



## Indenture Trustee Has Standing To Pursue Non-Contractual Remedies For Noteholders

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In *Cortlandt Street Recovery Corp. v. Hellas Telecommunications, S.A.R.L.*, the New York State Appellate Division strictly construed a note indenture to uphold the standing of the indenture trustee to pursue non-contractual remedies for payment of notes on behalf of all holders. The Court refused to permit an assignee of the noteholders, who had the right to become, but had never actually become, a registered holder, to pursue the same claims.

The case arose from a note issuance in 2006, sold to foreign investors. The investors alleged that the issuance was a fraudulent scheme, called a “bleed-out”, by which the issuer and its sponsors were rendered insolvent when the note proceeds were used to buy the issuer’s equity from its shareholders. The foreign note investors assigned the right to pursue their claims to plaintiff Cortlandt Street Recovery in late 2012, and Cortlandt brought various suits in state and federal court to recover on the notes.

### INDENTURE TRUSTEE’S STANDING

The Appellate Division, First Department, reversed the Supreme Court’s dismissal of the trustee’s claims for breach of contract, fraudulent conveyance, unlawful corporate distribution and unjust enrichment. Under Section 6.03 of the indenture, the trustee had standing to pursue fraudulent transfer and other non-contract claims that sought recovery of the amounts due under the notes for the benefit of all noteholders on a *pro rata* basis, as a remedy for an alleged injury suffered ratably by all noteholders by reason of their noteholder status.

The Court distinguished decisions holding that an indenture trustee cannot bring claims unique to individual noteholders, such as a claim against an underwriter for a fraud perpetrated against original purchasers of the notes. The Court also found, preliminarily, that the indenture trustee could pursue *alter ego* or veil piercing claims against the defendants in control of the issuer for causing the issuer to divest itself of the note proceeds, thereby rendering itself insolvent.

### LACK OF STANDING OF PERSONS NOT HOLDERS

The Appellate Division, however, followed several federal decisions based on the same facts, which had denied standing to the non-trustee plaintiff, Cortlandt Street Recovery Corp, to assert the same claims. See, e.g., *Cortlandt St. Recovery Corp. v. Hellas Telecomms.*, 790 F.3d 411 (2d Cir. 2015). The federal decisions had found lack of Article III standing because the assignments that Cortlandt Street Recovery had received had merely granted it full right to collect principal and interest due, and to pursue all remedies, on behalf of the assignors, but had not transferred “title or ownership” of the claims to Cortlandt Street Recovery. Those courts held that this arrangement was a mere power of attorney that did not allow Cortlandt Street Recovery to sue in its own name, and that therefore the actions had not been brought in the names of the real parties in interest. The federal decisions further held that this defect could not be cured by an amendment to the Complaint alleging ratification of the suit by the assignors.

Such relief was improper both because the federal courts had never had jurisdiction of any claim asserted and because the plaintiff had not properly sought relief under Federal Rule 17(a)(3). Substitution of the real parties in interest as plaintiffs would have destroyed federal jurisdiction, and leave to obtain new assignments would have changed the claims asserted.

The recent state court case refused to allow Cortlandt Street Recovery to pursue the claims on the additional ground that it had never become the holder of the notes being sued on. Although the assignors had obtained a court order requiring issuance of definitive notes, such notes had never actually been issued, and the Court declined to alter the terms of the indenture to permit suit by persons who were not registered holders of the notes.

### IMPORTANCE OF THE TRUSTEE'S STANDING

This case, and its companion cases in the federal courts, illustrate the importance of the indenture trustee's unquestioned standing to pursue remedies to collect on notes on behalf of all holders. It also illustrates the risks, and potential for years of delay in litigation over standing and jurisdiction, when holders attempt to assign their claims to a special purpose vehicle created to pursue such claims.

*Cortlandt Street Recovery Corp. v. Hellas Telecommunications, S.À.R.L.*, 2016 WL 4800872 (1<sup>st</sup> Dep't, September 15, 2016)

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