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COURT OF APPEALS

STATE OF NEW YORK

ACE SECURITIES CORP.,

Appellant,

-against-

NO. 34

DB STRUCTURED PRODUCTS, INC.,

Respondent.

20 Eagle Street
Albany, New York
May 19, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 THE COURT: Good afternoon. Judge Rivera is
2 appearing remotely for oral argument. The court welcomes
3 the junior and senior students from Columbia Grammar and
4 Prep who are here to observe this afternoon's oral
5 argument. The first matter on this afternoon's calendar is
6 appeal number 34, ACE Securities v. DB Structured Products.

7 Counsel?

8 MR. MAZIN: Good afternoon, Your Honor. May it
9 please the court. My name is Zachary Mazin from McKool
10 Smith. I represent the plaintiff-appellant HSBC, the
11 trustee of the ACE 2006 SL2 Trust. Madam Chief Judge, may
12 I reserve two minutes for rebuttal?

13 CHIEF JUDGE DIFIORE: You may, sir.

14 MR. MAZIN: Thank you, Your Honor. And thank you
15 for making time to hear from us today.

16 I want to drive one thing home with my time here
17 today, and it's this. This CPLR 205(a) action should not
18 have been dismissed because the plaintiff in this action is
19 the trust, just like the plaintiff in the preceding action
20 was the trust. There certainly was a change in the entity
21 acting on the trust's behalf, but it has always been the
22 trust whose "rights are sought to be vindicated" in both
23 actions; that's outcome determinative.

24 And that's not because I say so. Those words,
25 "whose rights are sought to be vindicated", Chief Judge



1 Kaye adopted those words in the Reliance action. She
2 called them the common thread running throughout CPLR 205
3 actions where the initial action was commenced by an
4 improper plaintiff. And when she applied that rule to the
5 facts in that case, she didn't mince words. She said,
6 Pivotal here is that unlike the scenario in George - - -
7 frankly unlike the scenario here - - - RIC - - - the
8 revival plaintiff - - - is seeking to enforce its own
9 separate rights.

10 JUDGE WILSON: Well, were the certificate holders
11 an improper plaintiff?

12 MR. MAZIN: They did not have standing to act on
13 behalf of the trust and that certainly doomed the original
14 action. We're not here to argue that the original action
15 was proper. But that is a defect that can be corrected, it
16 has been corrected. And that's exactly why Reliance
17 considers a common thread of cases where an improper
18 plaintiff commenced the original action, Your Honor. So -
19 - -

20 JUDGE SINGAS: Counselor, isn't the savings
21 provision intended to permit diligent plaintiffs the right
22 to a hearing on the merits? Were your clients diligent
23 here?

24 MR. MAZIN: Thank you, Judge Singas. I want to
25 emphasize that the claims here belong to the trust. They



1 don't belong to the certificate holders. They don't belong
2 to the trustee. They belong to the trust. And there was a
3 timely filed action that purported to act for the trust's
4 behalf; that's the only diligence requirement that you'll
5 find in the law. It was satisfied here. So why the
6 trustee didn't interpose that action versus the certificate
7 holders is completely irrelevant to the analysis under
8 205(a).

9 JUDGE WILSON: What about why the certificate
10 holders didn't act sooner?

11 MR. MAZIN: The certificate holders acted soon
12 enough to bring a timely filed action, Your Honor. The
13 action that - - - the original action was commenced by
14 summons with notice within the six-year time frame. So
15 that is the only timeliness, that's the only diligence
16 requirement that exists. We're not arguing that there
17 wasn't a defect in the case. I commend you to the George
18 case. It's 1979. Judge Gabrielli writes extensively about
19 the circular logic that would apply if we're going to deny
20 relief under 205(a) because of the same defect that caused
21 the original action to be dismissed.

22 That defect - - - it's not a merit's-based
23 defect. And so it can't knock out both actions. It
24 certainly knocked out the original. It can't knock out the
25 205(a) action as well. And that's what the concern about



1 the capacity of the certificate holders is right now.

2 JUDGE RIVERA: Oh, Counsel, I'm on the screen.
3 Yes, good afternoon.

4 Let me ask you this. Could - - - could the
5 certificate holders, if they had had a proper plaintiff
6 position, have brought an action and the trustee brought an
7 action? Could they both have brought an action?

8 MR. MAZIN: Your Honor, I'm struggling to
9 conceive of when that would have been necessary, why that
10 would have been necessary.

11 JUDGE RIVERA: OK.

12 MR. MAZIN: But that's - - - obviously, that's
13 not the circumstance that we have here. We have a whole -
14 - - a - - - an entity that lacked capacity who acted on the
15 - - -

16 JUDGE RIVERA: Yeah.

17 MR. MAZIN: - - - to vindicate the rights that
18 are at issue in this action as well. And so when the court
19 asked that - - -

20 JUDGE RIVERA: Well, why - - - why isn't that - -
21 - why isn't that like I have a claim. I don't bring the
22 claim. Someone wants to be generous for me and brings the
23 claim. And the court says, well, you can't bring the
24 claim; that's her claim, so you can't bring that claim.

25 MR. MAZIN: But - - -



1 JUDGE RIVERA: Statute of limitation expires, and
2 now I want to bring the claim.

3 MR. MAZIN: Because, Your Honor, this is the
4 scenario in Carrick. I would commend the court to Carrick,
5 where an administ - - - proposed administrators, someone
6 who knowingly lacked capacity to - - - to pursue the rights
7 at issue filed the original action. Of course that case
8 couldn't stand under 203(f), it was dismissed. She was
9 allowed to come back once she had gained that capacity.
10 And Carrick said that's fine; 205(a) will cover that. And
11 that I have - - - I should be clear wasn't because of the
12 same nominal plaintiff rule that Mr. Russell is advocating
13 for here. It was because they were pursuing the same
14 rights.

15 JUDGE GARCIA: Counsel, can I - - - can I ask a
16 question? What if this was dismissed on some other basis,
17 right, the action, and now you just want to substitute a
18 plaintiff? It wasn't because the plaintiff didn't have
19 capacity. It was just because of the notice requirement,
20 which is why we dismissed this case. We never decided that
21 there was no capacity to sue here.

22 MR. MAZIN: That's right.

23 JUDGE GARCIA: So couldn't this be looked at as
24 you're just substituting a plaintiff? It's not like you
25 got knocked out of this case because you didn't have the



1 capacity. We never said that.

2 MR. MAZIN: You're - - - Judge Garcia, you're
3 correct about the ruling in the original action. But this
4 motion to dismiss on this revival action only addresses
5 whether the plaintiff remained the same from the first
6 action to the next.

7 JUDGE GARCIA: Right.

8 MR. MAZIN: And I should say that my friends at
9 DB agreed with that. It's at page 46 of their - - -

10 JUDGE GARCIA: But let's say that ruling had
11 never been made in the first case, hypothetically. And it
12 was only taught - - - it was - - - the suit was only
13 dismissed because of the condition precedent.

14 MR. MAZIN: Um-hum.

15 JUDGE GARCIA: Could you do what you're doing
16 now?

17 MR. MAZIN: Yes, Your Honor. We don't have to
18 deal with the condition precedent issue here. That issue -
19 - -

20 JUDGE GARCIA: No, no, no, no. Could you
21 substitute a plaintiff if there has never been any finding
22 that the initial plaintiff - - -

23 MR. MAZIN: Y-yes, Your Honor; that - - -

24 JUDGE GARCIA: You can just bring in a new
25 plaintiff because you want?



1 MR. MAZIN: This is exactly what Chief Judge Kaye
2 was addressing in Reliance. There are reams and reams of
3 cases, both here at this court of appeals, but also below,
4 where different people act to pursue the same rights.

5 JUDGE GARCIA: But isn't there, in those case - -
6 - and I may be wrong, but it seems to me in at least the
7 ones I've looked at there was a finding that the initial
8 plaintiff lacked some capacity.

9 MR. MAZIN: Your Honor, the only thing that
10 precludes application of 205(a) is if there was a
11 merits-based dismissal in the prior action. It is
12 blackletter law in this state that lack of capacity to sue
13 does not constitute a merits-based dismissal. And that's
14 why we have the issue in Reliance.

15 Look. Some cl - - - some cases will apply under
16 205(a), some cases will not. I think Reliance neatly
17 illustrates how we're different from the facts there, where
18 Chief Judge K-Kaye said no. 205(a) does not apply. So in
19 or - - - in order to keep faith with her analysis, in order
20 to avoid unraveling the common thread that she identified,
21 you need to identify some difference in the rights being
22 vindicated.

23 JUDGE GARCIA: But - - - but just - - - just so
24 I'm clear, though. So in my hypothetical, the initial case
25 is dismissed. It's brought by shareholders here,



1 certificate holders. They have standing. They could bring
2 it, but they don't use - - - you know, they get knocked out
3 because of the condition precedent. Your view is you can
4 just bring another suit under 205(a) and substitute the
5 trustee in any way?

6 MR. MAZIN: Your Honor, I don't know - - - I'm
7 sorry, I - - - Judge, Garcia. I don't understand why
8 anyone would do that if they know there is a plaintiff with
9 capacity, but I would suggest that - - -

10 JUDGE GARCIA: Maybe because the trustee didn't
11 want to get sued for not bringing the initial action. So
12 now they come in and they say no. We want to do it.

13 MR. MAZIN: So - - - so that would be proper.
14 There is no prohibition here. And what I would suggest is
15 that to the extent there's a concern about gamesmanship,
16 look at Malay. It's a 2019 decision of this court. Judge
17 Fahey authored it. He talks extensively about how we don't
18 have to worry about gamesmanship when we're applying
19 remedial statutes. Because plaintiffs have every incentive
20 to have their cases heard and decided as quickly as
21 possible.

22 Judges are capable of judging, right, and
23 applying concerns about gamesmanship and - - - and dilatory
24 tactics at the ground level; that's not something that
25 should preclude application of this remedial statute.



1 I see that my red light is on.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 Counsel?

4 MR. RUSSELL: Good afternoon. William Russell of
5 Simpson Tacher & Bartlett LLP on behalf of respondent DB
6 Structured Products, Inc. And again, thank you. I want to
7 echo Mr. Mazin's thanks for accommodating us on the May
8 schedule and I apologize for any inconvenience caused by my
9 illness in April.

10 You know, it's interesting. Mr. Mazin started
11 off by saying he represents HSBC as trustee. And that's
12 important because he then said the plaintiff here is the
13 trust. But the plaintiff is not the trust. The trust is
14 not a legal entity. The trustee is the only party that has
15 the ability to bring these breach of representation and
16 warranty claims against the sponsor. HSBC is the only
17 party - - -

18 JUDGE WILSON: Well, under - - - under certain
19 circumstances, the certificate holders could as well,
20 right?

21 MR. RUSSELL: Under cert - - - certain sums - - -
22 certain circumstances not present here. The claims that
23 are being brought here, representation warranty claims, can
24 only be brought by the trustee. The hedge fund certificate
25 holders who brought the original action are expressly



1 precluded by the no action clause of the pooling and
2 servicing agreement from bringing those claims.

3 So unlike all the other case, including lower
4 court case decided before Reliance, the original plaintiff
5 here never had the ability to sue, was never a proper
6 plaintiff, and never could be a proper plaintiff. And the
7 rule that HSBC argues here ignores the clear language of
8 CPLR 205(a) and this court's holding in Reliance.

9 205(a) is very clear that under certain
10 circumstances "the plaintiff or if the plaintiff dies and
11 the cause of action survives, his or her executor or
12 administrator may commence an action outside the statute of
13 limitations". And this court was equally clear in Reliance
14 when it said, Turning first, as we must, to the text of the
15 statute, we note that the benefit provided by this section
16 is explicitly and exclusively bestowed on the plaintiff who
17 possessed the original action. Only if the plaintiff dies
18 and his or her cause of action survives may the executor or
19 administrator of a deceased plaintiff's estate commence a
20 new action based on the same occurrence.

21 Outside of this representative context, we have
22 not read the plaintiff to include an individual or entity
23 other than the original plaintiff. And it talks about the
24 original plaintiff who possessed the original action. The
25 certificate holder hedge funds here never possessed that



1 action. They never had the right to bring suit. They were
2 never a proper plaintiff.

3 JUDGE WILSON: Could an original plaintiff assign
4 the right to sue?

5 MR. RUSSELL: That is a good question. I think
6 if the original plaintiff assigned the right to sue and was
7 a proper plaintiff - - -

8 JUDGE WILSON: Um-hum.

9 MR. RUSSELL: - - - and that assignment took
10 place before the case was dismissed, I think that's a much
11 closer question.

12 JUDGE WILSON: What about after the case was
13 dismissed, but before the six-month period in 205 ran?

14 MR. RUSSELL: I think under that circumstance a
15 reading of 205(a) would preclude the second plaintiff from
16 bringing suit because it's a different plaintiff. But even
17 if this court were to extend its holding in Reliance and
18 effectively amend 205(a) to permit that to happen, that's
19 not what we have here; that rule wouldn't even save HSBC,
20 where the original plaintiff never had the right to sue.
21 And if the original plaintiff never had the right to sue,
22 it would have nothing to assign to a subsequent plaintiff.

23 This court has never held that anyone other than
24 the original plaintiff or his or her executor is entitled
25 to relief afforded by 205(a). And that's important because



1 205(a) and Reliance set forth a clear, predictable bright-
2 line rule that's easy to reply - - - easy to apply as to
3 who can commence an action under 205(a).

4 JUDGE GARCIA: Counsel, I'm sorry to interrupt
5 you.

6 MR. RUSSELL: Yeah.

7 JUDGE GARCIA: But if we ruled for you - - -

8 MR. RUSSELL: Yeah.

9 JUDGE GARCIA: - - - if we were to do that on the
10 basis you're saying, would that essentially mean overruling
11 the cases that applied this type of - - - 205(a) to a
12 bankruptcy trustee?

13 MR. RUSSELL: You know, that's an interesting
14 question. And clearly, I think the bankruptcy trustee
15 cases present a much closer question. Certainly - - - and
16 the bankruptcy trustee line of cases, those holdings began
17 before this court made abundantly clear what 205(a)
18 provides in the allian - - - Reliance decision. But it
19 certainly would not be inconsistent with Reliance or 205(a)
20 to hold that a Chapter 11 trustee cannot avail itself of
21 205(a). But even if this court doesn't overrule those
22 cases and finds that 205(a) is applicable in the situation
23 of a Chapter 11 trustee, again, the Chapter 11 trustee
24 succeeds by order - - - by act of law to the rights of the
25 debtor.



1 The debtor originally possessed the claim and by
2 operation of law, under Chapter 11, the Chapter 11 trustee
3 then steps into the shoes of that plaintiff. The trustee
4 is taking over a claim that the original plaintiff actually
5 at one point was the proper plaintiff. And that's not
6 what's going on here. The original hedge fund certificate
7 holders here never had a right to bring a claim in the
8 first place. So it's a very different situation than the
9 Chapter 11 trustee situation. As I was saying, the benefit
10 of Reliance and 205(a) is it sets a clear bright-line test
11 that this court has recognized is important, particularly
12 in the context of the statute of limitations, which serve
13 the goals of finality, predictability, and certainty.

14 The same rights test urged by HSBC would - - - is
15 effectively trying to manufacture an unclear and uncertain
16 test that would be largely impossible to apply at the
17 pleading stage and in every instance, the court would have
18 to conduct a fact-specific inquiry as to whether the two
19 plaintiffs' rights are sufficiently similar to justify the
20 application of 205(a). That's precisely what this court
21 warned against in Reliance when it rejected the rule
22 proposed by HSBC here, and the court expressed its concern
23 that a contrary ruling would "open a new tributary in the
24 law".

25 And again, this court recognized the importance



1 of clear, bright-line tests in this very case in its
2 decision in ACE, when it rejected an accrual date that
3 cannot be ascertained with certainty in favor of a
4 bright-line approach to the accrual of RMBS representation
5 warranty claims expressly noted, "Our statutes of
6 limitations serve the same objectives of finality,
7 certainty, and predictability that New York's contract law
8 endorses".

9 Then the court went on to say, "And we've
10 repeatedly rejected accrual dates which cannot be
11 ascertained with any degree of certainty in favor of a
12 bright-line approach". And the test urged by HSBC is just
13 the opposite of that bright-line approach, would require an
14 investigation into whether the rights of the two plaintiffs
15 are sufficiently similar.

16 And if you look at what happened in Reliance,
17 when the court talks about the same rights, it's not that
18 the original plaintiff RNY and the second plaintiff RIC
19 were asserting different rights. It's that RNY never had
20 the right to assert the claims in the first place. They
21 were suing under the same surety bonds. And the court said
22 RNY had no right to assert those claims because it wasn't
23 the issuer of the surety bonds.

24 But it wasn't trying to assert its own rights or
25 rights separate from what RIC was trying to assert. It was



1 attempting to assert the rights of the issuer of the surety
2 bonds. But because it was the wholly owned subsidiary of
3 the issuer and not the issuer itself, the case was
4 dismissed.

5 And on appeal RIC argued, well, we're the new
6 plaintiff and we're the parent. We're sufficiently related
7 to the original plaintiff. But the court said no. You're
8 suing for your own rights under the surety bonds. RNY had
9 no rights under those surety bonds, so you can't rely on
10 205(a) to enable you to bring the suit outside the statute
11 of limitations.

12 So it wasn't that they were es - - - trying to
13 assert separate rights. They were trying to assert the
14 same rights; the right of the issuer of the surety bonds.
15 But because RIC was the issuer, they were RIC's rights, not
16 RNY's rights. So RIC could not relay - - - rely on the
17 action commenced by RNY.

18 JUDGE GARCIA: Counsel, what are we to make of
19 the fact that this court never decided whether they were
20 the proper plaintiffs in that case?

21 MR. RUSSELL: Well, the fact of the matter is
22 that issue is not before this court. The First Department
23 ruled that H - - - that the original hedge fund certificate
24 holders didn't have standing. And in fact, when this issue
25 was argued before the trial court, before we came up before



1 this court, the trial court asked Mr. Mazin whether he was
2 challenging that standing decision. And he said on - - - I
3 believe page 487 and 497 of the record, I'm not challenging
4 that decision, I embrace it. I embrace it. So they are
5 not challenging the fact that they don't have standing
6 here.

7 JUDGE GARCIA: But the mo - - - the thing that I
8 - - - and maybe it's irrelevant, but seems interesting is
9 this case wasn't dismissed because it was an improper
10 plaintiff, right? We just - - -

11 MR. RUSSELL: This case was dismissed on two
12 grounds. It was dismissed in the original ACE decision by
13 Justice Friedman on the grounds that the sixty and
14 ninety-day notice period had not expired before the
15 certificate holder brought suit and on the ground that the
16 certificate holder lack standing to sue under the pooling
17 and servicing agreement.

18 JUDGE GARCIA: But we affirmed only on the first
19 basis.

20 MR. RUSSELL: That is correct, but it was
21 dismissed on both grounds, affirmed on broath - - - both
22 grounds by the First Department, and the HSBC has never
23 challenged the standing decision.

24 JUDGE GARCIA: No.

25 MR. RUSSELL: And like I said, when this - - -



1 JUDGE GARCIA: But I just think as a - - -

2 MR. RUSSELL: - - - when this current motion was
3 argued - - - I'm sorry.

4 JUDGE GARCIA: My - - - my issue is just as a
5 practical effect, it's not a suit that was dismissed
6 because of an improper plaintiff.

7 MR. RUSSELL: It was - - - I don't want to
8 quibble with you, Judge Garcia.

9 JUDGE GARCIA: Well, curious.

10 MR. RUSSELL: It - - - it was dismissed on the
11 grounds, but the - - - this court's affirmance of the
12 dismissal was not on that grounds. So this court has not
13 decided that issue, but it's not being challenged on
14 appeal.

15 JUDGE GARCIA: No.

16 MR. RUSSELL: It's still the law of the case.

17 JUDGE GARCIA: But perhaps they could have
18 brought the same plaintiffs and challenged it under 205(a).

19 MR. RUSSELL: But they chose not to.

20 And if you look at 205(a), the fact that 205(a)
21 has an express carve-out for if it's not the same plaintiff
22 it has to be the executor or administrator means that the
23 legislature intended that to be the only exception. If the
24 legislature intended it to be the plaintiff, his or her
25 executor or administrator, or anybody else who purports to

1 assert the same rights as the plaintiff, the legislature
2 could have said that. And in fact, if the test really were
3 same rights, including an executor or administrator as a
4 carve-out from the statute it would be unnecessary and
5 superfluous because by definition, administrators and
6 executors are asserting the rights of their decedent.

7 So HSBC also argues - - - oh, I'm sorry.

8 CHIEF JUDGE DIFIORE: Continue your thought.

9 MR. RUSSELL: Okay. HSBC also argues that
10 irrespective of whether the plaintiff is the hedge fund
11 certificate holders or HSBC is trustee, you know, the trust
12 ultimately is going to be the beneficiary here, but there
13 are a couple of problems with that. The first problem is
14 HSB ignores the fact that, again, there could never be a
15 recovery by the hedge funds because they had no right to
16 assert the claims in the first place, were never a proper
17 per - - - plaintiff, and in fact, were expressly prevented
18 from bringing suit.

19 It also ignores the fact that this is not all
20 that different from Reliance, where the original plaintiff
21 was a wholly owned subsidiary of the second plaintiff, RIC.
22 So by definition, if the original plaintiff had obtained
23 the recovery as the wholly owned subsidiary, that still
24 would have been to the ultimate benefit of the second
25 plaintiff. But this court nevertheless found that the - -

1 - the two plaintiffs were different plaintiffs, and
2 therefore CL - - - CPLR 205(a) did not apply.

3 CHIEF JUDGE DIFIORE: Thank you, Counsel.

4 MR. RUSSELL: Thank you very much.

5 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

6 MR. MAZIN: I have the deepest respect for my
7 colleague, Mr. Russell, but Chief Judge Kaye disagreed with
8 him and his interpretation of Reliance. She said that
9 pivotal in that action is that the revival plaintiff is
10 seeking to enforce its own separate rights rather than the
11 rights of the plaintiff in the original action. I didn't
12 create that rule, Chief Judge Kaye did. And let me explain
13 why we are seeking to enforce the same rights.

14 I have the summons with notice that commenced the
15 original action. And I think this is important to the
16 point you were addressing, Judge Garcia. We're here on the
17 revival of the second case. Not the original action, like
18 you recently saw in Heat. So the motion to dismiss below
19 was granted on the basis of the fact that we are not - - -
20 the trustee is not the same plaintiff as the certificate
21 holders. That's why I say the key point that I want you to
22 take away here today from my presentation is that the
23 plaintiff has always been the trust.

24 At page 384 of the summons with notice, the
25 certificate holders say right in the caption that they're



1 acting "on behalf of ACE Securities Corp. home equity loan
2 trust series 2006SL2. They notified Deutsche Bank within
3 the limitations period that they're making the claims
4 herein derivatively on behalf of the trust and all of the
5 certificate holders.

6 The - - - the demand for relief says that they
7 seek relief "on behalf of the trust and all of the
8 certificate holders in the form of specific performance to
9 repurchase the defective loans in the trust"; that's the
10 exact same relief that we're seeking here in this revival
11 action. The complaint in this action, it can be found at
12 page 63 of the record, the prayer for relief. The very
13 first demand on the next page is for repurchase from
14 Deutsche Bank of all the defective loans in the trust.

15 JUDGE WILSON: So you - - -

16 MR. MAZIN: Had the certificate holders been
17 acting for their own account, I would agree with Mr.
18 Russell. They weren't. They were acting for the trust.

19 Yes, Judge; I'm sorry.

20 JUDGE WILSON: You were effectively arguing that
21 they are standing in the shoes of the trustee, pursuant to
22 terms in the PSA that allow them to do that.

23 MR. MAZIN: They had a good faith belief for
24 that. In fact, if you continue on looking at the summons
25 with notice, Your Honor, you'll see my name on the



1 signature block. I've been with this case since its
2 inception. There is a good faith belief to believe that
3 they had standing pursuant to the no action clause in the
4 PSA to act for the trust. Turned out to be wrong; that's a
5 lack of capacity that can be corrected.

6 And so if you adopt the same nominal plaintiff
7 bright-line rule that my friend is advocating for, yes,
8 Judge Garcia, you will be overruling all of those
9 bankruptcy trustee cases. Not only that, you'll be setting
10 aside Judge Kaye's analysis in Reliance. You'll be
11 abrogating or overruling George and Carrick. And you'll be
12 setting aside reams of lower court decisions interpreting
13 those actions.

14 The cases here were identical in every respect
15 except for the entity that was acting on the trust's
16 behalf. So if you follow the money, in the original
17 action, had it been allowed to proceed, any recovery from
18 Deutsche Bank would have flowed through the trust waterfall
19 and gotten paid out to all of the certificate holders.

20 JUDGE RIVERA: So Counsel - - - I'm on the
21 screen. So Counsel, are there any rights that the trustee
22 holds as a trustee under the agreements?

23 MR. MAZIN: That - - - that's - - - thank you,
24 Judge Rivera; that's a great point that I want to make sure
25 to get in as well. The trust holds the equitable claims



1 here.

2 JUDGE RIVERA: Uh-huh.

3 MR. MAZIN: It is very much like a bankrupts - -
4 - bankruptcy trustee scenario like Ms. Russell described in
5 that those rights are divided into legal title and
6 equitable title and legal title is passed to the trustee
7 because the trust is a nonjuridical entity. Somebody has
8 to act on its behalf.

9 So the trustee obtains that right to act, but
10 equitable title has always resided with the trust. These
11 are the trust claims. They are not HSBCs. They are not
12 the certificate holders. And the certificate holders were
13 vindicating those rights. So unless you can identify some
14 difference in the rights being vindicated from the first
15 action to the next, we should be finally allowed to proceed
16 to the merits.

17 And I should close by indicating that this is not
18 a flood gates issue, Your Honors, to the extent that's part
19 of this analysis. Any action that will benefit from 205(a)
20 in the RMBS context already has been filed; that's in - - -
21 that's inherent in the nature of the statute. So thank
22 you, Your Honors, for your close consideration of this
23 issue.

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 (Court is adjourned)



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

I, Colin Richilano, certify that the foregoing transcript of proceedings in the Court of Appeals of ACE Securities Corp. v. DB Structured Products, Inc., No. 34 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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