

1 COURT OF APPEALS

2 STATE OF NEW YORK

NOMURA ASSET CAPITAL CORP.,

## Respondents,

-against-

No. 122

CADWALADER, WICKERSHAM & TAFT, LLP,

Appellant.

20 Eagle Street

Albany, New York 12207

September 8, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

#### Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1                   CHIEF JUDGE LIPPMAN: Let's start with 122,  
2 Nomura Assets.

3                   Counselor, do you want - - - want any  
4 rebuttal time?

5                   MR. MARRIOTT: Please, Your Honor, four  
6 minutes.

7                   CHIEF JUDGE LIPPMAN: Four minutes, go  
8 ahead. You're on.

9                   MR. MARRIOTT: Good afternoon, may it  
10 please the court, my name is David Marriot. I  
11 represent Cadwalader.

12                  The - - - the portion of the First  
13 Department decision which requires Cadwalader to  
14 stand trial puts lawyers in an impossible position  
15 and it ought to be reversed. It puts lawyers in an  
16 impossible positions (sic), Your Honors, because it  
17 puts the firm - - - lawyers generally - - at risk  
18 of liability for not doing something that their  
19 sophisticated clients specifically instructed them  
20 not to do.

21                  JUDGE PIGOTT: What do you think of the - -  
22 - the point that was made, I guess both by the trial  
23 bench and the Appellate Division, with respect to the  
24 Highlight document. It seems like that - - - you  
25 know, a lot of what we're talking about hangs on

1           that. Am I right?

2                   MR. MARRIOTT: Much of what we're talking  
3                 about hangs on that, Your Honor. The - - - the court  
4                 below, the First Department, found, the majority did,  
5                 that that document constituted a red flag. The - - -  
6                 the document, we respectfully submit, does not in any  
7                 way, shape, or form constitute - - -

8                   CHIEF JUDGE LIPPMAN: What - - - what is  
9                 its significance?

10                  MR. MARRIOTT: Its significance, Your  
11                 Honor, is - - - it is of essentially no significance,  
12                 except - - - except insofar as - - -

13                  CHIEF JUDGE LIPPMAN: Was it relied upon,  
14                 though?

15                  MR. MARRIOTT: Was it relied upon, Your  
16                 Honor? It - - -

17                  CHIEF JUDGE LIPPMAN: By you.

18                  MR. MARRIOTT: It - - - it was a document  
19                 that was sent to the Cadwalader firm several weeks  
20                 before the transaction closed.

21                  CHIEF JUDGE LIPPMAN: So what did it mean  
22                 to you when you're - - - when you got it?

23                  MR. MARRIOTT: What - - - what - - -  
24                 there's very little in the record, Your Honor,  
25                 precisely about what the document meant to any one

1           person. I think what we can say about that document  
2           is that it confirmed what Cadwalader was being told  
3           by Nomura. It confirmed that Cadwalader had an  
4           appraisal. It confirmed that there was - - -

5                         JUDGE RIVERA: But doesn't the first page  
6           indicate that the property is secured by the type of  
7           tangibles and intangibles that cannot count? They're  
8           not REMIC-eligible? Should that have sent a red  
9           flag?

10                  MR. MARRIOTT: The Deal Highlights  
11           document, Your Honor, does not do that. It does not  
12           communicate. What - - - what it says is that there  
13           is a reconciled valuation of sixty-eight million  
14           dollars. The Deal Highlights - - -

15                  JUDGE RIVERA: No, but on the first page.  
16           I know what you're talking about; I'm going to ask  
17           you about that too. "It's secured by the land,  
18           building, and operations of the property". Is every  
19           one of those char - - - categories REMIC-eligible?

20                  MR. MARRIOTT: Well, Your Honor, not every  
21           one of them necessarily is REMIC-eligible.

22                  JUDGE RIVERA: Okay, so once you know that,  
23           and then you go, as the AD suggests, to what is now  
24           in the record, 2184, the appraised value, and you've  
25           got these different approaches that come up with

1 different numbers, one of them, the 40,600,000,  
2 appearing to be perilously close to a very low  
3 number, doesn't the combination now put you on notice  
4 that maybe you should do more than just see these  
5 numbers on paper?

6 MR. MARRIOTT: It does not, Your Honor - -

7 -

8 JUDGE RIVERA: Okay.

9 MR. MARRIOTT: - - - and it does not,  
10 because at the same time that Cadwalader is sent this  
11 document, it is told by Nomura, we have an appraisal  
12 - - - an appraisal never given to the firm - - - we  
13 have an appraisal, and - - -

14 CHIEF JUDGE LIPPMAN: Did you have a  
15 responsibility to ask for the appraisal or - - -

16 MR. MARRIOTT: I don't believe, Your Honor,  
17 in this circumstance, there was any responsibility to  
18 ask for the appraisal. There was a - - -

19 CHIEF JUDGE LIPPMAN: Could you make a  
20 judgment without the appraisal or a recommendation?

21 MR. MARRIOTT: I believe, Your Honor, the  
22 firm could make a judgment without the appraisal,  
23 because it had a specific representation from Nomura  
24 that the real property securing the Doctor (sic)  
25 Hospital and was equal to at least forty million

1           dollars. We had that representation. And the  
2           representation just wasn't as to a legal conclusion,  
3           it was a - - -

4                   JUDGE RIVERA: But - - - but do you mean  
5           the reference, as I say, that's on page 2184 of the  
6           record?

7                   MR. MARRIOTT: I - - - I - - - Your Honor,  
8           I - - -

9                   JUDGE RIVERA: Are you talking about this  
10          or something else?

11                  MR. MARRIOTT: I'm referring specifically  
12          to the provision of the mortgage loan purchase and  
13          sale agreement, by which Nomura expressly represented  
14          that it had an appraisal - - -

15                  JUDGE RIVERA: Um-hum.

16                  MR. MARRIOTT: - - - and that that  
17          appraisal "evidenced" that Nomura had forty million  
18          dollars of real property value there.

19                  JUDGE RIVERA: Loan-to-value or fair market  
20          value? What are we talking about?

21                  MR. MARRIOTT: We are talking REMIC real  
22          estate property, all right. The - - -

23                  JUDGE STEIN: But - - - but is - - - isn't  
24          that representation tantamount to the REMIC opinion  
25          itself? I mean - - -

1                   MR. MARRIOTT: It is not, Your Honor.

2                   There is a separate representation - - -

3                   JUDGE STEIN: It's not.

4                   MR. MARRIOTT: - - - called the qualified  
5                   mortgage warranty, which one might argue is  
6                   tantamount. That particular representation is very  
7                   fact specific. We, Nomura, have an appraisal. That  
8                   appraisal evidences forty million dollars in value.  
9                   That's about as fact specific, respectfully, that I  
10                  think you can get.

11                  CHIEF JUDGE LIPPMAN: So what's your role  
12                  exactly with Nomura? What - - - what advice were you  
13                  giving them? What are you supposed to be doing if  
14                  you're just confirming what they're telling you?  
15                  That's not much of a role. What - - - what's your  
16                  role?

17                  MR. MARRIOTT: That would not be by itself  
18                  a - - - much of a role. That was not, however, the  
19                  role. The - - -

20                  CHIEF JUDGE LIPPMAN: So what - - - what is  
21                  it? What did - - - why did they spend money to hire  
22                  you?

23                  MR. MARRIOTT: They - - - they spent money  
24                  to hire us, Your Honor, so that based upon the  
25                  factual representations they made as to value, Cad -

1           - - Cadwalader could render an opinion as to whether  
2           that particular fact in combination with other facts  
3           resulted in this particular set of assets become - -  
4           - being REMIC-qualified.

5                             JUDGE RIVERA: But I'm - - - I'm - - - this  
6           - - - this is where I'm stuck. If - - - if you have  
7           documentation that suggests that the number that you  
8           say is REMIC - - - satisfies the - - - the REMIC  
9           eligibility eighty-percent number, but you have  
10          documentation that suggests that maybe that's not the  
11          case, doesn't that mean you are supposed to do  
12          something for your client?

13                            MR. MARRIOTT: That might, Your Honor, but  
14          that's not the set of facts that we have here. That  
15          document - - -

16                            JUDGE RIVERA: That - - - that's where I'm  
17          stuck. Where is that not the set of facts we have?  
18          Or is there a question of fact that's open?

19                            MR. MARRIOTT: The - - - I believe there is  
20          no question of fact that's open on this, Your Honor.  
21          The Deal Highlights document was entirely consistent  
22          with the proposition.

23                            CHIEF JUDGE LIPPMAN: But wait a second.  
24          But - - - but you're really saying the deal - - - in  
25          answer to Judge Pigott's question, you said the Deal

1           Highlight - - - whatever it's called - - - is - - -  
2           is not particularly of any great importance, right?

3           MR. MARRIOTT: I think it's of importance  
4           only insofar as it confirms what Nomu - - - Nomura  
5           was separately telling - - -

6           JUDGE PIGOTT: Well - - -

7           MR. MARRIOTT: - - - Cadwalader.

8           JUDGE PIGOTT: What did you mean - - - I -  
9           - - I think it's footnote 4 of your brief. You - - -  
10          you hit - - - you refer to the Deal Highlights memo  
11          as having something to do with litigation disclosure.

12          MR. MARRIOTT: Sure. Well, Your Honor, the  
13          Deal Highlights document did a lot of things. It was  
14          prepared by bankers for purposes of the rating  
15          agency. One thing it did was describe certain  
16          pending litigations relating to the owner of the  
17          Doctor Hos - - - Doctors Hospital property. That was  
18          of consequence, not for anything to do with respect  
19          to REMIC, but because - - - because Nomura separately  
20          had disclosure obligations potentially related to  
21          those litigations.

22          The - - - the key thing here, Your Honors,  
23          is Cadwalader and Nomura had a - - - they had an  
24          understanding. They had a scope of engagement.  
25          Cadwalader was to get that Nomura was - - -

1                   JUDGE ABDUS-SALAAM: Counsel - - - counsel,  
2 was there anything in the Deal Highlights memo that  
3 was different than the advice that Mr. Adelman gave  
4 to Nomura about REMIC property valuation?

5                   MR. MARRIOTT: Well, Your Honor, there's  
6 nothing inconsistent with that advice. The - - - the  
7 Deal Highlights document merely was a collection of  
8 documents, not an appraisal, not the kind of  
9 information that would have perhaps caused someone to  
10 wonder what - - - whether there might be a - - - an  
11 inconsistency. It was a collection of documents that  
12 simply referred to the fact that there was an  
13 appraisal. And it referred to there being three  
14 potential - - - three valuations that went into that  
15 reconciled valuation of sixty-eight million dollars.

16                  JUDGE STEIN: So are you - - -

17                  CHIEF JUDGE LIPPMAN: So - - -

18                  JUDGE STEIN: - - - that there are a whole  
19 lot of things or there are a number of different  
20 things that go into determining whether these loans  
21 were REMIC-eligible, one of which has to do with the  
22 eighty-percent rule?

23                  MR. MARRIOTT: Correct.

24                  JUDGE STEIN: And that you - - - you were  
25 giving advice on all of these other areas, but you

1                   were specifically told not to concern yourself with  
2                   the eighty percent? Is - - - is that your position?

3                   MR. MARRIOTT: Close. What - - - what I'm  
4                   saying, Your Honor, is that there was an  
5                   understanding that Cadwalader was not to do  
6                   valuations. That's not the job of lawyers. It was  
7                   not to do appraisals. It was to take the values that  
8                   Nomura gave it - - -

9                   CHIEF JUDGE LIPPMAN: But you did give them  
10                  a sense of valuation, right?

11                  MR. MARRIOTT: I don't believe we did give  
12                  them a sense of valuation, Your Honor. What - - -  
13                  what we did is - - -

14                  JUDGE FAHEY: But you still had - - - but  
15                  you still had to address the question of REMIC  
16                  qualification. And if a category - - - forgetting  
17                  the amount, because the appraisal discusses the  
18                  amount - - - if the category itself is clearly  
19                  ineligible, then didn't you have an obligation then  
20                  to notify the client?

21                  MR. MARRIOTT: Well, if - - - if one of the  
22                  categories would clearly have been ineligible,  
23                  perhaps - - -

24                  JUDGE FAHEY: Well, equipment - - -

25                  MR. MARRIOTT: But - - - but - - -

1                   JUDGE FAHEY: - - - 9.6 million dollars.

2                   MR. MARRIOTT: Right, but - - - but  
3                   equipment, Your Honor, on its face is not necessarily  
4                   ineligible. It depends on what the particulars of  
5                   the equipment are. It depends on - - -

6                   JUDGE FAHEY: Listen, I - - - I - - - this  
7                   - - - the Deal Highlights is obviously an important  
8                   document, but I just - - - I don't want you to sit  
9                   down without addressing the proximate cause argument.

10                  MR. MARRIOTT: Sure, well, there - - -  
11                  there are a number of - - - we submit respectfully -  
12                  - - of problems of causation here. A critical one  
13                  was that entirely independent of the supposed  
14                  malpractice by Cadwalader, Nomura represented the  
15                  property securing this loan was worth fifty million  
16                  dollars, not forty, which was the amount necessary  
17                  for the REMIC test, but fifty. They breached that  
18                  representation. There is absolutely no dispute about  
19                  that. They said there was fifty there; there was not  
20                  fifty there. Entirely independent of the alleged  
21                  malpractice by Cadwalader. Nomura would have had an  
22                  obligation to repurchase that loan, and that - - -

23                  JUDGE FAHEY: Well, but there would have  
24                  been no purchase if it hadn't been REMIC qualified.  
25                  So the REMIC qualification was the key decision to

1 making the purchase. So that's why I'm having a  
2 difficult time following your - - -

3 MR. MARRIOTT: Well, Your Honor, the - - -

4 JUDGE FAHEY: - - - your argument.

5 MR. MARRIOTT: - - - this particular loan  
6 was originated without any input from Cadwalader,  
7 entirely apart from Cadwalader. This loan would have  
8 been on Nomura's books irrespective of the alleged  
9 malpractice.

10 JUDGE STEIN: Well, there's at least a  
11 question as to that, isn't there?

12 MR. MARRIOTT: I don't believe there is any  
13 question as to that, Your Honor.

14 JUDGE PIGOTT: So you're saying - - -  
15 you're saying that - - - let's assume for a minute  
16 that it never went into the package of 155 loans.

17 MR. MARRIOTT: Correct.

18 JUDGE PIGOTT: It's sitting over there.

19 DHL goes bankrupt. That's their problem - - -

20 MR. MARRIOTT: That's right.

21 JUDGE PIGOTT: - - - whether it's - - - and  
22 - - - and if - - - and because it's in the 155, it  
23 has this extra added burden of - - - of running afoul  
24 of the REMIC thing.

25 MR. MARRIOTT: That's correct, Your Honor.

1 I believe my time is - - - is up.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MR. MARRIOTT: Thank you.

4 CHIEF JUDGE LIPPMAN: Thanks, counselor.

5 MR. POTTER: May it please the court, James  
6 Potter for Nomura.

7 CHIEF JUDGE LIPPMAN: Counsel, what did - -  
8 - what did they do wrong?

9 MR. POTTER: Multiple things.

10 CHIEF JUDGE LIPPMAN: Within the basic  
11 scope of what they're supposed to be doing - - -

12 MR. POTTER: Okay. Two - - - two - - -

13 CHIEF JUDGE LIPPMAN: What - - - what - - -  
14 put it in a nutshell. What'd they do wrong?

15 MR. POTTER: Two things on the advice  
16 claim. With respect to the advice, what they had to  
17 say to Nomura is, when you get a going concern, like  
18 an acute care hospital, you've got a different  
19 animal. This - - -

20 CHIEF JUDGE LIPPMAN: So - - - so - - - so  
21 they didn't - - - there should have been a - - - a  
22 special mention of this is a different kind of - - -

23 MR. POTTER: It's a different kind of - - -  
24 a different kind of loan. There were only 6 going  
25 concerns out of the 156 in the D5 securitization.

1                   CHIEF JUDGE LIPPMAN: So they should have  
2                   been looking at it - - - and that particular one  
3                   said, you know, this is different than - - - what  
4                   else? What else did they do wrong?

5                   MR. POTTER: The other thing is they gave  
6                   bad advice. They told - - -

7                   CHIEF JUDGE LIPPMAN: How so?

8                   MR. POTTER: They told Barry Funt that if  
9                   you use an eighty-percent loan-to-value test, you're  
10                  fine. There's nothing to worry about. Now, an  
11                  eighty-percent loan-to-value translates to eighty-  
12                  percent value-to-loan. The REMIC test is - - - or  
13                  125 percent value-to-loan. The REMIC test is eighty-  
14                  percent value-to-loan.

15                  JUDGE PIGOTT: But you knew that. I mean,  
16                  that's - - - that's basic banking. I think that's  
17                  true even in single hos - - -

18                  MR. POTTER: Oh, it is, but ba - - -

19                  JUDGE PIGOTT: So you - - - you're the ones  
20                  that did it. You're the ones that said, we have an  
21                  appraisal that - - - that satisfies this, and - - -  
22                  and you gave all of this to them to put in that final  
23                  form, because - - - and they make the argument that  
24                  this isn't the first time you've done it, and that  
25                  they've done it for you many, many, many times.

1                   MR. POTTER: We use that rule of thumb,  
2 because they said it was appropriate to use. In  
3 addition, their tax lawyer, Charles Adelman, looked  
4 at the Annex B, which had values, and he ran the  
5 exact same analysis.

6                   JUDGE PIGOTT: But you would be, right,  
7 relying on your appraisal? I mean, it - - - in fact,  
8 I was looking at - - - in - - - you sent a letter to  
9 Akin Gump when they - - - when they got upset about  
10 this, and - - - and you said "our appraiser's  
11 conclusions are both reasonable and not ambiguous in  
12 the manner you describe. It is not only accepted  
13 practice to appraise property for REMIC transactions  
14 by relying on the as-is or occupied value, rather  
15 than the darker bricks-and-mortar value if  
16 necessary." And it goes on and there's a number of -  
17 - - in fact, you went back to your appraiser CBIZ and  
18 they said, we're absolutely right. There is no doubt  
19 this is REMIC property.

20                  So when I got done reading all of that, I  
21 thought, what's the materiality? If - - - let's  
22 assume for a minute there's a question of fact in the  
23 Deal Highlights, is it material?

24                  MR. POTTER: Yes, absolutely, Your Honor.  
25 Because at that point, remember, you're in 2000.

1 This is when this is blown up. They're trying to get  
2 this REMIC qualified. Had they said in 1997, and  
3 having done their due diligence, wait a minute; you  
4 don't have forty million dollars of REMIC property,  
5 they would have required a full-blown appraisal.

6 JUDGE PIGOTT: No, I'm saying you said - -

7 - you said in 2000 - - - I mean, you got - - - you

8 got notice - - - Akin Gump went through, I think,

9 almost weekly sending you letters saying I see what

10 you're saying, you now sent me a supplement to your

11 appraiser, because you said you can justify this,

12 here's the appraiser saying, I have justified it. We

13 don't buy that either. And I don't know where the

14 Deal Highlights thing is going to help you in that

15 regard. You - - - you took the position all along

16 that that was the right - - -

17 MR. POTTER: No, this - - - this was after  
18 the fact. At this point - - -

19 JUDGE PIGOTT: Right.

20 MR. POTTER: - - - in time, they're trying  
21 to resurrect this. And remember - - -

JUDGE PIGOTT: No, no, no - - -

23 MR. POTTER: - - - they go to federal court  
24 - - -

JUDGE PIGOTT: Excuse me. I - - - I just

1           don't want to be misunderstood. They're saying that  
2           when they did this in '97, it was fine. This was the  
3           appraisal we did. This is the appraisal that we  
4           stand by. This is why you don't understand it. . .  
5           You don't understand it because it's a running  
6           concern and they - - - I think it was in a July 26th  
7           letter - - - they said, you know, this is a like  
8           nursing home, this is like something else. They're  
9           worth more when they're an ongoing - - -

10           MR. POTTER: And - - - and - - -

11           JUDGE PIGOTT: - - - and whether that's  
12           right or wrong, I just don't know where the Deal  
13           Highlights - - -

14           MR. POTTER: Well, the - - - the - - -

15           JUDGE PIGOTT: - - - document comes in.

16           MR. POTTER: - - - the federal court said  
17           that there's an issue of fact as to whether there was  
18           REMIC - - - forty-million dollars of REMIC property.  
19           In addition, our expert, Thomas Biafore, looked at  
20           it, looked at the original appraisal, saw there was  
21           thirty million dollars of REMIC property there,  
22           looked at the appraisal supplement that was done in  
23           2000, and he said, wait a minute. You can't - - -  
24           you don't have forty million dollars of REMIC  
25           property here. You've done things like included

1 equipment. You have no inventory of equipment. It  
2 hadn't had - - -

3 JUDGE PIGOTT: But wasn't that your  
4 appraiser that did that?

5 MR. POTTER: That was the appraiser that  
6 was commissioned, but - - -

7 JUDGE PIGOTT: By you.

8 MR. POTTER: By us, yes.

9 CHIEF JUDGE LIPPMAN: And they don't - - -  
10 they don't see the appraisal. Isn't that - - -  
11 doesn't that play into this?

12 MR. POTTER: No. Because had they give - -  
13 -

14 CHIEF JUDGE LIPPMAN: What are - - - what  
15 are - - -

16 MR. POTTER: - - - what their due diligence  
17 - - -

18 CHIEF JUDGE LIPPMAN: What are you  
19 expecting to do with - - - do you think that they had  
20 to ask for your appraisal?

21 MR. POTTER: In this circumstance, yes.  
22 Remember - - -

23 CHIEF JUDGE LIPPMAN: Why? Why?

24 MR. POTTER: Because you have - - -

25 JUDGE STEIN: In - - - in conjunction with

1           that question, who did this - - - this Deal  
2        Highlights document go to? Did it go to the - - -  
3        the people that were doing the REMIC eligibility?

4           MR. POTTER: It went to Lisa Post.

5           JUDGE STEIN: Yeah, but I thought she  
6        wasn't involved in the task of the REMIC eligibility.

7           MR. POTTER: Lisa - - - she was - - - there  
8        was a small Cadwalader team. It - - - it went to  
9        them. And this isn't about just the Deal Highlights  
10       document. With respect to the due diligence, what  
11       Thomas Biafore says is when you've got a going  
12       concern, you have an obligation to do more. You look  
13       at Charles Adelman's chapter in his book. He says  
14       that - - -

15           JUDGE STEIN: But that's if you're asked -  
16        - - isn't that if you're asked to be looking at this?  
17        Isn't that the question here? That Cadwalader says,  
18        that was never part of our - - - the scope of our  
19       representation.

20           MR. POTTER: I don't believe so, Your  
21        Honor. That's - - - that's what they claim, and  
22        there's certainly an issue of fact about that,  
23        because Gershon testifies, well, I expected them to  
24        do what they had to do. If they asked for an  
25       appraisal, I would have given it to them. Adelman

1       says, if I asked for an appraisal, I - - - I would  
2       have gotten it.

3                     JUDGE ABDUS-SALAAM: But - - - but the  
4       point is, counsel - - -

5                     MR. POTTER: Adelman also - - -

6                     JUDGE ABDUS-SALAAM: - - - isn't the point  
7       that they had to know to ask for the appraisal?

8                     MR. POTTER: Yes. And that's because - - -

9                     JUDGE ABDUS-SALAAM: And the only thing  
10      that has been pointed to that suggests that they  
11      should have asked for the appraisal is this Deal  
12      Highlights document.

13                    MR. POTTER: No, Your Honor. It's the one  
14      acute-care hospital they ever dealt with. It's the  
15      one - - -

16                    JUDGE PIGOTT: What about the - - - what  
17      about the 154 other loans that were in this package?

18                    MR. POTTER: Hun - - -

19                    JUDGE PIGOTT: Should they have done the  
20      exact same thing with respect to all of them?

21                    MR. POTTER: 150 of them, not a problem.

22                    JUDGE PIGOTT: But - - - but now we know  
23      that. But I mean, how did we know that back in '97,  
24      when they're putting this together - - - when you're  
25      putting this together?

1                   MR. POTTER: They knew that because Charles  
2 Adelman knew this was an acute-care hospital.  
3 Cadwalader had never dealt with an acute-care  
4 hospital.

5                   JUDGE PIGOTT: And Nomura?

6                   MR. POTTER: Nomura had never dealt with  
7 one.

8                   JUDGE PIGOTT: Well, what are you doing?

9                   MR. POTTER: Not one. Well, the - - -  
10 because that's - - - that's why you hire a tax  
11 lawyer.

12                  JUDGE PIGOTT: I see, yes.

13                  MR. POTTER: You hire a tax lawyer to tell  
14 us - - -

15                  JUDGE STEIN: What about the fact that the  
16 - - - the loan agreement in the Doctors Hospital loan  
17 had REMIC-type language in it.

18                  MR. POTTER: I'm sorry, Your Honor. Could  
19 you repeat that? I was distracted for a moment.

20                  JUDGE STEIN: My - - - yeah. My question  
21 is, is what it - - - what about the fact that the - -  
22 -- the Doctors Hospital loan agreement had REMIC-type  
23 language in it. I mean, it - - - it - - - to me that  
24 tells me that Nomura knew exactly what it was doing.

25                  MR. POTTER: No, no, Nomura knew that there

1                   was an eighty-percent value-to-loan test. That's  
2                   simple. The real issue is, what is REMIC real  
3                   property? How do you apply that? When you're  
4                   dealing with a - - - an office building, that's easy.  
5                   I've got fifty million dollars' worth of leases; the  
6                   property - - -

7                   CHIEF JUDGE LIPPMAN: You hired them to  
8                   tell you that?

9                   MR. POTTER: Yes, we hired - - - they were  
10                  hired - - -

11                  CHIEF JUDGE LIPPMAN: That's the - - -  
12                  that's within the scope of their employment?

13                  MR. POTTER: Yes, absolutely. They were  
14                  hired to give advice on how to do a REMIC  
15                  securitization. And with respect to the due  
16                  diligence, Adelman said, if something comes to my  
17                  attention that is essentially different than my  
18                  assumptions, if there is a red flag, greater due  
19                  diligence is required.

20                  JUDGE ABDUS-SALAAM: Counsel, you mentioned  
21                  that Nomura had never done a hospital REMIC before,  
22                  and you're saying Cadwalader had not either?

23                  MR. POTTER: Cadwalader hadn't either.

24                  JUDGE ABDUS-SALAAM: So the - - - I think  
25                  the advice from Adelman included that if there is

1 something you want to ask us, please ask us about it.  
2 And if Nomura had never done a hospital  
3 securitization before, wouldn't that be one of the  
4 first questions you would expect to be asked by the  
5 bankers or Mr. Gershon or someone?

6 MR. POTTER: Except - - - except, Your  
7 Honor, this again circles back to the advice that  
8 everybody was applying. That Barry Funt said, this  
9 was what was given to me in '95 when I came on as the  
10 general counsel, that if you've got eighty-percent  
11 loan-to-value, you're so safe; don't worry about it.  
12 You - - -

13 JUDGE ABDUS-SALAAM: You mentioned - - -  
14 you mentioned Mr. Funt before, but I thought it was  
15 Mr. Gershon and Ms. Manar - - -

16 MR. POTTER: Marincas.

17 JUDGE ABDUS-SALAAM: - - - Marincas, who  
18 were the primary members of the team - - -

19 MR. POTTER: And - - -

20 JUDGE ABDUS-SALAAM: - - - dealing with  
21 Cadwalader. And they testified that Cadwalader  
22 advised us about the 80 percent to val - - - value-  
23 to-loan which was equal to 1 - - - 125 percent loan-  
24 to-value.

25 MR. POTTER: But - - -

1                   JUDGE ABDUS-SALAAM: And that's - - - that  
2 was - - - I thought Mr. Adelman's testimony on that  
3 was uncontested.

4                   MR. POTTER: It - - - Mr. - - - Mr.  
5 Gershon, when he was questioned, said, well, we  
6 didn't have anything to worry about because we met  
7 the eight-percent loan-to-value test. He was  
8 applying the wrong test. And Charles Adelman, when  
9 he was doing his due diligence, applied to the wrong  
10 test. What Cadwalader should have said was, you know  
11 what, that rule of thumb works great when you're  
12 dealing with an office building. It works great when  
13 you're dealing with an apartment building. But if  
14 you've got a going concern - - - only 6 out of 156 -  
15 - - if you've got a going concern, you've got a  
16 different situation.

17                  CHIEF JUDGE LIPPMAN: You had no  
18 reservations about that whatsoever with the - - -  
19 with the hospital? It - - - you just took it, no  
20 problem?

21                  MR. POTTER: No, we - - -

22                  CHIEF JUDGE LIPPMAN: You have no real  
23 responsibility in - - -

24                  MR. POTTER: No - - - no, Your Honor. We -  
25 - - we applied the test that we - - - that - - -

1 Nomura applied the test that they told - - - were - -

2 -

3 JUDGE PIGOTT: If just seems - - -

4 MR. POTTER: - - - were told by their  
5 lawyers would work.

6 JUDGE PIGOTT: It seems odd. You know, I -  
7 - - I think that the - - - one of the briefs talk  
8 about there was fifteen - - - that Nomura's done  
9 fifteen of these type of transactions, the - - - and  
10 none of them are small, and Nomura, I think, is one  
11 of the largest dealers in this stuff.

12 MR. POTTER: They're big.

13 JUDGE PIGOTT: And they say, geez, we  
14 didn't know. You know, I mean, we originated the - -  
15 - the loan. They should have - - - they should have  
16 - - - I - - - I don't - - - you're very sophisticated  
17 and - - - and if you had a question, why wouldn't you  
18 go to them and say, hey, we don't do ongoing concerns  
19 a lot. Take a look at this, because we don't trust  
20 our own appraiser.

21 MR. POTTER: Because nobody said if you've  
22 got a going concern, you've got to come to us.

23 JUDGE PIGOTT: But your appraiser should  
24 have.

25 MR. POTTER: No, the appraiser gives an MIA

1 appraisal. He does - - -

2 JUDGE PIGOTT: But sticks and bricks is the  
3 - - - was the code words that I saw there.

4 MR. POTTER: And - - - sticks - - - that's  
5 an interesting issue, because the only place where  
6 sticks and bricks is mentioned is the Glick  
7 affidavit. She doesn't say I said use "sticks and  
8 bricks". She said Cadwalader said it. So I mean,  
9 that's, like, you know, - - -

10 JUDGE RIVERA: So - - - so - - - so what's  
11 in the - - -

12 MR. POTTER: - - - friends of the animals.  
13 That's - - - that's hearsay.

14 JUDGE RIVERA: So what's in this Highlight  
15 document that is the red flag?

16 MR. POTTER: Two things, I think. Judge,  
17 you mentioned it that it was 40.6 million dollars  
18 that was land, buildings, and equipment. A lot of  
19 equipment is not REMIC-qualified in the appraisal  
20 supplement.

21 JUDGE RIVERA: So you're saying because  
22 Nomura doesn't know that on that cover page when it -  
23 - - it's mentioning equipment or it includes  
24 equipment, it doesn't know that that's a problem.

25 MR. POTTER: They don't know that's a

1 problem.

2 JUDGE RIVERA: But the lawyers should know  
3 that that's a problem.

4 MR. POTTER: That's why you hire them.

5 JUDGE RIVERA: Or at least to say, maybe -  
6 - - maybe I need to look at this, because that looks  
7 like it's a problem.

8 MR. POTTER: Yes.

9 JUDGE PIGOTT: Cadwalader in its brief, I  
10 think, said that of the 1,200 documents you submitted  
11 in - - - in this motion, you never mentioned the Deal  
12 Highlights document as evidence of their alleged  
13 negligence.

14 MR. POTTER: And maybe just a small point.  
15 There weren't 1,200 documents.

16 JUDGE PIGOTT: Ah.

17 MR. POTTER: That - - - that was the  
18 numbering system. I think that was a mistake in the  
19 brief writing. I think there were about 200  
20 documents. But it wasn't mentioned, because the  
21 claim is much broader than that. The claim is if - -  
22 - if you've got this kind of document, the lawyer has  
23 to say wait a minute; I have to investigate.

24 CHIEF JUDGE LIPPMAN: So the Deal  
25 Highlights, in contrast to your adversary, is a

1           really important document?

2                   MR. POTTER: Oh, it's - - - it's - - - it -  
3                           - - it's a very important document.

4                   CHIEF JUDGE LIPPMAN: Is that the key to  
5                           what - - - what should have triggered their knowledge  
6                           that there's a problem here? I mean, is that the  
7                           heart of it?

8                   MR. POTTER: Yeah.

9                   CHIEF JUDGE LIPPMAN: I think Judge Pigott  
10                           said at the beginning, doesn't it all bo - - - boil  
11                           down to that deal. Does it or - - - or is that - - -  
12                           how - - - how important - - -

13                   MR. POTTER: Oh, I - - - I - - - I think  
14                           that's - - -

15                   CHIEF JUDGE LIPPMAN: How important is it?

16                   MR. POTTER: I think that's the nail in the  
17                           coffin once they had the Deal Highlights document.  
18                           You send a document to your lawyer; you expect them  
19                           to read it. And - - -

20                   JUDGE RIVERA: What if he says, the  
21                           appraisal is fine and the appraisal says you've got  
22                           enough that you satisfy the eighty-percent REMIC  
23                           requirements. So your position is that yes, that's  
24                           fine and you didn't ask them to do an appraisal and  
25                           you told them, abide by the appraisal. But once they

1           get this document and they see that the appraisal  
2           itself may be based on material - - - for lack of a  
3           better phrase - - - that's not REMIC-eligible, they  
4           should have said, aha, and gone back to you?

5           MR. POTTER: They should have - - - that  
6           was an aha moment. The other aha moment was - - -

7           JUDGE PIGOTT: Why wasn't - - -

8           JUDGE STEIN: But then why didn't you ever  
9           raise this document? Why did it - - - why was it the  
10          Supreme Court that came - - - I mean, if this is the  
11          aha document, you would think that - - - that you  
12          would have been hawking that.

13          MR. POTTER: It's - - - because - - - I  
14          mean, that's - - - that's the - - - that's the nail  
15          in the coffin, but the coffin is this is a - - - an  
16          acute-care hospital. All it required - - - Charlie  
17          Adelman is looking at the - - - the supplement. Oh,  
18          we've got an acute-care hospital. Pick up a phone.  
19          Do you have forty million dollars in REMIC property?  
20          How did you get there? Well, we've got thirty  
21          million dollars of land and building. Oh. Well,  
22          what else do you have? We have nine million dollars  
23          of equipment. Is it REMIC equipment? The appraisal  
24          doesn't say that. That's what you hire a tax lawyer  
25          for.

1                   JUDGE PIGOTT: He does it say it later,  
2 though, right? When - - when Akin Gump was going  
3 after this thing on behalf of the - - - the - - - the  
4 appraiser came back and said, oh, no, you're  
5 misunderstanding this, and this - - - this equipment  
6 counts.

7                   MR. POTTER: And the - - - and the Second  
8 Circuit disagreed and the lower courts disagreed and  
9 that's why we have an issue of fact, Your Honor.

10                  JUDGE PIGOTT: We're here.

11                  CHIEF JUDGE LIPPMAN: Okay, counsel, thanks  
12 a lot.

13                  MR. POTTER: Thank you.

14                  CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

15                  MR. MARRIOTT: Thank you, Your Honor.

16                  CHIEF JUDGE LIPPMAN: Is this the nail in  
17 the coffin? Is that something that should have  
18 electrified you as to what's going on here?

19                  MR. MARRIOTT: It absolutely is not, Your  
20 Honor.

21                  CHIEF JUDGE LIPPMAN: Why not?

22                  MR. MARRIOTT: As evidenced by, among other  
23 things, the fact that it was not mentioned - - -  
24 whether it would be 200 or 1,200 documents - - - it  
25 wasn't raised until eleven - - - after eleven years

1           of litigation on this very issue. Eleven years of  
2           litigation in which they were litigating with others  
3           about this issue, and nothing is made of the Deals  
4           Highlights document.

5                 By - - - by making an issue of that now,  
6                 what essentially the First Department has done is  
7                 make - - - is make hindsight and the perfect vision  
8                 of hindsight, the test, and that - - -

9                     JUDGE RIVERA: But isn't the point that  
10                 it's either a red flag to you or it's not? Isn't  
11                 that the point?

12                     MR. MARRIOTT: Well, Your Honor, that is a  
13                 point, but - - - but what I would say - - -

14                     JUDGE RIVERA: You know you have some  
15                 malpractice going on there, but the point is whether  
16                 or not it was a red flag to you.

17                     MR. MARRIOTT: Right, that is in fact an  
18                 important issue here. And what I would say to Your  
19                 Honor is, on its face as it was construed by the  
20                 First Department, not a red flag, certainly not a red  
21                 flag to Cadwalader. The document didn't come to  
22                 Cadwalader in a vacuum. It came against years of  
23                 experience of dealing with them, knowing they were  
24                 sophisticated, trusting their representations, having  
25                 no reason to doubt their representations - - -

1                   JUDGE RIVERA: But why is he not correct  
2 that you should have told him, you know, there's  
3 something different when you deal with an acute-care  
4 hospital?

5                   MR. MARRIOTT: Your Honor, the advice given  
6 was as to the way the REMIC rules work.

7                   JUDGE RIVERA: Um-hum.

8                   MR. MARRIOTT: And they've pulled out  
9 hospitals and tried to make them sound as if they're  
10 unique. In fact, Nomura did do one other hospital.  
11 It wasn't the only hospital they did. But in any  
12 case, the REMIC rules apply across all property  
13 types. They're not unique or different to given  
14 property types. The question is do you have forty  
15 million dollars, in this case, of real property?  
16 They said they did. And not only did they say they  
17 did - - -

18                   JUDGE RIVERA: No, I understand that - - -  
19 and I think you - - - he concedes that - - - that - -  
20 - this point about the eighty percent and the rule as  
21 a general matter. I - - - I understood his argument  
22 now to be that, yes, but that depends on what you're  
23 counting to get you to the eighty percent. And if an  
24 acute-care hospital is different, they depend on  
25 their lawyer to tell them, you know, the general rule

1           we told you? You should just know that when it comes  
2           to this kind of property, you have to treat that  
3           differently.

4                            MR. MARRIOTT: There's - - -

5                            JUDGE RIVERA: Why isn't he right about  
6                            that?

7                            MR. MARRIOTT: There's no evidence that an  
8                            acute-care hospital is different in the sense. None.  
9                            The rules apply to all property types, okay. There's  
10                          nothing in the Deal Highlights document - - -

11                          JUDGE RIVERA: It's a going concern,  
12                          doesn't matter.

13                          MR. MARRIOTT: It's not that it doesn't  
14                          matter, it's that the rule has to take account of  
15                          that fact and Cadwalader - - -

16                          JUDGE ABDUS-SALAAM: So were there other  
17                          hospitals or other going concerns in this D5  
18                          securitization - - -

19                          MR. MARRIOTT: There - - - there were other  
20                          going concerns, Your Honor. There was no other  
21                          hospital, okay.

22                          JUDGE ABDUS-SALAAM: That was the only  
23                          hospital?

24                          MR. MARRIOTT: In this particular  
25                          securitization, correct.

1                   JUDGE ABDUS-SALAAM: I thought your - - -  
2                   your adversary said something about five other REMIC  
3                   properties in this D5 that may have been going  
4                   concerns.

5                   MR. MARRIOTT: I believe he was referring  
6                   to going concerns, Your Honor - - -

7                   JUDGE ABDUS-SALAAM: Yeah, that were going  
8                   concerns.

9                   MR. MARRIOTT: - - - not hospitals.

10                  JUDGE ABDUS-SALAAM: So if - - - if that's  
11                  true, even though this were the only hospital, would  
12                  that mean that Cadwalader should look at all 5 or  
13                  even 6 of these 150-some-odd properties to make sure  
14                  that they are REMIC-qualified, as opposed to the rest  
15                  of them?

16                  MR. MARRIOTT: Well, that's - - - that's  
17                  where the argument of Nomura leads. That is not,  
18                  respectfully, what we think the rule is or ought to  
19                  be.

20                  JUDGE ABDUS-SALAAM: Well, that's what I'm  
21                  asking you. Should - - - should you have done that?

22                  MR. MARRIOTT: No, we - - - we should not  
23                  have. Your Honor, the de - - - the deal here was, we  
24                  will tell you what the property values are. We don't  
25                  want you, Cadwalader, doing it. We don't want to pay

1 you to do that. That's not a legal function. The  
2 record on that is clear. Cadwalader did what it was  
3 asked to do. And now - - -

4 JUDGE FAHEY: Well, what would have  
5 happened is you - - - you would have - - - if you had  
6 alerted them to the - - - to the - - - the adequacy  
7 of the appraisal, I'm assuming that you would have  
8 said you better get another appraisal.

9 MR. MARRIOTT: If we had known about the  
10 appraiser, Your - - - the appraisal, Your Honor, if  
11 it had been given to us and if we had looked at it,  
12 we probably would have said, what in fact happened in  
13 2000, which is they went back, they got the appraisal  
14 clarified and it was clarified to demonstrate there  
15 was forty million dollars of real property value.

16 JUDGE ABDUS-SALAAM: Was there anything  
17 besides - - -

18 JUDGE RIVERA: I guess, I'm back to why - -  
19 - I'm sorry.

20 JUDGE ABDUS-SALAAM: Was there anything  
21 besides the Deal Highlights memo that told you what  
22 the properties were of the 155 in the D5  
23 securitization - - -

24 MR. MARRIOTT: Sure, there was this - - -  
25 there were other documents that generally identified

1                   the properties, Your Honor, yes.

2                   JUDGE ABDUS-SALAAM: Okay, so, assuming the  
3                   Deal Highlights document did not exist, would we be  
4                   here, because you didn't look at those other  
5                   documents to find out whether any of those other  
6                   properties required additional REMIC qualification  
7                   scrutiny?

8                   MR. MARRIOTT: I respectfully believe under  
9                   their theory, we'd be here in any circumstance, and  
10                  that's why I think the decision below puts lawyers in  
11                  an impossible position. We - - - we were given a  
12                  scope of work. We complied with the scope of work,  
13                  and now after the fact, what's essentially happened  
14                  is they said, a problem occurred; you should have  
15                  figured it out; you're - - - you're the lawyers.

16                  We were asked to do a specific job. That  
17                  job was done. It was not as if this representation  
18                  was a casual co - - - comment over a conference  
19                  table.

20                  CHIEF JUDGE LIPPMAN: So your - - - your  
21                  view is that there's no way that within the - - - the  
22                  scope of your employment that you could know that  
23                  there was going to be a problem here or that they  
24                  were relying on you to provide that kind of  
25                  assistance? You just think they know as much as you

1 knew in this case - - - they're a - - -

2 MR. MARRIOTT: I think they knew all - - -

3 CHIEF JUDGE LIPPMAN: - - - it's a  
4 sophisticated argument, is that what it is? That - -

5 -

6 MR. MARRIOTT: It's the sophisticated  
7 argument, but it's much more. They knew a lot more  
8 than we did. They had the appraisal. They  
9 commissioned it. They told us not to look at it.

10 CHIEF JUDGE LIPPMAN: So you weren't in the  
11 position unless they gave certain information and  
12 then said, hey, what do you think of this?

13 MR. MARRIOTT: If they had given us that  
14 appraisal and asked for the advice, which is in fact  
15 exactly what the advice had been, then further  
16 information could have been provided.

17 CHIEF JUDGE LIPPMAN: Okay, thank - - -

18 JUDGE RIVERA: So - - - so - - -

19 CHIEF JUDGE LIPPMAN: - - - oh, sorry,  
20 Judge Rivera.

21 JUDGE ABDUS-SALAAM: So let me - - - I just  
22 want to clarify what - - - what - - - what your  
23 argument is. So - - - and perhaps this is not as  
24 nuanced as really the understanding was between  
25 Cadwalader and the client. But am I understanding

1                   your argument to be that you were hired to basically  
2                   tell them what the legal standard was, and they said  
3                   okay, we'll apply it. We don't need you to apply it;  
4                   we got that. We'll give you documents to do some  
5                   final check, but we don't need you to do anything  
6                   else. And your position is that that was your  
7                   understanding. Your - - - your role as lawyer was  
8                   not to confirm that the legal standard here, being  
9                   this eighty percent eligibility requirement of REMIC  
10                  was properly assessed and properly applied?

11                  MR. MARRIOTT: Essentially that latter  
12                  part, Your Honor, is correct. We - - - we were given  
13                  the values. On the basis of those values, we  
14                  rendered an opinion. There were a lot of opinions  
15                  that were rendered. We're now focusing on - - - on  
16                  simply one of those. But as to the value, that was  
17                  their job, and the record is indisputable that that's  
18                  the case.

19                  JUDGE RIVERA: So - - - so - - - so do you  
20                  agree though - - - do you concede that if there was  
21                  something - - - because I understand you're saying  
22                  the Highlight - - - the document Deal Highlights  
23                  doesn't do this. But do you concede that if indeed  
24                  there was a document that came to Cadwalader and  
25                  indicated that the - - - the legal standard that you

1 had explained to them was being incorrectly applied,  
2 that you had the duty to - - - to inquire further?

3 MR. MARRIOTT: I think in - - - in that  
4 particular hypothetical - - -

5 JUDGE RIVERA: Yes.

6 MR. MARRIOTT: - - - it would have been  
7 prudent for Cadwalader to - - - to inquire further.  
8 That simply is not our facts.

9 JUDGE RIVERA: Okay, thank you.

10 CHIEF JUDGE LIPPMAN: Okay, thank you.

11 MR. MARRIOTT: Thank you, Your Honors.

12 CHIEF JUDGE LIPPMAN: Thank you both,  
13 appreciate it.

14 (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 Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft, LLP, No. 122, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Kerry Schaffville

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