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COURT OF APPEALS
STATE OF NEW YORK

KASOWITZ BENSON,

Respondent,

-against-

JPMORGAN CHASE,

Appellant.

NO. 99

20 Eagle Street
Albany, New York
October 16, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
ASSOCIATE JUSTICE ANDREW G. CERESIA

Appearances:

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Raven Wood
Official Court Transcriber

1 CHIEF JUDGE WILSON: Last case on this
2 afternoon's calendar is Kasowitz Benson v. JPMorgan Chase.
3 And we're delighted to be joined by our colleague Justice
4 Ceresia for this appeal.

5 Counsel?

6 MR. SCHOENFELD: Good afternoon, Your Honor. May
7 it please the Court. The Appellate Division gave three
8 reasons why JPMorgan could not challenge the basis for the
9 Dakota's claimed attorney's fee lien. All of them are
10 indefensibly wrong under this court's precedent and Supreme
11 Court precedent. And this court should vacate and remand
12 for a decision on the merits. First, the court held that
13 JPMorgan was precluded because it was in privity with
14 Fletcher as the assignee of his shares in The Dakota. But
15 this court made entirely clear in Gramatan, consistent with
16 centuries of case law from every court to have addressed
17 the issue, that an assignee is bound only by a judgment
18 entered prior to the assignment. Chase obtained its
19 assignment from Fletcher seven years before the fee
20 judgment was entered.

21 JUDGE RIVERA: Can we discuss the nature of that
22 agreement, please? Because he raises questions about the
23 nature of this agreement.

24 MR. SCHOENFELD: So I think, Your Honor, you're
25 asking about the recognition agreement?

1 JUDGE RIVERA: Yes, correct.

2 MR. SCHOENFELD: So I don't think the recognition
3 agreement has anything to do with the assignment. The
4 recognition agreement is a three-party agreement between
5 the Dakota, JPMorgan, and Fletcher. And all it does is it
6 acknowledges that there's a lien in place as of the time of
7 the assignment in 2008. Under Gramatan, that has nothing
8 to do with whether JPMorgan is bound as the assignee.

9 JUDGE RIVERA: But doesn't Chase understand that
10 The Dakota has a superior position on the debts and it has
11 an inferior position. And that that is what this - - -
12 that agreement and the assignment that is part of that,
13 that they understand that they are inferior to that?

14 MR. SCHOENFELD: With respect to the lien, any
15 lien that existed at that point in time. Gramatan is
16 entirely - - -

17 JUDGE RIVERA: Why does it have to already have
18 existed?

19 MR. SCHOENFELD: Because what - - -

20 JUDGE RIVERA: That's my point. I'm not sure I'm
21 reading Gramatan the way you do, because if you understand
22 that if there is a debt, Dakota has a superior position;
23 that's moving forward. Now, if you want to argue that they
24 didn't have notice of it, I'm happy to hear that. But I'm
25 having a little bit of difficulty with the argument that

1 even though they understand this superior, inferior status,
2 that they had to know already about every single debt that
3 had already been incurred.

4 MR. SCHOENFELD: They do have to know about the
5 debt that's incurred because you take property standing in
6 the shoes of the assignor. And if there's no debt - - -

7 JUDGE RIVERA: Yes, but they're not like a - - -
8 it's not a pure assignment in that sense, an assignment
9 where Fletcher walks away, right? Fletcher still has an
10 interest, right?

11 MR. SCHOENFELD: Right, that - - - that certainly
12 - - -

13 JUDGE RIVERA: So they are - - - they have co
14 interests.

15 MR. SCHOENFELD: So that certainly doesn't
16 matter. And let me make two points.

17 JUDGE RIVERA: Why doesn't that matter?

18 MR. SCHOENFELD: Well, can I address the first
19 part of the question?

20 JUDGE RIVERA: Sure. Of course.

21 MR. SCHOENFELD: So I think the recognition
22 agreement only matters with respect to contractual privity
23 and not - - - not nonparty privity. There's - - -

24 JUDGE HALLIGAN: Why is that?

25 MR. SCHOENFELD: Because there's nothing about



1 the recognition agreement that contravenes or countermands
2 the rule that an assignee only takes - - - is only bound by
3 pre-assignment estoppel. So Gramatan speaks very
4 explicitly about what matters is the dispute. The dispute
5 giving rise to the liability has to attach before the
6 assignment. It's not simply the existence of some
7 hypothetical lien or even a lien that exists at that point
8 in time.

9 JUDGE RIVERA: Yes, but that makes sense, if,
10 again, the assignor is indeed assigning all of their
11 interest.

12 MR. SCHOENFELD: So - - -

13 JUDGE RIVERA: It makes complete sense.

14 MR. SCHOENFELD: - - - Your Honor, we cite plenty
15 of case law, including the restatement which this court has
16 adopted, the Restatement of Judgments on Privity, which
17 says that even where you have a shared property interest,
18 so mortgage mortgage, mortgage or mortgagee, tenant lessee,
19 it doesn't matter to the question of whether a nonparty can
20 be bound under estoppel principles as a matter of nonparty
21 preclusion. So even when the interest is something less
22 than a full and complete assignment, it still doesn't
23 matter.

24 JUDGE RIVERA: But that does involve a situation
25 where you have parties that by the UCC The Dakota has a

1 superior status?

2 MR. SCHOENFELD: Absolutely, I don't think it
3 matters at all whether you have a mortgage or mortgagee
4 that has a recognized statutory superior interest, has
5 nothing to do with whether as a matter of due process
6 principles, an assignee can be bound by a post assignment
7 judgment against the assignor. And that is true, again,
8 and we cite all of these - - - the treatises and also the
9 case law in our reply brief. That is true regardless of
10 the nature of the property interest, even if there's a
11 shared interest, even if they are contemporaneous holders
12 of the same property with respect to the security interest,
13 the same due process principles apply with respect to
14 nonparty privity. So the - - - as I noted - - -

15 JUDGE RIVERA: Why don't you address whether or
16 not Chase had notice of the Fletcher action?

17 MR. SCHOENFELD: So I think Chase was aware of
18 the Fletcher action. The Fletcher action was filed in
19 2011, I believe. And then the proceedings with respect to
20 the fee claim were in 2015, but it didn't have notice of
21 until the fee judgment was entered, and recall that the
22 Article 52 proceedings were already going on as of 2015.
23 It had no notice that the Dakota was going to use this fee
24 judgment to prime the lien and the Article 52 proceedings.
25 There was one email where counsel for the Dakota sent as a

1 courtesy, upon request from Chase's notice, a copy of
2 papers asking for entry of the fee judgment. But that said
3 nothing about the fact that they were going to attempt to
4 use that fee judgment to enter - - - to essentially prime
5 the lien and the Article 52 proceedings. And in any event,
6 it doesn't matter. I mean, Taylor v. Sturgell is quite
7 clear that mere notice of other proceedings is not a
8 sufficient basis to bind a nonparty through preclusion
9 principles.

10 JUDGE RIVERA: It does seem that the actual
11 merits issue has been addressed by more than one judge.
12 Why is it you're not actually seeking more than one bite at
13 this apple?

14 MR. SCHOENFELD: We're entitled to unencumbered
15 appellate review of that question, and we've never gotten
16 it. We didn't get - - -

17 JUDGE RIVERA: And you think the - - - I'm sorry,
18 on the motion to vacate and to intervene that somehow that
19 is encumbered; you won't be able to get to the merits - - -

20 MR. SCHOENFELD: Precisely.

21 JUDGE RIVERA: - - - even though the judge did.

22 MR. SCHOENFELD: Precisely. I mean - - -

23 JUDGE RIVERA: Why is that?

24 MR. SCHOENFELD: Because there's nothing
25 obligating the Appellate Division in that second appeal

1 from not deciding - - - the intervention and motion to
2 vacate were denied in their entirety. The appellate - - -

3 JUDGE RIVERA: After going through the merits.
4 Not on a timeliness issue, not - - - not for any reason.

5 MR. SCHOENFELD: Correct. But the motion - - -
6 the motion was denied. And so there's nothing stopping the
7 Appellate Division in this currently pending not fully yet
8 briefed appeal from saying, no, we deny it; intervention
9 was untimely. No, we deny it; you don't meet the standard
10 for 5015.

11 JUDGE RIVERA: You don't think the prior panel
12 indicating that that was your path would be enough to
13 do - - - to send that signal to bind - - -

14 MR. SCHOENFELD: I don't - - -

15 JUDGE RIVERA: - - - law of the case?

16 MR. SCHOENFELD: I don't, Your Honor. But I - -
17 - I would also say that I think we would be satisfied with
18 a judgment from this court that essentially directed the
19 Appellate Division in the subsequent proceedings to address
20 that question in the first instance, unencumbered by any of
21 the procedural barriers. All we're asking for here is one
22 unfettered chance at appellate review of a question, which
23 I think is, at the very least, a closed question. I mean,
24 I won't get into the merits unless the court's interested,
25 but the reading of the plain language of the statute,

1 particularly in light of the explanatory note which is
2 contemporaneous - - - which was presented contemporaneously
3 and contiguously to the voters on The Dakota shares, makes
4 very clear exactly what The Dakota meant.

5 That's all we're asking for. One clean shot to
6 persuade the Appellate Division, that and possibly this
7 court, that were right on that. And we've just been denied
8 that. And I think the critical point is there is nothing
9 in the Appellate Division's decision depriving us of that
10 opportunity that is defensible under New York or Supreme
11 Court case law. It gave three reasons, each one is flatly
12 inconsistent with New York and Supreme Court case law. I
13 mentioned the first, which is that JPMorgan was precluded
14 because it's in privity with Fletcher. I think that's
15 entirely clearly wrong under Gramatan. And I think for all
16 of the reasons that The Dakota gives in its answering
17 brief, we address them in our reply brief. There's simply
18 nothing that gives an exception in these circumstances,
19 from what is a pretty categorical rule that an assignee
20 only takes - - -

21 JUDGE RIVERA: Let me ask you, if Chase actually
22 knew early enough that it could have done something - - - I
23 take your point that they really didn't know. Okay. Would
24 that matter at all?

25 MR. SCHOENFELD: It doesn't. And I think that's



1 clear from Taylor v. Sturgell. The Supreme Court directly
2 addresses - - -

3 JUDGE RIVERA: That notice insufficient?

4 MR. SCHOENFELD: I'm sorry?

5 JUDGE RIVERA: That notice on its own is
6 insufficient.

7 MR. SCHOENFELD: Absolutely, notice on its own is
8 insufficient. The Supreme Court and Taylor discusses - - -

9 JUDGE RIVERA: Even in a shared interest
10 situation?

11 MR. SCHOENFELD: Absolutely. I think the
12 shared - - - to answer your question very clearly, I think
13 the shared interest question is immaterial. And I don't
14 think you can aggregate a sort of quasi privity notion of a
15 shared security interest with what is a constitutionally
16 indefensible - - - what the Supreme Court calls a virtual
17 representation theory, that merely because you had notice
18 of ongoing proceedings, that you are somehow bound by that
19 judgment. And the Supreme Court discusses the due process
20 principles behind that in Sturgell. It discusses the
21 Supreme Court's prior decision in the Alabama case, which
22 is a state supreme court case, and it makes clear that
23 that's insufficient to bind a nonparty.

24 JUDGE RIVERA: I take it there's - - - I take it
25 there's nothing in the record that indicates that when

1 Chase and Fletcher entered their agreement, that Chase
2 required that Fletcher advise them of any kind of action
3 that might incur a debt that they would have to pay off to
4 Dakota?

5 MR. SCHOENFELD: I don't know the answer to that
6 question. The security interest that JPMorgan obtained
7 from Fletcher was in 2008. He didn't file the
8 discrimination case until 2011. I honestly don't know when
9 the attempted purchase of the additional shares that gave
10 rise to the 2011 case occurred, so I just don't know it
11 would have been feasible. And to the extent you're asking
12 whether there's some evergreen notice provision, I'm not
13 aware of one.

14 I also don't think it - - - it would matter. I
15 think The Dakota actually acknowledges in their answering
16 papers that there is no legal requirement that JPMorgan had
17 to intervene in the prior proceedings. They say that
18 JPMorgan could have intervened if it wanted to, but there's
19 no legal requirement that JPMorgan was obligated to
20 intervene, which I think brings us to the second basis for
21 the Appellate Division's decision, which is it held that
22 JPMorgan was required to intervene in the underlying case
23 in order to protect it from some application of preclusion
24 principles as a nonparty. But The Dakota concedes in its
25 brief that it's - - -

1 JUDGE RIVERA: I don't know that I read it, that
2 it said required, other than noting that you could have.
3 That doesn't necessarily mean that - - - I get your point.
4 It's a compelling point that that doesn't mean you had to.
5 Let me ask you this. Were you - - - is there a joinder
6 issue? Should you have been joined in that action as a
7 necessary party?

8 MR. SCHOENFELD: Yeah. I want to get to your
9 reading of the Appellate Division's decision. But to
10 answer your question, we could have been joined. And
11 certainly if the Dakota wanted to secure its rights in this
12 asserted superior loan as to JPMorgan Chase, it could have
13 joined us under 1010. There was nothing stopping them from
14 doing that. And that would have been a much cleaner way to
15 ensure that JPMorgan was bound by the same judgment. But
16 to get this judgment against Fletcher and then to wield it
17 in parallel proceedings against JPMorgan and assert that
18 JPMorgan cannot, in those proceedings, challenge the basis
19 for that judgment, I think, is wrong. So certainly there
20 were tools that The Dakota's disposal if they wanted to
21 make sure that the judgment they were obtaining would bind
22 JPMorgan as the assignee of Fletcher.

23 JUDGE HALLIGAN: On that - - - on that front and
24 the three way agreement, do you think due process would
25 preclude an assignor and an assignee from agreeing that

1 each would be bound in the future? I don't see anything
2 along those lines in the three way agreement.

3 MR. SCHOENFELD: Yeah.

4 JUDGE HALLIGAN: Maybe your adversary has a
5 different view, but under basic freedom of contract
6 principles, could you agree to contract around what you
7 articulate as the due process rule?

8 MR. SCHOENFELD: It's an interesting question. I
9 don't know why you couldn't. Certainly, well - - -

10 JUDGE HALLIGAN: So if Dakota wanted to, you were
11 just offering one route, which was joinder, right? I think
12 that Dakota could have brought Chase in. I assume also, if
13 there was an interest in binding Chase going forward, that
14 could have been agreed to in the three-way agreement and
15 due process wouldn't preclude that?

16 MR. SCHOENFELD: Yeah. I can't think of any
17 reason why it wouldn't, but obviously that agreement was
18 signed against common law principles of preclusion and
19 estoppel, which are then backstopped by due process
20 principles. So I - - - it's hard for me standing here to
21 think of a reason why the parties couldn't have contracted
22 to that, but that's certainly not what they did. I also
23 realized that I didn't ask for rebuttal time. So if I
24 could belatedly or - - - how much I talked.

25 CHIEF JUDGE WILSON: How much would you like to

1 reserve?

2 MR. SCHOENFELD: Four minutes, if it's okay with
3 the court.

4 CHIEF JUDGE WILSON: If you haven't used that
5 yet, we can allow that.

6 MR. SCHOENFELD: Thank you. And so third, you
7 know, the Appellate Division held that chase in the Article
8 52 proceeding seeks to destroy the underlying judgment.
9 Chase seeks no such thing. The Dakota is free to wield
10 that judgment against Fletcher however it wants. The only
11 question is whether JPMorgan is bound in these Article 52
12 proceedings by a judgment that was essentially obtained as
13 a default, with no real adversity between The Dakota and
14 Fletcher, and whether it's precluded from challenging that
15 in a proceeding where the Dakota is trying to wield that
16 lien to subordinate JPMorgan's interest in the property.
17 And I think I'm happy to answer any questions about
18 mootness, but I think there's no real question that this
19 appeal is not moot.

20 I think for the reasons I was going back and
21 forth with you, Judge Rivera, there's an obvious
22 encumbrance to our appellate rights currently pending.
23 It's clear from the first Appellate Division decision that
24 they viewed these insupportable procedural barriers as
25 precluding plenary review of the merits question. And

1 right now, what we are confronting in the Appellate
2 Division is the very real probability that we will never
3 get a decision on the merits, because there are multiple
4 procedural vehicles available to them to avoid ruling on
5 the merits at all.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. SCHOENFELD: Thank you, Your Honor.

8 MR. VAN DER TUIN: Good afternoon, Your Honors,
9 John Van Der Tuin, Smith Gambrell and Russell, for
10 respondent, The Dakota. And I'm puzzled by one thing, I
11 guess. My adversary talks about the collateral estoppel
12 issues and wanting one clean shot. They've had one clean
13 shot. Indeed, they've had two clean shots. The order
14 that's on appeal here is the order of Justice Lubell in the
15 Supreme Court, which, after lengthy proceedings, found on
16 the merits in favor of The Dakota without applying any
17 collateral estoppel or preclusion barrier to the proofs or
18 the claims of Chase. At the trial court, in this case,
19 there were pleadings. They had notice before the pleadings
20 were even filed of the specific nature of The Dakota's
21 claim. Contrary to what my colleague stated, if you look
22 at the record - - -

23 JUDGE CANNATARO: Well, counsel, even if Supreme
24 Court decided the issue on the merits, and I agree with you
25 that it sure looks like they decided, Judge Justice Lubell

1 decided the issue on the merits. Does that guarantee Chase
2 merits appellate review? I mean, because what I hear him
3 to say, his last statement before he sat down is there are
4 too many non-merits-based off ramps that the Appellate
5 Division could take to resolve this appeal against them.
6 And what he wants is not just a clean shot, he wants a
7 clean shot at merits-based appellate review.

8 MR. VAN DER TUIN: And he had a clean shot at
9 merits-based appellate review already in the First
10 Department. How did that happen? The appeal in the First
11 Department was the appeal of Justice Lubell's decision,
12 which was on the merits, not a collateral estoppel
13 decision, not a preclusion decision, but a decision on the
14 merits of all of the attacks that Chase chose to make
15 against our claim.

16 JUDGE RIVERA: Well, I thought the panel was very
17 clear that it said, you can't attempt to unwind that
18 judgment by challenging the - - - whatever it is, paragraph
19 15 or 16, whatever it is - - - in this action. You have a
20 different path that's available to you, and you had a path
21 in the past that was available to you that you didn't take.
22 So I didn't - - -

23 MR. VAN DER TUIN: They did say - - -

24 JUDGE RIVERA: I didn't read the - - - there is
25 one merits part of the decision. You're correct in that



1 way. But not about this issue, not about this challenge.

2 MR. VAN DER TUIN: They - - - all of the merits
3 issues were briefed in the Appellate Division.

4 JUDGE RIVERA: Yeah.

5 MR. VAN DER TUIN: If you look at the briefs that
6 are included in the record here, and - - -

7 JUDGE RIVERA: Well, no doubt, but the question
8 is whether or not they actually ruled on the merits.

9 MR. VAN DER TUIN: They - - -

10 JUDGE RIVERA: I don't think you can read the AD
11 that way.

12 MR. VAN DER TUIN: They affirmed the order of
13 Justice Lubell that was on the merits. They didn't modify
14 it. They didn't reverse it. They didn't - - -

15 JUDGE RIVERA: But then why would they say you
16 couldn't go seek to vacate? Why would they say that?

17 MR. VAN DER TUIN: I think they threw my
18 adversary a bone there even though they were affirming on
19 the merits, Justice Lubell. If this court were to disagree
20 with the First Department in terms of its holding or its
21 reasoning with respect to 5015 and decided that the First
22 Department was wrong on that, it would still need to affirm
23 Justice Lubell's decision and order, which is what's on
24 appeal here.

25 CHIEF JUDGE WILSON: Well, why would why couldn't

1 we reverse that if you're right? That is if you're saying
 2 they in this appeal, what we have is Supreme Court decision
 3 Justice Lubell on the merits, the merits being the
 4 interpretation of The Dakotas agreement, right? And the
 5 Appellate Division decided that or had it in front of it,
 6 decided something else, but that was raised there. Are you
 7 saying that really their clear chance of appellate review
 8 is for us to reach the merits here?

9 MR. VAN DER TUIN: If you look at what they - - -

10 CHIEF JUDGE WILSON: Can we do that?

11 MR. VAN DER TUIN: No, you cannot. On the briefs
 12 and on the question that they have presented to this court,
 13 their question presented to this court in their brief, and
 14 their introduction in their brief, was solely with respect
 15 to the collateral estoppel preclusion rationale of the
 16 First Department.

17 JUDGE HALLIGAN: You mean before us?

18 MR. VAN DER TUIN: Before you. Their brief
 19 before their - - - in their briefs to us. They did not - -
 20 - they did not raise, they did not attack, they did not
 21 raise an issue with respect to the

22 JUDGE HALLIGAN: But - - -

23 MR. VAN DER TUIN: - - - merits decision of
 24 Justice Lubell - - -

25 JUDGE HALLIGAN: But - - -



1 MR. VAN DER TUIN: - - -that was affirmed. I'm
2 sorry, Justice - - - Judge Halligan.

3 JUDGE HALLIGAN: No, not at all. But isn't that
4 because - - - maybe I'm missing something? But it seems to
5 me that what the Appellate Division says is that Chase
6 argues what they argue about, about their interpretation of
7 paragraph 15. But the App Div says this is an
8 impermissible collateral attack on The Dakota's judgment.
9 So I don't see how the Appellate Division is reaching the
10 merits of the question of how to read paragraph 15. Do you
11 disagree?

12 MR. VAN DER TUIN: I disagree because they
13 affirmed Justice Lubell's order.

14 JUDGE HALLIGAN: They affirm, did they not, on
15 the grounds that - - -

16 JUDGE CANNATARO: Yeah, I'm sorry.

17 JUDGE HALLIGAN: No, go ahead.

18 JUDGE CANNATARO: It's with respect to the
19 priority of the - - - of the liens in the case.

20 JUDGE CANNATARO: And the other - - -

21 JUDGE HALLIGAN: But just - - - I just want to
22 pin this down if I can. Where in the App Div's opinion, do
23 you see the Appellate Division ruling on the merits of the
24 question of what paragraph 15 means?

25 MR. VAN DER TUIN: I would say two places.

1 JUDGE HALLIGAN: Okay.

2 MR. VAN DER TUIN: One is that, you know, and I
3 know it's kind of a technical, procedural appellate issue.
4 But Justice Lubell - - - Justice Lubell's order was on the
5 merits. The Appellate Division affirmed - - -

6 JUDGE HALLIGAN: They're affirming, are they not,
7 on the alternative ground that it's an impermissible
8 collateral attack?

9 MR. VAN DER TUIN: They didn't - - - they didn't
10 say that; they didn't modify - - -

11 JUDGE HALLIGAN: You're saying however it's an
12 impermissible - - -

13 MR. VAN DER TUIN: And in addition - - -

14 JUDGE HALLIGAN: Go ahead.

15 MR. VAN DER TUIN: I'm sorry; I don't mean to
16 step on your sentences.

17 And in addition, I believe I'm quoting it
18 correctly. But the Appellate Division decision says unless
19 the Article 2, 15th, doesn't mean what it clearly says, the
20 Dakota was entitled to its fees here.

21 JUDGE CANNATARO: Counsel, if you could just back
22 this conversation up a little, because I was under the
23 impression, I saw those words too, from the Appellate
24 Division, that that this claim was an impermissible
25 collateral attack on the - - - on the Fletcher judgment. I

1 took that to be a collateral estoppel bar. And I think I
2 hear you saying, that's not at all what it is. So can you
3 tell me what it is?

4 MR. VAN DER TUIN: I think that the First
5 Department viewed there being a bar, but that it did not
6 disagree with Justice Lubell's decision on the merits of
7 every issue that Chase raised with respect to - - -

8 JUDGE HALLIGAN: I mean, aren't those
9 mutually - - - aren't those mutually exclusive, counsel? I
10 mean, if I'm barred from reaching the merits, then I can't
11 also, I think, lay down a holding on the merits.

12 MR. VAN DER TUIN: But the Appellate Division did
13 address, as Judge Rivera noted, certain aspects of the
14 merits. They didn't view it as being a total bar. They
15 affirmed Justice Lubell, and then said could have also been
16 barred and should have gone to 5015. Now, if one goes to
17 the collateral estoppel issue on the merits - - - the other
18 issue I want to note is that this court does not review the
19 constitutional issues that were not raised below. There
20 was no litigation of the due process issues below. This
21 was first surfaced in - - - on this appeal. So to the
22 extent that there are due process issues, that they're not
23 properly before this court for review.

24 JUDGE RIVERA: Wouldn't that be because it
25 doesn't arise until the Appellate Division says you're

1 foreclosed?

2 MR. VAN DER TUIN: No, because - - -

3 JUDGE RIVERA: Here from trying to address the
4 merits.

5 MR. VAN DER TUIN: Because - - -

6 JUDGE RIVERA: Let's say we disagree with your
7 reading of the Appellate Division, and we think they did
8 not address the merit - - - because I think they addressed
9 the merits on a different claim, not this claim. So on
10 this claim, if we disagree with you and say they didn't
11 address the merits, isn't now their opportunity to argue,
12 oh, having said that, having rendered that decision, that
13 would violate my due process rights. It would raise that
14 to us.

15 MR. VAN DER TUIN: The issue of collateral
16 estoppel - - -

17 JUDGE RIVERA: Yes.

18 MR. VAN DER TUIN: - - - was litigated before
19 Justice Lubell, but Justice Lubell did not base his
20 decision on it. They did not say at that time that
21 application of collateral estoppel would be a due process
22 violation. So it was - - - you know, it was not raised
23 either before Justice Lubell or in the First Department.
24 It was only raised to this court.

25 JUDGE RIVERA: By the way, if you're correct in

1 your reading about the Appellate Division decision here,
2 why is Justice Bluth, in the motion to vacate and to
3 intervene, addressing it anew? Wouldn't she be bound by
4 the merits decision?

5 MR. VAN DER TUIN: We suggested that she should
6 be in our opposition to their belated 5015 application last
7 year. She did not rule on that basis, and she instead
8 again addressed the merits.

9 JUDGE RIVERA: And can I ask you, what is your
10 view of counsel's claim that even though Justice Bluth
11 addressed the merits and denied their motion, that on
12 appeal, I know that state, on appeal, the Appellate
13 Division could very well decide that she should not have
14 addressed the merits, and then they'll never have a
15 decision on the merits. Again, assume, for the purposes of
16 this question, that we disagree with your reading of the
17 Appellate Division decision, or to here regarding whether
18 or not it addressed the merits.

19 MR. VAN DER TUIN: That might then make it ripe
20 to decide that issue as to whether the Appellate Division
21 was correct with respect to that, if they reversed her and
22 said, you shouldn't have decided this, it's barred by the
23 prior proceedings or the other decision. But to anticipate
24 that now and try to speculate on that, I think, would be
25 error for this court, or a mistake for this court.

1 JUDGE RIVERA: So you're saying we should affirm
2 here, let that proceed. If then the Appellate Division
3 doesn't address the merits, they can appeal that and argue
4 to us that that violates their due process?

5 MR. VAN DER TUIN: They can. But let's - - -
6 let's recall, though, that they want - - - they claim they
7 want one - - - they want to be heard on the merits of their
8 claim.

9 JUDGE RIVERA: Yes. At the appellate level.
10 That's their issue.

11 MR. VAN DER TUIN: So they are being heard on the
12 merits of their claim at the appellate level by this court.
13 I don't believe that the court needs to reach that issue
14 for the reasons I've discussed, but let's talk - - - let me
15 address why they're wrong on the estoppel issue. Okay.
16 And I say that with the prefatory statement that they've
17 had one, if not two, full hearings on the merits. I mean,
18 in this proceeding below, there were pleadings, there was
19 extensive discovery, there was substantive motion practice,
20 and there was a decision in the Dakotas favor which should
21 be affirmed. On appeal, they're wrong with respect to the
22 estoppel issue as well, I believe.

23 And with apologies - - - apologies to the
24 professor. I'm going to get a little academic, and let's
25 talk a minute about what this court's prior decisions with

1 respect to preclusion and estoppel have said. And on that,
2 I'm going to call the court's attention to the Gilberg and
3 Barbieri case, the Gramatan case that they cite, and the
4 Biondi case. The purposes and limits and the principles of
5 preclusion or estoppel, this court has said previously, is
6 based on general notions of fairness with few immutable
7 rules, and when collateral estoppel is an issue, the
8 question as to whether a party had a full and fair
9 opportunity to litigate a prior determination involves a
10 practical inquiry into the realities of litigation.

11 That's this court in the Gilberg case, and in the
12 Gramatan case which they rely on. They said that estoppel
13 must be limited to ensure that a party is not precluded
14 from obtaining at least one full hearing on his or her
15 claim, which they've had here. They've had two. They want
16 a third one. And the Biondi case likewise said it is not
17 fair to permit a party to relitigate an issue which has
18 previously been decided against him in a proceeding in
19 which he had a fair opportunity to fully litigate the
20 point. They've had their full, fair opportunity.

21 Now, Justice Judge Rivera, you were asking about
22 some of the factual issues that relate to the estoppel
23 here. And those factual issues distinguish this case from
24 the cases that they rely on.

25 JUDGE RIVERA: Well, actually, if you would,

1 because I don't know how much more time you have, but I
2 assume the white light is going to go on soon. If you
3 could address this question of the agreement - - -

4 MR. VAN DER TUIN: Yes.

5 JUDGE RIVERA: - - - and how that effects, if it
6 does, all the appointments.

7 MR. VAN DER TUIN: It does effect it.

8 JUDGE RIVERA: You heard my line of questioning
9 initially to counsel. I would like to see what your view
10 is.

11 MR. VAN DER TUIN: It does effect it because in
12 that agreement, which was between the two creditors, Chase
13 and - - - and The Dakota, with respect to the asset owned
14 by Fletcher, they agreed as to the priority. They
15 recognized that The Dakota got paid first out of the
16 proceeds of any sale or from the apartment if there was a
17 dispute. Dakota had the prior lien. The other facts that
18 bear on this, and that are distinguishing factors - - -

19 JUDGE RIVERA: But his point is that's different
20 from a situation where when there's an assignment, you know
21 what the debt is as opposed to the debt being something
22 that is incurred post the assignment. Could you address
23 that?

24 MR. VAN DER TUIN: Yes. But you know at that
25 time - - -

1 JUDGE RIVERA: What's the at that time? I'm
2 sorry.

3 MR. VAN DER TUIN: At the time the agreement was
4 made in 2008 here.

5 JUDGE RIVERA: Okay.

6 MR. VAN DER TUIN: You know you are agreeing to a
7 priority of debt that may include such things as attorney's
8 fees or other obligations that arise under the proprietary
9 lease or the bylaws in the future. You know that you're
10 agreeing - - -

11 CHIEF JUDGE WILSON: But that's the underlying
12 question here is whether they do arise under the
13 proprietary lease or not. And the question is whether you
14 can bind the bank to that without their participation?

15 MR. VAN DER TUIN: Well, there are - - - you've
16 identified two questions. One is do they arise under the
17 lease. And every judge that has looked at it below has
18 said yes it does.

19 CHIEF JUDGE WILSON: And what they - - - what
20 they want is, as I understand counsel, a clean appellate
21 review of that question.

22 MR. VAN DER TUIN: And that appellate review took
23 place at the First Department. First Department in this
24 case - - -

25 CHIEF JUDGE WILSON: In this case you say, and

1 that could have been reviewed here had they asked us to
2 review it and they didn't.

3 MR. VAN DER TUIN: And - - -

4 That's your position?

5 MR. VAN DER TUIN: Yes. And it is before this
6 court now. And it is before - - -

7 CHIEF JUDGE WILSON: Well, except you say it's
8 before this court now, except because they didn't brief it
9 it's actually not before the court.

10 MR. VAN DER TUIN: Well, I would say that because
11 they didn't brief it it's not before this court. They
12 waived it.

13 CHIEF JUDGE WILSON: Right.

14 MR. VAN DER TUIN: It was their choice.

15 CHIEF JUDGE WILSON: That's - - - I understand
16 that's your position.

17 MR. VAN DER TUIN: But if - - - but if I'm
18 incorrect on that, and it is before this court, this court
19 gives them a clean appellate review of it. The other
20 factors that enter into that analysis, Judge Rivera, are
21 that they were - - - that Chase was on clear notice of the
22 underlying Fletcher action and the claims as to fees that
23 The Dakota was making in it and The Dakota's claims that
24 its fee claim was superior to the Chase mortgage lien under
25 the lease. How did they know that? On August 27th, 2015,

1 which was a month after this proceeding was commenced - - -

2 JUDGE TROUTMAN: So are you arguing that they had
3 the - - - they were required to intervene if they wanted to
4 have a say?

5 MR. VAN DER TUIN: If they wanted - - - if they
6 wanted to have a say, they had two - - - they had two
7 routes. They could have intervened at that time or they
8 could have taken advantage of this legislative opening
9 created by CPLR 5015.

10 CHIEF JUDGE WILSON: But why is the knowledge of
11 the priority in the agreement any different from the
12 knowledge of the general rule that first, a judgment
13 recovers first?

14 MR. VAN DER TUIN: I'm sorry, Judge; I didn't - -
15 -

16 CHIEF JUDGE WILSON: Why is their knowledge of
17 the contractual priority in the recognition agreement
18 different from anybody's knowledge that first to judgment
19 recovers first? I mean, you seem to be imposing the rule I
20 think you want - - - is that to protect your rights, you
21 need to intervene rather than to bind a third party, you
22 need to get that third party joined.

23 MR. VAN DER TUIN: You need to intervene, or if
24 you see that there has been a judgment or an order in that
25 action that adversely affects your interests, you could



1 move within a year pursuant to 5015 to have that judgment
2 modified or vacated.

3 CHIEF JUDGE WILSON: So you would like a general
4 rule that seems to me to be different from Gramatan?

5 MR. VAN DER TUIN: It would be different from
6 Gramatan because the circumstances of Gramatan are
7 different.

8 CHIEF JUDGE WILSON: But that's what I'm trying
9 to get. I don't understand why the priority, whether the
10 priority is set up contractually among the parties, or the
11 priority is one that simply operates by - - - by normal
12 operation of law, first to judgment to recover first, why
13 that circumstance is different.

14 MR. VAN DER TUIN: The circumstances are
15 different. And again, I hark back to this court's prior
16 discussion of the need to attune estoppel and preclusion
17 issues without regard to a fixed rule, and taking into
18 consideration fairness and the practicalities of the
19 litigation. And in this case is different than Gramatan.
20 Gramatan correctly decided, okay, party there had no
21 notice. There was no three-party agreement. In this case,
22 at the outset of this litigation, they had knowledge of the
23 details of - - - of the Dakota's claim and that it was - -
24 - they claim priority. When - - -

25 JUDGE RIVERA: So is it your point that because

1 of - - - because of this agreement - - -

2 MR. VAN DER TUIN: Because of the agreement.

3 JUDGE RIVERA: Because of the agreement, and
4 otherwise without the agreement, they wouldn't have this.
5 But because of the agreement, there is a - - - a duty and
6 obligation on them to protect their interests by doing one
7 of the two things you have identified, intervening or
8 waiting for the judgment, because maybe it'll all work out,
9 and filing a 5015 motion to vacate.

10 MR. VAN DER TUIN: I would say because of the
11 agreement and because they were on notice of the fee
12 application.

13 JUDGE RIVERA: Yeah.

14 MR. VAN DER TUIN: He concedes I sent a
15 Chase's - - - Chase's counsel was following the Fletcher
16 action. He emailed me. The emails were in the record. He
17 emailed me and say, what's you know, what's your motion
18 about here? And I emailed back and said, it's our fee
19 application. You want a copy? Here's a copy. Let me know
20 if you have questions.

21 JUDGE RIVERA: Why isn't he right, and why isn't
22 as the Chief Judge suggests there was the option to join.
23 Why not just join them?

24 MR. VAN DER TUIN: If I, again - - -

25 JUDGE RIVERA: I mean, you're in this email back



1 and forth, why not just join them?

2 MR. VAN DER TUIN: The practicalities of the
3 litigation at that point, if I move to join them, I've got
4 joinder motion practice. If I'm successful in their join,
5 they're going to say, let's go back - - - I didn't have any
6 of the discovery. Let's dig back into discovery. Let's
7 have a dismissal motion with respect to your claim.

8 CHIEF JUDGE WILSON: Though, in hindsight, you
9 probably had more motion practice and other litigation.

10 MR. SCHOENFELD: We have an appeal now.

11 MR. VAN DER TUIN: I've been involved in this
12 case since 2011, Judge. You know, there's a lot of things
13 I might do in hindsight, but my point - - -

14 JUDGE RIVERA: It may go even longer.

15 MR. VAN DER TUIN: But my point, though, to
16 continue my answer to Judge Rivera - - -

17 JUDGE RIVERA: Yes, yes.

18 MR. VAN DER TUIN: - - - is that there was the
19 three-party agreement. There was the notice of the details
20 of the nature of the priority of The Dakota's claim that
21 was given to Chase's counsel, both, you know, before the
22 fee motion was heard or decided. I gave them notice in
23 June. They had been following it. They got a copy of the
24 papers in June. It got argued in October, I believe, and
25 decided in December. They had ample opportunity if they

1 felt they had an interest. And apparently they think
2 they've got an interest. We've been litigating it for the
3 last nine years. They had ample opportunity at that time
4 to make an application under 5015 or to move to intervene.

5 I don't say they had to move to intervene, but if
6 they thought they had an interest that was being affected,
7 they had the obligation to do one of those two things where
8 they were on notice of the details of it, where they had a
9 prior agreement as to the relative priorities that
10 distinguishes this case from Gramatan, where there was no
11 notice, where it was, as Judge Rivera pointed out, a clean
12 assignment, if you will, whereas opposed - - - in this
13 case, where Fletcher and Chase had a continuing joint
14 interest in this asset, the shares, and Fletcher had an
15 interest parallel to Chase's to defend against the fee
16 claim, because it was going to be a judgment against him
17 and against his asset. So there was a - - -

18 CHIEF JUDGE WILSON: Well, that maybe isn't
19 entirely clear because he was - - - he probably wasn't able
20 to pay the judgment, right? So he didn't much care. The
21 sale of the apartment was going to result in less than what
22 was owed to the two in combination. So I'm not sure he had
23 the same interest.

24 MR. VAN DER TUIN: Fletcher, it's not in the
25 record - - -

1 CHIEF JUDGE WILSON: Right.

2 MR. VAN DER TUIN: Fletcher was at least at one
3 point a wealthy guy.

4 CHIEF JUDGE WILSON: At one point.

5 MR. VAN DER TUIN: Okay. Chase was chasing a lot
6 of his other assets as well. He had a castle up in
7 Connecticut. He, you know, had a bunch of stuff.

8 CHIEF JUDGE WILSON: Yeah.

9 MR. VAN DER TUIN: So I don't think that that
10 really is a matter - - -

11 CHIEF JUDGE WILSON: Fair enough.

12 MR. VAN DER TUIN: - - - of relevance to the
13 decision in this case. And so what we're faced with here
14 is the rule that they want to apply here, it's simple.
15 It's easy to apply. You know, pre-assignment, you know, a
16 post-assignment judgment. We're done. Okay. But I don't
17 think that is consistent with this court's preclusion and
18 estoppel analysis which says that one has to be fair. And
19 what's fair here? Is it fair that The Dakota has had no
20 repose in its judgment that it obtained in 2017?

21 JUDGE RIVERA: Let me ask you this on the
22 fairness.

23 MR. VAN DER TUIN: Intervening for seven years?

24 JUDGE RIVERA: Let me ask you this on the
25 fairness. And your red light is off. So I assume this may

1 be the end of this. If we disagree with you on the
2 Appellate Division's decision here that it did not reach,
3 right - - - we don't agree with you about having reached
4 the merits. We don't think it's reached the merits. Is it
5 then fair that they not have their one appellate
6 consideration of the merits?

7 MR. VAN DER TUIN: No. If this court disagreed -
8 - -

9 JUDGE RIVERA: Yes.

10 MR. VAN DER TUIN: - - - with the Appellate
11 Division's analysis - - -

12 JUDGE RIVERA: Yes.

13 MR. VAN DER TUIN: - - - what would be fair is to
14 address the merits that Justice Lubell addressed. That's
15 the decision that you're reviewing. His decision was
16 correct on the merits, and they haven't challenged it on
17 the merits. But to address that and issue an order, a
18 decision, that affirms - - -

19 JUDGE RIVERA: But we don't usually do that,
20 right? If we - - - if we think the merits should be
21 addressed, it wouldn't be fair. Otherwise, wouldn't we
22 send it back to the panel and say, address the merits. You
23 should have addressed it here.

24 MR. VAN DER TUIN: You - - - - that could be
25 done, but what you might do is - - -

1 CHIEF JUDGE WILSON: But are the merits just a
2 pure question of law. Sorry. Right in front of you. Are
3 the merits just a pure question of law? Is there any fact
4 finding required?

5 MR. VAN DER TUIN: Well, yeah, there was fact
6 finding involved by - - -

7 CHIEF JUDGE WILSON: Right.

8 MR. VAN DER TUIN: - - - Justice Lubell on the
9 summary judgment, you had to make findings of lack of a
10 material factual dispute, but you would affirm the order
11 while rejecting the Appellate Division's rationale, if you
12 will, in holding and affirm for the reasons stated on the
13 order below, you know, with whatever analysis of those
14 reasons that this court chose to include. That's what
15 would be fair. That's what would put an end to this
16 litigation. Otherwise, you know, we'll see it in a year
17 after the - - - after we take another trip to the First
18 Department. Thank you, Judges.

19 MR. SCHOENFELD: Thanks, Your Honor, and I'm very
20 happy to keep this short. Judge Rivera, on the reading of
21 Gramatan, I would just direct the court to - - - I only
22 have the northeast reporter citations. It's 386
23 Northeastern Reporter second at 1332. It makes very clear
24 that an assignee is deemed to be in privity with the
25 assignor, where the action against the assignor is

1 commenced before there was an assignment. In other words,
2 it's not some preexisting abstract contractual arrangement.
3 It has to be a dispute about the particular encumbrance on
4 the security interest. With respect to the colloquy Your
5 Honor was having with The Dakota's counsel, I think it
6 reads a lot into the court's judgment to find that it
7 affirmed on any basis other than collateral estoppel, which
8 is itself a judgment on the merits. I don't think there's
9 any way to read the Appellate Division's order as
10 vindicating Justice Lubell's reading of paragraph 15 with
11 respect to this particular issue, which is the entitlement
12 to attorney's fees.

13 And finally, with respect to the question of the
14 due process issues, just to be clear, and I think it's
15 clear for the court, we're not raising a freestanding
16 constitutional argument here. I think what Justice
17 Ginsburg said in Taylor v. Sturgell is the due process
18 principles animate and set boundaries on common law
19 collateral estoppel principles. And that's merely all
20 we're saying here, that you need to understand the
21 operation of collateral estoppel against these background
22 principles, which make very clear that ordinarily, a
23 nonparty is not bound and precluded from making its own
24 argument as to a judgment that's going to bind us. There
25 are exceptions to it, and none of them applies here, and

1 certainly the ones the Appellate Division identified are
2 incorrectly applied in this case.

3 JUDGE HALLIGAN: You agree there's a finding on
4 whether it's by the Appellate Division and whether it's
5 incident to ownership as distinct from whether default is
6 required.

7 MR. SCHOENFELD: Correct.

8 JUDGE HALLIGAN: Okay.

9 MR. SCHOENFELD: I think that there is - - - if
10 you assume the predicate that they are entitled to the fees
11 at all under paragraph 15, I think the Appellate Division
12 decided the priority question, but it did not reach the
13 underlying question, which of course is the one that we're
14 looking for a merits determination on.

15 JUDGE RIVERA: Correct. But can you just address
16 what he described as the other two alternatives? I'll call
17 them alternative. One is we should just get to the merits
18 of that issue in this case, see what your thoughts are on
19 that, or make it clear in the writing that the Appellate
20 Division in the action decided by Bluth, a motion to vacate
21 and to intervene, should not be disposed of for reasons of
22 untimeliness, but rather they should also get to the
23 merits.

24 MR. SCHOENFELD: So if we could take the second
25 one first. Again, just to be very clear, we're just

1 looking for one clean shot. So if there were some decretal
2 language the court could formulate that made clear to the
3 Appellate Division in a different appeal that doesn't, of
4 course, arise from the same index number, which may be an
5 issue. That's all we're looking for. Shorn of these
6 inappropriate procedural hurdles that have been thrown in
7 our way as a result of the original Appellate Division
8 decision, all we want is a merit determination.

9 As to your first question, I think that's an
10 issue for the court's discretion. We offered in our reply
11 brief to provide supplemental briefing on the underlying
12 merits question, which we're, of course, happy to do. But
13 if the court believes that it can decide the issue in the
14 first instance, that's obviously the court's prerogative.
15 I think the ordinary course is to have at least the
16 Appellate Division decide that issue on plenary briefing on
17 the merits, which is what happened the first time around.
18 They just didn't reach the issue. Thank you very much.

19 CHIEF JUDGE WILSON: Thank you.

20 (Court is adjourned)

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

I, Raven Wood, certify that the foregoing transcript of proceedings in the Court of Appeals of Kasowitz Benson v. JPMorgan Chase, No. 99 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Raven Wood

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