securities transaction,  
17           that's what's going to happen. Is that good or bad?

18                    MR. DALEY: That is not what's going to  
19           happen as - - -

20                    CHIEF JUDGE LIPPMAN: Why - - - what if it  
21           did happen? Would that be a terrible thing?

22                    MR. DALEY: It wouldn't - - - is more  
23           honesty in the marketplace a terrible thing? I don't  
24           think so.

25                    JUDGE PIGOTT: Well, no, I - - - his point,

1 I think, is if I - - - if I buy GM stock today and I  
2 - - - and I don't find out about the ignition thing  
3 until tomorrow, I can accuse my broker of fraud,  
4 because now I've - - - you know, I've bought a  
5 lawsuit.

6 MR. ROUHANDEH: I think that's a lot more  
7 attenuated then - - - then the facts in front of this  
8 court right now. Now, as Judge - - -

9 CHIEF JUDGE LIPPMAN: Why? Why isn't this  
10 a simple transaction? Why does the tort claim go  
11 along with it?

12 MR. DALEY: The tort claim goes along with  
13 it, because as I said in my presentation-in-chief,  
14 let - - - sorry, let's go back to another century.  
15 The Griffey case said when you purchase - - - when  
16 you transfer the entirety of the object, of - - - of  
17 the chattel, everything comes along with that, unless  
18 it is in someway qualified. This was unqualified.

19 CHIEF JUDGE LIPPMAN: You don't think this  
20 is changing the law of New York to take your  
21 position?

22 MR. DALEY: I don't think it's changing the  
23 law of New York, not at all, because the law of New  
24 York has been - - - has - - - as has been repeated in  
25 many of the cases that we cite in our brief say that

1 when it's an unqualified transfer, it can encompass  
2 something beyond just this - - - the pure words in -  
3 - -

4 CHIEF JUDGE LIPPMAN: If there's language  
5 of intent, but there's - - - there's no language of  
6 intent here.

7 MR. DALEY: And in that case, we do what  
8 the Second Circuit said, which is we are properly in  
9 this case allowed to look at the extrinsic - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but that goes  
11 to the first question that - - - that really - - - or  
12 asked on the first series of questions; you're - - -  
13 you're arguing that without the language of intent,  
14 you go outside to try and find it?

15 MR. DALEY: If the - - - if the absence of  
16 the language of intent makes what we're calling the  
17 contract ambiguous, yes. Sometimes there's no  
18 language in a contract - - -

19 CHIEF JUDGE LIPPMAN: What's ambiguous - -  
20 -

21 MR. DALEY: - - - and it's very clear.

22 CHIEF JUDGE LIPPMAN: - - - about this  
23 language here?

24 MR. DALEY: Are you referring to the  
25 confirmation letter? That - - - that's not the

1 contract, Your Honor. That is not the contract.  
2 That's - - - that's a post - - - that's a four - - -  
3 four days after the agreement was reached. It's only  
4 signed by one half of the contracting parties.

5 JUDGE READ: So the contract is all oral?

6 MR. DALEY: It appears that it - - - that  
7 it was.

8 JUDGE RIVERA: So I'm a little bit - - -

9 JUDGE FAHEY: So you're saying this isn't  
10 part of the contract? I'm sorry, Judge - - - you're  
11 saying this isn't part of the contract?

12 MR. DALEY: That it - - -

13 JUDGE FAHEY: I gather the October 8th,  
14 2007 confirmation?

15 MR. DALEY: That is a - - - that is four  
16 days after that - - - that particular piece of paper  
17 references the agreement reached four days earlier.

18 JUDGE FAHEY: And it's signed by Smith and  
19 Williams.

20 MR. DALEY: Who are both on one side of the  
21 - - -

22 JUDGE FAHEY: Yeah. Excuse me, Judge, I  
23 didn't mean to interrupt you. Go ahead.

24 JUDGE RIVERA: No, it's okay.

25 JUDGE FAHEY: I apologize.

1                   MR. DALEY: And - - - and Judge Fahey, you  
2 were correct when you said there were bigger  
3 questions at stake here.

4                   JUDGE FAHEY: Well, obviously, but it cuts  
5 the other way, too, the big questions. For instance,  
6 Commerz, I'm assuming they knew what they were buying  
7 here. When they bought this, they knew that - - -  
8 because - - - because they - - - they were buying  
9 from Dresdner, and Dresdner had - - - had bailed out  
10 the money market funds through DAF, they knew what  
11 they were buying.

12                   So - - - so that they knew that these were  
13 defective bonds, so are - - - there was a defective -  
14 - - an argue - - - at least, arguably a fraud  
15 problem. So if there was, why wasn't there something  
16 express put in this agreement, or at least an  
17 affidavit that says, we discussed - - - but that  
18 isn't there.

19                   MR. DALEY: Well, Your Honor, when you - -  
20 - when you refer to Commerzbank, Commerzbank is the  
21 third leg of this transaction. They were the ones  
22 that - - -

23                   JUDGE FAHEY: No, I got - - - I got that.  
24 I got that.

25                   MR. DALEY: Yes.

1 JUDGE FAHEY: I got that.

2 JUDGE RIVERA: Okay.

3 JUDGE FAHEY: But you're saying they didn't  
4 know what they were buying?

5 MR. DALEY: When you say "they", you mean  
6 Dresdner?

7 JUDGE FAHEY: I - - - no, I mean  
8 Commerzbank.

9 MR. DALEY: Commerzbank, well, first - - -

10 JUDGE FAHEY: We're talking standing now.  
11 Therefore they - - - if they knew what they were  
12 buying when they bought Dresdner, and that Dresdner  
13 had been in the transaction before with DAF when they  
14 bailed out their money market fund, assuming they  
15 knew all these things, and they're sophisticated  
16 commercial transactions, that being the case, why  
17 wouldn't you explicitly put in a purchase agreement -  
18 - - or at least have an affidavit that said, we  
19 discussed this explicitly, but we don't have that.

20 MR. DALEY: We don't have that. We have -  
21 - - we have the merger into Commerzbank as - - - as  
22 an operation of German law. They didn't think - - -

23 JUDGE FAHEY: That's true.

24 MR. DALEY: - - - they had to do it. And I  
25 believe - - -

1 JUDGE FAHEY: No, no, I understand that  
2 point.

3 MR. DALEY: All right.

4 JUDGE FAHEY: They - - - they might have  
5 assumed under German law. Yeah, I understand that.

6 MR. DALEY: And - - -

7 JUDGE RIVERA: Now just to - - - to  
8 clarify, although obviously we - - - we are free to  
9 change the question that is asked. But as I  
10 understand the Second Circuit's first certified  
11 question, they're asking about - - - they're asking  
12 based on the declarations and the documentary  
13 evidence presented by Commerzbank, which included the  
14 supplemental information. Is that not the tenor of  
15 this question?

16 MR. DALEY: Exactly.

17 JUDGE RIVERA: And we are to assume - - -  
18 we could change the question.

19 MR. DALEY: I understand that.

20 JUDGE RIVERA: But as presented to us is,  
21 you have to look also at what Commerzbank has  
22 presented through its supplemental documentation,  
23 which is - - -

24 MR. DALEY: I - - - I believe that was - -  
25 -

1 JUDGE RIVERA: - - - external to the  
2 limited language - - -

3 MR. DALEY: Agreed.

4 JUDGE RIVERA: - - - which we were first  
5 talking about.

6 MR. DALEY: Agreed. But I think implicitly  
7 that's a nod to the New York case law that says, you  
8 don't just look at the words. You're also allowed to  
9 consider acts and circumstances.

10 JUDGE STEIN: Okay. That is if there are  
11 words. And - - - and my question to you is, are you  
12 saying that where there is a written contract, then  
13 we look at what the words say, and if they don't  
14 specifically say - - - which is what our law is, if  
15 they don't say that it comes with tort claims or if  
16 something - - - or that it's transferring the  
17 entirety of the asset or something like that, then  
18 it's no good. But if there's no language at all,  
19 then it doesn't matter that there was nothing said.  
20 We can go in and find that it - - - that that was  
21 their subjective intent.

22 MR. DALEY: This to me appears to be - - -

23 JUDGE STEIN: Is that - - - is that what  
24 you're saying?

25 MR. DALEY: - - - there's no language at



1 all. We have to go back - - -

2 JUDGE STEIN: I understand.

3 MR. DALEY: - - - and - - - and try to  
4 reconstruct what happened on October 4th, 2007, and  
5 we have - - -

6 JUDGE STEIN: You're saying where there's  
7 no written agreement, it's easier to find that the  
8 fraud cause of action was transferred, than if there  
9 is a written agreement that - - -

10 MR. DALEY: If there were a written  
11 agreement here - - - I mean, boy, do I wish it had -  
12 - - there were a written agreement that had spelled  
13 out precisely what was going with the note. But  
14 again, and I hate to sound like I'm beating this dead  
15 horse, but we need to consider what was happening at  
16 the time. It was the transfer of 120 million dollars  
17 of notes that were certainly not worth 120 million.  
18 What sophisticated financial entity in his right mind  
19 - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel - - -

21 MR. DALEY: - - - would pay - - -

22 CHIEF JUDGE LIPPMAN: - - - we - - - we  
23 understand both of your arguments.

24 MR. DALEY: Thank you.

25 CHIEF JUDGE LIPPMAN: Thank you.

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

Appreciate it.

(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 Commonwealth of Pennsylvania Public School Employees' Retirement System v. Morgan Stanley & Co., Incorporated, No. 104, 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: June 8, 2015