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COURT OF APPEALS

STATE OF NEW YORK

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CNH DIVERSIFIED OPPORTUNITIES MASTER  
ACCOUNT, L.P., ET AL.,

Appellants,

-against-

NO. 42

CLEVELAND UNLIMITED, INC., ET AL.,

Respondents.

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20 Eagle Street  
Albany, New York  
September 10, 2020

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Karen Schiffmiller  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good morning, everyone.  
 2 The first appeal on this morning's calendar is appeal  
 3 number 42, CNH Diversified Opportunities v. Cleveland  
 4 Unlimited.

5 Counsel?

6 MR. MILLAR: Good morning, Your Honors, and may  
 7 it please the court, James Millar of Faegre Drinker Biddle  
 8 & Reath, on behalf of the appellants, the minority  
 9 noteholders. And I would like to reserve two minutes for  
 10 rebuttal.

11 CHIEF JUDGE DIFIORE: You may, sir.

12 MR. MILLAR: Your Honors, we are asking the court  
 13 to apply the debt documents in this case as written. My  
 14 clients, as holders of notes, have a right to payment of  
 15 principal and interest that cannot be impaired or affected  
 16 without our consent. That right is in Section 6.07 of the  
 17 indenture which begins - - -

18 JUDGE GARCIA: Counsel, Counsel - - - up here,  
 19 sorry. We - - - we've looked at the Marblegate case - - -  
 20 I'm sure everybody has - - - and under - - - I understand  
 21 that the facts in Marblegate are very different. The debt  
 22 levels are different. The action that was taken is very  
 23 different. But there - - - and it's - - - it's dicta in a  
 24 federal case under the TIA, but there is language in that  
 25 case that seems to indicate that foreclosure actions,



1           whatever the effect, that have the ultimate effect of  
2           terminating the rights you're about to describe, do not  
3           qualify as actions that would violate what there is 316(b)  
4           of the TIA. How do you address that dicta?

5                       MR. MILLAR: That's - - - that's a great  
6           question, and let's look at the facts in Marblegate,  
7           because this is important, and this is true in TIA history.

8                       There were two levels of debt, senior secured  
9           debt under a bank credit agreement and junior unsecured  
10          debt under the notes. The senior secured debt, the banks  
11          came in and foreclosed and took everything. And the junior  
12          unsecured notes, their rights were left in place, but they  
13          were looking at an empty shell.

14                      And if you look at the Second Circuit, they make  
15          very clear that when they're talking about foreclosures,  
16          they are talking about foreclosures by a senior secured  
17          creditor that leave the noteholders in a position of  
18          looking towards an empty shell.

19                      And that is clear in the - - - when they talk  
20          about the 1940 SEC report, and the history, they talk  
21          about, practically, a junior unsecured holder isn't going  
22          to get anything because they have rights only against an  
23          empty shell.

24                      JUDGE WILSON: So - - - so what would have  
25          happened here - - - sorry, over - - - over this way. What



1 would have happened here if the trustee had entered into a  
2 settlement, you know, following the default, with  
3 Cleveland, by which it created a NewCo, took all the shares  
4 in Cleveland, put it into the NewCo, and didn't grant a  
5 release? Isn't that effectively the same economically as  
6 what happened here, and - - - and your clients and  
7 everybody else would still have a right to sue Cleveland  
8 but would have no assets.

9 MR. MILLAR: So a couple of things on that.  
10 Remember we have a holding company and an operating  
11 company.

12 JUDGE WILSON: Um-hum.

13 MR. MILLAR: And just to make this abundantly  
14 clear, our rights to sue - - - we should be able to sue  
15 either of those entities. But the trustee can't take  
16 assets and just put them somewhere. The trustee has a  
17 right of foreclosure, and what that right is, it can take  
18 assets, it can go to a foreclosure sale, sell those assets  
19 for money, pay the noteholders, and the noteholders have a  
20 deficiency claim.

21 JUDGE WILSON: But the trustee could sue for  
22 breach, no?

23 MR. MILLAR: The trustee could sue for breach - -  
24 -

25 JUDGE WILSON: And if the trustee sues for



1 breach, he can settle.

2 MR. MILLAR: The trustee cannot settle, and this  
3 court said that in 1889, in a case called Hollister v.  
4 Stewart. This trustee has no right to compromise the debt  
5 of the individual holders. Trustees do not have that  
6 right. That's a very important point.

7 JUDGE WILSON: Don't you think the rights of  
8 trustees are somewhat different now than they were in 1889?  
9 Isn't that, in fact, what a lot of the materials in the  
10 record that the parties provided say?

11 MR. MILLAR: So the trustee's rights are guided  
12 by the documents. And there in - - - one unequivocal  
13 provision is that the noteholders have the right to  
14 payment. That is the legally enforceable claim against the  
15 issuer; that cannot be taken away. And what this court  
16 said in 1889 still remains true today. If trustees could  
17 settle, what happens is fifty-one percent of the  
18 noteholders instruct the trustee to settle for something  
19 less than full value, and that value then flows down to the  
20 shareholders.

21 That's the problem with allowing trustees to  
22 settle. They do not have that right. They do not have  
23 that right under the documents. They do not have that  
24 right in New York law, and there is no case from any  
25 jurisdiction that anyone has cited that says a trust - - -



1 an indenture trustee has the right to settle.

2 JUDGE RIVERA: But go - - - so you're saying all  
3 they can do is go proceed till the end of the case,  
4 regardless of how - - - regardless of the outcome that  
5 might be perhaps more detrimental to the shareholders than  
6 what would have been available through a settlement?

7 MR. MILLAR: They can't take action that  
8 compromises the right to payment. They don't have to take  
9 any action at all. They can follow the direction of the  
10 majority. Oftentimes, trustees don't do anything. They  
11 wait to be directed, or they leave it to the holders to  
12 enforce their own rights.

13 JUDGE FAHEY: You - - - you know what I - - - you  
14 know what I'm struggling with, Counselor, is the effect of  
15 the associated agreements here. It seems you - - - you  
16 want us to read everything through 6.07, and that it  
17 controls every - - - under your theory, controls all other  
18 conflicting provisions, and we got the indenture, the  
19 security documents, the CT agreement. The way I understand  
20 it, defense argument says all those documents had to be  
21 read together. It - - - how - - - how do we not read them  
22 together? I mean, wasn't this a situation where they were  
23 all signed the same day, same time?

24 MR. MILLAR: You - - - you do read them together.

25 JUDGE FAHEY: Um-hum.



1 MR. MILLAR: And let's look at them. The  
2 security agreement provides quite expressly in 11.1 - - -

3 JUDGE FAHEY: -- Um-hum.

4 MR. MILLAR: - - - "The actions of the collateral  
5 trustee hereunder are subject to the provisions of the  
6 indenture." That means any actions that the collateral  
7 trustee seeks to take under the security agreement, which  
8 is how this transaction would abound - - - it was under the  
9 security agreement - - -

10 JUDGE FAHEY: Well, it also says that there's - -  
11 - that the - - - the trustees can foreclose on direction  
12 from majority of the shareholders. So I'm - - - I'm a bit  
13 confused here how - - - how - - - the exclusivity and the  
14 prism through which you - - - you are asking us to read all  
15 of these documents.

16 MR. MILLAR: Okay. So as a matter of document  
17 primacy, the actions under the security agreement are  
18 subject to the rights of the indenture. That's all the  
19 rights, including the right to not have our payment for  
20 principal and interest impaired or affected.

21 But I should say, with respect to your point,  
22 again, a foreclosure is a very - - - while I'll call it  
23 ordinary foreclosure, that's a very well understood  
24 mechanism of turning collateral into cash. And then - - -

25 JUDGE FAHEY: Right.



1 MR. MILLAR: - - - giving that cash to the  
2 noteholders and letting them maintain their deficiency  
3 judgment. The difference here is, they didn't give us  
4 cash. They purported to give us property, and they said,  
5 we're taking away your right to sue, the issuer and the  
6 other obligors. There is no case that allows that, and we  
7 - - -

8 JUDGE FAHEY: So how - - - how would we  
9 distinguish this from a bankruptcy? With a bankruptcy, it  
10 wouldn't - - - it couldn't be blocked by an individual  
11 bondholder, could it?

12 MR. MILLAR: A bankruptcy, that is a - - -

13 JUDGE FAHEY: Let's just stick with my question.

14 MR. MILLAR: Yeah.

15 JUDGE FAHEY: Could it be - - - I - - - the way I  
16 understand it - - - you can correct me if I'm wrong,  
17 because generally, you guys know more about this than some  
18 of us would - - - so the bankruptcy cannot be blocked here  
19 by an individual bondholder.

20 MR. MILLAR: Not in bankruptcy court, no - - -

21 JUDGE FAHEY: No.

22 MR. MILLAR: - - - because we have a federal law  
23 that overrides the contract rights.

24 JUDGE FAHEY: So is - - - is it fair to say that  
25 a strict foreclosure would yield more value to the





1           shareholders than a bankruptcy would?

2                   MR. MILLAR: No, that's not true.

3                   JUDGE FAHEY: Oh, I see. Okay.

4                   MR. MILLAR: That's not true.

5                   JUDGE FAHEY: My understanding is that it would,  
6 but okay.

7                   MR. MILLAR: That's not true, because frankly,  
8 look what's happened here. They - - - they took over as  
9 shareholders. They put themselves in as the board of  
10 directors. They made a loan to the company and took back  
11 money for themselves. They ran the company into the  
12 ground. We brought suit eight-and-a-half years ago. We  
13 haven't received one dollar.

14                  JUDGE FAHEY: Did you ever move for a - - - to  
15 enjoin the action?

16                  MR. MILLAR: So to enjoin the action, I need to  
17 not have an adequate remedy of law.

18                  JUDGE FAHEY: So but let me start from the  
19 beginning, then. Did you ever move to enjoin the action?

20                  MR. MILLAR: No, I didn't.

21                  JUDGE FAHEY: Okay. Go ahead.

22                  MR. MILLAR: I - - - and I didn't - - -

23                  JUDGE FAHEY: No, I - - - in fairness, explain  
24 why, go ahead.

25                  MR. MILLAR: I - - - I didn't because I have an



1           adequate remedy at law, and that is to get a judgment  
2           against the people who owe me money, and by the way, I'm  
3           not asking the court to do anything more than give me a  
4           judgment for failure to pay. I will pursue my post - - -

5                   JUDGE FAHEY: Well - - -

6                   MR. MILLAR: - - - judgment remedies - - -

7                   JUDGE FAHEY: - - - the way I understand the  
8           other side of the argument is you're really seeking to cut  
9           the line.

10                   MR. MILLAR: That's not correct. Let's remember  
11           what they did. They proposed a strict foreclosure. We  
12           said we object. They went forward anyway, and voluntarily  
13           - - - voluntarily - - - moved from debt to equity. That  
14           was their choice, and they knew we objected, and they knew  
15           we would pursue the issuer. They're the ones that chose to  
16           - - - to voluntarily take equity, so that they could take  
17           over the company, put themselves in as directors, make a  
18           sweetheart loan, pay themselves interest, and then take the  
19           rest of the money for themselves.

20                   That is precisely the policy behind the Trust  
21           Indenture Act. Don't let majority holders do that.

22                   JUDGE WILSON: So why isn't that a breach of  
23           fiduciary duty claim?

24                   MR. MILLAR: Against the trustee?

25                   JUDGE WILSON: Yeah.



1 MR. MILLAR: Well, it might very well be, but the  
2 preeminent right - - -

3 JUDGE WILSON: Did you file that?

4 MR. MILLAR: We did not file a breach of  
5 fiduciary duty. The trustee has many exculpatory  
6 provisions under the document. But the preeminent right,  
7 under these documents, I'm - - - I'm saying again, which  
8 cannot be taken away without our consent, is the right to  
9 get principal and interest from the people who owe us, the  
10 issuer and the obligors. That is the one right that we are  
11 trying to enforce.

12 This is not about collateral. It's not about  
13 anything else. It's about a judgment against the issuer.

14 CHIEF JUDGE DIFIORE: Counsel, just following up  
15 on something you - - - you mentioned in your answers to  
16 Judge Fahey's question. Could some form of a partial  
17 strict foreclosure be proper if the cancelled debt was only  
18 for the consenting bondholders and the debt for the  
19 dissenting holders isn't canceled? Does - - -

20 MR. MILLAR: So - - -

21 CHIEF JUDGE DIFIORE: Go ahead.

22 MR. MILLAR: The answer is that - - - is that  
23 that's a pretty technical question and there's no case on a  
24 partial strict foreclosure. The UCC doesn't cover it. But  
25 I will say on the record here -



1 CHIEF JUDGE DIFIORE: Um-hum.

2 MR. MILLAR: - - - we proposed that. We said if  
3 you want to do, essentially, a private-debt-for-equity  
4 transaction, you take equity, we'll stay in as noteholders.  
5 And indeed, we will restructure our note. You don't have  
6 to pay us today. We will take our - - - our note out to a  
7 new maturity date. They declined that.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.  
9 Counsel?

10 MR. MCGUIRE: Thank you, Judge. Judge, James  
11 McGuire for the respondents.

12 First of all, I'd like to respond to a question  
13 Judge Garcia had asked before. And respectfully, Judge  
14 Garcia, it - - - and it's not - - - the ratio decidendi of  
15 the opinion in Marblegate is that 316(b) prohibits formal  
16 amendments, and only formal amendments. Judge - - - at the  
17 end of the opinion, Judge Lohier pointed back to the fact  
18 that they had the right, but - - - but - - - they had  
19 rights. But it was a right that - - - that the opinion  
20 made clear was worthless, an absolutely worthless right.

21 They had independent remedies, such as the ones  
22 that have been mentioned here, under the UCC and under the  
23 Fraudulent Conveyance Doctrine.

24 JUDGE GARCIA: But I would think in this case,  
25 Counsel - - - and I don't know; maybe it's not that



1 relevant - - - the reason why it couldn't be a Marblegate-  
2 type of resolution for you, was the number of guarantees  
3 that were in place from other companies. I mean,  
4 Marblegate was such a different animal, because they were  
5 the secured lenders. They had the unique and sole right -  
6 - - exclusive rights to the collateral, and they  
7 foreclosed. And it trickled down to the nonsecured  
8 bondholders, who didn't then have a practical right to  
9 collect. So Marblegate is - - - is a very different case.

10 But I think this - - - this formal amendment  
11 language, to me, the key seems to be, 316 overall in the  
12 TIA. And if you look at the structure of that statute, (a)  
13 allows - - - permits certain provisions to be placed in the  
14 indenture, one of them being you can forgive defaults, one  
15 of them being the majority can direct remedies - - - to the  
16 trustee to take remedies, and then (b) is a prohibition.

17 And if you look at certain other cases on  
18 defaults where they've tried to excuse defaults, even  
19 though it says any default can be excused by a majority,  
20 they said, no, no, no, that doesn't apply to interest and  
21 principal payments. So why wouldn't majority action  
22 directing the trustee to take the remedy permitted by  
23 316(a) not also be limited by 316(b)?

24 MR. MCGUIRE: The - - - the short answer to that,  
25 Judge, is that the rights that someone has under indenture,



1 they vary. The rights are bounded by the terms of the  
2 indenture. That was the - - - Judge Kram's decision in the  
3 UPIC case. They're not all going to be the same.

4 JUDGE GARCIA: But 316(b) doesn't - - -

5 MR. MCGUIRE: Let me give you a couple examples.

6 JUDGE GARCIA: - - - vary. I mean isn't that the  
7 point of 316(b)? You cannot have it - - - I mean, in the  
8 Trust Indenture Act, again, this was voluntary here, but  
9 they incorporated that scheme. And while they split the  
10 provisions of 316 up into two or three different provisions  
11 in the indenture, the structure of the TIA, it seems to me,  
12 to lead to this type of analysis.

13 MR. MCGUIRE: Well, I don't think that can be  
14 squared either with the text or with Chairman Douglas'  
15 testimony in 1938, and Douglas - - - Justice Douglas was  
16 talking about how the - - - that - - - that he's - - - he's  
17 responding to the question - - - to the - - - to the  
18 criticism that it can't - - - indenture can't be amended.

19 And he's saying, yes, it can; there's no  
20 restriction under this specific restriction, and that  
21 remains the case. That specific restriction can't. But -  
22 - - but otherwise, it doesn't do anything other than - - -  
23 he said, "merely restricts the power of the majority to  
24 change those particular phases", the rights to receive  
25 principal and interest when it's past due.



1 JUDGE GARCIA: The orig - - -

2 MR. MCGUIRE: My - - -

3 JUDGE GARCIA: - - - original workout in this  
4 case, would that have violated 607 if you had done it over  
5 the objection of the dissenting minority?

6 MR. MCGUIRE: If it - - - if we had done what,  
7 Your Honor?

8 JUDGE GARCIA: If you had gone through with the  
9 initial workout with the company that they objected to  
10 originally, and you pulled back and then did a strict  
11 foreclosure, would that have violated 607, if you had gone  
12 forward with it over their objection?

13 MR. MCGUIRE: We - - - we're perfectly free to do  
14 it on a strict foreclosure because - - -

15 JUDGE GARCIA: No, no, no. Not the strict  
16 foreclosure. The first proposed workout.

17 MR. MCGUIRE: Just in - - - just involving a  
18 foreclosure on the assets?

19 JUDGE GARCIA: Right, the - - -

20 MR. MCGUIRE: Yeah.

21 JUDGE GARCIA: - - - the way it was structured  
22 originally, you were trying to do this on unanimous  
23 consent.

24 MR. MCGUIRE: Right.

25 JUDGE GARCIA: And then the trust - - - then they



1 send out a letter saying, we don't have unanimous consent -  
2 - -

3 MR. MCGUIRE: Right.

4 JUDGE GARCIA: - - - we're doing a strict  
5 foreclosure.

6 MR. MCGUIRE: Right. Now I got it. I - - -

7 JUDGE GARCIA: The initial transaction. Would  
8 that have violated 607, if you went ahead over the  
9 objection of the minority?

10 MR. MCGUIRE: If - - - if they did the purchase  
11 and - - - and - - - the purchase and sale - - -

12 JUDGE GARCIA: Right.

13 MR. MCGUIRE: - - - over the objection of - - -  
14 of the majority?

15 JUDGE GARCIA: Right.

16 MR. MCGUIRE: I don't know that there's any  
17 provision of the indenture that allowed that. So the  
18 answer to that may be yes. I don't know for sure. But  
19 there's provisions of the indenture that allows - - -

20 JUDGE GARCIA: Okay.

21 MR. MCGUIRE: - - - expressly allows the UCC - -  
22 -

23 JUDGE GARCIA: So if the initial one would  
24 violate 607, I mean, so that would then be considered a  
25 formal amendment?





1 MR. MCGUIRE: No, a formal amendment is just what  
2 it is. We're talking about contract rights. How are  
3 contracts modified? They're modified prototypically or - -  
4 - or paradigmatically by amendments. And I think - - -

5 JUDGE GARCIA: That seems somewhat inconsistent  
6 then - - -

7 MR. MCGUIRE: - - - I think we need to point out  
8 some of the implications of their - - - of this position.  
9 And Judge Wilson asked about it. You cannot settle. The -  
10 - - the Trust Indenture Act even provides for it. You - -  
11 - the trustee can settle at - - - at the direction of - - -  
12 of the majority. A settlement takes away the right to sue.  
13 There's nothing wrong with that, because that - - - that -  
14 - - your right was always bounded by that, and that right  
15 is being protected.

16 The right - - - why - - - why would the right to  
17 sue be granted, and trustee sue at the direction, if it's  
18 impossible? Because that - - - because that's what would  
19 be the case.

20 JUDGE WILSON: I have an understanding, I guess,  
21 of what was going in the TIAA, and correct me if you think  
22 I'm wrong or fix what I'm going to say. My understanding  
23 of basically what was happening there is that Congress had  
24 decided, with the guidance of the, you know, Justice  
25 Douglas and the commission, that the old world in which



1 trustees, which were typically banks, were sort of - - -  
2 they were not real trustees. They were kind of powerless,  
3 and the major fix was to - - -

4 MR. MCGUIRE: Yeah.

5 JUDGE WILSON: - - - change that. To give them  
6 fiduciary obligations, as - - - as a real fiduciary would  
7 have, but those obligations would be much stronger upon  
8 default than they were prior to default.

9 MR. MCGUIRE: Exactly right.

10 JUDGE WILSON: And so that the main protections  
11 provided by the Act, really were the empowerment of the  
12 trustee upon default, and - - - combined with the fiduciary  
13 duties so that all holders had to be treated equally.

14 MR. MCGUIRE: Exact - - -

15 JUDGE WILSON: Or equally to existent holders had  
16 - - -

17 MR. MCGUIRE: Exactly right. And that - - - and  
18 that's one of the reasons why no remedy - - - they were  
19 aware of strict fore - - - the - - - the fore - - -  
20 traditional foreclosures. They were aware that they left  
21 them with worthless deficiency judgments, and Jerome Frank  
22 even derided them, because they were so - - - because they  
23 were so useless. But that the main - - -

24 JUDGE WILSON: For what reason - - -

25 MR. MCGUIRE: - - - the main reform was to



1 invigorate the trustee, an active trustee. There's a whole  
2 - - - so much history on that in - - - in - - - in the - -  
3 - '36 and '38 and up to - - - up to '40. But my adversary  
4 wants to enfeeble the trustee.

5 JUDGE GARCIA: Counsel, Counsel - - -

6 MR. MCGUIRE: Because at trial he can't sue - - -

7 JUDGE GARCIA: - - - Counsel, Counsel?

8 MR. MCGUIRE: Yes, sir, Your Honor.

9 JUDGE GARCIA: In this agreement, in the  
10 direction you have to the trustee - - - and I agree with  
11 Judge Wilson's characterization of the TIA. I think they  
12 wanted an active trustee. The trustee takes over certain  
13 fidu - - - fiduciary obligations imposed after default.  
14 But you - - - here, the majority bondholders direct the  
15 trustee to take a certain action and indemnify the trustee  
16 specifically for any resulting breaches of fiduciary duty  
17 claims. Doesn't that completely undermine the active role  
18 of the trustee and the fiduciary duties after a default  
19 that are imposed?

20 MR. MCGUIRE: The - - - the - - - the trustees  
21 can't - - - they just can't disclaim negligence, and they  
22 can't be indemnified for breaches of fiduciary duties.

23 JUDGE GARCIA: It's in the direction. It's in  
24 your direction to the trustee.

25 MR. MCGUIRE: They're - - - they're indemnified,



1 but it's not like a blanket indemnification: do whatever  
2 you want. They - - - they specifically say you can't be  
3 indemnified for - - - you know, for gross negligence. And  
4 certain - - - and nor for fiduciary duties.

5 JUDGE GARCIA: But that's very different.

6 MR. MCGUIRE: This was a carefully crafted scheme  
7 to invigorate the trustee. And it would be enfeebled if  
8 you accept - - - my adversary, the - - - my adversary said  
9 that there's no case that you can't settle it. The Ninth  
10 Circuit case we cite - - - cited, expressly on point. And  
11 pointing out that it's crazy to think that you can be  
12 granted the right to sue and yet you can't settle. You - -  
13 - no matter how great a deal for all bondholders, you can't  
14 take it. Just like with this strict foreclosure.

15 My adversary can deny all he wants that - - -  
16 that this was not the - - - the best value. Ninety-seven-  
17 six percent believed otherwise. There's testimony that - -  
18 - that they believed otherwise. We know bankruptcy has  
19 kept costs. But he's asking for a rule of law that'll  
20 apply to cases in which there's a vast gulp - - - gulf  
21 between the value that a strict foreclosure and a  
22 bankruptcy can - - - can deliver. And it can't happen  
23 under my - - - under my adversary's view.

24 Under my adversary's view, you shouldn't even be  
25 able to have acceleration provisions. Acceleration



1 provisions change the terms, when the payments are due.  
2 Now, if - - - if you can do that, you know, why - - - my  
3 adversary said, well, then, yeah, that's okay, because all  
4 they do -- it just moves the dates around. Okay, well, if  
5 that's - - - if that's true, then it - - - then it follows  
6 that if there was no acceleration provision, a majority can  
7 add one. They can't do that.

8 But the reason - - - but - - - and the reason  
9 they can't is because it - - - because it - - - it violates  
10 316(b). And it reinforces that it pro - - - what Judge  
11 Lohier ruled, that all 316(b) do - - - does is prohibit  
12 formal amendments, and only formal amendments. And that  
13 prohibition applies to both rights. There's no textual  
14 basis to say it applies to the right to receive payment,  
15 but it doesn't - - - but - - - and it applies to the right  
16 to sue, but other things apply to the right - - - to the  
17 right to sue.

18 So guarantor - - - how about releases of  
19 guarantees? This - - - this one has one. You sell assets  
20 under certain - - - certain circumstances, and all I have  
21 the right to sue the guarantor if there's a default. Why  
22 is that okay? It's okay because your right protected by  
23 316(b) is the right defined in the agreement. Again,  
24 that's what Judge Kram said in UPIC. That's always been  
25 the traditional understanding.



1           If my adversary is right, and that - - - an  
2           indenture that did - - - that did not have a release for a  
3           guarantor upon sale of substantially all the assets, you  
4           know, if he's right, well, then you could have amended and  
5           added it in. That can't be right.

6           And my adversary here is - - - their rights  
7           weren't - - - weren't - - - weren't violated. They were  
8           enforced. They got an indenture that they agreed to, that  
9           gave them rights. And those rights were enforced by a  
10          vigorous trustee, and what was the result? Exactly what  
11          you would want: value maximized and value distributed pro  
12          - - - pro rata to - - - to - - - to all noteholders.

13          CHIEF JUDGE DIFIORE: Thank you - - -

14          MR. MCGUIRE: I see I'm out of time.

15          CHIEF JUDGE DIFIORE: Thank you, Counsel.

16          Counsel?

17          MR. MILLAR: Briefly, with respect to the  
18          vigorous trustee, there may very well have been a policy  
19          point about a vigorous trustee, but there was a very  
20          expressed statute, 316(b), that said you cannot take away  
21          the right of a holder's - - - to payment of principal and  
22          interest without their consent. The vigorous trustee  
23          doesn't override that.

24          With respect to that Ninth Circuit case, that  
25          Ninth Circuit case was not - - - did not have this



1 language. It did not say that the bondholder had a right  
2 to not have their - - - their right to payment impaired  
3 without the consent of the - - -

4 JUDGE RIVERA: Well, what - - - what about his  
5 criticism, and I think, essentially, this is what he's  
6 trying to say, that your approach devolves to bankruptcy's  
7 the only option?

8 MR. MILLAR: Not quite. You can - - - you can do  
9 an out-of-court liquidation, essentially through a  
10 foreclosure sale, sell the assets and get money. But look,  
11 bankruptcy, if you read UPIC - - - he loves the UPIC case -  
12 - - they talk in there, and they cite all the authorities  
13 about how the '39 Act, the Trust Indenture Act, was meant  
14 to push these companies into bankruptcy. And we have the  
15 most efficient bankruptcy process in the world. You can do  
16 a bankruptcy case now in one day.

17 JUDGE GARCIA: Counsel, isn't also the usual  
18 remedy here - - - I mean, now, as I've read - - - an  
19 exchange offer.

20 MR. MILLAR: That's right. And here's how you do  
21 it. You send out an exchange offer, and you - - - you set  
22 a threshold. If I get ninety-five percent, I'm going to  
23 leave the other five percent under their original terms.  
24 But if I get something lower than that, like sixty-seven  
25 percent, I'm going to do what's called a prepack



1 bankruptcy. I'll be in-and-out of bankruptcy in one day.

2 Nowhere, in no case, it - - - you have nine  
3 trillion of bonds out there. There is no proposition that  
4 says a trustee can compromise the noteholders' right to  
5 payment against the issuer. Make no mistake, if that's  
6 what you rule, that will be a sea change. And the amicus  
7 professors, who are from all over the spectrum, politically  
8 and economically, wanted this court to take this case for  
9 precisely that reason.

10 If you're going to change the rights of  
11 bondholders, because all those bonds are governed by New  
12 York law and the federal TIA, please do it with your eyes  
13 open, because you are making a sea change by saying, we're  
14 letting the trustee compromise notes. That's never before  
15 - - - never before - - - going back to 1889, been the law  
16 in New York.

17 CHIEF JUDGE DIFIORE: Thank you, Counsel.

18 MR. MILLAR: Thank you.

19 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of CNH Diversified Opportunities Master Account, L.P., et al. v. Cleveland Unlimited, Inc., et al., No. 42 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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