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COURT OF APPEALS

STATE OF NEW YORK

QUADRANT STRUCTURED PRODUCTS CO.,
LTD.,

Appellant,

-against-

No. 112

VERTIN, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
May 07, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 112, Quadrant
2 Structured Products, Co.

3 Counsel would you like any rebuttal time?

4 MR. WILLETT: Five minutes, if it please
5 the court.

6 CHIEF JUDGE LIPPMAN: Five minutes, sure.
7 Go ahead.

8 MR. WILLETT: Good afternoon, Your Honors,
9 Sabin Willett for the appellant. My case is a simple
10 one. It's the words of the contract.

11 The words in this case are - - - the words
12 that matter, "by virtue or by availing of any
13 provision of this indenture." That's what's barred.
14 And the issue is - - -

15 CHIEF JUDGE LIPPMAN: What arises from the
16 indenture? What - - - what types of claims arise
17 from the - - - from the indenture?

18 MR. WILLETT: A breach of one of the
19 covenants in Article 7, which would then give rise to
20 a right in the indenture trustee to accelerate and
21 demand payment.

22 JUDGE SMITH: So - - - so you say that the
23 - - - the no-action clause bars only contractual
24 claims?

25 MR. WILLETT: In this case, Your Honor.

1 JUDGE SMITH: Why would that not also be
2 true if it said the securities or the indenture?

3 MR. WILLETT: Well, Vice Chancellor Laster
4 wondered the same thing. And it may be true that
5 that's also the case. It's not presented by this
6 case.

7 JUDGE SMITH: Chancellor Allen seemed to
8 think otherwise in Fine - - -

9 MR. WILLETT: Feldbaum, Your Honor. Yes.
10 Feldbaum is a case unlike ours that makes reference
11 to the indenture and the securities, and the - - -

12 CHIEF JUDGE LIPPMAN: So when you leave the
13 securities out, what's the - - - what's the impact if
14 that - - -

15 MR. WILLETT: Well, the - - -

16 CHIEF JUDGE LIPPMAN: - - - language is not
17 there?

18 MR. WILLETT: - - - logic is, that when you
19 put the securities in, you're making reference to the
20 status of the party as a creditor. And he needs
21 status as a creditor to bring what we've brought,
22 which is a fraudulent transfer suit and a derivative
23 action under Delaware law.

24 But where there's no reference to the
25 securities - - -

1 JUDGE SMITH: But isn't somebody - - -
2 isn't somebody has a debenture a creditor?

3 MR. WILLETT: Yes, exactly. But there's
4 nothing - - - there's nothing in the no-action clause
5 that refers to debentures. It just says "rights of
6 action", "rights," actually, "that arise by virtue or
7 availing of any provision of this indenture."

8 And we don't make reference to any
9 provision of the indenture in our suit. In fact, the
10 provisions of the - - -

11 JUDGE SMITH: So you're going by the word
12 "provision"? If it says - - - if actions by - - - by
13 virtue or availing of the - - - the indenture, it
14 would be different?

15 MR. WILLETT: No, it would be the same.
16 But it - - - the - - - the precise phrase here is
17 "provision of the indenture", which is quite precise.
18 And after all, we're construing a contract. We're
19 under ordinary rules.

20 JUDGE SMITH: So - - -

21 MR. WILLETT: The parties have to - - -

22 JUDGE GRAFFEO: I was going to say, what's
23 - - - what's the rule? Because with respect to no-
24 action clauses, what is it you want us to say?

25 MR. WILLETT: Well, I - - - I'm puzzled why

1 - - -

2 JUDGE GRAFFEO: If that - - - that you have
3 to - - - you have to name the type of document?

4 MR. WILLETT: No, Your Honor. Not at all.
5 All I want this court or some court to say is that
6 this particular clause doesn't bar our suit. We're a
7 little surprised, frankly, that the Delaware Supreme
8 Court thought this was an issue that had to come
9 here, because it's an ordinary contract - - -

10 CHIEF JUDGE LIPPMAN: What is barred? What
11 is barred? Suits - - - contract suits? What's
12 barred?

13 MR. WILLETT: Any right of action under the
14 indenture itself, which would mainly consist of
15 rights to accelerate the notes because there's a
16 default - - - and there are several defaults listed -
17 - - and demand payment.

18 And you can understand why that is. You
19 don't want to let one bondholder accelerate - - -

20 CHIEF JUDGE LIPPMAN: Well, the trustees
21 control, right?

22 MR. WILLETT: Right. But here, keep in
23 mind, if one of - - -

24 CHIEF JUDGE LIPPMAN: If the trustees can
25 do it, you can't, right? That's the rule?

1 MR. WILLETT: Well, if the - - - the
2 trustees can do it if there is a - - - only if there
3 is an event of default.

4 CHIEF JUDGE LIPPMAN: Right.

5 MR. WILLETT: They have no other power.

6 CHIEF JUDGE LIPPMAN: Right.

7 MR. WILLETT: And - - - and we can instruct
8 them, more than fifty percent can instruct them - - -

9 CHIEF JUDGE LIPPMAN: More than fifty
10 percent. Right.

11 MR. WILLETT: - - - if there's an event of
12 default. None of which exists here.

13 It's worth noting that our - - -

14 JUDGE GRAFFEO: So 7, 8 and 10, what do you
15 want us to do with those?

16 MR. WILLETT: Articles 7, 8 and 10, Your
17 Honor?

18 JUDGE GRAFFEO: Yes.

19 MR. WILLETT: I - - -

20 JUDGE GRAFFEO: The Chancery Court had
21 dismissed those counts.

22 MR. WILLETT: Oh, we have not contested
23 that. Seven - - - well, the court dismissed Count 10
24 in part. And we have not contested that.

25 Basically, the simple way to resolve this

1 case is to have a look at the Vice Chancellor's
2 report, which is a thorough research into New York
3 law, and which is correct.

4 JUDGE READ: You like - - - you like
5 Laster's report?

6 JUDGE GRAFFEO: Right.

7 MR. WILLETT: I do.

8 JUDGE READ: And you want us to say yes and
9 yes and answer the questions.

10 MR. WILLETT: It's actually yes, no, yes.

11 JUDGE READ: Yes, no, yes.

12 MR. WILLETT: Because the first question
13 has two parts, but yes, and yes. He had it right.

14 JUDGE RIVERA: He - - - can I ask - - - I
15 took your opponents to argue if - - - if we read this
16 no - - - no-action clause the way you suggest, that
17 it undermines the whole purpose of the clause. Could
18 you address that?

19 MR. WILLETT: Well, it - - - my opponent is
20 incorrect. The whole purpose of the clause is what
21 flows from the words in the clause.

22 JUDGE RIVERA: Um-hum.

23 MR. WILLETT: The purpose of the clause is
24 to stop us bringing on our own, claims - - -

25 JUDGE RIVERA: Um-hum.

1 MR. WILLETT: - - - under the indenture.

2 Now - - -

3 JUDGE SMITH: But is it really plausible,
4 the - - - I mean, the purpose of the clause, not just
5 your opponent's view of it, but Chancellor Allen's
6 view of it, the purpose of the clause when it says
7 "securities or indenture" - - - securities or
8 debentures or whatever it is, is essentially to - - -
9 to maxim - - - to prevent, insofar as possible, a
10 lone ranger from bringing a lawsuit, and to - - -

11 MR. WILLETT: Yes, Your Honor. But - - -

12 JUDGE SMITH: - - - consolidate in the
13 trustee.

14 Is it - - - but you say that if you leave
15 off the word "securities" it becomes this very narrow
16 provision where all it bars is sue - - - is a
17 contractual suit under the indenture itself.

18 MR. WILLETT: All it bars is what it says,
19 Your Honor.

20 JUDGE SMITH: I mean, is it - - - does - - -
21 - is it plau - - - I mean, do you really think that
22 the people who are drafting and negotiating and
23 signing these things are intending that kind of large
24 difference from that - - - that minor a variation in
25 words?

1 MR. WILLETT: Oh, you - - - you can be
2 certain that they are. Here's why. The - - - the
3 indenture was written in 2004. Feldbaum was well
4 known to the lawyers who toil away at these bond
5 indentures. And its form of no-action clause was
6 well known.

7 There were many cases that had our form,
8 including New York cases, had our form of no-action
9 clause, and which said that they don't reach common
10 law and statutory - - -

11 JUDGE SMITH: If it's all well that well-
12 known, and this issue is well-know, why don't the
13 people who write, you know - - - why don't you write
14 a whole paragraph saying this either does or - - -
15 does or doesn't bar everything that Feldbaum says it
16 bars?

17 MR. WILLETT: Well, I think we can all
18 agree that lawyers, in hindsight, can always do a
19 better job of writing these contracts. But the legal
20 question is, what did - - - what do the words, as
21 expressed - - - what intention is expressed by the
22 words? And the words couldn't be simpler in limiting
23 that which we can't pursue to claims that arise from
24 the indenture.

25 Remember as well, these are claims that

1 Delaware's courts and legislature has given my
2 client. And so the question is, does this contract
3 take them away? And it has to take them away with
4 clarity if it's going to do that. And that's the - -
5 -

6 JUDGE SMITH: But by adding the word
7 "securities or", they would have taken them away with
8 clarity?

9 MR. WILLETT: According to Chancellor
10 Allen, we would have - - -

11 JUDGE SMITH: You aren't conceding that
12 he's right?

13 MR. WILLETT: Well, no, Your Honor,
14 particularly not with a derivative claim, where - - -
15 we're - - - we're bringing suit on behalf of the
16 issuer, not against it, in a derivative claim.

17 And - - - I see that the red light is on.

18 CHIEF JUDGE LIPPMAN: Okay, counselor. You
19 have your rebuttal. Let's - - -

20 MR. WILLETT: Thank you.

21 CHIEF JUDGE LIPPMAN: - - - let's hear from
22 your adversary.

23 Counsel?

24 MS. SULLIVAN: May it please the court, my
25 name is Kathleen Sullivan for the appellees.

1 CHIEF JUDGE LIPPMAN: Counselor, what's the
2 significance of that securities language being there
3 or not being there?

4 MS. SULLIVAN: Absolutely none, Your Honor.
5 And - - -

6 CHIEF JUDGE LIPPMAN: Why?

7 MS. SULLIVAN: Because the purpose of no-
8 action clauses is to centralize in the trustee on the
9 demand of the noteholders as a majority, the role of
10 bringing claims that are shared and common by the
11 noteholders, and - - -

12 CHIEF JUDGE LIPPMAN: But not any
13 conceivable claim? Or is it any conceivable claim?

14 MS. SULLIVAN: All - - - the - - - the
15 trustee has the power under this indenture, to bring
16 all claims. He's not limited to event of default.
17 He can bring all claims, upon a demand of the
18 noteholders.

19 And the purpose of the clause is - - -

20 JUDGE SMITH: So you say he could bring - -
21 -

22 MS. SULLIVAN: - - - to prevent lone
23 rangers.

24 JUDGE SMITH: - - - fraudulent conveyance
25 claims?

1 MS. SULLIVAN: Yes, he can. He can bring -
2 - -

3 JUDGE SMITH: There's something somewhere,
4 there's that commentary on the - - - a uniform
5 statute, that says he can't, that the - - -

6 MS. SULLIVAN: Let - - -

7 JUDGE SMITH: - - - the - - -

8 MS. SULLIVAN: - - - let - - - the
9 commentaries, we respectfully suggest, are - - - are
10 unhelpful here.

11 Let me say what is helpful. Let's start
12 with Feldbaum, Chancellor Allen's opinion. Now, we
13 think the term "securities", the addition of the term
14 "and securities" adds nothing to the clause, that the
15 clause operates to bar any individual claim that
16 could be brought by the trustee for the noteholders
17 as a whole, so long as it bars any claim that arises
18 under or with respect to the indenture. The addition
19 of the term "or securities" does not matter.

20 And the reason is - - -

21 JUDGE SMITH: Well, why - - -

22 MS. SULLIVAN: - - - that non - - -

23 JUDGE SMITH: - - - why write in a term
24 that has no meaning?

25 MS. SULLIVAN: Well, Your Honor, we think

1 it may be a - - - an artifact of the time when it had
2 some meaning. In the pre - - - pre-Trust Indenture
3 Act cases, there was a great deal of debate in the
4 New York cases about whether you had to read the term
5 "security" to bar claims for past-due principal and
6 interest.

7 With the enactment of the TIA in 1939, it's
8 never - - - those claims can never be barred by a no-
9 action clause.

10 JUDGE SMITH: But it does - - - but those
11 cases did establish the principle that "securities"
12 means something different from "securities and
13 indenture"?

14 MS. SULLIVAN: Correct, Your Honor. We're
15 not saying the terms mean the same. But rights under
16 the indenture can be brought by the trustee on behalf
17 of all of the noteholders, whether or not you add the
18 term "securities".

19 Now, Your Honor, we think - - -

20 JUDGE SMITH: What - - - what holds that?

21 JUDGE GRAFFEO: Is that - - - is that a new
22 rule we're going to have to create?

23 MS. SULLIVAN: It's not, Your Honor. Let
24 me just talk for a minute about the weight of
25 authority. But let me start with why this would have

1 very bad consequences for New York.

2 The answer to your questions about what
3 drafters think, or drafters think it makes no
4 difference whether the term in the no-action clause
5 is "rights under the indenture" or "rights under the
6 indenture and the securities".

7 JUDGE SMITH: Well, how - - - but if - - -
8 but if they've read all of the old New York cases and
9 then they - - - if they read the - - - the Cruden
10 case and the Victor against Ricklis case, shouldn't -
11 - -

12 MS. SULLIVAN: But - - -

13 JUDGE SMITH: - - - shouldn't the drafters
14 figure out that it does make a difference?

15 MS. SULLIVAN: They still should not, Your
16 Honor. And let me say why. The overwhelming weight
17 of cases interpreting New York law, and a lot of them
18 have arisen in Delaware of course, but interpreting
19 New York law, and the key New York cases, all find
20 the no-action clause bars non-contract claims, even
21 if it's missing the term "the securities".

22 And let me cite you the key cases. Let me
23 start with New York. If you go back to Ernst and
24 Greene, Ernst and Greene are New York cases that held
25 that statutory receivership cases - - - sorry,

1 statutory receivership claims were barred by no-
2 action clauses that simply said "the indenture"; it
3 didn't say "the securities". Those are still the
4 law.

5 JUDGE SMITH: I mean, this - - - this
6 clause uses the word "receiver" in it. A lot of them
7 do.

8 MS. SULLIVAN: It does, Your Honor. But
9 let me give you some other cases. A number of
10 federal cases interpreting New York law, and
11 following Feldbaum, also say that a clause like ours,
12 which says "the indenture" but does not include the
13 magic words my opponents wants to insert, "the
14 securities", the federal cases, In re Enron out of
15 the Texas federal court, Peak out of the Third
16 Circuit, Tang out of the Delaware Chancery Court,
17 following Feldbaum, and - - -

18 JUDGE SMITH: Well, Tang is a receivership
19 case.

20 MS. SULLIVAN: Tang is a receivership case,
21 Your Honor.

22 R.J. Capital, in the Southern District; In
23 re Enron, Ernst, Greene, Peak, Tang, and R.J. Capital
24 all have our form of no-action clause, and they all
25 read New York law to bar noncontract claims.

1 So they're our - - - we think you don't
2 have to make new law, Your Honor. You have to simply
3 hash out the meaning of - - -

4 CHIEF JUDGE LIPPMAN: Has the - - -

5 MS. SULLIVAN: - - - Ernst and Greene.

6 CHIEF JUDGE LIPPMAN: - - - has the whole
7 area of law evolved here in terms of fiduciary
8 obligations to debt holders? Is it - - - is it
9 evolving in a way that makes your interpretation,
10 sort of dated? Or do you think, to this day, that -
11 - - that all encompassing, any claims hold?

12 MS. SULLIVAN: Absolutely not, Your Honor.
13 No-action clauses centralize in the trustee -

14 CHIEF JUDGE LIPPMAN: Any - - -

15 MS. SULLIVAN: - - - the power - - -

16 CHIEF JUDGE LIPPMAN: - - - any possible
17 claim?

18 MS. SULLIVAN: Contract or noncontract.
19 There's - - - not in any possible claim. We concede
20 there are exceptions.

21 CHIEF JUDGE LIPPMAN: But particularly
22 fiduciary obligations?

23 MS. SULLIVAN: Well, Your Honor, if there's
24 a suit against a trustee who's conflicted, obviously,
25 that's not precluded. Claims for past-due principal

1 and interest are not precluded. That's the Trust
2 Indenture Act.

3 JUDGE SMITH: Securities - - - federal
4 securities - - -

5 MS. SULLIVAN: Federal securities claims;
6 absolutely, Your Honor. But why is that? Because
7 they're not assignable under statute. Those are
8 individual claims. And so are fraudulent inducement
9 claims.

10 JUDGE SMITH: They're also not waivable
11 under federal law.

12 MS. SULLIVAN: I'm sorry, Your Honor?

13 JUDGE SMITH: Isn't there a no-waiver
14 clause in the federal statute - - - no waiver
15 statute?

16 MS. SULLIVAN: Correct, yes.

17 JUDGE SMITH: Yeah.

18 MS. SULLIVAN: So, Your Honor, federal
19 securities claims, claims for past-due principal and
20 interest under the TIA, claims against a conflicted
21 trustee, and we would add fraudulent inducement
22 claims. This is not a fraudulent inducement case.
23 This is a strike suit by a sophisticated financial
24 operation that knew all the relevant facts at the
25 time it purchased these securities on the secondary

1 market.

2 So Your Honor, the weight of authority
3 would tell the drafter that it doesn't matter whether
4 your clause says, as it did in Enron, Ernst, Greene,
5 Peak, Tang and R.J. Capital, it doesn't matter if it
6 said, as in those cases, "the indenture" and didn't
7 have the magic words "and the securities".

8 To give you some other New York cases,
9 Emmet, Greenwich, and Walnut Place, are all cases
10 that had our clause, it said "indenture", didn't have
11 the magic word "the securities" - - - those cases all
12 held that contract claims are barred, but they
13 nowhere stated that noncontract claims would be
14 allowed. They nowhere suggested that my opponent's
15 interpretation could be drawn out of those cases.

16 Now, Your Honor, in respect of Cruden and
17 Victor, you asked - - - Victor went our way. It said
18 no - - - it said that the noncontract claims, the
19 RICO and fraud claims were barred. It held in that
20 case that it could distinguish Cruden because there
21 was an "and the securities" clause. But Cruden had
22 no reason - - - gave no reasoning, and nothing in
23 Victor says that the addition of the magic words "the
24 securities" was required in all cases.

25 So we think that a drafter looking at the

1 law out there would say I'm perfectly safe with my
2 clause if it says "the indenture", and doesn't add
3 the magic words "the securities".

4 And you will unsettle the expectations of
5 countless parties who have joined into these
6 agreements expecting their no-action clauses to
7 preclude lone ranger suits by mavericks who want to
8 multiply - - -

9 JUDGE SMITH: How - - - how do we know that
10 we're right about people's expectations?

11 MS. SULLIVAN: Well, Your Honor, the - - -
12 you can infer from the cases I've just cited to you
13 that these clauses have been employed widely. And
14 they've come back to life in the RMBS context. And
15 in answer to your - - -

16 JUDGE SMITH: So in other - - - we should -
17 - - we should - - - to try to figure out what the
18 drafters intended, we should look at the law and see
19 what a lawyer would have made of it.

20 MS. SULLIVAN: We think - - -

21 JUDGE SMITH: This is becoming circular.
22 The drafter - - -

23 MS. SULLIVAN: Well - - -

24 JUDGE SMITH: - - - whatever here is going
25 to be the right answer is what the drafter - - -

1 drafter intended.

2 MS. SULLIVAN: Your Honor - - - Your Honor,
3 we would submit that there's never been a case that
4 would put the drafter on notice that he must add "and
5 the securities" in order to - - -

6 JUDGE GRAFFEO: But what's - - - what's the
7 policy - - - is there - - - are there any policy
8 reasons why - - - why the trustee should have such
9 all encompassing authority here?

10 MS. SULLIVAN: Yes, Your Honor - - -

11 JUDGE GRAFFEO: To the exclusion of - - - I
12 mean, I assume sometimes, perhaps, a minority
13 shareholder may have - - - or a minority party may
14 have some decent interest.

15 MS. SULLIVAN: Your Honor, the policy here,
16 as Feldbaum, as Chancellor Allen so clearly
17 explained, is to ensure that when claims affect the
18 noteholders as a whole, affect noteholders ratably as
19 a whole - - - it doesn't affect them as individuals,
20 it affects them as a whole - - - that it is best to
21 have that set of claims centralized in the trustee,
22 Your Honor, upon the demand of the noteholders.

23 All that the no-action clause - - - let's
24 be clear. The no-action clause here is not a waiver
25 of claim. It's just a set of procedural requirements

1 designed to ensure majority rule, that the majority
2 of noteholders will speak before the trustee acts.

3 Now, in my opponent's world - - -

4 JUDGE GRAFFEO: Is it - - -

5 JUDGE SMITH: Have - - -

6 JUDGE GRAFFEO: - - - so there's an
7 equitable distribution of whatever proceeds are
8 there?

9 MS. SULLIVAN: Yes.

10 JUDGE GRAFFEO: Is that - - - is that the
11 policy reason?

12 MS. SULLIVAN: That's part of the policy,
13 Your Honor.

14 JUDGE GRAFFEO: But some noteholder may
15 have a very valid objection.

16 MS. SULLIVAN: The - - - there - - - Your
17 Honor, that's part of the policy, to assure ratable
18 distribution of proceeds. But there's an additional
19 policy. If lone rangers can go out and bring their
20 suits, we'll live in a world in which there are
21 duplicative lawsuits. And the noteholders will lose
22 control of their actions. Now - - -

23 JUDGE SMITH: Is there also a problem with
24 a noteholder who wants to be the squeaky wheel, and
25 get a little more than the next guy?

1 MS. SULLIVAN: Absolutely. And that's this
2 case in a nutshell, Your Honor. And there's also a
3 problem of claim splitting.

4 In my opponent's world, you'd have contract
5 claims that could be brought only by the trustee, and
6 noncontract claims that, in his world, could be
7 brought by individual noteholders, willy-nilly, all
8 over the country in multiple courts. That would lead
9 to claim splitting about claims about the same
10 transaction and - - -

11 CHIEF JUDGE LIPPMAN: But why - - - why
12 isn't it possible that the drafters just didn't
13 contemplate the kinds of actions that - - - that - -
14 - these kind of more fiduciary - - -

15 MS. SULLIVAN: Well - - -

16 CHIEF JUDGE LIPPMAN: - - - in nature?

17 MS. SULLIVAN: - - - Your Honor, let's - -
18 - let's be clear. The New York law question here is
19 do - - - everyone agrees, and my opponent doesn't
20 disagree, that there's a purpose to no-action
21 clauses. He just wants to limit them to contract
22 claims. That makes no sense. And no one would
23 expect that was the - - -

24 JUDGE ABDUS-SALAAM: Vice Chancellor Laster
25 thought so too, so what - - -

1 MS. SULLIVAN: He's the only one so far,
2 Your Honor - - -

3 JUDGE ABDUS-SALAAM: But he was - - -

4 JUDGE RIVERA: But why does it make - - -

5 JUDGE ABDUS-SALAAM: - - - asked to look at
6 this question and - - - and actually review it in
7 terms of New York law, and he came up with an answer
8 that your opponent likes and you don't.

9 MS. SULLIVAN: Your Honor, with respect, we
10 think this court is far better suited than the Vice
11 Chancellor to decide what New York law is. And
12 what's good for New York is - - -

13 JUDGE RIVERA: Excuse me. Can you finish
14 your thought about why - - - why you say it makes no
15 sense to do - - - to take his approach?

16 MS. SULLIVAN: It will lead to claim
17 splitting, Your Honor. He - - - remember, he's not
18 saying no-action clauses should have no effect,
19 because we want to have lots of enforcement of
20 fiduciary duties; he's saying - - - he's trying to
21 say that the clause that we have, no rights under the
22 indenture, bars contract claims under the indenture,
23 but not noncontract claims. That makes no sense,
24 because it will lead to a world of litigation,
25 dissipating the common trust, forcing noteholders

1 who'd lose control over their action to show up in
2 different actions around the country, allowing
3 different courts to come to different conclusions in
4 these renegade suits, and dissipating the assets of
5 the - - - held in common - - -

6 CHIEF JUDGE LIPPMAN: So your hard and fast
7 rule, your bright line rule, is what?

8 MS. SULLIVAN: A no-action clause bars all
9 claims, whether contractual or noncontractual, but
10 for the exceptions: federal securities laws,
11 payments for - - - claims for past due principal and
12 interest, conflicted trustee cases or fraudulent
13 inducement cases.

14 It bars, as Feldbaum said, all claims,
15 whether contractual or noncontractual, with or
16 without the addition of the term "securities".

17 Now, here, Your Honor, the addition of the
18 word "securities" is especially unnecessary, because
19 if you look at the appendix at page 95 to 96, you'll
20 see that a claim under the indenture embraces a claim
21 under the securities. It's, in a sense, a partial
22 redundancy, if you add the terms "or the securities"
23 here, because the securities are defined as those
24 notes that are distributed - - - or executed and
25 delivered under the indenture. So here, "or the

1 securities" doesn't add anything.

2 JUDGE SMITH: What about any provision of
3 the indenture? Isn't that even narrower, as he says?

4 MS. SULLIVAN: It's not, Your Honor,
5 because to read - - - may I finish, Your Honor?

6 CHIEF JUDGE LIPPMAN: Sure.

7 MS. SULLIVAN: We think that you - - - when
8 you get to this indenture clause - - - this - - -
9 excuse me - - - no-action clause, you should read all
10 the other language my opponent wants you to ignore.

11 This one talks about any right, not just a
12 remedy, by virtue of the indenture or availing of any
13 provision of the indenture. Your Honor, and then it
14 says with respect - - - under - - - upon, under or
15 with respect to the indenture.

16 The clause "by virtue of the indenture",
17 can't be redundant of the clause "availing of any
18 provision of the indenture". Availing of any
19 provision perhaps covers contract, but under - - -
20 but "by virtue of" covers other claims that are not
21 contractual.

22 JUDGE SMITH: But there's going to be some
23 redundancy in these clauses any way you - - - I mean,
24 you - - - you say "indenture or securities" is
25 redundant, and people say it all - - - use it all the

1 time.

2 MS. SULLIVAN: May I answer, Your Honor?

3 CHIEF JUDGE LIPPMAN: Sure.

4 MS. SULLIVAN: Your Honor, we don't think
5 that what we're pointing to is redundant. We think
6 what the drafters here did was to make the cause as
7 broad as possible to preclude individual lone ranger
8 suits in any court for any right, contractual or non-
9 contractual.

10 And if you go with the Vice Chancellor's
11 outlier view, you will unsettle the expectations of
12 all the parties that have relied on no-action clauses
13 of our form - - - and I've quoted you the cases - - -
14 for - - - it's the minority of cases that involve the
15 peculiar clause that my friend wants you to adopt.
16 It's only - - - it's only an accident that Feldbaum
17 and Lang and other cases involved "or the securities"
18 clause.

19 The majority of the cases in our briefs
20 involve our clause and find non-contractual claims as
21 well as contractual claims barred.

22 CHIEF JUDGE LIPPMAN: Okay.

23 MS. SULLIVAN: We hope that you won't
24 unsettle New York law - - -

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 MS. SULLIVAN: - - - because it'll be bad
2 for issuers and bad for New York. Thank you.

3 CHIEF JUDGE LIPPMAN: Thank you, counselor.

4 Counselor, how do we know what the drafters
5 contemplated at - - - in these kinds of clauses?

6 MR. WILLETT: You can't know, but there are
7 clues.

8 CHIEF JUDGE LIPPMAN: Go ahead, what are
9 the clues?

10 MR. WILLETT: Here are three clues. First,
11 you can look at the fact that in New York cases, as
12 long ago as the '20s and the '30s, judges were
13 deciding the cases differently under no-action
14 clause, depending on whether it referred to the
15 securities.

16 JUDGE SMITH: She says that's an artifact
17 of the days before the Trust Indenture Act that
18 became obsolete when the Trust Indenture Act is
19 passed.

20 MR. WILLETT: Well, take a look, Your
21 Honor, at footnote 7 of her brief. There's a case
22 called Lidgerwood. Lidgerwood was decided by
23 District Judge Patterson, the father of the current
24 Judge Patterson. And he says, I have to read the
25 contract. This decision is guided not by the Trust

1 Indenture Act, but simply what the contract says.

2 I'm really shocked to hear my - - - my
3 friend and colleague say it doesn't matter whether
4 they use the word "securities", when we had this long
5 brief about superfluity and, you know, whether you
6 can't - - - you have to indu - - - imbue meaning in
7 every word - - -

8 CHIEF JUDGE LIPPMAN: Would you be
9 upsetting - - - your adversary says that you'll be
10 upsetting everybody - - - all of the expectations
11 based on - - -

12 MR. WILLETT: Yeah.

13 CHIEF JUDGE LIPPMAN: - - - precedent by -
14 - - by allowing - - -

15 MR. WILLETT: Just the opposite, Your
16 Honor.

17 CHIEF JUDGE LIPPMAN: To - - - why? Why?

18 MR. WILLETT: The expectations parties have
19 are that you will enforce the agreements they write.
20 So in 2004, somebody sits down to write this
21 agreement. Does he choose to use the - - - the
22 clause that's been construed to bar my suit, that
23 says "securities" under Feldbaum in 1992? No. He
24 chooses to use the one that's been effectively
25 blessed by Cruden, by Continental Illinois, by Mabon

1 Nugent, by a lot of cases in these briefs, as not
2 barring my claim.

3 As a matter of fact, there isn't - - -

4 JUDGE READ: What are the other - - - what
5 are the other clues: You said - - - you pointed us
6 to some cases. But you said there are other clues -
7 - -

8 MR. WILLETT: Okay. The - - -

9 JUDGE READ: - - - we could look at to try
10 to figure out what the intent of drafters - - -

11 MR. WILLETT: Right. The clues are first,
12 that any drafter in 2004 knows that it has mattered
13 to New York judges since as long ago as the '20s,
14 whether that language is in there.

15 Second, Feldbaum, has said it matters that
16 - - - well, Feldbaum has - - - has construed a form
17 of clause that includes securities. This contract
18 defines securities, not as my colleague described it
19 by the way - - - it is on 95, but there's no
20 reference to the indenture in the securities
21 definition. They could have used that term. They
22 didn't. You can construe from that an intention not
23 to use the Feldbaum type of clause, but rather to use
24 the Cruden type of clause, which lets the case go
25 forward.

1 The - - - the point was made - - - this is
2 a very important point. The suggestion was made that
3 the trustee could bring our claims. No, that's not
4 right.

5 The trustee is limited by the indenture.
6 Section 7.04 says - - -

7 CHIEF JUDGE LIPPMAN: You agree if the
8 trustee can bring it, then - - -

9 MR. WILLETT: No - - -

10 CHIEF JUDGE LIPPMAN: - - - you can't?

11 MR. WILLETT: - - - I don't. I can bring
12 it too, unless I'm barred by the contract, which I'm
13 not.

14 JUDGE SMITH: But the - - - but to the
15 extent the trustee is limited, it's because the - - -
16 the authors of the indenture wanted to limit
17 litigation, isn't it?

18 MR. WILLETT: No, I don't think so, Your
19 Honor. It may be simply because the - - - the
20 authors of the - - - of the indenture wanted to
21 create an administrative narrow function for an
22 indenture trustee. You collect the money; you pay
23 the money to the bondholders. If there's a default
24 in payment, you bring a suit - - -

25 CHIEF JUDGE LIPPMAN: So the contemplation

1 was that you might be able to bring it even though
2 they can't?

3 MR. WILLETT: Well, precisely, because the
4 guts of my suit is a derivative action where we speak
5 for the corporation that my friend's clients have
6 looted. We're not against it. And the notion that
7 an indenture trustee would become the steward, the
8 standard-bearer, the spokesman for the issuer, that's
9 novel. It's a new case - - -

10 JUDGE SMITH: Why - - - I mean, why is it
11 impossible in this case - - - I mean, is it because
12 there's no - - - there is no default? You couldn't
13 serve a notice of default if you wanted to?

14 MR. WILLETT: Two things. There's no
15 default under the agreement.

16 JUDGE SMITH: Um-hum.

17 MR. WILLETT: And 8.04 - - - 8.01 says what
18 the trustee can do. Before there's a default he
19 can't do anything but collect the money and pay it
20 out. And after the default, all he can do is sue on
21 the default.

22 JUDGE SMITH: Where - - - do you have fifty
23 percent of the - - - of the debenture holders with
24 you here?

25 MR. WILLETT: No. But we don't have them

1 against us. Essentially, they're free riders.
2 There's been no suggestion that anyone opposes this
3 suit, and certainly no suggestion that the trustee
4 wishes to jump in and try to pursue a derivative
5 action, which would be unheard of.

6 JUDGE SMITH: Well - - - well the - - - but
7 isn't the whole point of the no-action clause that if
8 the trustee's judgment is that a case shouldn't be
9 pursued, it doesn't get pursued?

10 MR. WILLETT: No, Your Honor. The whole
11 point of this no-action clause is what this no-action
12 clause says.

13 I wish I had another moment to talk about
14 Marchant (ph.), which is very much like this case,
15 but it's discussed in our briefs. Thank you very
16 much.

17 CHIEF JUDGE LIPPMAN: Okay. Thank you
18 both. Appreciate it.

19 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Quadrant Structured Products Co., Ltd. v. Vertin, et al., No. 112 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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