UNDERSTANDING BONDHOLDERS' RIGHT TO SUE: WHEN A NO-ACTION CLAUSE SHOULD BE VOID

Judge Posner famously wrote that "the fundamental function of contract law . . . is to deter people from behaving opportunistically toward their contracting parties."[1] Deterrence from opportunistic behavior is motivated by the good intention of protecting potential victims of that behavior. But in the realm of contract law, good intentions do not make good law. The way to hell is paved with good intentions. At least within the bondholder-issuer context, judges are, at best, inconsistent in protecting victims of opportunistic behavior.

The only consistency has been the constant whittling away of *any* contractual protections for bondholders. Now, after decades of well-intentioned jurisprudence, what is left over for a bondholder after signing a bond contract is at the whim of the courts. Unfortunately, the whim of the courts appears to favor a position that, rather than adhering to the fundamental function of deterrence, actually encourages opportunistic behavior to the detriment of bondholders.

One highly contentious contractual provision that has become a vehicle for opportunistic behavior is the bond indenture's standard no-action clause. The no-action clause precludes a bondholder from bringing a claim against the corporation to enforce his contractual rights.[2] Essentially, each bondholder has waived his or her right to bring claims relating to the security against the debtor.[3] This waiver turns the bondholder into a dependent of the corporation and its trustee.[4]

This Comment explores the courts' use of the no-action clause in quashing meritorious lawsuits and the policy implications of the no-action clause. This Comment also proposes that the standard no-action clause should be void in certain circumstances. Part I provides a background introduction of the standard no-action clause and its role in bondholder transactions. Part II describes the current jurisprudence and consequent policy implications of no-action clauses. Part III proposes three scenarios in which no-action clauses should be void.

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1. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 81 (3d ed. 1986).

2. Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp., 677 F.3d 1286, 1292, 1295 (11th Cir. 2012).

3. *Id.* at 1292–93.

4. Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. REV. 1165, 1167–68 (1990).

I. BACKGROUND: BOND CONTRACTS AND THE NO-ACTION CLAUSE

Bonds are security instruments commonly used as a source of fixed-income, external debt financing.[5] As fixed-income securities, bonds are tradable on the secondary market and typically traded over-the-counter, allowing the parties to enter into a transaction without meeting face-to-face.[6] Initial issuances, however, are negotiated between parties and issued via a debt instrument or contract containing the promise to pay a future stream of cash to investors holding the bonds.[7]

Issuances of corporate bonds finance operations without diluting the equity holdings of stockowners. Nonetheless, equity holders can expropriate value from the bondholders through corporate transactions that increase asset risks, reduce assets through shareholder dividend payments, or increase liabilities.[8] Additionally, like stockowners, bondholders can expect to lose their investment in the event of default or insolvency.[9]

Corporate bonds, however, are unsecured debt that provides bondholders a claim on general corporate assets.[10] Thus, in a case of insolvency, corporate bondholders theoretically have priority over stockholders in debt repayment.[11] The corporate issuances may be classified as either senior (unsubordinated) or junior (subordinated).[12] Because of the priority of bondholders over stockowners, a natural tension exists between the two parties.[13]

The common solution to alleviate this tension is the drafting of a bond indenture with protective covenants. These protective covenants attempt to protect bondholders from stockowner actions that reduce the value of the bonds.[14] Violation of the indenture and the protective covenants constitutes contractual default.[15]

In each bond contract, bondholder rights are memorialized and the paradigm of the relationship is defined.[16] Theoretically, these arrangements are comprehensively negotiated and extensively

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5. DAVID HILLIER ET AL., FINANCIAL MARKETS AND CORPORATE STRATEGY 37 (2008).
6. *Id.* at 75.
7. *Id.* at 31–32.
8. *Id.* at 38.
9. MILES LIVINGSTON, MONEY & CAPITAL MARKETS: FINANCIAL INSTRUMENTS AND THEIR USES 372 (1990).
10. *Id.* at 371.
11. *Id.*
12. *Id.*
13. *Id.* at 372.
14. *Id.*
15. *Id.* at 378.
16. *See* Dale B. Tauke, *Should Bonds Have More Fun? A Reexamination of the Debate over Corporate Bondholder Rights*, 1989 COLUM. BUS. L. REV. 1, 8–9 (1989).

documented.[17] Practically, however, a body of people consisting of management, underwriters, and trustees drafts the bond contract unilaterally.[18] This body of drafters consequently holds the power to define the scope of the relationship.[19] Investors do not typically draft the contract and only react to the process through the "indirect route of the market price mechanism and its impact on bond underwriters," if at all.[20] Thus, bondholder rights are essentially "at the level of the lowest common denominator."[21] Not surprisingly, the relationship between bondholder and issuer excludes any fiduciary duty because the unilaterally drafted arrangement establishes a purely contractual relationship.[22]

For the purposes of this Comment, the bond indenture will be referred to generally as a bond contract. Such contracts are debt instruments, which have been in existence for nearly the last two centuries.[23] The bond contract is a standard form contract described as "long, detailed, and technical,"[24] containing numerous "boilerplate" provisions that impair bondholder rights.[25] From this bond contract, bondholders and the issuer derive both contractual rights and contractual obligations.[26] The bond covenants typically vest the rights of the bondholder in a trustee.[27]

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17. Katz v. Oak Indus. Inc., 508 A.2d 873, 879 (Del. Ch. 1986).

18. *Id.*

19. *See* Mitchell, *supra* note 4.

20. Tauke, *supra* note 16, at 87–88.

21. Mitchell, *supra* note 4, at 1167.

22. Lorenz v. CSX Corp., 736 F. Supp. 650, 658–59 (W.D. Pa. 1990). Likewise, obligations in the context of convertible debt securities are purely contractual in nature. *See* Metro. Sec. v. Occidental Petroleum Corp., 705 F. Supp. 134, 140–41 (S.D.N.Y. 1989); Simons v. Cogan, 542 A.2d 785, 788 (Del. Ch. 1987); *Katz*, 508 A.2d at 879 ("Under our law—and the law generally—the relationship between a corporation and the holders of its debt securities, *even* convertible debt securities, is contractual in nature." (emphasis added)).

23. *See, e.g.*, Shaw v. R.R. Co., 100 U.S. 605, 607 (1879) (summarizing railroad company entering into a bond contract on December 22, 1869).

24. *See In re* Enron Corp. Sec., Nos. H-01-3624, 03-5808, 2008 WL 744823, at *8 (S.D. Tex. Mar. 19, 2008) ("Bondholders/Noteholders obtain their rights from a contract, known as an indenture, which sets out a system of individual rights held separately by individual noteholders and of collective rights held by the group of noteholders or their representative, i.e., the indenture trustee."); Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off Between Individual and Collective Rights*, 77 N.Y.U. L. REV. 1040, 1044–45 (2002) (outlining the complex nature of bondholder contracts).

25. *See Enron*, 2008 WL 744823, at *8 (noting that bondholder/noteholder rights tend to be highly standardized). For a book of sample boilerplate provisions, see also CORP. DEBT FIN. PROJECT, AM. BAR FOUND., SAMPLE INCORPORATING INDENTURE: (DEMONSTRATING A METHOD OF INCORPORATING BY REFERENCE MODEL DEBENTURE INDENTURE PROVISIONS—ALL REGISTERED ISSUES—1967) AND MODEL DEBENTURE INDENTURE PROVISIONS: ALL REGISTERED ISSUES, 1967, at 35–37 (1967).

26. LIVINGSTON, *supra* note 9, at 378.

27. *See Enron*, 2008 WL 744823, at *8.

Accordingly, bondholders often find themselves bound by rigid contractual provisions that impose hurdles to deter suing an issuer. The issuer, upon drafting the bond contract, defines both the circumstances that give rise to standing and the procedural method for suing. Foremost among these contractual provisions is the standard no-action clause

The no-action clause is theoretically a product of contractual negotiations and represents the intentions of both parties as to their obligations under the agreement.[28] The reality is, however, the no-action clause is standard boilerplate, and courts have been anything but consistent when enforcing it. This inconsistency has been dominated in recent years with an interpretation of the no-action clause that fosters a culture where corporate management is essentially handed a license to engage in arguably fraudulent activities.[29] The practical implication of inconsistent enforcement has been prejudicial to bondholders.

The no-action clause has been in existence for decades, and "it is a rare indenture which does not include them."[30] Under the provisions of a no-action clause, a bondholder must act collectively with a majority and make a demand upon the issuer's trustee as a preliminary hurdle to filing a lawsuit.[31] Indeed, the preliminary demand may quash the very lawsuit a bondholder is pursuing. A particular situation in which "bondholders will be excused from compliance with a no-action provision [is] where they allege specific facts which if true establish that the trustee itself has breached its duty under the indenture or is incapable of disinterestedly performing that duty."[32] Unsurprisingly, given the extensive preclusions of the no-action clause, its applicability has been at the heart of significant debtor-creditor lawsuits.

A typical no-action clause contains the following provisions:

> A Security holder may not pursue *any remedy with respect to this Indenture or the Securities* unless:
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> > (1) the Holder gives to the Trustee written notice of a continuing event of default;

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28. Katz v. Oak Indus. Inc., 508 A.2d 873, 879 (Del. Ch. 1986).

29. Mitchell, *supra* note 4, at 1166–68.

30. Case Note, *Conflict of Interests Between Indenture Trustee and Bondholders: Avoidance of "No Action" Clauses Prohibiting Bondholder Suits Against the Obligor*, 62 YALE L.J. 1097, 1097 n.1 (1953) [hereinafter Rabinowitz Note] (quoting Gerald J. O'Leary, Assistant Dir., S.E.C., Div. of Corp. Fin., Communication to the Yale Law Journal (Feb. 24, 1953)).

31. *Id.* at 1097–98.

32. Feldbaum v. McCrory Corp., Civ. A. Nos. 11866, 11920, 12006, 1992 WL 119095, at *644 (Del. Ch. June 1, 1992); *accord* Cruden v. Bank of N.Y., 957 F.2d 961, 968 (2d Cir. 1992).

> (2) the Holders of at least a majority in principal amount of outstanding Securities make a written request to the Trustee to pursue the remedy;
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> (3) such Holder or Holders offer to the Trustee indemnity satisfactory to the Trustee against any loss, liability or expense;
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> (4) the Trustee does not comply with the request within 60 days after receipt of the request and the offer of indemnity; and
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> (5) during the 60–day period the Holders of a majority in principal amount of the outstanding Securities do not give the Trustee a direction which is inconsistent with the request.[33]

As can be seen, the typical no-action clause includes a number of standard terms. In sum, individuals and minority groups are precluded from asserting the right to make a demand on the trustee. Those bondholders who successively organize into a collective majority must make a demand upon a trustee and cannot bring a direct action against the issuer. Even after making the demand, the clause imposes a requisite sixty-day period during which the plaintiffs cannot proceed on their lawsuit. This entire process is implicated in any "Event of Default." Most no-action clauses define the "Event of Default" to include:

> (a) failure to pay interest when due, (b) failure to make redemption of bonds after notice of redemption has been given and published, (c) failure to maintain sufficient assets, (d) failure to maintain the sinking fund, (e) failure in the observance of any performance of a covenant contained in the bond, and (f) a ceasing to do business on the part of the company.[34]

Although the contract specifies the circumstances that qualify as an "Event of Default," as will be discussed later, the courts have not been consistent in interpreting the scope of "Events of Default." Sixty years ago, it was argued that courts should apply a "strict construction of the indenture agreement in order to limit the coverage of the 'no action' clause,"[35] but modern courts appear to interpret the provision broadly to include any event that may lead to a potential default.[36] This broad construction has effectively allowed bond issuers to engage in fraudulent transfers and breaches of

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33. *Feldbaum*, 1992 WL 119095, at *641.

34. *See, e.g.*, Gordon v. Conlon Corp., 55 N.E.2d 821, 821–22 (Ill. App. Ct. 1944).

35. Rabinowitz Note, *supra* note 30, at 1100.

36. *See, e.g.*, *Feldbaum*, 1992 WL 119095, at *641–42.

contract at the expense of the bondholders, conduct analogous to that of corporate piranhas.

Indeed, the effect of both interpreting the "Event of Default" broadly and imposing a sixty-day demand window has created a loophole in which issuers have engaged in fraudulent conduct without legal ramifications.[37] This has led to what one scholar termed a "moral hazard"—when an issuer is permitted to engage in conduct that increases the risk of insolvency.[38]

For example, often litigated is the applicability of no-action clauses to corporate violations of the Uniform Fraudulent Transfer Act ("UFTA"). Courts have held that UFTA claims against a corporation must be brought collectively through a trustee under the no-action clause.[39] However, these dual requirements for bondholders who seek an injunction on a fraudulent transfer under the UFTA effectively provide the issuer a free license to engage in fraudulent conduct without legal ramifications. And, although courts have commented that the no-action clause need not bar meritorious suits,[40] the stark reality is that many meritorious lawsuits are ultimately prevented from proceeding despite protracted litigation.[41]

II. UNDERSTANDING THE NO-ACTION CLAUSE AND ITS POLICY IMPLICATIONS

The courts have treated the no-action clause as a contractual provision that provides many positive benefits, including preventing a multiplicity of suits[42] and protecting majority bondholders' interests.[43]

The standard no-action clause insulates a corporation from defending itself from a multiplicity of suits by forcing bondholders to channel their grievances through an independent trustee appointed by the issuer.[44] Typically, bondholders must make a demand upon

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37. *See, e.g.*, Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp., 677 F.3d 1286, 1295–96 (11th Cir. 2012).

38. Tauke, *supra* note 16, at 5.

39. *Akanthos*, 677 F.3d at 1293 (explaining that "fraudulent transfer claims 'allegedly arise from transactions by issuers of their bonds and assert injuries arising from the bondholder status of plaintiffs . . . [,] [plaintiffs] are hurt derivatively . . . and thus should share any remedy they receive on *pari passu* basis with other bondholders'; [t]herefore the claims could only be properly be brought by the trustee" ((alterations in original) quoting *Feldbaum*, 1992 WL 119095, at *645–46)).

40. *Feldbaum*, 1992 WL 119095, at *641–42.

41. *See, e.g.*, Fir Tree Partners v. MGC Commc'ns, Inc., No. 114674 (N.Y. Sup. Ct. Nov. 7, 2001), *available at* http://decisions.courts.state.ny.us/nyscomdiv/nov01/114674-01-002.pdf.

42. Quirke v. St. Louis–S.F. Ry. Co., 277 F.2d 705, 709 (8th Cir. 1960).

43. *See Akanthos*, 677 F.3d at 1295.

44. Rabinowitz Note, *supra* note 30, at 1097–98 & n.2.

the trustee, and the trustee has the discretion to proceed with or quash a potential lawsuit.[45] To overcome the preclusions of the no-action clause and to make a demand upon the trustee, bondholders must act collectively. Indeed, collective action is usually one of the few exceptions to the no-action clause prohibition of bondholder action.[46] The no-action clause creates significant hurdles for individual bondholders to bring a lawsuit against the corporation. Modern law treats bondholders as a collective group, presuming the individual's independent action to be unjustified and that "all rights and remedies of the indenture are for the equal and ratable benefit of all holders."[47]

As recently as 2012, the Eleventh Circuit commented that "[a]n important purpose of no-action clauses is to 'protect against the exercise of poor judgment by a single bondholder or a small group of bondholders, who might otherwise bring a suit against the issuer that most bondholders would consider not to be in their collective, economic interest.'"[48] Whether or not such rationale is reasonable, it has become common judicial practice, and, as the American Bar Foundation has noted in drafting a model no-action clause, subjugating the individual to the collective is, "in fact, . . . their primary purpose."[49]

Despite the appearance that the no-action clause protects bondholder interests, it actually strips bondholders of the ability to protect themselves. By removing a bondholder's individual ability to sue the issuer, the no-action clause has removed the main accountability mechanism that a bondholder had over the issuer. Because there are no fiduciary duties within the relationship, contractual remedies are the only enforcement mechanism the bondholder has to ensure the value of his investment. The no-action clause, however, removes the viability of those contractual remedies by imposing debilitating conditions and vesting them with a trustee.[50] But, this trustee is not necessarily a neutral party representing the bondholder's interests. Indeed, the no-action

45. *Id.* at 1097–98.

46. *Id.*

47. Feldbaum v. McCrory Corp., Civ. A. Nos. 11866, 11920, 12006, 1992 WL 119095, at *642 (Del. Ch. June 1, 1992).

48. *Akanthos*, 677 F.3d at 1295 (quoting *Feldbaum*, 1992 WL 119095, at *642–43).

49. CORP. DEBT FIN. PROJECT, AM. BAR FOUND., COMMENTARIES ON INDENTURES 232 (1971).

50. *Akanthos*, 677 F.3d at 1293 ("'[No-action] clauses in the indentures constitute waivers by plaintiffs' of their rights to bring claims relating to the securities and instead vest those rights in the trustee." (quoting *Feldbaum*, 1992 WL 119095, at *641)).

clause has been upheld even in situations when either the issuer is the trustee or the issuer controls the trustee.[51]

The implications of the no-action clause are prejudicial and fraught with inequitable results when meritorious lawsuits for an issuer's fraudulent transfers are dismissed. The following three cases provide a glimpse into judicial understanding and application of the no-action clause. *Feldbaum v. McCrory Corp.*[52] is an unpublished Delaware decision that dismissed a fraudulent transfer claim for procedural failures governed by the no-action clause. *Akanthos Capital Partners v. CompuCredit Holdings, Inc.*[53] is a recent Eleventh Circuit case that likewise dismissed a fraudulent transfer claim for procedural failures, reversing a comprehensive district court analysis into the policy of the no-action clause and its inapplicability in certain bondholder-issuer contexts. *Metropolitan West Asset Management, LLC v. Magnus Funding, LTD*[54] is an unpublished opinion by the Southern District of New York that reveals a contrary position by interpreting the no-action clause narrowly, which this Comment proposes is more suitable within the bondholder-issuer context.

A. Feldbaum v. McCrory Corp.

The most famous bondholder no-action clause lawsuit is *Feldbaum v. McCrory Corp.*,[55] which, although unpublished, has become a commonly cited authority on the subject by the Delaware Court of Chancery. In *Feldbaum*, there were three categories of plaintiffs: E-II bondholders, MPC bondholders, and McCrory bondholders.[56] E-II and MPC bondholders alleged that a number of transactions by the defendant constituted fraudulent transfers that increased the risk of default on their bonds and diluted the value of their bonds.[57]

All three classes of plaintiffs brought breach of contract claims for violating the implied covenants of good faith and fair dealing of the indenture covenant. MPC and McCrory also alleged common law fraud claims.[58] In dismissing all but two claims against the defendant (the court stayed the two claims it did not dismiss), the Delaware court found that the no-action clauses in the indentures constituted waivers of the right to seek redress by the plaintiffs.[59]

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51. *See* Fried v. Marburger, 186 S.W.2d 584, 587–88 (Mo. 1945); Rabinowitz Note, *supra* note 30, at 1097 n.2.

52. *Feldbaum*, 1992 WL 119095, at *644.

53. 677 F.3d 1286 (11th Cir. 2012).

54. No. 03 Civ. 5539(NRB), 2004 WL 1444868 (S.D.N.Y. June 25, 2004).

55. *Feldbaum*, 1992 WL 119095, at *644.

56. *Id.* at *634.

57. *Id.* at *635–36.

58. *Id.* at *637.

59. *Id.* at *638, *640–41.

In order to bring a claim against the defendant, the plaintiffs must have first complied with the procedural requirements, which include making a trustee demand.[60]

The Delaware court rejected the contention that the no-action clause applied only to express contract provisions and expressed its faith in the ability of a trustee to bring a claim on behalf of the bondholders for contract breaches.[61] Regarding the fraudulent conveyance claims, the court held that the contract provision—"a Securityholder [sic] may not pursue *any remedy with respect to this Indenture or the Securities*"—was a broad prohibition, so that the fraudulent conveyance fell within the scope of the no-action clause.[62] The court likewise rejected the common law fraud claims, finding no fraud in the inducement, which was the only fraud claim that the court held would fall outside the scope of the no-action clause.[63]

B. Akanthos Capital Management, LLC v. CompuCredit Holdings Corp.

In a more recent fraudulent transfer claim—and the poster case for this Comment, *Akanthos Capital Management, LLC v. CompuCredit Holdings Corp.*[64]—the district court thoroughly considered the no-action clause and the full spectrum of its implications.[65] The Eleventh Circuit's subsequent decision, however, created a class of creditors who were handicapped from enjoining egregiously fraudulent transfers to their detriment.[66]

In *Akanthos*, a majority group of bondholders collectively brought a lawsuit to enjoin fraudulent transfers by CompuCredit shareholder-directors.[67] CompuCredit had been struggling financially for several years.[68] In 2009, directors announced a twenty-four million dollar distribution to themselves effective within a sixty-day window.[69] Additionally, two tender offers of unprecedented value for a distressed company were announced and set to expire within a thirty-day window, shifting value from

60. *Id.* at *641.

61. *Id.* at *643 ("[N]o matter what legal theory a plaintiff advances, if the trustee is capable of satisfying its obligations, then any claim that can be enforced by the trustee on behalf of all bonds, other than a claim for the recovery of past due interest or principle, is subject to the terms of a no-action clause of this type.").

62. *Id.* at *641–42.

63. *Id.* at *648–50.

64. 770 F. Supp. 2d 1315 (N.D. Ga. 2011), *rev'd* 677 F.3d 1286 (11th Cir. 2012).

65. *Id.* at 1325–26.

66. *See Akanthos*, 677 F.3d at 1293, 1295.

67. *Akanthos*, 770 F. Supp. 2d at 1320.

68. *Id.*

69. *Id.* at 1327.

creditors to shareholders.[70] The three transactions ensured that the company would default on its bonds, a situation absorbed by the market as the value of the notes on the bond market plummeted.[71] The company then exploited the harm and repurchased the bonds at distressed prices.[72] A majority of bondholders collectively sued to enjoin the company from making the twenty-four million dollar distribution and proceeding on the two tender offers under the UFTA.[73]

The bond contract between the parties included a standard "Event of Default" no-action clause.[74] The district court held that the no-action clause was inapplicable for three reasons: (1) plaintiffs constituted a majority of bondholders, so that the no-action clause was rendered void; (2) an injunction under the UFTA is not considered an "Event of Default"; and (3) CompuCredit's conduct prevented compliance with the bond contract.[75] However, upon appeal, the Eleventh Circuit refused to construe the no-action clause narrowly, instead holding that extracontractual fraudulent transfer claims were equally barred by the no-action clause.[76] The Eleventh Circuit ultimately denied Akanthos bondholders the ability to enjoin CompuCredit's fraudulent transfer despite the egregiously bad faith nature of the transactions.[77]

C. Metropolitan West Asset Management, LLC v. Magnus Funding, Ltd.

Despite the long-standing deference to the broad construction of no-action clauses seen in *Feldbaum* and *Akanthos*, courts are not necessarily uniform in their construction of no-action clauses in bondholder litigation. Contrast *Feldbaum* with the unpublished opinion, *Metropolitan West Asset Mgmt., LLC v. Magnus Funding, Ltd.* where the district court found that "'no-action' provisions apply according to their terms and are not broadly construed."[78]

In *Metropolitan West*, the plaintiff was a junior bondholder who alleged a breach of contract when Magnus Funding allegedly mismanaged the trust collateral and entered into a liquidation

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70. Brief of Appellees at 10–11, *Akanthos*, 677 F.3d 1286 (No. 11013227-E), 2011 WL 4734963, at *10–11.

71. *Akanthos*, 770 F. Supp. 2d at 1320, 1324; Brief of Appellees, *supra* note 70, at 11.

72. *Akanthos*, 770 F. Supp. 2d at 1329; Brief of Appellees, *supra* note 70, at 11.

73. *Akanthos*, 770 F. Supp. 2d at 1320; Brief of Appellees, *supra* note 70, at 3.

74. *Akanthos*, 677 F.3d at 1288.

75. *Akanthos*, 770 F. Supp. 2d at 1327–28, 1335–36.

76. *Akanthos*, 677 F.3d at 1295.

77. *Id.* at 1298.

78. No. 03 Civ. 5539(NRB), 2004 WL 1444868, at *5 (S.D.N.Y. June 25, 2004).

agreement without notification to bondholders.[79] The bondholders were sophisticated investors who had invested in collateralized bond obligations of high-risk, high-yield bonds.[80] The plaintiff sought damages relating to the liquidation agreement, which was not expressly listed as an "Event of Default" in the bond contract.[81] Therefore, the *Metropolitan West* court held that the no-action clause did not apply because "such clauses do not prevent noteholders from bringing extracontractual tort claims or breach of contract claims that are not of the type to which the 'no-action' provision, by its terms, applies."[82]

As can be deduced from these cases, the most commonly litigated problems arise because the no-action clause "is not an individualized contract condition particular to these parties; it is a standard provision present in many trust indentures."[83] Consequently, the terms of the no-action clause do not always afford sufficient clarity or comprehension for issues that arise in the future between the parties.

III. NO-ACTION CLAUSES SHOULD BE VOID IN THREE CIRCUMSTANCES

In light of the court's holding in *Akanthos*, this Part will argue that a narrow construction approach of interpreting the no-action clause is preferable to a broad interpretation. A narrow construction considers the underlying policies that justify the no-action clause and the balance of equities between the parties. Such an interpretation also arguably protects bondholders from an issuer's fraudulent conveyances, whereas a broad interpretation effectively licenses an issuer to engage in fraudulent transfers while protected under the bubble of an "Event of Default"—a bubble that a bondholder is hard pressed to pierce due to the constrictions of the no-action clause.

Based on policy implications of the no-action clause and the proposition that it should be interpreted narrowly, a no-action clause should be void in three circumstances: (1) when a majority of bondholders act collectively; (2) when the issuer's conduct gives rise to extracontractual causes of action; and (3) when the issuer frustrates the intendment of contractual provisions.

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79. *Id.* at *2, *4.
80. *Id.* at *1.
81. *Id.* at *5.
82. *Id.*
83. Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp., 677 F.3d 1286, 1298 (11th Cir. 2012); *accord* Sharon Steel Corp. v. Chase Manhattan Bank, 691 F.2d 1039, 1048 (2d Cir. 1982).

A. When a Majority of Bondholders Act Collectively

Collective action by bondholders gives rise to situations where a court should find no-action clauses void. Typically no-action clauses include a provision permitting a majority of bondholders to make a demand on the trustee in a collective action.[84] Nonetheless, majority collective action should eliminate the applicability of the no-action clause because the intended protections afforded by the no-action clause are rendered irrelevant upon collective bondholder action.

Bondholders of a particular security often act collectively to concentrate power in negotiations in order to protect their investments.[85] In the rare situation, bondholders of different securities from the same issuer may also concentrate their power in collective action.[86] Collective action often operates as a means of forcing the issuer to agree to more favorable terms[87]—terms that an individual bondholder may not have the means to negotiate and terms that would certainly be precluded under the no-action clause. Indeed, the incentive to act collectively arguably stems from the power such a group may hold.

Collective action by a majority of bondholders renders a no-action clause meaningless. As discussed above, the primary purpose of the no-action clause is to protect majority bondholder interest.[88] The courts have conceptualized bondholders as sharing all profits and losses as a collective class so that any benefit or harm to a bondholder is a harm shared by all.[89] And, any fraudulent or otherwise illegal act by an issuer places all bondholders at equal risk of default.[90] Thus, the courts hold that the majority should not be inconvenienced by the whims of an individual or a minority group of bondholders.[91] Given such policies by the court, when a majority of bondholders choose to act collectively the protections afforded by the no-action clause are nullified and inconsequential.

Given that the no-action clause's purpose is rendered irrelevant in light of collective action, the no-action clause should be void. The continued application of the no-action clause despite majority collective action creates the unfair risk to the bondholders that their meritorious case may nonetheless be dismissed. For example, in

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84. *See supra* Part I; *see also* Kahan, *supra* note 24, at 1052.

85. Ali M. Stoeppelwerth, *United We Stand: Antitrust Aspects of Collaboration Among Corporate Bondholders*, 67 BUS. LAW. 393, 394 (2012).

86. *Id.*

87. *Id.* at 394 & n.5.

88. *See supra* Part I.

89. Feldbaum v. McCrory Corp., Civ. A. Nos. 11866, 11920, 12006, 1992 WL 119095, at *646 (Del. Ch. June 1, 1992).

90. *Id.*

91. Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp., 677 F.3d 1286, 1295 (11th Cir. 2012); *Feldbaum*, 1992 WL 119095, at *642.

Akanthos, the bondholders' collective lawsuit seeking an injunction to enjoin the issuer's fraudulent transfer was barred from proceeding because the Eleventh Circuit held that the no-action clause applied despite the fact that a majority of bondholders had collectivized.[92] Pursuant to the Eleventh Circuit's opinion, a majority ownership could permit the bondholders to seek a trustee demand and wait a sixty-day window. The no-action clause nonetheless precluded them from seeking judicial remedies directly.[93]

Such a constriction obstructs justice in light of a fraudulent transfer.[94] In *Akanthos*, the fraudulent conduct of CompuCredit went unpunished when the Eleventh Circuit held the parties were bound by the text of the no-action clause despite the bondholders' argument that their majority collective action nullified the intended protections of the no-action clause.[95]

B. When an Issuer's Conduct Gives Rise to Extracontractual Causes of Action

Contract law has been preoccupied with providing corporate participants only the rights for which they have negotiated.[96] Remedies sought by corporate participants, including bondholders, for causes of action against the corporation are limited to "relatively undemanding corporate law norms."[97] Among the norms in the paradigm created by deference to contract law is the preference for strict construction of the bond contract and its accompanying no-action clause.[98]

Strict construction of the contracts would, in theory, exclude any extracontractual rights or causes of action not expressly considered in the purview of the no-action clause. However, courts' interpretations as to the scope of the no-action clause in this context differ significantly. As will be discussed below, some courts construe the "Event of Default" provision narrowly, which is more appropriate within the bondholder-issuer context. Taking a contrary position, the Eleventh Circuit in *Akanthos* interpreted the provision broadly as encompassing any conduct that has the potential of leading to an "Event of Default."[99] Such interpretation leads to prejudicial consequences.

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92. *Akanthos*, 677 F.3d at 1296.
93. *Id.* at 1296–98.
94. *Id.* at 1297.
95. *Id.* at 1295–96.
96. Mitchell, *supra* note 4.
97. *Id.* at 1167.
98. *See, e.g.*, Howe v. Bank of N.Y. Mellon, 783 F. Supp. 2d 466, 473 (S.D.N.Y. 2011); Metro. W. Asset Mgmt., LLC v. Magnus Funding, Ltd., No. 03 Civ. 5539, 2004 WL 1444868, at *5 (S.D.N.Y. June 25, 2004).
99. *See supra* Subpart II.B.

Despite contrary judicial interpretations regarding the scope of the no-action clause, it must be noted that the existence of extracontractual rights is established. "[A]ny extra-contractual rights granted to bondholders logically stem not from the legal instruments themselves but from the underlying relationship between the bondholders and other corporate constituent groups created by the legal instrument."[100] However, this underlying relationship between bondholders and other parties creating the bond contract is a delicate one at best. Even though judicial treatment of the bond contract presumes sophisticated investors, bond contracts are "difficult reading even for the trained corporate lawyer, . . . [and] the potential significance of many of their apparently mundane provisions is unlikely to be appreciated." [101]

Moreover, as previously discussed, the contract is typically drafted unilaterally, granting the issuer significant power in the relationship. Bondholders become necessarily dependent on the issuer and its trustee to not engage in conduct that precipitates an "Event of Default" because to seek legal recourse is a litigious obstacle course for the bondholder. Thus, extracontractual rights that may exist within the bondholder-issuer context arise from a relationship that is unbalanced, dependent, and unchecked.

A better approach in determining the existence of extracontractual rights would be to look to both the nature of the debt instrument and the relationship of the contractual participants. More specifically, courts should construe the no-action clause consistent with the doctrine of *contra proferentem*—that is, unclear contractual terms should be construed against the drafter.[102] With such strict construction, the scope of the no-action clause will be narrowly defined so that the "Event of Default" provision will not include circumstances that the parties did not expressly contemplate at contracting.

For example, in *Metropolitan West*, the court held that a no-action clause relating to an "Event of Default" does not bar bondholders from bringing tort or breach of contract claims which are not explicitly considered by the "Event of Default" term and therefore outside the purview of the no-action clause.[103] Likewise, in *Howe v. Bank of New York Mellon*,[104] the court found that the plaintiff-bondholders' claims for breach of contract were not barred

100. Mitchell, *supra* note 4, at 1175.

101. *Id.* at 1181.

102. Tauke, *supra* note 16, at 86.

103. *Magnus Funding*, 2004 WL 1444868, at *4 (finding that no-action clauses "do not prevent noteholders from bringing extra-contractual tort claims or breach of contract claims that are not of the type to which the 'no action' provision, by its terms, applies").

104. Howe v. Bank of N.Y. Mellon, 783 F. Supp. 2d 466 (S.D.N.Y. 2011).

by the no-action clause because the claims were not expressly considered within the "Event of Default" provision.[105]

> Where a "no action" clause relates to an "Event of Default" by its own terms, it does not bar a plaintiff from seeking a remedy for a claim outside the scope of the "no action" clause, including seeking "damages for mismanagement of the trust collateral and a failure to safeguard plaintiff's rights."[106]

In *Howe*, the court denied a motion for summary judgment for breach of contract claims on the bond contract.[107] In doing so, the court specifically stated that the no-action clause did not bar the meritorious lawsuit because the claims were not expressly listed as an "Event of Default."[108] Instead, the *Howe* court stated that the "Event of Default" provision merely "provides direction to noteholders implicitly contingent upon a situation involving such an Event of Default."[109] The court, thus, would not presume any limitations to extracontractual action "[a]bsent more specific language to the contrary."[110] As such, "the 'no action' clause . . . [did] not serve to bar Plaintiff's claims."[111]

When a cause of action is not expressly listed as an "Event of Default" giving rise to the application of the no-action clause, a plaintiff-bondholder should not be barred from seeking legal redress. Such causes of action are outside the scope contemplated by the parties at the contracting stage. To interpret the "Event of Default" provision broadly as encompassing any conduct that has the potential of leading to an "Event of Default" is a presumption by the courts that may fully violate the parties' intendment for that provision.

The inherent irony in construing the no-action clause broadly to include within its scope extracontractual causes of action is that the "bond doctrine" demands the opposite.[112] In theory, all rights and remedies for both parties are expressly contained within the four corners of the bond contract.[113] It is axiomatic, then, that if the contract is self-contained and expresses all limitations to contractual

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105. *Id.* at 474.
106. *Id.* at 473.
107. *Id.* at 472–74.
108. *Id.* at 474.
109. *Id.*
110. *Id.*
111. *Id.*
112. *See* Mann v. Oppenheimer & Co., 517 A.2d 1056, 1061 (Del. 1986) (discussing the limitation of bondholder rights by the terms of the indenture agreement).
113. Feldbaum v. McCrory Corp., Civ. A. Nos. 11866, 11920, 12006, 1992 WL 119095, at *651 (Del. Ch. June 1, 1992) (holding that parties possess rights that are "created at the outset of [the] commercial relationship . . . to permit and to govern the resolution of claims relating to the bonds").

rights and obligations, the no-action clause cannot bar lawsuits based on terms neither specified nor limited by the bond contract.

Yet, modern cases that broadly construe the no-action clause preclude bondholders from bringing lawsuits on causes of actions that are not expressly barred by the no-action clause and the "Event of Default" provisions.[114] Not only do such considerations undercut the "bond doctrine" that the courts use to tenuously justify their holdings, but they also foster a legacy of expanding the "Event of Default" provision to preclude meritorious lawsuits from proceeding. Moreover, such broad construction of the no-action clause also contravenes the common contract law doctrine of *contra proferentem*.[115] Thus, ambiguities regarding the scope of the "Event of Default" provision should be interpreted in favor of the non-drafting party—the bondholders.

C. When the Issuer Frustrates the Intendment of Contractual Provisions

The Delaware Court of Chancery has stated, "[I]t is elementary that rights of bondholders are ordinarily fixed by and determinable from the language of documents that create and regulate the security."[116] Conduct by the issuer that frustrates bondholders' ability to comply with the contractual terms and protect their interests ought to void the no-action clause. This is particularly true in regard to breaches of good faith, fair dealing, and prevention.

1. Good Faith and Fair Dealing

Although courts have typically limited the rights of a party to those expressly set out in a bond contract, "contractual documents creating the debenture and the duties of the issuer may, in narrow circumstances, be held to imply obligations arising from an implied covenant of good faith and fair dealing."[117] Indeed, under New York law, every contract contains the implied covenant of good faith and fair dealing.[118] However, in a bond contract, these obligations cannot be construed to be inconsistent with the express terms.[119] The covenant of good faith and fair dealing is a fundamental precept that prohibits either party from taking action in a manner that

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114. *See, e.g.*, Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp., 677 F.3d 1286, 1288 (11th Cir. 2012); Peak Partners, LP v. Republic Bank, 191 Fed. App'x 118, 124 (3d Cir. 2006); *Feldbaum*, 1992 WL 119095, at *646.

115. *See* Tauke, *supra* note 16, at 86–87 (discussing the interpretation of bond contract language and *contra proferentem*).

116. Simons v. Cogan, 542 A.2d 785, 786–87 (Del. Ch. 1987).

117. *Id.* at 787.

118. Lorenz v. CSX Corp., 1 F.3d 1406, 1415 (3d Cir. 1993).

119. Elliott Assocs. L.P. v. Bio-Response, Inc., Civ. A. No. 10624, 1989 WL 55070, at *5 (Del. Ch. May 23, 1989).

would prevent the other from "receiving the fruits of the contract."[120] Essentially, bad faith performance under a contract would violate the terms of the implied covenant of good faith and fair dealing.

How does a court determine whether such an implied term has been breached? Courts typically interpret bond contracts under the plain language doctrine, looking at the unambiguous, express terms of the contract.[121] Thus, implied terms would not appear to be contained in a bond contract. Notwithstanding the reliance on express terms to interpret a bond contract, however, in *Katz v. Oak Industries, Inc.*,[122] the court inferred the intendment of the express terms to determine the existence of a covenant of good faith and fair dealing.[123]

In *Katz*, the plaintiff alleged that Oak Industries breached an implied contractual obligation of good faith and fair dealing when it structured a coercive exchange offer.[124] The Delaware Court of Chancery explained the problem as whether it was "clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter."[125] In holding that the implied covenant of good faith and fair dealing was not breached, the court analyzed the express terms and whether the structure and timing of Oak Industries's offer violated the intendment of any expressed provisions within the contract.[126]

Although *Katz* did not consider the context of a no-action clause, the no-action clause is an expressed provision of a bond contract from which a court can infer the parties' intentions. The no-action clause arguably provides a party a contractual method of seeking legal recourse upon certain conditions being met. This belies an intention by the parties that each will act in accordance with the contract, and if one party should deviate from the contractual terms and invoke an "Event of Default," the other party can seek recourse under the no-action clause conditions. Indeed, the existence of the no-action clause is an indication that each party intends for the other to execute the contract in good faith to avoid an "Event of Default." But the no-action clause provides a contractual protection if that good faith were breached. Nonetheless, as already discussed, because the no-action clause is negotiated to only apply to "Events of

120. *Lorenz*, 1 F.3d at 1415.
121. Broad v. Rockwell Int'l Corp., 642 F.2d 929, 946 (5th Cir. 1981) (en banc).
122. Katz v. Oak Indus. Inc., 508 A.2d 873 (Del. Ch. 1986).
123. *Id.* at 881.
124. *Id.* at 880.
125. *Id.*
126. *Id.* at 881.

Default," nonevents of default are not contemplated within the scope of the no-action clause and are not barred under contract.

A fraudulent transfer by an issuer falls within the scope of conduct that the parties sought to protect against in the bond contract. Given the courts' treatment of bondholders as sophisticated investors, it is axiomatic that a bondholder would not enter into a bond contract with the intention that the issuer engages in fraudulent transfer. On the contrary, bondholders enter into these contractual relationships resting on the good faith conduct of the issuer in order to make a return on the investment. Because of the expectation of the parties, an implied covenant of good faith and fair dealing arguably provides the bondholders with substantive rights on equitable grounds.[127] Fraudulent transfers violate the implied covenant of good faith and fair dealing.

In a standard "Event of Default" provision, the contracting parties have contemplated the "failure in the observance of any performance of a covenant contained in the bond."[128] The conundrum that is posed here is whether a breach of the implied covenant of good faith and fair dealing falls within the plain language scope of the contract. If the implied covenant of good faith and fair dealing falls within the scope of a narrowly interpreted "Event of Default," the bondholders would find themselves constricted by the terms of the no-action clause for any breach of the covenant.

It is more likely, however, that the contracting parties did not contemplate the implied covenant of good faith and fair dealing within the scope of the "Event of Default." Cases where an implied covenant is found are rare,[129] although, at least one court has held that "the contractual documents creating the debenture and the duties of the issuer may, in narrow circumstances, be held to imply obligations arising from an implied covenant of good faith and fair dealing."[130]

Because the implied covenant of good faith and fair dealing was most likely not contemplated by the parties as an "Event of Default,"

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127. *See, e.g.*, Broad v. Rockwell Int'l Corp., 614 F.2d 418, 430 (5th Cir. 1980), *reh'g en banc*, 642 F.2d 929 (5th Cir. 1981); Tauke, *supra* note 16, at 131 n.312.

128. *See* Gordon v. Conlon Corp., 55 N.E.2d 821, 822 (Ill. App. Ct. 1944).

129. *See, e.g.*, Lorenz v. CSX Corp., 1 F.3d 1406, 1416 (3d Cir. 1993) ("Because the bank did not deprive the plaintiff of any right under the indenture, the bank could not have breached the implied covenant of good faith and fair dealing."); Metro. Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504, 1519 (S.D.N.Y. 1989) ("These plaintiffs do not invoke an implied covenant of good faith to protect legitimate, mutually contemplated benefit of the indentures; rather, they seek to have this Court create an additional benefit for which they did not bargain."); Simons v. Cogan, 542 A.2d 785, 787 (Del. Ch. 1987), *aff'd*, 549 A.2d 300 (Del. 1988); *Katz*, 508 A.2d at 878.

130. *Simons*, 542 A.2d at 787.

a breach of the covenant is extracontractual. Therefore, such a breach would fall outside the paradigm considered by the standard no-action clause. Accordingly, the no-action clause should be inapplicable.

2. Prevention

The prevention doctrine can be succinctly summarized:

> One who unjustly prevents the performance or the happening of a condition of his own promissory duty thereby eliminates it as such a condition. He will not be permitted to take advantage of his own wrong, and to escape from liability for not rendering his promised performance by preventing the happening of the condition on which it was promised.[131]

In *Akanthos*, the issuer announced a twenty-four million dollar distribution to directors and officers, which the creditors sought to enjoin.[132] Following that announcement, the issuer announced a one hundred million dollar tender offer, which was substantially higher than the market price of the bonds.[133] Several months later, a second tender offer was announced at an uncharacteristically elevated price for a struggling company.[134] All transactions were scheduled to occur within a thirty-day window, preventing the creditors from complying with the no-action clause in seeking an injunction on the transfer.[135] When bondholders sought an injunction to enjoin the ongoing conduct, the district court found that the bondholders were excused from the no-action clause as the creditors alleged that the issuer's conduct prevented the bondholders from complying with the terms of the bond contract. [136] Regarding CompuCredit stripping the company of assets to the detriment of creditors, Judge Batten remarked: "I'll tell you what I'm thinking. I think it smells.... [W]hat... [the Directors and Officers are] doing to this company, I don't like it."[137]

The Eleventh Circuit's reversal upon appeal is in error. The prevention doctrine in contract law is fully applicable here, and the creditors ought to have been protected when an issuer's bad faith conduct prevented compliance with a no-action clause. The Eleventh Circuit makes a fair distinction between conditions

131. Ellenberg v. Hard Rock Cafe Assocs., 500 N.Y.S.2d 696, 699 (N.Y. App. Div. 1986).

132. Brief of Appellees, *supra* note 70, at 10–11.

133. *Id.*

134. *Id.*

135. *Id.* at 12.

136. Akanthos Capital Mgmt., LLC v. CompuCredit Holding Corp., 770 F. Supp. 2d 1315, 1325, 1336 (N.D. Ga. 2011), *rev'd*, 677 F.3d 1286 (11th Cir. 2012).

137. Transcript of Preliminary Injunction Proceedings at 10:15–20, *Akanthos*, 770 F. Supp. 2d 1315 (No. 1:10-CV-844-TCB).

precedent and preconditions to contractual duties, stating: "[T]he conditions precedent at issue are not preconditions to contractual duties of either party . . . they are conditions allowing Plaintiffs to fall within an exception to an agreed upon contractual bar to suits brought by Plaintiffs."[138]

But the alternative is also true. In *Akanthos*, the issuer specifically tailored the distribution in question so that the preconditions to bringing a lawsuit under the no-action clause could never arise, thereby permitting the issuer to manipulate the contractual terms to engage in fraudulent conduct.[139] The prevention doctrine is premised on bringing equity when the intendment of a contract is frustrated as it was in *Akanthos*. Given the circumstances of fraudulent conduct and the potentially dual interpretation of the applicable doctrine, the Eleventh Circuit failed to recognize the complete picture of contractual prevention by ignoring the equitable overtures of the doctrine.

Contrast, however, *Akanthos* with *Whitebox Convertible Arbitrage Partners, L.P. v. World Airways, Inc.*[140] In *Whitebox*, the same district court that decided *Akanthos* found that enforcing the no-action clause would be inequitable as the issuer's conduct rose to the level of contractual prevention.[141] In that case, select bondholders sued World Airways for violation of good faith and fair dealing when it designated certain bondholders for a private deal.[142] The plaintiffs alleged the private deal constituted preferential treatment, which was a breach of their bond contract.[143] Specifically, the nature of the transactions—bond redemptions—between World Airways and its bondholders effectively cancelled the bond contracts and discharged the designated trustee.[144]

The district court found that the redemption call was intentionally designed to terminate the bond contract and discharge the trustee within the sixty-day demand window.[145] Thus, World Airway's conduct prevented the bondholders from exercising their legal rights under the bond contract.[146] Consequently, enforcing the no-action clause would be inequitable.[147] This decision was not appealed to the Eleventh Circuit.

When an issuer engages in conduct that prevents bondholders from complying with the no-action clause in seeking legal remedies,

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138. Akanthos Capital Mgmt., LLC v. CompuCredit Holding Corp., 677 F.3d 1286, 1297 (11th Cir. 2012).
139. Brief of Appellees, *supra* note 70, at 34–36.
140. No. Civ.A. 1:04-CV-1350-, 2006 WL 358270 (N.D. Ga. Feb. 15, 2006).
141. *Id.* at *4.
142. *Id.* at *1–2.
143. *Id.* at *2–3.
144. *Id.* at *4.
145. *Id.* at *3–4.
146. *Id.* at *4.
147. *See id.*

enforcing the no-action clause would be inequitable. The no-action clause is a contractual term understood by the parties as providing for specific recourse. Under the contractual scheme, prevention renders the term null and void. Therefore, a no-action clause ought to be void when an issuer engaged in conduct that prevented the exercise of contractual remedies.

CONCLUSION

"Clarity is key. . . . [T]he final covenants . . . in the indenture must be clearly and carefully drafted, as they are likely focal points, should difficulties subsequently ensue."[148] However, no-action clauses in a bond contract—despite careful drafting—often give rise to difficult and complex litigation as courts struggle to determine the scope and conditions of their applicability to bondholder lawsuits. The conditions under which the no-action clause should not impair a bondholder's right to sue are at least three-fold. When a majority of bondholders organize collectively in a lawsuit, the policies underlying the no-action clause are void. When an issuer engages in conduct that gives rise to causes of action not expressly defined as an "Event of Default," the no-action clause should not bar a bondholder lawsuit. When an issuer engages in conduct that frustrates the contractual rights of the bondholder to bring a lawsuit, equitable principles demand that the no-action clause not impair a bondholder's right to sue.

It certainly appears that the trend in the courts—and most recently in the Eleventh Circuit[149]—is to interpret the provisions of the bond contract broadly and prevent meritorious lawsuits from proceeding. Perhaps the time is ripe for potential bondholders in the market to take power into their own hands during the negotiation process and demand the removal of the no-action clause from future bond contracts. Only then will issuers cease engaging in fraudulent conduct and breaches of contract because a legitimate threat of legal consequences could quickly follow.

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148. Bruce C. Bennett, *Reflections on Indenture Remedies and Investor Protection*, INSIGHTS, Feb. 2008, at 9, 11.

149. Akanthos Capital Mgmt., LLC v. CompuCredit Holding Corp., 677 F.3d 1286, 1298 (11th Cir. 2012).

* J.D. Candidate, 2014: Wake Forest University School of Law. The author is grateful for all those who have contributed to this piece from inception to publication, including the editorial board and staff of the *Wake Forest Law Review* for their impeccable editing skills.