Fordham Journal of Corporate & Financial Law

Volume 7, *Number* 2 2002 *Article* 5

The Impact of Bankruptcy Reform on "True Sale" Determination in Securitization Transactions

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THE IMPACT OF BANKRUPTCY REFORM ON "TRUE SALE" DETERMINATION IN SECURITIZATION TRANSACTIONS*

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I. INTRODUCTION

Both Houses of Congress have passed similar bankruptcy reform bills,[1] and President Bush has signaled he would sign such a bill ("Reform Act") once Congress reconciles the differences between the House and Senate versions.[2] Among other things, the Reform Act would create, for the first time, a legislative "safe harbor" regarding what constitutes a bankruptcy true sale[3] in

* As this Article was going to press, the provision of the Bankruptcy Reform Act that would have reformed "true sale" determination in securitization transactions was withdrawn by Congress, in response to concerns generally raised by the Enron debacle about the use of special purpose vehicles. This Article illustrates that Congress overreacted when withdrawing the "true sale" provision. This Article also provides an important conceptual framework for further debate on whether that provision, or one like it, should be included in any future bankruptcy reform.

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1. *See* Bankruptcy Reform Act of 2001, S. 220, 107th Cong. § 912 (2001); H.R. 333, 107th Cong. § 912 (2001) [hereinafter Bankruptcy Reform Act of 2001].

2. *See In Brief: Senate to Reopen Bankruptcy Bill Issues,* AM. BANKER, Jan. 11, 2002; *see also Putting the Brakes on Bankruptcy Reform Bill,* CONGRESS DAILY, June 8, 2001, at 4; Christopher Lee, *Lawmakers Plan to Fight Bankruptcy Reform Bill: Bush Has Opposed Ending Texas' Homestead Exemption,* DALLAS MORNING NEWS, Apr. 8, 2001.

3. *See* Steven L. Schwarcz, *The Parts Are Greater than the Whole: How Securitization of Divisible Interests Can Revolutionize Structured Finance and*

securitization transactions.[4] Because both bills include identical forms of this safe harbor provision, it is expected that the Reform Act will include the safe harbor provision unchanged.

Because of the attacks against our country on September 11, 2001 and the resulting economic downturn, it is uncertain when, and indeed whether, Congress will enact the Reform Act.[5] At the time of this writing, there was some indication that the Reform Act would be placed back on track.[6] Even if the Reform Act is not ultimately enacted in full, it is possible that the provisions that are identical in both House and Senate versions — such as the aforesaid securitization safe harbor — may be enacted separately.

II. BACKGROUND

Securitization is reputed to be by far the most rapidly growing segment of the U.S. credit markets,[7] and its use is rapidly expanding worldwide.[8] In a typical transaction, a company usually

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Open the Capital Markets to Middle Market Companies, 1993 COLUM. BUS. L. REV. 139, 150 (1993) (noting that sales that are effective against creditors and the estate of a bankrupt originator, in that the property is no longer "property of the debtor's estate" under Section 541 of the Bankruptcy Code, are generally referred to as "true sales").

4. The Reform Act's true sale "safe harbor" is solely for purposes of bankruptcy law. Whether a given transfer of receivables constitutes a sale for tax, accounting, regulatory, reporting, or other purposes is not covered by the Reform Act.

5. *See, e.g., Bill to Alter Bankruptcy Law Remains Stalled*, ABI WORLD, Oct. 19, 2001, *at* http://www.abiworld.org/headlines/01oct19.html (last visited Oct. 26, 2001) (noting that "with consumer confidence considerably weaker since the terrorist attacks on September 11, lawmakers' enthusiasm for the legislation may have dimmed [because] no one in Washington wants to be perceived as anti-consumer").

6. *See, e.g., Bankruptcy Reform May Resurface Before Congress Goes Home*, 38 BANKR. L. NEWSL., Nov. 14, 2001, at 14.

7. *See* Investment Company Act, Release No. 19105, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,062, at 83,500 (Nov. 19, 1992). This was provided in connection with the issuance of Rule 3a-7 under the Investment Company Act of 1940. *Id.*

8. *See* STEVEN L. SCHWARCZ, STRUCTURED FINANCE, A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION § 8:1 (3d ed. 2002).

called the "originator" transfers rights to payment from income-producing assets such as accounts receivable,[9] loans, or lease rentals (collectively, "receivables" or "financial assets") – or frequently undivided interests in such rights – to a special purpose vehicle ("SPV").[10] The SPV, in turn, issues securities to capital market investors and uses the proceeds of the issuance to pay for the receivables. The investors, who are repaid from collections of the receivables, buy the securities based on their assessments of the value of the receivables.

Perhaps the most important issue in a securitization is whether the SPV's investors will continue to be repaid in the event of the originator's bankruptcy. If the SPV owns the receivables, its investors *will* continue to be repaid; if not, their right to be repaid will be suspended and subject to possible impairment. The SPV will own the receivables only if the transfer of those receivables from the originator to the SPV constitutes a sale under applicable bankruptcy law — usually referred to as a "true sale."[11]

This issue, and the concerns that surround it, are illustrated by the recent bankruptcy case of LTV Steel Company, Inc. ("LTV").[12] LTV challenged its pre-bankruptcy securitization facilities, arguing that the transfers to the SPVs were not true sales, and therefore, LTV should be able to use the collections of receivables as "cash collateral" by giving adequate protection under bankruptcy law.[13] LTV's rationale was that, without such use, it might have to cease its operations, thereby jeopardizing employee jobs and retiree benefits and adversely affecting the local economy.[14] The

9. *See* BLACK'S LAW DICTIONARY 11 (6th ed. 1991) (defining account receivables as an account reflecting a balance owed by a debtor; such as a debt owed by a customer to an enterprise for goods or services).

10. *See id.* at 972 (defining a special purpose vehicle, also known as a special-purpose entity, as "[a] business established to perform no function other than to develop, own and operate a large complex project . . . [especially] so as to limit the number or creditors claiming against the project").

11. *See* Schwarcz, *The Parts Are Greater Than the Whole, supra* note 3 (defining a true sale).

12. *In re* LTV Steel, Inc., No. 00-43866, 2001 Bankr. LEXIS 131 (Bankr. N.D. Ohio Feb. 5, 2001).

13. *Id.* at *4-*7.

14. *Id.* at *4.

Bankruptcy Court permitted LTV to use these collections pending resolution of the true sale issue.[15] However, *LTV* should have little importance as a legal precedent because, prior to such resolution, the parties reached a settlement that included a summary finding that the transfers were true sales.[16] Nonetheless, to some extent, this use has shaken financial market confidence in securitization.

III. THE REFORM ACT

The Reform Act provides an explicit "true sale" safe harbor for most transfers of receivables in securitization transactions. It does this by amending § 541 of the Bankruptcy Code,[17] which defines property of the debtor's estate, to exclude from that estate any "eligible asset" transferred to an "eligible entity" in connection with an "asset-backed securitization."[18] Because these terms are expansively defined, the exclusion is broad.

The term "eligible asset," for example, means any existing or future-arising financial asset, including interests therein and proceeds thereof, that by their terms convert into cash within a finite period of time.[19] This would appear to include any conceivable type of receivable; and the definition's broad enumeration of examples, as well as the inclusion of (among other things) residual interests, rights designed to assure servicing, cash, and securities, is consistent with such an expansive interpretation.[20]

The term "eligible entity" is likewise expansively defined to mean any entity engaged exclusively (aside from ancillary actions) in the business of either (1) acquiring and holding eligible assets (an "issuer"), or (2) acquiring and transferring eligible assets directly or indirectly to an issuer.[21] This should include most SPVs used, directly or (as in a two-tier structure) indirectly, in securitization transactions. If, however, the SPV in question has

15. *Id.* at *5-*6.
16. *See* SCHWARCZ, STRUCTURED FINANCE, *supra* note 8, at § 4:1 n.7.
17. 11 U.S.C. § 541 (2000).
18. *See* Bankruptcy Reform Act of 2001, *supra* note 1, § 912(2).
19. *Id.*
20. *Id.*
21. *Id.*

been used in prior transactions – for example, where the SPV is a multi-seller securitization conduit – it may be prudent to obtain assurance that such SPV has engaged exclusively in the foregoing businesses and actions ancillary thereto.

The Reform Act's safe harbor breaks most dramatically with existing law when defining the term "transferred."[22] Under existing law, the primary issue is whether a given transfer constitutes a bankruptcy true sale.[23] After the Reform Act takes effect, *any transfer* in which the debtor represents in writing that the eligible assets in question are to be "sold, contributed, or otherwise conveyed with the intention of removing them" from the debtor's estate will, under bankruptcy law, accomplish such removal.[24] The substantive law criteria of what constitutes a bankruptcy true sale – such as the amount and nature of the transferee's recourse against the transferor, and whether the transferor has any right to take back transferred receivables[25] – have simply been eliminated.

The final requirement of the safe harbor is that the transfer of eligible assets to an eligible entity be made "in connection with an 'asset-backed securitization.'"[26] This term is broadly defined to include virtually all transactions that one commonly thinks of as a

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22. *Id.* (amending 11 U.S.C. § 541 (2000)).

23. *See* 11 U.S.C. § 541(c)(1)(A) (stating that the trustee in bankruptcy may not avoid a transfer to the extent that the transfer was "intended by the debtor and the creditor . . . to be a contemporaneous exchange for new value given to the debtor."); *see also* SCHWARZ, STRUCTURED FINANCE, *supra* note 8, at § 4:1.

24. *See* Bankruptcy Reform Act of 2001, *supra* note 1.

25. *See, e.g.,* Major's Furniture Mart, Inc. v. Castle Credit Corp., Inc., 602 F.2d 538, 544-45 (3d Cir. 1979) (holding that whether a transfer of accounts receivable was a true sale or only the granting of a security interest depended on the "true nature" of the transaction, including the intentions of the parties (as demonstrated by their actions), the creditor's right of recourse, and the creditors right to claim for a deficiency); *In re* Woodson Co., 813 F.2d 266, 271-72 (9th Cir. 1987) (determining that transactions were loans not sales, because permanent investors were not subject to any risk when they transferred funds to the debtor, and because they did not possess "the usual indicia of ownership"); *In re* Lemons & Assocs., Inc. 67 B.R. 198, 210 (Bankr. D. Nev. 1986) (looking to "objective manifestations of the parties 'intent' to determine that a transfer was a sale transaction and not a loan").

26. *See* Bankruptcy Reform Act of 2001, *supra* note 1 (amending 11 U.S.C. § 541(b) by adding paragraph (8)).

securitization – that is, all transactions in which the transferred receivables are used as the source of payment on securities – so long as "at least one class or tranche of [those securities] was rated investment grade by one or more nationally recognized securities rating organizations, when the securities were initially issued."[27] The reference to "nationally recognized securities rating organizations"[28] appears to be a misnomer; the correct reference should be to Nationally Recognized Statistical Rating Organizations ("NRSROs").[29] This requirement essentially means that a major rating agency, such as Standard & Poor's, Moody's, or Fitch, has rated at least one class or slice of the issuer's securities investment grade in order for the safe harbor to apply.

Where the safe harbor applies, it *also* resolves the difficult issue of whether a transfer that otherwise constitutes a sale would fail because only a partial interest in receivables is being transferred.[30] In many securitization transactions, the SPV purchases undivided interests in receivables. The rationale for buying undivided interests is that it maximizes the statistical diversification of the receivables sold to the SPV and also permits the SPV to invest in newly arising receivables by simple readjustment of the SPV's fractional interest.[31] The undivided

27. *Id.* (amending 11 U.S.C. § 541 by adding a subsection (f)(1)).

28. *See id.* at § 912 (2001).

29. *See, e.g.*, Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 U. ILL. L. REV. 1 (2002) (analyzing NRSROs).

30. *See* Steven L. Schwarcz, *Intermediary Risk in a Global Economy*, 50 DUKE L. J. 1541 (2001), *accord*, 1 SECURITIZATION OF FINANCIAL ASSETS § 3.09 (Jason H. P. Kravitt, ed., 2d ed. 1999 & 2000-1 Supplement) (observing that "[i]t is also possible to argue that a court will more likely find a sale of a discrete group of receivables than a sale of an undivided interest in a pool to be a true sale, though there is no obvious analytical reason that this must be so").

31. Undivided interests are widely used, for example, in collateralized loan obligation and bank credit card securitizations. *See* SECURITIZATION OF FINANCIAL ASSETS, *supra* note 30, at § 3.03[A] (noting that the advantage of the undivided interest structure when securitizing pools of medium term receivables is "that one may avoid the transaction costs associated with numerous separate purchases"); *id.* at § 3-14 (observing that "mortgage-backed securitizations are generally handled using the [undivided interest] structure"); *id.* at §§ 3.14-16 (observing that securitization of credit card receivables also generally uses the undivided interest structure); *id.* at § 3.17 (recognizing that "[t]he most

nature of the SPV's interest, however, raises concern because the law has generally been unsettled as to whether the transfer of a partial interest in receivables can constitute a true sale.[32] The Reform Act's safe harbor eliminates this concern by applying to the sale of "interests" in receivables.[33]

IV. SCOPE OF THE REFORM ACT

The Reform Act's safe harbor provision will apply to all bankruptcy and analogous state-law cases commenced thereafter. Existing law on true sale characterization will continue to apply, however, in all bankruptcy and analogous state-law cases commenced *before* the Reform Act's enactment.[34]

The Reform Act does not purport to resolve all bankruptcy issues associated with securitization. For example, the Act continues to permit a transferor's trustee in bankruptcy to avoid a transfer of receivables that may be recovered as a fraudulent conveyance under § 548 of the Bankruptcy Code.[35] This should not be significant, however, because it is rare in securitization transactions for such transfers to be avoided: "[T]he buyer of financial assets normally will have paid reasonably equivalent value for the assets."[36]

Transfers may also be avoided where the transferor and transferee are substantively consolidated pursuant to the equitable powers of a bankruptcy court under § 105 of the Bankruptcy

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practicable structure [for securitization of trade receivables] has been the purchase of an undivided, fractional interest in a pool of receivables").

32. *See, e.g.*, Peter V. Pantaleo et al., *Rethinking the Role of Recourse in the Sale of Financial Assets*, 52 BUS. LAW. 159 (1996); Schwarcz, *The Parts Are Greater Than the Whole, supra* note 3, at 150 (1993) (referring to the "unfounded perception that the transfer of only a partial interest in a future payment stream . . . cannot be a true sale").

33. *See* Bankruptcy Reform Act of 2001, *supra* note 1.

34. *See, e.g.*, SCHWARCZ, STRUCTURED FINANCE, *supra* note 8, at 28-35.

35. *See* Bankruptcy Reform Act of 2001, *supra* note 1, § 912 (following the line of thought that § 912 only would amend § 541 of the Bankruptcy Code, thus other Bankruptcy Code sections, such as § 548, would continue to be applicable).

36. *See* Pantaleo, *supra* note 32, at 185.

Code.[37] Even though the transfer may be effective when viewed in isolation, substantive consolidation treats the transferee and transferor as the same entity in bankruptcy. Again, this risk appears minimal because substantive consolidation is a risk that can be controlled in securitization transactions by maintaining appropriate formalities between the transferor and transferee.

It nonetheless is likely that bankruptcy counsel will, as under present law, be asked to opine on the possibility of substantive consolidation. Counsel also may be asked to opine that the transfer of receivables is not a fraudulent conveyance, and that the constituent elements of the safe harbor (i.e., that the receivables are "eligible assets" that have been "transferred" to an "eligible entity" in connection with an "asset-backed securitization") have been achieved.

As wide as the safe harbor is, there are significant exceptions. For example, securitization transactions that lack NRSRO-investment grade ratings, such as unrated private placements or private placements relying on National Association of Insurance Commissioners ratings, are not covered.[38] Bankruptcy counsel then will need to address the traditional true sale criteria. Also, because the Reform Act only purports to resolve the true sale question for transferors that become debtors under U.S. bankruptcy law,[39] that question will continue to have vitality for cross-border securitization transactions involving non-U.S. transferors.

V. CONCLUSION

Once the Reform Act becomes effective, the question of whether a given transfer of receivables will constitute a true sale for bankruptcy will be readily answered in the affirmative for a broad range of securitization transactions. Within this range, the

37. 11 U.S.C. § 105 (2000).

38. *See* Bankruptcy Reform Act of 2001, *supra* note 1 (defining a security in an asset securitization as one that has been rated investment grade by one or more nationally recognized securities rating organizations when the security was initially issued).

39. *See generally id.*

concerns raised by the *LTV* case[40] should be greatly mitigated. If, for example, a debtor argues that a transfer made in a securitization transaction is not a true sale, the issue can be promptly resolved by examining the transactional documentation.[41] Furthermore, because the safe harbor criteria allow virtually no judicial discretion, it should be irrelevant that a court (as in *LTV*) is influenced by the debtor's argument that it may have to cease its operations, thereby jeopardizing jobs and the local economy.[42]

The safe harbor provision also might provide a basis to do away with the present need in many securitization transactions for a two-tier structure. If so, that would significantly reduce transaction costs and potentially extend the benefits of securitization to smaller companies. The primary purpose of a two-tier structure is to "avoid the risk that recourse [to the transferor] might disqualify true sale treatment for a transfer."[43] For transactions within the safe harbor, however, recourse is no longer a relevant criterion for sale treatment. Thus, the originator may be able to transfer its receivables, in a simplified "one-tier" structure, directly to a non-affiliated SPV that issues the securities and has recourse against the originator. If the originator also has the right to take back any surplus collections once the transaction has ended, the one-tier structure may replace the two-tier structure. The only proviso is that an originator seeking "off-balance sheet" treatment of its transfer of receivables would need

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40. *In re* LTV Steel, Inc., No. 00-43866, 2001 Bankr. LEXIS 131 (Bankr. N.D. Ohio Feb. 5, 2001).

41. A debtor nonetheless might argue that the securitization safe harbor is unconstitutional, in that the Supreme Court has ruled that "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." Butner v. United States, 440 U.S. 48, 55 (1979). One would think, however, that the Reform Act itself constitutes the requisite "federal interest" requiring a different result.

42. Indeed, the true sale safe harbor should not be viewed as undermining the policies of bankruptcy law. *Cf.* Pantaleo, *supra* note 32, at 185-89 (arguing that the concept of a true sale with recourse for collectibility should not undermine these policies).

43. *See id.* at 162.

to clear the one-tier structure with its accountants. It is arguable, however, that at least some one-tier structures should be able to qualify for off-balance sheet treatment.[44]

My colleagues on the panel at the Two Shocks to the Bankruptcy Symposium,[45] Mark A. Speiser, Edward J. Janger, Kenneth C. Kettering and Lois R. Lupica oppose the Reform Act's legislative safe harbor for securitization. Professor Janger argues that he is not sure that securitization is uniformly economically efficient, whereas the existing "muddy" rules on true sale create an opportunity for judicial sorting and also "tax" securitization transactions at the margin.[46] Professor Lupica argues that the safe harbor provides participants in securitization with a degree of

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44. Off-balance sheet accounting for securitization transactions are governed in the United States, for transfers occurring after March 31, 2001, by Statement of Financial Accounting Standards No. 140 (FAS 140). ACCOUNTING FOR TRANSFERS AND SERVICING OF FINANCIAL ASSETS AND EXTINGUISHMENTS OF LIABILITIES, Statement of Financial Accounting Standards No. 140 (Financial Accounting Standards Bd. 2001). FAS 140 generally requires that (a) the transferred receivables be put presumptively beyond the reach of the transferor and its creditors, even in bankruptcy; (b) if the transferee is a qualifying special purpose entity ("SPE"), each holder of its beneficial interests (i.e., its securities) has the right to pledge or exchange those interests; and (c) the transferor does not have the ability to unilaterally cause the holder to return specific assets, other than through a cleanup call. *Id.* These conditions may well be satisfied in some one-tier structures. The first condition would be explicitly satisfied by the Reform Act's safe harbor. The second condition (b) should be feasible because, in practice, many SPVs that constitute "eligible entities" under the Reform Act may also constitute "qualifying SPEs" under FAS 140. *See id.* § 35 (setting forth the criteria of a qualifying SPE). Additionally, each holder of the SPV's securities would normally have the right to pledge or exchange those assets. *Cf. id.* § 173. Condition (c) also should be feasible because FAS 140 interprets the phrase "unilaterally" to permit a transferor, consistent with sale accounting, to retain the right to remove defaulted receivables from the SPV, and also permits the transferor to remove cash collections of receivables. *See id.* §§ 87.b, 189, 42, 43, 35.d.

45. This Article is a reflection of the authors remarks at the Eugene P and Delia S. Murphy Conference on Corporate Law, entitled, "Two Shocks to the Bankruptcy System" held at Fordham University School of Law on November 15, 2001.

46. *See* Edward J. Janger, *Muddy Rules for Securitization,* 7 FORDHAM J. CORP. & FIN. L. 301 (2002).

protection and immunity from the normal operation of the bankruptcy system at the expense of other creditors and debtors that seek to reorganize under the shelter of the bankruptcy laws.[47]

My colleagues' arguments raise, of course, the larger question of whether securitization is efficient and fair. I believe, and have argued, that it is.[48] A summary analysis nonetheless follows.

Securitization merely replaces one type of asset, receivables, with another type, cash.[49] Unsecured creditors have the same amount of unencumbered assets to levy against after the securitization as they did before the securitization. Some may argue that securitization could hurt creditors where the cash received is wasted by the originator. But one cannot assume wasteful behavior simply because an originator sells its receivables for cash. In fact, given the scrutiny imposed by rating agencies, securitization may present fewer opportunities for such behavior than other financing methods.[50]

Nonetheless, securitization, just like any other sale of assets by

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47. *See* Lois R. Lupica, *Revised Article 9, The Proposed Bankruptcy Code Amendments, and Securitizing Debtors and Their Creditors,* 7 FORDHAM J. CORP. & FIN. L. 321 (2002).

48. My colleagues on this panel argue that there is no empirical study of whether securitization is efficient, and therefore it should be limited. But it would seem that for a type of financing as important and widespread as securitization, those attempting to set limits should bear the burden of producing persuasive empirical evidence that securitization is inefficient. *See* Claire A. Hill, *Securitization: A Low-Cost Sweetener for Lemons,* 74 WASH. U. L.Q. 1061 (1996); *see also* Steven L. Schwarcz, *The Alchemy of Asset Securitization,* 1 STAN. J. L., BUS. & FIN. 133 (1994); SCHWARCZ, STRUCTURED FINANCE, *supra* note 8, App. A. *But cf.* Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy,* 47 DUKE L.J. 425, 428 (1997) (arguing that those attempting to set limits on secured credit should bear the burden of producing persuasive empirical evidence that such credit is not efficient).

49. *See* SCHWARTZ, STRUCTURED FINANCE, *supra* note 8, at § 1:1.

50. In this context, I have shown that even though proceeds of secured borrowing can likewise be wasted or unwisely invested, unsecured creditors, given a choice *ex ante* the borrowing, would want the debtor to be able to borrow. Schwarcz, *The Easy Case, supra* note 48, at 83 (1997). Because securitization similarly provides liquidity to a debtor, indeed at a lower cost than secured borrowing, unsecured creditors given a choice *ex ante* likewise would want the debtor to be able to engage in a securitization transaction.

an originator, may become suspect if implemented when an originator is on the brink of bankruptcy. The potential for such suspect actions, however, is not unique to securitization transactions. The same issues would arise, for example, if on the eve of bankruptcy an originator sold, or borrowed money by encumbering, a factory or equipment and similarly sought to dissipate the sale or loan proceeds. Such questionable uses of proceeds are more appropriately addressed by preference and fraudulent conveyance laws.

Moreover, securitization increases overall value by providing a new source of financing, the capital markets, whose rates are systematically lower than the rates at which many companies commonly borrow. So long as the added transaction costs are less than the interest saved by using securitization instead of secured financing, there is a net gain.

This begs the question, however, why the capital markets should be prepared to fund securitization transactions at a lower rate than secured financing. It is because a securitization based on a "true sale" effectively can separate the source of payment of the SPV's securities from the risks associated with the originator, largely eliminating the need for investors to monitor the originator's financial condition. Although the risks associated with servicing and collecting the receivables still necessitate some monitoring, these risks are borne by providers of credit enhancement or investors in subordinated securities, parties who are in the business of precisely assessing and absorbing such risks.

However, all other things being equal, the safe harbor for securitization proposed in the Bankruptcy Reform Act to some extent would act counter to the bankruptcy goal of debtor rehabilitation. That is because the safe harbor would prevent a court from re-characterizing a securitization "sale" as a secured loan[51] even though, "in a reorganization case, the financial assets of a business are often a prime source of collateral for debtor-in-possession financing."[52] But other things *are not equal*. For

51. Once sold, a debtor's receivables could no longer be used as collateral for debtor-in-possession financing.

52. *See* Pantaleo, *supra* note 32, at 186.

example, "the proceeds of the [securitization] may have provided liquidity to help a debtor stave off an earlier bankruptcy filing" or "could allow sufficient liquidity to [help the debtor] avoid bankruptcy altogether."[53] The safe harbor also would help to "preserv[e] reasonable commercial expectations that insure efficiency and predictability in the marketplace."[54] For these reasons, I favor, on balance, the Bankruptcy Reform Act's safe harbor.

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53. *Id.* at 187.
54. *Id.* at 189.

Notes & Observations