

## **Cutting Edge Issues Where Securitization Meets Insolvency After LTV and Enron Program Outline**

### ***Securitization Overview***

- How does securitization work, and what useful purposes does it serve?
- Comparison and contrast of illustrative structures, basic to aggressive: what structural elements (recourse, lack of separation, nature of assets, continuing use of assets) make a securitization transaction vulnerable to recharacterization?
  
- ***LTV Implications***
  - *LTV*: the infamous inventory securitization. Does the case represent an overly-aggressive structure that is distinguishable from the typical deal, or reveal a slippery slope for structuring securitization transactions? Could it have implications more threatening to the securitization industry than *Octagon*?
  - What part of the *LTV* rationale could be fairly applied to a typical securitization of monetary assets only?
  - Does *LTV* change the dynamic by making the "buyer" prove the sale was a true sale rather than making the "seller" prove it was not?
  - How does the market derive its comfort level regarding true sales, and should the *LTV* analysis erode that comfort level?
  - Even if a transaction passes true sale muster, might the sold asset still be property of the estate, and for what purposes?
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- ***Enron Complications***
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  - To what extent does the Enron use of SPEs taint the securitization industry?
  - What if the accounting treatment seems designed to make a sow's ear look like a silk purse? Can full disclosure prevent Enronization of securitization?
  - What is full disclosure: what do investors need to understand? How should the disclosure differ for equity investors in the asset originator, versus investors in the securitization?
  - Does structural interdependence of securitization parties make clean securitization impossible? Are conflicts unavoidable, given the relationship of the securitization parties? What degree of independence is appropriate? What options do issuers have (structural insulation, non-profits, etc.)?
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- ***Emerging Practices***
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  - What effect will FASB's proposed interpretation, Consolidation of Certain Special-Purpose Entities, an interpretation of ARB No. 51, and other foreseeable changes to financial accounting treatment have on securitization transactions?

What impact would changes to the consolidation rules have on the securitization market?

- How do ratings triggers function in these transactions?
- Will recent developments curtail the expanding use of bankruptcy-remote SPEs in non-securitization transactions?
- Has the transactional due diligence been subjected to heightened scrutiny?
- What are the implications of recent developments on legal opinion practice?
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- ***Is a Legislative Solution Workable?***
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- Controversial, and now withdrawn, proposed Section 912 would have provided an open-ended safe harbor for most securitization transactions. Many felt that 912 also eviscerated the trustee's powers.
- Should there be a bankruptcy securitization safe harbor? If so, what existing types of transactions should be protected?
- What if securitization continues to evolve, so that unanticipated structures develop outside the safe harbor? Is there a way to fashion a statute that protects the best practices, eliminates the worst, and is flexible enough to accommodate financial market changes? How to avoid being both over-inclusive and under-inclusive?
- Is the use of "private gatekeepers" appropriate?
- Delaware's new law – the transaction is what the parties say it is. Can parties to a transaction opt out of bankruptcy to the detriment of other stakeholders?
- Does state or federal law govern the question of whether a transaction is a true sale? How should courts resolve the preemption issues surrounding state "true sale" laws?
- Under *Grupo Mexicano*, are bankruptcy courts even empowered to order substantive consolidation?
- ***Summary***
- Will the multi-trillion dollar securitization industry successfully shrug off the aftermath of LTV, Enron, and the issues raised, including concerns regarding the use of SPEs, or will LTV prove only the tip of the iceberg? How can practitioners structure deals with confidence?